LAW REFORM COMMISSION

NEW SOUTH WALES

# REPORT

# on

# PERPETUITIES AND ACCUMULATIONS

L.R.C. 26

1976

# PREFACE

The Law Reform Commission is constituted by the Law Reform Commission Act, 1967. The Commissioners are—

*Chairman:* The Honourable Mr Justice C. L. D. Meares.

*Deputy Chairman:* Mr R. D. Conacher.

Mr D. Gressier.

Professor J. D. Heydon.

Mr J. M. Bennett is Executive Member of the Commission.

The offices of the Commission are in the Goodsell Building, 8-12 Chifley Square, Sydney. But letters to the Commission should be addressed to its Secretary, Box 6, G.P.O., Sydney 2001.

This is the twenty-sixth report of the Commission on a reference from the Attorney General. Its short citation is L.R.C. 26.

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## ABBREVIATIONS

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## STATUTES

Alb. Act—The Perpetuities Act, 1972 of Alberta.

N.Z. Act—The Perpetuities Act 1964 of New *Zealand.*

*Oat.* Act—The Perpetuities Act, 1964 of Ontario.

Qld Act—Part XIV of the Property Law Act 1974 (formerly the Perpetuities and Accumulations Act 1972) of Queensland.

U.K. Act—The Perpetuities and Accumulations Act 1964 of the United Kingdom.

Vict. Act—The Perpetuities and Accumulations Act 1968 of Victoria.

W.A. Act—Part XI of the Property Law Act, 1969 (formerly the Law Reform (Property, Perpetuities and Succession) Act, 1962) of Western Australia.

LAW REFORM COMMISSION
NEW SOUTH WALES

To the Honourable F. J. Walker, LL.M., M.L.A., Attorney General for New South Wales, Sydney.

# REPORT ON THE RULES AGAINST PERPETUITIES AND ACCUMULATIONS

## PART 1—PRELIMINARY

1.1 *Terms of reference.* We make this report under our reference—

> To consider the Perpetuities and Accumulations Act 1964 of the United Kingdom and comparable legislation of other countries for the purpose of recommending whether such legislation, or any part of it, is suitable for adoption in New South South Wales and, if so, what modifications would be necessary, and incidental matters arising therefrom.

1.2 *The Perpetuities and Accumulations Act* 1964 *(U.K.).* In 1956, the Law Reform Committee in England recommended changes in the law relating to perpetuities and accumulations.[1] With some modifications, the Perpetuities and Accumulations Act 1964 (U.K.) gave effect to the Committee's recommendations.

1.3 *Comparable legislation.* An Act of the kind proposed by the Law Reform Committee in England was passed in Western Australia in 1962.[2] Like Acts have since been passed in New Zealand,[3] Ontario,[4] Victoria,[5] Queensland[8] and Alberta.[7] The Acts are not identical, they differ in some matters of substance and in many matters of detail. To illustrate a typical legislative approach, we reproduce, in Appendix A, the Perpetuities and Accumulations Act 1968 of Victoria.

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[1] For a summary of the recommendations, see Law Reform Committee *Report* (1956) paragraph 68.

[2] Law Reform (Property, Perpetuities and Succession) Act, 1962 (now Part XI of the Property Law Act, 1969).

[3] Perpetuities Act, 1964.

[4] Perpetuities Act, 1966.

[5] Perpetuities and Accumulations Act 1968.

[8] Perpetuities and Accumulations Act 1972 (now Part XIV of the Property Law Act 1974).

[7] Perpetuities Act, 1972.

1.4 *Suitability of the United Kingdom Act and comparable legislation for adoption in New South Wales.* To the extent that they do not differ, the Acts mentioned in paragraphs 1.2 and 1.3 are suitable for adoption in New South Wales. In this report, we recommend that a Perpetuities Bill, to the effect of the draft Bill set out in Appendix B, be introduced. The draft Bill, though drawing on the provisions of comparable legislation, has no counterpart elsewhere. Where we change the substance of these provisions we try, in this report, to justify the change. But where we change the form of the same provisions we do so only in an attempt to adapt the legislation of other places to the pattern of legislation in this State.

1.5 *Consultation,* We did not publish a Working Paper on the rules against perpetuities and accumulations: the writing on these subjects is already extensive.[8] We did, however, talk with some legal practitioners about the operation of the rules in New South Wales. The co-operation given to us was generous and we are indebted to the persons concerned.

1.6 *Abbreviations.* In this report, we refer often to Acts of other places, to reports of other law reform agencies and to published works on the law of perpetuities and accumulations. In most instances these references are made in an abbreviated form. A table of the abbreviations we use appears on page 5. Also, we speak as though the draft Perpetuities Bill were an Act. We do so only for the sake of convenience and brevity: we appreciate that it is not for us to say whether our recommendations will be implemented wholly or in part or not at all. Where we refer to a section number without additional description, we refer to a section in the draft Bill.

1.7 *Acknowledgments.* Many works are referred to in this report. We must, however, make special mention of those of Dr J. H. C. Morris and Professor W. Barton Leach, Dr Morris and Professor H. W. R. Wade, Q.C., Professor D. E. Allan, Dr Richard Gosse and Mr K. U. McKay. We have drawn copiously from their writings.

## PART 2—INTRODUCTION

2.1 *The rule against perpetuities.* In its classical form, the rule against perpetuities may be stated in two propositions[1]—

(1) Any future interest in any property, real or personal, is void from the outset if it may possibly vest[2] after the perpetuity period has expired.

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[8] See, for example, the Table of Abbreviations, p. 5.

[1] Megarry and Wade (1975) pp. 208-209. For the rule generally, see Gray (1942), Morris and Leach (1962) and Megarry and Wade (1975) pp. 207-281.

[2] The word "vest" carries several meanings: for a discussion of them, see Hogg and Ford (1969) pp. 156-158.

(2) The perpetuity period consists of any life or lives in being together with a further period of twenty-one years and any period of gestation.

2.2 **The Duke of Norfolk's Case.** The rule against perpetuities, as stated in paragraph 2.1, has as its root Lord Nottingham's decision in 1682 in the *Duke of Norfolk's Case*.[3] That case marked not only the end of a stage in the history of the rule,[4] but also, according to Holdsworth, settled two basic principles of modern property law: the validity of a future interest depends on the remoteness of the date at which it is limited to vest; and, in determining the validity of an interest, possible and not actual events are to be considered.[5]

2.3 *Criticisms of the rule against perpetuities.* The main causes of dissatisfaction with the rule are two:[6] first, the requirement of absolute certainty that the interest will vest within the perpetuity period, and its consequent invalidity if any possible combination of events, however improbable or fantastic, could cause it to vest outside the period;[7] and, secondly, the harsh consequences of violating the rule, whereby the interest fails completely instead of being altered so as not to offend the rule. Leach, in 1952, suggested that the rule was then "so abstruse that it is misunderstood by a substantial percentage of those who advise the public, so unrealistic that its 'conclusive presumptions' are laughable nonsense to any sane man, so capricious that it strikes down in the name of public order gifts which offer no offence except that they are couched in the wrong words, [and] so misapplied that it sometimes directly defeats the end it was designed to further".[8]

2.4 *Abolition of the rule against perpetuities.* Notwithstanding the criticisms levelled at the rule, we know of no considerable body of opinion calling for its abolition. The relevant Acts of Western Australia, the United Kingdom, New Zealand, Victoria, Queensland, Ontario and Alberta only modify the rule, they do not abolish it. Why

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[3] *Howard* v. *Duke of Norfolk* (1682) 3 Ch. Cas. 1; 22 E.R. 931; (1685) 3 Ch. Cas. 54; 22 E.R. 963.

[4] For that history see, generally, Holdsworth Vol. 7, pp. 81-144, 193-238, Gray (1942) ss. 123-200.1, Yale (1957) Ixxiii-xci and Morris and Leach (1962) pp. 3-13.

[5] Holdsworth Vol. 7, p. 225. Morris and Leach doubt whether the second suggestion is correct. They say (Morris and Leach (1962) p. 9) that the principle that possible and not actual events are to be considered did not clearly emerge until *Jee* v. *Audley* (1787) 1 Cox 324; 29 E.R. 1186.

[6] Morris and Wade (1964) p. 486 and see, generally, Leach (1952) pp. 35-58, Morris and Leach (1962) pp. 36-37, Leach (1963-64) pp. 12-16, Simes (1955) pp. 64-71 and Simes (1963-64) p. 21.

[7] For an elaboration of this criticism, see paragraph 11.3 and, for exceptions to the requirement of absolute certainty, see Morris and Leach (1962) p. 182.

[8] Leach (1952) p. 35.

is this so? According to Morris and Wade,[9] it is because the rule strikes "a fair balance between the desires of members of the present generation, and similar desires of succeeding generations, to do what they wish with the property which they enjoy". Allan put a similar view when he wrote[10]—

> 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.'[11] 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 . . .

We do not propose that the rule be abolished.

2.5 *Possible reforms of the rule against perpetuities.* There appear to be at least three principal ways of reforming the rule,[12] namely—

(1) To provide that in its operation the occurrence of events which are theoretically possible but in practice impossible, or at least highly improbable, should be disregarded.

(2) To modify the terms of excessive limitations so as to make them give effect to the substantial intention of the dispositions creating them so far as it is possible to do so without infringing the rule. This might be done, for example, by means of specific statutory provisions appropriately qualifying the effect of particular types of gift, as has already been done in relation to certain classes of gift by section 36 (1) of the Conveyancing Act, 1919.

(3) To abolish the present inflexible requirement that the validity of any limitation must be tested *ab initio* in relation to possible events, and substitute for it a wait-and-see principle which would determine validity on the basis of actual rather than possible events.

In the draft Bill annexed to this report we use each of these, and other, methods.

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[9] Morris and Wade (1964) p. 486 and see, generally, Simes (1955) pp. 58-60, Morris and Leach (1962) p. 18 and Allan (1963-64) pp. 28-33.

[10] Allan (1963-64) p. 32.

[11] "Kohler, *Philosophy of Law* (1921), pp. 205-6."

[12] See Law Reform Committee (1956) paragraph 10.

2.6 *The rule against accumulations.* Although the rule against perpetuities extends to directions for the accumulation of income, directions of this kind are further restricted by the rule against accumulations. The last-mentioned rule determines for how long income from property may be accumulated in such a way as to prevent its being enjoyed by anyone in the meantime. In New South Wales, the rule is stated in section 31 of the Conveyancing Act, 1919. The general import of this provision is to limit accumulations to any one of four periods: the life of the settlor, twenty-one years from the death of the settlor, the infancy of any person who shall be living at the death of the settlor, or the infancy of any person who under the trusts of the instrument directing the accumulation, would for the time being, if of the age of twenty-one years, be entitled to receive the income so directed to be accumulated.[13]

2.7 *Criticisms of the rule against accumulations.* Criticisms of the rule against accumulations[14] are to the effect that—

(1) The rule is hard to apply and productive of litigation.

(2) The rule defeats the settlor's intention.

(3) There is no need for the rule: accumulations of income can be controlled by the rule against perpetuities and accumulations so controlled will not produce inordinately large estates or harm the economy or society during the period of accumulation.

2.8 *The rule against accumulations in other places.* The relevant Acts of the United Kingdom and Ontario modify the rule against accumulations by providing two additional periods for which accumulations may validly be directed; twenty-one years from the date of a settlement *inter vivos,* and the minority or respective minorities of persons living or *en ventre sa mere* at the date of a settlement *inter vivos.*[15] On the other hand, the relevant Acts of Western Australia, New Zealand, Victoria and Queensland extend the period permitted for the accumulation of income to the full period permitted by the rule against perpetuities.[16] For reasons stated in Part 21 of this report, we propose that the same extension be made in New South Wales.

2.9 *Draft Perpetuities Bill.* The draft Bill for a Perpetuities Act set out in Appendix B is extremely technical. For this reason, in Part 3 of this report, we outline its main features and, in Parts 4 to 21, we comment on many of its provisions. We stress that the Bill is not a code. It presupposes a knowledge of the rules which it is intended to reform.

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[13] Section 31A of the Conveyancing Act, 1919, modifies the rule in a way that is of no importance for the purposes of this discussion.

[14] See, for example, Morris and Leach (1962) pp. 303–306; Allan (1963–64) pp. *70-72* and the Alberta Report (1971) p. 75.

[15] U.K. Act, s. 13 and the Accumulations Act, s. 1, R.S.O. 1970 c. 5.

[16] W.A. Act, s. 113; N.Z. Act, s. 21; Vict. Act, s. 19 and Qld Act, s. 222.

## PART 3—OUTLINE OF DRAFT BILL

3.1 *Purpose of this part.* In this part, we outline in a general way the substance of our main proposals for reforming the rules against perpetuities and accumulations. We do not try to state here the effect of each provision of the draft Bill. This part must therefore yield to the Bill and to our later comments on its sections.

3.2 *The general nature of our proposals.* Apart from section 10 (which introduces a new type of interest: one which is presumptively valid but which may later prove to be invalid) the Bill proposes no change in the nature of the rule against perpetuities. It remains a rule against remoteness of vesting. The Bill is mainly concerned to remove the traps that now lie in wait for both the skilled and the unskilled draftsman.

3.3 *The perpetuity period: section* 7. Section 7 provides that, for the purpose of the rule against perpetuities, the perpetuity period applicable to an interest created by a settlement shall be eighty years from the date on which the settlement takes effect. If, however, the settlor wants the perpetuity period to be fixed by reference to the common law criterion of lives in being plus twenty-one years plus actual periods of gestation, he may so provide in the settlement. In proposing the adoption of a period of eighty years as the primary criterion and lives in being as an alternative criterion, we seek to avoid most violations of the rule against perpetuities. If settlors, and testators, elect not to use the alternative period, their legitimate aims should seldom be frustrated by errors of drafting.

3.4 *Wait-and-see: section* 10. As indicated in paragraph 2.3, at common law it must be absolutely certain at the time an instrument takes effect that the interest which it creates must vest within the perpetuity period. Any possibility, however slight, that an interest might not do so renders the interest invalid. Section 10 introduces a wait-and-see principle whereby instead of determining validity in the light of initial possibilities, we wait and see whether the interest does or does not vest within the period.

3.5 *Income during wait-and-see period.* Section 10 attends to the problem of what is to be done with any income from the property during any wait-and-see period. Shortly stated, if the interest disposed of would carry the intermediate income if valid, it will still carry it even though it is not possible to say whether the interest complies with the rule against perpetuities or not. Similarly, maintenance can still be paid from the income under section 43 of the Trustee Act, 1925. Likewise, capital can still be advanced under and subject to the provisions of section 44 of that Act.

3.6 *Unborn husband or wife: section* 8. A common trap for the unwary draftsman is the "unborn widow".[1] Waiting and seeing under section 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 section 10 had not been enacted.[2]. It has therefore been necessary in section 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.

3.7 *Fantastic possibilities: section 9.* Section 10 (wait-and-see) is intended to be a section of last resort. We are concerned, whenever possible, to remove any need to wait-and-see. One way of doing this is to abolish some of the fantastic[3] possibilities which would otherwise require wait-and-see to be applied.[3] To avoid, for example, the absurdity of waiting to see whether a woman aged seventy bears any children, section 9 provides a presumption that a woman who has attained the age of fifty-five years is incapable of bearing a child. The section also provides a presumption that a person who is under the age of twelve is incapable of begetting or conceiving a child. By virtue of section 9, evidence of incapacity to beget or conceive children is admissible. And, to cover the unlikely event of a child being born to a woman after a judicial decision to the effect that she is capable of bearing children, the court is given a wide discretion to do what is just in the particular circumstances of any case.

3.8 *Other fantastic possibilities.* The only fantastic possibilities specifically dealt with in the Bill are those mentioned in paragraph 3.7. We do not, for example, deal with the "magic gravel pit" situation considered in paragraph 11.3.1. We are satisfied that it is impossible to prepare a list of all the possibilities that may pose special problems in the field of perpetuities. We have dealt with the main offenders. In other cases, it will be necessary to wait-and-see.

3.9 *The Supreme Court.* Another way of avoiding any need to wait-and-see is provided for, not in the Bill, but in the Supreme Court Act, 1970. Under section 75 of that Act, the Supreme Court may make binding declarations of right whether any consequential relief is or could be claimed in the proceedings or not. Hence a trustee of property or any person interested under, or on the invalidity of, any disposition of property may apply to the Supreme Court for a declaration as to the validity of the disposition in so far as it is affected by the rule against perpetuities. It is not necessary to wait until the disposition vests. Immediately it becomes possible to say that the disposition must vest, or that it cannot vest, within the perpetuity period, the Court is empowered to make a declaration as to its validity.

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[1] See Part 9.

2 See s. 10 (3).

[3] The fantastic possibilities to which we refer are those mentioned in paragraph 11.3.

3.10 *Recapitulation.* To this point, our main proposals for reform are—

(1) To fix a period of eighty years as the period for the vesting of any future interest in property unless the person creating the interest specifies that the period for its vesting is to be the period fixed by the common law (section 7).

(2) To abolish the requirement of absolute certainty and to substitute a wait-and-see rule (section 10).

(3) To limit the use of the wait-and-see rule in cases where the common law perpetuity period applies—

(a) by making unborn spouses lives in being (section 8) ; and

(b) by introducing some presumptions concerning parenthood (section 9).

3.11 *Cy-pres modifications.* Our other proposals for reform can shortly be described as follows:

(1) Reduction of age contingencies.

(2) Exclusion of class members.

3.12 *Reduction of age contingencies: section* 11 (1). Section 36 of the Conveyancing Act, 1919, validates some dispositions of property which are otherwise void for perpetuity because they are made contingent on the attainment by a person of an age exceeding twenty-one years. That section operates by reducing the age to twenty-one years. Section 11 (1) of the draft Bill provides that invalid age contingencies are not reduced automatically to twenty-one years but to the age nearest to that specified which will prevent the disposition being void. This has the effect of not altering the disposition any more than is necessary to validate it.

3.13 *Exclusion of class members: section* 11 (3) *and* (4). A class gift is a gift of property to all who come within some particular description, the property being divisible in shares varying according to the number of persons in the class:[4] for example, a devise of Blackacre "to such of my children as shall attain the age of twenty-five years and if more than one in equal shares". If a single member of the class might possibly take a vested interest outside the perpetuity period, the whole gift fails. The rule is: "All or nothing." Section 11 (3) and (4) provide, in effect, that no class gift is to be invalidated by the failure of the limitation to some only of the members of a class: the limitation is to be construed and to take effect as a limitation only to those members of the class who comply with the perpetuity rule. The members of that class who do not comply with the rules are excluded from the class.

[4] See Megarry and Wade (1975) p. 228.

3.14 *Miscellaneous matters.* Sections 13 to 19 of the Bill deal with particular situations where the rule against perpetuities applies less than satisfactorily or where there are doubts that it applies at all. The matters covered include administrative powers of trustees, the remuneration of trustees, superannuation funds, determinable interests, options, trusts for purposes which are not charitable and dependent dispositions. Because the sections turn on technical considerations, we do not comment generally upon them in this Part. We do, however, consider them in some detail in Parts 14 to 20.

3.15 *Accumulation of income: section* 20. As indicated in paragraph 2.8, the Bill provides for the extension of the permitted period for the accumulation of income to the full period permitted by the rule against perpetuities. We consider this section in Part 20.

3.16 *The application of our proposals: section* 3. In general, nothing in the Bill is intended to affect existing trusts or settlements. Any Act based on the Bill will not, by virtue of section 3, apply to instruments, including wills, taking effect before its commencement. But, in the case of an instrument exercising a power of appointment, whether general or special, an Act based on the Bill will apply to that instrument even though the instrument creating the power took effect before the commencement of the Act. Retrospective effect is, however, given to sections 13, 14 and 15: these sections are intended to declare, both for the past and for the future, the law governing the application of the rule against perpetuities to administrative powers of trustees (section 13), the remuneration of trustees (section 14) and superannuation funds (section 15).

3.17 *The draft Bill.* We turn now to a consideration of particular sections of the draft Bill.

## PART 4—APPLICATION OF DRAFT BILL

4.1 *Draft Bill—section 3.* Section 3 of the draft Bill provides—

> (1) Subject to subsection (3), this Act shall not apply in relation to a settlement taking effect before the commencement of this Act.
>
> (2) This Act shall apply in relation to a settlement made by an appointment under 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 section shall not affect the operation of sections 13, 14 and 15.

4.2 *Retrospective operation of Bill.* Section 3 is concerned with the extent to which an Act based on the draft Bill should operate retrospectively. The Law Reform Committee in England considered this question[1] and concluded that, in general, their recommendations should apply only to instruments executed, and to the wills of testators dying, after the requisite legislation came into force, or, preferably, the date of any official announcement that the legislation would be introduced.[2] For their purposes, "instruments" included appointments made under a power of appointment, whether general or special,[3] even if the power was created before the legislation came into force.

4.3 *Comparable Acts.* The recommendations of the English Law Reform Committee were followed in Western Australia,[4] New Zealand,[5] Ontario[6] and Alberta,[7] but not in England,[8] Victoria[9] and Queensland.[10] In the last three mentioned places, the relevant Acts apply to an instrument exercising a special power of appointment only where the instrument creating the power takes effect after the commencement of the Act.

