New South Wales

DP4: Drafting savings and transitional provisions

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Introduction

1. This document is *DP4: Drafting savings and transitional provisions* (NSW Parliamentary Counsel's Office, 1st Ed, May 2017). It is a drafting practice document of the NSW Parliamentary Counsel's Office (***the PCO***).

2. The purpose of this document is to outline the drafting practices of the PCO concerning savings and transitional provisions and the reasons for those practices. It represents the official view of the PCO on the topic. See DP1: Using PCO drafting practice documents under the heading "PCO drafting practices" on the Legislation information page of the NSW legislation website (www.legislation.nsw.gov.au).

What is a savings or transitional provision?

3. A ***savings provision*** is "a provision the intention of which is to narrow the effect of the enactment to which it refers so as to preserve some existing legal rule or right from its operation". See *Halsbury's Laws of England* (LexisNexis 5th ed, 2012), vol 96 at [668].

4. A ***transitional provision*** is a provision that "regulates the coming into operation of [an] enactment and (where necessary) modifies its effect during the period of transition". See *Halsbury's Laws of England* (LexisNexis 5th ed, 2012), vol 96 at [694].

5. In a similar vein, Thornton says that the function of a transitional provision is "to make special provision for the application of legislation to circumstances which exist at the time when the legislation comes into force". See H. Xanthaki, *Thornton's Legislative Drafting* (Bloomsbury Professional, 5th ed, 2013) at [17.1], previous editions of which have been cited with approval by the House of Lords in *Regina v Secretary of State for Social Security, Ex parte Britnell* [1991] 1 WLR 198 at 202; [1991] 2 All ER 726 at 730 and the Queensland Court of Appeal in R v Sayers [1997] QCA 274.

6. A provision may sometimes have both a savings aspect and a transitional aspect, but with one aspect being its focus. As stated in *Thornton's Legislative Drafting* (Bloomsbury Professional, 5th ed, 2013) at [17.1]:

> "Both terms are loosely used with overlapping meanings; there is little or no advantage in seeking to pursue a watertight distinction between them. But the distinguishing criterion is the focus of the intent of

the drafter: if time is the focus, then the drafter must title and express the provision as transitional; if the focus is on exception, then the drafter must title and express the provision as a savings. At the end of the day, the drafter's pen [sic] will identify the nature of the provision, and there is great benefit in doing so clearly and accurately."

Background

7. It is useful to begin with an outline of the background that has informed the current PCO drafting practices concerning savings and transitional provisions.

8. The background can only be understood by distinguishing between principal Acts and amending Acts in the senses those terms are used by the PCO.

9. A ***principal Act*** is an Act that contains substantive provisions that regulate or prohibit conduct or other activities. It may in some cases also contain amendments or repeals of other legislation.

10. An ***amending Act*** is an Act that is limited to provisions that deal with or otherwise relate to the repeal or amendment of legislation (or both). An amending Act typically has the word "repeal" or "amendment" (or both) in its name.

11. Before the 1980s, it was common practice to include savings and transitional provisions as standalone provisions in an amending Act. These provisions were often contained in a Schedule to the amending Act. See, for example, Schedule 9 to the Superannuation (Amendment) Act 1976. These kinds of provisions were referred to in the PCO as ***unincorporable savings and transitional provisions*** because they were not incorporated into the principal Act to which they related.

12. The practice of using unincorporable savings and transitional provisions began to wind down in the mid 1980s and had virtually died out by 1989. Instead, the PCO instituted a new drafting practice in which amending and principal Acts provided for savings and transitional provisions to be inserted in a dedicated Schedule to a principal Act rather than as standalone provisions of an amending Act. The PCO also began routinely to include a power to make regulations of a savings or transitional nature. There were examples of both of these drafting techniques before the mid 1980s, but they were exceptions to the common practice of using unincorporable savings and transitional provisions.

13. There were a number of reasons for the change in drafting practice. They included the following:

- It became difficult for users of legislation to locate important unincorporable savings and transitional provisions (particularly, in relation to superannuation legislation) because of the increasing volume of legislation.
- Governments began to call for the repeal of unnecessary legislation.
- The location of savings and transitional provisions in principal Acts enabled amending Acts to be repealed after their amendments had all commenced and it also enabled savings and transitional provisions to be more easily amended if required.

