

**Report on the Rules Against  
Perpetuities and Accumulations**

**Northern Territory Law Reform Committee**

**Report No 15**

**October, 1993**



# Northern Territory Law Reform Committee

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18 October 1993


The Hon Daryl W. Manzie  
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Dear Attorney-General

RE: LAW REFORM COMMITTEE'S REPORT ON PERPETUITIES AND  
ACCUMULATIONS

I have pleasure in presenting you with the Committee's Report on  
Perpetuities and Accumulations.

Yours sincerely



HON JUSTICE DEAN MILDREN  
PRESIDENT

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# Northern Territory Law Reform Committee

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## 1. INTRODUCTION

The Attorney-General has asked the Committee to examine three rules of law:

- the Rule Against Perpetuities;
- the Rule in *Whitby v Mitchell*;
- the Rule Against Accumulations.

Appendix A contains the full Terms of Reference to the Committee and information on the manner in which the Committee considered the reference.

In Part 2 the effects of these rules are explained. They permit a person who is disposing of property or income to tie it up for a certain period. This period is called the perpetuity period. If there is a possibility that the property or income may be tied up for longer than the perpetuity period, then the disposition is void.

In Part 3 the Committee examines the policy options for reforming these rules.

In Part 4 the Committee makes recommendations for the reform of the rules.

### The Rule Against Perpetuities

Adam may make a will in which the family house is left to Adam's first male grandson born after Adam dies. This means that, until the grandson is born, the house remains as part of Adam's estate. The legal response to this possibility could take three primary forms.

- **No rule controlling vesting.**

Under this approach a person can make a transfer of property and attach any conditions he or she chooses. In Adam's case, he could leave the house to his first male descendant born after 3001.

The policy behind this approach is that:-

- Adam should be free to deal with his property as he sees fit;
  - common sense and commercial reality will restrict Adam to making common sense transfers; and
  - the Courts have the power to alter the terms of any transfer that is too vague or that lasts too long (this alteration may be inconsistent with Adam's intention).
- **A rule against deferred vesting.**

Under this rule, a person can only transfer property to someone who is alive when the transfer takes place. In Adam's case, he could leave the house to any grandson alive when Adam dies.

The policy behind this rule is that the dead hand of Adam should not be allowed to restrict the use of the house until some future event, eg. when the first grandson is born after 3001. The house should be able to be bought and sold immediately on Adam's death.

- **A rule against remoteness of vesting.**

Under this rule, a person can transfer property to someone who is:-

- alive when the transfer takes place, or
- born within a reasonable time after the transferor's death (eg. 80 years).

The policy behind this rule is that Adam should be allowed some control over how his property is dealt with, as long as the restriction doesn't take the property out of circulation for too long.

The Rule Against Perpetuities is such a rule. In adopting this policy, a rule against remoteness of vesting must also decide the following associated issues:

*How long is too long?*

The Rule adopts a period of the life of someone alive at the transfer plus 21 years – often a period of approximately 80 years.

*To what property should the Rule apply?*

All or some, eg. only land. The Rule applies to most property.

*Should the rule be one of initial certainty or wait-and-see?*

Under an initial certainty rule, it must be certain, when the transfer is made, that the ultimate recipient, eg. the first male grandson, will become entitled to the property within the allowed period. Under a "wait and see" rule, you wait until the end of the allowed period. If the grandson has taken the property then the transfer is valid. If not, the transfer ceases to be valid.

The Rule Against Perpetuities is a rule of initial certainty.

## 2. THE COMMON LAW

### (a) The Rule Against Perpetuities

The rule of law known as the rule against perpetuities is one of the rules developed by English courts to restrict dispositions of property which might tie up land or wealth indefinitely or for too long a time. The rule developed in the late 17th century, when family settlements were often made with the intention of keeping property within landed families from generation to generation and to protect family fortunes against profligate heirs and their creditors. These settlements effectively prevented the sale or mortgage of land for substantial periods of time. The courts thought it necessary to place some restraint on schemes that tied up land 'in perpetuity'.

The rule against perpetuities was designed to strike a balance between a wealthy family's ambitions for its descendants and the needs of a market economy in which land ought to be traded like any other commodity. The rule achieved this object by focusing on the vesting of future interests in the property. The rule is usually stated as follows:

**No interest in property is valid unless it must vest (take effect), if at all, earlier than 21 years after the death of a person alive at the time the interest was created.**

#### The rule is one of initial certainty

The rule requires that it must be certain, when the disposition is made, that the property must vest (if it is ever going to vest) in a person within the perpetuity period.

Examples of dispositions which do not offend against the rule are:

#### Example 1

A gives land to B to vest 20 years after A's death.  
**(Land vests in B (if at all) less than 21 years after A's death).**

#### Example 2

A gives land to B to enjoy during B's life (a 'life estate') then after B's death to B's oldest surviving child (if any).  
**(Land will vest in B's child less than 21 years after B's death.)**

Examples of dispositions which do offend against the rule are:

Example 3

A gives land –

- (1) to B a life estate;
- (2) to B's first child (if any) to attain 25.

**(B's first child may turn 25 more than 21 years after B's death, eg. he or she is one year old when B dies.)**

Example 4

A gives land –

- (1) to B a life estate;
- (2) to B's first child (if any) a life estate;
- (3) remainder to that child's first child (if any).

**(Land may not vest in child's child within 21 years of B's death, whereas the rule requires that it must be certain that when the disposition is made it must vest within the perpetuity period.)**

Example 5

A gives land –

- (1) to B a life estate;
- (2) to all of B's grandchildren who reach 21.

**(The gift to the grandchildren is wholly invalid because one grandchild may reach 21 more than 21 years after B's death. For gifts to a class, the rule is: one out all out.)**

**To what property does the rule apply?**

The purpose of the rule was originally to ensure the free alienability of land. According to Sappideen and Butt (p. 3), most commentators agree that the rule no longer serves this purpose, see Maudsley pp. 220–224, Allan pp. 31–32.

However, the common law rule has been applied to many dispositions of personal property, powers of sale, a special power of appointment (the common law modifies the rule when it applies to general powers), the creation of options to purchase land (in some jurisdictions, not others) and various other interests, but does not apply at all or with full force to certain charitable gifts, certain covenants over land (however, it does apply to contingent easements) and certain trusts: see Sappideen and Butt pp. 7–11, American Jurisprudence pp. 36–73.

Example 6

A transfers land to X Pty. Ltd., subject to an option exercisable by Y Pty. Ltd. to buy the land at valuation, the option to remain open for 25 years.

**(There is no relevant life in being, so the perpetuity period is 21 years. The option may be exercised beyond the perpetuity period, so it is invalid: see *Worthing Corporation v Heather* [1903] 2 Ch 532.)**

Example 7

A gives to B and B's heirs –

- (1) a right for 999 years to use existing roads on his or her farm;
- (2) a right to use any future roads on his or her farm.

**(The first gift is valid because it vests immediately, even though it lasts for 999 years. The second gift is void because it may not vest (ie. a road may not be built) within the perpetuity period.)**

It has been said that the range of interests to which the rule against perpetuities applies may be extended as the necessity arises, and that the court proceeds on the principle that the rule is to be applied where no other sufficient protection against remoteness is attainable: *Re Ashforth, Sibley v Ashforth* [1905] 1 Ch 535, at p. 545.

**How long is the perpetuity period?**

The perpetuity period is defined by reference to 21 years after the end of a "life in being" at the time the interest is created.

A life in being includes the entire period from conception. Accordingly, a person born 8 months after the interest is created may be a life in being for the purpose of the rule. Similarly, the period of gestation may be added on to the 21 years, so an interest that must vest 21 years and 8 months after the life in being may be valid.

**How does the rule apply to a gift to a class of people?**

A gift is to a class of persons when it is to those who come within a certain specific category and who, if they are to take at all, are to take one divisible object in certain shares. Gifts of my land "to all the children of X living at my death" are class gifts. But a gift of property to be equally divided between five daughters of X is not a class gift because a **distinct** share is given to each beneficiary as if she had been named.

The rule against perpetuities as applied to class gifts is: if a single member of a class might take a vested share outside the perpetuity period, the whole gift fails, even in respect of those members of the class who have already satisfied any required condition. A class gift cannot be good as to one party and void as to the rest because the share of every member may be increased or diminished by the void contingency.

Example 8

T gives property to his wife for life, then to such of the children of his brothers and sisters who attain 21. At T's death, his father and mother were alive but both were aged 66. He had two brothers and two sisters, of whom the youngest was 32, and several nephews and nieces, of whom the eldest was 14: *Ward v Vander Leoff* [1924] AC 653. **(The gift to the nephews and nieces is invalid. There is a common law conclusive presumption of fertility in respect of any man or woman, however young or however old. T's 66-year-old parents might have a further child who might outlive the other brothers and sisters and then have a child. Such a child would attain a vested interest more than 21 years after any life in being.)**

**What is the effect of breaching the rule?**

The general effect of a particular disposition being void under the rule against perpetuities is that the instrument containing the disposition takes effect as if the invalid disposition, and all dispositions dependent on it, were omitted.

**(b) The Rule in *Whitby v Mitchell***

English courts grappled with the question of perpetuities before the rule against perpetuities was finally formulated. At least as early as 1556, in *Chudleigh's Case* 1 Co. 120, doubts were expressed about the practice of piling contingency upon contingency in order to keep land within a family.

