

CONCURRENCE COPY

PERPETUITIES BILL, 1984

EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

This Bill gives effect, with certain modifications, to recommendations of the Law Reform Commission of New South Wales in its report on Perpetuities and Accumulations (L.R.C. 26). The object of this Bill is to effect reforms to the following rules of law relating to perpetuities:—

- (a) The rule against perpetuities, namely, the rule of law that a future interest in property is void from the outset if it may possibly vest outside the perpetuity period of a life in being together with a further period of 21 years.
- (b) The rule against perpetual trusts, namely, the rule of law that renders invalid certain non-charitable trusts whose duration may exceed the perpetuity period referred to above.
- (c) The rule against accumulations, namely, the rule of law that invalidates directions for the accumulation of income whose duration may exceed the period specified in section 31 of the Conveyancing Act, 1919.

The principal reforms effected by the Bill are—

- (a) to fix a period of 80 years as the perpetuity period;
- (b) to abolish the requirement of absolute certainty and to substitute a wait-and-see rule;
- (c) to enable a disposition of a future interest in property to be modified by the reduction of any age contingency or by the exclusion of any class members to save the interest from infringing the rule against perpetuities;
- (d) to extend the permitted period for the accumulation of income to the full period permitted by the rule against perpetuities; and
- (e) to make other provisions to qualify the application of the rule against perpetuities and the rule against perpetual trusts.

The Bill does not give effect to the recommendation of the Law Reform Commission of New South Wales that a person should be given the option of retaining the existing perpetuity period fixed by the common law instead of the period of 80 years.

The Bill contains the following provisions:—

Clause 1. Short title.

Clause 2. Commencement.

Clause 3. Interpretation. In the proposed Act the word "settlement" includes a will, an instrument exercising a power of appointment or any other instrument or dealing effecting a disposition of property.

Clause 4 provides, with certain exceptions, that the proposed Act does not apply in relation to a settlement taking effect before the commencement of the proposed Act.

Clause 5 provides that the rule against perpetuities, the rule against perpetual trusts and the proposed Act bind the Crown except in relation to a settlement made by the Crown or where any other Act otherwise provides.

Clause 6 classifies powers of appointment for the purposes of applying the rule against perpetuities.

Clause 7 fixes the period of 80 years as the perpetuity period.

Clause 8 substitutes a requirement of wait-and-see for the rule that a future interest is void at the outset if it might possibly vest outside the perpetuity period.

Clause 9 operates to save a future interest created by a settlement that might otherwise infringe the rule against perpetuities by enabling the age at which the interest is to vest to be reduced or by enabling some members of the class in whom the interest may vest to be excluded.

Clause 10 specifies the order of application of the remedial provisions referred to in clauses 8 and 9.

Clause 11 makes it clear that the rule against perpetuities does not invalidate the administrative powers of a trustee in relation to trust property.

Clause 12 makes it clear that the rule against perpetuities does not invalidate any power or other provision for remunerating a trustee for the trustee's services.

Clause 13 makes it clear that the rule against perpetuities does not invalidate superannuation, sick and other benefit funds, schemes or arrangements.

Clause 14 provides that, where an interest is determinable on a contingency that arises outside the perpetuity period, any subsequent interest is void and the determinable interest is no longer subject to determination on the contingency.

Clause 15 provides that the rule against perpetuities does not apply to options of any description.

Clause 16 provides that the perpetuity period of 80 years and the wait-and-see rule apply to the rule against perpetual trusts.

Clause 17 makes it clear that a future interest which is ulterior to and dependent upon a void interest is not itself thereby rendered void by the rule against perpetuities or the rule against perpetual trusts.

Clause 18 provides for the extension of the permitted period for the accumulation of income to the full period permitted by the rule against perpetuities.

Clause 19 and Schedule 1 repeal certain enactments which are to be replaced by provisions of the proposed Act.

Clause 20 enacts certain savings and transitional provisions.

PERPETUITIES BILL, 1984

No. , 1984.

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A BILL FOR

An Act to effect reforms in the rules of law relating to perpetuities; and to repeal certain provisions of the Conveyancing Act, 1919, and the Trustee Act, 1925.

[MR GORDON—21 *September*, 1983.]

Perpetuities.

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

5 Short title.

1. This Act may be cited as the "Perpetuities Act, 1984".

Commencement.

