

AUSTRALIAN CAPITAL TERRITORY

Perpetuities and Accumulations Ordinance 1985

No. 65 of 1985

I, THE GOVERNOR-GENERAL of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, hereby make the following Ordinance under the *Seat of Government (Administration) Act 1910*.

Dated 12 December 1985.

N. M. STEPHEN
Governor-General

By His Excellency's Command,

LIONEL BOWEN
Attorney-General

An Ordinance to effect reforms in the rules of law relating to perpetuities and accumulations

Short title

1. This Ordinance may be cited as the *Perpetuities and Accumulations Ordinance 1985*.¹

Interpretation

2. In this Ordinance, unless the contrary intention appears—

“commencement date” means the date of commencement of this Ordinance;

“disposition” includes—

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

“interest” includes any estate and any right;

“power of appointment” includes any discretionary power to make a disposition;

“property” includes any interest in real or personal property and any 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 a law in force in the Territory;

“the rule against perpetual trusts” means the common law rule that invalidates a trust for a purpose which is not charitable where the duration of the trust, if it were valid, would or might exceed the perpetuity period;

“trust” and “trustee” have the same respective meanings as in the Trustee Act, 1925 of the State of New South Wales in its application in the Territory;

“will” includes a codicil.

Application

3. (1) Except as provided by sections 12, 13 and 14, this Ordinance does not apply in relation to a settlement taking effect before the commencement date.

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

(3) For the purposes of sub-section (2), a gift over in default of an appointment under a power, whether general or special, shall be treated as a settlement exercising a power of appointment.

(4) Where a provision of a will executed before the commencement date but taking effect on or after that date creates an interest—

- (a) if that provision would not have infringed the rule against perpetuities if this Ordinance had not been made—the provision shall take effect as if this Ordinance had not been made; or
- (b) if that provision would have infringed the rule against perpetuities if this Ordinance had not been made—this Ordinance applies to the provision.

Crown

4. (1) Except as provided by sub-section (2) or by any other law of the Territory, the rule against perpetuities, the rule against perpetual trusts and this Ordinance bind the Crown.

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

Time of effect of will

5. For the purposes of this Ordinance, a will shall, in relation to a disposition contained in it, be deemed to take effect on the death of the testator.

Member of class

6. For the purposes of this Ordinance, a person shall be treated as a member of a class if in that person's case each and every condition identifying a member of the class is satisfied.

Power of appointment

7. (1) For the purposes of the rule against perpetuities, a power of appointment shall be treated as a special power unless—

- (a) in the settlement creating the power it is expressed to be exercisable by one person only; and
- (b) the power could at all times during its currency when that person is of full age and capacity be exercised immediately by him or her to transfer to, or otherwise vest in, himself or herself the whole of the interest governed by the power without the consent of any person or compliance with any other condition, not being a formal condition relating only to the mode of the exercise of the power.

(2) Notwithstanding sub-section (1), 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 purpose of determining whether an appointment under the power infringes the rule against perpetuities.

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

Perpetuity period

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

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

(3) Where a child who is *en ventre sa mère* at the time when the perpetuity period applicable to an interest created by a settlement would, but for this sub-section, have expired would, if that child has been born before that time, have taken that interest, that perpetuity period shall be extended until—

- (a) the expiry of the date on which the child is born; or
- (b) it becomes apparent that the child will not be born,

as the case requires.

(4) Sub-section (3) does not apply unless, before the expiry of the perpetuity period that would, but for that sub-section, be applicable to the interest created by the relevant settlement, the trustees under that settlement have received notice, supported by a certificate signed by a duly qualified medical practitioner who has examined the woman carrying the child in question, that the child is *en ventre sa mère*.

Wait-and-see

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

(2) Where a provision of a settlement which creates an interest consisting of the conferring of a general power of appointment would, but for this section or this section and section 10, infringe the rule against perpetuities, the interest shall be treated, until such time (if any) as it becomes certain that,

notwithstanding section 10, the power will not be exercisable within the perpetuity period, as if the provision did not infringe that rule.

(3) Where a provision of a settlement which creates an interest consisting of the conferring of any power or right (except a general power of appointment) would, but for this section or this section and section 10, infringe the rule against perpetuities, the interest shall be treated as regards any exercise of the power or right within the perpetuity period as if the provision did not infringe that rule, and the provision shall be treated as infringing that rule only if and so far as the power or right is not fully exercised within the perpetuity period.

Reduction of age and exclusion of class members

10. (1) Where—

- (a) a provision of a settlement creates an interest and the vesting of the interest depends on the attainment by a person of a specified age or by persons of respective specified ages;
- (b) immediately before the expiration of the perpetuity period applicable to that interest—
 - (i) that person has not attained the specified age, or any of those persons has not attained the age specified in relation to that person, as the case may be; and
 - (ii) the interest has not vested; and
- (c) the provision is, by reason of the operation of section 9, to be treated as if it did not infringe the rule against perpetuities,

the interest shall, for all purposes, be treated as if its vesting depended on the attainment by the person, or each of the persons referred to in sub-paragraph (b) (i), as the case requires, of the age that he or she has attained immediately before the expiration of that perpetuity period.

