

# PERPETUITIES AND ACCUMULATIONS ACT 2009

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### *Perpetuities: miscellaneous*

#### *Section 6: Start of the perpetuity period*

48. *Section 6* specifies when the 125-year perpetuity period will start. *Subsection (1)* sets out the general rule that the perpetuity period commences when the instrument creating the estate, interest, right or power referred to in section 1 takes effect. For this purpose a will takes effect on the death of the testator (section 20(6)). The general rule applies to instruments created in the exercise of a general power of appointment: the perpetuity period is 125 years beginning on the date on which the general power is exercised, not on the date on which the power was created.
49. *Subsection (2)* provides that the perpetuity period for an instrument created in the exercise of a special power of appointment (sections 11 and 20 define a special power of appointment) begins on the date on which the instrument creating the power took effect. The Act applies to such instruments only where the instrument which created the special power took effect on or after the commencement day (section 15(1)(b)).
50. *Subsections (3) and (4)* specify when the perpetuity period starts to run in the circumstances set out in section 2(5), that is, where the interests or rights arise under an instrument nominating benefits under a relevant pension scheme, or under an instrument made in the exercise of a power of advancement arising under such a scheme. In these cases the perpetuity period of 125 years (section 5(1)) runs from when the member joined the scheme.

#### *Section 7: Wait and see rule*

51. The operation of the rule against perpetuities was modified by the 1964 Act, which introduced the “wait and see” principle. The “wait and see” principle means that the rule against perpetuities does not affect an estate or interest in property unless and until it becomes certain that the estate or interest will not vest within the perpetuity period. Section 7 of the Act applies this principle of “wait and see” to instruments to which the Act applies.
52. The section asks in effect whether, within the terms of the instrument, the estate, interest, right or power in question might—
  - vest (in the case of an estate or interest);
  - be exercised (in the case of a right of re-entry or an equivalent right in property other than land exercisable if a condition subsequent is broken, or a special power of appointment); or

- become exercisable (in the case of a general power of appointment); outside the perpetuity period applicable to it.
53. If the answer is “yes”, then the principle of “wait and see” (set out in *subsections (2), (4) and (6)*) applies, and the estate, interest, right or power is valid if in fact it vests, is exercised or becomes exercisable within the perpetuity period. Only when it is clear that this will not happen, is the estate, interest, right or power void for perpetuity. In such a case, *subsections (2)(b) and (4)(b)* preserve the validity of things already done in relation to the estate or interest, or by way of exercise of the right or power, during the “wait and see” period.

### ***Section 8: Exclusion of class members to avoid remoteness***

54. At common law, where a gift was made in favour of a group of people (a class) the whole gift was void if all of the possible members of the class of beneficiaries were not ascertainable during the perpetuity period. This was because at common law a gift would fail even if only a part of it might vest outside the perpetuity period. Class closing prevents this result by artificially closing the class to prevent potential members (for example, those yet unborn) from being taken into consideration.
55. The 1964 Act applies the “wait and see” principle to the class closing rule, meaning that all of the members who qualify for the gift during the perpetuity period will benefit. If all of the potential beneficiaries do not qualify during the “wait and see” period, section 4(4) of the 1964 Act allows for the exclusion of any members who did not qualify during the perpetuity period.
56. **Section 8** replicates the effect of section 4(4) of the 1964 Act. Section 8 applies if it becomes apparent — whether at the time the instrument takes effect or at some later stage — that the estate or interest would be void for perpetuity if certain members (whether alive or unborn) are included in the class. Under *subsection (2)*, once it is clear that an interest will be void for perpetuity if certain potential members are included in the class, they are excluded, provided their exclusion does not exhaust the class. *Subsection (3)* provides that, if the “wait and see” rule (section 7(1) and (2)) also applies, section 8 does not invalidate anything done during the “wait and see” period (section 7(2)) in relation to the estate or interest. *Subsection (4)* specifies who is to be treated as a member or potential member of a class.

### ***Section 9: Saving and acceleration of expectant interests***

57. **Section 9** replicates the effect of section 6 of the 1964 Act. *Subsection (1)* provides that, where an estate or interest is void for remoteness, an estate or interest ulterior (or subsequent) to, and dependent on, the void estate or interest is not void for remoteness simply for that reason. This deals with the technical problem that, at common law, if a disposition was void for perpetuity, a subsequent disposition that depended on it was also void.
58. *Subsection (2)* provides that, where a prior disposition is void for remoteness, the subsequent interest may take effect earlier than it otherwise would have done (though it can do so only if any other conditions attached to it have been fulfilled).

### ***Section 10: Determinable interests becoming absolute***

59. **Section 10** provides that, if an estate (in land) arising under a right of reverter or an interest (in property other than land) arising under a resulting trust on the determination of a determinable interest is void under the rule, the determinable estate or interest becomes absolute. This replicates the effect of section 12 of the 1964 Act.

***Section 11: Powers of appointment***

60. The Act refers at various points to powers of appointment, special powers of appointment and general powers of appointment. Section 11 defines when a power of appointment is a “special power of appointment” for the purposes of the Act. The definition has substantially the same effect as section 7 of the 1964 Act, which does not apply by virtue of section 16. Powers of appointment not falling within the section 11 definition are classed as general powers; these are tantamount to outright ownership.
61. A power of appointment may be given so as to be exercisable in a variety of ways. The Act divides these into three categories.
62. *Subsections (1) and (2)* define when a power is a special power of appointment for the purposes of a power exercisable otherwise than by will. All such powers are special powers unless they are exercisable by one person only and that person (being of full age and capacity) could transfer all the property subject to the power to himself or herself without having to obtain consent from anyone else and without complying with any other condition.
63. *Subsections (3) and (4)* make analogous provision in relation to special powers exercisable by will.
64. *Subsections (5) and (6)* apply to powers exercisable by will or otherwise. In such cases, the power is a special power of appointment if it satisfies either subsection (2) or subsection (4).

***Section 12: Pre-commencement instruments: period difficult to ascertain***

65. **Section 12** applies to instruments which have taken effect (or, in the case of wills, been executed) before the Act came into force, and which have a “lives in being” perpetuity period. Where it is difficult or not reasonably practicable to ascertain whether the lives have ended, and therefore whether the perpetuity period has ended, under section 12 the trustees have a power to “opt in” to a 100-year perpetuity period. To exercise the opt-in the trustees must execute a deed stating that the trustees believe it is difficult or not reasonably practicable to know if the perpetuity period has ended, and that subsection (2) is to apply (*subsection (1)*). This deed cannot be revoked (*subsection (3)*). The effect of the opt-in is that the trust is deemed to have always had a perpetuity period of 100 years and is subject to sections 6 to 11 of the Act. Sections 1 to 12 of the 1964 Act are treated as if they did not apply (and never applied) in relation to the trust (*subsection (2)*).
66. The power is necessarily a fiduciary power, and so must be exercised in the best interests of the beneficiaries. The power does not enable the trustees to opt in to the provisions in the Act relating to accumulations.