

Mastering the past (and the current) in the future – recurring issues



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Retrospectivity, transitional and savings provisions,
penalties for repeat offending, and validations

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24 October 2019

Outline

- Focus – recurring issues of retrospectivity
- 3 brief scenarios to discuss / 2 presentations
- Wrap up (Mastering the issues ... in the future)

*“ . . . life must be understood backwards. But ... lived forwards.”: Søren Kierkegaard
(Danish philosopher, 1843)*

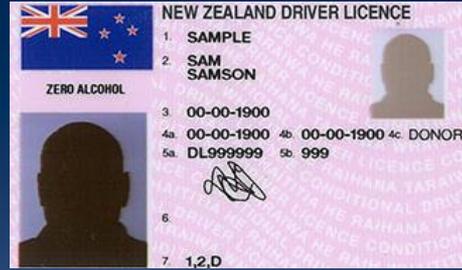
"Ka mua, ka muri" is a whakataukī (saying) that many will know means "walking backwards into the future" – the idea we should look to the past to inform the future.



3 Scenarios (3 Key Topics)

- Transitional and savings provisions (Ross)
- Secondary legislation and penalties (Ross)
- Validations (Paul)





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Transitional and savings provisions / Secondary legislation and penalties

Transitional and saving arrangements – a difficult area?

- Yes, but not made easier by looking at them late, or not at all (gaps). (“Potential transitional or savings issues should be identified early”)
- They involve key practical issues – so drafters need your help.



- Mastering them helps make you a (current and) “past master” (instructor especially adept or expert in this key field).

Why bother? (What happens if issues are not addressed?)



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Legislation Guidelines: 2018 edition

- [Chapter 12](#) (Affecting existing rights, duties, and situations and addressing past conduct).
- Legislation is presumed to have prospective, not retrospective, effect.
- Even legislation that is prospective (ie, to affect only events taking place after it comes into force) can still affect existing situations.
- Issues, if unaddressed, can lead to uncertainty and injustice. If people need to find out if and how the law applies, litigation often results.
- Legislation should be clear, fair, and workable – without litigation.

“Transitional provisions” vs “savings provisions”

- **Transitional provision** – indicates how the new law will apply to circumstances that arose in the past (past and current situations)

Social Security Act 1964	Social Security Act 2018
Jobseeker support on the ground of sickness, injury, or disability	Jobseeker support on the ground of health condition, injury, or disability

- **Savings provision** – continues something otherwise altered or ended by the new law (especially its repeal of the old law)

Limitation Act 1950	Limitation Act 2010
Claims based on acts or omissions before 1 January 2011	Claims based on acts or omissions after 31 December 2010

A dismal experience? (A poor and over-simple choice?)

Special transitional and savings provisions

Interpretation Act 1999

“The dismal experience of those who work with legislation is that . . .

. . . **special transitional and savings provisions** crafted to reflect perceived special features of the particular legislation often tend to become complex, which adds to difficulties in interpretation. . . .

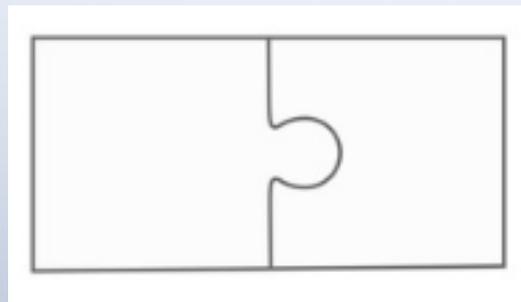
And **the simple general [default] provisions of the Interpretation Act 1999** ... yield to the special provisions of the particular legislation [(apply unless excluded, expressly or by context)].”



Vela Fishing Ltd v Commissioner of Inland Revenue
[2002] 1 NZLR 49, 54 (NZCA) at [26] per Richardson P
Special provisions apply, and may alter, general principles.

Use the simple general default provisions ?

- Legislation should not include specific transitional provisions if the general default provisions in the Interpretation Act 1999 address satisfactorily the issues concerned
- So, do the general default rules provide, clearly, the right outcomes?
 - Eg, if repealing, and not replacing, an offence – pre-repeal offending?
 - Eg, if varying (that is, increasing) penalty for an offence?



