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CIVIL PECUNIARY PENALTIES



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CIVIL PECUNIARY PENALTIES

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

The Commissioners are:

Honourable Sir Grant Hammond KNZM – President

Dr Geoff McLay SJD; Mich

Honourable Dr Wayne Mapp Ph D; Cantab

The General Manager of the Law Commission is Roland Daysh

The office of the Law Commission is at Level 19, 171 Featherston Street, Wellington

Postal address: PO Box 2590, Wellington 6140, New Zealand

Document Exchange Number: sp 23534

Telephone: (04) 473-3453, Facsimile: (04) 471-0959

Email: com@lawcom.govt.nz

Internet: www.lawcom.govt.nz

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Call for submissions

Submissions or comments (formal or informal) on this Issues Paper should be sent to Susan Hall, Senior Legal and Policy Adviser by **15 February 2013** at:

**Law Commission,
PO Box 2590,
Wellington 6011, DX SP 23534**

or cpp@lawcom.govt.nz

The Law Commission asks for any submissions or comments on this Issues Paper on Civil Pecuniary Penalties. The submission can be set out in any format but it is helpful to specify the number of the question you are discussing.

Submitters are invited to focus on any of the questions, particularly in areas that especially concern them, or about which they have particular views. It is certainly not expected that each submitter will answer every question.

Alternatively, submitters may like to make a comment about the Civil Pecuniary Penalties review that is not in response to a question in the paper and this is also welcomed.

Official Information Act 1982

The Law Commission's processes are essentially public, and it is subject to the Official Information Act 1982. Thus copies of submissions made to the Law Commission will normally be made available on request, and the Commission may refer to submissions in its reports. Any requests for withholding of information on grounds of confidentiality or for any other reason will be determined in accordance with the Official Information Act 1982.

Foreword

Civil pecuniary penalties are imposed by the High Court under the authority of a statute for a breach of that legislation. The primary purpose of such a regime is to secure compliance with a statutory requirement. That is unobjectionable in itself.

The decision is discretionary and can involve very large sums of money. This is done without a criminal trial or a conviction being entered.

This has given rise to a debate about when such penalties are desirable, how they should be formulated and applied, and in particular what safeguards should attend their employment.

These issues are of fundamental importance given the widespread resort to civil pecuniary penalties in New Zealand statutes today.

The Commission has been given a reference which requires us to look at the present state of the law relating to civil pecuniary penalties, with particular emphasis on the circumstances in which they should be used and what sort of legal framework should be devised for them.

Following the release of this Issues Paper, the Commission will engage in a consultative process with a range of parties, and enable public submissions, before preparing a final report for tabling in Parliament.



Grant Hammond
President

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List of questions

Q1 What circumstances favour the inclusion of civil pecuniary penalties in legislation?

Q2 To what extent is there scope to broaden the use of civil pecuniary penalties to target more traditional criminal offending, for example, where there is a comparatively low level of harm?

Q3 Is there any conduct for which civil pecuniary penalties are *not* suited?

Q4 Should civil pecuniary penalty statutes contain a broad instruction to the effect that “civil pecuniary penalty proceedings are civil proceedings and the usual rules of court and rules of evidence and procedure for civil proceedings apply”?

Q5 Should civil pecuniary penalty statutes contain a uniform standard of proof provision and, if so, what should it contain?

Q6 Do you agree that civil pecuniary penalty provisions should be drafted to maximise certainty over the allocation of the burden of proof?

Q7 Should civil pecuniary penalty statutes recognise a privilege against self-exposure to a non-criminal penalty?

Q8 Should a regulator be able to commence criminal proceedings if civil pecuniary penalty proceedings concerning the same conduct have already been started?

Q9 Should civil pecuniary penalty statutes require that, if criminal proceedings are commenced, the civil pecuniary penalty proceedings must be stayed?

Q10 Should there be a statutory restriction on the use in criminal proceedings of evidence adduced in civil pecuniary penalty proceedings?

Q11 Should a regulator be able to commence civil pecuniary penalty proceedings if criminal proceedings have failed or been withdrawn?