14. Beginning in the mid 1980s, the PCO began systematically to repeal amending Acts that had made amendments that were already in force. The process evolved as follows:

- The PCO began repealing amending Acts using the Statute Law Revision program and relocating any savings or transitional provisions of continuing effect in a relevant principal Act. See, for example, the Statute Law (Miscellaneous Provisions) Act 1985.
- Section 30A was inserted in the Interpretation Act 1987 in 1995 to enable the transfer of unincorporable savings and transitional provisions into a principal Act without altering their meaning or operation (see Schedule 1.6 to the Statute Law (Miscellaneous Provisions) Act 1995).

- Section 30 of the Interpretation Act 1987 was also amended in 1995 to make it clear that the repeal of savings or transitional provisions did not affect their continuing operation (see Schedule 1.10 to the Statute Law (Miscellaneous Provisions) Act (No 2) 1995).
- A provision was included in each amending Act enacted between 2006–2008 to provide for its automatic repeal once it was fully commenced.
- Section 30C of the Interpretation Act 1987 was inserted in 2008 to provide for the automatic repeal of all fully commenced amending Acts enacted after 1 January 2009.

15. In passing, mention should also be made of another concern that may have led to caution in the PCO when it came to repealing amending Acts even if they did not contain unincorporable savings and transitional provisions.

16. This concern related to whether the repeal of an amending Act operated to extinguish any amendments it had made to a principal Act. On this view, an amending Act was seen as a "continuing prop" that could not be removed without affecting the continued efficacy of the amendments it made. See D.C. Pearce and R.S. Geddes, *Statutory Interpretation in Australia* (LexisNexis, 8th ed, 2014) at [7.23] and [7.25].

17. The better view (and, certainly, the long standing view of the PCO) is that an amending Act becomes spent once it is fully commenced and has no further work to do because its amendments now form part of the current substantive "Statute Book". Compare Oliveri v Dept Transport [2001] NSWSC 45 at [7]-[10] (Rolfe J). The argument in favour of this view is now compelling because of the automatic repeal of amending Acts by section 30C of the Interpretation Act 1987. See also sections 28, 29A and 30 (1) (a) of the Interpretation Act 1987.

Savings and transitional provisions in Acts

18. As indicated, the current PCO drafting practice is to include savings and transitional provisions for a principal Act (or amendments to a principal Act) in a dedicated Schedule to the principal Act.

19. These dedicated Schedules are now invariably headed "Savings, transitional and other provisions", though early versions of these Schedules tended to be headed simply "Savings and transitional provisions". The inclusion of the words "and other provisions" is intentional. It is to make it clear that the provisions of the Schedule should not be read down by reference to the words "savings" or "transitional" in the heading. Compare State of New South Wales v Bujdoso [2007] NSWCA 44 at [88]-[92] (Basten JA). For example, it is common to include in these Schedules validation provisions or other provisions of a "one-off" or limited duration that do not relate to amendments or repeals. See, for example, Part 3 of Schedule 4 to the Crime Commission Act 2012.

20. Part 1 of the dedicated Schedule will usually contain what is described in the PCO as the ***savings and transitional regulation-making power***. The usual precedent for this power is as follows:

1 Regulations

(1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act or any Act that amends this Act.

(2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.

(3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication on the NSW legislation website, the provision does not operate so as:

(a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or

(b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

21. As discussed later in this document, this usual precedent may on occasion be augmented.

22. The other Parts of the dedicated Schedule will usually have a heading along the lines of "Provisions consequent on the enactment of". The second Part is usually headed "Provisions consequent on the enactment of this Act", and will include the savings, transitional and other provisions enacted originally for the new principal Act. Additional Parts will usually include in their headings the name of the Act that inserted the Part.

23. The PCO considers that a provision is still consequent on the enactment of a particular amending Act even if the only thing that the Act does is to insert the provision in the dedicated Schedule. Compare State of New South Wales v Bujdoso [2007] NSWCA 44 at [88] (Basten JA). This may happen, for example, if all that an amending Act does is to insert a provision in the dedicated Schedule to validate something. See, for example, the Independent Commission Against Corruption Amendment (Validation) Act 2015. Such a provision is still consequent on the enactment of the amending Act concerned because, but for its enactment, the provision would not have been inserted.

