

EXPLANATORY STATEMENT

AUSTRALIAN CAPITAL TERRITORY

PERPETUITIES AND ACCUMULATIONS ORDINANCE 1985

No. 65, 1985

The purpose of this Ordinance is to modify the common law rule against perpetuities, and the related rules against accumulations and perpetual trusts, in order to make them less arbitrary in their operation and more suited to present day circumstances.

On the grounds of public policy, the common law courts of the seventeenth century developed criteria for disallowing some restrictions in settlements of property, whereby individuals sought to tie up property for what were considered to be excessive periods.

The rule against perpetuities (or remoteness of vesting as it is also known) was that a disposition is invalid if it could possibly take effect later than 21 years after the death of a person alive when the gift was made. This rule applied not only to trusts as such but also to, for example, wills, leases and option agreements.

Legislation to reform the common law rules has been enacted in several other jurisdictions, including New Zealand and the United Kingdom (1964), Victoria (1968), Western Australia (1969), Queensland (1974) and New South Wales

(1984). This Ordinance is mainly based on the N.S.W. Perpetuities Act 1984. There are, however, some changes of substance and other changes intended to achieve greater clarity or to simplify the operation of some provisions.

Details of the Ordinance are as follows:

Section 1 provides that the Ordinance may be cited as the Perpetuities and Accumulations Ordinance 1985.

Section 2 defines some words and phrases used in the Ordinance.

Section 3 provides that, except for sections 12 (administrative powers of trustees), 13 (remuneration of trustees) and 14 (superannuation and other funds), the Ordinance does not apply to a settlement which takes effect before the date of commencement.

The Ordinance applies to any exercise of a power of appointment, after its commencement, irrespective of when the settlement which conferred the power came into effect.

The Ordinance does not apply to any provision of a will which would not have infringed the rule against perpetuities under the law applicable on the date of its execution, even if the testator dies after the commencement date.

Section 4 provides that, except as provided by any other law of the Territory, the Crown is bound by the rule against perpetuities, and the rule against perpetual trusts, as they are amended by the Ordinance, but these rules do not affect any settlement made by the Crown.

Section 5 provides that for the purposes of the Ordinance a will takes effect on the death of the testator. This accords with the Wills Ordinance 1968.

Section 6 provides that a person is treated as a member of a class if in that person's case all the conditions identifying a member of the class are satisfied i.e. such a person is considered a member of the class before all members of the class have been identified.

Section 7 clarifies a number of matters about which there was some uncertainty under the old law. It distinguishes, for the purposes of the Ordinance, a general power of appointment from a special power by defining a special power as one where the appointor does not have an unfettered discretion to exercise the power in his or her own favour.

Section 8 provides that the perpetuity period is to be 80 years from the date the settlement takes effect. This provides certainty and avoids difficulties involved under the old law in establishing which were the lives in being.

For the vesting of a disposition under a special power of appointment, the perpetuity period is to be calculated from when the original settlement creating the power came into effect. This is also the common law rule.

This section also provides that where a child has been conceived but not born when the perpetuity period would otherwise expire, the perpetuity period is extended until the birth of the child, if, by so doing, that child will take the interest in question. This only applies if the trustees of the settlement have received prior notice of the pregnancy.

Section 9 modifies the application of the common law rule to adopt a "wait-and-see" principle. Under the common law rule a disposition is void from the outset if it is possible (however unlikely) the disposition will not vest within the perpetuity period. This section provides that validity is to depend on whether the disposition in fact vests within the perpetuity period. Further, where it is not certain whether it will vest within the perpetuity period, the interest is to be treated as valid until it is certain that it will vest, if at all, after the end of the perpetuity period.

Similarly, an interest which consists of the conferring of a general power of appointment is valid if the power is in fact exercisable within the perpetuity period.

An interest which consists of the conferring of a special power of appointment is treated as valid in relation to any exercise of the power within the perpetuity period, and is treated as infringing the rule against perpetuities only insofar as the power is not fully exercised within the perpetuity period.

Section 10 enables certain conditions in a settlement to be varied in order to prevent the settlement infringing the rule against perpetuities.

