

## PERPETUITIES BILL

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### EXPLANATORY NOTE

THIS Bill effects substantial reforms in the rule of law known as the rule against perpetuities, and abolishes for the future the rule set out in section 2 of the Property Law Amendment Act 1963 and known as the rule against accumulations. These rules are highly technical, and are part of a body of law that is designed to restrict "dead hand" control of property, and to strike a fair balance between the desires of members of the present generation, and similar desires of succeeding generations, to do what they wish with property.

Under the rule against perpetuities a disposition of an interest in property is void if it is capable of vesting after the expiration of the perpetuity period, which consists of a life or lives in being at the date of the disposition and 21 years thereafter. The period is designed to allow the very common type of settlement under which a life interest is conferred on a wife and the ultimate gifts to children and perhaps grandchildren are made (so far as the law permits) conditional on their attaining the age of 21 years. In such a case, if the man dies young, his widow's interest could continue for upwards of 60 years; and, if there is a very young grandchild living at her death whose interest is contingent on attaining the age of 21 years, there could be a further delay of nearly 21 years before final vesting, i.e., over 80 years between the creation of the trust and the final vesting of the property. Where particularly extended trusts are required the practice has grown up of defining the maximum duration of the trust by reference to Royal lives, e.g., by providing that the trust shall continue until the death of the last descendant of His Late Majesty King George V who is living at the creation of the trust and for 21 years thereafter. By taking Royal lives as the measuring lives the existing law permits trusts to be created which are likely to continue for 90 or 100 years.

Under the rule against accumulations directions for the accumulation of income of a trust fund must be restricted to one of the various periods set out in section 2 of the Property Law Amendment Act 1963. The effect of the section is frequently to restrict the accumulation of income to 21 years or less.

During recent years there has been much study in the British Commonwealth and the United States of America in connection with problems that have been arising in connection with the rules against perpetuities and accumulations. In particular, reference is made to the Fourth Report of the Law Reform Committee in England presented in November 1956 and published as Cmd 18. This report inspired the Law Reform (Property, Perpetuities, and Succession) Act 1962 of Western Australia, and the Perpetuities and Accumulations Act 1964 of the United Kingdom. These Acts and the report of the English Law Reform Committee have received careful study by the Law Revision Committee in New Zealand, and this Bill gives effect to recommendations made by that Committee.

The reforms in the rule against perpetuities are designed to achieve three main purposes:

- (a) To remove certain obvious and known defects in the rule;
- (b) To introduce a principle of "wait and see" so that the validity of a limitation under the rule against perpetuities will depend, not on events which might occur, but on events which do occur; and
- (c) To introduce a *cy-pres* principle providing that any limitation of property which would violate the rule against perpetuities shall be reformed, within the limits of that rule, so as to give effect to the general intent of the settlor of the property whenever that general intent can be ascertained.

In drafting the Bill the United Kingdom provisions have been followed so far as they are appropriate in New Zealand conditions and are consistent with the recommendations of the New Zealand Law Revision Committee. This course has been adopted, partly to secure the benefit of English cases and textbooks, and partly because the United Kingdom Act is known to have been prepared after very full consideration by recognised experts in the field who took account of the earlier Act of Western Australia.

*Clause 1* relates to the Short Title to the Bill.

*Clause 2* defines some of the main terms that are used in the Bill.

*Clause 3* declares that the rule against perpetuities and the provisions of the Bill shall bind the Crown. Both the United Kingdom and the Western Australian Acts are made to bind the Crown. It is not certain whether under existing law the rule against perpetuities binds the Crown. This Bill makes it clear that in future the Crown will be bound by the rule in New Zealand.

*Clause 4* clarifies the application of the provisions of the Bill. Except where otherwise stated, they are to apply only to the wills of testators who die after the commencement of the Bill and to other instruments made after the commencement of the Bill. Where such a will or instrument exercises a power of appointment, every provision of the Bill is to apply to the exercise, whether or not it applies to the will or instrument which created the power.

*Clause 5* prescribes rules stating whether a power of appointment is to be treated as a general power or a special power for the purposes of the rule against perpetuities. The point is of importance because, in the case of a special power, time commences to run from the operative date of the instrument creating the power, whereas, in the case of a general power, time commences to run from the date of the instrument exercising the power. There are many varieties of powers, and the existing rules of law leave doubt in a number of cases as to whether the powers are general or special. The clause is designed to provide a clear rule which will resolve this doubt in all cases for the purposes of the rule against perpetuities.

*Clause 6* provides that (subject to the special provisions regarding powers of appointment, options, and possibilities of reverter), where the instrument by which any disposition of property 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 of such number of years not exceeding 80 as is specified in that behalf in the instrument. The provision enables the duration of a trust to be specified within the legal limits in any of the ways at present permissible, or by reference to a specified period of years not exceeding 80 years. As shown above, under the existing law, particularly where Royal lives are taken as the measuring lives, trusts to continue for 80 or more years can be created without difficulty. The 80-year period is not designed to extend the period during which trusts may continue, but to provide an inducement not to use as the measuring period Royal lives or other lives not connected with the trust. Properly framed "Royal lives" provisions are legally effective, but cause difficulty in practice because of the difficulty in determining when the last of the persons specified actually dies.