4.4 *Section* 3 (2). Section 3 (2) of the draft Bill incorporates the substance of the English Law Reform Committee's recommendations mentioned in paragraph 4.2. We adopt the Committee's approach for two reasons: first, if, as we believe, the proposals made in this report are generally beneficial, they should be applied to as many existing dispositions as possible and not be totally withheld from all those dispositions and, secondly, when, to mitigate the severity of the rule against perpetuities, section 36 was introduced into the Conveyancing Act, 1919, the section was, without untoward consequences, applied to special powers created before the commencement of that Act.

4.5 *Exceptions to our recommendations.* Section 3 (3) expressly preserves the operation of section 13 (administrative powers of trustees), section 14 (remuneration of trustees) and section 15 (superannuation funds). These three sections are intended to declare the law for both the past and the future: they should therefore be exempted from the operation of section 3 which says that, in general, the Act shall operate prospectively, not retrospectively.

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[1] Law Reform Committee Report (1956) paragraphs 63-67.
[2] *Id.*, paragraph 67 (a) and (b).
[3] *Id.*, paragraph 63.
[4] W.A. Act, s. 99.
[5] N.Z. Act, s. 4.
[6] Ont Act, s. 19.
[7] Alb. Act, s. 25.
[8] U.K. Act, s. 15.
[9] Vict. Act, s. 3.
[10] Qld Act, s. 207.

4.6 *Effect of our recommendations.* Shortly stated, the effect of section 3 is that, subject to the exceptions referred to in paragraph 4.5—

(1) In considering dispositions that take effect before the commencement of an Act based on the draft Bill, the rule against perpetuities must be applied as it was before that commencement.

(2) In considering dispositions that take effect after the commencement of an Act based on the draft Bill, the rule against perpetuities, as modified by the Act, must be applied.

(3) In drafting dispositions after the commencement of an Act based on the draft Bill, the rule against perpetuities, as modified by the Act, must be taken into account.

## PART 5—INTERPRETATION

5.1 *Draft Bill—section* 4. Section 4 of the draft Bill provides—

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

"disposition" includes the conferring or exercise of a power of appointment or any other power or authority to dispose of property, and any alienation of property.

"instrument" includes a will, and also includes an instrument, testamentary or otherwise, exercising a power of appointment, whether general or special, but does not include an Act of Parliament.

"interest" includes any estate or 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 any instrument, transaction or dealing whereby a person makes a disposition.

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

"trustee" has the same meaning as in the Trustee Act, 1925.

"will" includes a codicil.

(2) For the purposes of this Act, a settlement made by will shall take effect as if it was made at the death of the testator.

(3) For the purposes of this Act, a person shall be treated as a member of a class if in his case each and every condition identifying a member of the class is satisfied, and shall be treated as a potential member of a class if in his case any condition identifying a member of the class is not satisfied but there is a possibility that the condition will be satisfied.

5.2 *Section* 4 (1): *definitions. A* key concept of the draft Bill is "an interest created by a settlement"[1] but, for the purposes of the Bill, the concept cannot be fully understood unless it is considered in the light of the definitions contained in section 4(1). Brief comments on some of these definitions follow—

(1) *"Disposition".* The definition of "disposition" is intended to ensure that the Bill will apply to a wide range of property settlements. The word is defined broadly and not exhaustively. This is so because it is not a technical word but an ordinary English word of very wide meaning.[2] As we see it, "settlement", as defined in section 4 (1) and when read with the definition of "disposition", should comprehend most of the ways by which one person can pass an interest in property to another person.

(2) *"Interest".* Because problems arise under the rule against perpetuities in relation not only to estates in property, but also in relation to absolute and other interests in and rights over property, "interest" is also defined broadly but not exhaustively

(3) *"Power of appointment".*[3] The definition of "power of appointment", in line with the definitions of that expression in the comparable Acts of the United Kingdom, New Zealand, Victoria and Queensland,[4] is wide: it includes, for example, a power of maintenance or advancement and any discretionary trust. A power to apply property under a discretionary trust will, by virtue of section 5, rank as a special power of appointment.

(4) *"Property".* "Property" is defined in section 4 (1) in terms substantially the same as those used in the definition of that word in section 7 of the Conveyancing Act, 1919.

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[1] See, for example, ss. 7, 8, 9 and 16 and, for a like concept ("where a provision of a settlement creates an interest") see, for example, ss. 4 and 19.

[2] *Ward* v. *Commissioner of Inland Revenue* [1956] A.C. 391, 400 and see *Grey* v. *Inland Revenue Commissioners* [1960] A.C. 1 and *Dobell* \. *Parker* (1959) 76 W.N. (N.S.W.) 356, 360.

[3] See, generally, Part 6.

[4] See Cheshire (1972) p. 286.

(5) *"Settlement"*. A settlement, as the word is defined in section 4 (1), is not confined to a disposition of property made by an instrument. It can extend, for example, to the creation of an oral trust of personality, to the creation by parol of an implied or constructive trust of an interest in land,[5] and to the making of a privileged will.

5.3 *Section* 4 (2)—*settlements made by will.* Section 21 of the Wills, Probate and Administration Act, 1898, provides that every will shall speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will. For the purposes of the draft Bill, section 4 (2) states the substance of section 21 of the Wills, Probate and Administration Act, 1898, without the qualification concerning a contrary intention. Provisions of the same kind are contained in the comparable Acts of the United Kingdom, New Zealand, Victoria and Queensland:[6] they do no more than state the existing law that in the case of devises and bequests the perpetuity period commences to run at the death of the testator.[7]

5.4 *Section* 4 (3)—*members of a class.* Section 4 (3) of the draft Bill is merely an aid to the construction of section 8 (unborn husband or wife) and section 11 (reduction of age and exclusion of class members). A like provision appears in the comparable Acts of the United Kingdom, New Zealand, Victoria and Queensland.[8]

## PART 6—POWERS OF APPOINTMENT

6.1 *Draft Bill—section 5.* Section 5 of the draft Bill provides—

(1) This section applies where an appointment of an interest is made under a power, and applies for the purpose of determining whether the appointment is invalid as infringing the rule against perpetuities.

(2) Where, immediately before the appointment takes effect, the appointor had, by the settlement creating the power, unconditional authority at his own discretion to exercise the power by appointing the interest to himself or to his legal personal representative, the power shall be treated as a general power.

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[5] See the Conveyancing Act, 1919, s. 23c (2).

[6] U.K. Act, s. 15 (2); N.Z. Act, s. 2 (2); Vict. Act, s. 2 and Qld Act, s. 206 (2).

[7] See Gray (1942) s. 231 and Morris and Leach (1962) p. 56.

[8] U.K. Act, s. 15 (3); N.Z. Act, s. 2 (3); Vict. Act, s. 2 (3) and Qld Act, s. 206 (3).

(3) In any other case the power shall be treated as a special power.

(4) For the purpose of this section, an authority is unconditional notwithstanding any formal conditions relating to the mode of exercise of the power.

6.2 *The rule against perpetuities and powers of appointment.* In 1964, in commenting on the Perpetuities and Accumulations Act 1964 (U.K.), Morris and Wade considered the rule against perpetuities in relation to powers of appointment.[1] They said—

> Two principal questions arise under the Rule against Perpetuities in relation to powers of appointment: first, the validity of the power; secondly, the validity of the appointment. In both questions the distinction betwen general and special powers is vital. 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 at 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.
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> Although the distinction between general and special powers is well recognized, some powers (sometimes known as hybrid powers) are difficult to classify from this point of view. They include (1) general powers exercisable by will only; (2) powers to appoint by will to any persons living at the death of the donee; (3) general powers exercisable jointly by two or more persons; (4) general powers exercisable only with the consent of another person or persons; (5) powers to appoint to any person or persons other than the donee; (6) powers to appoint to any person or persons other than X (a person other than the donee); (7) powers to appoint to a specified class of persons of whom the donee happens to be one. Most of these cases are covered by authority in the sense that the power has been held to be general or special for some purposes

[1]Morris and Wade (1964) pp. 518-521.

but these do not always include the Rule against Perpetuities, and of course a power may be general for some purposes and special for others. In some cases, the decisions are conflicting. Thus, a general testamentary power has been held to be equivalent to a special power when the validity of the power is in question,[2] but to be equivalent to a general power when the question relates to the validity of the appointment.[3]

With a view to removing these uncertainties, the Law Reform Committee recommended[4] 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.

6.3 *Recommendations for change.* The recommendation mentioned in the concluding paragraph of our quotation from Morris and Wade has found favour with law reform agencies in Western Australia, New Zealand, Victoria, Queensland, Ontario and Alberta.[5] We are satisfied that substantially the same recommendation should be adopted here.

6.4 *The purpose and effect of section 5.* Section 5 of the draft Bill gives effect to the recommendation now being considered and to the exception to it: "The effect of this section is that the powers numbered (6) and (7) [in the extract from Morris and Wade quoted in paragraph 6.2] will be treated as general, the powers number (2) to (5) inclusive will be treated as special, and general testamentary powers will continue to be treated as special when the validity of the power is in question, but as general when the question relates to the validity of the appointment. There should be no difficulty in determining, with the aid of the statutory definition, into which category any new type of hybrid power should fall for the purposes of the Rule."[6]

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**Wollaston* v. *King* (1868) L.R. 8 Eq. 165; *Morgan* v. *Gronow* (1873) L.R. 16 Eq. 1.

**Rous* v. *Jackson* (1885) *29* Ch.D. 521; *Re Flower* (1885) 55 L.J.Ch. 200; not following *Re Powell's Trusts* (1869) 39 L.J.Ch. 188.

[4] Law Reform Committee Report (1956) paragraphs 47-48.

[5] See W.A. Act, s. 112; McKay (1965) p. 522; Victorian Report (1966) cl. 4 of draft Act; Qld Working Paper (1971) p. 3; Ont. Report (1965) pp. 21-25; Alberta Report (1971) pp. 42-44.

8 Morris and Wade (1964) p. 520.

6.5 *Comparable legislation.* Section 5 of the draft Bill, though based on provisions in the comparable legislation of Western Australia, the United Kingdom, New Zealand, Victoria, Queensland, Ontario and Alberta,[7] is not a copy of those provisions. It differs from them in both form and substance.

6.6 *First substantive difference.* The first substantive difference is that the comparable provisions apply where the power in question is to be exercised by "one person only". Section 5 (2), on the other hand, may apply where the power is to be exercised by one, two or more persons.[8] It may be rare for a settlement creating a power to provide that two or more appointors may appoint to themselves, but we do not think it right in principle that a power should, on that account only, be treated as a special power.

6.7 *Second substantive difference.* The second substantive difference between section 5 and comparable provisions elsewhere is that section 5 applies if "immediately before" the appointment of the interest under the power the conditions of the section are satisfied. Elsewhere the provisions apply only if "at all times during the currency of the power" the conditions are satisfied. These provisions seem to be based on the idea that if a power is once treated as a special power it should always be so treated.[9] Where, for example, A has a power, exercisable with the consent of B, to appoint such person as A thinks fit (a special power within the meaning of section 5) and B dies before the power is exercised and before the perpetuity period has expired, should the power, after the death of B, continue to be treated as a special power or should it then be treated as a general power? The legislation of other places provides that the power will continue to be treated as a special power but section 5 (2) provides that the power will be treated as a general power. Which approach is right? The enactment of section 5 (2) will lead to the results that the power need not be exercised within the perpetuity period and the validity of any appointment will be tested by reference to a new perpetuity period starting when the instrument of appointment takes effect. In our view, these results are unobjectionable.

## PART 7—THE CROWN

7.1 *Draft Bill—section 6.* Section 6 of the draft Bill provides—

> (1) Subject to subsection (2), the rule against perpetuities, the rule against perpetual trusts and this Act shall bind the Crown not only in right of New South Wales but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

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[7] W.A. Act, s. 112; U.K. Act, s. 7; N.Z. Act, s. 5; Vict. Act, s. 4; Qld Act, s. 208; Ont. Act, s. 11 and Alb. Act, s. 14.

[8] Although s. 5 (2) speaks only of the "appointor", that word, by virtue of s. 21 (b) of the Interpretation Act, 1897, includes "appointors".

[9] Morris and Wade (1964) p. 521

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

7.2 *Comparable Acts.* A provision to the effect of section 6, but limited in its application to the rule against perpetuities, appears in the comparable Acts of New Zealand, Victoria, Queensland and Alberta.[1] In Western Australia and the United Kingdom the relevant provisions merely state that the Crown is bound by the Act:[2] no mention is made of the Crown being bound by the rule against perpetuities itself. One commentator says of the Western Australian section: "The result is that there now applies to the Crown a statute modifying a rule that does not bind the Crown. The effect must be a matter of some speculation."[3]

7.3 *The common law.* In 1889, in *Cooper* v. *Stuart** the Privy Council advised that the rule against perpetuities was inapplicable, in 1823, to—

> . . . Crown grants of land in the Colony of New South Wales, or to reservations or defeasances in such grants to take effect on some contingency more or less remote, and only when necessary for the public good.[5]

In the case of dispositions of property made by the Crown, it is likely that *Cooper* v. *Stuart* would still be followed in New South Wales. In other cases it seems to be an open question whether the rules against perpetuities and perpetual trusts are applicable or inapplicable to the Crown.

7.4 *The intention of section 6.* Section 6 of the draft Bill is, in the case of dispositions of property made by 'the Crown, intended to preserve what we believe to be the existing law. In other cases, it is intended to make it clear that where a disposition affecting the Crown is within the application of the draft Bill, the rules against perpetuities and perpetual trusts, as modified by the Bill, will bind the Crown.

7.5 *Policy issue: Crown lands.* Our proposal to exclude dispositions of property made by the Crown from the operation of the draft Bill can, we believe, be justified on at least one policy ground. It is this: some eighty million acres, comprising over forty per cent of the area of New South Wales, are subject to the several Acts comprising the Crown lands legislation of this State;[6] if dispositions by the Crown

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[1] N.Z. Act, s. 3; Vict. Act, s. 1 (2); Qld Act, s. 1 (4) and Alb. Act, s. 23.
[2] W.A. Act, s. 99 (2) and U.K. Act, s. 15 (7).
[3] Allan (1963-64) p. 38.
[4] 14 App. Cas. 286.
[5] *Id.*, 294.
[6] Lang (1973) p. ix.

of lands within the application of that legislation were to be made subject to the rule against perpetuities, the whole of the law relating to, amongst other things, defeasance conditions in Crown grants would need to be reviewed; a review of this kind is beyond the scope of a review of the law relating to perpetuities, it is more properly within the scope of a review of the law relating to Crown lands.

7.6 *Policy issue: general.* It is difficult to justify, for any particular policy reason, that part of section 6 which makes the rules against perpetuities and perpetual trusts, as modified by the draft Bill, binding upon tie Crown. On the other hand, it is equally difficult to justify, on grounds of policy, any proposal that the Crown should not be bound by the rules: indeed, subject to what we say in paragraph 7.5, we know of no special hurt that the Crown would suffer if it were bound. In the event, we propose that in general the Crown should be bound.

## PART 8.—POWER TO SPECIFY PERPETUITY PERIOD

8.1 *Draft Bill—section 1.* Section 7 of the draft Bill provides—

> (1) Subject to subsections (2) and (3), for the purpose of the rule against perpetuities, the perpetuity period applicable to an interest created by a settlement shall be eighty years from the date on which the settlement takes effect
>
> (2) Subject to subsection (3), where a settlement provides that this subsection shall apply to an interest created by the settlement, then, for the purpose of the rule against perpetuities, the perpetuity period applicable to the interest, instead of being eighty years, shall, subject to this Act, be the perpetuity period which at common law would be applicable to the interest.
>
> (3) Where an appointment of an interest is made under a special power—
>
> (a) the provision mentioned in subsection (2) must be made by the settlement creating the power; and
>
> (b) the perpetuity period shall be reckoned from the date when that settlement takes effect.

8.2 *The present perpetuity period.*[1] The present perpetuity period consists of lives in being plus twenty-one years. If no lives are expressly or impliedly designated as the lives in being, the perpetuity period is limited to an absolute term of twenty-one years. Actual periods of gestation may, however, always be added to the perpetuity period.

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[1]See, generally, Morris and Leach (1962) pp. 64-67.

8.3 *The Law Reform Committee.* The Law Reform Committee in England recommended that the length of the perpetuity period should not be altered.[2] The Committee said[3]—

> 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 arbitrarily 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 . . .

8.4 *An optional alternative perpetuity period.* The Law Reform Committee did, however, recommend that as an alternative to the present perpetuity period, there should be allowed such period of years, not exceeding eighty, as might be specified in an instrument creating an interest.[4] This recommendation was prompted by the desire of the Committee to entice conveyancers away from "royal lives" clauses. The Committee thought that a period of eighty years was long enough to achieve this purpose.[5]

8.5 *"Royal lives" clauses.* For the purpose of the rule against perpetuities, any number of lives in being may be selected, provided they are not so numerous as to make it impossible to ascertain the survivor.[6] The lives in being need not be beneficiaries or relations of the settlor or testator: they may be selected at random. In an attempt to stretch the perpetuity period to the limit, some draftsmen select the lives of all issue of some royal progenitor (for example, King George VI) living at the relevant date. By using an extraneous life the draftsman may, however, render a limitation void for uncertainty or involve the estate in great expense in ascertaining the relevant lives.[7] The Law Reform Committee in England considered many proposals for eliminating extraneous lives altogether but each proposal foundered on the difficulties of definition.[8] In the result, the Committee made the recommendation mentioned in paragraph 8.4.

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[2] Law Reform Committee Report (1956) paragraph 5.
[3] *Ibid.*
[4] *Ibid.*
[5] *Ibid.*
[6] See *Re Moore* [1901] 1 Ch. 936.
[7] See *Re Villar* [1929] 1 Ch. 243; *Re Leverhulme* [1943] 2 All E.R. 274.
[8] See Law Reform Committee Report (1956) paragraph 9 and Morris and Wade (1964) p. 488.

8.6 *Adoption of the optional alternative perpetuity period.* This last mentioned recommendation was adopted in Western Australia, the United Kingdom, New Zealand, Victoria and Queensland.[9] It was rejected in Ontario and Alberta: mainly because "royal lives" are little used in those Provinces.[10] In speaking of the New Zealand provision, one commentator says[11]—

> Undoubtedly, the power to specify an alternative period up to eighty years will largely do away with the continued use of "royal lives" clauses, or the similar use of a number of lives in being. It should make for a greater simplicity in drafting and ease the task of administration.

8.7 *Section* 7: *outline.* As indicated in paragraph 3.3, we recommend that the perpetuity period applicable to an interest created by a settlement should be eighty years from the date on which the settlement takes effect. If, however, a settlor does not want a period of eighty years, but wants instead a period fixed by reference to the common law criterion, we recommend that he should be able to provide to this effect in his settlement. Section 7 gives legislative expression to these recommendations. If enacted, the section will break new ground in the perpetuities field: it is, in effect, the opposite of the provision adopted in Western Australia, the United Kingdom, New Zealand, Victoria and Queensland.

8.8 *Section 7—justification.* As we see it, if a perpetuity period provision of the kind enacted in Western Australia and elsewhere is enacted here, the alternative period will almost invariably be used. This is so because few persons will want a period longer than eighty years and most persons will choose to avoid the pitfalls that await those who use the comon law period. But we cannot see why a person should be required to specify a period which is definite and likely to be trouble-free (the eighty years period) when, if he does not specify it, he is left with a period which can be obscure and troublesome (the common law period). In our view, it is better for the law to provide first for the common case and secondly for the exceptional case. In this context, the common case is that of a person for whom a perpetuity period of eighty years will work well and the exceptional case is that of a person whose wishes might be better satisfied if the common law perpetuity period is chosen. On our approach, the right to choose between the two perpetuity periods is given but the common case is catered for automatically and only the exceptional case calls for special provision in a will or settlement.

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[9] W.A. Act, s. 101; U.K. Act, s. 1; N.Z. Act, s. 6; Vict. Act, s. 5 and Qld Act, s. 209.

[10] See Ontario Report (1965) pp. 5-6 and Alberta Report (1971) p. 13.

[11] McKay (1965) p. 493.

8.9 *Section* 7 (1): *the period of years.* Where the common law period is not specified as the perpetuity period applicable to a disposition, a draftsman may safely ignore many of the technical points of the rule against perpetuities He has no need, for example, to consider the supporting lives which may be relevant to the disposition; he may disregard those sections of the draft Bill which are directed to particular problems such as the unborn husband or wife (section 8) and presumptions as to parenthood (section 9); moreover he can assure his client at the outset that the disposition is not void for remoteness. As we see it, these results are good results.

8.10 *Section* 7 (2): *the common law period.* Section 7 (2) is intended to apply to an interest created by a settlement only where the settlement so provides. We think that an implication should not be enough to attract the alternative perpetuity period. The subsection is so worded, however, that its condition can be satisfied by the use of a simple formula such as the following—

> Section 7 (2) of the Perpetuities Act, 1976, shall apply to any interest created by this [settlement].

