

NORTHERN TERRITORY OF AUSTRALIA

PERPETUITIES BILL 1994

TABLE OF PROVISIONS

Clause

1. Short title
2. Commencement
3. Interpretation
4. Application
5. Crown bound
6. Powers of appointment
7. Perpetuity period
8. Unborn husband or wife
9. Presumptions and evidence as to future parenthood
10. Wait-and-see
11. Reduction of age and exclusion of class members
12. Order of application of remedial provisions
13. Administrative powers of trustees
14. Remuneration of trustees
15. Superannuation and other funds
16. Determinable interest
17. Options
18. Trusts for purposes that are not charitable
19. Dependent interests
20. Mitigation of rule of remorseless construction
21. Abolition of double possibility rule
22. Accumulation of income
23. Repeal





## 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.

*Perpetuities*

(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;

## Perpetuities

- (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.

---