*Subclause (2)* specifies how the 80-year principle is to operate in relation to powers of appointment. The subclause allows greater flexibility than the corresponding U.K. provision by providing that (subject to the terms of the power) the fixed period may be specified in the instrument made in exercise of the power as well as in the instrument creating the power. This flexibility is permitted under the Act of Western Australia, and is recommended by the New Zealand Law Revision Committee.

*Clause 7* creates presumptions that a woman who has attained the age of 55 years is incapable of having a child and will not subsequently have a child, and that a male or female who has not attained the age of 12 years is incapable of having a child while under that age. These presumptions are to apply for all purposes connected with the rule against perpetuities, or the ascertainment of the right of any persons to put an end to a trust or accumulation, or generally in the management or administration of any trust, estate, or fund, or for any purposes relating to the disposition, transmission, or devolution of property. In connection with the right of persons to put an end to a trust or accumulation, they are to apply to existing as well as future cases. In the unlikely event of a child being born at a time when the Court has ruled that its parent is incapable of having a child, the decision is to stand subject to the qualification that any rights of the child and its issue and their spouses are not to be prejudiced. It is declared that the presumptions against having a child extend to exclude having a child by adoption, legitimation, or other means. Sections 16 (2) and 17 of the Adoption Act 1955 would in any event exclude adopted

children from benefiting in cases where the presumption would be invoked. The clause is in accordance with recommendations of the New Zealand Law Revision Committee, and is adapted from the corresponding provisions in the Acts of the United Kingdom and Western Australia. The absence of these obvious presumptions has caused serious difficulty in many cases in the past.

*Clause 8:* Under the existing law a disposition is invalid as infringing the rule against perpetuities unless it is certain, at the date of the making of the disposition, that it will vest, if at all, within the perpetuity period. Possible and not actual or probable events are looked at. The clause reverses this principle, and provides that a disposition is to be treated as if it were not invalid as infringing the rule against perpetuities until such time (if any) as it becomes established that the vesting must occur, if at all, after the end of the perpetuity period. During the intervening period, powers of advancement are to be exercised, intermediate income is to be applied, and powers of appointment, options, etc., are to be exercised, as if the disposition were not invalid as infringing the rule against perpetuities.

*Subclauses (4) and (5)* deal with the problem of ascertaining the period during which one must wait under this clause in order to see whether or not the disposition does vest in time. Unless a period of years is selected by a settlor under *clause 6*, the perpetuity period will be the duration of lives in being at the creation of the disposition plus a further 21 years as at common law (except where a shorter period is prescribed under *clauses 17 and 18*). Under a "wait and see" rule, however, a special difficulty is encountered in identifying the relevant lives in being. *Subclauses (4) and (5)* are designed to resolve this difficulty.

At common law, a disposition is invalid unless it is certain at the time when the disposition is made that it must necessarily vest, if at all, within the period of lives in being plus 21 years, and this "initial certainty" requirement removes any practical difficulty in identifying the appropriate lives, although theoretically the problem remains. Hence, unless the settlor has specified the lives in being, on one view they constitute an amorphous class that includes any one alive at the relevant date, although no time is wasted considering lives which are not in some way involved in the scheme of disposition. On another view, the term "lives in being" refers only to those persons whose existence ensures that the disposition will vest in time, so that if no such person can be found the disposition is too remote.

(A third view, that the "lives in being" are those that are causally connected with the vesting or failure of the disposition and restrict the period in which it will vest, does not appear to provide a satisfactory or workable explanation of a number of cases.) However, this variable meaning of "measuring lives" causes no embarrassment in the practical application of the rule at common law as it is inherent in the "initial certainty" requirement and, whichever variant is ascribed to, the same result follows.

The position however is different as soon as the "wait and see" rule is adopted, and the "initial certainty" requirement is abolished. The proper ascertainment of measuring lives then becomes of practical importance in determining the period during which one may wait for the disposition to vest, and neither of the traditional theories provides a satisfactory test under "wait and see". As the common law prescribes no period that is

meaningful outside the "initial certainty" test, it is necessary in this clause to specify afresh the period during which the disposition must vest to be valid. A satisfactory answer is not provided by requiring the same "measuring lives" to be used as would have been used at common law because, if the first theory is correct, this would include any one alive at the relevant date and the amended rule would be unworkable. On the other hand, if the second theory is correct and the lives are those which at common law show the disposition to be valid, there would be no occasion on which the "wait and see" rule could apply. The test, adopted in one jurisdiction, that the "lives" are those that are causally related to the vesting or failure of the disposition, seems fraught with ambiguity and uncertainty and is capable of excluding some persons who should be included, and includes many who should not.

Of the devices adopted for solving this problem in the various countries that have introduced a "wait and see" rule, it appears that the most practical is that incorporated in the U.K. Act which specifies a list of persons whose lives may be taken into account for this purpose. Although even this provision has been subjected to some criticism, it provides the most convenient solution at present available. It has been therefore embodied in *subclauses (4) and (5)*.

#### *Cy-pres Modifications of Dispositions*

*Clause 9* provides specifically for the *cy-pres* modification of dispositions in two cases, namely, where they can be validated by a reduction of the age specified for taking, or where they can be validated by the exclusion of class members whose inclusion would destroy the whole gift.

*Subclauses (1) and (2)* provide for the reduction of age, and replace section 25 of the Property Law Act 1952. That section required the age to be reduced to 21 years in every case; but, in view of the new "wait and see" rule, it is desirable to reduce the age only so far as is necessary to save the gift, and the new provisions have been modified accordingly.

