

GUIDE | CEMETERIES & CREMATORIA NSW

Guide to the interment rights system in New South Wales

Information for cemetery operators

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More information

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Introduction

The *Cemeteries and Crematoria Act 2013* (the C&C Act) sets out the interment rights system for New South Wales (NSW) that provides:

- two types of interment rights:
 - perpetual interment rights
 - renewable interment rights
- when and how rights can be transferred, bequeathed or revoked
- obligations on cemetery operators* to:
 - provide interment right certificates
 - keep cemetery operator registers
- other obligations on operators (for example about memorials and exhumations).

**Note: 'cemetery operator' is used throughout this guide to include a crematorium operator if they conduct interments (see the definition of 'cemetery' in the C&C Act).*

The C&C Act applies to all cemeteries in NSW, ensuring a consistent and transparent system throughout the state. The interment rights system offers significant benefits to both the community and industry.

Community benefits include:

- a choice of interment rights
- the ability to transfer and bequest interment rights
- safeguards to ensure that interment rights are not revoked without consultation
- clear information about the interment rights they hold.

Industry benefits include:

- the ability to offer different types of interment rights
- the ability to manage future land use and make better use of existing cemetery space
- clear obligations and responsibilities
- informed consumers who have consumer confidence in the industry
- consistent obligations on operators across the state.

Cemeteries & Crematoria NSW (CCNSW) is the government statutory agency responsible for regulatory oversight of the interment rights system, seeking to educate and assist both consumers and industry.

This guide is intended to help cemetery operators understand their obligations relevant to the interment rights system under the C&C Act and the Cemeteries and Crematoria Regulation 2014 (the C&C Regulation).

Historical context

In 2018, legislative reform delivered formal recognition of two interment right types: perpetual and renewable. Prior to 2018, some operators sold time-limited burial plots, but the vast majority of interment rights were perpetual. For interment rights issued before the reforms (often referred to as burial licences or interment licenses), unless the original agreement specified a limited period, the right is taken to be perpetual.

The interment industry involves numerous sectors including:

- Crown cemeteries

- local government-operated cemeteries
- church- and community-operated cemeteries
- privately-operated cemeteries.

Previously each of these sectors was regulated differently, resulting in inconsistent approaches to important aspects of cemetery operations and management. This led to consumer uncertainty and a lack of transparency. For example, burial licence agreements contained limited information, making it difficult for rights holders to fully understand the terms and conditions of interment rights. This lack of clarity and transparency increased the likelihood of confusion and disputes between customers and operators. Given the sensitivity of interment issues, these disputes were often emotionally charged.

Previous burial and interment licences

Before the introduction of the C&C Act and the creation of interment rights, consumers relied on a common law right that created two distinct rights arising in the burial context. Cemetery operators previously offered a contractual right to bury (and erect a headstone or monument), usually known as a 'burial licence'. In Crown cemeteries, this was governed by the Crown Lands (General Reserves) By-Law 2006 (now repealed).

Once a person had been buried, a common law right arose in favour of the deceased's heirs for the body to remain in the grave where it is interred and not be disturbed until its dissolution. This common law right was described as an 'interment licence'.

This previous framework did not distinguish between these two distinct rights, although it allowed a 'burial licence' to be bequeathed and provided that the rules of intestacy apply. Neither of those rights conferred ownership in land.

The interment rights system introduced under part 4 of the C&C Act recognises both the right of burial and the right of interment, and seeks to minimise as much as possible the ambiguity of the previous system and deliver consistency and transparency of interment rights throughout the industry in NSW.

Interment rights

The C&C Act sets out two types of interment rights:

- **perpetual interment right** that provides the right of interment in a specified site with the interment to be left undisturbed forever (in perpetuity)
- **renewable interment right** that provides exclusive right of interment in a specified site for a limited and specified period of time, with the option to extend the time period up to a total maximum of 99 years.

An interment right is not required for scattering cremated remains in a cemetery.