The use in the subsection of the expression "subject to this Act" is intended to make it clear that in determining the length of the alternative perpetuity period the rules to be applied are the common law rules as modified by the draft Bill. A person using section 7 (2) will therefore have the benefits of, for example, section 10 (wait-and-see) and section 11 (reduction of age and exclusion of class members).

8.11 *Section* 7 (3): *special powers of appointment.* In the case of special powers of appointment, the perpetuity period starts running when the power is created. The object of section 7 (3) is to prevent the donee of a special power from using section 7 (2) to prolong the duration of the period after it has started to run. Provisions to the effect of section 7 (3) are included in the relevant legislation of the United Kingdom, Victoria and Queensland.[12] On the other hand, the New Zealand Act embodies a different approach.[13] The Law Revision Committee of that country took the view that where special powers of appointment are granted, it is important to preserve the full flexibility of the trusts by giving the donee power to specify the perpetuity period in the instrument of appointment. It recommended, and the recommendation was adopted, that the period could be specified within the instrument creating the power or, subject to the terms of the power, in the instrument making the appointment, but in either event the period should be calculated from the date of the creation of the power and not from its exercise.[14] Although we see benefits in following the New Zealand approach we have, in the interests of uniformity of Australian laws, followed the legislative pattern of Victoria and Queensland.

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[12] U.K. Act, s. 1 (1); Vict. Act, s. 5 (2) and Qld Act, s. 209 (2).
[13] N.Z. Act, s. 6 (3).
[14] See McKay (1965) p. 492.

8.12 *A perpetuity period of eighty years.* Before concluding our notes on section 7, we make some general comments on the perpetuity period of eighty years proposed in section 7 (1). Under the existing rule, if a proper choice of lives is made, the perpetuity period can be extended to roughly one hundred years. A settlor who wishes to defer the vesting of a disposition for this long time may, by the use of section 7 (2), still do so. To this extent, section 7 does not contain any proposal for radical change. But, when section 7 (2) is not used, is a period of eighty years too long Would a period of forty, fifty or sixty years be a better period? These questions do not admit of definitive answers. If it is accepted that the rule against perpetuities should not be abolished, the determination of a proper perpetuity period becomes largely an exercise in arbitrary choice. It is easy to cite cases where a period of eighty years may be too long and other cases where it may be too short. We recommend the adoption of the eighty years period because many jurisdictions similar to our own have adopted that period and we can see no compelling reasons for recommending to the contrary.

## PART 9—UNBORN HUSBAND OR WIFE

9.1 *Draft Bill—section* 8. Section 8 of the draft Bill provides—

Where—

(a) for the purpose of the rule against perpetuities, the life of any person is a life in being in relation to an interest created by a settlement; and

(b) the interest is to or may vest on or after an event during the life, or on or after the death, of a husband or wife of that person,

the life of the husband or wife shall, for the purpose of the rule against perpetuities and in relation to the interest, have effect as a life in being, whether or not the life of the husband or wife was a life in being at the time the settlement took effect

9.2 *The problem.* As indicated in paragraph 2.3, a cause of dissatisfaction with the rule against perpetuities is that it invalidates any disposition of property which can by any conceivable possibility vest beyond the perpetuity period.[1] Cases involving "unborn spouses" illustrate the harshness of the common law rule. Suppose that T, by will, gives property to trustees upon trust for L (a bachelor) for life, then for any wife he may marry for life, then for L's eldest son then living, and if there is no such son to X.[2] The gift to the wife is valid, for she will be ascertained at the death of L who is a life in being. But

[1] There are three exceptions to this proposition: gifts subject to alternative contingencies; appointments under special powers of appointment; and gifts in default of appointment (see Morris and Leach (1962) p. 181).

[2] *Re Frost* (1889) 43 Ch. D. 246.

the gifts to Us eldest son, and to X, are too remote. These gifts will not vest until the death of L's widow. L might marry a woman who was not alive at T's death, and she might outlive L for more than twenty-one years. In these circumstances, the interests of L's eldest son and of X would not vest within a life in being and twenty-one years.[3]

9.3 *The incidence of the problem.* In practice, the possibility of an "unborn spouse" calls for careful consideration: it is not a remote possibility. Suppose T gives property to A for life, then to any widow who may survive A for her life, and then to the children of A living at the death of the survivor of A and his widow. If A is aged twenty-one when T dies, he might, when he is aged forty-five, marry a woman aged twenty who could easily survive him by more than twenty-one years. Indeed it is not necessary to suppose any great age disparity. T could have given property to A for life, then for such of A's children as A shall appoint, with power for A to appoint a life interest to any spouse of any child of A. Suppose A appoints to his son B for life, then to any widow of B who may survive B for her life, then to the children of B living at the death of the survivor of B and his widow. If at T's death B is aged one, B could eventually marry a woman two years younger than himself: a woman not in being when the perpetuity period started running at T's death. The gift to B's children would be too remote.[4]

9.4 *Possible solutions.* The Law Reform Committee in England recommended that where a disposition would be void for perpetuity by reason of some person marrying a spouse who was not a life in being, the disposition should take effect as if a reference to that spouse was confined to one who was born before the date of the disposition.[5] The Western Australian Act, in section 108, goes further than the English recommendation. Instead of confining the reference to a spouse to one who is a life in being, the section uses the expedient of deeming any such spouse to be a life in being whether in fact he or she is or not. The section also deems the unborn spouse to be a life in being, not merely for the purposes of a disposition to take effect at or after his or her death, but also for the purposes of any disposition in favour of that spouse. Thus, a disposition in favour of an unborn widow could be valid. The New Zealand, Victorian and Queensland Acts adopt the Western Australian approach:[6] so too does section 9 of the draft Bill.[7]

9.5 *The utility of section* 8. The utility of section 8 is that it avoids the necessity for applying the wait-and-see provisions of section 10 to fairly common situations.

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[3] See Hogg and Ford (1968) pp. 162-163.
[4] For these illustrations, see Morris and Wade (1964) p. 512.
[5] Law Reform Committee Report (1956) paragraph 28.
[6] N.Z. Act, s. 13; Vict. Act, s. 10 and Qld Act, s. 214.
[7] For the comments in paragraph 9.4, see McKay (1965) p. 502.

## PART 10—PARENTHOOD: PRESUMPTIONS

10.1 *Draft Bill—section 9.* Section 9 of the draft Bill provides—

(1) In this section—
"beget" means beget so as to father a child,
"conceive" means conceive so as to bear a child.

(2) Subsections (3) and (4) apply where, in relation to the application of the rule against perpetuities to an interest created by a settlement, a question arises which turns on the possibility of a person having a child at a future time.

(3) It shall be presumed—

(a) that a male will not beget a child while under the age of 12 years

(b) that a female will not conceive a child while under the age of 12 years or over the age of 55 years; and

(c) that a person will not become parent of another person, by adoption or otherwise, while the first person is under the age of 16 years or over the age of 55 years, except where the second person is a child or natural child of the first person.

(4) The question whether a living person will or will not be able to beget or to conceive a child at a future time shall be a question of fact and shall be determinablc on the presumptions in subsection (3) (a) and (b) and on evidence accordingly

(5) Subsections (6) and (7) apply—

(a) where a presumption under subsection (3) is applied, and the presumption is disappointed by the event; and

(b) where a determination is made under subsection (4) that a living person will not be able to beget or to conceive a child at a future time, and he does beget or conceive a child at that time

(6) Subject to subsection (7), the Court may make such orders as it thinks fit for the purpose of putting the persons interested into the positions, so far as is just, that they would have held if the presumption had not been applied or the determination had not been made.

(7) The Court shall not make an order under subsection (6) affecting adversely the position of a person who claims by virtue of a purchase or other transaction for valuable consideration made in good faith and without notice of the application of the presumption or of the making of the determination.

10.2 *The common law.* For the purposes of the rule against perpetuities, the common law conclusively presumes that any person, however old or young, is capable of having children.[1] As Dean /. has said[2]—

> The attitude of the law on this matter would scarcely commend itself to an intelligent layman. It is prepared to concede that a deceased person cannot have children, but it will concede no more. The fact that by a surgical operation a woman's organs of generation have been removed, or the fact that she is of an advanced age, will not, in the eye of the law, exclude the possibility of further children being born to her.

For the purpose of the rule against perpetuities, section 9 abolishes this unreal presumption of fertility.

10.3 *Comparable legislation.* The relevant Acts of Western Australia, the United Kingdom, New Zealand, Victoria, Queensland, Ontario and Alberta all contain provisions touching the subject-matter of section 9.[3] The provisions differ in matters of detail.

10.4 *The new presumptions: section 9* (3). Section 9 (3) (a) and (b) create new presumptions. So far as males are concerned, the presumption is that if they are under the age of twelve years they cannot beget a child. The Western Australian, Victorian, Queensland and New Zealand Acts proceed on the same premise. But in the United Kingdom, Ontario and Alberta Acts the comparable age for males is fourteen years: the age recommended in 1956 by the Law Reform Committee in England.[4] According to Allan[5]—

> . . . the difference is accounted for, not wholly by any difference in the comparative rates at which children in England and Australia may mature, but also by a suspicion that the English Law Reform Committee may have been a little too complacent about the potentialities of the young.

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[1] See paragraphs 11.3.2 and 11.3.3 where this presumption is considered in some detail.

[2] *Re Fawaz* [1958] V.R. 426, 431.

[3] W.A. Act, s. 102; U.K. Act, s. 2; N.Z. Act, s. 7; Vict. Act, s. 8; Qld Act, s. 212; Qnt. Act, s. 7 and Alb. Act, s. 9.

[4] Law Reform Committee Report (1956) paragraph 13.

[5] Allan (1963-64) p. 49.

In the case of males, we see no good reason for not following the example of the southern hemisphere legislatures already mentioned. So far as females are concerned, in specifying the ages of twelve years and fifty-five years as the minimum and maximum ages for child bearing, section 9 (3) (b) is identical with each of the comparable provisions already mentioned.[6]

10.5 *Section* 9(3) (c). The utility of the presumptions created in section 9 (3) (a) and (b) is much reduced if a person to whom they apply can become a parent by, for example, adoption or some like procedure of a foreign jurisdiction. For this reason, section 9 (3) (c) creates a further presumption that a person will not become a parent of another person, by adoption or otherwise, while the first person is under the age of sixteen years or over the age of fifty-five years. The age of sixteen years is chosen because, in general, an adoption order will not be made in this State in favour of a person who is less than sixteen years older than the person to be adopted.[7] The age of fifty-five years is chosen because, as we understand it, it is only in exceptional circumstances that an adoption order is made in this State in favour of a person over the age of fifty-five years. The presumption created by section 9 (3) (c) is subject to one exception: it does not apply in the case of a child or natural child of the person concerned. In these cases, as we see it, it would be unreal to presume that that person will not become the legal parent of the child or natural child by, for example, legitimation. The Acts mentioned in paragraph 10.3 create a presumption that a person will not, between specified ages, become a parent by legitimation. Our recommendation does not go so far because, as indicated, we believe that a presumption of this kind does not accord with reality where there is, in fact, the relationship of parent and child.

10.6 *When the presumptions apply.* Section 9 (3) and (4) apply where "in relation to the application of the rule against perpetuities to an interest created by a settlement, a question arises which turns on the possibility of a person having a child at a future time". The comparable provisions in the Acts of most other places apply only where the same question arises "in any proceedings". In our view, the application of the section need not be so limited.

10.7 *How the presumptions apply.*[8] Suppose, for the purposes of illustration, that T, by will, makes a gift to the grandchildren of X, a woman, and that on T's death X is aged seventy-five and has four children but no grandchildren. At common law, X would be regarded

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[6] To the best of our knowledge, there is no evidence that the age of puberty in males in New South Wales is significantly different from the age of puberty in males in other States or places or that the age of menarche in this State is significantly different from the age of menarche in other States or places.

[7] Adoption of Children Act, 1965, s. 20.

[8] See Gosse (1966) p. 36.

as capable of having further children. A grandchild could therefore be born outside the perpetuity period. The gift would be void. Under section 9 (3) (b), X is presumed to be incapable of having further children. X's children are treated as lives in being and the gift will vest in time.

10.8 *Section 9* (4).[9] Suppose in the last illustration, that X was aged forty at T's death. Under section 10, the wait-and-see rules would apply until X reached the age of fifty-five, when the section 9 (3) (b) presumption would become operative. There is, however, no reason why an early application, under section 9 (4), could not be made to the Court if evidence is available to show that X is incapable of having further children.

10.9 **Saunders v. Vautier.** The Western Australian and New Zealand equivalents of section 9 apply to the presumptions now being considered not only to cases involving a question whether a disposition infringes the rule against perpetuities, but also to cases involving a determination of the right of any person to put an end to a trust or accumulation under the rule in *Saunders v. Vautier,*[10] and, generally, whenever, in the administration of a trust, estate or fund, or for any purpose relating to the disposition, devolution or transmission of property, it becomes relevant to consider capacity to have children. The comparable provisions of the United Kingdom, Victorian and Queensland Acts do not go so far. The draft Bill[11] embodies our recommendation that in this State we should follow the examples of Western Australia and New Zealand in preference to those of the United Kingdom, Victoria and Queensland. We make this recommendation because, in our view, if, for the purpose of the rule against perpetuities, it is right to presume that in some circumstances a woman is incapable of bearing a child, it is right to make a similar presumption in cases to which the rule in *Saunders* v. *Vautier* applies. Indeed the same presumption should apply to any provision governing the disposition, transmission or devolution of property. The case of *Teague* v. *Trustees, Executors and Agency Co. Ltd*[12] provides a striking instance of the living being kept out of their money by the remote, but legally decisive, possibility of the birth of issue to a woman aged 69.

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[9] *Id.*, pp. 36-37.

[10] (1841) 4 Beav. 115; 49 E.R. 282. The rule permits beneficiaries who are *sui juris* and together absolutely entitled to a fund to terminate an accumulation of income directed for their benefit and to require payment to them of the capital and income. If there is the possibility of another beneficiary, the existing beneficiaries cannot have the benefit of the rule.

[11] Section 23 and Schedule 2. We note, however, that if s. 36E of the Conveyancing Act, 1919, is enacted, s. 9 of the draft Bill may be otiose. This matter may need to be resolved after a decision has been made in relation to presumptions generally

[12] (1923) 32 C.L.R. 252.

10.10 *Children born after judicial decision that birth is impossible.* In the unlikely event that a person has a child after a decision under section 9 (4) to the effect that the person concerned is incapable of begetting or conceiving a child, should the decision remain effective? The Law Reform Committee in England recommended that it should but that if the child has any right to any property that in the event is not itself void for perpetuity, that right (including any right to follow or trace the property) should not be prejudiced by the decision of the Court.[13] This recommendation was followed in Western Australia[14] but not in England, Victoria or Queensland. **In** the last-mentioned places, the Court is empowered to make such order as it thinks fit to place the persons interested in the property comprised in the disposition, so far as may be just, in the position they would have been if the decision touching capacity had not been made. As we see it, the reason for this approach is the possibility that subsequently born children might exercise a right to trace and so disadvantage the persons among whom the property has already been distributed.[15] Section 9 (6) follows the example of the United Kingdom, Victorian and Queensland Acts. It does so because we believe that any problems arising out of the application of section 9 (4) will be better solved by the exercise of a judicial discretion than by the application of a rigid rule which may ill fit the facts of a particular case. Section 9 (7) limits the scope of this proposed discretion: it denies the Court any power to affect adversely the position of a limited class of persons, namely, those who claim as purchasers for value without notice. As we see it, this limitation does not call for justification.

## PART 11—WAIT-AND-SEE

11.1 *Draft Bill—section* 10. Section 10 of the draft Bill provides—

> (1) Where a provision of a settlement which creates an interest would, but for this Act, 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 shall 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 any power or right would, but for this Act, 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 the rule, and the provision shall be treated as infringing the rule only if and so far as the power or right is not fully exercised within the perpetuity period.

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[13] Law Reform Committee Report (1956) paragraph 13.
[14] W.A. Act, s. 102 (4).
[15] See McKay (1965) p. 501.

(3) Subject to subsection (4), this section does not make the life of any person a life in being for the purpose of ascertaining the period within which at common law an interest must vest unless that life would have been reckoned a life in being for that purpose if this section had not been enacted.

(4) Where—

(a) an interest created by a settlement is to be taken by a class of persons or by one or more members of a class; and

(b) the life of any person would be relevant for the purpose of ascertaining the period within which at common law the interest must vest in any member of the class if under the settlement the interest were to be taken by that person alone,

that life may be reckoned a life in being as regards every member of the class.

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

11.2 *The common law.* As indicated in paragraphs 2.3 and 9.2, the rule against perpetuities invalidates any disposition of property which can by any conceivable possibility vest beyond the perpetuity period:[1] "the result is that many perfectly reasonable dispositions are held void because on some outside chance not foreseen by the testator or his draftsman it is mathematically possible that the vesting might occur at too remote a time".[2]

11.3 *The harshness of the common law.* In Part 9, we illustrate the harshness of the common law by reference to cases of the "unborn widow". In this Part, we illustrate the same harshness by reference to the cases of the "magic gravel pits", the "fertile octogenarian" and the "precocious toddler".[3]

(1) *The "magic gravel pits".* T by will gives his gravel pits to trustees upon trust to work them until the pits are exhausted, then to sell them and divide the proceeds among T's issue then living. If the pits are worked at the same rate as in the past then they will be exhausted in four years. In fact, they are exhausted in six years—before the matter came to court.[4] The gift to the issue is too remote. It does not vest until the

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[1] For the exceptions to this statement, see paragraph 9.2 (footnote 1).

[2] Morris and Wade (1964) p. 492.

[3] See, for the terminology, Leach (1952) pp. 45-55 and, for the illustrations, Hogg and Ford (1968) pp. 162-164.

4 *Re Wood* [1894] 2 Ch. 310; 3 Ch. 381.

pits are exhausted. This might take more than a life in being and twenty-one years. If the words "then living" were deleted, the gift to the issue would vest on T's death and there would be no problem.

(2) *The "fertile octogenarian".* T by will gives property to trustees upon trust for his wife for life, then for such of the children of his brothers and sisters who attain twenty-one. At T's death, his father and mother are alive but both are aged sixty-six. He has two brothers and two sisters, of whom the youngest is thirty-two, and several nephews and nieces, of whom the eldest is fourteen.[5] The gift to the nephews and nieces is too remote. In the application of the rule against perpetuities there is, as we noted in Part 10, a conclusive presumption of fertility in respect of any man or woman, however young or however old. T's parents might have a further child after T's death who might outlive the other brothers and sisters and then have a child. Such a child would attain a vested interest more than twenty-one years after any life in being.[6]

(3) *The "precocious toddler".* T by will gives property to trustees upon trust for L for life, then for such of L's grandchildren living at T's death or born within five years thereafter who should attain the age of twenty-one. At T's death L is a widow aged sixty-five; she has two children living and one grandchild aged eight.[7] The gift to L's grandchildren is too remote. L's two children are lives in being, and their children therefore must attain twenty-one within a life in being and twenty-one years. But L might remarry and have another child, who would not be a life in being. That child might marry and have a child within five years of T's death: the child might marry and give birth before it was five years old. The conclusive presumption of fertility is applied twice in this example: to L, a woman aged sixty-five, and to the hypothetical child under the age of five.[8]

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[5] *Ward* v. *Van der Loeff* [1924] A.C. 653.

'This gift would have been saved if one of the nieces and nephews had attained twenty-one at the death of T. In that case, class-closing rules (see paragraph 12.15) would have closed the class at the wife's death when that child (or his estate) would be entitled to call for distribution. In that event, only nephews and nieces who were born in the wife's lifetime would comprise the class. They must attain twenty-one, and a vested interest, within twenty-one years of the wife's death (the wife being a life in being).

[7] ***Re*** *Gaite's Will Trusts* (1949) 65 T.L.R. 194.

[8] In this particular case *(Re Gaite's Will Trusts)* the Court upheld the gift, not because the possibility of the woman and the child having children was fantastic, but because a marriage between persons under sixteen was illegal and void under English law. Therefore it was legally impossible for a child of L, born after Ts death to have a legitimate child within five years of T's death. And only a legitimate child would be a "child" on the true construction of the will. This ground of decision has been generally criticized because it overlooks the possibility that the child might have travelled to a foreign country where the legal age for marriage is less than sixteen, acquired a domicile and married there. It could not be assumed that the marriage would occur in England.

11.4 *Recommendation of the Law Reform Committee.* The Law Reform Committee in England recommended that the validity of a disposition under the rule against perpetuities should depend not on the facts which may occur but on the facts which do occur: the principle should be wait-and-see.[9] Section 3 (1), (2) and (3) of the United Kingdom Act gives effect to this recommendation.