*Subclauses (3) and (4)* provide for the validation of a disposition by the exclusion of members of a class. Under the present law a class gift under which a single member of the class is capable of taking a vested interest outside the perpetuity period is totally invalid. These subclauses provide for the disposition to be construed and take effect as one to those members only of the class whose interests vest within the perpetuity period. *Subclause (3)* provides for the special case where the need for "age-reduction" and "class-exclusion" is found in combination: i.e., 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 *subclauses (1) and (2)*, but for the fact that there are other members of the class in whose case the defect in the disposition cannot be so cured. *Subclause (3)* provides that in this case those other members are to be excluded from the class. *Subclause (4)* deals with the case of validation by exclusion of class members where there is no question of age reduction. It provides that where the "wait and see" rule and "age reduction" cannot help, and the inclusion of any persons in the class would render the whole class gift invalid, the gift is to be validated by construing it as excluding those persons, unless that would exhaust the whole class.

*Subclause (5)* declares that the exclusion of any class members as aforesaid is not to affect the validity of any advancement of capital or application of intermediate income before it is known that the disposition must fail.

*Clause 10* provides generally for the *cy-pres* modification of all future dispositions and certain existing dispositions, where the dispositions infringe the rule against perpetuities and are not otherwise cured by the Bill, if the dispositions are capable of being reformed so as to give effect within the perpetuity period to the original general intentions. Subject to the qualifications expressed in the clause, *cy-pres* modification is to be mandatory in all cases where the clause applies. *Subclause (2)* specifies the types of existing dispositions which are not to be capable of *cy-pres* modification. It is designed to give reasonable protection to vested interests, and to allow a settlor who is entitled under a resulting trust the period until 31 December 1966 to decide whether he will accept the resulting trust or cause or allow the disposition to be reformed. Reformation is to be made by the Supreme Court, but until 31 December 1966 living settlors under existing trusts are to effect reformations by deed where they are entitled to the settled property under a resulting trust and are not of unsound mind. Where a disposition is reformed in accordance with the clause, the reformation is deemed to have had effect from the making of the disposition; and all consequences (including revenue consequences) follow as if the reformed disposition had been the original one.

*Clause 11* imposes restrictions on the acceptance of a resulting trust in respect of property that has become subject to a trust because of assistance given to the trustee by a person who is not strictly a settlor.

*Clause 12* provides that, in any case where, before the commencement of the Bill, it has become apparent that any disposition would be invalid solely on the ground that the property that is disposed of would not become vested until too remote a time, or doubts have arisen as to whether any disposition might be invalid solely on that ground, if within six years before the commencement of the Bill the property has been resettled to carry into effect the general intentions originally governing the disposition as those general intentions appeared from the instrument governing the disposition or (where there was no such instrument) from the terms of the disposition, the provisions of *subclause (7) of clause 10* of the Bill shall apply to the resettlement as if it were a reformation of the disposition.

*Clause 13*: Under the existing law, when the Court is construing a disposition in favour of the widow or widower of a person who is a life in being for the purposes of the rule against perpetuities, or a disposition expressed to vest on or after the death of such a widow or widower or on or after the happening of any contingency during her or his lifetime, the Court takes account of the possibility that the person who becomes the widow or widower may not be born at the date when the settlement comes into existence. This regard to possibilities in this connection is a trap which has caused many dispositions to infringe the rule against perpetuities. In all the known reported cases the widow or widower has actually been a life in being, but this has not saved the dispositions. The clause provides that, for the purposes of any such disposition, such a widow or widower is to be deemed to be a life in being. This will produce greater initial certainty than would be produced under "wait and see" by limiting the occasions in which it will be necessary to wait and see.

*Clause 14* reverses the existing law by providing that a disposition shall not be treated as being invalid as infringing the rule against perpetuities by reason only that the interest disposed of is ulterior to and dependent upon an interest under a disposition which is so invalid, and that 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.

*Clause 15:* Under existing law dispositions are construed in the first place without any regard to the fact that, while under one possible construction they would or might be void as infringing the rule against perpetuities, under another they would or might be valid. The clause abolishes this rule of remorseless construction. In future the Court is to be permitted to have regard to such a fact; and, in considering which of those constructions is to be preferred, the Court is permitted to take into account that the maker thereof would probably have intended the construction under which the disposition would be valid.

*Clause 16* declares that 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 valuable consideration, or to do any other act in the administration (as distinct from 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. The clause follows section 29 of the Trustees Act 1962 of Western Australia in validating past actions to which it applies. The corresponding U.K. provision is not made retrospective to this extent, though it is made to apply for the future to existing instruments as well as future ones.

*Clause 17* provides that the rule against perpetuities is not to apply to options to acquire property for valuable consideration in cases where the option is exercisable by a lessee and must be exercised at or before the expiration of one year following the determination of the lease; and in cases where the option is conferred by a will or other settlement and the option must be exercised at or before the expiration of one year from the time when the trust assets would become distributable. In the case of other options the rule against perpetuities is not to apply, but the option is to become void on the expiration of 21 years from the date of its grant as between the original parties to that grant and all persons claiming through them. The 21 year period in respect of these options in gross has been fixed because the Committees which considered this question took the view that in general the existence of an option in gross tended to discourage the development of the land by the person in occupation. Section 9 (2) of the U.K. Act has a proviso whereby the 21-year period is not to apply to a right of preemption conferred on a public or local authority in respect of land used or to be used for religious purposes where the right becomes exercisable only if the land ceases to be used for such purposes. No such proviso has been included in the clause in the Bill because it is understood that corresponding rights of preemption are not granted under New Zealand practice.