Cemetery operators are not required to offer both types of interment rights. Cemetery operators also have some discretion in determining the duration of renewable rights (see the section on 'Renewable interment rights').

Cemetery operators should make clear to customers what interment rights are available at a particular cemetery. This is in addition to the legislative obligation to ensure that the certificate of interment right specifies which type of right is held (see the section 'Certificate of interment right').

Nature of interment rights

See section 46 of the C&C Act

An interment right requires a cemetery operator to do all of the following:

- allow interment of the remains of the person identified and in the specified location in the cemetery
- allow interment in accordance with relevant cultural or religious practices that applied at the time the right was granted
- allow an approved memorial of the deceased to be erected on the site
- leave the remains undisturbed:
 - in perpetuity if the right is a perpetual interment right
 - until such time as the remains can be disturbed or removed in accordance with the C&C Act if the right is a renewable interment right (see the section ‘Reusing a site’)

unless earlier disturbance or removal is requested or authorised by the right holder

- leave any lawfully erected and approved memorial to the deceased person at the site undisturbed (provided the interment right remains in force and the memorial is kept in good repair) until the memorial can be disturbed in accordance with the C&C Act, unless earlier disturbance or removal is requested or authorised by the right holder
- ensure that any remains that are disturbed or removed are dealt with according to relevant cultural or religious practice (the C&C Regulation provides more detail on how an operator should manage this).

Granting an interment right

See sections 56, 60 and 61 of the C&C Act

A cemetery operator may grant an interment right to a specified site, either in perpetuity or for a limited period of time. An application for an interment right must be:

- in the form approved by CCNSW
- accompanied by an appropriate fee.

An interment right may be granted to:

- one person
or
- two or more persons as joint holders.

A cemetery operator cannot grant or transfer an interment right to a person if that will result in the person holding more than two interment sites in the cemetery, unless CCNSW approves of the grant or transfer.

A cemetery operator can refuse to grant an interment right if, in the operator’s opinion, the grant would tend to create a monopoly or encourage dealing in interment rights.

If there is a dispute or doubt about who holds an interment right, the cemetery operator can determine the holder of the right:

- after a person who believes they are the holder applies to the operator for a decision
- at least 28 days before making the decision, the cemetery operator:
 - displays a notice about the intention to decide in a prominent position at the cemetery
 - publishes a notice about the intention to decide:
 - in the NSW Government Gazette

- in a state-circulated newspaper, or in a manner approved in writing by the relevant minister
- takes any other steps considered reasonable in the circumstances to determine who holds the right.

In some instances, it might not be possible for the cemetery operator to follow the above steps because an urgent decision is necessary due to the imminent interment of a person who was:

- related by blood or marriage to the applicant or a person interred in the site
or
- in a domestic relationship with the applicant or a person interred in the site.

Once the cemetery operator decides that a person holds the right, it is taken that any other right for the site has been revoked.

Perpetual interment rights

See sections 45 and 48 of the C&C Act

A perpetual interment right provides a right of interment in a specified site with the remains to be left undisturbed forever.

Any interment right granted before 2018 is taken to be a perpetual right, unless the original grant specified that the interment right was of a limited period.

The C&C Act recognises that a perpetual right is never extinguished and that there is always an interment right holder.

Perpetual rights can be transferred, bequeathed or revoked (see the section ‘Transfers, bequests and revocation of interment rights’).

Renewable rights

See sections 54, 55 of the C&C Act and regulations 7, 8, 9, 10,11,12 and 13 of the C&C Regulation

A renewable interment right provides a right of interment in a specified site with the remains to be left undisturbed for a limited period, being:

- any period up to 99 years for cremated remains
- for a minimum period of 25 years for non-cremated remains, but up to no longer than 99 years.

The option of renewable rights gives the operator more flexibility to manage land use within the cemetery. The C&C Act provides sufficient flexibility for cemetery operators to market renewable rights competitively. However, cemetery operators are not allowed to offer renewable rights in parts of the cemetery where perpetual interment is required for religious or cultural reasons.