Q12 Are there any circumstances in which a regulator should be able to commence criminal proceedings if a civil pecuniary penalty has already been imposed?

Q13 Should all statutes containing criminal offences and civil pecuniary penalties state that no person may be liable for a civil pecuniary penalty and a criminal sanction for the same conduct?

Q14 Are there any circumstances in which a regulator should be able to commence civil pecuniary penalty proceedings if a criminal sanction (whether a fine or imprisonment) has already been imposed?

Q15 If the same conduct can contravene multiple civil pecuniary penalty provisions, should the statute provide that proceedings may be brought in respect of any one or more of the contraventions, but that a person cannot be liable for more than one civil pecuniary penalty for the same conduct?

Q16 When imposing penalties, should courts be required to take into account whether a management ban or other civil remedy has been imposed for the same conduct?

Q17 Should statutes specify in more detail what constitutes “the same conduct” for the purposes of multiple civil pecuniary penalties and criminal sanctions?

Q18 Where there is sufficient similarity of conduct, should this be dealt with through a statutory bar or through guidance for the courts in penalty setting?

Q19 Do you agree that enforcement bodies should develop and publish enforcement guidelines or policies?

Q20 Do you agree that there should be no prohibition on civil pecuniary penalties being used for contraventions which entail some degree of moral blameworthiness?

Q21 Should civil pecuniary penalty provisions be drafted to expressly require or exclude fault and to set out all the available defences?

Q22 What guidance should be in place for policy makers about the decision to opt for mens rea, strict or absolute liability civil pecuniary penalties? Specifically, should there be guidance that absolute liability civil pecuniary penalties should be contemplated only in rare circumstances when:

- (a) there is an overwhelming national interest in using them as an incentive to prevent certain behaviour occurring, regardless of fault; and
- (b) there is a cogent reason in the particular circumstances for precluding a defence of total absence of fault?

Q23 Should civil pecuniary penalty provisions be more explicit as to the degree and nature of knowledge required to establish ancillary liability?

Q24 Should civil pecuniary penalty statutes provide guidance to courts determining penalty quantum in cases where both a company and an individual are principally liable for the same contravention?

Q25 Should there be guidance for policy makers about the methods of attributing or ascribing liability between a body corporate and its officers in a civil pecuniary penalty regime?

Q26 Do you agree that any penalty:

- that involves substantial maximum financial penalties;
 - that is imposed by the High Court after a civil trial, according to the rules of civil procedure and evidence;
 - where liability is established on the civil standard of proof;
 - where payment of the penalty is enforced in the civil courts, as a debt due to the Crown; and
 - where neither imprisonment nor criminal conviction can result;
- should be referred to in legislation as a "civil pecuniary penalty"?

Q27 Do you agree that the imposition of variable monetary penalties by non-judicial bodies should be discouraged?

Q28 Should enforcement agencies be able to “settle” with parties that they would otherwise seek to have civil pecuniary penalties imposed upon?

Q29 If so, should there be a requirement to publicise details of the settlement, including (a) the agreed circumstances and nature of the breach and (b) the quantum of the agreed penalty?

Q30 Should enforcement bodies with such a power make public their policy for approaching settlement negotiations?

Q31 Are there any circumstances when individuals should be able to commence civil pecuniary penalty proceedings?

Q32 Should all civil pecuniary penalty regimes provide for a declaration of contravention to be made?

Q33 Should the setting of maximum civil pecuniary penalties in legislation be guided by the following principles?

Maximum penalties:

- should reflect the worst class of case in each particular category;
- should be designed to encourage compliance with the regulatory system at hand and so be set at a level to deter the classes and sizes of participants in that regulatory field;
- should balance the promotion of compliant behaviour with ensuring that business remains willing to enter the market and/or take sensible commercial risks.

Q34 Where parallel criminal and civil pecuniary penalties target the same conduct or breach, is it ever appropriate for maximum civil pecuniary penalties to be higher than the equivalent maximum monetary criminal penalty?

Q35 In what circumstances should Acts contain guidance as to when to impose a civil pecuniary penalty, and what should that guidance be?

Q36 Are there difficulties in providing for a “threshold” of seriousness as in the Takeovers Act 1993?