A rule, also known as the rule against double possibilities, was stated in a case in 1890 and has been known since as the rule in *Whitby v Mitchell* (1890) 44 Ch.D. 85:

**If an interest in land is given to an unborn person, any remainder to his or her issue is void, together with all subsequent limitations.**

Some grants may infringe this rule without infringing the rule against perpetuities; for example, a grant of a life estate to a person who has no children at the time of the grant, remainder to his or her first-born son for life, remainder to the first-born son of that son to be born within 21 years of the death of a nominated person then living or ascertainable from a list. Since the most remote interest vests within 21 years of the death of a living person, the rule against perpetuities is avoided. The rule in *Whitby v Mitchell*, however, will still apply.

**(c) The Rule Against Accumulations**

The accumulation of income within a trust is a common device where interests are vested in minors. Maintenance and support are normally permitted at the discretion of the trustee and the remaining income, if any, is accumulated (usually re-invested).

The rule against accumulations is not directed specifically at trusts but affects them. It is concerned with the person who seeks to set aside a fund, have it accumulate for many years, and then, at the end of the period, have it passed to a beneficiary, usually a lineal descendant of the settlor. To prevent this accumulation, the U.K. Parliament passed the Accumulations Act in 1800 (presently in force in the Northern Territory).

The Act limits the accumulation period to one of four periods which the settlor (person creating the fund) might choose:

- the lifetime of the settlor;
- 21 years from the death of the settlor;
- the minorities of persons living at the settlor's death; or
- the minorities of person entitled to the accumulated sum on coming of age.

The rule against accumulations determines for how long income from property may be accumulated in such a way as to prevent it being enjoyed by anyone in the meantime.

The rule against accumulations relies on accumulation periods which are arbitrary and may be difficult to apply. They may result in otherwise avoidable litigation. There are practical problems, too. If a parent sets up a trust for his or her mentally handicapped child, with a discretionary power to accumulate income, the rule would apply to allow accumulations for only the parent's lifetime, or worse, the minority of the child. The parent's intention to provide a discretionary trust for the duration of the child's lifetime could not be accomplished.

### 3. POLICY OPTIONS FOR REFORM

#### (a) The Rule Against Perpetuities

There are three policy options for reform:

- Option A: To abolish the present rule and introduce variation of trusts legislation.
- Option B: To introduce a rule against deferred vesting.
- Option C: To retain the present common law rule, but to take away its traps for the unwary by the introduction of repairing legislation.

#### **Option A: Abolish the rule and introduce variation of trusts legislation**

This option rejects the view that as a matter of policy there should be a rule to control the disposition of property.

The general thrust of arguments advocating abolition is that modern laws of income tax, capital gains tax and death duties mean property cannot be "taken out of circulation" as a result of commercial decision making. In the event specific property is ever tied up (presumably for non-commercial reasons) then variation of trusts legislation permits the terms of the disposition to be altered. For example, Waters states, at 287:

*It is arguable that today the perpetuity rule, like the accumulations rule could safely be abolished also. This indeed is the author's view. Those rules arose in the days when some such machinery was required in order to implement the policy of keeping property in commercial circulation, and of limiting the control upon the future beyond their own lives which was otherwise open to settlors and testators. Then came the volume of modern taxation. The result today is that a succession of limited interests will yield such a rich haul to the Crown that the Crown itself rather than the cestui que trust will in effect be the chief beneficiary of the trust. It is difficult to see who among intending settlors and testators would wish to create this result. Moreover, in recent years, at the behest of the beneficiaries, the court consenting on behalf of the incapacitated, the variation of trusts legislation has allowed beneficiaries to make vast inroads upon the schemes of beneficial interests as contrived by settlors and testators.*

Generally speaking, Scotland does not have a rule relating to perpetuities (see *Muir's Trustees v Williams* (1942) SC 5), but it does have a series of rules dealing with particular problems (eg. *Smith's Trustees v Michael* (1972) SLT 89).

The Manitoba Law Reform Commission in its Report on the Rules Against Accumulations and Perpetuities (1982), the South Australian Law Reform Committee in its Report Relating to the Reform of the Law of Perpetuities (1984) and the Law Reform Commission of Saskatchewan in its Proposals Relating to the Rules Against Perpetuities and Accumulations (1987) recommended that the rule be abolished.

The reasoning of the South Australian Law Reform Committee is as follows:

- The absence of a rule against perpetuities doesn't seem to have caused "the slightest inconvenience" to anyone: p.11.
- Taxation laws means "No one in his sane senses would tie up property strictly for a life in being and 21 years": p.11.
- Variation of trusts legislation provides a better mechanism to prevent perpetuities: p.12.

The reasoning of the Canadian bodies can be stated as follows:

- Assuming the law should provide some protection against attempts to create perpetuities, is the rule against perpetuities the most appropriate vehicle for implementing that policy? MLRC p. 33, LRCS p. 5.
- Reform has proceeded by dealing with the most obvious absurdities of the rule but has not made any simpler or clearer a technical and complex area of law: MLRC p. 39, LRCS p. 6.
- Variation of trust legislation provides a better mechanism to prevent perpetuities. It allows a court to consent to a termination or variation of a trust on the application of any presently entitled beneficiary: MLRC pp.54–57, LRCS p.6.

In 1986 Manitoba abolished its Rule Against Perpetuities. The Committee received advice in April 1992 from Cy Fein, a leading Manitoba trusts practitioner. He feels there may now be more generation skipping trusts (ie. where gifts are made directly to grandchildren) but has not come across attempts to attach conditions to the transfer, so that the deceased attempts to "rule from the grave".

### Variation of trusts legislation

In *Chapman v Chapman* [1954] AC 429 the House of Lords held that the court had a common law power to vary the terms of a trust in limited circumstances. These included allowing income which a settlor had directed to be accumulated to be paid as maintenance. The case was followed in New Zealand (*Re Ebbett* [1974] 1 NZLR 392) and Canada (eg. *Lockwood v Brontwood Park Invts Ltd.* (1970) 10 DLR (3d) 143).

In New South Wales a wider view of the power to vary trusts is taken: *Tickle v Tickle* (1987) 10 NSWLR 581.

As a result of *Chapman*, a number of jurisdictions have enacted variation of trusts legislation:

UK: *Variation of Trusts Act* 1958  
Vic: *Trustee Act* s. 63A  
Qld: *Trustee Act* s. 95  
WA: *Trustee Act* s. 90  
SA: *Trustee Act* s. 59C  
NZ: *Trustee Act* s. 64A

There is no such legislation in the Northern Territory.

### **Option B: Introduce a rule against deferred vesting**

Under this option the power to dispose of an interest in property would be limited to giving it to persons alive at the time of the transfer takes effect.

Louisiana law has a civil law background and a statutory prohibition of all "substitutions" (La. Civil Code (1932) Art. 1520). Louisiana law permits a trust, but only to last for ten years, or, where an infant is beneficiary, for ten years after the majority of such infant. (Const. Art. IV, S 16 and Gen. Stat. (Dart, 1941) S 9850.4.) By virtue of these statutory provisions the Louisiana regulation of the creation of future interests and of the duration of trusts is totally unlike, and, in many particulars, is more stringent than that of any other State in the USA. The Louisiana situation is explained and discussed in Nabors, 4 Tulane L. Rev. 190 (1929), 603 (1930); and 13 Tulane L. Rev. 178 (1939).

Until 1940 Wyoming had no relevant legislation except a constitutional prohibition of "perpetuities" (Const., (1890) Art. I, S 30.). In 1939 this State adopted a statute forbidding transfers unless made to "persons in being or their immediate issue or descendants." (Wyo. Laws 1939, c. 92. Now Wyo. Rev. Stat. (Supp., 1940 S 97-209.)

### **Option C: Retain the rule but introduce repairing legislation**

#### **The reason to retain**

The reasons stated by Allan (p. 32) are those generally given to support retention of the rule:

*It is the natural desire of each generation to provide for future generations by distributing the assets it has amassed in the manner it thinks will be most beneficial for those future generations. Similarly, it is the natural desire of each generation to shape its own destiny, which it can not do if an earlier generation has already prescribed for it. 'The far-reaching hand of the testator who would enforce his will in distant future generations destroys the liberty of other individuals, and presumes to make rules for distant times.' Hence the rule against perpetuities holds a balance between the aspirations and interests of the living and of the dead and is a compromise to secure that the control of property is not withheld from the living for too long a period...*

Waters (pp. 530-31) expresses the following point of view:

*There is a good deal to be said for the argument, which has now prevailed in Manitoba, as we have seen, that the day of the rules against remote vesting, alienability, and accumulations was spent when modern modes of taxation came about, and personal wealth no longer took the form of land, but of invested funds...*

*However, Manitoba aside, reform commissions everywhere, for not particularly precise reasons, still seem to be unwilling to bury the perpetuity rule. In its modern legislative form, shorn of its hidden traps, the perpetuity rule seems to be intended to play the role of what the village green cricketer would know as 'long stop' - a player kept out of the way where he can do no harm, but possibly be able in an unusual situation to do some good. In these circumstances the exemptions enjoyed by charitable gifts from the rule still have their significance...*

American Jurisprudence (pp. 12–13) expresses the object and purpose of the rule as follows:

*The immediate object of the rule against perpetuities is to require the vesting of future estates within a limited period of time after their creation and to bar the creation of future interests depending on remote contingencies. The underlying and fundamental purpose of the rule is founded in the public policy of preventing the fettering of the marketability of property over long periods of time by indirect restraints upon its alienation. The rule is one of policy in favour of free alienability and transferability. Again, the purpose of the rule is to prevent the tying up of property to the detriment of society in general.*

*The exclusion of property from the channels of commercial development for extended periods of time is considered by the law as a public evil. Since alienability is the object, the destruction of future interests is the means of obtaining this object. The rule against perpetuities is used as a knife to cut out the limitations which, if they were allowed to take effect, would produce the consequences which are to be avoided. Accordingly, a period has been fixed, sometimes varying between jurisdictions, beyond which no one can exclude his estate from the course of free alienability. The dead hand can control contingent devolution toward ultimate vesting only within a fixed period.*

Another reason to retain the rule is that there are an unknown number of instruments drafted on the basis of the rule and changes may invalidate these.