11.5 *Comparable legislation.* The relevant Acts of Western Australia, New Zealand, Victoria, Ontario and Alberta all embody the principle of wait-and-see.[10] American experience is also pertinent. Indeed, the first legislation giving effect to such a rule was the Pennsylvania Estate Act 1947, which provides that interests are valid if "as measured by actual rather than possible events" they vest within the perpetuity period. The Massachusetts Perpetuities Act 1954 achieves substantially the same result. This was followed by a Vermont Statute in 1957 which was copied in Washington in 1959 and Kentucky in 1960.[11]

11.6 *Disadvantages of wait-and-see.* If the wait-and-see rule is adopted in New South Wales, the certainty that is inherent in the present rule will be lost: persons interested under, or entitled on the failure of, a particular disposition will not know their position at the outset; they will have to wait-and-see if the interest in question will in fact vest in due time or not. But, in the words of the Law Reform Committee in England[12]—

> . . . convenience may be too dearly bought, and we do not consider that such inconvenience as may inevitably attend the application of the 'wait and see' principle . . . affords any sufficient justification for avoiding an interest which would otherwise in fact have vested in due time merely because, in events which did not happen, it might not have done so.

We are satisfied that the advantages of wait-and-see outweigh the disadvantages. Section 10 of the draft Bill is a wait-and-see provision.

11.7 *Section 10: general.* Section 10 does not, of course, apply to a disposition which is incapable of vesting outside the perpetuity period. Likewise, it does not apply to a disposition which is incapable of vesting within the perpetuity period: that limitation is still void *ab initio.* The section applies only where a disposition is capable of vesting either within or beyond the perpetuity period: the disposition is not void *ab initio* as at present but continues as presumptively valid until events

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[9] Law Reform Committee Report (1956) paragraphs 17, 23.

[10] W.A. Act, s. 1O3; N.Z. Act, s. 8; Vict. Act, s. 6; Ont. Act, s. 4 and Alb. Act, s. 4.

[11] See McKay (1965) p. 489.

[12] Law Reform Committee Report (1956) paragraph 23.

resolve the uncertainty. As soon as events show that the disposition can never vest within the perpetuity period it becomes void. And, as soon as events show that the disposition can never vest outside the perpetuity period it becomes immune from destruction by the perpetuity rule.[13]

11.8 *Section* 10 (1); *intermediate income, etc.* Section 10 (1) provides, in effect, that a disposition otherwise void is to be treated as valid until it is established that the vesting must occur after the end of the perpetuity period. If it is so established, the validity of any thing previously done in relation to the disposition is not affected. If, for example, a gift carries the intermediate income, then during the wait-and-see period the income goes to the person or class contingently entitled. If the gift does not carry the intermediate income there is no problem. If there is no person or class contingently entitled, the income will be treated as undisposed of.

11.9 *Section* 10 (1); *the Conveyancing Act,* 1919, *and the Trustee Act,* 1925. It can be argued that it is wrong that a disposition which ultimately becomes void because of the rule against perpetuities should nevertheless carry the income to the contingently entitled beneficiary. Yet section 43 of the Trustee Act, 1925, authorizes income to be applied for the benefit of a contingent beneficiary. Furthermore, under the powers conferred by section 44 of the Trustee Act, 1925, up to one half of the capital of some interests to which a beneficiary is contingently entitled may be paid to him, even though in the event his interest never vests. We, in common with the Law Reform Committee in England, do not see why it should be objectionable to apply a similar principle during a wait-and-see period.[14]

11.10 *Section* 10 (1) *and comparable legislation.* The substance of the provision in section 10 (1) dealing with things done in relation to a disposition during wait-and-see is taken from the legislation of the United Kingdom, New Zealand, Victoria, Queensland, Ontario and Alberta.[15]

11.11 *Other approaches to intermediate income.* The problem of what to do with intermediate income during the wait-and-see period was carefully examined by the Law Reform Committee in England.[16] We do not discuss the alternatives that the Committee considered and rejected. It is, we believe, sufficient to say that the difficulties inherent in each alternative do not arise under section 10 (1).

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[13] See McKay (1965) p. 494.

[14] See Law Reform Committee Report 1956) paragraph 22.

[15] U.K. Act, s. 3 (1); N.Z. Act, s. 8 (1); Vict. Act, s. 6 (1); Old Act, s. 210 (1); Ont. Act, s. 5 (2) and Alb. Act, s. 12.

[16] Law Reform Committee Report (1956) paragraphs 20-22.

11.12 *Section* 10 (2): *general powers of appointment.* Section 10 (2) applies the wait-and-see principle to, amongst other things, the validity of general powers of appointment. As Morris and Wade note[17] —

> At common law, general powers are seldom too remote, because they are valid if they could be exercised within the perpetuity period, even if they could also be exercised outside the period. But sometimes a general power is invalid at common law because the donee may not be ascertainable within the perpetuity period, e.g., when he is the survivor of a class of unborn persons;[18] or because the power is not exercisable until the happening of an event which may not happen within the period, e.g., the general failure of the issue of a marriage,[19] or the marriage of an unborn person.[20]

Section 14 (2) takes care of these rare situations. It provides that the power shall be treated as valid until such time (if any) as it becomes established that it will not be exercisable within the period.

11.13 *Section* 10 (2): *rights.* Section 10 (2) also applies the wait-and-see principle to "an interest consisting of the conferring of any . . . right". It provides that the interest shall be treated as regards any exercise of the right within the perpetuity period as if it were not subject to the rule against perpetuities and shall be treated as invalid as infringing that rule only if, and so far as, the right is not fully exercised within that period. Thus, for example, special powers of appointment will be valid if and so far as they are exercised within the perpetuity period, and appointments made under discretionary trusts will be valid if and so far as they are made within the perpetuity period.[21]

11.14 *Section* 10 (1) *and* (2). There may possibly be some overlap between subsections (1) and (2) and some difficulty in determining into which subsection certain dispositions properly fall. But even where the same disposition is caught by both subsections the result will be the same.

11.15 *Section* 10 (3): *ascertaining the lives in being.* A subject of controversy among writers on the rule against perpetuities is whether adoption of wait-and-see calls for any modification of the rules concerning "lives in being" and, if so, to what extent.[22] Section 10 (4) expresses our conclusion that legislation in this State should proceed on the presumption that adoption of wait-and-see does not necessarily call for a statutory definition of "lives in being"

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[17] Morris and Wade (1964) p. 494.

[18] *Re Hargreaves* (1890) 43 Ch.D. 401.

[19] *MGristaw* v. *Boothby* (1826) 2 S. & St. 465; 57 **E.R.** 424.

[20] *Morgan* \. *Gronow* (1873) L.R. 16 Eq. 1.

[21] See Morris and Wade (1964) pp. 494-495.

[22] See Allan (1963-64) pp. 43-46; Simes (1963-64) pp. 22-25; Morris and Wade (1964) pp. 496-501; Allan (1965) pp. 106-115 and Maudsley (1970) pp. 357-378.

11.16 *Section* 10 (3): *comparable legislation.* Section 10 (3) has counterparts in the legislation of Western Australia, Victoria and Queensland.[23] On the other hand, the comparable legislation in the United Kingdom and New Zealand presumes that for the purposes of wait-and-see it is necessary to define "lives in being".[24] In Ontario and Alberta, another approach has been adopted. There the relevant provision "operates negatively to exclude a great many lives which might otherwise cause difficulty in the application of the 'wait and see' principle".[25]

11.17 *Section* 10 (3): *justification.* We follow the examples of Western Australia, Victoria and Queensland for the single reason that unless we see real advantages in an independent approach, we prefer an approach that may lead to uniformity in Australian legislation. In this instance, the experts in the field are so divided in their views that we cannot be convinced that any real advantages are to be gained by our recommending an independent approach. Moreover, the alternative approach of enumerating "lives in being" for the purpose of wait-and-see is not without its own particular hazards: the risks must be taken of excluding too many lives and of not including enough.[26]

11.18 *Section* 10 (4): *class gifts—general.* We consider the rule against perpetuities in relation to class gifts in Part 12 where we comment on section 11 (reduction of age and exclusion of class members). For present purposes, it is sufficient to make the broad statement that the rule requires all potential members of a class to take vested interests within the perpetuity period. The possibility that the share of any member might vest beyond the perpetuity period invalidates the gift for all: even for those whose shares could only vest within the period. Section 11 abolishes this rule that a clear gift cannot be partly good and partly bad. It does not by excluding those members of the class who do not attain vested interests within the perpetuity period.

11.19 *Section* 10 (4): *objective.* Section 10 (4) will, in some cases, operate to extend the time within which members of a class can attain a vested interest. To this extent it complements section 11. The substance of the subsection is taken from the proviso to section 6 (4) of the Victorian Act. In proposing the provision, the subcommittee of the Victorian Chief Justice's Law Reform Committee said[27]—

> The proviso however is new and is to make it clear that in the case of class gifts lives may count as 'lives in being' under the rule [against perpetuities] if relevant to the vesting of the disposition in any, although not all, of the potential members of the class.

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[23] W.A. Act, s. 103 (3); Vict. Act, s. 6 (4) and Qld Act, s. 210 (4).
[24] U.K. Act, s. 3 (4) and N.Z. Act, s. 8 (4) and (5).
[25] Ontario Report (1966) p. 3.
[26] See Morris and Wade (1964) pp. 501-508.
[27] Victorian Report (1966)—Notes on Sections, p. 2.

The subcommittee speaks of the operation of the proviso as follows[28]—

> A gift 'to the first child of A to marry'. At date of the gift A is alive and has one child, not married. As the first of his children to marry might be an unborn child—apart from the proviso A alone could be reckoned a life in being. The living child could not, and the gift would fail if it vested more than twenty-one years after A's death even if vesting within the lifetime of A's child living at the date of the disposition. By reason of the proviso A's living child may be reckoned a life in being, or again take a gift to A's grandchildren 'who attain twenty-one'. A's own children living at the date of the disposition, assuming that they then have no children aged twenty-one and that A is alive could not, apart from this proviso, be taken as lives in being because some if not all of the grandchildren might be children of children of A not yet born. Under the proviso A's living children would be reckoned lives in being and all grandchildren qualifying within twenty-one years of their deaths would take.

11.20 *Section* 10 (4) *and section* 11. As we see it, section 10 (4) will be of little use in cases where the age-reduction provisions of section 11 will prevent a gift from failing. To illustrate:[29] T devises Blackacre to the children of A who shall attain twenty-five (at Ts death, A is alive and has two children, X and Y, who are aged one and two respectively). The gift fails at common law because the children of A might attain twenty-five more than twenty-one years after A's death. At common law, all A's children, including any born after Ts death, must be able to reach the required age within the perpetuity period: the gift cannot be valid for some children and not for others. It makes no difference whether X and Y are counted as measuring lives for they are members of a class to which others, yet unborn, might be added. But with wait-and-see and by allowing class gifts to be valid in part (section 11), the lives of X and Y can be used. X and Y are relevant lives in so far as their own particular interests are concerned: if X's gift is to vest, X must live to be twenty-five: the same applies to Y. Consequently, if A dies immediately after T, X's gift will still be valid under the wait-and-see rule and will vest when he attains the age of twenty-five, notwithstanding that twenty-four years must elapse before that event. The lives of X and Y are, however, not relevant factors with respect to the vesting in other children of A who are born after T's death. Suppose A has a third child, Z, who is born two years after T dies. Z cannot, of course, be a life in being since he was not alive when T died. The lives of X and Y have nothing to do with the vesting of Z's gift. A will be the only life in being so far as Z is concerned. Thus, under wait-and-see, if A dies a year after Z is born, Z's interest

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[28] ***Id.*, p. 3.**

[29] See Gosse (1966) pp. 32-33.

cannot vest in time. But, by virtue of section 10 (4) and wait-and-see, Z's interest will vest in time if he attains twenty-five within twenty-one years after the deaths of A, X or Y. Section 10 (4) therefore brings in additional lives in being in class gifts so that the wait-and-see period may in fact last longer. In this example, the age-reduction provision in section 11 (1) will save Z's interest whether or not X and Y are relevant lives in being. Without the benefit of section 10 (4), the vesting age will be reduced to twenty-two if A dies a year after Z was born. By adding X and Y as lives in being, Z will have to wait until he is twenty-five so long as either X or Y lives until Z is four. Should neither X nor Y live that long, section 11 (1) will still save Z's interest by reducing the vesting age so that it can vest in time. Therefore, as stated, section 10 (4) will be of little use in cases to which the age-reduction provisions of section 11 apply.

11.21 *Section* 10 (4): *utility*. Section 10 (4) will, however, be of significance in cases of class gifts where there is no requirement of age attainment. To illustrate:[30] T devises Blackacre to such of the daughters of A who marry (A is alive at T's death and then has unmarried daughters). In this example, age reduction is irrelevant. But it may be helpful to a daughter bora to A after T's death to be able to use the lives of her sisters born before T's death as lives in being for the purpose of her interest. The wait-and-see period (in terms of years) may well be extended in this way. It will be so extended for whatever period the longest living sister survives her father A.

## PART 12—REDUCTION OF AGE AND EXCLUSION OF CLASS MEMBERS

12.1 *Section* 11. Section 11 of the draft Bill provides—

(1) Where—

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

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

the interest shall, for all purposes, be treated as if, instead of its vesting depending on the attainment by the person of the specified age, its vesting depends on the attainment by the person of the greatest age which, if put in place of the specified age, would escape the infringement.

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[30] I*d.*, pp. 33-34.

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

(3) Where, in relation to an interest created by 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 age so far as is necessary to save the interest from infringing the rule against perpetuities.

(4) Where a provision of a settlement creates an interest which is to be taken by a class of persons and it becomes apparent that the inclusion of 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 subsections (1) or (3) from operating to save the provision from infringing that rule,

then, upon its becoming so apparent, that person shall, unless his exclusion would exhaust the class, be treated in relation to the interest as if he were not a member of the class, and, where subsections (1) and (3) apply, those subsections shall thereupon have effect accordingly.

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

12.2 *Comparable legislation.* Provisions touching reduction of age and exclusion of class members are contained in the comparable Acts of the United Kingdom, New Zealand, Victoria and Queensland.[1]

12.3 *Section* 36 *of the Conveyancing Act,* 1919. Settlors and testators often wish to withhold capital from unborn persons until they attain an age greater than twenty-one. Before the enactment of section 36 of the Conveyancing Act, 1919, wishes of this kind were often frustrated by the rule against perpetuities. In the case of dispositions to which section 36 applies, the severity of the rule is mitigated. The section operates by substituting the age of twenty-one

[1] U.K. Act, *s.* 4; N.Z. Act, s. 9; Vict. Act, s. 9 and Qld Act, s. 213.

years for the age specified in the relevant instrument. Its justification is that most settlors and testators, confronted with a choice between earlier vesting and total invalidity, would prefer the former. This justification exists only if section 36 is used as a last resort. It does not exist if the gift can otherwise be saved.

12.4 *Reduction of age and wait-and-see.* If the wait-and-see principle embodied in section 10 of the draft Bill is adopted, the specified age should, in our view, be reduced not to twenty-one years but to whatever age will save the gift and accord most closely with the wishes of the settlor or testator. In general, a disposition should not be altered more than is necessary to make the gift good. Section 11 (1) is intended to take the place of section 36 of the Conveyancing Act, 1919, which would be repealed upon the enactment of section 21 of the draft Bill.

12.5 *Operation of section* 11 (1). Suppose, for the purposes of illustration, that T, by will, makes a gift to A's children at twenty-five. A survives the testator. If all A's children were in being at T's death, or if they were all over four at A's death, the gift is valid under section 10 and, by virtue of section 12, section 11(1) does not apply. But if A's youngest child was not in being at T's death and was aged two at A's death, section 11 (1) applies and reduces the age for all A's children to twenty-three.[2]

12.6 *Section* 11 (1): *a new approach.* Section 11 (1) differs from the provisions of the perpetuities legislation referred to in paragraph 12.2. The latter operate where, first, an interest depends on the attainment by a person of a specified age exceeding twenty-one years, and, secondly, the provision creating the interest infringes the rule against perpetuities but would not do so if the specified age had been twenty-one years. Section 11 (1), on the other hand, operates where, first, an interest depends on the attainment by a person of any specified age and, secondly, the provision creating the interest infringes the rule but would not do so if the specified age had been a lesser age. If enacted, section 11 (1) will, in some rare cases, allow persons under the age of twenty-one years to acquire a vested interest in property. If, for example, the perpetuity period applicable to a gift to the children of X who attain the age of eighteen years is eighty years and it becomes apparent that Z would take under the gift is the specified age was fifteen years, Z will take under the gift upon attaining the age of fifteen years. We do not believe that this result is wrong. In this State, by virtue of the Minors (Property and Contracts) Act, 1970, persons under the age of eighteen years may, subject to that Act, participate in any act relating to contractual or proprietory rights or obligations which is for their benefit. In its potential application to minors, section 11 (1) is, as we see it, merely an extension of the public policy embodied in the Minors (Property and Contracts) Act, 1970.

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[2] Morris and Wade (1964) p. 509.

12.7 *Section* 11 (2). Section 11 (2) expresses our view that where section 11 (1) operates to accelerate the vesting of an interest, the acceleration should not adversely affect any subsisting interest. If, for example, there is a gift to A of the income of Blackacre for a term of ten years and, by virtue cf the operation of section 11 (1), the remainder vests in B during that term, section 11 (2) will ensure that A receives the income for the balance of the term.

12.8 *Operation of section* 11 (3). Section 11 (3) applies to situations which are not within the application of section 36 of the Conveyancing Act, 1919: for example, a gift to the children of A who being sons attain thirty or being daughters attain twenty-five. Section 11 (3) provides, first, that the reference in section 11 (1) to the specified age shall be construed as a reference to both the specified ages and, secondly, that section 11 (1) shall operate to reduce each age so far as is necessary to prevent an infringement of the rule against perpetuities. Thus, if on the death of A his youngest son, unborn at T's death, is aged eight and his youngest daughter is aged three, section 11 (3) reduces the age to twenty-nine for sons and twenty-four for daughters.[3]

12.9 *Section* 11: *class gifts.* As indicated in paragraphs 3.13 and 11.19, at common law a class gift cannot be partly good and partly bad. If a single member of the class might possibly take a vested interest outside the perpetuity period, the whole gift fails. Moreover the interest of a member of a class is not regarded as vested until both the maximum and minimum size of his share is ascertained. In other words, a class gift is not vested in any member until the interests of all members have vested. We agree with Morris and Wade that this rule is undoubtedly harsh in its operation.[4] The class closing rule, often called the rule in *Andrews v. Partington,*[5] sometimes modifies the harshness of this aspect of the rule against perpetuities by artificially closing the class within the perpetuity period. The class closing rule does not, however, always have this effect because, even where it applies, it is directed more at discovering a date for distribution than at saving the gift from the rule against perpetuities.[6] The Law Reform Committee in England recommended that no class gift should be invalidated by the failure of a limitation to some only of the members of a class and that the limitation should be construed and take effect as a limitation only to those members of the class who comply with the perpetuity rule.[7] The legislative provisions referred to in paragraph 12.2 are intended to implement these recommendations: section 11 (4) seeks to do the same.

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[3] *Id.,* p. 510.
[4] *lbid.*
5 (1791) 3 Bro. C.C. 404; 29 E.R. 610.
[6] See Allan (1963-64) p. 56.
7 Law Reform Committee Report (1956) paragraph 25.

12.10 *Section* 11 (4): *operation.* Section 11 (4) is intended 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, secondly, 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. In this case the gift is to be validated by, in effect, construing it as excluding the potential class members, unless that would exhaust the whole class. To illustrate: 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 section 10, 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 by section 11 (4). 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 in accordance with section 11 (1) and (3) 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. To illustrate: T gives property to A for life and then to such of A's children as shall attain twenty-five and the children of such of them as shall die under twenty-five leaving children who shall attain twenty-five, 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,[8] unless saved by wait-and-see. If not so saved, the grandchildren will be excluded by section 11 (4) and the ages of the children will be reduced so far as is necessary by section 11 (1).[9]

12.11 *Section* 11 (5). Under section 11 (5), where there is a disposition to which the wait-and-see rule applies, the validity of any advancement of capital or application of intermediate income during the wait-and-see period is not affected by the operation of section 11. Hence, if members of a class are excluded after the operation of wait-and-see has failed to include them, any advancement of capital or application of income to the excluded potential class members is valid.

12.12 *Section* 11 *and wait-and-see.* The inter-relation between age-reduction and wait-and-see was considered by the Law Reform Committee in England.[10] The majority view was that age-reduction should be made before wait-and-see was applied. 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 disposition should be reformed so as to refer to that age which would, if it had been specified instead, have prevented the gift from failing.

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[8] *Pearks v. Moseley* (1880) 5 App. Cas. 714.
[9] Morris and Wade (1964) pp. 512-513.
[10] See Report of the Law Reform Committee (1956) paragraph 27.

12.13 *The majority view.* The majority put the example of a pecuniary legacy to be divided among the children of X at thirty where thirty-five years later X died leaving children aged twenty-five, sixteen and eight. It would then be known that the youngest could not attain the age of thirty within twenty-one years of a life in being. The eldest child would then find out that he should have attained a vested interest four years previously. Accordingly, the majority recommended that age contingencies should be reduced first.