*Clause 18* makes the provisions regarding perpetuities set out in this Bill apply to conditions subsequent, exceptions or reservations attached to any disposition, and provisions which provide for a possibility of reverter on the determination of a determinable fee simple or for a possibility of a resulting trust on the determination of any other determinable interest in property. The Law Revision Committee recommended that the perpetuity period in cases to which this clause applied should be 21 years. There has been criticism of this proposed period on the ground that it would be unduly short where a donor gave land to a Club in fee simple for club purposes, but only so long as it is used for those purposes. It has been suggested that if the authorised use ceased after say 25 years there is no good reason why the proceeds of the property should belong to the then members of the Club rather than revert to the donor or his estate. It has also been pointed out that the donor could secure the benefit for himself and his estate during the normal perpetuity period by the simple device of settling the property upon trusts. No special perpetuity period has been provided under the corresponding provisions of the legislation of the United Kingdom and Western Australia; and in the circumstances the normal period is being left to apply in New Zealand.

*Clause 19* transfers to the new Perpetuities Act the provisions of section 24 of the Property Law Act 1952, which section declares that the rule against perpetuities is not to apply to certain superannuation funds.

*Clause 20* declares that the Bill does not affect trusts for non-charitable purposes where there is no obvious human beneficiary to enforce the trust, with the qualification that, if any such disposition is not otherwise invalid, the provisions of *clause 8* are to apply to it and the property may be applied for the purposes during the perpetuity period but not thereafter. The position of trusts of this nature is discussed in paragraph 49 of the report of the U.K. Committee.

#### *Accumulation of Income*

*Clause 21* provides that, in connection with wills and instruments which take effect in future, there is to be no restriction on the period for which an accumulation of income may be directed or permitted other than the full period applicable under the rule against perpetuities. The clause also declares that existing and previous enactments regarding accumulations shall be deemed never to have applied to any power to accumulate.

Special restrictions on accumulation were first imposed in England by the Accumulations Act 1800, commonly called the Thellusson Act. The date of this Act is significant. The Act did not form part of the body of English law that was inherited by most of the States when the United States of America gained independence. Most of the States have never had any corresponding legislation, and those that have passed such legislation have in most cases repealed it. Most of the Commonwealth countries, on the other hand, inherited the Accumulations Act 1800, and, until recently, retained it without question. The rule against accumulation was abolished in Western Australia by section 17 of the Law Reform (Property, Perpetuities and Succession) Act 1962, and its abolition in New Zealand has been recommended by the New Zealand Law Revision Committee. Experience in the Commonwealth



countries and the United States has shown that countries can manage reasonably well either with or without an accumulations rule. In an extreme form, such as the Thellusson will which inspired the Act of 1800, extended trusts for accumulation are objectionable, but in the absence of controls these cases do not often arise. On the other hand the existing rules frustrate reasonable dispositive schemes and schemes for administration, e.g., temporary accumulations of surplus income under a discretionary trust for the protection of an adult spendthrift son, and the withholding of income for capital development and expenditure. The statutory accumulations have always been exceedingly difficult to apply and have introduced many technicalities and complexities into conveyancing. On balance it seems better to abolish the accumulations rule.

*Power to Apply to Court for Directions*

Clause 22 gives power to apply to the Court for directions in any case where doubt or difficulty arises in respect of the application of any provision of the Bill in respect of any disposition.

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Hon. Mr Hanan

## PERPETUITIES

### ANALYSIS

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### A BILL INTITULED

**An Act to effect reforms in the rule of law commonly known as the rule against perpetuities and to abolish the rule of law commonly known as the rule against accumulations**

**5 BE IT ENACTED** by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

**1. Short Title**—This Act may be cited as the Perpetuities Act 1964.

**2. Interpretation**—(1) In this Act, unless the context otherwise requires,—

“Disposition” includes the conferring or exercise of a power of appointment or any other power or authority to dispose of an interest in or 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: 5 10

“In being” means living or *en ventre sa mere*:

“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: 15

“Issue”, in relation to any person, means the children and other descendants of that person; and includes any person who bears any such relationship illegitimately:

“Power of appointment” includes any discretionary power to transfer or grant or create a beneficial interest in property without valuable consideration: 20

“Property” includes any interest in real or personal property and any thing in action:

“Will” includes a codicil. 25

(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 identifying 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. 30

Cf. Perpetuities and Accumulations Act 1964, s. 15 (2), (3) (U.K.); Law Reform (Property, Perpetuities and Succession Act 1962, s. 4 (W.A.) 35

**3 Act and rule against perpetuities to bind the Crown**—This Act and the rule against perpetuities shall bind the Crown. 40

Cf. U.K. Act, s. 15 (7); W.A. Act, s. 3 (2)

**4. Application of Act**—(1) Except where otherwise expressly provided in this Act, every provision of this Act,—

5 (a) In so far as it applies to wills, shall apply only to the wills of testators who die after the commencement of this Act; and

(b) In so far as it applies to instruments other than wills, shall apply only to instruments executed after the commencement of this Act

10 (2) All other wills and instruments shall, except where otherwise expressly provided in this Act, be governed by the enactments and rules of law which would have applied to them if this Act had not been passed.