### **The repairing legislation: the "wait and see" approach**

Statutory reforms to the rule against perpetuities may be said to follow publication of a comprehensive textbook on the topic in 1956 by Morris and Leach. The principal reform recommended by Morris and Leach was to replace the "initial certainty" rule with a "wait and see" rule. That approach, with some modification, has been adopted in most jurisdictions which have reformed the rule:

Western Australia (1962)  
England and Wales (1964)  
New Zealand (1964)  
Ontario (1966)  
Victoria (1968)  
Queensland (1972)  
Alberta (1972)  
British Columbia (1975)  
New South Wales (1984)  
Australian Capital Territory (1985)  
Tasmania (1992)

The various reforming Acts do not provide a complete code for the rule against perpetuities, but modify various aspects. For the disposition to be void, it must actually vest outside the perpetuity period. This reform would seem to save most breaches of the rule (see Examples 3, 4, 5, 8).

The "wait and see" approach, while attempting to give every opportunity for an interest to vest, lacks certainty by merely suspending the final determination of the validity of interests. If invalidity does occur, it may be necessary to reopen an estate which has

been administered with assets dispersed or to delay administration for years in order to avoid a perpetuities problem.

**The repairing legislation: other issues**

Once a decision to retain is made, it would follow that all the traps identified in the rule would be examined and repaired.

**(b) The Rule in *Whitby v Mitchell***

The options are to retain, abolish or modify the rule.

**(c) The Rule Against Accumulations**

The options are to retain, abolish or modify the rule.

#### 4. RECOMMENDATIONS FOR REFORM

##### (a) The Rule Against Perpetuities

### Recommendation 1: Introduction of a "wait and see" rule to replace the rule of initial certainty (Clause 10)

Under the "wait and see" rule, the instrument creating an interest is assumed to be valid and only becomes invalid if a contingent interest cannot or does not in fact vest within the perpetuity period. At the outset you cannot be certain that the instrument is valid, but you must "wait and see", sometimes until the expiration of the perpetuity period.

The Ontario Perpetuities Act provides a typical example of the "wait and see" approach:

3. *No limitation creating a contingent interest in real or personal property shall be treated as or declared to be invalid as violating the rule against perpetuities by reason only of the fact that there is a possibility of such interest vesting beyond the perpetuity period.*
- 4 (1) *Every contingent interest in real or personal property that is capable of vesting within or beyond the perpetuity period shall be presumptively valid until actual events establish –*
  - (a) *that the interest is incapable of vesting within the perpetuity period, in which case the interest ... shall be treated as void or declared to be void; or*
  - (b) *that the interest is incapable of vesting beyond the perpetuity period, in which case the interest shall be treated as valid or declared to be valid.*

See also: NSW s. 8, Vic s. 6, Qld s. 210, WA s. 103, ACT s. 9, UK s. 3.

These provisions render void only those interests which cannot possibly vest within the perpetuity period. As most contingencies are created by conditions that will remain unfulfilled for an indefinite period of time, few interests are void from the outset. This makes the "wait and see" rule attractive.

Accordingly, the Committee recommends a "wait and see" rule be adopted. Apart from Recommendation 1 which introduces a new type of interest; one which is presumptively valid but which may later prove to be invalid, the Committee proposes no change in the nature of the rule against perpetuities. It remains a rule against remoteness of vesting. The subsequent recommendations are intended to remove the traps that now lie for the drafters of such dispositions.

**Recommendation 2: Abolition of presumption of fertility (Clause 9)**

Under the initial certainty rule, extremely remote possibilities operated to invalidate a disposition. Under the "wait and see" rule this will no longer be the case. However, it may be more convenient for beneficiaries to receive a disposition when it becomes probable that the disposition will vest within the period, rather than wait until the end of the period.

Rebuttable presumptions of fertility have been established in some jurisdictions to provide certainty in distribution: Vic s. 8, Qld s. 212, WA s. 102, UK s. 2, NZ s. 6. The presumptions are usually that a male or female under 12 cannot have a child, nor can a female over 55. If a disposition is made on the basis of these presumptions, and the relevant person does have a child, the Supreme Court is given power to adjust the rights of persons interested in the disposition.

While the NSW Report recommended such presumptions, the subsequent legislation contained none.

**Recommendation 3: Unborn husband or wife (Clause 8)**

A common trap for the unwary drafter is the "unborn widow". Waiting and seeing under clause 10 will not save a gift which fails at common law because of an unborn spouse. This is so because the spouse would not have been reckoned a life in being if clause 10 had not been enacted. It has therefore been necessary in clause 8 to resort, in effect, to the expedient of deeming the spouse to be a life in being. In most cases this will accord with the facts and in the rest no great harm is done.

**Recommendation 4: Fantastic possibilities (Clause 9)**

Clause 10 (wait and see) is intended to be a section of last resort. The Committee considered it appropriate, whenever possible, to remove any need to "wait and see". One way of doing this is to abolish some of the fantastic possibilities which would otherwise require wait and see to be applied. To avoid, for example, the absurdity of waiting and seeing whether a woman aged seventy bears any children, clause 9 provides a presumption that a woman over 55 is incapable of bearing a child. The section also provides a presumption that a person who is under 12 is incapable of having a child. By virtue of section 9, evidence of capacity and incapacity to have

children is admissible. To cover the unlikely event of a child being born to a woman after a judicial decision to the effect that she is incapable of bearing children, the court is given a wide discretion to do what is just in the particular circumstances of any case.

The only fantastic possibilities specifically dealt with in the Bill are those mentioned above. The Committee is satisfied that it is impossible to prepare a list of all the possibilities that may pose special problems in the field of perpetuities. In other cases, it will be necessary to wait and see.

### **Recommendation 5: Clarifying the perpetuity period**

If the perpetuity period is to be measured by a "life in being", it has been argued by some (see earlier) that one must specify how to find out who are the relevant lives in being in order to calculate the perpetuity period.

Some jurisdictions have done this by saying it is the lives relevant to the vesting: Vic s. 6(4), Qld s. 210(4), WA s. 103(3), Ontario s. 6(1). Another approach is to provide a statutory list of measuring lives: UK s. 3(5), NZ s. 8, Alberta s. 5.

Some jurisdictions provide no guidance on the question.

Another approach is to simply abolish a measuring lives approach altogether and replace it with a statutory period.

The Committee considers no guidance is necessary on the question of who is a life in being.

### **Recommendation 6: Altering the vesting age (Clause 11)**

The most common reason for breaches of the rule was an instrument which postponed the vesting of an interest until the beneficiary attained an age greater than 21 (see Example 3). To overcome this problem, legislation usually provides that age may be reduced to allow vesting within the perpetuity period: Vic s. 9, Qld s. 213, WA s. 105, 107.

The "wait and see" rule will obviously save many class gifts (see Example 5). If not, the age reduction rule may save others. If both of these rules fail, exclusion of members of the class may be necessary to save a gift (see below).

One option is to provide that where any instrument provides a vesting age of more than the age of majority, it is automatically reduced to the age of majority: UK Law of Property Act 1925, WA s. 105(1).

The second option is to allow age reduction only to save a disposition when it becomes obvious that the disposition would be void as offending the rule against perpetuities if the age was not reduced. This option has two variations.

Firstly, it may operate after a mandatory age of majority reduction. If so, it would allow a second reduction to an age below 18.

Secondly, it may operate only to save an otherwise invalid disposition. If so, it may allow the age to be reduced –

- (a) to 21 or 18 but not below: eg. Ontario s. 8, Qld s. 18, Vic s. 9(1), NZ s. 9(1);
- (b) to any age: eg. NSW s. 9.

When this second option can be used depends on whether there is a "wait and see" rule. If there is one, then it may be necessary to wait until the end of that period.

The age reduction rule has been criticised as destroying the settlor's intention in the guise of preserving it: Gray p. 757.

The Committee recommends that where any age over 18 is specified, it be automatically reduced to the age that will prevent the disposition from being void. This has the effect of not altering the disposition more than necessary.