Prior to the C&C Act, limited tenure could exist in non-Crown land and private-sector cemeteries but was largely unregulated. Two cemeteries in NSW offered interment rights of limited tenure, being Waverley and Kemps Creek (which is natural burial). The renewable rights provisions in the C&C Act accommodated existing practices as much as possible but also allow all cemetery sectors to offer renewable interment rights.

It is important that consumers are reminded that renewable interment rights are optional and do not operate retrospectively—this is a joint responsibility of CCNSW and cemetery operators.

Initial term of a renewable right

Cremated remains

For cremated remains, the initial term of a renewable right can be any period up to 99 years. This gives cemetery operators full discretion to set the initial period for interment of cremated remains.

If the initial term decided by the cemetery operator is 99 years, no renewal will be permitted because a renewable interment right cannot be held for longer than 99 years in total.

Non-cremated remains

For non-cremated remains, the initial term of a renewable right is a minimum of 25 years. However, a cemetery operator can determine a different initial term of between 25 and 99 years if they apply to CCNSW and the period is approved. This flexibility is granted under the C&C Regulation.

The application to, and approval by, CCNSW ensures there is a consistent set of initial terms across the industry. CCNSW will consider particular conditions and needs of each cemetery when assessing applications.

Renewal of a right

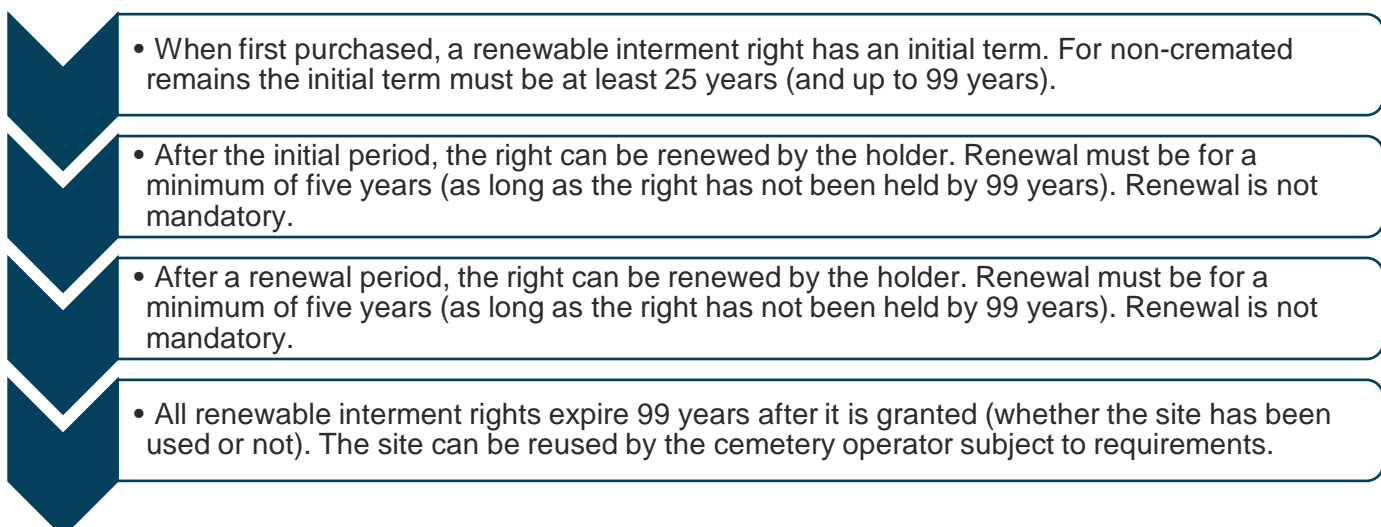
At the end of the initial period, the interment right can be renewed. The minimum renewal period is five years (as long as the right has not been held by 99 years). The C&C Act gives an operator flexibility to determine the renewal period—allowing operators to consider their financial situation and the capacity of the cemetery. The maximum period a person can hold a renewable right is 99 years in total.