15 (3) Where a will or other instrument to which this subsection applies in accordance with subsection (1) of this section exercises a power of appointment, every provision of this Act shall apply in relation to that exercise, whether or not it applies to the will or other instrument creating the power.

20 (4) 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 executed when the disposition was made.

Cf. U.K. Act, s. 15 (5), (6); W.A. Act, s. 3 (1)

**5. Powers of appointment**—For the purposes of the rule against perpetuities, a power of appointment shall be treated as a special power unless—

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

30 (b) It could, at all times during its currency when that person is of full age and capacity, be exercised by him so as immediately to transfer to 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:

35 Provided that, for the purpose of determining whether a disposition made under a power of appointment exercisable by will only is invalid as infringing the rule against perpetuities, the power shall be treated as a general power where it would have fallen to be so treated if exercisable by deed.

Cf. U.K. Act, s. 7; W.A. Act, s. 16

**6. Power to specify perpetuity period—**(1) Subject to subsection (2) of this section, 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 of such number of years not exceeding eighty as is specified in that behalf in the instrument. 5

(2) This section shall apply to an instrument creating a power of appointment and (subject to the terms of the power) to an instrument made in exercise of a power of appointment. 10

(3) In the case of an instrument made in exercise of a special power of appointment, the period specified as aforesaid, shall run from the date of the creation of the power, and in all other cases shall run from the time when the instrument comes into operation. 15

Cf. U.K. Act, s. 1; W.A. Act, s. 5

**7. Presumptions and evidence as to future parenthood—**(1) This section shall apply whenever it becomes relevant to inquire whether any person is or at any relevant date was or will be capable of having a child, if— 20

(a) The inquiry is necessary for the purpose of determining the rights of any person to put an end to a trust or accumulation under any will or instrument, whether (in the case of a will) the testator has died or dies before or after the commencement of this Act or (in the case of any other instrument) it was made before or after the commencement of this Act; or 25

(b) In any other case where this paragraph applies in accordance with section 4 of this Act, the inquiry is necessary for the purpose of determining whether any disposition is invalid as infringing the rule against perpetuities, or arises generally in the management or administration of any trust, estate, or fund, or is necessary for any purpose relating to the disposition, transmission, or devolution of property. 30 35

(2) Where this section applies, there shall be a presumption, rebuttable by sufficient evidence to the contrary tendered at the time at which the matter falls for decision, but not subsequently, that— 40

(a) A woman who has attained the age of fifty-five years is incapable of having a child and will not subsequently have a child; and

(b) A male or female who has not attained the age of twelve years is incapable of having a child while under that age.

(3) Where this section applies, evidence that a male or female of any age is or at a relevant date was or will be incapable of having a child shall be admissible in proceedings in order to establish that incapacity, and the Court may accept any such evidence of a high degree of improbability of having a child as it thinks proper as establishing the incapacity.

(4) Where this section applies in relation to any disposition and any question is decided by the Supreme Court or any higher Court under this section by treating a person as incapable of having or unlikely to have a child at a particular time, then (whether or not he or she does so) he or she shall be so treated for the purpose of any question which may arise where this section applies in relation to the same disposition in any subsequent proceedings; and no action shall lie against a trustee by reason of his having distributed any property in reliance on any such decision of the Court:

Provided that, if a disposition that is not itself invalid as infringing the rule against perpetuities confers upon a child who is born to a parent at a time when any such Court has treated the parent as unable to have a child, or upon the husband or wife of such a child, or upon the child's issue or the husband or wife of any of the child's issue, a right to any property, that right (including any right to follow or trace the property) shall not be affected by the decision of the Court:

Provided also that this subsection shall not apply to any decision of any Court made in accordance with paragraph (a) of subsection (1) of this section in respect of any disposition made by a will or instrument to which this subsection does not apply in accordance with section 4 of this Act.

(5) In the foregoing provisions of this section references to having a child are references to begetting or giving birth to a child; but (except as provided in subsection (6) of this section) those provisions, except subsection (3), shall also apply in relation to the possibility that a person may at any time have a child by adoption, legitimation, or other means:

Provided that, in relation to that possibility subsection (2) of this section shall be read as if the words "rebuttable by sufficient evidence to the contrary tendered at the time at which the matter falls for decision" were omitted.

(6) The foregoing provisions of this section, so far as they would otherwise apply in relation to the possibility that a person will at any future time have a child by legitimation, shall not apply in the case of any person if it is established that the person has had an illegitimate child who has not been adopted by some other person and that the child and both its parents are living, unless the Court is satisfied that there is a high degree of improbability that the child will be legitimated. 5

Cf. U.K. Act, ss. 2, 14; W.A. Act, s. 6 10

**8. Necessity to wait and see—**(1) Where, apart from the provisions of this section, a disposition would be invalid as infringing the rule against perpetuities, the disposition shall be treated, until such time (if any) as it becomes certain that the vesting must occur after the end of the perpetuity period or that the vesting cannot occur, as if the disposition were not invalid as infringing the rule against perpetuities; and its becoming so certain 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. 15 20

(2) Where, apart from the said provisions, a disposition consisting of the conferring of a general power of appointment would be invalid as infringing the rule against perpetuities, the disposition shall be treated, until such time (if any) as it becomes certain that the power will not be exercisable within the perpetuity period, as if the disposition were not invalid as infringing the rule against perpetuities. 25