2. (1) Sections 1 and 2 shall commence on the date of assent to this Act.

- 10** (2) Except as provided by subsection (1), this Act shall commence on such day as may be appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette.

Interpretation.

- 15** 3. (1) In this Act, except in so far as the context or subject-matter otherwise indicates or requires—

"appointed day" means the day appointed and notified under section 2 (2);

"disposition" includes—

- 20** (a) the conferring or exercising of a power of appointment and any other power or authority to dispose of property; and
(b) any alienation of property;

"interest" includes any estate and any right;

"power of appointment" includes any discretionary power to make a disposition;

- 25** "property" includes any interest in real or personal property and any thing in action;

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“settlement” includes—

- (a) a will;
 - (b) an instrument, testamentary or otherwise, exercising a power of appointment, whether general or special; and
 - 5 (c) any other instrument, transaction or dealing whereby a person makes a disposition,
- but does not include an Act of Parliament;

10 “the rule against perpetual trusts” means the common law rule that invalidates a trust (not otherwise invalid) for a purpose which is not charitable where the duration of the trust will or may exceed the perpetuity period;

“trust” and “trustee” have the meanings respectively ascribed thereto in the Trustee Act, 1925;

“will” includes a codicil.

15 (2) For the purposes of this Act, a will shall, in relation to a disposition contained in it, be deemed to take effect on the death of the testator.

(3) For the purposes of this Act—

- (a) a person shall be treated as a member of a class if in that person’s case each and every condition identifying a member of the class is
- 20 satisfied; and
- (b) a person shall be treated as a potential member of a class if in that person’s case only one or some of the conditions identifying a member of the class is or are satisfied but there is a possibility that the remainder of those conditions will in time be satisfied.

25 Application.

4. (1) Except as provided by sections 11, 12 and 13, this Act does not apply in relation to a settlement taking effect before the appointed day.

(2) This Act applies in relation to a settlement exercising a power of appointment, whether general or special, and taking effect on or after the

30 appointed day, whether or not it applies in relation to the settlement creating the power of appointment.

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(3) This Act does not apply to render invalid, at the outset or at some future time, an interest created by a provision of a will executed before the appointed day, but taking effect on or after the appointed day, if the provision would not have infringed the rule against perpetuities had this Act not been enacted and had the will taken effect when it was executed.

The Crown.

5 (1) Except as provided by subsection (2) or by any other Act, the rule against perpetuities, the rule against perpetual trusts and this Act bind the Crown not only in right of New South Wales but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

(2) Nothing in the rule against perpetuities, in the rule against perpetual trusts or in this Act affects any settlement made by the Crown.

Powers of appointment.

15 (1) For the purposes of the rule against perpetuities, a power of appointment shall at any particular time be treated as a special power unless, at that time, the appointor has, by the settlement creating the power, unconditional authority at his or her own discretion to exercise the power by appointing the interest the subject of the power to himself or herself.

20 (2) Notwithstanding subsection (1), an appointment of an interest made by will under a power of appointment that would, but for the fact that it was made exercisable only by will, have been a general power shall be treated as a general power for the purposes of determining whether the appointment of the interest infringes the rule against perpetuities.

25 (3) For the purposes of this section, an authority is unconditional notwithstanding any formal condition relating to the mode of exercise of the power.

The perpetuity period.

30 (1) For the purposes of the rule against perpetuities, the perpetuity period applicable to an interest created by a settlement shall be 80 years from the date on which the settlement takes effect.

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(2) Where an appointment of an interest is made under a special power of appointment, the perpetuity period shall be reckoned from the date on which the settlement creating the power takes effect.

Wait-and-see.

5 **8. (1)** Where a provision of a settlement which creates an interest would, but for this section and section 9, infringe the rule against perpetuities, the interest shall be treated, until such time (if any) as it becomes certain that it must vest, if at all, after the end of the perpetuity period, as if the provision did not infringe that rule, and its becoming so certain does not affect the
10 validity of any thing previously done in relation to the interest.

(2) Where a provision of a settlement which creates an interest consisting of the conferring of a general power of appointment would, but for this section and section 9, infringe the rule against perpetuities, the interest shall be treated, until such time (if any) as it becomes certain that the power
15 will not be exercisable within the perpetuity period, as if the provision did not infringe that rule.