At least 12 months before the initial period expires, a cemetery operator must take reasonable steps to contact the right holder to offer renewal. Reasonable steps are listed in the C&C Regulation and include all of the following:

- written notice by post
- telephone contact
- publication of a notice on the operator's website
- use of social media, if appropriate.

Any renewal of the interment right will incur costs that the cemetery operator must disclose to consumers both at the time of original granting the right and at renewal). Once a cemetery operator receives a completed renewal application and payment of the appropriate fee, the cemetery operator **must** renew a renewable right if the holder has six months to renew a right after the expiry date. If the right is not renewed it will revert to the cemetery operator for reuse after certain requirements have been met

Figure 1. Timeline for a renewable interment right—a simple example



Reuse of interment sites and removal of memorials

When an interment right expires and is not renewed, the cemetery operator may reuse the site after the following conditions have been met:

- all bodily remains (not cremated remains) interred at the site have been interred for a minimum of 25 years and are in a sufficiently decomposed state
- the cemetery operator has taken reasonable steps to give notice to the right holder about reclaiming the memorial (if any)
- the cemetery operator has given notice of its intention to reuse the site to the right holder and any secondary contact listed in the cemetery operator's register
- two-years have passed since the expiration of the interment right
- the cemetery operator has sought advice from its statutory heritage advisory committee.

Cemetery operators intending to reuse interment sites must treat human remains with dignity, respect and in accordance with any applicable religious or cultural practices. In addition, cemetery operators must ensure that:

- any remains are removed from the site and placed in an ossuary box
- the remains are either:
 - re-interred at a greater depth
 - placed in an ossuary house
 - in the case of cremated remains, either returned to the right holder or scattered in the cemetery.
- if memorials are removed these are held so that family members can claim the memorial, only unclaimed memorials can be disposed of.

It should be noted that removal of any bodily remains in compliance with these obligations are not defined as an 'exhumation' under the Public Health Regulation 2012.

Transfers, bequests and revocation of interment rights

Both perpetual and renewable interment rights can be transferred and bequeathed, However, because renewable rights have an expiry date, they cannot be revoked—only perpetual rights can be revoked.

Transfer of an interment right

See sections 51, 58, 59 and 60 of the C&C Act

The holder of an interment right can transfer the right to another person or back to the cemetery operator. The C&C Act includes obligations to ensure that the transfer is transparent and appropriately recorded. For example, a transfer application must be made by the holder to the cemetery operator. If the interment right is held by joint holders, the application must be made by all holders. The cemetery operator must issue a interment right certificate to the new holder. Further, details about the right and the new holder must be recorded in the cemetery operator's register.

A cemetery operator may refuse to transfer an interment right if, in the operator's opinion, the transfer would tend to create a monopoly or encourage dealing in interment rights.

Death of a joint right holder

On the death of a joint holder, the remaining joint holder(s) becomes the interment right holder(s). The remaining holder(s) should contact the cemetery operator so the register can be updated.

Bequest of an interment right

See sections 49 and 50 of the C&C Act

The holder of an interment right may bequeath the right as part of their personal estate. The person who benefits from the bequest does not become the holder of the right until the cemetery operator's register is amended.

Intestacy

Rules of intestacy apply when interment rights are not bequeathed. A person to whom an interment right devolves as a result of intestacy does not become the holder of the right until the cemetery operator's register is amended.

Revoking a perpetual interment right

See sections 52, 53 and 54 of the C&C Act

The C&C Act allows a perpetual interment right to be revoked if no burial has occurred within 50 years from the date of the grant. Before a cemetery operator can revoke an interment right they must take reasonable steps to contact the rights holder. If the right holder makes contact with the operator, the future of the site can be negotiated, the holder can either sell or retain the site.

If a cemetery operator revokes a perpetual interment right, the former holder of that interment right is entitled to the following compensation:

- the grant of a perpetual interment right for an alternative interment site in the same cemetery
- monetary compensation of an amount equal to half of the current fee payable for the granting of a perpetual interment right at an alternative site in the same cemetery.