12.14 *The minority view.* The minority preferred to wait-and-see, because the reduction of invalid age contingencies involved an interference with a testator's wishes, usually legitimate, that property interests should not vest at twenty-one. Moreover, the reduction of age contingencies would alter the class by enlarging it to include persons whom the testator did not intend to take, thereby diminishing the shares of the others. They challenged the example put by the majority, pointing out that it was not true to say that the eldest child would find that he had attained a vested interest four years previously, as he attained a vested interest only by attaining the age of thirty or by the operation of the section reducing the age contingencies. There was therefore no element of retrospectivity or administrative inconvenience. The minority put forward an example of their own: "to A for life and then to his children at twenty-five". If A's youngest child was over four at A's death, there would be no need to reduce the age contingency as the gift must vest within the perpetuity period, if at all, and so could then be declared valid under wait-and-see. It is doubtful, they argue, whether the testator would have preferred the earlier vesting when he might have had the one he stipulated. It is true that it would be uncertain during A's lifetime whether his children would take at twenty-one or twenty-five, but there would be little inconvenience in that.

12.15 *The prevailing view.* The minority view is reflected in each of the legislative provisions referred to in paragraph 12.2 and also in section 11 of the draft Bill.

12.16 *Section* 11 *and* Andrews *v.* Partington. In paragraph 12.9, we mention a rule of construction for the closing of classes. Megarry and Wade write of the rule as follows[11] —

> For the sake of convenience the courts have laid down the rule, often called the Rule in *Andrews* v. *Partington,*[12] that a numerically uncertain class of beneficiaries normally closes when the first member becomes entitled to claim his share. If this

[11] (1975) p. 231 and see, generally, Morris and Leach (1962) pp. 109-125.
[12] (791) 3 Bro.C.C. 401; 29 E.R. 610.

were not so, it would be impossible to give him his portion without waiting until there could be no more members of the class. Therefore the settlor is presumed to have intended that the class should close as soon as the first share vests in possession,[13] no one born subsequently can enter the class, but any potential member of it already born is included. Thus by closing the class against those born later, the maximum number of shares is fixed and the first taker can receive his share.[14]

Shordy stated, the effect of the draft Bill on the rule in *Andrews v. Partington* is as follows[15]—

(1) The rule itself remains unaltered.

(2) Where a class is closed under the rule, a person born after the closing and who would otherwise have been entitled to be a member of the class remains excluded from the class even though that person is born within the perpetuity period.

(3) Where a class is closed under the rule and the disposition is still void because the interest of someone in the closed class might vest outside the perpetuity period, wait-and-see will apply and the draft Bill may save the gift. To illustrate: T, by will, makes a gift to such of X's grandchildren as attain thirty. X and one grandchild, aged twenty-five, are alive at T's death. That grandchild subsequently attains thirty and at that time the class closes. But, between Ts death and the date of closing another grandchild might have been born. Since the interest of this possible second grandchild might have vested outside the perpetuity period the whole gift was void at common law. Under the draft Bill, the wait-and-see rule is applied. We wait-and-see whether another grandchild is born after Ts death and before the class closes. If no such grandchild is born by the time the class closed, the gift will be good. If such a grandchild is born, we will have to continue our wait-and-see; to determine whether that grandchild's interest must vest within the perpetuity period. If actual events show that his interest must so vest, the limitation will, of course, be good. If, however, it is not possible for his interest to vest in time, then section 11 will apply and the age requirement will be reduced so that the interest can vest in time. Then, of course, the grandchild will have to reach the reduced age before he will be entitled to take his share of the gift. Thus, the draft Bill may save a limitation under which a gift is made to a class and that class has been closed under the class closing rules, but not closed in such a way as to prevent the gift from being too remote.

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[13] *Barrington* v. *Tristram* (1801) 6 Ves. 345, 348; 31 E.R. 1085, 1087.

[14] If any other potential member of the class dies without having become entitled, those who do become entitled will receive accrued shares in addition.

[15] See Gosse (1965) pp. 41-45.

## PART 13—ORDER OF APPLICATION OF REMEDIAL PROVISIONS

13.1 *Draft Bill—section* 12. Section 12 of the draft Bill provides—

> The following provisions shall be applied in the following order:
>
> (a) section 9;
>
> (b) section 10 (1) and (2);
>
> (c) section 11 (1) and (3); and
>
> (d) section 11 (4).

13.2 *Section* 12: *removal of doubts*. Section 12 makes clear the order in which the remedial provisions of the Bill are to be applied (no problems should arise under section 8 because the "unborn spouse" is made a life in being). To us, it seems right that section 9 (parenthood: presumptions) should be applied wherever the circumstances so require. And, in paragraphs 12.12-12.15, we looked at the inter-relation between section 10 (wait-and-see) and section 11 (reduction of age and exclusion of class members) and concluded that section 10 (1) and (2) should be applied before section 11. In the event, section 12 is intended merely to remove any doubts about the order in which these remedial provisions are to be used.

## PART 14—ADMINISTRATIVE POWERS AND REMUNERATION OF TRUSTEES

14.1 *Drait Bill—sections* 13 *and* 14. Sections 13 and 14 of the draft Bill provide—

> 13. (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, except 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 shall 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, and to any exercise of the power, taking effect either before or after the commencement of this Act.
>
> 14. (1) The rule against perpetuities shall not invalidate a power or other provision for remunerating a trustee for his services.

(2) This section applies to a power or other provision for remunerating a trustee taking effect either before or after the commencement of this Act.

(3) This section does not affect any rights arising under a judgment or order which has taken effect before the commencement of this Act or arising under any agreement made before the commencement of this Act.

14.2 *Comparable legislation.* Provisions to the effect of sections 13 and 14 are contained in the relevant Acts of the United Kingdom, New Zealand, Victoria, Queensland, Ontario and Alberta.[1] These provisions stem from recommendations made by the Law Reform Committee in England. The Committee said[2]—

> Another field in which the operation of the rule [against perpetuities] 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. We feel that this is an instance of the rule acting (to use a phrase uttered by Lord Mersey in another context) 'like an unruly dog, which, if not securely chained to its own kennel, is prone to wander into places where it ought not to be'. The basic object of the rule is to restrict within due limits the tying up of property. A power to sell, lease or otherwise deal with the property facilitates the disposition of property, and to invalidate such a power restricts rather than assists a policy of free alienability. 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. We do not suggest that any change should be made in powers which affect the beneficial interests under the trust, such as powers of advancement or the exercise of the powers of distribution given under a discretionary trust; nor of course are we here concerned with powers of appointment. But if and so far as the powers or provisions are merely administrative and the trusts to which they are ancillary are still valid and subsisting, we think they should be immune from the perpetuity rule, and we so recommend. Such legislation, we may add, has already been enacted in another part of the Commonwealth: see section 27A of the Trustee Act, 1925, of New South Wales, added by the Trustee (Amendment) Act, 1929.

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[1] U.K. Act, s. 8; N.Z. Act, s. 16; Vict. Act, s. 14; Qld Act, s. 220; Ont. Act, s. 12 and Alb. Act, s. 15.

[2] Law Reform Committee Report (1956) paragraph 34.

14.3 *Section* 13. Section 13 is intended to replace section 27A of the Trustee Act, 1925. The last mentioned section will be repealed upon any enactment of section 21 of the draft Bill. We propose the repeal and, in effect, the re-enactment of section 27A because legislative provisions touching the rule against perpetuities should, wherever possible, be found in the one Act. Section 13 of the draft Bill is, however, more extensive in its scope than section 27A of the Trustee Act, 1925: it applies to any administrative power of a trustee, not only powers to sell, lease or exchange property. Section 13 does, however, accord with the recommendation noted in paragraph 14.2.

14.4 *Section* 14. Section 14 gives legislative expression to the recommendation relating to the remuneration of trustees also noted in paragraph 14.2.

## PART 15—SUPERANNUATION FUNDS

15.1 *Draft Bill—section* 15. Section 15 of the draft Bill provides—

(1) The rule against perpetuities shall not invalidate—

(a) any settlement for the purpose of making provision by way of superannuation benefits or death benefits or both for the directors, officers, servants or employees of any employer or the spouses, children, grandchildren, parents, dependants or legal personal representatives of any such directors, officers, servants or employees or for any persons duly selected or nominated for that purpose by any such directors, officers, servants or employees pursuant to the provisions of the settlement; or

(b) any settlement for the purpose of making provision by way of superannuation benefits or death benefits or both for persons (not being employees) engaged in any lawful profession, trade, occupation or calling or the spouses, children, grandchildren, parents, dependants or legal personal representatives of any of those persons or for any persons duly selected or nominated for that purpose by any of the first-mentioned persons pursuant to the provisions of the settlement.

(2) This section applies to settlements made either before or after the commencement of this Act.

(3) For the purpose of this section, "benefits" includes assistance, allowances, gratuities and pensions.

15.2 *Comparable legislation.* In England, since 1927, the rule against perpetuities has not applied to trusts or funds the main purpose of which is, in broad terms, the provision of superannuation.[1] Provisions substantially to the same effect are contained in the perpetuities legislation of Western Australia, New Zealand, Victoria and Queensland.[2] In New South Wales, the Companies Act, 1936, provided and the Companies Act, 1961, provides that the rule against perpetuities: "shall not apply and shall be deemed never to have applied to the trusts of any fund or scheme for the benefit of any employee of a company . . ."[3] The Greater Newcastle (Amendment) Act, 1940, exempts the superannuation scheme described in that Act from the application of the rule against perpetuities.

15.3 *Arguments for reform.* The application of the rule against perpetuities to modern superannuation schemes has been considered in some detail by the Statute Law Revision Committee of Victoria. The Committee concluded[4]

> In sum, the Committee concedes that there is much to be said for allowing the same exclusion from the rule against perpetuities for genuine self-employed or non-employed persons' superannuation funds as is enjoyed by employees' schemes. In so doing, the Committee feels that administrative tests or discretions would not be appropriate in dealing with property law principles to determine whether the rule against perpetuities would affect such a scheme. It would be desirable to ensure that the principles should be sufficiently precise to enable a person to know where he stands at the outset. The Committee therefore recommends that suitable statutory exemption be given to bona fide self-employed or non-employed superannuation schemes, setting out the principal features of appropriate schemes with all due caution, so as to make a realistic distinction as between genuine schemes and those which are not a genuine attempt to make provision for the future by way of a trust or fund closely allied to the accepted superannuation schemes. In this regard, the attention of Honourable Members is directed to section 19 of the Western Australian Law Reform (Property, Perpetuities, and Succession) Act, 1962, which may be useful as a guide for adaptation to the circumstances prevailing in this State.

In the event, the Victorian perpetuities legislation embodied the Committee's recommendation. Section 15 represents our recommendation that legislation in this State should do the same.

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[1] The Superannuation and Other Trust Funds (Validation) Act 1927, s. 1.
[2] W.A. Act, s. 115; N.Z. Act, s. 19; Vict. Act, s. 17 and Qld Act, s. 220.
[3] Companies Act, 1936, s. 346 and Companies Act, 1961, s. 382.
[4] Victorian Report (1968) paragraph 25.

## PART 16—DETERMINABLE INTERESTS

16.1 *Draft Bill—section* 16. Section 16 of the draft Bill provides—

(1) Subject to subsection (4), this section applies to an interest created by a settlement where the interest is, by a provision of the settlement, determinable on a contingency, and in this section that interest is called the particular interest.

(2) Subject to subsection (4), the rule against perpetuities shall apply to render invalid the provision for determination of the particular interest in like manner as the rule would apply to render invalid a condition subsequent in the settlement for defeasance of the particular interest on the same contingency, to the intent that, where the rule does so apply—

(a) the particular 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 particular interest to have effect free of the provision for determination.

(3) For the purposes of this section—

(a) an interest created by, or a provision in, an appointment or other exercise of a power in a settlement (but not a general power of appointment) shall be treated as an interest created by, or a provision in, the settlement; and

(b) "subsequent interest" means an interest—

(i) created by the settlement, or remaining undisposed of by the settlement, or which takes effect by reverter on a possibility arising under the settlement; and

(ii) as regards which the particular interest is a prior interest,

whether the subsequent interest is vested or contingent, and whether it arises or takes effect by way of reverter, resulting trust, residuary gift, gift over or otherwise.

(4) The rule against perpetuities shall not apply to a gift over from one charity to another.

16.2 *Comparable legislation.* Provisions touching the application of the rule against perpetuities to possibilities of reverter, resulting trusts of personalty and rights of entry for breach of conditions subsequent are included in the perpetuities legislation of Western Australia, United Kingdom, New Zealand, Victoria, Queensland, Ontario and Alberta.[1] Section 16 is concerned with like questions and, in general, it proposes like answers. Its expression is, however, different from that used elsewhere.

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[1]W.A. Act, s. 1ll (1); U.K. Act, s. 12; N.Z. Act, s. 18; Vict. Act, ». 16; Qld Act, s. 219; Ont. Act, s. 15 and Alb. Act, s. 19.

16.3 *Possibilities of reverter.* A possibility of reverter is an interest that remains in a grantor or testator after he has conveyed or devised land by way of a fee simple determinable. A disposition, for example, to A and his heirs until B marries gives rise to a possibility of reverter: B may marry. And a disposition of land to the X church for so long as the land is used for church purposes gives rise to a like possibility: the premises may cease to be used for church purposes. Despite a decision of the Chancery Court of Lancaster to the contrary,[2] it seems that a possibility of reverter is not subject to the rule against perpetuities.[3] But, as a matter of policy, the Law Reform Committee in England argued that a possibility of reverter should be subject to the rule.[4] In effect, the Committee said that the indefinite duration of such a possibility is an inconvenience with little compensating utility: 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. We agree. Section 16 (2) provides, in effect, that possibilities of reverter shall be subject to the rule against perpetuities as modified by the Bill.

16.4 *Resulting trusts analogous to possibilities of reverter.* If T leaves a fund to a charitable[5] or non-charitable[6] body so long as a certain state of affairs continues to exist, he retains a valid interest in the fund which will form part of his 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. The equitable doctrine is that any beneficial interest of which T fails to dispose remains in him under a resulting trust and that this interest is vested *ab initio* even if it is uncertain when, if ever, it will become effective.[7] 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.[8] We, in common with the Law Reform Committee in England,[9] do not see that subjecting resulting trusts of this kind to the perpetuities rule will create any real hardship: they arise mainly in situations where the maintenance of a tomb or monument is required and there are other ways of achieving this object.[10] Hence section 16 (2) provides, in effect, that these interests shall be subject to the rule against perpetuities as modified by the Bill.

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[2] *Hopper v. The Corporation of Liverpool* (1944) 88 SolJ. 213.
[3] See Megarry and Wade (1975) pp. 245-246.
[4] Law Reform Committee Report (1956) paragraph 20.
[5] *Re Randell* (1888) 38 Ch.D. 213; *Re Blunfs Trusts* [1904] 2 Ch. 767.
[6] *Re Chardon* [1928] Ch. 464.
[7] See Megarry and Wade (1975) p. 245.
[8] See Law Reform Committee Report (1956) paragraph 41.
[9] *Ibid.*
[10] See *Re Tyler* [1891] 3 Ch. 252.

16.5 *Rights of entry for breach of condition subsequent.* A gift, for example, of land to trustees in fee simple "on condition that it shall always be used for the purposes of a hospital only" does not create a determinable fee simple giving rise to a possibility of reverter: it creates a fee simple defeasible on breach of a condition subsequent. If the condition infringes the perpetuity rule, the right of entry for condition broken is, according to English cases,[11] void. But the interest which it was intended to defeat is not invalidated: it becomes an absolute interest free of the condition.[12]

16.6 *Section* 16 (2). Section 16 (2) provides, in effect, that the rule against perpetuities shall apply in relation to a provision in a settlement which causes an interest to be determinable as it would apply if that provision were expressed in the form of a condition subsequent giving rise, on breach of the condition, to a right of re-entry. For practical purposes, the effect of section 16 (2) is that possibilities of reverter and analogous interests in personalty are to be as much subject to the rule against perpetuities as rights of entry for condition broken.[13] Where a possibility of reverter is created, it will remain valid for eighty years or if, under section 7 (2), the common law perpetuity period is applicable and there are no relevant lives in being, for twenty-one years: thereafter the fee simple will be absolute and indefeasible. By virtue of section 3, section 16 (2) will apply only to determinable interests which came into existence after the commencement of an Act based upon the Bill.

16.7 *Section* 16 (4). Section 16 (4) preserves the rule in *Christ's Hospital v. Grainger*[14] whereby the rule against perpetuities does not apply to a gift over from one charity to another.[15]

16.8 *A Canadian alternative.* In their application to determinable interests, the Perpetuities Acts of Ontario and Alberta are different from section 16 and from the other comparable Acts referred to in paragraph 16.2. The Ontario Acts has, for section 16 cases, an intricate provision fixing twenty-one years as the period but where there are relevant lives, the maximum period is those lives plus twenty-one years, or forty years, whichever is the lesser. The Alberta Act, for like cases, specifies a perpetuity period of forty years. We do not see that any special benefits would be gained from following the Canadian examples in New South Wales and hence section 16 is drafted in its present form.

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[11] For example, *Re Da Costa* [1912] 1 Ch. 337. Dicta in Australian cases are to the same effect: *Williams* v. *Perpetual Trustee Co.* (1913) 17 C.L.R. 469, 485, 495 and *Will of Brett* [1947] V.L.R. 483, 488.

[12] Si/ton v. *Sifton* [1938] A.C. 656, 677.

[13] See Morris and Wade (1964) pp. 526-527.

[14] (1849) 1 Mac. & G. 460; 41 E.R. 1343.

[15] The rule is preserved in spite of the doubts which may have been cast on its validity by Dixon. *C.J.* in *R.S.P.C.A. of New South Wales* v. *Benevolent Society of New South Wales* (1959) 102 C.L.R. 629, 641.

## PART 17—OPTIONS

17.1 *Draft Bill—section* 17. Section 17 of the draft Bill provides—

> The rule against perpetuities shall not apply to—
>
> (a) any option to renew a lease of property;
>
> (b) any option to acquire a reversionary interest in property comprised in a lease;
>
> (c) any right of pre-emption given for valuable consideration in respect of property; and
>
> (d) any option given for valuable consideration to acquire an interest in property.

17.2 *Comparable legislation.* In varying terms, the application of the rule against perpetuities to options is specifically provided for in the relevant Acts of Western Australia, the United Kingdom, New Zealand, Victoria, Queensland, Ontario and Alberta.[1]

17.3 *The common law: contracts creating rights of property.* Although the rule against perpetuities is not concerned with contracts as such,[2] where a contract creates a right of property to arise in the future, the rule applies to the creation of that right of property,[3] but not to the personal obligations flowing from the contract.[4] And where, under a contract, an equitable estate or interest is to arise in the future that estate or interest is also within the rule.[5] H*alsbury's Laws of England* states the position as follows[6]—

> A contract relating to a right of or equitable interest in property *in futuro* may be intended to create a limitation of land only, in which case, if the limitation is to take effect beyond the perpetuity period, the contract is wholly void and unenforceable; or the contract may, upon its true construction, be a personal contract only, in which case the rule does not apply to it; or it may, upon its true construction, be, as regards the original covenantor, both a personal contract and a contract

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[1] W.A. Act, s. 110; U.K. Act, s. 9; N.Z. Act, s. 17; Vict. Act, s. 15; Qld Act, s. 218; Ont. Act, s. 13 and Alb. Act, s. 17.

[2] *Walsh* v. *Secretary of State for India* (1863) 10 H.L. Cas. 367; 11 E.R. 1068.

[3] *London and South Western Railway Co.* v. *Gomm* (1882) 20 Ch.D. 562, 576, 582; *Hutton* v. *Watling* [1948] Ch. 26, 36; and *Trustees Executors and Agency Co. Ltd.* v. *Peters* (1960) 102 C.L.R. 537.

[4] *Worthing Corporation* v. *Heather* [1906] 2 Ch. 532, 538-540.

[5] *London and South Western Railway Co.* v. *Gomm* (1882) 20 Ch.D. 562, 582.

[6] (3rd edn.) Vol. 29, pp. 297-298.

attempting to create a remote limitation. In the last-mentioned case the limitation will be had for perpetuity, but the personal contract will be enforceable, if the case otherwise admits, against the promisor by specific performance or by damages, or against his personal representatives in damages, or possibly by specific performance. Unless, however, the burden of the contract runs with the land, it will not be enforceable against an assign of the promisor. In all cases it is a question of construction whether the contract is intended to create a limitation of property only, or a personal obligation only, or both.

17.4 *The common law: options to purchase.* An option to purchase is subject to the rules stated in paragraph 17.3. If unlimited in tune, and in so far as it creates an interest in land, the option is void for perpetuity:[7] but in so far as it gives rise to personal rights and liabilities in contract, it may be enforceable to the extent mentioned in the same paragraph.[8] On the other hand, if confined within the perpetuity period, the option is not affected by the rule against perpetuities.