(3) Where a provision of a settlement which creates an interest consisting of the conferring of any power or right (except a general power of appointment) would, but for this section and section 9, infringe the rule
20 against perpetuities, the interest shall be treated as regards any exercise of the power or right within the perpetuity period as if the provision did not infringe that rule, and the provision shall be treated as infringing that rule only if and so far as the power or right is not fully exercised within the perpetuity period.

25 **(4)** This section does not affect the operation of section 15.

Reduction of age and exclusion of class members.

9. (1) Where—

- (a) a provision of a settlement creates an interest and the vesting of the interest depends on the attainment by any person of a specified
30 **age; and**

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(b) it becomes apparent that the provision would, but for this subsection, infringe the rule against perpetuities but that it would not infringe that rule if the specified age had been a lesser age,

5 the interest shall, for all purposes, be treated as if, instead of its vesting depending on the attainment by the person of the specified age, its vesting depended on the attainment by the person of the greatest age which, if put in place of the specified age, would save the provision from infringing that rule.

(2) Where an interest to which subsection (1) applies is ulterior to any other interest created by the settlement, that other interest shall not be
10 defeated or otherwise adversely affected by the operation of subsection (1).

(3) Where, in relation to an interest created by a provision of a settlement, different ages are specified in relation to different persons—

(a) the reference in subsection (1) to the specified age shall be construed as a reference to all the specified ages; and

15 (b) subsection (1) shall operate to reduce each such age so far as is necessary to save the provision from infringing the rule against perpetuities.

(4) Where a provision of a settlement creates an interest which is to be taken by a class of persons and it becomes apparent that the inclusion of
20 a person, being a member of the class or an unborn person who at birth would become a member or potential member of the class, would, but for this subsection—

(a) cause the provision to infringe the rule against perpetuities; or

25 (b) prevent subsection (1) from operating to save the provision from infringing that rule,

then, upon its so becoming apparent, the person shall, unless the exclusion of the person would exhaust the class, be treated in relation to the interest as if the person were not a member of the class, and, where subsection (1) applies, that subsection shall thereupon have effect accordingly.

30 (5) Where this section has effect in relation to a provision to which section 8 applies, the operation of this section does not affect the validity of any thing previously done in relation to the interest created by the provision.

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Order of application of remedial provisions.

10. The following provisions shall, for the purposes of the rule against perpetuities, be applied in the following order:—

- (a) section 8;
- 5 (b) section 9 (1);
- (c) section 9 (4).

Administrative powers of trustees.

11. (1) In this section, “administrative power” means a power of a trustee to sell, lease or exchange trust property and any other power of a trustee, but does not include a power to appoint, pay, transfer, advance, apply, distribute or otherwise deal with trust property in or towards satisfaction of the interest of a beneficiary under the trust or in or towards satisfaction of a purpose of the trust.

(2) The rule against perpetuities does not invalidate an administrative power in relation to trust property during the subsistence of a beneficial interest in the trust property.

(3) This section applies to an administrative power taking effect, and to any exercise of an administrative power, before, on or after the appointed day.

20 Remuneration of trustees.

12. (1) The rule against perpetuities does not invalidate a power or other provision for remunerating a trustee for the trustee’s services.

(2) This section applies to a power or other provision for remunerating a trustee taking effect before, on or after the appointed day.

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Superannuation and other funds.**13. (1)** In this section—

“employees” includes directors, officers, servants and employees of any employer;

5 “fund” means a provident, superannuation, sick, accident, assurance, unemployment, pension or co-operative benefit fund, scheme, arrangement or provision or other like fund, scheme, arrangement or provision;

10 “self-employed persons” includes persons engaged in any lawful profession, trade, occupation or calling.

(2) The rule against perpetuities does not invalidate a fund established by a settlement for the benefit of—

(a) employees;

(b) self-employed persons;

15 (c) spouses, children, grandchildren, parents, dependants or legal personal representatives of employees or self-employed persons; or

(d) persons duly selected or nominated for that purpose by employees or self-employed persons pursuant to the provisions of the settlement.

20 **(3)** This section applies to settlements taking effect before, on or after the appointed day.