(3) Where, apart from the said provisions, a disposition consisting of the conferring of any power, option, or other right would be invalid as infringing the rule against perpetuities, the disposition shall be treated as regards any exercise of the right within the perpetuity period as if it were not so invalid and, subject to the said provisions, shall be treated as invalid as infringing the rule against perpetuities only if and so far as the right is not fully exercised within that period. 30 35

(4) Where any of the foregoing provisions of this section applies to a disposition and the duration of the perpetuity period is not determined by virtue of section 6 of this Act, it shall be determined as follows:

5 (a) Where any persons falling within subsection (5) of this section are individuals in being and ascertainable at the commencement of the perpetuity period, the perpetuity period shall be the period expiring  
10 twenty-one years after the death of the survivor of them, and no regard shall be had to any other lives, but so that the lives of any description of persons falling within paragraph (b) or paragraph (c) of that subsection shall be disregarded if the number of persons of that description is such as to render it  
15 impracticable to ascertain the date of death of the survivor:

(b) When there are no lives under paragraph (a) of this subsection, the period shall be twenty-one years.

(5) The said persons shall be as follows:

20 (a) The person by whom the disposition was made:  
(b) A person to whom or in whose favour the disposition was made, that is to say—

25 (i) In the case of a disposition to a class of persons, any member or potential member of the class:

(ii) In the case of an individual disposition to a person taking only on certain conditions being satisfied, any person as to whom only one or some of the conditions are satisfied and the remainder may in time be satisfied:

30 (iii) In the case of a special power of appointment exercisable in favour of members of a class, any member or potential member of the class:

(iv) In the case of a special power of appointment exercisable in favour of one person only, that person or, where the object of the power is ascertainable only on certain conditions being satisfied, any person as to whom only one or some of the conditions are satisfied and the remainder may in time be satisfied:

35 (v) In the case of any power, option, or other right, the person on whom the right is conferred:

40 (c) A person having a child or grandchild within sub-paragraphs (i) to (iv) of paragraph (b) of this subsection, or any of whose children or grandchildren, if subsequently born, would by virtue of  
45 his or her descent fall within those subparagraphs:



- (d) Any person on the failure or determination of whose prior interest the disposition is limited to take effect.

Cf. U.K. Act, s. 3; W.A. Act, s. 7

*Cy-pres Modifications of Dispositions*

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**9. Reduction of age and exclusion of class members to avoid remoteness—**(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— 10

- (a) That the disposition would, apart from this section, be invalid as infringing the rule against perpetuities, but

- (b) That it would not be so invalid if the specified age had been twenty-one years,— 15

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 the specified age which would, if specified instead, have prevented the disposition from being so invalid. 20

(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) of this section to the specified age shall be construed as a reference to all the specified ages; and 25

- (b) That subsection shall operate to reduce each such age so far as is necessary to save the disposition from being invalid as infringing the rule against perpetuities. 30

(3) Where it is apparent at the time when any disposition is made or becomes apparent at any subsequent time that, apart from this subsection, 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 invalid as infringing the rule against perpetuities, those persons shall thenceforth be deemed for all the purposes of the disposition to be excluded from the class, and the said provisions shall thenceforth have effect accordingly. 35 40

(4) Where, in the case of a disposition to which subsection (3) of this section does not apply, it is apparent at the time the disposition is made or becomes apparent at a subsequent time that, apart from this subsection, the inclusion of any persons, being potential members of a class or unborn persons who at birth would become members or potential members of a class, would cause the disposition to be treated as invalid is infringing the rule against perpetuities, 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 8 of this Act 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.

(6) Section 25 of the Property Law Act 1952 is hereby consequentially repealed:

Provided that the repeal of that section shall not restrict the operation of subsection (2) of section 4 of this Act.

Cf. U.K. Act, s. 4

**10. Cy-pres modification in certain other cases—**(1) Subject to the provisions of this section, where it has become apparent that, apart from the provisions of this section, any disposition (whether made before or after the commencement of this Act) would be invalid solely on the ground that the property that is disposed of would not become vested until too remote a time, the disposition shall be reformed so as to take effect within the limits permitted under the rule against perpetuities and to give effect to the general intentions originally governing the disposition where those general intentions can be ascertained from the instrument governing the disposition or (where there is no such instrument) from the terms and the scheme of the disposition.

(2) No disposition of any property that was made before the commencement of this Act shall be so reformed—

(a) If the disposition has been declared invalid before the commencement of this Act by any order or judgment made or given in any legal proceedings; or

- (b) If any property comprised in the disposition has, before the commencement of this Act, been paid or transferred to, or applied for the benefit of, or set apart for, the persons entitled by reason of the invalidity of the disposition; or 5
- (c) If the person who made the disposition of the property while living and of full capacity has, before the first day of January, nineteen hundred and sixty-seven, elected in accordance with subsection (8) of this section to accept the property under a resulting trust in his favour; or 10
- (d) So as to prejudice any person who has, before the commencement of this Act, reasonably so altered his position in reliance on the invalidity of the disposition that, in the opinion of the Supreme Court, having regard to all possible implications in respect of other persons, it is inequitable to reform the disposition wholly or in part. 15
- (3) Where it is possible that any disposition made after the commencement of this section would, apart from the provisions of this section, become invalid solely on the ground that the property that is disposed of would not become vested until too remote a time, and where (if the disposition subsequently became invalid) it would have to be reformed in accordance with subsection (1) of this section, the disposition may be reformed under this section before that subsection applies to it, if— 20
- (a) The reformation would not prejudice any person who could possibly take under the disposition if it were not reformed and proved to be valid; or 30
- (b) Every person who could possibly be prejudiced by the reformation consents to it.
- (4) In every case where the reformation of a disposition of any property is required or permitted under this section,— 35
- (a) If the disposition was made before the commencement of this Act, and it has become apparent that the person who made the disposition of the property has become entitled to it under a resulting trust, or that he or his personal representative will become so entitled to it,— 40