**Recommendation 7: Altering the rule as it applies to gifts to a class (Clause 11)**

At common law, if a single member of the class might take a vested interest outside the perpetuity period, the whole gift fails. The NSW Report (p. 47) agreed with Morris and Leach that this rule is undoubtedly harsh in its operation. The UK Report recommended that no class gift should be invalidated by the failure of a disposition to some of the members of a class and that the disposition should take effect as a disposition only to those members of the class who take an interest within the perpetuity period (para. 25). This reform has been enacted in all jurisdictions which have reformed the rule against perpetuities by adopting a "wait and see" rule.

A class exclusion rule will have to apply to two situations: first, where there is a need for the exclusion of potential class members but no need for age reduction, and second, where there is a need for both age reduction and exclusion of potential class members. The first situation can arise where the inclusion of potential class members would make a class gift wholly void. For example, T, by will, makes a gift to A for life and then to A's grandchildren. At T's death, A is alive but has no grandchildren. A dies leaving children but no grandchildren. Under a "wait and see" rule we wait and see whether any grandchildren are born. If so, the gift to them is valid. If at the end of the wait-and-see period there is a possibility of further grandchildren being born, they will be excluded from the class.

The second situation can arise where there is a class gift which could be saved in the case of some members of the class by reduction of the specified age except that there are other members of the class for whom the defect cannot be cured. In this event, the other members are excluded from the class. For example, T gives property to A for life and then to such of A's children as shall attain 25 and the children of such of them as shall die under 25 leaving children who shall attain 25 such children to take the share their parent would have taken. At T's death, A is alive but has no children. The gift is too remote, unless saved by the "wait and see" rule. If not so saved, the grandchildren will be excluded and the ages of the children will be reduced so far as is necessary.

This is the reform adopted in NSW s. 9, Vic s. 9, Qld s. 213, WA s. 105, NZ s. 9, UK s. 4. See Sappideen, "Perpetuities – Age Reduction and the Application of the 80-year Period: Some Unexpected Problems" (1986) 60 ALJ 471, where these examples are given.

The Committee recommends that no disposition be invalidated only because of a failure of some of the members of a class to qualify. The members who do not qualify should be excluded from the class.

**Recommendation 8: Allowing the court to alter the terms of a disposition (Trustee Amendment Bill)**

Where a settlor has expressed a general intention, and also a particular way in which he or she wishes it to be carried out, but the intention cannot be carried out in that particular way, the court may be empowered to vary the instrument creating the intention and to direct the intention to be carried out as nearly as possible to the way desired.

The doctrine, called the *cy-pres* doctrine (*cy-pres* being French for "as nearly as possible"), is applied to charitable gifts by the common law. Reform of perpetuities law has often imported a power to vary the terms of a disposition to enable an interest to vest within the perpetuity period in a way that is as near as possible to the settlor's intentions.

Australian reform has rejected adoption of a general *cy-pres* power, presumably because it gives rise to uncertainty because it will be difficult to tell how the power will be exercised in a particular case. See the discussion in UK Report pp. 16–17. A contrary view is taken in New Zealand. The Committee considers it desirable that the Supreme Court be given such a power.

**Recommendation 9: Restricting coverage of the rule: options (Clause 17)**

Generally, proposals have treated the reform of options separately from general reform. One approach to reform has been to limit the perpetuity period to a wait and see period of 21 years for most options: eg. Ontario s. 13(3), UK ss. 9 and 10, WA s. 110, NZ s. 10.

Alberta provides a wait and see period of 80 years.

In NSW, the rule has been abolished in respect of options for valuable consideration: NSW s. 15. The NSW Report noted the situation in New York City (para. 17.10):

*In New York, as Morris and Leach point out, options in gross unlimited in time are valid and specifically enforceable and yet no difficulties seem to arise and no demands for time restrictions seem to be voiced. This divergence of views leads us to the question whether options should be subject to the rule against perpetuities at all. It can be argued, as Morris and Leach do, that the rule has its origin in family settlements and to derive from it a general concept applicable to commercial transactions is wrong. In these transactions, they argue, neither lives in being nor the period of twenty-one years have any significance.*

In the Committee's view, the rule against perpetuities serves little purpose when applied to arrangements which are essentially of a commercial nature.

### **Recommendation 10: Specifying an order of applying the modifying rules (Clause 12)**

If various aspects of the common law rule are to be modified, one must determine the order in which the modifying rules are to be applied, and if they are to be applied only to save a disposition that would otherwise be invalid.

British Columbia requires the remedial provisions of its Act to be applied in the following order:

1. Presumptions concerning capacity to have children;
2. Wait and see;
3. Age reduction;
4. Class exclusion;
5. *Cy-pres* modification.

The fifth remedy gives the court power to amend only when all else has failed. This is substantially the approach adopted in NSW. The Committee endorses the New South Wales Order.

The relationship between the age reduction rule and the "wait and see" rule was considered in the UK Report. The majority view was that age-reduction should be applied before wait and see. The minority view was that wait and see should be applied first and, if actual evidence showed that the gift would not vest in time, the vesting age would be reduced to that age which would, if substituted, prevent the gift from failing.

## **Recommendation 11: Special Powers of Appointment (Clause 6)**

In 1964, Morris and Wade considered the rule against perpetuities in relation to powers of appointment (p. 518–521). They said:

*In substance, a general power is equivalent to ownership; the donee can make himself owner by a stroke of the pen; and so the Rule against Perpetuities, looking at substance rather than form, treats property subject to a general power as property beneficially owned. Thus, a general power is valid if it could be exercised within the perpetuity period, even if it could also be exercised outside the period; but a special power is void if it could be exercised outside the period, even if it could also be exercised within the period. Again, the perpetuity period starts to run in the case of a general power from the date of the appointment, and the appointees need only be capable of taking under the instrument of appointment; but in the case of a special power the period starts to run from the date of the creation of the power, and the appointees must have been capable of taking under the instrument of creation.*

*Although the distinction between general and special powers is well recognised, some powers ..... are difficult to classify from this point of view.*

*With a view to removing these uncertainties, the Law Reform Committee recommended [paras 47–48] that, with one exception, for all purposes connected with the Rule against Perpetuities, every power of appointment should be treated as a special power, other than a power under which there is a sole donee who is at all times free without the concurrence of any other person to appoint to himself. The exception was that for the purpose of determining whether an appointment under a general testamentary power infringed the Rule, the power should be treated as general. This was intended to preserve the liberal (but illogical) rule mentioned above.*

The recommendation mentioned in Morris and Wade has been adopted in Western Australia, New Zealand, Victoria, Queensland, New South Wales, ACT, Ontario and Alberta. The Committee is satisfied that substantially the same recommendation should be adopted here.

## **Recommendation 12: Power to Specify a Perpetuity Period (Clause 7)**

The Law Reform Committee in England recommended that the length of the perpetuity period should not be altered. The Committee said:

*We know of no serious objections as to the period as being excessive in duration, and we can see no real advantage in shortening it, or in substituting a rigid and arbitrary fixed term of years which might be too long in some cases and too short in others. A period which has grown out of the provisions commonly to be found in wills and trusts has at all events that much to commend it, and seems preferable to any of the alternatives which have been suggested. In the absence of any compelling reasons, whether based on public policy or otherwise (and we can see none), we prefer to leave the permitted period as it is, subject to the provision of [an] optional alternative ... [para 5]*

The Committee agrees with this reasoning.

The Law Reform Committee in England did, however, recommend that as an alternative to the present perpetuity period, there should be allowed such period, not exceeding 80 years, as specified in an instrument creating an interest.

The Committee also agrees with this reasoning.

<p><b>Recommendation 13: Administrative Powers (Clause 13)</b> <b>Recommendation 14: Remuneration of Trustees (Clause 14)</b></p>
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Provisions to the effect of clauses 13 and 14 exist in England (s.8), New Zealand (s.16), Victoria (s.14), Queensland (s.220), Ontario (s.12) and Alberta (s.15). These provisions stem from recommendations made by the Law Reform Committee in England. The Committee said:

*Another field in which the operation of the rule has justly been the cause of some complaint is that of the exercise of administrative powers by trustees. Thus in *Re Allott (1924) 2 Ch. 498*, the Court of Appeal held invalid a power for trustees to grant leases, on the ground that the power might be exercised so as to bring new interests in property into being after the perpetuity period had run...*

*So long as the substantive trust itself validly endures, we think it wrong that any application of the perpetuity rule should prevent the trustees from exercising any administrative powers given to them: and we include in this opinion any provision for the remuneration of the trustees.*

The Committee agrees with this reasoning.

## **Recommendation 15: Determinable Interests (Clause 16)**

A possibility of reverter is an interest that remains in a grantor after he or she has conveyed land by way of a fee simple determinable. For example, a disposition of land to the ABC Club for so long as the land is used for club purposes gives rise to a possibility: The premises may cease to be used for club purposes. It seems that a possibility of reverter is not subject to the rule against perpetuities. But, as a matter of policy, the Committee considers that a possibility of reverter should be subject to the rule. It ties up land in a way that the rule against perpetuities was intended to prevent and possibilities of this kind can give rise to considerable difficulties in tracing the persons entitled to the reverter. Clause 16 (2) provides, in effect, that possibilities of reverter shall be subject to the rule against perpetuities as modified by the Bill.