The choice of compensation is up to the cemetery operator.

Renewable interment rights cannot be revoked, because their terms expire in any event.

Certificate and register obligations

The C&C Act sets out obligations on cemetery operators to:

- issue interment right certificates when granting, renewing and transferring interment rights
- keep a cemetery operator's register.

The C&C Act is prescriptive about the information needed on an interment right certificate and in the cemetery operator's register.

Certificates for interment rights

See sections 57 and 65 of the C&C Act

A cemetery operator must issue a certificate to the holder of an interment right each time an interment right is granted, renewed or transferred. Among other things, the certificate must set out the following:

- the person to whom the right is granted, renewed or transferred
- the interment site to which the right relates
- the number of persons whose remains may be interred in accordance with the right
- whose remains may be interred or who may nominate whose remains may be interred
- for a renewable interment right, the manner in which the fee for renewing the right will be calculated.

The interment right must make clear whether the right granted is perpetual or renewable. Where an operator issues a contract note to an interment right holder, the certificate can be incorporated in the contract document, or can be issued separately.

Cemetery operator register

See sections 63 and 64 of the C&C Act and sections 14 & 15 of the C&C Regulation

The cemetery operator's register must record every activity that occurs after 25 June 2018, including:

- grants of interment rights
- erections of memorials
- interments and cremations carried out
- disturbances of remains.

The C&C Act requires the following details to be included in a cemetery operator's register:

- the identity of the right holder
- contact details of the holder and any nominated secondary contact
- details of any person interred or cremated in accordance with the interment right.

The C&C Regulation also requires the register to include:

- the cultural or religious practices of the interred person(s) (if any)
- the section and allotment where the interment is made
- the name of the funeral director or other person who transported the deceased
- the fees paid to the cemetery for the interment.

A cemetery operator must make the cemetery operator's register available for public inspection free of charge. It is important that cemetery operator's make themselves aware of any legislative requirements relevant to privacy.

Other obligations

Memorials (section 46)

See sections 46 of the C&C Act

Cemetery operators must allow a memorial to the deceased person to be erected at the site. Operators have flexibility to approve memorials and to ensure that any proposed memorial is in keeping with the relevant portion of the cemetery. Factors such as safety can also be taken into account.

The cemetery operator must also leave in place any lawfully erected memorial to the deceased person at the site, provided the interment right remains in force and the memorial is kept in good repair.

Exhumations

See sections 66 of the C&C Act

Under the C&C Act any exhumation must comply with the requirements of the Public Health Regulation 2012 (see particularly regulations 69–72).

The C&C Act specifies that any exhumation must be carried out in accordance with any cultural or religious practice applicable to the person whose remains are to be exhumed.

Order for interment

See sections 67 of the C&C Act

An interment cannot take place in a cemetery without the cemetery operator issuing an order for interment.

Advice and assistance from CCNSW

A range of guides and templates have been developed to assist cemetery operators, available on CCNSW's website (industry.nsw.gov.au/ccnsw).

Pilot programs for renewable interment rights

CCNSW will support operators who wish to establish pilot programs to identify best-practice approaches for the interment rights scheme. For example, information gathered from pilots of renewable rights will inform the practical development of the regulatory framework in NSW. Operators who are interested in participating in a pilot program for renewable interment rights should contact CCNSW.

Dispute resolution

The C&C Act provides operators discretion and decision-making powers on a range of matters relevant to interment rights. Decisions made by cemetery operators can be reviewed under the C&C Act or in other ways. For example, complaints can be made to CCNSW for investigation. Also common law remedies are available through the NSW Supreme Court. Some matters might also fall under the jurisdiction of NSW Fair Trading or the domain of the NSW Civil and Administrative Tribunal where these may be part of Australian Consumer Law.

Cemetery operators are required to demonstrate that they:

- have appropriate dispute resolution procedures or policies in place
- follow procedural fairness when investigating complaints or disputes
- retain records that demonstrate the process followed for resolution and the outcome of that process.