5 (i) The reformation may be made by that person executing, before the first day of January, nineteen hundred and sixty-seven, a deed specifying such alterations to the disposition as are necessary to provide for its reformation in accordance with the provisions of this section; or

10 (ii) The reformation may be made, on or after the last-mentioned date or before that date if the person has died or is for the time being of unsound mind, by the Supreme Court, by order specifying such alterations to the disposition as are necessary to provide for its reformation in accordance with the provisions of this section:

15 (b) If paragraph (a) of this subsection does not apply to the disposition, the reformation may be made by the Court, by order specifying such alterations to the disposition as are necessary to provide for its reformation in accordance with the provisions of this section.

20 (5) Where a disposition made before the commencement of this Act is reformed under this section, in determining the validity of the reformed disposition, regard shall be had to events and circumstances which have occurred or exist at the date of the reformation.

25 (6) In any case where this section requires the reformation of any disposition, it shall be the duty of the trustees of property comprised in the disposition to take all reasonable steps that may be necessary to secure the reformation of the disposition.

30 (7) Where a disposition is reformed in accordance with this section,—

(a) The perpetuity period shall run from the date of the original disposition:

35 (b) Except as otherwise provided in this Act, the disposition as reformed shall be governed by the enactments and rules of law which would have applied to it if the reformed disposition had been made at the time of the original one:

40 (c) Subject to the foregoing provisions of this section, the reformation shall be deemed to have had effect as from the making of the disposition; and all consequences (including revenue consequences) shall follow as if the reformed disposition had been made at the time of and instead of the original one.

(8) For the purposes of this section, a person who is entitled to elect to accept any property under a resulting trust may—

(a) Declare his intention to do so by deed; or

(b) Manifest his intention to do so by—

(i) Accepting a transfer or payment of the property or any part thereof from the trustees of the property; or

(ii) Otherwise dealing with the property or any part thereof as his own property.

(9) No election which is not so declared or manifested before the first day of January, nineteen hundred and sixty-seven, shall have any effect for the purposes of paragraph (c) of subsection (2) of this section.

(10) On the reformation of a disposition under this section the perpetuity period in respect of that disposition shall not be extended under section 6 of this Act or otherwise.

**11. Restrictions on acceptance of resulting trust—**(1) In the case of any disposition made before the commencement of this Act which is capable of reformation under section 10 of this Act, where any person other than a donor of property that was given to the trustee upon trust has sold other property to that trustee, or has assisted that trustee (by loan, guarantee, or otherwise) to acquire other property, the Court may direct that the right of any such donor to elect after the commencement of this Act to accept under a resulting trust any property that is subject to the trust governing the disposition shall be restricted to so much of that property as was given by that donor or fairly attributable to his gift.

(2) Upon any such direction being given by the Court, any election (whether made before or after the time of the direction) shall be restricted to such property as is specified in the direction.

(3) At the time of giving any such direction or at any subsequent time the Court may make an order under section 10 of this Act reforming the disposition in respect of so much of the property comprised in the disposition as was not given to the trustee by any donor or fairly attributable to any such gift; and the provisions of section 10 of this Act shall apply to that part of the property as if the donor thereof were dead.

(4) An application to the Court under this section in respect of the property comprised in any disposition may be made by the trustee of that property, or by any vendor of property to that trustee, or by any person who assisted that trustee  
 5 (by loan, guarantee, or otherwise) to acquire that property, or by any person who may be prejudiced by an election to accept a resulting trust in respect of any such property.

**12. Previous *cy-pres* resettlements**—In any case where, before the commencement of this Act, it has become apparent  
 10 that any disposition would be void solely on the ground that the property that is disposed of would not become vested until too remote a time, or doubts have arisen as to whether any disposition might be void solely on that ground, if within six  
 15 years before the commencement of this Act the property has been resettled to carry into effect the general intentions originally governing the disposition as those general intentions appeared from the instrument governing the disposition or  
 (where there was no such instrument) from the terms and scheme of the disposition, the provisions of paragraph (c) of  
 20 subsection (7) of section 10 of this Act, so far as it relates to revenue consequences, shall apply to the resettlement as if it were a reformation of the disposition.

*Miscellaneous Provisions Affecting Rule Against Perpetuities*

**13. Unborn husband or wife**—The widow or widower of  
 25 a person who is a life in being for the purpose 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 or of a person who attains, or of a class the members of which  
 30 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  
 35 widow or widower, or on or after the happening of any contingency during her or his lifetime.