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

(3) Subject to section 11, where—

- (a) a provision of a settlement creates an interest which is to be taken by a class of persons; and
- (b) immediately before the expiry of the perpetuity period applicable to that interest—
 - (i) the interest has not vested;

- (ii) there is a person who is, or there are persons each of whom is, a member of that class (whether by virtue of the operation of sub-section (1) or otherwise); and
- (iii) the provision is, by reason only of the operation of section 9, to be treated as if it did not infringe the rule against perpetuities,

in relation to that interest, that class shall be taken to comprise only that person or those persons.

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

Death of potential class member

11. Where—

- (a) sub-section 10 (1) applies to an interest that is to be taken by a class of persons;
- (b) a person would have been a member, or persons would have been members, of that class (whether by virtue of the operation of sub-section 10 (1) or otherwise) if that person or those persons had survived to the expiry of the perpetuity period applicable to that interest; and
- (c) that person has, or those persons have, any children who survive to the expiry of that perpetuity period,

those children will take, *per stirpes*, the interest that their parent, or the respective interests that their parents, would have taken had that parent or those parents survived to the expiry of that perpetuity period.

Administration power of trustees

12. (1) 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.

(2) This section applies to an administrative power taking effect, and to any exercise of an administrative power, before, on or after the commencement date.

(3) In this section, “administrative power” means any power of a trustee other than 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.

Remuneration of trustees

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

(3) This section applies to a power or other provision for remunerating a trustee taking effect before, on or after the commencement date.

Superannuation and other funds

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

- (a) employees;
- (b) self-employed persons;
- (c) spouses, children, grandchildren, parents, dependants or legal personal representatives of employees or self-employed persons; or
- (d) persons duly selected or nominated for that purpose by employees or self-employed persons pursuant to the provisions of the settlement.

(2) This section applies to settlements taking effect before, on or after the commencement date.

(3) In this section—

“employees” includes directors, officers, servants and employees of any 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 persons” includes persons engaged on their own behalf in any lawful profession, trade, occupation or calling.

Determinable interests

15. (1) The rule against perpetuities operates to render invalid the provision for determination of a determinable interest in the same manner as the rule would operate to render invalid a condition subsequent in a settlement for defeasance of the determinable interest on the same contingency, and where that rule does so operate—

- (a) the determinable interest shall not be so determinable; and

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

(2) For the purposes of this section, an interest created by, or a provision of, 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 of, the settlement.

(3) Notwithstanding sub-section (1), the rule against perpetuities shall not apply to—

- (a) a gift over from one charity to another; or
- (b) any provision for the determination of a lease for breach of a covenant or condition of the lease.

(4) In this section—

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

“subsequent interest”, in relation to a determinable interest 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) as regards which the determinable interest is a prior interest.

Options

16. (1) The rule against perpetuities does not apply to—

- (a) any option to renew a lease; or
- (b) an option to acquire for valuable consideration a reversionary interest in the property comprised in a lease if the option is exercisable only—
 - (i) by the lessee or the lessee’s successors in title; and
 - (ii) during the currency of the lease.

(2) Where the rule against perpetuities operates to render invalid an option, no action lies, in contract or otherwise, for giving effect to it or making restitution for its lack of effect.

Trusts for purposes which are not charitable

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

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

(3) Where—

- (a) by a settlement, a disposition creates a trust for a purpose;
- (b) the trust would, but for this section, infringe the rule against perpetual trusts; and
- (c) the term of the trust is determined by reference to the occurrence or non-occurrence of a contingency or contingencies specified in the settlement,

the trust shall be treated as if it did not infringe the rule until such time as it becomes certain that, by reason of the occurrence or non-occurrence of such a contingency, the term of the trust specified in the settlement will exceed the perpetuity period, and its so becoming certain does not affect the validity of anything previously done in relation to the trust.

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

Dependent interest

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

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

Accumulation of income

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

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

Savings and transitional provisions

20. (1) Section 13 does not affect any rights arising under a judgment or an order which took effect before the commencement date or arising under any agreement made before that date.

(2) Notwithstanding section 21, the provisions of the Act referred to in that section continue to apply in relation to a settlement that took effect before the commencement date.

Repeal

21. The Imperial Act 39 and 40 George 3 chapter 98 shall cease to be in force in the Territory.

Trustee Ordinance 1957—amendment

22. The Second Schedule to the *Trustee Ordinance 1957* is amended by inserting after item 17 the following item:

“17A Section 27 A Omit”.

Seat of Government (Administration) Ordinance 1930—amendment

23. The Second Schedule to the *Seat of Government (Administration) Ordinance 1930* is amended by inserting—

“*Perpetuities and Accumulations Ordinance 1985*”

after—

“*Partnership Ordinance 1963*”.

NOTE

1. Notified in the *Commonwealth of Australia Gazette* on 19 December 1985.