It is recognised that many operators will already have established and functional complaints management systems in place.

Frequently asked questions

Q1: 'Interment' is not a commonly used term. How will consumers know what it means?

Public education is essential and can be delivered by CCNSW with assistance from cemetery operators. For example, operators should make available published CCNSW guides to consumers. CCNSW will maintain consumer guides on its website for this purpose. In all guides, CCNSW will explain that 'interment' means burial, or more fully 'the placement of human remains in the earth or in a mausoleum, crypt, vault, columbarium, niche wall or other structure designed for the placement of such remains'.

Q2: What is an interment right?

An interment right is a contract between a cemetery operator and a right holder (consumer) permitting the right holder to have burials occur in a particular grave or other allotment in a cemetery. The holder of the interment right can determine who can be buried in the grave or other allotment.

An interment right is an 'interest' in land but the right holder does not become the owner of the land.

Interment rights apply to burials of both cremated and non-cremated remains. Non-cremated remains can be buried in the earth, in mausoleums, crypts and vaults. Cremated remains can be buried in the earth, in a columbarium or in a niche wall.

Q3: What is a perpetual interment right?

A perpetual interment right allows the right holder to have human remains buried in a particular grave or other allotment in a cemetery and for those remains to be left undisturbed forever (in perpetuity).

Q4: What is a renewable interment right?

A renewable interment right is optional and allows the right holder to have human remains buried in a particular grave or other allotment in a cemetery and for those remains to be left undisturbed for a limited period. The initial period of a renewable right is between 25 and 99 years.

A renewable interment right can be renewed for a minimum of 5 years at a time. The total duration of a renewable right cannot be greater than 99 years.

Any human remains in the grave must remain undisturbed until the renewable right expires. If a right holder does not renew the renewable interment right, the grave may be reused subject to certain conditions.

Q5: Are renewable interment rights mandatory in NSW?

No, renewable interment rights are entirely optional and voluntary.

The C&C Act provides a regulatory framework to ensure that, when offered, renewable interment rights are offered consistently and with adequate consumer safeguards.

Some important things to note about optional renewable interment rights are that:

- renewable interment rights are a choice, they are optional
- no community or individual will be required to take up renewable interment rights
- renewable interment rights will not operate retrospectively—all existing graves and rights continue exactly as they were
- perpetual interment rights will continue to be available
- legislative requirements ensure that the holders of renewable interment rights are protected
- graves of local heritage significance and those listed by the Office of Australian War Graves cannot be re-used under any circumstances.

Q6: What consumer protections are provided in the *Cemeteries and Crematoria Act 2013*?

There are a range of measures provided in the C&C Act to protect consumers. For example, when granting an interment right to a person, the operator must provide:

- information about the cost, process and choices available
- a certificate of interment right
- record information in a cemetery operator's register.

Access to information (such as the information recorded in the cemetery operator's register) is permitted under the C&C Act. There is also a process for compensation for situations where an interment right is revoked by a cemetery operator. There are robust notification processes for cemetery operators to follow before a renewable interment right expires.

Q7: Can a renewable interment right be converted to a perpetual right?

There is no statutory prohibition in the C&C Act preventing a right holder from applying to a cemetery operator to convert an existing renewable interment right into a perpetual interment right.

Cemetery operators that offer renewable interment should consider how best to manage such a request. For example, an operator could withdraw an existing renewable interment right and then commence a new perpetual interment right with a right holder. Such changes will require operators to consider financial matters and make the appropriate administrative changes.

Q8: If an operator wants to offer renewable interments, must the cemetery have a designated location for renewable interments?

The only location restriction provided for in the C&C Act is that a renewable interment right must not be granted in a portion of a cemetery consecrated for use by a religious or cultural group that requires perpetual interment (see subsection 54(2) of the C&C Act).

Q9: What assistance will Cemeteries & Crematoria NSW give to cemetery operators and the public?

CCNSW provides guidance and information for both industry and the community. Check CCNSW's website for more information.