Provisions on the application of the rule to possibilities of reverter, resulting trusts of personality and rights of entry for breach of conditions subsequent are included in the perpetuities legislation of Western Australia (s.111), United Kingdom (s.12), New Zealand (s.18), Victoria (s.16), Queensland (s.219), Ontario (s.15) and Alberta (s.19). Clause 16 is concerned with like questions and, in general, it proposes like answers. Its expression is based on section 16 of the New South Wales Act.

If T leaves a fund to a body so long as a certain state of affairs continues to exist, he or she retains a valid interest in the fund which will form part of his or her estate, if and when that state of affairs ceases to exist. T might, for example, give a fund to X so long as X maintains T's grave: a resulting trust attaches to the fund.

It now seems settled that interests by way of resulting trusts, which are analogous to possibilities of reverter, are not subject to the rule against perpetuities.

We consider that resulting trusts should be subject to the Rule.

## **Recommendation 16: Non-Charitable Purpose Trusts (Clause 18)**

A trust is usually void if it is not for the benefit of an individual or of a charity. The courts do, however, recognise some exceptions to this general rule. The most important of the exceptions are trusts for the erection of monuments or graves and trusts for the benefit of unincorporated associations. Trusts of this kind are often called "non-charitable purpose trusts".

The ordinary Rule Against Perpetuities does not apply to such trusts. There is, however, a rule restricting the duration of trusts for purposes which are not charitable: the rule against perpetual trusts or the rule against inalienability. Under this rule, a trust for a non-charitable purpose lasting longer than the perpetuity period is void, if by the

terms of the trust the capital is to be kept intact so that the income can be used for a period exceeding the perpetuity period. For the purposes of this rule the perpetuity period is the same as in the rule against perpetuities.

Provisions for non-charitable purpose trusts are contained in the legislation of the United Kingdom (s15(4)), New Zealand (s.20), Victoria (s.18), Queensland (s.221), Ontario (s.16) and Alberta (s.20).

Clause 18 (2) preserves the present law that for the purpose of the rule against perpetual trusts the perpetuity period is the same as in the rule against perpetuities, including the option of a perpetuity period of 80 years.

Clause 18 (3) introduces a "wait and see" rule into the law of perpetual trusts similar to the "wait and see" rule for the law of perpetuities.

### **Recommendation 17: Dependent Interests (Clause 19)**

If an interest is void under the rule against perpetuities, does that fact always cause subsequent interests to fail? Morris and Leach (p. 173–181) have considered this question. They draw a distinction between:

- subsequent interests which are dependent upon the same contingency as the prior interest; and
- subsequent interests which are either vested or bound to vest, if at all, within the perpetuity period.

In the former case, the interest is intrinsically too remote and, in the latter case, the interest is intrinsically valid (p. 173).

The Committee does not think it right that any limitation which itself complies with the rule should be invalidated by being preceded by an invalid limitation. It accordingly recommends that no limitation which complies with the rule should be invalidated solely by reason of being preceded by one or more invalid limitations, whether or not it takes effect after or subject to any such invalid limitations, or is dependent on them.

#### **(b) Rule in *Whitby v Mitchell***

In many jurisdictions this rule was simply abolished, long before any reform to the rule against perpetuities: eg. NSW Conveyancing Act 1919 s. 23A (added in 1930): UK Law of Property Act 1925 s. 161.

In all jurisdictions which have reformed the rule against perpetuities, this rule has been abolished.

**Recommendation 18: Abolition of the Rule in *Whitby v Mitchell*  
(Clause 21)**

The Committee considers that the Rule serves no purpose and recommends that it be abolished. The reformed Rule Against Perpetuities will apply to such situations.

**(c) Rule Against Accumulations**

In the United Kingdom (s. 13) and Ontario (s. 1) the rule has been modified by the addition of two new accumulation periods: 21 years from the date of a settlement, or the minority of a living person.

In New South Wales (*Conveyancing Act 1919* s. 31), Western Australia (s. 113), New Zealand (s. 21), Victoria (s. 19), Queensland (s. 222), Tasmania (s. 22), Alberta and British Columbia the Rule has been abolished.

**Recommendation 19: Abolition of the Rule Against  
Accumulations (Clause 22)**

The Committee considers that this Rule is based on a fiction and should be repealed as it serves no purpose. The reformed Rule Against Perpetuities will apply to such situations.

## APPENDIX A:

### TERMS OF REFERENCE

I, the Honourable Daryl William Manzie, Attorney-General, refer to the Northern Territory Law Reform Committee, for examination and report, the following question:

Is there a need to amend the various rules of law known as –

- (1) the rule against perpetuities;
- (2) the rule in *Whitby v. Mitchell*; and
- (3) the rule against accumulations,

in their application to the Northern Territory?

### CONDUCT OF THE REFERENCE

The Committee established a subcommittee to examine the reference. The Subcommittee consisted of:

Members: Judith Kelly  
Robert Bradshaw  
Neville Richards  
Peter McNab (until January 1992)

Secretary: Stephen Herne

At the request of the Committee the Secretary of the Subcommittee prepared and circulated an Issues Paper on a limited basis within Australia and to three persons overseas. Comments were received from:

- MC Meston, University of Aberdeen,
- Cy Fein, trusts lawyer in Manitoba,
- Tasmanian Law Reform Commissioner,
- NSW Law Reform Commission,
- Carolyn Sappideen, Reader in Law at the University of Queensland

Parts 2 and 3 of this Report are based on the Issues Paper. The Paper identified three primary options for reform:

- Option A: Abolish the present rule and introduce variation of trusts legislation
- Option B: Introduce a rule against deferred vesting
- Option C: Retain the present rule but introduce repairing legislation

After consideration of the comments received, the Subcommittee recommended to the Committee that Option C be adopted, the principal element of which was the introduction of a "wait and see" rule. Subject to some modifications, the Committee adopted this approach.

## **APPENDIX B: SELECT BIBLIOGRAPHY**

### **BOOKS**

D. E. Allan, "The Rule Against Perpetuities Restated" (1963–64) 6 UWALR 27 [Allan]

61 American Jurisprudence, 2d, Perpetuities and Restraints on Alienation, ss. 1–119 (1979) [American Jurisprudence]

P. J. Butt, "Introduction to Land Law" (1980)

J. C. Gray, "The Rule Against Perpetuities" (4th ed., 1942) [Gray]

W. B. Leach, "Perpetuities Reform: London proposes, Perth disposes" (1963–64) 6 UWALR 11 [Leach]

R. H. Maudsley, "The Modern Law of Perpetuities" (1979) [Maudsley]

J.H.C. Morris and W. B. Leach, "The Rule Against Perpetuities" (2nd ed., 1962)

J.H.C. Morris and W. B. Leach, "The Rule Against Perpetuities" (1964 Supplement to 2nd ed.)

C. M. Sappideen and P. J. Butt, "The Perpetuities Act 1984" (1986) [Sappideen and Butt]

D.W.M. Waters, "Law of Trusts in Canada" (2nd ed., 1984)

### **LAW REFORM REPORTS**

Manitoba Law Reform Commission, "Report on the Rules Against Accumulations and Perpetuities" (1982)

New South Wales Law Reform Commission, "Report on Perpetuities and Accumulations", L.R.C. 26 (1976) [NSW Report]

Ontario Law Reform Commission, "Report on Perpetuities and Accumulations" (1965)

Saskatchewan Law Reform Commission, "Proposals Relating to the Rules Against Perpetuities and Accumulations" (1987)

South Australian Law Reform Committee, "Report Relating to the Reform of the Law of Perpetuities" (1984)

United Kingdom Law Reform Committee, "The Rule Against Perpetuities" (1956, Fourth Report, Cmnd 18) [UK Report]

**APPENDIX C: LEGISLATION**

Australia	ACT:	Perpetuities and Accumulations Act 1985
	NSW:	Perpetuities Act 1984
	Qld:	Property Law Act 1974, Part XIV
	Tas:	Perpetuities and Accumulations Act 1992
	Vic:	Perpetuities and Accumulations Act 1968
	WA:	Property Law Act 1969, Part XI
Canada	Alberta:	Perpetuities Act RSA 1980, c. P-4
	British Columbia:	Perpetuities Act RSBC 1979, c. 321
	Ontario:	Perpetuities Act RSO 1980, c. 374
New Zealand		Perpetuities Act 1964
UK		Perpetuities and Accumulations Act 1964