17.5 *The common law: options to renew leases.* Although the rules stated in paragraph 17.4 apply to an option to purchase the reversion given by a lessor to a lessee, they do not apply to an option to renew a lease given by the lessor to the lessee.[9]

17.6 *Centaur-like qualities of options.* One result of the law relating to options is that an option to purchase may remain valid indefinitely as between the contracting parties (who may be two companies) but as regards third parties it is enforceable only if confined within the perpetuity period. In the words of the Law Reform Committee in England[10]: "Options then have a centaur-like quality which is to some extent incovenient." Morris and Leach demonstrate this inconvenience by reference to two propositions.[11]

(1) If A gives B an option to purchase land which is unlimited as to time, the option can be specifically enforced against A as long as he still owns the land. If A transfers the land to C, the option cannot be specifically enforced against C. But B can collect damages from A or A's estate.

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[7] *London and South Western Railway Co.* v. *Gomm* (1882) 20 Ch.D. 562.

[8] For the question whether an option to purchase, until it is exercised, is a conditional contract or an offer which the maker is contractually precluded or restricted from withdrawing, see, generally, *Westminster Estates Pty Ltd* v. *Calleja* [1970] 1 N.S.W.R. 526, 530-1.

[9] *Weg Motors Ltd v. Hales* [1961] Ch. 176, 190-191.

[10] Law Reform Committee Report (1956) paragraph 35.

[11] Morris and Leach (1962) p. 226.

(2) If A leases land to B for any term exceeding twenty-one years and gives B an option to purchase the reversion at any time during the term, the same rules apply. That is, the option is specifically enforceable against A as long as A holds the reversion; if A transfers the reversion to C, the option cannot be specifically enforced against C; but A or his estate is liable in damages.

Morris and Leach suggest that the mere statement of these propositions indicates a need for corrective action.

17.7 *Options: terminology.* In considering options to which the rule against perpetuities apply, we are mainly concerned with options contained in leases which enable the lessee for the time being to purchase the freehold (which, for convenience, we call "leasehold options") and other options to acquire an interest in land (which we call "options in gross"). Options to purchase chattels do not, in our view, create any special problems: in general, they are contractual only.

17.8 *Options: policy considerations.* Leasehold options commonly stimulate the development of land: a lessee is encouraged to invest labour and money if he knows that he can secure the fruits of his investment by exercising an option to purchase the reversion. On the other hand, options in gross may inhibit the development of land: unless the option specifies that the price of the land will vary according to its improved value, the landowner, knowing that the option may be exercised at any time, is unlikely to improve the land.

17.9 *The Law Reform Committee (U.K.).* The Law Reform Committee in England recommended that leasehold options should be wholly exempt from the rule against perpetuities but that options in gross which purport to be exercisable for a period exceeding twenty-one years should be valid for twenty-one years and then void, even as between the original parties.[12] With some modifications, these recommendations have been incorporated in the legislative provisions referred to in paragraph 17.2.

17.10 *Alternative approaches.* The Alberta perpetuities legislation departs significantly from the United Kingdom model: for options in gross, the Alberta Act fixes a period of eighty years, not twenty-one years. In New York, as Morris and Leach point out,[13] 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

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[12] Law Reform Committee Report (1956) paragraphs 35-38.

13 (1962) p. 226.

be argued, as Morris and Leach do,[14] 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. We agree. In our view, the rule against perpetuities serves little purpose when applied to arrangements which are essentially of a commercial nature. Section 17 reflects this view.

17.11 *Section* 17 *(d).* In providing that the rule against perpetuities shall not apply to "any option given for valuable consideration to acquire an interest in property", section 17 (d) will affect most options. It will permit the granting of options unlimited in time. The duration of a particular option will turn on the demands of the particular transaction and on the negotiating skills of the persons concerned. We see no harm in this result. The occasions for seeking an option for more than eighty years may be few but, if they arise, the granting of the option should not, in our view, be an invalid act.

17.12 *Section* 17 *(a), (b) and* (c). Section 17 (a), (b) and (c) are directed to particular situations which, in most cases, will come within the general words of section 17 (d). Indeed section 17 (a) is merely a re-statement of the existing law referred to in paragraph 17.5. Section 17 (a) and (b) are included to show that the transactions to which the paragraphs refer are within the scope of our general proposal concerning options.

## PART 18—TRUSTS FOR PURPOSES WHICH ARE NOT CHARITABLE

18.1 *Draft Bill—section* 18. Section 18 of the draft Bill provides—

(1) This section applies to the rule against perpetual trusts.

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

(3) Where, by a settlement, there is a disposition for a purpose, the perpetuity period applicable to the disposition shall, for the purpose of the rule against perpetual trusts, be eighty 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 it must infringe that rule, as if it did not infringe it, and its becoming so certain shall not affect the validity of any thing previously done in relation to the disposition.

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[14](1962) pp. 224-226.

*(5)* Where—

(a) by a settlement there is a disposition for a purpose until the happening of a future event, whether certain or uncertain; and

(b) the rule against perpetuities would not render invalid a provision in the settlement creating an interest vesting on the happening of the same event,

the rule against perpetual trusts shall not render the disposition invalid.

(6) Subsection (6) applies whether the property the subject of the disposition passes on the happening of the future event by way of reverter, resulting trusts, residuary gift or otherwise.

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

18.2 *Comparable legislation.* Provisions touching trusts for purposes which are not charitable are contained in the perpetuities legislation of the United Kingdom, New Zealand, Victoria, Queensland, Ontario and Alberta.[1]

18.3 *Non-charitable purpose trusts*[2] *A* trust is usually void if it is not for the benefit of an individual or of a charity.[3] The courts do, however, recognize some exceptions to this general rule.[4] The most important of the exceptions are trusts for the erection of monuments or graves, trusts for the maintenance of particular animals and trusts for the benefit of unincorporated associations.[5] Trusts of this kind are often called "non-charitable purpose trusts".

18.4 *Non-charitable purpose trusts and the rule against perpetuities.* The ordinary rule against perpetuities cannot prevent property subject to a trust for a purpose which is not charitable from being tied up indefinitely. This is so because there are no individual beneficiaries *in* whom successive interests are to vest. 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, as it is sometimes called. Under this rule, a trust for a purpose which is not charitable lasting longer than the perpetuity period is void, if by the

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[1] U.K. Act, s 15 (4); N.Z. Act, s. 20; Vict Act s. 18; Qld Act, s. 221; Ont. Act, s 16 and Alb. Act, s. 20.

[2] See, generally, Morris and Leach (1962) Chapter 12.

[3] See *Re Astor's Settlement* [1952] Ch. 534, 547; *Re Shaw* [1957] 1 W.L.R. 729, 745 and *Re Endacott* [1960] Ch. 232.

[4] See *Re Endacott* [1960] Ch. 232, 246 and 250-251.

[5] See, generally, Morris and Leach (1962) pp. 310-319 and *Re Denley's Trust Deed* [1969] 1 Ch. 373.

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.[6] For the purposes of this rule the perpetuity period is the same as in the rule against perpetuities.[7] Accordingly in this Part we treat "perpetuity" as meaning not only an interest which may vest at too remote a time but also a trust for a purpose not being charitable which may last too long.[8]

18.5 *The rule against perpetual trusts and the courts.* If a testator uses words such as "so long as the law allows" or "so long as my trustee can legally do so" the courts will uphold a trust for a purpose which is not charitable even though no definite period is fixed for the duration of the trust.[9] But if the testator goes on to define what he means by the words and transgresses the perpetuity period the trust will fail.[10] As most testators are trying to do only what is legally possible the validity of trusts for purposes which are not charitable should not, in our view, have to depend upon the use of a correct verbal formula. As we see it, these trusts should be valid for the perpetuity period even though necessary words are missing. Most testators would prefer validity for the perpetuity period to total invalidity.

18.6 *Section* 18 (3). Section 18 (3) 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. But because section 7(1) specifies a perpetuity period of eighty years for the rule against perpetuities, section 18 (3) also specifies a perpetuity period of eighty years for the rule against perpetual trusts. Unlike section 7 (2), section 18 does not provide for an alternative period fixed by reference to lives in being. In this context, we doubt that the provision of an alternative period would serve any useful purpose. Indeed if a settlor wants a trust for the maintenance of a tomb to be valid for an indefinite time, he may achieve his objective by using the rule in *Christ's Hospital* v. *Grainger.*[11] If this is done, no perpetuity period has any relevance. In the case of trusts for the maintenance of particular animals, a perpetuity period fixed by reference to a human life in being seems less appropriate than one fixed by reference to a definite term of years. And, in our view, the same comment applies to trusts for unincorporated associations.

18.7 *Section* 18 (4). Section 18 (4) introduces a wait-and-see into the law of perpetual trusts similar to the wait-and-see rule which section 10 (1) introduces into the law of perpetuities. If that rule is a beneficial addition to the law of perpetuities a like rule should, for reasons of the kind considered in Part 11 of this report, be a beneficial addition to the law of perpetual trusts.

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[6] See Allan (1963-64) p. 73.
[7] Morris and Leach (1962) p. 321.
[8] *Id.,* 326 and see Megarry and Wade (1975) pp. 267-269
[9] *Re Hooper* [1932] 1 Ch. 38.
[10] *Re Moore* [1901] 1 Ch. 936.
[11] (1849) 1 Mac & G. 460; 41 E.R. 1343.

18.8 *Section* 18 (5). Suppose, for the purpose of illustration, that a settlement provides for a gift for a purpose which is not charitable until the happening of a particular future event and for a gift over to X vesting upon the happening of that event. Suppose top that for the purpose of the rule against perpetuities the perpetuity period applicable to the gift over is, by virtue of an election under section 7 (2) of the draft Bill, the common law period. Suppose further that the event in question happens 90 years after the date of the gift and it is then clear, in consequence of waiting and seeing under section 10, that the rule against perpetuities does not invalidate the gift over. In circumtances of this kind, and notwithstanding section 18 (3), section 18 (5) will, in effect, for the purposes of the rule against perpetual trusts, extend the perpetuity period from 80 to 90 years. It is unlikely that section 18 (5) will apply to many settlements, but in the rare cases to which it will apply, it should, in our view, produce a just result.

## PART 19—DEPENDENT DISPOSITIONS

19.1 *Draft Bill—section* 19. Section 19 of the draft Bill provides—

> (1) Where a provision of a settlement creates an interest, the provision shall not be 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.

19.2 *Comparable legislation.* Provisions to the effect of section 19 are contained in the relevant Acts of Western Australia, the United Kingdom, New Zealand, Victoria, Queensland, Ontario and Alberta.[1] These provisions stem from recommendations made by the Law Reform Committee in England. The Committee said[2]—

> 32. ... At present, a limitation which itself complies with the rule (perhaps because it is vested *ab initio) is* nevertheless invalid if it is subsequent to and 'dependent upon' a void limitation. If the ulterior limitation is 'dependent upon' the prior invalid limitation in the sense that it is itself contingent upon the

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[1] W.A. Act, s. 109; U.K. Act, s. 6; N.Z. Act, s. 14; Vict. Act, s. 11; Qld Act, s. 215; Ont. Act, s. 10 and Alb. Act, s. 13.

[2] Law Reform Committee Report (1956) paragraphs 32 and 33.

same contingency as strikes down the prior limitation, then plainly it must be held invalid for the same reason. But the phrase 'dependent upon' does not appear to be confined to such cases, and it is not easy to discover any precise test for 'dependency' in this context. On this point, it may without any disrespect to the courts be said that a perusal of such cases such as *Re Thatcher's Trusts* (1859) 26 Beav. 365, *Re Backhouse [1921] 2* Ch. 51, *Re Canning's Will Trusts* [1936] Ch. 309, *Re Coleman* [1936] Ch. 528, and *Re Mill's Declaration of Trust* [1950] 1 All E.R. 789 (affirmed [1950] 2 All E.R. 292) is more depressing than illuminating; and we can see small merit in attempting to make more precise a doctrine in which we can discern little virtue.

33. We do not think it right that any limitation which itself complies with the rule should be invalidated by being preceded in the series of limitations by an invalid limitation. We accordingly recommend that no limitation which itself complies with the rule should be invalidated solely by reason of being preceded by one or more invalid limitations, whether or not it expressly or by implication takes effect after or subject to, or is dependent upon, any such invalid limitations. In view of difficulties sometimes encountered in deciding whether a subsequent limitation is or is not accelerated by the failure (e.g. by lapse) of the immediately preceding limitation, we think it would be as well to provide explicitly for the acceleration of subsequent limitations where a prior limitation is void for perpetuity.

19.3 *Dependent dispositions.* If an interest is void under the rule against perpetuities, does that fact always cause subsequent interests to fail? Morris and Leach, and others, have considered this question at length.[3] A distinction is drawn between, on the one hand, subsequent interests which are dependent upon the same contingency as the prior interest and, on the other hand, subsequent interests which are either vested or bound to vest, if at all, within the perpetuity period. It is said, in the former case, that the interest is intrinsically too remote and, in the latter case, that the interest is intrinsically valid.[4]

19.4 *One reason for the dependent disposition rule.* Stirling /. in *Re Abbott*[5] said—.

It is settled that any limitation depending or expectant upon a prior limitation which is void for remoteness is invalid. The reason appears to be that the persons entitled under the

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[3] Morris and Leach (1962) pp. 173-181 and see, for example, Megarry (1962) pp. 480-482 and Megarry (1963) pp. 341-344.

[4] Morris and Leach (1962) p. 173.

[5] [1893] 1 Ch. 54, 57.

> subsequent limitation are not intended to take unless and until the prior limitation is exhausted; and as the prior limitation which is void for remoteness can never come into operation, much less be exhausted, it is impossible to give effect to the intentions of the settlor in favour of the beneficiaries under the subsequent limitation.

Morris and Leach argue that the explanation of Stirling J. will not stand analysis. They say[6]—

> ... it seems quite artificial to base the rule on the supposed intentions of the settlor, because no rational settlor could ever intend anything of the sort. Consider this example: a residuary gift to A for life, then to A's grandchildren for their lives, and then to B absolutely. Suppose the testator is told: 'Your limitation to the grandchildren of A is void and cannot take effect. Do you wish the property to go to B on A's death? Or do you wish it to go to your next-of-kin?' Surely few testators, confronted by such a question, would reply: 'I would prefer to die intestate'
>
> In the second place, the explanation is inconsistent with one well-established analogy in the law of future interests, namely the doctrine of acceleration. Suppose that property is given to A for life and then to B absolutely. Suppose that the life interest given to A fails for some reason other than remoteness, for example because A disclaims, or witnessed the will. In such cases it has been settled law for centuries that the ulterior gift to B is accelerated and does not fail. Yet in each case it is true that 'the persons entitled under the subsequent limitation are not intended to take unless and until the prior limitation is exhausted, and ... the prior limitation . . . can never come into operation, much less be exhausted.' Why should the doctrine of acceleration not apply to cases where the prior limitation is void for remoteness?

19.5 *Section* 19.[7] By virtue of section 19, the test for dependency is removed and a subsequent limitation which itself complies with the rule against perpetuities remains valid notwithstanding the failure of any prior limitation. Section 19 also makes it clear that the vesting of an interest is not prevented from being accelerated on the failure of a prior interest by reason only that the failure arises because of remoteness. The acceleration of subsequent limitations is put negatively rather than positively because a prior limitation can fail, without acceleration, for reasons other than remoteness.[8]

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8 Morris and Leach (1962) p. 179.

[7] For the following comments, see McKay (1965) p. 520.

8 See *Re Taylor deceased* [1957] 1 W.L.R. 1043, 1045.

19.6 *The operation of section* 19.[9] Suppose, for the purposes of illustration, that T, by will, makes a gift to X for life, then to X's grandchildren but if there are no grandchildren, then to Y. Suppose too that at T's death X has no children. At common law, the rule against perpetuities catches the gift to the grandchildren and, because of the rule governing dependent dispositions, the subsequent limitation to Y is void. Under the draft Bill, the wait-and-see principle will be applied. If no grandchildren are born within twenty-one years from X's death, the gift to the grandchildren will be void. But, under section 19, the gift to Y will be good, because if it stood alone, it would be valid.

## PART 20—ACCUMULATION OF INCOME

20.1 *Draft Bill—section* 20. Section 20 of the draft Bill provides—

> (1) Where property is disposed of in such 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 shall be 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 his benefit, or any jurisdiction or power of the Court to maintain or advance out of accumulations, or any power of a trustee under the Trustee Act, 1925, or under any other Act or law or under any settlement.

20.2 *The rule against accumulation.* In paragraphs 2.6 to 2.8, we made some introductory comments on the rule against accumulations of income. For convenience, we restate paragraph 2.6—

> Although the rule against perpetuities extends to directions for the accumulation of income, directions of that kind are further restricted by the rule against accumulations. This last-mentioned rule determines for how long income from property may be accumulated in such a way as to prevent its being enjoyed by any one in the meantime. In New South Wales, the rule is stated in section 31 of the Conveyancing Act, 1919. The general import of this provision is to limit accumulations to any one of four periods: the life of the settlor, twenty-one years from the death of the settlor, the infancy of any person who shall be living at the death of the settlor, or the infancy of any person who under the trusts of the instrument directing the accumulation, would for the time being, if of the age of twenty-one years, be entitled to receive the income so directed to be accumulated.

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[9] See Gosse (1965) p. 49.

20.3 *Comparable legislation.* As noted in paragraph 2.8, in Western Australia, New Zealand, Victoria and Queensland the period for the accumulation of income has been extended to the full period permitted by the rule against perpetuities. Section 20 makes a like extension.

20.4 *The history of the present rule.* The present restrictions on the power to direct or authorize an accumulation of income were imposed by the Imperial Act known as the Thellusson Act 1800.[1] This Act was passed shortly after *Thellusson* v. *Woodford*[2] was decided. Thellusson's Act, so far as it applied to New South Wales,[3] was repealed by section 31 of the Conveyancing Act, 1919. There are, however, no major differences in meaning between sections 1 and 2 of the Thellusson Act 1800 and section 31 of the Conveyancing Act, 1919.

20.5 **Thellusson's Case.** In *Thellusson's Case,* it was held that, apart from the rule against perpetuities itself, there was no restriction upon the period for which an accumulation could be directed. Peter Thellusson had, by will, directed an accumulation of the residue of his estate, some £600,000, during the lives of his sons, grandsons and great grandsons living at his death. Estimates of the accumulated fund varied between £27,000,000 and £140,000,000.[4] In the event, the estimates were wrong. The accumulation ended in 1856, slightly less than fifty-nine years after the trust was established, and the estate was then of comparatively moderate size.[5]

20.6 *Thellusson's Act and policy.* According to Allan[6]—

> [The Thellusson Act] was passed in an age when there was an almost superstitious fear of the power of compound interest, and it was considered that the power to direct accumulations of this nature would enable a man to leave his immediate family destitute, to withdraw capital and property from ordinary commerce, and ultimately to wreck the economy by unleashing vast funds upon the community. However, none of these fears seems to be justified today.

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[1] 39 & 40 **Geo.** Ill c. 98.
[2] (1799) *4* Ves. 227; 31 **E.R.** 117.
3 See 9 Geo. IV c. 83, s. 24.
4 Simes (1955) p. 84.
5 *Ibid.*
6 Allan (1963-64) p. 71.

> The power of compound interest today, mitigated by the levelling effect of taxation and duty, is incapable of producing any accumulation of the extent feared. It may in fact be considered doubtful whether there would ever have been an Accumulation Act if there had been income tax in 1800. Property which is the subject of an accumulation is not withdrawn from commerce, for the trustee's duty in respect of that property is to invest it—both capital and income are working, but the income is not distributed. It is said that the power to accumulate for the full perpetuity period will enable property to be left to remote descendants, to the neglect of the immediate family; but the testator has always been able to defeat his family by leaving his property to charity. The problem in fact is the whole problem of 'dead hand' control which, if it is to be tackled, should be tackled directly and not cuffed with an indiscriminate side sweep of a statute. In any event, there are existing statutory provisions (e.g., the Testator's Family Maintenance Act . . . and statutory powers of maintenance and advancement) which protect the interests of the immediate family of the testator and enable provision to be made for them out of both capital and accumulated income[7]. ... It should also be remembered that any person or persons absolutely entitled to the property being accumulated may put an end to an accumulation for their benefit under the rule in *Saunders* v. *Vautier*[8]
>
> Finally, it should be observed that no convincing reason has ever been put forward to explain why, if the rule against perpetuities is adequate to regulate 'dead hand' control over capital, a separate rule should be needed for income; and in those American States (and in Northern Ireland and Nova Scotia) where there is no separate rule the economy nevertheless continues to flourish with no 'visible inconvenience' or injustice to individual citizens.

And, according to Morris and Leach[9]—

> . . . the Thellusson Act remains to this day as a memorial to the shock which one man's testamentary dispositions administered to contemporary opinion. Judge after judge has complained of the looseness of its drafting. It has proved to be one of the most difficult Acts on the Statute Book to apply. It has produced a vast mass of intricate case law which abounds with fine distinctions and some sharp differences of judicial opinion. Nor should it be supposed that all the questions which can arise

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[7] "In *Re Lesser*, [1954] V.L.R. 435, the Accumulations Act actually prevented the statutory provision for maintenance from operating for the benefit of beneficiaries contingently entitled."

[8] (1841) 4 Beav. 115; 49 E.R. 282.

[9] Morris and Leach (1962) pp. 304-305.