Cf. W.A. Act, s. 12; U.K. Act, s. 5

**14. Saving and acceleration of expectant interests**—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. 5

Cf. U.K. Act, s. 6; W.A. Act, s. 13

**15. Rule of remorseless construction abolished**—Where a Court is construing a will or other instrument, whether made before or after the commencement of this Act, and the will or instrument makes a disposition of any property, the Court may have regard to the fact that, while under one possible construction the disposition would or might be void as infringing the rule against perpetuities, under another possible construction it would or might be valid; and, in considering which of those constructions is to be preferred, the Court may take into account that the maker thereof would probably have intended the construction under which the disposition would be valid. 10 15 20

**16. Administrative powers of trustees**—(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 valuable consideration, or to do any other act in the administration (as distinct from 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. 25 30

(2) Subsection (1) of this section shall not—

- (a) Render any trustee or other person liable for any acts done before the commencement of this Act for which the trustee or person would not have been liable if this Act had not been passed; or
- (b) Enable any trustee or person to recover any money distributed or paid under any trust, if he could not have recovered that money had that subsection not been enacted. 35

Cf. U.K. Act, s. 8

17. **Options relating to property**—(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  
5 the term of a lease if—

(a) The option is exercisable only by the lessee or its 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.

10 (2) Subsection (1) of this section shall apply in relation to an agreement for a lease as it applies in relation to a lease, and the term “lessee” shall be construed accordingly.

(3) The rule against perpetuities shall not apply to a disposition consisting of the conferring of an option to acquire  
15 any property for valuable consideration if—

(a) The option is conferred by a will or other instrument which provides for the settlement upon trust of assets comprising or including the property; and

20 (b) The option is exercised at or before the expiration of one year after the first point of time when,—

(i) In accordance with the settlement, all interests in remainder in the property that vest within the perpetuity period have vested and all prior interests in the property have terminated; and

25 (ii) The persons entitled in remainder to the property in accordance with the settlement have all attained the age of twenty-one years or sooner died.

(4) In the case of a disposition to which the foregoing provisions of this section do not apply and which consists of  
30 the conferring of an option to acquire for valuable consideration any interest in land, the rule against perpetuities shall not apply, but that option shall become void on the expiry of twenty-one years from the date of its grant as between the original parties to that grant and all persons claiming through  
35 them; and no remedy shall lie in contract or otherwise for giving effect to it or making restitution for its lack of effect.

Cf. U.K. Act, ss. 9, 10; W.A. Act, s. 14

18. **Possibilities of reverter, conditions subsequent, exceptions, and reservations**—(1) Subject to the provisions of section 8  
40 of this Act, the rule against perpetuities as modified by this Act shall apply—



- (a) To a possibility of reverter in land on the determination of a determinable fee simple; and so that, if the fee simple does not determine within the perpetuity period, it shall thereafter continue as a fee simple absolute: 5
- (b) To a possibility of a resulting trust on the determination of any other determinable interest in property; and so that, if the prior interest created by the trust does not determine within the perpetuity period, the interest it creates shall thereafter continue as an absolute interest: 10
- (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; and so that 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. 15 20
- (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 subsection (1) of this section 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. 25 30

Cf. U.K. Act, s. 12; W.A. Act, s. 15 35

**19. Rule against perpetuities not to apply to superannuation funds—**(1) The rule against perpetuities shall not apply and shall be deemed never to have applied to the trusts of any fund of which the main purpose or one of the main purposes is the provision of retiring allowances or pensions on retirement to persons employed in the undertaking or combination 40

of undertakings in connection with which the fund is established, if the fund is a superannuation fund within the meaning of the Land and Income Tax Act 1954, or if the fund is such that the Commissioner of Inland Revenue allows deductions to be made under section 128 of that Act of the whole or any part of the amounts set aside or paid by the employer as or to the fund.

(2) Section 24 of the Property Law Act 1952 is hereby consequentially repealed.

10 **20. Rule against inalienability**—Nothing in this Act shall affect the operation of the rule of law rendering invalid as infringing the rule against perpetuities certain dispositions under which property is limited to be applied for purposes other than the benefit of any person or class of persons in  
15 cases where the property may be so applied after the end of the perpetuity period:

Provided that, if any such disposition is not otherwise invalid, the provisions of section 8 of this Act shall apply to it, and the property may be applied for the purposes during  
20 the perpetuity period but not thereafter.

Cf. U.K. Act, s. 15 (4)

*Accumulation of Income*

**21. Accumulation of income**—(1) Where property is settled or disposed of in such manner that the income thereof  
25 may or shall 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, and not otherwise.

(2) Nothing in this section shall affect the power of any  
30 person or persons to terminate an accumulation that is for his or their benefit, or any jurisdiction or power of the Court to maintain or advance out of accumulations, or any powers of a trustee under the Trustee Act 1956 or under any other Act or law or under any instrument creating a trust or making  
35 a disposition.

(3) The following enactments are hereby repealed:

(a) Sections 41 and 42 of the Property Law Act 1952:

(b) Section 2 of the Property Law Amendment Act 1963.

(4) The enactments repealed by subsection (3) of this section, and the corresponding provisions of any former enactment, shall be deemed, in connection with the law of New Zealand, never to have applied to any power to accumulate:

5

Provided that this subsection shall not—

(a) Render any trustee or other person liable for any acts done before the commencement of this Act for which the trustee or person would not have been liable if this Act had not been passed; or

10

(b) Enable any trustee or person to recover any money or other property distributed or paid under any trust, if he could not have recovered that money or property had this subsection not been passed.

(5) Except as provided in subsection (4) of this section, this section shall have effect only as provided in section 4 of this Act.

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Cf. W.A. Act, s. 17

*Power to Apply to Court for Directions*

**22. Power to apply to Court for directions**—Any person who is a trustee of or beneficially interested in any property comprised in a disposition may apply to the Supreme Court for directions in any case where doubt or difficulty arises in respect of the application of any provision of this Act in respect of that disposition.

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25