## **APPENDIX D: LIST OF RECOMMENDATIONS**

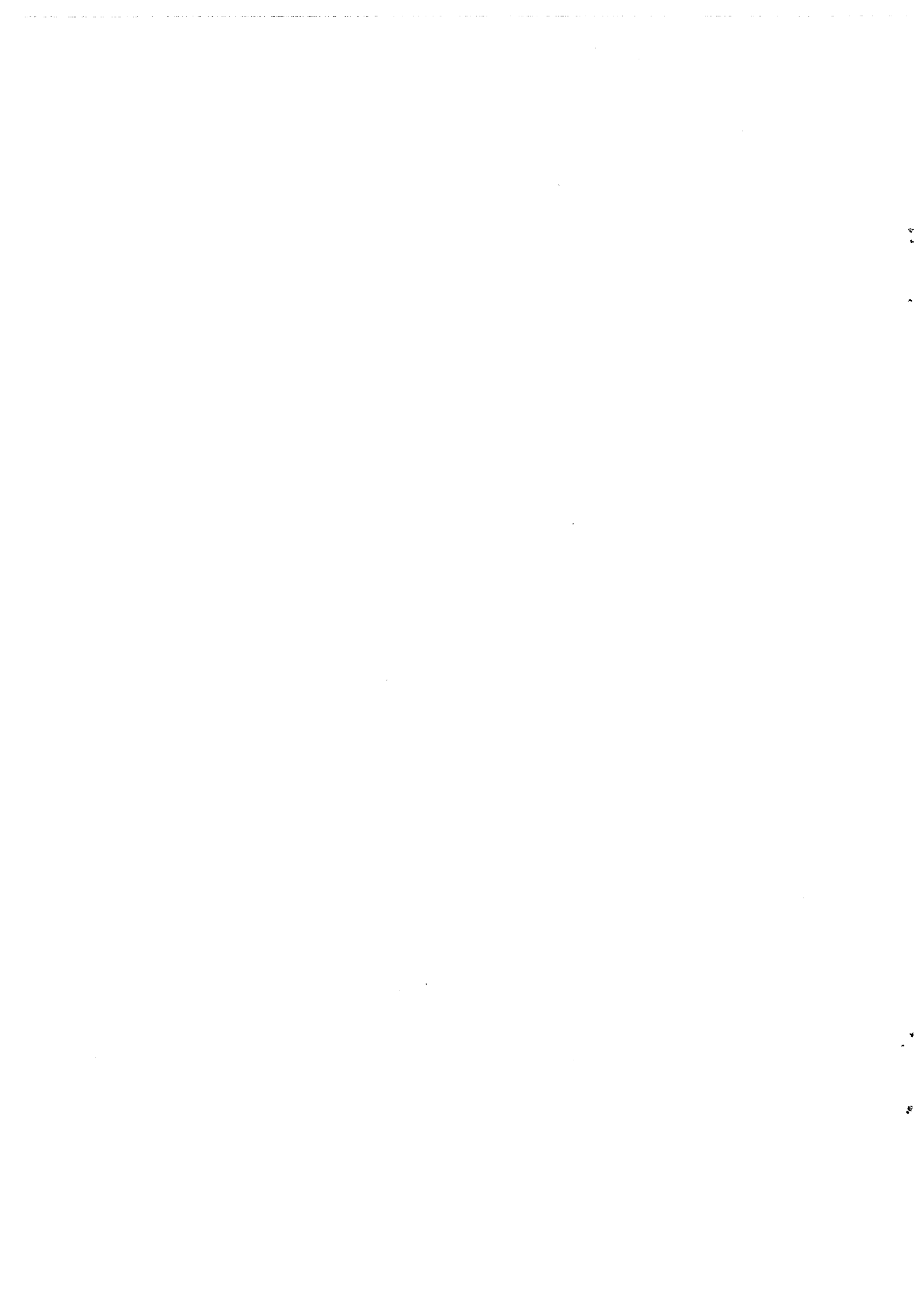
- Recommendation 1: Introduction of a "wait and see" rule to replace the rule of initial certainty (clause 10).
- Recommendation 2: Abolition of presumption of fertility (clause 9)
- Recommendation 3: Unborn husband or wife (clause 8)
- Recommendation 4: Fantastic possibilities (clause 9)
- Recommendation 5: Clarifying the perpetuity period
- Recommendation 6: Altering the vesting age (clause 11)
- Recommendation 7: Altering the rule as it applies to gifts to a class (clause 11)
- Recommendation 8: Allowing the court to alter the terms of a disposition (Trustee Amendment Bill)
- Recommendation 9: Restricting coverage of the rule: options (clause 17)
- Recommendation 10: Specifying an order of applying the modifying rules (clause 12)
- Recommendation 11: Special Powers of Appointment (clause 6)
- Recommendation 12: Power to specify a Perpetuity Period (clause 7)
- Recommendation 13: Administrative Powers (clause 13)
- Recommendation 14: Remuneration of Trustees (clause 14)
- Recommendation 15: Determinable Interests (clause 16)
- Recommendation 16: Non-charitable Purpose Trusts (clause 18)
- Recommendation 17: Dependent Interests (clause 19)
- Recommendation 18: Abolition of the Rule in *Whitby v Mitchell* (clause 21)
- Recommendation 19: Abolition of the Rule Against Accumulations (clause 22)

**APPENDIX E: PERPETUITIES BILL – INTERSTATE CLAUSE COMPARISON**

<b>CLAUSE</b>	<b>ORIGIN*</b>	<b>NSW</b>	<b>VIC</b>	<b>QLD</b>	<b>WA</b>	<b>TAS</b>	<b>ACT</b>	<b>REC</b>
3	3	3	2	206	100	3	2	
4	4	4	3	207	99	4	3	
5	5	5	1	1	99	5	4	
6	6	6	4	208	112	8	7	
7	7	7	5	209	101	6	8	<b>11,12</b>
8	7 TAS	-	10	214	108	7	-	<b>3</b>
9	10 TAS	-	8	212	102	10	-	<b>2,4</b>
10	8	8	6	210	103	9	9	<b>1</b>
11	9	9	9	213	105,107	11	10	<b>6,7</b>
12	10	10	-	-	107	-	-	<b>10</b>
13	11	11	14	220	-	14	12	<b>13</b>
14	12	12	-	-	-	-	13	<b>14</b>
15	13	13	17	220	115	17	14	
16	14	14	16	219	111	16	15	<b>15</b>
17	15	15	15	218	110	15	16	<b>9</b>
18	16	16	18	221	-	18	17	<b>16</b>
19	17	17	11	215	109	-	18	<b>17</b>
20	13 TAS	-	-	-	-	13	-	
21	21 TAS	-	12	216	114	21	-	<b>18,19</b>
22	18	18	19	222	113	22	19	
23	19	19	-	-	20	27	21	

\* Perpetuities Act 1984 (NSW) unless otherwise indicated.

**APPENDIX F:**  
**DRAFT PERPETUITIES BILL**  
**DRAFT TRUSTEE AMENDMENT BILL**



NORTHERN TERRITORY OF AUSTRALIA

PERPETUITIES BILL 1994

TABLE OF PROVISIONS

Clause

1. Short title
2. Commencement
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12. Order of application of remedial provisions
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21. Abolition of double possibility rule
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## NORTHERN TERRITORY OF AUSTRALIA

### A BILL for AN ACT

to effect reforms in the rule of law commonly known as the rule against perpetuities and to abolish the rule of law commonly known as the rule against accumulations, and for related purposes

WHEREAS:

1. It is a rule of the common law in force in the Territory in relation to dispositions of property by will or by settlement that an interest is not valid unless it shall vest, if at all, not later than 21 years after some life in being at the creation of the interest.
2. The rule of law referred to in clause 1 is commonly known as the rule against perpetuities or the rule against remoteness of vesting.
3. The application of the rule against perpetuities has been found to be harsh and capricious and to have defeated the reasonable intentions of testators, settlors and other persons dealing with property.
4. It is considered that the law should continue to exercise a measure of control over dispositions of property, whether by will, settlement or otherwise, to ensure that there are reasonable time limits for the vesting of future interests but that it is desirable to modify the rigidity of the application of the rule against perpetuities.
5. It is expedient to effect other reforms in the law relating to accumulations of property and otherwise.

*Perpetuities*

**B**E it enacted by the Legislative Assembly of the Northern Territory of Australia, with the assent as provided by the *Northern Territory (Self-Government) Act 1978* of the Commonwealth, as follows:

1. SHORT TITLE

This Act may be cited as the *Perpetuities Act 1994*.

2. COMMENCEMENT

This Act shall come into operation on a date to be fixed by the Administrator by notice in the *Gazette*.

3. INTERPRETATION

(1) In this Act, unless the contrary intention appears -

"disposition" includes -

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

"interest" includes an estate and a right;

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

"property" includes an interest in real or personal property and a thing in action;

"settlement" includes -

- (a) a will;
- (b) an instrument, testamentary or otherwise, exercising a power of appointment, whether general or special; and
- (c) any other instrument, transaction or dealing whereby a person makes a disposition,

but does not include an Act or an instrument of a legislative or administrative character;

"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;

## *Perpetuities*

"trust" and "trustee" have the same meanings respectively as they have in the *Trustee Act*;

"will" includes a codicil.

(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 person shall be treated -

(a) as a member of a class if, in the person's case, each and every condition identifying a member of the class is satisfied; and

(b) as a potential member of a class if, in the 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.

### 4. APPLICATION

(1) This Act does not, except as provided by sections 13, 14 and 15, apply in relation to a settlement taking effect before the commencement of this Act.

(2) This Act applies in relation to a settlement exercising a power of appointment, whether general or special, and taking effect after the commencement of this Act, whether or not it applies in relation to the settlement creating the power of appointment.

(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 commencement of this Act, but taking effect after that commencement, where 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.

### 5. CROWN BOUND

(1) Except as provided by subsection (2) or by any other Act, the rule against perpetuities, the rule against perpetual trusts or this Act, this Act binds the Crown not only in right of the Territory, but also, so far as the legislative power of the Legislative Assembly 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 a settlement made by the Crown.

## *Perpetuities*

### 6. POWERS OF APPOINTMENT

(1) For the purposes of the rule against perpetuities, a power of appointment shall at a 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.