> on the interpretation of the Act have now been settled by litigation . . . There are now some one hundred and eighty reported cases on the Thellusson Act—an average of over one a year since it was passed. The bulk of the case law seems out of all proportion to the importance of the subject. No one who has not been exposed to this material can have any idea of the complexities involved.
>
> The Act frustrates the quite reasonable dispositive schemes of settlors and testators and has proved a great hindrance to conveyancing. Thus, an implied direction to accumulate may lurk behind the most innocent-looking dispositions, so attracting the Act and causing windfalls to result to residuary legatees or next-of-kin who were never intended to enjoy the property. The interest which so results is a legal abortion, being usually an interest for a term of years or an estate *pur autre vie* which contrives to be both wasting and reversionary . . .
>
> The legal case for the repeal of the Act seems overwhelming. Would this be attended by any untoward economic or social consequences? The present authors believe that it would not.

20.7 *Another view.* In considering the rule against accumulations of income, the Law Reform Committee in England said[10]—

> One view is that a direction to accumulate is evil *per se* in that it enables a settlor or testator to starve the living in order to augment the fund for posterity. Whatever may have been the position a century or so ago or more, we doubt whether this is a serious or insurmountable evil today. On the other hand, we know of no substantial argument why the periods should be extended. Certainly the two periods of minorities serve a useful purpose in enabling a fund to be built up to start children in life. On the whole, we consider that the general scheme of the statutory regulation of accumulation calls for no change.

20.8 *Repeal of the rule.* If the present rule against accumulation of income is abolished, not only should there be no untoward consequences but also there should be consequences which many persons would call beneficial. First, the law will be simpler: there will not be one law for capital (the rule against perpetuities) and one law

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[10] Law Reform Committee Report (1956) paragraph 55.

for profits (the rule against accumulations). Secondly, a death duty pitfall will be removed.[11] Thirdly, a person planning the disposition of his estate will have a wider range of options open to him: he will, for example, be able to provide that income from a business conducted under the trusts of his will be used, during the full perpetuity period, for the expansion and development of the business.[12] And, fourthly, a settlor may gain income tax advantages for a beneficiary by directing a longer accumulation of income.

20.9 *Conclusion.* In Western Australia, Queensland and Victoria, no difficulties, social or economic, appear to have arisen in consequence of repeals of the kind proposed in this Part. We know of no factor which, in this context, distinguishes New South Wales from the places mentioned.

## PART 21—REPEALS, SAVINGS AND AMENDMENT

21.1 *Draft Bill—sections* 21, 22 *and* 23 *and the Schedules.* Sections 21, 22 and 23 and the Schedules, of the draft Bill provide—

> 21. Each Act specified in Column 1 of Schedule 1 is, to the extent specified opposite that Act in Column 2 of Schedule 1, repealed.
>
> 22. The repeal of sections 31, 31A and 36 of the Conveyancing Act, 1919, shall not affect settlements, dispositions or instruments to which this Act does not apply.
>
> 23. The Act specified in Column 1 of Schedule 2 is amended in the manner set forth opposite that Act in Column 2 of Schedule 2.

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[11] Where, for example, a trust instrument contains a direction for the accumulation of income for a period not limited **to** one of the periods specified in section 31 of the Conveyancing Act, 1919, but not exceeding the period allowed by the rules against perpetuities, the direction will be read as a direction to accumulate for the most appropriate of the statutory periods and the income for the excess period will go to the person who would have been entitled to it if the excessive accumulation had not been directed. One such period is the life of the settlor. Where this is the most appropriate period, the effect is to introduce a trust to take effect after the settlor's death. (See Ford [1971] p. 72.) Section 102 (2) (a) of the Stamp Duties Act, 1920, will therefore apply to the property subject to the trust even though the property may not otherwise be caught for death duty.

12 See, for example, *Blair* v. *Curran* (1939) 62 C.L.R. 464, 521-3.

SCHEDULE 1.

REPEALS.

| Column 1. | | Column 2. |
|---|---|---|
| Year and number of Act. | Short title of Act. | Extent of Repeal. |
| 1919, No. 6 .. | Conveyancing Act, 1919. | Section 31;<br>Section 31A;<br>Section 36. |
| 1925, No. 14 | Trustee Act, 1925. | Section 27A. |

SCHEDULE 2.

AMENDMENT OF ACT.

| Column 1. | | Column 2. |
|---|---|---|
| Year and number of Act. | Short title of Act. | Amendment. |
| 1919, No. 6 .. | Conveyancing Act, 1919. | Section 36E—<br>After section $36^{D}$, insert:<br>36E. (1) In this section — Parenthood: presumptions.<br>"beget" means beget so as to father a child.<br>"conceive" means conceive so as to bear a child.<br>(2) Subsections (3) and (4) apply where a question arises which turns on the possibility of a person having a child at a future time. |

SCHEDULE 2.

AMENDMENT OF ACT.

| Column 1. | | Column 2. |
|---|---|---|
| Year and number of Act. | Short title of Act. | Amendment. |
| 1919, No. 6, *continued.* | Conveyancing Act, 1919, *continued.* | (3) It shall be presumed —<br>(a) that a male will not beget a child while under the age of 12 years;<br>(b) that a female will not conceive a child while under the age of 12 years or over the age of 55 years; and<br>(c) that a person will not become parent of another person, by adoption or otherwise, while the first person is under the age of 16 years or over the age of 55 years, except where the second person is a child or natural child of the first person.<br>(4) The question whether a living person will or will not be able to beget or to conceive a child at a future time shall be a question of fact and shall be determinable on the presumptions in subsection (3) (a) and (b) and on evidence accordingly.<br>(5) Subsections (6) and (7) apply —<br>(a) where a presumption under subsection (3) is applied, and the presumption is disappointed by the event; and<br>(b) where a determination is made under subsection (4) that a living person will not be able to beget or to conceive a child at a future time, and he does beget or conceive a child at that time.<br>(6) Subject to subsection *(7),* the Court may make such orders as it thinks fit for the purpose of putting the persons interested into the positions, so far as is just, that they would have held if the presumption had not been applied or the determination had not been made.<br>(7) The Court shall not make an order under subsection (6) affecting adversely the position of a person who claims by virtue of a purchase or other transaction for valuable consideration made in good faith and without notice of the application of the presumption or of the making of the determination. |

21.2 *Sections* 21 *and 22 and Schedule 1.* Section 21 and Schedule 1 are intended to give effect to the proposals made in Parts 20, 12 and 14 touching respectively sections 31, 31A and 36 of the Conveyancing Act, 1919, and section 27A of the Trustee Act, 1925. Section 22 of the draft Bill is intended to give effect to the proposal made in Part 4 relating to the application of the Bill.

21.3 *Section* 23 *and Schedule 2.* Section 23 and Schedule 2 put in legislative terms the proposal made in paragraph 10.9.

C. L. D. MEARES,
Chairman.

D. GRESSIER,
Commissioner.

30th June, 1976.

**APPENDIX A**

THE PERPETUITIES AND ACCUMULATIONS ACT 1968 (VICTORIA)

1968

VICTORIA.

ANNO SEPTIMO DECIMO

# ELIZABETHS II *REGINAE*

* * * * * * * * * * * * * * * * * * * * * * * *

No. 7750

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 Accumulation, and for other purposes.

*[10th December,* 1968.]

BE it enacted by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and the Legislative Assembly of Victoria in this present Parliament assembled and by the authority of the same as follows (that is to say):—

*Short title*

1. (1) This Act may be cited as the *Perpetuities and Accumulations Act* 1968.

(2) This Act and the rule against perpetuities shall bind the Crown except in respect of dispositions of property made by the Crown.

Act and rule against perpetuities to bind Crown.

Cf. *Law Reform (Property, Perpetuities and Succession) Act* 1962 (W.A.) s. 2, *Perpetuities and Accumulations Act* 1964 (U.K.) s. 15, *Perpetuities Act* 1964 (N.Z.) s. 3.

2. (1) In this Act unless inconsistent with the context or subject-matter—

interpretation.

SVS&3S s. 15, N.Z. Act 1968.2

"Court" means the Supreme Court or a Judge thereof.

"Disposition" includes the conferring or exercise or a power of appointment or any other power or authority to dispose of an interest in or a right over property and any other disposition of an interest in or right over property; and references to the interest disposed of shall be construed accordingly.

"Instrument" includes a will, and also includes an instrument, testamentary or otherwise exercising a power of appointment whether general or special but does not include an Act of Parliament.

"Power of appointment" includes any discretionary power to transfer or grant or create a beneficial interest in property without the furnishing of valuable consideration.

"Property" includes any interest in real or personal property and any thing in action.

"Will" includes a codicil.

(2) For the purposes of this Act a disposition contained in a will shall be deemed to be made at the death of the testator.

(3) For the purposes of this Act a person shall be treated as a member of a class if in his case all the conditions indentifying a member of the class are satisfied, and shall be treated as a potential member if in his case only one or some of those conditions are satisfied but there is a possibility that the remainder will in time be satisfied.

**Application.**
**Cf. W.A. Act s. 3. U.K. Act s. 15, N.Z. Act, s. 4.**

3. (1) Save as otherwise provided in this Act, this Act shall apply only in relation to instruments taking effect after the commencement of this Act, and in the case of an instrument whereby a special power of appointment is exercised shall apply only where the instrument creating the power takes effect after that commencement: Provided that section 4 shall apply in all cases for construing the foregoing reference to a special power of appointment.

(2) This Act shall apply in relation to a disposition made otherwise than by an instrument as if the disposition had been contained in an instrument taking effect when the disposition was made.

**Powers of appointment.**
**Cf. W.A. Act s. 16, U.K. Act s. 7, N.Z. Act 8.5.**

4. For the purpose of the rule against perpetuities a power of appointment shall be treated as a special power unless—

(a) in the instrument creating the power it is expressed to be exercisable by one person only; and

*(b)* it could at all time during its currency when that person is of full age and capacity be exercised by him so as immediately to transfer to or otherwise vest in himself the whole of the interest governed by the power without the consent of any other person or compliance with any other condition, not being a formal condition relating only to the mode of exercise of the power:

Provided that for the purpose of determining whether a disposition made under a power of appointment exercisable by will only is void for remoteness the power shall be treated as a general power where it would have fallen to be so treated if exercisable by deed.

***Perpetuities.***

**Power to specify perpetuity period.**

*5.* (1) Save as in this Act otherwise provided where the instrument by which any disposition is made so provides the perpetuity period applicable to the disposition under the rule against perpetuities instead of being of any other duration shall be such number of years not exceeding eighty as is specified in the instrument as the perpetuity period applicable to the disposition.

Cf. W.A. Act s. 5, U.K. Act s. 1, N.Z. Act s. 6.

(2) Subsection (1) shall not have effect where the disposition is made in exercise of a special power of appointment but where a period is specified under that subsection in the instrument creating such a power the period shall apply in relation to any disposition under the power as it applies in relation to the power *itself.*

(3) If no period of years is specified in an instrument by which a disposition is made as the perpetuity period applicable to the disposition but a date certain is specified in the instrument as the date on which the disposition shall vest the instrument shall, for the purposes of this section, be deemed to specify as the perpetuity period applicable to the disposition a number of years equal to the number of years from the date of the taking effect of the instrument to the specified vesting date.

"Wait and see" rule.

*6.* (1) Where apart from the provisions of this section and of section 9 a disposition would be void on the ground that the interest disposed of might not become vested until too remote a time the disposition shall be treated until such time (if any) as it becomes established that the vesting must occur, if at all, after the end of the perpetuity period as if the disposition were not subject to the rule against perpetuities; and its becoming so established shall not affect the validity of anything previously done in relation to the interest disposed of by way of advancement, application of intermediate income or otherwise.

Cf. W.A. Act s. 7, U.K. Act s. 3, N.Z. Act s.8.

((2) Where apart from the said provisions a disposition consisting of the conferring of a general power of appointment would be void on the ground that the power might not become exercisable until too remote a time the disposition shall be treated until such time (if any) as it becomes established that the power will not be exercisable within the perpetuity period as if the disposition were not subject to the rule against perpetuities.

(3) Where apart from the said provisions a disposition consisting of the conferring of any power option or other right would be void on the ground that the right might be exercised at too remote a time the disposition shall be treated as regards any exercise of the right within the perpetuity period as if it were not subject to the rule against perpetuities and subject to the said provisions shall be treated as void for remoteness only if and so far as the right is not fully exercised within that period.

(4) Nothing in this section makes any person a life in being for the purposes of ascertaining the perpetuity period unless the life of that person is one expressed or implied as relevant for this purpose by the terms of the disposition and would have been reckoned a life in being for such purpose if this section had not been enacted:

Provided however that in the case of a disposition to a class of persons or to one or more members of a class, any person living at the date of the disposition whose life is so expressed or implied as relevant for any member of the class may be reckoned a life in being in ascertaining the perpetuity period.

Power to apply to Court for declaration as to validity. Cf. W.A. Act s. 8, N.Z. Act s. 22.

7. (1) A trustee of any property, or any person interested under or on the invalidity of, a disposition of property may at any time apply to the Court for a declaration as to the validity, in respect to the rule against perpetuities, of a disposition of that property.

(2) The Court may, on an application under subsection (1), make a declaration on the basis of 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; but the Court shall not make a declaration in respect of any disposition the validity of which cannot be determined at the time at which the Court is asked to make the declaration.

Presumptions and evidence as to future parenthood.
Cf. W.A. Act s. 6, U.K. Act s. 2, N.Z. Act s.6.

8. (1) Where in any proceedings there arises on the rule against perpetuities a question which turns on the capacity of a person to have a child at some future time, then—

*(a)* it shall be presumed, subject to paragraph (b), that a male can have a child at the age of twelve years or over but not under that age and that a female can have a child at the age of twelve years or over but not under that age or over the age of fifty-five years; but

*(b)* in the case of a living person evidence may be given to show that he or she will or will not be capable of having a child at the time in question.

(2) Where any such question is decided by treating a person as incapable of having a child at a particular time and he or she does so, the Court may make such order as it thinks fit for placing the persons interested in the property comprised in the disposition so far as may be just in the position they would have held if the question had not been so decided.

(3) Subject to subsection (2), where any such question is decided in relation to a disposition by treating a person as capable or incapable of having a child at a particular time then he or she shall be so treated for the purpose of any question which may arise on the rule against perpetuities in relation to the same disposition in any subsequent proceedings.

(4) In the foregoing provisions of this section references to having a child are references to begetting or giving birth to a child; but those provisions (except subsection (1) *(b)*) shall apply in relation to the possibility that a person will at any time have a child by adoption, legitimation or other means as they apply to his or her capacity at that time to beget or give birth to a child.

**Reduction of age and exclusion of class members to avoid remoteness.**
**Cf. No. 6344 s. 162. W.A. Act s. 9, U.K. Act s. 4, N.Z. Act s. 9.**

9. (1) Where a disposition is limited by reference to the attainment by any person or persons of a specified age exceeding twenty-one years and it is apparent at the time the disposition is made or becomes apparent at a subsequent time—

*(a)* that the disposition would apart from this section be void for remoteness; but

*(b)* that it would not be so void if the specified age had been twenty-one years—

the disposition shall be treated for all purposes as if instead of being limited by reference to the age in fact specified it had been limited by reference to the age nearest to that age which would if specified instead, have prevented the disposition from being so void.

(2) Where in the case of any disposition different ages exceeding twenty-one years are specified in relation to different persons—

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

*(b)* that subsection shall operate to reduce each such age so far as is necessary to save the disposition from being void for remoteness.

(3) Where the inclusion of any persons being potential members of a class or unborn persons who at birth would become members or potential members of the class prevents the foregoing provisions of this section from operating to save a disposition from being void for remoteness those persons shall thenceforth be deemed for all the purposes of the disposition to be excluded from the class and the said provisions shall thereupon have effect accordingly.

(4) Where in the case of a disposition to which sub-section (3) does not apply it is apparent at the time the disposition is made or becomes apparent at a subsequent time that apart from this sub-section the inclusion of any persons, being potential members of a class or unborn persons who at birth could become members or potential members of the class would cause the disposition to be treated as void for remoteness those persons shall unless their exclusion would exhaust the class thenceforth be deemed for all the purposes of the disposition to be excluded from the class.

(5) Where this section has effect in relation to a disposition to which section 6 applies the operation of this section shall not affect the validity of anything previously done in relation to the interest disposed of by way of advancement, application of intermediate income or otherwise.

**Unborn husband or wife.**

**Cf.W.A.Act s. 12,U.K.Act s. 5,N.Z.Act s. 13.**

**10.** The widow or widower of a person who is a hie in being for the purposes of the rule against perpetuities shall be deemed to be a life in being for the purpose of—

(a) a disposition in favour of that widow or widower; and

*(b)* a disposition in favour of a charity which attains or of a person who attains or of a class the members of which attain according to the terms of the disposition a vested interest on or after the death of the survivor of the said person who is a life in being and that widow or widower, or on or after the death of that widow or widower or on or after the happening of any contingency during her or his lifetime.

**Dependent limitations.**
**Cf. W.A. Act s. 13, U.K. Act s. 6, N.Z. Act s. 14.**

11. A disposition shall not be treated as void for remoteness by reason only that the interest disposed of is ulterior to and dependent upon an interest, under a disposition which is so void, and the vesting of an interest shall not be prevented from being accelerated on the failure of a prior interest by reason only that the failure arises because of remoteness.

**Abolition of the double possibility rule.**
**No. 6344 s. 161.**

**12.** (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 hereby declared to have been abolished by section 161 of the *Property Law Act* 1928, but without prejudice to any other rule relating to perpetuities.

(2) This section shall apply only to limitations or trusts created by an instrument within the meaning of the *Property Law Act* 1958 coming into operation after the commencement of the *Property Law Act* 1928.

**Restrictions on the perpetuity rule.**
**No. 6344 s. 161.**

**13.** (1) For removing doubts, it is hereby declared that the rule of law relating to perpetuities does not apply and shall be deemed never to have applied—

(a) to any power to distrain on or to take possession of land or the income thereof given by way of indemnity against a rent, whether charged upon or payable in respect of any part of that land or not; or

*(b)* to any rentcharge created only as an indemnity against another rentcharge, although the indemnity rentcharge may arise or become payable only on breach of a condition or stipulation ; or

(c) to any power, whether exercisa'ble on breach of a condition or stipulation or not, to retain or withhold payment of any instalment of a rentcharge as an indemnity against another rentcharge ; or

*(d)* to any grant, exception or reservation of and right of entry on, or user of, the surface of land or of any easements, rights or privileges over or under land for the purpose of—

(i) winning, working, inspecting, measuring, converting, manufacturing, carrying away and disposing of mines and minerals ;

(ii) inspecting, grubbing up, felling and carrying away timber and other trees, and the tops and lops thereof ;

(iii) executing repairs, alterations or additions to any adjoining land, or the buildings and erections thereon;

(iv) constructing, laying down, altering, repairing, renewing, cleansing and maintaining sewers, watercourses, cesspools, gutters, drains, water-pipes, gas-pipes, electric wires or cables or other like works.

(2) This section shall apply to instruments within the meaning of the *Property Law Act* 1958 coming into operation before or after the commencement of that Act.

Administrative powers of trustees.

**Cf.** No. 6401 s.73, **U.K.** Act s. 8, N.Z. Act s. 16.

14. (1) The rule against perpetuities shall not operate and shall be deemed never to have operated to invalidate a power conferred on trustees or other persons to sell lease exchange or otherwise dispose of any property for full consideration or to do any other act in the administration (as opposed to the

distribution) of any property, and shall not prevent and shall be deemed never to have prevented the payment to trustees or other persons of reasonable remuneration for their services.

(2) This section—

(a) shall not render any trustee liable for any acts done prior to the commencement of the *Trustee Act* 1953 for which such trustee would not have been liable if this section and any corresponding previous enactment had not been enacted or for any acts done after the commencement of the *Trustee Act* 1953 but before the commencement of this Act for which such trustee would not have been liable if this section had not been enacted;

*(b)* shall not enable any person to recover any money distributed or paid under any trust before the commencement of the *Trustee Act 1953* if he could not have recovered such money if this section and any corresponding previous enactment had not been enacted or any money distributed or paid under any trust after the commencement of the *Trustee Act* 1953 but before the commencement of this Act if he could not have recovered such money if this section had not been enacted.

Options, Cf. W.A. Act s. 14, U.K. Act ss.9,10, N.Z. Act s. 17.

15. (1) The rule against perpetuities shall not apply to a disposition consisting of the conferring of an option to acquire for valuable consideration an interest reversionary (whether directly or indirectly) on the term of a lease if—

(a) the option is exercisable only by the lessee or his successors in title ; and

*(b)* it ceases to be exercisable at or before the expiration of one year following the determination of the lease.

This sub-section shall apply in relation to an agreement for a lease as it applies in relation to a lease, and "lessee" shall be construed accordingly.