Savings and transitional provisions in regulations

24. As indicated in paragraph 20, dedicated Schedules for savings and transitional provisions in a principal Act usually have a savings and transitional regulation-making power that authorises the Governor to make regulations that "contain provisions of a savings or transitional nature consequent on the enactment of [the principal Act concerned] or any Act that amends [the principal] Act".

25. Under section 7 of the Subordinate Legislation 1989, a regulation or other statutory rule cannot be made or approved by the Governor unless the Attorney General or Parliamentary Counsel has provided an opinion that it may legally be made. Since the enactment of that Act, opinions as to the legality of regulations have invariably been provided by the Parliamentary Counsel rather than the Attorney General. The issues canvassed in this document are those that the PCO takes into account when giving a relevant opinion on the legality of savings or transitional regulations.

26. With this in mind, it is useful to analyse the savings and transitional regulation-making power by reference to the following 3 concepts used in the provision:

- "savings nature",
- "transitional nature",

- "consequent on the enactment of".

"Savings nature"

27. The PCO considers a provision of a regulation to be of a "savings nature" if it operates to preserve, whether wholly or partly, an existing legal rule or an existing right, privilege, obligation or liability that would otherwise be repealed or cease to have effect because of a new Act or other new legislation (or an amendment or repeal of an existing Act or other existing legislation).

28. Examples of a savings provision include the following:

- preserving a liability to pay a fine or other amount,
- preserving current legal proceedings by reference to pre-existing law,
- preserving an accrued right despite the abolition of such rights in the future.

29. It has been recognised that a savings provision can occasionally include some degree of modification to the preserved matter without losing its character as a savings provision. See Gregson v L & Mr Dimasi Pty Ltd [2000] NSWCC 47 at [46] (Burke CCJ). It is by no means uncommon for NSW savings provisions to do so.

"Transitional nature"

30. The PCO considers a provision of a regulation to be of a "transitional nature" if it operates to modify the operation of a new Act or other new legislation (or an amendment or repeal of an existing Act or other existing legislation) for a finite time.

31. Lord Keith said in *Regina v Secretary of State for Social Security, Ex parte Britnell* [1991] 1 WLR 198 at 202; [1991] 2 All ER 726 at 730:

> "One feature of a transitional provision is that its operation is expected to be temporary, in that it becomes spent when all the past circumstances with which it is designed to deal have been dealt with, while the primary legislation continues to deal indefinitely with the new circumstances which arise after its passage. In the present instance [the transitional regulation concerned] must eventually become spent, although it may be envisaged that that could take a considerable period of time."

32. This passage has been cited with approval in Australia on several occasions. See Empire Waste Pty Ltd v District Court of New South Wales [2013] NSWCA 394 at [77] (Bathurst CJ); R v Sayers [1997] QCA 274 (Demack J); Isman Ismail v Minister of Immigration and Ethnic Affairs, Margaret JM Korn and the Commonwealth of Australia [1996] FCA 1346 at [20] (Beaumont J).

33. Accordingly, the PCO drafts a transitional provision in a regulation on the basis that it must have a temporary operation in the sense that it will become spent once a specified event or circumstance eventuates, even if this may take a considerable period of time.

34. The PCO also considers that there should be a reasonable expectation that the specified event or circumstance will eventuate and therefore cause the provision to become spent. An eventuality that is unlikely to occur, or could never occur, cannot be used to limit a transitional provision. An example of a remote eventuality might be, for instance, one that is completely determined by chance (for example, winning a lottery).

35. The following are examples of kinds of events or circumstances that are often used by the PCO to limit a provision so that it has a transitional operation:

- the expiration of a specified period of time,
- the coming into operation of legislation that has already been enacted or made,
- the conclusion of pending proceedings,
- the expiry of an existing licence, permit or other authority,
- the processing of applications that are pending on the commencement of the new law.

"Consequent on the enactment of"

36. The savings and transitional regulation-making power is limited to making savings and transitional provisions that are *consequent on the enactment* of a principal Act or any Act that amends that Act.

37. The PCO intentionally chose the words "consequent on the enactment" instead of "consequent on the commencement" to facilitate the making of regulations as soon as the Act concerned is enacted.

Inconsistency or repugnancy

38. The traditional formulation for the general regulation-making power conferred on the Governor by an Act is in the following terms:

> "The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act."

39. The requirement that regulations are "not inconsistent with this Act" is probably unnecessary because it reflects the position at common law. See D.C. Pearce and S. Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 4th ed, 2012) at [19.1].