(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.

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

### 7. PERPETUITY PERIOD

(1) For the purposes of the rule against perpetuities but subject to subsection (3), the perpetuity period applicable to an interest created by a settlement shall be a life in being plus 21 years, or 80 years from the date on which the settlement takes effect, whichever is specified in the settlement.

(2) Subject to subsection (3), where no perpetuity period is specified in the settlement, the perpetuity period shall be taken to be 80 years from the date on which the settlement takes effect.

(3) 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.

### 8. UNBORN HUSBAND OR WIFE

The widow or widower of a person who is a life in being for the purposes of the rule against perpetuities shall be treated as a life in being for the purpose of the application of the rule to -

- (a) a disposition in favour of that widow or widower; and
- (b) a disposition in favour of -
  - (i) a charity that attains;
  - (ii) a person who attains; or

## Perpetuities

- (iii) a class the members of which attain,  
according to the terms of the disposition, a  
vested interest on or after -
- (iv) the death of the survivor of a person who  
is a life in being and his widow or her  
widower;
- (v) the death of his widow or her widower; or
- (vi) the happening of a contingency during the  
lifetime of his widow or her widower.

### 9. PRESUMPTIONS AND EVIDENCE AS TO FUTURE PARENTHOOD

(1) Where there arises, in the application of the rule against perpetuities to a disposition or in determining the right of a person to put an end to a trust or an accumulation, a question that depends on the capacity of a person to procreate a child at a future time -

- (a) it shall be presumed, subject to paragraph (b),  
that -
  - (i) a male person who has attained the age of  
12 years can procreate a child but not  
under that age; and
  - (ii) a female person who has attained the age of  
12 years can procreate a child but not  
under that age or if she has attained the  
age of 55 years; but
- (b) in the case of a living person, evidence may be  
given in any proceedings to show that he or she  
will, or will not, be capable of procreating a  
child at the time in question.

(2) Where, by virtue of subsection (1), a person is treated as incapable of procreating a child at a particular time and he or she in fact procreates a child at that time, the Supreme Court may make such order as it thinks fit for placing the persons interested in the property comprised in a disposition, as far as practicable, in the position they would have held if subsection (1) were not applicable to the disposition, trust or accumulation concerned.

(3) Subject to an order under subsection (2), where, in proceedings relating to a disposition, a person is treated by virtue of subsection (1) as capable or incapable of procreating a child at a particular time, the person shall be so treated for the purpose of a question that may arise in the application of the rule against perpetuities to the same disposition in any subsequent proceedings.

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(4) This section, except subsection (1)(b), has effect in relation to the possibility that a person may at any time become a parent of another person by adoption or the operation of a law, whether or not in force in the Territory.

### 10. WAIT-AND-SEE

(1) Where a provision of a settlement that creates an interest would, but for this section and section 11, 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 the rule, and its becoming so certain does not affect the validity of a thing previously done in relation to the interest.

(2) No limitation in a provision of a settlement that creates a contingent interest shall be treated as or declared to be invalid because it infringes the rule against perpetuities, by reason only of there being a possibility of the interest vesting after the end of the perpetuity period.

(3) Every contingent interest in a provision of a settlement capable of vesting before or after the end of the perpetuity period shall be presumed valid until events establish that the interest is incapable of vesting -

- (a) before the end of the perpetuity period, in which case the interest shall be treated as, or declared to be, void; or
- (b) after the end of the perpetuity period, in which case the interest shall be treated as, or declared to be, valid.

(4) This section does not affect the operation of section 17.

### 11. REDUCTION OF AGE AND EXCLUSION OF CLASS MEMBERS

- (1) Where -
  - (a) a provision of a settlement creates an interest and the vesting of the interest depends on a person attaining a specified age; and
  - (b) it becomes apparent that the provision would, but for this subsection, infringe the rule against perpetuities but that it would not infringe the rule if the specified age had been a lesser age,

## Perpetuities

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

(2) Where an interest to which subsection (1) applies is subsequent to any other interest created by the settlement, the other interest shall not be 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
- (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 members of a class of persons and it becomes apparent that the inclusion of 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
- (b) prevent subsection (1) from operating to save the provision from infringing the rule,

then, on 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 thereon have effect accordingly.

(5) Where this section has effect in relation to a provision to which section 10 applies, the operation of this section does not affect the validity of a thing previously done in relation to the interest created by the provision.

## 12. ORDER OF APPLICATION OF REMEDIAL PROVISIONS

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

- (a) section 10;

## Perpetuities

(b) section 11(1);

(c) section 11(4).

### 13. ADMINISTRATIVE POWERS OF TRUSTEES

(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 an exercise of an administrative power, before or after the commencement of this Act.

### 14. REMUNERATION OF TRUSTEES

(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 or after the commencement of this Act.

### 15. SUPERANNUATION AND OTHER FUNDS

(1) In this section -

"employee" includes a director, officer, servant and employee of an employer;

"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;

"self-employed person" includes a person engaged in a 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;

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- (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 in pursuance of the provisions of the settlement.

(3) The rule against perpetuities does not invalidate a trust established by a settlement and used for investing the assets of a fund referred to in subsection (2) (whether or not it is also used for investing other assets).

(4) Subsection (3) does not affect the generality of subsection (2).

(5) This section applies to settlements taking effect before or after the commencement of this Act.

### 16. DETERMINABLE INTERESTS

- (1) In this section -

"determinable interest" means an interest created by a settlement, being an interest that is, by a provision of the settlement, determinable on a contingency;

"subsequent interest", in relation to a determinable interest created by a settlement, means an interest, whether vested or contingent -

- (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) in relation to 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 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 the rule does so apply -

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

## *Perpetuities*

(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 (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 does not apply to a gift over from one charity to another.

### 17. OPTIONS

The rule against perpetuities does not apply to -

- (a) an option to renew a lease of property; or
- (b) an option or right of pre-emption of a lessee to acquire a reversionary interest in property comprised in a lease.

### 18. TRUSTS FOR PURPOSES THAT ARE NOT CHARITABLE

(1) This Act does not, except as provided by this section, affect the operation of the rule against perpetual trusts for a purpose.

(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, but subject to subsection (2), be a life in being plus 21 years or 80 years from the date on which the settlement takes effect, whichever is specified in the settlement.

(3) Where no perpetuity period is specified in the settlement, the perpetuity period shall be taken to be 80 years from the date on which the settlement takes effect.

(4) 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 the rule, as if it did not infringe the rule, and its so becoming certain does not affect the validity of a thing previously done in relation to the disposition.

(5) This section does not apply to a disposition for a purpose that is charitable.

### 19. DEPENDENT INTERESTS

(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 subsequent to and dependent on an interest that is so invalid.

## *Perpetuities*

(2) Where a provision of a settlement creates an interest that is subsequent 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 subsequent interest shall not be affected by reason only that the other interest is so invalid.

### 20. MITIGATION OF RULE OF REMORSELESS CONSTRUCTION

(1) Where a court construes a will or other instrument, whether made before or after the commencement of this Act, and the will or instrument makes a disposition of property, the court may have regard to the fact that, while under one possible construction the disposition would or might be void by virtue of the rule against perpetuities, under another possible construction it would or might be valid.

(2) In considering which of those constructions is to be preferred, the court may take into account that the testator would probably have intended the construction under which the disposition would be valid.

(3) In the application of this section a court shall not -

- (a) render a trustee or other person liable for an act done before the commencement of this Act for which the trustee or person would not have been liable if this Act had not come into force; or
- (b) enable a trustee or person to recover money distributed or paid under a trust, where the trustee or person could not have recovered the money apart from subsection (1).

### 21. ABOLITION OF DOUBLE POSSIBILITY RULE

(1) The rule of law prohibiting the limitation, after a life interest to an unborn person, of an interest in land to the unborn child or other issue of an unborn person is abolished but without prejudice to any other rule relating to perpetuities.

(2) This section applies only in relation to dispositions or trusts created by an instrument coming into operation after the commencement of this Act.

### 22. ACCUMULATION OF INCOME

(1) Where property is settled or disposed of otherwise than for a purpose that is charitable, so that the income of the property may be, or is directed to be, accumulated wholly or in part, the power or direction to accumulate the income is valid only if the disposition of the accumulated income is, or may be, valid.

*Perpetuities*

- (2) Nothing in subsection (1) affects -
  - (a) the power of a person to terminate an accumulation that is for his or her benefit;
  - (b) the jurisdiction or power of the Supreme Court to maintain or advance out of accumulations; or
  - (c) a power of a trustee under the *Trustee Act* or any other Act or law, or an instrument creating a trust or making a disposition.

23. REPEAL

The *Accumulations Act 1800* (30 and 40 Geo. 3 c. 98) of the United Kingdom, so far as it has effect in the Territory, is repealed.