Q37 Do you agree that civil pecuniary penalty statutes should include guidance for courts as to the setting of the level of a penalty?

Q38 Is there a core list of factors that could be set out in legislation for courts to take into account when determining the quantum of a penalty and if so, what should it include? What other additional factors are or are not relevant?

Q39 To what extent should courts draw on criminal sentencing practice when determining the quantum of a penalty?

Q40 Do you agree that appeals from civil pecuniary penalties should continue to be brought under the broadly framed right in s 66 of the Judicature Act 1908?

Q41 Do you agree that civil pecuniary penalty statutes should deal expressly with the issue of limitation?

Q42 Do you agree that guidance should be provided to policy makers on the matters influencing the choice of limitation periods?

Q43 Should we recommend the addition to the Legislation Advisory Committee Guidelines of a chapter relating to civil pecuniary penalties? Are there any other forms of guidance that would assist?

Q44 Is there a need for (a) legislation to amend existing civil pecuniary penalty regimes to ensure that they are principled and consistent; and/or (b) a set of standard civil pecuniary penalty statutory provisions?

Chapter 1

Introduction

- 1.1 The Minister has asked the Law Commission to review the law relating to civil pecuniary penalties. The number of civil pecuniary penalty provisions has grown steadily over the last 25 years. The earliest were introduced by the Commerce Act 1986 and they now feature in 15 statutes. Three Bills before Parliament contain civil pecuniary penalties. Over recent years the Legislation Advisory Committee (LAC) has raised concerns about the increasing number of civil pecuniary penalty provisions and the lack of clear principle or consistency guiding their development.¹ There is little guidance in place for government agencies considering whether to include civil pecuniary penalties in legislation. Also, there has been little debate about their benefits, drawbacks or design. No study has given general consideration to:
- The circumstances when it might be appropriate for civil pecuniary penalties to be used in a regulatory regime;
 - How they should or might be used alongside other regulatory sanctions and enforcement tools; or
 - The procedural protections that should be in place.
- 1.2 The Law Commission’s task in this review is to examine these issues.

WHAT ARE CIVIL PECUNIARY PENALTIES?

- 1.3 In this Issues Paper we use the term “civil pecuniary penalties” to describe certain monetary penalties on the New Zealand statute book that are imposed and enforced through non-criminal processes. The civil pecuniary penalties that concern us share the following characteristics:

¹ The Legislation Advisory Committee provides advice to departments on the development of legislative proposals; reports to the Attorney-General on public law matters; and scrutinises and makes submissions on aspects of Bills introduced into Parliament that affect public law or raise public law issues. Its overarching purpose is to help improve the quality of law-making.

- They are imposed by the High Court after a civil trial, according to the rules of civil procedure and evidence;
- Liability is established on the civil standard of proof – that is, the balance of probabilities;
- They involve very substantial maximum financial penalties;
- Payment of the penalty is enforced in the civil courts, as a debt due to the Crown;
- Neither imprisonment nor criminal conviction can result.

1.4 An example of a civil pecuniary penalty can be found in the Hazardous Substances and New Organisms Act 1996, s 124B which provides:

- (1) The enforcement agency may apply to the Court for an order that a person pay to the Crown a pecuniary penalty under this Act.
- (2) The Court may make the order if it is satisfied that the person—
 - (a) developed, field tested, imported, or released a new organism in breach of this Act; or
 - (b) possessed or disposed of any new organism imported, developed, or released in breach of this Act; or
 - (c) failed to comply with any controls relating to a new organism—
 - (i) imposed by any approval granted under this Act; or
 - (ii) specified in regulations made under this Act.

1.5 Section 124C(1) states:

- (1) The Court must not make an order for the payment of a pecuniary penalty that exceeds,—
 - (a) in the case of an individual, \$500,000; or
 - (b) in the case of a body corporate, the greater of—
 - (i) \$10,000,000; or
 - (ii) if it can be readily ascertained and if the Court is satisfied that the contravention occurred in the course of producing a commercial gain, 3 times the value of any commercial gain resulting from the contravention; or
 - (iii) if the commercial gain cannot be readily ascertained, 10% of the turnover of the body corporate and all of its interconnected bodies corporate (if any).