The section provides that where a settlement provides for an interest to vest in a person upon that person attaining a certain age that age is to be reduced to enable the interest to vest within the perpetuity period.

Further, where there is a gift to a class of persons, any person who has not satisfied the conditions necessary to become a member of the class before the end of the perpetuity period is excluded from the class so that the interest will vest in the (existing) class members.

Section 11 provides that where section 10 operates to validate a disposition to a class of persons, and a person who would have taken an interest in the disposition has died before the expiry of the perpetuity period, the children of the deceased person shall take the share their parent would have taken if he or she had survived.

Section 12 stops the rule against perpetuities applying to administrative powers of trustees. Section 27A of the Trustee Act 1925 of New South Wales, in its application to the Territory already exempted powers to sell, lease or exchange property from the effect of the rule. This section extends the exemption to cover any power of a trustee, other than a power to deal with trust property in or towards the satisfaction of the interest of a beneficiary under the trust or in satisfaction of the purpose of the trust.

Section 13 excepts provisions for remuneration of trustees from the rule against perpetuities.

Section 14 excepts from the rule against perpetuities certain funds and provisions established for the benefit of employees, self-employed persons or certain relatives or nominees of such persons.

Section 15 removes the common law distinction between interests determinable upon the happening of a subsequent event (which were not subject to the rule) and interests defeasible on breach of a condition subsequent (which were subject to the rule). This distinction is one of form only, not effect.

The result is that a provision for determination of an interest is not valid and the interest is no longer determinable. Any subsequent interest will therefore be postponed or extinguished.

This section also restates the common law position that the rule against perpetuities does not apply to -

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

Section 16 provides that the rule against perpetuities is not to apply to an option to renew a lease, or, in certain cases to purchase a reversionary interest in the property comprised in a lease.

This section also provides that where the rule against perpetuities renders an option invalid, no action will lie in contract or otherwise to enforce it or to gain compensation for its lack of effect. This is intended to remove the rights, which previously existed, to enforce a personal covenant against the original covenantor independently of the interest created by the option, even though the interest had been rendered invalid.

Section 17 modifies the perpetuity period applicable to perpetual trusts. The rule against perpetual trusts deals with non-charitable trusts which, because they are not in favour of people, do not involve vesting of property and are therefore not subject to the rule against perpetuities. A (non-charitable) purpose trust was void if it might have lasted for more than a life in being plus 21 years.

This section substitutes a perpetuity period of 80 years for the common law period and applies the principle of 'wait and see' to the rule against perpetual trusts. It also confirms that otherwise the common law rule remains unchanged, including the exemption of trusts for charitable purposes from the rule.

Section 18 provides that a provision which does not itself infringe the rule against perpetuities or the rule against perpetual trusts is not to be invalid solely because the interest it creates is subsequent to and dependent upon an interest created by an invalid provision.

Section 19 provides that, where income is to be accumulated (i.e. not distributed) wholly or partly, the provision for such accumulation is valid if the provision for the eventual distribution of that income is valid. The effect is that the income may be accumulated for the full perpetuity period if the provision for the disposition of the income is not invalidated by the rule against perpetuities. Previously income could only be accumulated during one of four periods set out in the Imperial Act 39 and 40 George III Chapter 98.

Section 20 provides that section 13 (which relates to remuneration of trustees) is not to affect any rights arising under a judgment or order which took effect before the commencement date or under any agreement made before that date. It further provides the Imperial Act 39 and 40 George III Chapter 98 is to continue to apply to settlements which took effect before the commencement date, notwithstanding the repeal of that Act by section 21.

Section 21 causes the Imperial Act 39 and 40 George III Chapter 98, (the Accumulations Act 1800) to cease to be in force in the Territory (see section 19 above).

Section 22 amends the Trustee Ordinance 1957 in order to repeal section 27A of the Trustee Act 1925 of New South Wales, in its application to the Territory (see section 12 above).

Section 23 amends the Second Schedule to the Seat of Government (Administration) Ordinance 1930 so that this Ordinance is administered by the Attorney-General.

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Authorized by the
Attorney-General