40. At common law, subordinate legislation cannot repeal or interfere with the operation of a statute unless that result is clearly authorised by the terms of the Act (whether expressly or by necessary intendment). See Combined State Unions (Tucker) v State Services Co-ordinating Committee [1982] NZCA 88; [1982] 1 NZLR 742 at 745 (Woodhouse P); *New South Wales v Law* (1992) 45 IR 62 at 75 (Kirby P), 89 (Priestley JA); Bestcare Foods v Origin Energy; Origin Energy v Bestcare Foods [2007] NSWSC 354 at [35] (Hammerschlag J); Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v State of New South Wales [2014] NSWCA 116 at [104] (Basten JA).

41. The case law is unclear as to when a savings or transitional provision in subordinate legislation will be inconsistent with, or repugnant to, the principal Act under which it is made.

42. There have been statements in some of the cases that a savings and transitional regulation cannot be inconsistent with, or repugnant to, the Act under which it is made unless there is an express power to enable this to be done. See, for example, R (on the application of Haw) v Secretary of State for the Home Department [2005] EWHC 2061 (Admin) at [55] (Smith LJ) and [62] and [63] (McCombe J).

43. However, even if the power to make subordinate legislation of a savings or transitional nature contains an express power to modify the Act, it has been said that any such modification cannot be "so radical as to be an excess of power". See *Regina v Secretary of State for Social Security, Ex parte Britnell* [1991] 1 WLR 198 at 205; [1991] 2 All ER 726 at 732 (Lord Keith); Isman Ismail v Minister of Immigration and Ethnic Affairs, Margaret JM Korn and the Commonwealth of Australia [1996] FCA 1346 at [20] (Beaumont J).

44. The view of the PCO is that the conferral of a regulation-making power to make provision for savings and transitional matters necessarily carries with it the power to modify the operation of the Act even in the absence of express words to that effect.

45. This is because the whole *raison d'être* for such provisions is to modify what would otherwise be the operation of a principal Act (or the amendment or repeal of a principal Act). If the operation of a principal Act (or an amendment or repeal of it) could not be modified using a savings and transitional regulation-making power conferred by that Act, then there would be no point in conferring the power. See ADCO Constructions Pty Ltd v Goudappel [2014] HCA 18 at [61] and [62] (Gageler J). A narrower interpretation would effectively defeat the purpose of the provision that confers the power. Legislation must be construed in a way that promotes its purpose rather than defeats it. See section 33 of the Interpretation Act 1987.

46. In this way, it can be said that a power to modify the operation of an Act is necessarily intended by Parliament when it confers a savings and transitional regulation-making power even if it is not expressly stated. A necessary intendment is sufficient to overcome the principle of interpretation that an Act cannot be modified by regulations made under it. See Combined State Unions (Tucker) v State Services Co-ordinating Committee [1982] NZCA 88; [1982] 1 NZLR 742 at 745 (Woodhouse P); *New South Wales v Law* (1992) 45 IR 62 at 75 (Kirby P), 89 (Priestley JA). As a result, a savings or transitional regulation that modifies the operation of an Act is not relevantly inconsistent with that Act for the purposes of the common law or the general regulation-making power for the Act.

47. It may be, however, that the one area where this argument loses some of its force is if a savings and transitional regulation is inconsistent with the savings and transitional provisions in the principal Act under which it is made. This is why the PCO sometimes includes an express modification power if the modification of the Act's savings or transitional provisions is contemplated as a possibility.

48. An express modification power is usually conferred in one of 2 ways.

49. *First*, a particular savings or transitional provision contained in the Act might, for example, be expressed to be "subject to the regulations" or to have effect "except as provided by the regulations". This is a ***specific modification power***. See, for example, clause 4 (2) of Schedule 4 to the State Insurance and Care Governance Act 2015.

50. *Second*, the general savings and transitional regulation-making power might be augmented to enable the regulations to provide that they have effect despite any provisions of the Act or the savings or transitional provisions in the Act (or both). This is a ***general modification power***.

51. A general modification power may also be coupled with a power to amend directly the savings and transitional provisions in the Act for the purposes of consolidating these provisions in one place. See, for example, clause 1 (4) of Schedule 2 to the Water NSW Act 2014.