Determinable interests.**14. (1)** In this section—

25 “determinable interest” means an interest created by a settlement, being an interest which is, by a provision of the settlement, determinable on a contingency;

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“subsequent interest”, in relation to a determinable interest created by a settlement, means an interest, whether vested or contingent—

- 5 (a) created by the settlement, or remaining undisposed of by the settlement, or taking effect by way of reverter, resulting trust, residuary gift or otherwise on a possibility arising under the settlement; and
- (b) as regards which the determinable interest is a prior interest.

(2) The rule against perpetuities applies to render invalid the provision for determination of a determinable interest created by a settlement in
10 the same manner as the rule would apply to render invalid a condition subsequent in the settlement for defeasance of the determinable interest on the same contingency, and where that rule does so apply—

- (a) the determinable interest shall not be so determinable; and
- 15 (b) a subsequent interest not itself rendered invalid by that rule shall be postponed or defeated to the extent necessary to allow the determinable interest to have effect free from the provision for determination.

(3) For the purposes of this section, an interest created by, or a provision in, an appointment or other exercise of a power in a settlement
20 (except a general power of appointment) shall be treated as an interest created by, or a provision in, the settlement.

(4) Notwithstanding subsection (2), the rule against perpetuities shall not apply to a gift over from one charity to another.

Options.

25 **15.** The rule against perpetuities does not apply to—

- (a) any option to renew a lease of property;
- (b) any option to acquire a reversionary interest in property comprised in a lease;
- 30 (c) any right of pre-emption given for valuable consideration or by will in respect of property; or
- (d) any other option given for valuable consideration or by will to acquire an interest in property.

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Trusts for purposes which are not charitable.

16. (1) Except as provided by this section, this Act shall not affect the operation of the rule against perpetual trusts.

5 (2) Where, by a settlement, there is a disposition for a purpose, the perpetuity period applicable to the disposition shall, for the purposes of the rule against perpetual trusts, be 80 years from the date on which the settlement takes effect.

10 (3) Where, by a settlement, there is a disposition for a purpose and the disposition would, but for this Act, infringe the rule against perpetual trusts, the disposition shall be treated, until such time (if any) as it becomes certain that the disposition must infringe that rule, as if it did not infringe that rule, and its so becoming certain does not affect the validity of any thing previously done in relation to the disposition.

15 (4) This section does not apply to a disposition for a purpose which is charitable.

Dependent interests.

17. (1) Where a provision of a settlement creates an interest, the provision is not rendered invalid by the rule against perpetuities or the rule against perpetual trusts by reason only that the interest is ulterior to and 20 dependent upon an interest which is so invalid.

(2) Where a provision of a settlement creates an interest which is ulterior to another interest and the other interest is rendered invalid by the rule against perpetuities or the rule against perpetual trusts, the acceleration of the vesting of the ulterior interest shall not be affected by reason only 25 that the other interest is so invalid.

Accumulation of income.

18. (1) Where property is disposed of in such a manner that the income of the property may be or is directed to be accumulated wholly or in part, the power or direction to accumulate that income is valid if the disposition 30 of the accumulated income is, or may be, valid, but not otherwise.

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(2) This section does not affect the power of any person to terminate an accumulation that is for the person's benefit, or any jurisdiction or power of a court to maintain or advance out of accumulations, or any power of a trustee under the Trustee Act, 1925, or under any other Act or law or
5 under any settlement.

Repeals.

19. Each Act specified in Column 1 of Schedule 1 is, to the extent specified opposite that Act in Column 2 of that Schedule, repealed.

Savings and transitional provisions.

10 20. (1) Section 12 does not affect any rights arising under a judgment or an order which has taken effect before the appointed day or arising under any agreement made before the appointed day.

(2) Notwithstanding the repeal of sections 31, 31A and 36 of the Conveyancing Act, 1919, the provisions of those sections continue to apply
15 in relation to a settlement taking effect before the appointed day.

SCHEDULE 1.

(Sec. 19.)

REPEALS.

Column 1.		Column 2.
Year and number of Act.	Short title of Act.	Extent of repeal.
1919, No. 6 ..	Conveyancing Act, 1919 ..	Sections 31, 31A and 36.
1925, No. 14 ..	Trustee Act, 1925	Section 27A.

BY AUTHORITY

D. WEST, GOVERNMENT PRINTER, NEW SOUTH WALES—1984