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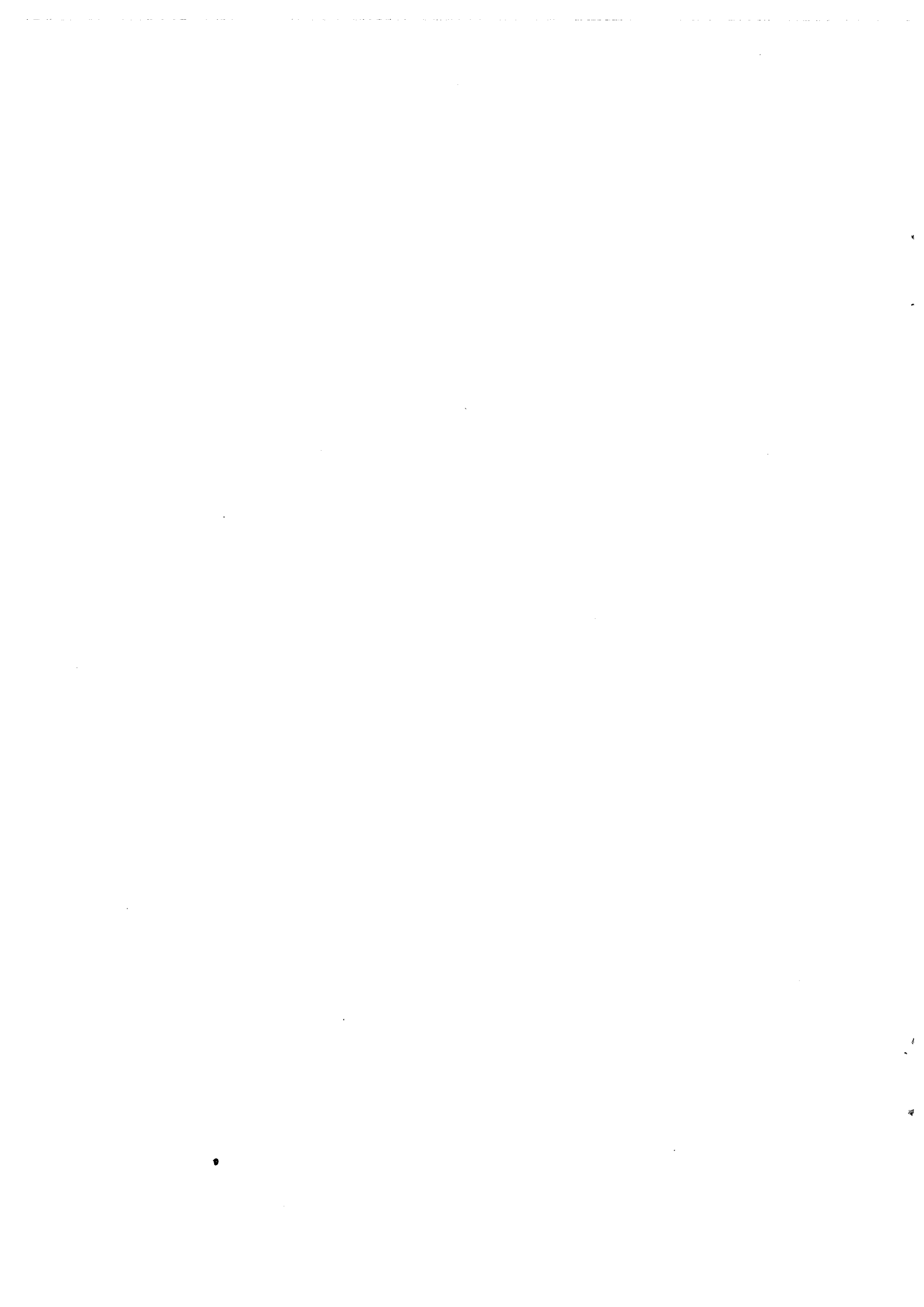
Serial 308  
Trustee Amendment  
(No. 2)  
Mr Manzie

NORTHERN TERRITORY OF AUSTRALIA  
TRUSTEE AMENDMENT BILL (NO. 2) 1994

TABLE OF PROVISIONS

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TRUSTS"
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## NORTHERN TERRITORY OF AUSTRALIA

### A BILL for AN ACT

to amend the *Trustee Act* consequential  
on the passing of the *Perpetuities Act 1994*

**B**E it enacted by the Legislative Assembly of the Northern Territory of Australia, with the assent as provided by the *Northern Territory (Self-Government) Act 1978* of the Commonwealth, as follows:

1. SHORT TITLE

This Act may be cited as the *Trustee Amendment Act (No. 2) 1994*.

2. COMMENCEMENT

This Act shall come into operation on the commencement of the *Perpetuities Act 1994*.

3. PRINCIPAL ACT

The *Trustee Act* is in this Act referred to as the Principal Act.

4. NEW SECTION

The Principal Act is amended by inserting after section 21 the following:

"21A. POWER TO APPLY TO SUPREME COURT FOR DECLARATION AS TO VALIDITY, &c.

"(1) An executor or trustee of property, or a person interested under, or in the invalidity of, a disposition of property, whether made before or after the commencement

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of this section, may at any time apply to the Supreme Court for a declaration as to the validity, in respect of the rule against perpetuities, of the disposition.

"(2) The Supreme Court may, on an application under subsection (1), make a declaration, having regard to facts existing and events that have occurred at the time the declaration is made, as to the validity or otherwise of the disposition in respect of which the application is made.

"(3) The Supreme Court shall not make a declaration under subsection (2) in respect of a disposition the validity of which cannot be determined at the time the Court is asked to make the declaration.

"(4) If the Supreme Court refuses to make a declaration under subsection (2) relating to a disposition, it may give such directions as it thinks fit on -

- (a) the construction of the instrument by which the disposition is made;
- (b) the determination of a person who is a measuring life for the purposes of the disposition;
- (c) whether a person who is a measuring life is to be presumed dead;
- (d) whether, before the determination of the perpetuity period applicable to the disposition, an interest is to be treated as incapable of vesting during the period; and/or
- (e) any other matter on which an application could properly be made to the Court apart from under this Act."

5. NEW SECTIONS

The Principal Act is amended by inserting in Part III, after section 50, the following:

"50A. CY-PRES MODIFICATION IN CERTAIN CASES

"(1) Subject to this section, where -

- (a) the Supreme Court has, under section 21A, declared a disposition of property to be invalid; or
- (b) it appears to the Court that a disposition, whether made before or after the commencement of this section, would be invalid solely on the ground that it conflicts with the rule against perpetuities,

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and the general intentions originally governing the disposition can be ascertained, the Court shall reform the disposition so as to give effect as far as possible to those general intentions within the limits permitted under the rule against perpetuities as affected by this section.

"(2) A disposition of property made before the commencement of this section shall not be reformed under subsection (1) -

- (a) where the disposition has been declared invalid before that commencement by an order or judgment made or given in legal proceedings;
- (b) where any property comprised in the disposition has, before that commencement, been paid or transferred to, or applied for the benefit of, or set apart for, a person entitled by reason of the invalidity of the disposition; or
- (c) so as to prejudice a person who has, before that commencement, reasonably altered his or her position in reliance on the invalidity of the disposition where, in the opinion of the Supreme Court, having regard to all possible implications in respect of other persons, it is inequitable to reform the disposition wholly or in part.

"(3) In hearing an application to reform a disposition under this section, the Supreme Court -

- (a) may admit extrinsic evidence of the general intentions originally governing the disposition and shall apply liberal rules of construction for the purpose of ascertaining them; and
- (b) shall have no regard to the rights of a person other than -
  - (i) a person born or *en ventre sa mere* when the disposition was made; and
  - (ii) a person entitled on the death of a such person,

and in reforming the disposition the Court may specify the perpetuity period in accordance with section 7 of the *Perpetuities Act*.

"(4) An application for reformation under this section may be made by -

- (a) a trustee of property comprised in the disposition;

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- (b) the settlor or the settlor's personal representative; or
- (c) a person having an interest, whether vested or contingent, under the disposition or the personal representative of the person to whom the interest passes.

"(5) Where a trustee of property comprised in a disposition becomes aware that the disposition requires to be reformed under subsection (1), the trustee has a duty to make an application under this section.

"(6) A disposition that has been reformed under this section -

- (a) is valid notwithstanding that it would have been invalid under a rule of law or construction if it had been effected in any other way; and
- (b) shall be construed as if it had not been effected under this section.

"50B. VESTING ORDERS ARISING FROM RESULTING TRUSTS

"(1) Where the Supreme Court has refused to reform a disposition under section 50A, it may, if satisfied that the person who made the disposition, or his or her personal representative, has become entitled under a resulting trust, make an order vesting the property comprised in the disposition absolutely in the person or, if the person has died, in his or her personal representative on the trusts of the estate of the deceased person.

"(2) In the case of a disposition referred to in subsection (1), where a person other than a donor of property given to the trustee on trust, has sold other property to the trustee, or has assisted the trustee, by loan, guarantee or otherwise, to acquire other property -

- (a) the power of the Supreme Court to make a vesting order under that subsection is restricted to so much of the property comprised in the disposition as was given by the donor or fairly attributable to the donor's gift; and
- (b) the Court may make such order as it thinks fit regarding the remainder of property comprised in the disposition.

"(3) An application for a vesting order under this section in respect of property comprised in a disposition may be made by -

- (a) a trustee of the property;

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- (b) a vendor of the property to the trustee or the personal representative of such a vendor; or
- (c) a person who assisted the trustee, by loan, guarantee or otherwise, to acquire the property, or the personal representative of the person."

6. DEFINITIONS

Section 82 of the Principal Act is amended by inserting after the definition of "devisee" the following:

"The expression 'disposition' includes -

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