(2) An option to acquire an interest in land (not being an option to which sub-section (1) refers) or a right of pre-emption in respect of land, which according to its terms is or may be exercisable at a date more than twenty-one years from the date of its grant shall after the expiration of twenty-one years from the date of its grant be void and not exercisable by any person and no remedy shall lie in contract or otherwise for giving effect to it or making restitution for its lack of effect, but—

*(a)* this sub-section shall not apply to an option or right of pre-emption conferred by will; and

(b) nothing in this sub-section shall affect an option for renewal or right of pre-emption contained in a lease or an agreement for a lease.

**Determinable interests. Cf. W.A. Act I. 15, U.K. Act s. 12, N.Z. Act s.18.**

16. (1) The rule against perpetuities shall apply—

*(a)* to a possibility of reverter in land on the determination of a determinable fee simple; in which case if the fee simple does not determine within the perpetuity period it shall thereafter continue as a fee simple absolute ;

*(b)* to a possibility of a resulting trust on the determination of any other determinable interest in property; in which case if the first interest created by the trust does not determine within the perpetuity period the interest it creates shall thereafter continue as an absolute interest;

(c) to a right of entry for condition broken the exercise of which may determine a fee simple subject to a condition subsequent and to an equivalent right in the case of property other than land; in which case if the right of entry or other right is not exercised within the perpetuity period the fee simple shall thereafter continue as an absolute interest and any such other interest in property shall thereafter continue free from the condition.

(2) This section shall apply whether the determinable or conditional disposition is charitable or not except that the rule against perpetuities shall not apply to a gift over from one charity to another.

(3) Where a disposition is subject to any provision that causes an interest to which paragraph (a) or paragraph *(b)* of sub-section (1) applies to be determinable, or to any condition subsequent giving rise on breach thereof to a right of re-entry or an equivalent right in the case of property other than land, or to any exception or reservation the disposition shall be treated for the purposes of this Act as including a separate disposition of any rights arising by virtue of the provision condition subsequent exception or reservation.

**Superannuation funds.**
**No. 6401 s.73.**
**Cf. W.A. Act s. 19, N.Z.Act s. 19.**

17. (1) The rule of law known as the rule against perpetuities shall not apply and shall be deemed never to have applied so as to render void—

(a) a trust or fund established for the purpose of making provision by way of assistance, benefits, superannuation, allowances, gratuities or pensions for the directors, officers, servants or employes of any employer or the spouses children grandchildren parents dependants or legal personal representatives of any such directors officers servants or

employes or for any persons duly selected or nominated for that purpose by any such directors officers servants or employes pursuant to the provisions of such trust or fund ; or

*(b)* a trust or fund established for the purpose of making provision by way of superannuation for persons (not being employes) engaged in any lawful profession trade occupation or calling or the spouses children grandchildren parents dependants or legal personal representatives of any of those persons or for any persons duly selected or nominated for that purpose pursuant to the provisions of the trust or fund.

(2) This section—

(a) shall not render any trustee liable for any acts done prior to the commencement of the *Trustee Act* 1953 for which such trustee would not have been liable if this section and any corresponding previous enactment had not been enacted or for any acts done after the commencement of the *Trustee Act* 1953 but before the commencement of this Act for which such trustee would not have been liable if this section had not been enacted ;

*(b)* shall not enable any person to recover any money distributed or paid under any trust before the commencement of the *Trustee Act* 1953 if he could not have recovered such money if this section and any corresponding previous enactment had not been enacted or any money distributed or paid under any trust after the commencement of the *Trustee Act* 1953 but before the commencement of this Act if he could not have recovered such money if this section had not been enacted.

Non-charitable purpose trusts. Cf. U.K. Act s. 15, N.Z. Act s. 20.

18. (1) Except as provided in sub-section (2) nothing in this Act shall affect the operation of the rule of law rendering non-charitable purpose trusts and trusts for the benefit of corporations which are not charities void for remoteness in cases where the trust property may be applied for the purposes of the trusts after the end of the perpetuity period.

(2) If any such trust is not otherwise void the provisions of sections 5 and 6 shall apply to it and the property subject to the trust may be applied for the purposes of the trust during the perpetuity period but not thereafter.

*Accumulations.*

Accumulation of income. Cf. W.A. Act s. 17. U.K. Act ss.13,14.N.Z. Act s. 21.

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

(2) Nothing in this section shall affect the power of any person or persons to terminate an accumulation that is for his or her benefit and any jurisdiction or power of the Court to maintain or advance out of accumulations or any power of a trustee under the *Trustee Act* 1958 or under any other Act or law or under any instrument creating a trust or making a disposition.

*Consequential.*

20. (1) Section 73 of the *Trustee Act* 1958 shall be repealed.

(2) Section 161 of the *Property Law Act* 1958 shall be repealed.

(3) Sections 162, 164, 165 and 166 of the *Property Law Act* 1958 shall be repealed, but the repeal of those sections shall not affect instruments or dispositions in relation to which this Act does not apply.

## APPENDIX B

### A Draft Perpetuities Bill, 1976

ARRANGEMENT

1. Short titie.
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8. Unborn husband or wife.
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Schedule 1.
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*Appendix B—Draft Bill*

# A BILL

To effect reforms in the rules of law relating to perpetuities; to repeal section 31 of the Conveyancing Act, 1919, and to amend that Act in other respects; to amend the Trustee Act, 1925; and for purposes connected therewith.

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

1. This Act may be cited as the Perpetuities Act, 1976. **Short title.**

2. This Act shall commence upon the 1st January, 1977. **Commencement.**

3. (1) Subject to subsection (3), this Act shall not apply in relation to a settlement taking effect before the commencement of this Act. **Application. Cf. Perpetuities and Accumulations Act 1964 (U.K.) s. 15(5); Perpetuities Act 1964 (N.Z.)s.3; Perpetuities and Accumulations Act 1968 (Vict.) s. 1(2); Property Law Act, 1969 (W.A.) s.99; Property Law Act 1974 (Qld) s.207.**

(2) This Act shall apply in relation to a settlement made by an appointment under 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 section shall not affect the operation of sections 13, 14 and 15.

4. (1) In this Act except in so far as the context or subject matter otherwise indicates or requires— **Interpretation. Cf.U.K. Act, s. 15(2); N.Z. Act, s.2(1); Vict. Act, s.2(1); W.A. Act, s. 100; Qld Act, s. 206.**

"disposition" includes the conferring or exercising of a power of appointment or any other power or authority to dispose of property, and any alienation of property.

"instrument" includes a will, and also includes an instrument, testamentary or otherwise, exercising a power of appointment, whether general or special, but does not include an Act of Parliament.

"interest" includes any estate or 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 any instrument, transaction or dealing whereby a person makes a disposition.

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

"trustee" has the same meaning as in the Trustee Act, 1925.

"will" includes a codicil.

(2) For the purposes of this Act, a settlement made by will shall take effect as if it was made at the death of the testator.

(3) For the purposes of this Act, a person shall be treated as a member of a class if in his case each and every condition identifying a member of the class is satisfied, and shall be treated as a potential member of a class if in his case any condition identifying a member of the class is not satisfied but there is a possibility that the condition will be satisfied.

5. (1) This section applies where an appointment of an interest is made under a power, and applies for the purpose of determining whether the appointment is invalid as infringing the rule against perpetuities.

Powers of appointment. Cf. U.K.Act, s. 7; N.Z. Act, s. 5; Vict. Act, s. 4; W.A. Act, s. 112; Qld Act, s. 208.

(2) Where, immediately before the appointment takes effect, the appointor had, by the settlement creating the power, unconditional authority at his own discretion to exercise the power by appointing the interest to himself or to his legal personal representative, the power shall be treated as a general power.

(3) In any other case the power shall be treated as a special power.

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

The Crown. Cf. U.K. Act, s. 15 (7); N.Z. Act, s. 3; Vict. Act, s. 1(2); W.A. Act, s. 99(2); Qld Act, s. 1 (4).

6. (1) Subject to subsection (2), the rule against perpetuities and this Act shall bind the Crown not only in right of New South Wales but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

(2) Nothing in the rule against perpetuities or in this Act shall affect any settlement made by the Crown.

The perpetuity period. Cf. U.K. Act, s. 1; N.Z. Act, s. 6; Vict. Act, s. 5; W.A. Act, s. 101; Qld Act, s. 209.

7. (1) Subject to subsections (2) and (3), for the purpose of the rule against perpetuities, the perpetuity period applicable to an interest created by a settlement shall be eighty years from the date on which the settlement takes effect.

(2) Subject to subsection (3), where a settlement provides that this subsection shall apply to an interest created by the settlement, then, for the purpose of the rule against perpetuities, the perpetuity period applicable to the interest, instead of being eighty years, shall, subject to this Act, be the perpetuity period which at common law would be applicable to the interest.

(3) Where an appointment of an interest is made under a special power—

(a) the provision mentioned in subsection (2) must be made by the settlement creating the power; and

(b) the perpetuity period shall be reckoned from the date when that settlement takes effect.

Unborn husband or wife.
Cf. U.K. Act, s. 5; N.Z. Act, s. 13; Vict. Act, s. 10; W.A. Act, s. 108; Qld Act, s. 214.

8. Where—

(a) for the purpose of the rule against perpetuities, the life of any person is a life in being in relation to an interest created by a settlement; and

(b) the interest is to or may vest on or after an event during the life, or on or after the death, of a husband or wife of that person,

the life of the husband or wife shall, for the purpose of the rule against perpetuities and in relation to the interest, have effect as a life in being, whether or not the life of the husband or wife was a life in being at the time the settlement took effect.

Parenthood: presumptions.
Cf. U.K. Act, s.2; N.Z. Act, s. 7; Vict. Act, s. 8; W.A. Act, s. 102; Qld Act, s. 212.

9. (1) In this section—

"beget" means beget so as to father a child,
"conceive" means conceive so as to bear a child.

(2) Subsections (3) and (4) apply where, in relation to the application of the rule against perpetuities to an interest created by a settlement, a question arises which turns on the possibility of a person having a child at a future time.

(3) It shall be presumed—

(a) that a male will not beget a child while under the age of 12 years;

(b) that a female will not conceive a child while under the age of 12 years or over the age of 55 years; and

(c) that a person will not become parent of another person, by adoption or otherwise, while the first person is under the age of 16 years or over the age of 55 years, except where the second person is a child or natural child of the first person.

(4) The question whether a living person will or will not be able to beget or to conceive a child at a future time shall be a question of fact and shall be determinable on the presumptions in subsection (3) (a) and (b) and on evidence accordingly.

(5) Subsections (6) and (7) apply—

(a) where a presumption under subsection (3) is applied, and the presumption is disappointed by the event; and

(b) where a determination is made under subsection (4) that a living person will not be able to beget or to conceive a child at a future time, and he does beget or conceive a child at that time.

(6) Subject to subsection (7), the Court may make such orders as it thinks fit for the purpose of putting the persons interested into the positions, so far as is just, that they would have held if the presumption had not been applied or the determination had not been made.

(7) The Court shall not make an order under subsection (6) affecting adversely the position of a person who claims by virtue of a purchase or other transaction for valuable consideration made in good faith and without notice of the application of the presumption or of the making of the determination

10. (1) Where a provision of a settlement which creates an interest would, but for this Act, infringe the rule against perpetuities, the interest shall be treated, until such tune (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 shall not affect the validity of any thing previously done in relation to the interest. Wait-and-see. Cf. U.K. Act, s.3; N.Z. Act, s. 8; Vict. Act, s.6; W.A. Act, s. 103; Qld Act, s.210.

(2) Where a provision of a settlement which creates an interest consisting of the conferring of any power or right would, but for this Act, 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 the rule, and the provision shall be treated as infringing the rule only if and so far as the power or right is not fully exercised within the perpetuity period.

(3) Subject to subsection (4), this section does not make the life of any person a life in being for the purpose of ascertaining the period within which at common law an interest must vest unless that life would have been reckoned a life in being for that purpose if this section had not been enacted.

(4) Where—

(a) an interest created by a settlement is to be taken by a class of persons or by one or more members of a class; and

(b) the life of any person would be relevant for the purpose of ascertaining the period within which at common law the interest must vest in any member of the class if under the settlement the interest were to be taken by that person alone,

that life may be reckoned a life in being as regards every member of the class.

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

Reduction of age and exclusion of class members. **Cf. U.K.** Act, s. 4; N.Z. Act, s. 9; Vict. Act, s. 9; W.A. Act. s. 105; Qld Act, s.213; 1919, No. 6, s.36.

**11.** (1) Where—

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

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

the interest shall, for all purposes, be treated as if, instead of its vesting depending on the attainment by the person of the specified age, its vesting depends on the attainment by the person of the greatest age which, if put in place of the specified age. would escape the infringement.

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

(3) Where, in relation to an interest created by 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 age so far as is necessary to save the interest from infringing the rule against perpetuities.

(4) Where a provision of a settlement creates an interest which is to be taken by a class of persons and it becomes apparent that the inclusion of 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 subsections (1) or (3) from operating to save the provision from infringing that rule,

then, upon its becoming so apparent, that person shall, unless his exclusion would exhaust the class, be treated in relation to the interest as if he were not a member of the class, and, where subsections (1) and (3) apply, those subsections shall thereupon have effect accordingly.

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

Order of application of remedial provisions.

12. The following provisions shall be applied in the following order—

(a) section 9;

(b) section 10 (1) and (2);

(c) section 11 (1) and (3);and

(d) section 11 (4).

Administrative powers. Cf. U.K. Act s. 8; N.Z. Act, s. 16; Vict. Act, s. 14; Qld Act, s. 220.

**13.** (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, except 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 shall 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, and to any exercise of the power, taking effect either before or after the commencement of this Act.

Remuneration of trustee.

Cf. U.K. Act s. 8; N.Z. Act, s. 16; Vict. Act, s. 14; Qld Act, s. 220.

14. (1) The rule against perpetuities shall not invalidate a power or other provision for remunerating a trustee for his services.

(2) This section applies to a power or other provision for remunerating a trustee taking effect either before or after the commencement of this Act.

(3) This section does not affect any rights arising under a judgment or order which has taken effect before the commencement of this Act or arising under any agreement made before the commencement of this Act.

Superannuation funds.

Cf. N.Z. Act, s. 19; Vict. Act, s. 17; W.A. Act, s. 115; Qld Act, s. 220.

**15.** (1) The rule against perpetuities shall not invalidate—

(a) any settlement for the purpose of making provision by way of superannuation benefits or death benefits or both for the directors, officers, servants or employees of any employer or the spouses, children, grandchildren, parents, dependants or legal personal representatives of any such directors, officers, servants or employees or for any persons duly selected or nominated for that purpose by any such directors, officers, servants or employees pursuant to the provisions of the settlement; or

(b) any settlement for the purpose of making provision by way of superannuation benefits or death benefits or both for persons (not being employees) engaged in any lawful profession, trade, occupation or calling or the spouses, children, grandchildren, parents, dependants or legal personal representatives of any of those persons or for any persons duly selected or nominated for that purpose by any of the first-mentioned persons pursuant to the provisions of the settlement.

(2) This section applies to settlements made either before or after the commencement of this Act.

(3) For the purpose of this section, "benefits" includes assistance, allowances, gratuities and pensions.

Determinable interests. Cf.U.K. Act, s. 12; N.Z. Act, s. 8; Vict. Act, s. 16; W.A.Act, s. 111; Qld Act, s. 219.

**16.** (1) Subject to subsection (4), this section applies to an interest created by a settlement where the interest is, by a provision of the settlement, determinable on a contingency, and in this section that interest is called the particular interest.

(2) Subject to subsection (4), the rule against perpetuities shall apply to render invalid the provision for determination of the particular interest in like manner as the rule would apply to render invalid a condition subsequent in the settlement for defeasance of the particular interest on the same contingency, to the intent that, where the rule does so apply—

(a) the particular 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 particular interest to have effect free of the provision for determination.

(3) For the purposes of this section—

(a) an interest created by; or a provision in, an appointment or other exercise of a power in a settlement (but not a general power of appointment) shall be treated as an interest created by, or a provision in, the settlement; and

(b) "subsequent interest" means an interest—

(i) created by the settlement, or remaining undisposed of by the settlement, or which takes effect by reverter on a possibility arising under the settlement; and

(ii) as regards which the particular interest is a prior interest, whether the subsequent interest is vested or contingent, and whether it arises or takes effect by way of reverter, resulting trust, residuary gift, gift over or otherwise.

(4) The rule against perpetuities shall not apply to a gift over from one charity to another.

**17.** The rule against perpetuities shall not apply to—

Options. Cf. U.K. Act, ss. 9, 10; N.Z. Act, s. 17; Vict. Act, s. 15; W.A. Act, s. 110; Qld Act, s. 218; 1919, No. 6, s. 89.

(a) any option to renew a lease of property;

(b) any option to acquire a reversionary interest in property comprised in a lease;

(c) any right of pre-emption given for valuable consideration in respect of property; and

(d) any option given for valuable consideration to acquire an interest in property.

**Trusts for purposes which are not charitable. Cf. U.K. Act, s. 15 (4); N.Z. Act, s. 20; Vict. Act, s. 18; Qld Act, s. 221.**

18. (1) This section applies to the rule against perpetual trusts.

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

(3) Where, by a settlement, there is a disposition for a purpose, the perpetuity period applicable to the disposition shall, for the purpose of the rule against perpetual trusts, be eighty 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 it must infringe that rule, as if it did not infringe it, and its becoming so certain shall not affect the validity of any thing previously done in relation to the disposition.

(5) Where—

(a) by a settlement there is a disposition for a purpose until the happening of a future event, whether certain or uncertain; and

(b) the rule against perpetuities would not render invalid a provision in the settlement creating an interest vesting on the happening of the same event,

the rule against perpetual trusts shall not render the disposition invalid.

(6) Subsection (5) applies whether the property the subject of the disposition passes on the happening of the future event by way of reverter, resulting trust, residuary gift or otherwise.

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

**Dependent interests. Cf.U.K. Act.s.6; N.Z. Act, s. 14;Vict. Act,s.11; W.A. Act, s. 109; Qld Act, s. 215.**

**19.** (1) Where a provision of a settlement creates an interest, the provision shall not be 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. Cf. N.Z. Act, s. 21; Vict. Act, s. 19;W.A. Act, s. 113; Qld Act, s.222.**

**20.** (1) Where property is disposed of in such 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 shall be 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 his benefit, or any jurisdiction or power of the Court to maintain or advance out of accumulations, or any power of a trustee under the Trustee Act, 1925, or under any other Act or law or under any settlement.

**Repeals.**

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

**Savings.**

**22.** The repeal of sections 31, 31A and 36 of the Conveyancing Act, 1919, shall not affect settlements, dispositions or instruments to which this Act does not apply.

**Amendment.**

**23.** The Act specified in Column 1 of Schedule 2 is amended in the manner set forth opposite that Act in Column 2 of Schedule 2.

**APPENDIX B**—*continued*

SCHEDULE 1.

REPEALS.

| Column 1. | | Column 2. |
|---|---|---|
| Year and number of Act. | Short title of Act. | Extent of Repeal. |
| 1919, No. 6. | Conveyancing Act, 1919. | Section 31 ; Section $31_A$; Section 36. |
| 1925, No. 14. | Trustee Act, 1925. | Section 27A. |

SCHEDULE 2.

AMENDMENT OF ACT.

| Column 1. | | Column 2. |
|---|---|---|
| Year and number of Act. | Short title of Act. | Amendment. |
| 1919, No. 6. | Conveyancing Act, 1919. | Section 36E—<br>After section 36D, insert —<br>36E. (1) In this section — **Parenthood; presumptions.**<br>"beget" means beget so as to father a child.<br>"conceive" means conceive so as to bear a child.<br>(2) Subsections (3) and (4) apply where a question arises which turns on the possibility of a person having a child at a future time. |

**APPENDIX B**—*continued*

SCHEDULE 2—*continued*
AMENDMENT OF ACT—*continued*

| Column 1. | | Column 2. |
|---|---|---|
| Year and number of Act. | Short title of Act. | Amendment. |
| 1919, No. 6, —*continued.* | Conveyancing —*continued.* | (3) It shall be presumed —<br>(a) that a male will not beget a child while under the age of 12 years;<br>(b) that a female will not conceive a child while under the age of 12 years or over the age of 55 years; and<br>(c) that a person will not become parent of another person, by adoption or otherwise, while the first person is under the age of 16 years or over the age of 55 years, except where the second person is a child or natural child of the first person.<br>(4) The question whether a living person will or will not be able to beget or to conceive a child at a future time shall be a question of fact and shall be determinable on the presumptions in subsection (3) (a) and (b) and on evidence accordingly.<br>**(5)** (5) Subsections (6) and (7) apply—<br>**(a)** where a presumption under subsection (3) is applied, and the presumption is disappointed by the event; and<br>(b) where a determination is made under subsection (4) that a living person will not be able to beget or to conceive a child at a future time, and he does beget or conceive a child at that time.<br>(6) Subject to subsection (7), the Court may make such orders as it thinks fit for the purpose of putting the persons interested into the positions, so far as is just. that they would have held if the presumption had not been applied or the determination had not been made.<br>(7) The Court shall not make an order under subsection (6) affecting adversely the position of a person who claims by virtue of a purchase or other transaction for valuable consideration made in good faith and without notice of the application of the presumption or of the making of the determination. |

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