Interpretation Act 1999 (detailed rules related to s 7)

Section	Subject
Section 17	Effect of repeal generally – doesn't affect validity of anything done or existing rights
Section 18	Effect of repeal on enforcement – doesn't affect completion of a matter or bringing/completing proceedings
Section 19	Effect of repeal on prior offences/breaches – doesn't affect a liability to a penalty
Section 20	Secondary legislation made under repealed legislation may have continuing effect
Section 21	Powers exercised under repealed legislation may have continuing effect
Section 22	References to repealed enactment

Changes in Legislation Bill 2017 – eg, “new versions” created by amendments only (not effect only of “repeals”)

Use special transitional and savings provisions ?

“Given the difficulty of applying transitional rules of general application, even clear ones, **there is much to be said for including [special] transitional provisions in legislation that changes existing law.** Even if the Interpretation Act and common law rules appear to govern a particular transitional question, there is no guarantee that the courts will arrive at the answer anticipated by the legislative counsel given the complexity of transitional issues, the confused terminology and the uncertainty about when a set of facts can be said to have produced legal effects.

Ruth Sullivan [“The Challenges of Transitional Law — the Canadian Experience” \(March 2013\) *The Loophole* 14, 21.](#)



- All transitional or savings issues identified should be addressed
- If the outcome achieved is not self-evident to instructors, then it will most probably also not be self-evident to other users

Clear, fair, and workable – without litigation ?

What happens on repeal to . . .	Examples
An existing right or an existing status	Licences, registrations, certificates, approvals, consents, permits, or exemptions, options or elections? (s 17)
Processes started but incomplete	Applications, proceedings? (s 18)
Existing arrangements (eg, contracts)	Apply new law or not?
Existing offices and their holders	Abolish or transfer (rename or replace)?
Legislative references (and others)	Interpretation Act 1999 s 22?
Investigations, etc (past breaches)	Interpretation Act 1999 ss 18 and 19?
Secondary legislation	Interpretation Act 1999 s 20?
Administrative documents	Interpretation Act 1999 s 21?

Overlapping / unclarity ?

Periods incomplete (eg, reports, licences, fees, terms of office, etc).

Ruth Sullivan: special transitional provisions are needed or desirable for clear and predictable outcomes if—

- (a) it is possible to interpret the legislation as applying, on competing analyses, either to an event that has already occurred (eg, signing a contract), or to an ongoing state of affairs (eg, a contractual relationship); and
- (b) the legislation is to apply to past facts, or to pending appeals, new declaratory provisions that are to resolve or clarify disputed meaning or application (what proceedings are affected by Act?).

Procedural reforms may be able to be applied fairly to incomplete proceedings – because no one has a right to a particular procedure, but work done in reliance on existing law is a key factor (eg, costs)

Old bodies – new bodies

- Does the old body simply continue as the new body? That is, the body is continued (renamed) as the same legal entity. (Option 1)
- Alternatively, is the old body disestablished and a completely new body formed? (Option 2)
- Option 2 involves more detailed transitional provisions. Need to deal with, eg, officers, transfer of the assets, liabilities, and employees; existing proceedings; the completion of matters or things.
- In either case, what about references to the old body (or its officers/employees) in instruments, records, and other documents?

More complex transitions (key policy decisions)

- Options – continue old law for, say, multi-year transition period?
- Example: for a 2-year transitional period the Financial Markets Conduct Act allowed offers of securities to be made under either—
 - the old (repealed) Securities Act 1978 (prospectus, investment statement) or
 - the new FMC Act (product disclosure statement)
- Phased commencements – ability to be licensed, then duty to be
- Automatic temporary licensing subject to review and renewal?
- Contracting out? (Agreement to apply new law)
- Mix of provisions applying – eg, different classes of licensees, etc
- Deeming provisions to transition status or outcome under old law
- Generally best to deal with special provisions in Act concerned, rather than in temporary overriding regulations or in a special related Act

Special is best (with general to supplement if needed)

Land Transfer Act 2017

7 **Transitional, savings, and related provisions**

The transitional, savings, and related provisions set out in [Schedule 1](#) have effect according to their terms.