52. However, there has not been a uniform approach in the PCO concerning the conferral of a general modification power. It has been done in number of different ways, including the following:

- by reference to any provision of an Act (see, for example, clause 1 (2) of Schedule 2 to the Food Act 2003),
- by reference to any provision of an Act including the savings and transitional provisions in the Act (see, for example, clause 1 (2) of Schedule 2 to the Water NSW Act 2014),
- by reference only to the savings and transitional provisions in the Act (see, for example, clause 1 (2) of Schedule 6 to the Electricity Generator Assets (Authorised Transactions) Act 2012).

53. Also, a general modification power is occasionally (but not invariably) expressed to have been conferred for the avoidance of doubt. See, for example, clause 1A (4) of Schedule 5 to the Fair Trading Act 1987.

54. The conferral of a general modification power by reference to any provision of the Act may be explained as an attempt to avoid the argument that a modification power limited to the Act's savings and transitional provisions reflects an intention not to permit the modification of the operation of other provisions of the Act.

55. Given the lack of uniformity in drafting practices, the inclusion of a general or specific modification power (or the absence of one) should not be regarded as a concession that, but for the inclusion of the power, a savings and transitional regulation cannot modify the operation of the principal Act.

56. It is important to appreciate that the principal rationale for the inclusion of a modification power (however expressed) is to avoid arguments about whether the savings and transitional provisions in the Act can be modified. See ADCO Constructions Pty Ltd v Goudappel [2014] HCA 18 at [60] (Gageler J). The real focus of a modification power is not whether the substantive provisions of the principal Act can be modified. For the reasons given, this is necessarily implied from the use in the regulation-making power of the terms "savings" or "transitional".

57. That being said, the PCO recognises that the savings and transitional regulation-making power does not authorise the wholesale rewriting of a principal Act. The power must be exercised for the limited purposes of preserving existing matters or transitioning existing matters into a new legislative regime. It cannot be used for a "radical" rewriting of a principal Act.

Retrospective provisions

58. The standard savings and transitional regulation-making power set out in paragraph 20 makes it clear that a regulation can be expressed to have taken effect before it is published, subject to 2 qualifications.

59. *First*, the commencement date can be no earlier than the date of assent to the Act concerned.

60. *Second*, the regulation cannot:

- affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
- impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

61. A regulation can, however, operate prejudicially on rights of, or impose liabilities on, "the State" or an "authority of the State".

62. The reference to the "the State" is a reference to the State of New South Wales. See the definition of ***the State*** in section 21 (1) of the Interpretation Act 1987. As it is a reference to the State as a body politic rather than in a geographical sense, it is apt to include all components of the body politic (whether legislative, judicial or executive).

63. An "authority of the State" bears its ordinary legal meaning. See, for example, Federal Commissioner of Taxation v Silverton Tramway Co Ltd [1953] HCA 79; (1953) 88 CLR 559 at 565-566 (Dixon CJ); Committee of Direction of Fruit Marketing v Delegate of the Australian Postal Commission [1980] HCA 23; (1980) 144 CLR 577 at 580 (Gibbs J); *Commissioner of Taxation v Bank of Western Australia Ltd* (1995) 61 FCR 407 at 429.

Relationship with section 30 of Interpretation Act 1987

64. Sometimes the PCO relies on the provisions of section 30 of the Interpretation Act 1987 instead of setting out detailed savings or transitional provisions in a principal Act or regulations. The courts have recognised that this occurs, even though there has been a tendency in recent times to have detailed savings and

transitional provisions set out in the Act. See NSW Bar Association v Meakes [2006] NSWCA 340 at [107] (Basten JA).

65. Section 30 (1) provides that the amendment or repeal of an Act or statutory rule does not:

- revive anything not in force or existing at the time at which the amendment or repeal takes effect, or
- affect the previous operation of the Act or statutory rule or anything duly suffered, done or commenced under the Act or statutory rule, or
- affect any right, privilege, obligation or liability acquired, accrued or incurred under the Act or statutory rule, or
- affect any penalty incurred in respect of any offence arising under the Act or statutory rule, or
- affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability or penalty.

66. The subsection concludes by providing that any such penalty may be imposed and enforced, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, as if the Act or statutory rule had not been amended or repealed.

67. However, section 30 has effect subject to a contrary intention appearing "in the Act or instrument concerned". See section 5 (2) of the Interpretation Act 1987.