Schedule 1

Transitional, savings, and related provisions

s 7

Part 1

Provisions relating to Act as enacted

13 **Application of Interpretation Act 1999**

Except as provided in [clauses 1 to 12](#) or in regulations made under [section 228](#), nothing in this schedule limits the [Interpretation Act 1999](#).

Interpretation Act 1999

4 **Application**

- (1) This Act applies to an enactment that is part of the law of New Zealand and that is passed either before or after the commencement of this Act unless—
 - (a) the enactment provides otherwise; or
 - (b) the context of the enactment requires a different interpretation.
- (2) The provisions of this Act also apply to the interpretation of this Act.



Special is best (with general to supplement if needed)

Land Transfer Act 2017

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Schedule 1

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s 7

Part 1

Provisions relating to Act as enacted

12 Existing computer registers and certificates of title treated as records of title

- (1) Until a record of title is created for an estate or interest in land for which there is a computer register or certificate of title, the computer register or certificate of title is to be treated as if it were a record of title created under this Act.
- (2) In this clause,—

certificate of title means a certificate of title issued under the [Land Transfer Act 1952](#)

computer register means a computer freehold register, computer interest register, or computer unit title register created under the [Land Transfer \(Computer Registers and Electronic Lodgement\) Amendment Act 2002](#).

Quake Outcasts v The Minister of Canterbury Earthquake Recovery
[2017] NZCA 332 at [99]–[102] per Miller J (special schedule fits with
general interpretation law)



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Henry VIII powers – transitional and savings regulations

- Regulations to provide for transitionals and savings (as well as or in place of provisions in the Act?)
- If the reform is complex, it may not be possible to foresee all of the potential transitional and savings issues that might arise (large transitions)
- What is the risk of a serious problem?
- Checks and balances – sun setting, clear test
- Controversial in NZ (Henry VIII) – but a well-established technique in comparable jurisdictions
- No substitute for a thorough assessment of the potential transitional and savings issues
- Shouldn't be used routinely – need a clear justification
- “... a balance needs to be struck which ensures that all reasonable steps are taken to prevent urgent remedial legislation.”



Saving old arrangements vs transitioning those arrangements into the “new world”

- Saving old rights and entitlements may cause future problems
- The burden of maintaining 2 or more regimes over an extended period of time
- Risk of mistakes, inaccessibility, complexity
- Crown Minerals Act 1991 – significant permits still operate under the Petroleum Act 1937 as if it were still in force. This has caused problems when CMA is amended (risks of inadvertent extinguishment and inconsistent rules for permits granted at different times)
- ACC – complex procedural inconsistencies
- Often better to transition existing rights into the new law (while retaining their essential character)

Secondary legislation – backdating and penalties

- main principle – legislation is presumed not to have retrospective effect (Interpretation Act 1999 s 7, Legislation Bill 2017 cl 12)
- need for express power to make back dated regulations ((2017) Standing Order 319(2)(g)) – rare (benign back dating)
- the creation of serious criminal offences and significant penalties should generally (or in some cases only) be addressed in primary legislation: LDAC *Legislation Guidelines* (2018) ch 14
- regulations prescribing penalties are limited, eg, for offences created by those regulations, or infringement offences, and within limits (maximum penalties) set by the empowering Act

Penalties



Provision(s)	Subject
New Zealand Bill of Rights Act 1990, s 26(1); Crimes Act 1961, s 10A	Retrospective criminal liability
New Zealand Bill of Rights Act 1990, s 26(2)	Double jeopardy
New Zealand Bill of Rights Act 1990, s 25(g); Sentencing Act 2002, s 6	Variation of penalty between commission of offence and sentencing
Interpretation Act 1999, s 19	Effect of repeal on prior offences and breaches of enactments
Crimes Act 1961, ss 413-415	Enactment in 1961 Act and creating offence is repealed and replaced or consolidated

Do v New Zealand Police [2016] NZAR 1354 (CA), per Miller J – “A statute is not retrospective merely because it finds a new consequence on a past act.”