68. In its application to section 30, one reading of the requirement that the contrary intention appear "in the Act or instrument concerned" is that the intention needs to appear in the Act or statutory rule that contains the amendment or repeal. However, such a reading is unduly restrictive because it does not take into account that savings and transitional provisions can, under an express authority that is often given by a principal Act, be contained in regulations that are made separately to the amending or repealing legislation.

69. Nevertheless, the presence of savings or transitional provisions (whether in a principal Act or regulations) may raise the issue of whether those provisions manifest a contrary intention. The question becomes, then, whether the provisions were intended to be exhaustive. See Winn v Director General of National Parks and Wildlife [2001] NSWCA 17 at [80]-[83] (Spigelman CJ).

70. In this regard, Gageler J said in ADCO Constructions Pty Ltd v Goudappel [2014] HCA 18 at [52]:

> "A contrary intention sufficient to displace s 30 of the Interpretation Act must ordinarily appear with the same reasonable certainty as is needed to displace the general common law rule. A contrary intention need not be express and its implication, although sometimes referred to as "necessary implication", has not been confined to those extreme circumstances in which alteration of an existing right or liability "cannot be avoided without doing violence to the language of the enactment". The cases, rather, demonstrate that a contrary intention will appear with the requisite degree of certainty if it appears "clearly" or "plainly" from the text and context of the provision in question that the provision is designed to operate in a manner which is inconsistent with the maintenance of an existing right or liability."

71. Again, there has not been a uniform drafting practice concerning whether and when to indicate that savings or transitional provisions are intended to displace the operation of section 30. The reasons for this include the following:

- the gradual evolution of the use of savings and transitional provisions over many years (as outlined in the background section of this document),
- personal drafting styles,
- the expectations of instructors as to whether extensive savings and transitional provisions should be included.

72. Accordingly, it should not be assumed that just because there are extensive savings and transitional provisions that it was intended to exclude completely the operation of section 30. Although a drafter may say expressly that it does not (see, for example, clause 11 (4) of Schedule 3 to the Passenger Transport Act 2014), this may not always be the case. For example, extensive savings or transitional provisions limited to a particular area may be included because it is thought necessary to deal with that area because it is contentious, with other non-contentious areas left to be dealt with by reference to the general law (including section 30).

73. Also, it should not be assumed that an absence of extensive savings and transitional provisions is the result of drafting shortcomings. For instance, it may not be possible to deal with savings and transitional matters given the short time frame within which a Bill for an Act is required to be drafted. In addition, the instructors may not yet have formulated a settled policy on them at the time the Bill is required for introduction. In these situations, the expectation is likely to be that these matters will be dealt with by means of savings and transitional regulations if required.

Key points

74. The following is a summary of the key points of this document:

- A savings provision preserves, whether wholly or partly, an existing legal rule or an existing right, privilege, obligation or liability that would otherwise be repealed or cease to have effect because of a new Act or other new legislation (or an amendment or repeal of an existing Act or other existing legislation).
- A transitional provision modifies the operation of a new Act or other new legislation (or an amendment or repeal of an existing Act or other existing legislation) for a finite time.
- The drafting practices of the PCO for savings and transitional provisions have evolved over many years. Accordingly, care needs to be taken in applying current PCO drafting practices to older Acts (particularly, those enacted before the 1990s).
- The current PCO drafting practice is to include savings and transitional provisions that relate to a principal Act in a dedicated Schedule to that Act or in regulations made under that Act.
- A dedicated Schedule used in a principal Act is usually headed "Savings, transitional and other provisions" because it may include "one-off" provisions (such as validations) that are not really savings or transitional provisions.
- The dedicated Schedule usually confers power on the Governor to make regulations of a savings or transitional nature consequent on the enactment of a principal Act or an Act that amends the principal Act.
- The PCO considers that a power to make savings or transitional regulations necessarily carries with it the power to modify the operation of the principal Act (as amended).
- However, the PCO considers that an additional express power is required to enable regulations to amend directly the text of a principal Act or make provision in a way that is inconsistent with a dedicated Schedule of savings and transitional provisions in a principal Act. As a result, care needs to be taken when dealing with these express powers because of the evolution of drafting practices concerning them.
- The PCO often relies on section 30 of the Interpretation Act 1987 to preserve existing rights, privileges, obligations or liabilities rather than save them by means of savings and transitional provisions. Again, care needs to be taken when deciding whether that section has been displaced by savings and transitional provisions because of the evolution of drafting practices.