1.6 In chapter 2, we describe the range of civil pecuniary penalties in greater detail.

WHY IS THE REVIEW NEEDED?

Novelty

- 1.7 Forms of civilly-imposed penalty have existed for many years in New Zealand. For example ss 134 and 135 of the Employment Relations Act 2000 provide for a penalty of up to \$10,000 (in the case of an individual) or \$20,000 (in the case of a company or other corporation) to be imposed by the Employment Relations Authority for breach of an employment agreement or a breach of the Act. Equivalent provisions have featured in our employment law since 1908.² Statutes regulating certain professions have provided for civil “fines” for breaches of licensing conditions since at least the 1940s.³
- 1.8 However, the penalties that concern us have a number of unique features which suggest they warrant particular examination. They are relatively novel. The majority of them have been introduced since 2000. Increasingly they are being adopted as a central feature of regulatory regimes. All indications are that they will become a key tool in the way that we regulate and punish breaches of the law.
- 1.9 They can give rise to considerable liability. Currently, New Zealand’s highest maximum penalty amounts to \$1m for an individual⁴ and, for a body corporate, the greater of \$10m or either three times the value of any commercial gain resulting from the contravention or 10 per cent of the turnover of the body corporate.⁵
- 1.10 The fact that such growth in the use of a potentially severe form of penalty has occurred in the absence of any general consideration of their design is undesirable. Examination of civil pecuniary penalties is both warranted and overdue.

2 Industrial Conciliation and Arbitration Amendment Act 1908, s 13. See also Industrial Conciliation and Arbitration Act 1925, s 129, Industrial Conciliation and Arbitration Act 1954, s 199, Industrial Relations Act 1973, s 148, Labour Relations Act 1987, s 202, Employment Contracts Act 1991, s 53.

3 For example the Physiotherapy Act 1949, s 24. Similar provisions appear today in, among others, the Health Practitioners Competence Assurance Act 2003, s 101, Lawyers and Conveyancers Act 2006, s 242 and Veterinarians Act 2005, s 51.

4 Securities Markets Act 1988, s 42W.

5 Biosecurity Act 1993, s 154J, Commerce Act 1986, s 80, Dairy Industry Restructuring Act 2001, s 141 and Hazardous Substances and New Organisms Act 1996, s 124C. The maximum penalty for a body corporate under the Telecommunications Act 2001, s 156L is also \$10m. For a brief period even higher civil pecuniary penalties were possible under Part 3A of the Energy (Fuels, Levies, and References) Act 1989. Part 3A was enacted just before the November 2008 election by the Energy (Fuels, Levies, and References) Amendment Act 2008 and repealed in December 2008 by the Energy (Fuels, Levies, and References) Biofuel Obligation Repeal Act 2008. Sections 34X and 34Y contained equations for the calculation of civil penalties under the Act that involved multiples of between \$20m and \$30m.

Inconsistency in existing legislation

- 1.11 The lack of analysis may carry some blame for the inconsistencies that exist across the field of civil pecuniary penalty provisions. While there are some common approaches, current statutes deal with matters such as procedural rules, guidance about penalty levels and when a penalty should be imposed, privilege and double punishment in a variety of ways. This range of approaches can create confusion. It does not assist in promoting the integrity of the law and suggests that insufficient consideration has been given to taking an approach that reflects good legal principle.
- 1.12 There is also a lack of consistency in when civil pecuniary penalties have or have not been included in a legislative scheme. For example, while they feature heavily in some aspects of environmental legislation they are entirely absent in other areas of environmental law. Another example arises in the regulation of certain financial services. Civil pecuniary penalties are a feature of the Securities Trustees and Statutory Supervisors Act 2011, which has as its purpose to protect the interests of security holders and of residents of retirement villages, and to enhance investor confidence in financial markets and retirement villages. In part, it does this by setting standards for trustees and statutory supervisors and providing for them to be held accountable for failures to perform their functions effectively. In contrast, the obligations under the, also recent, Insurance (Prudential Supervision) Act 2010 are all enforced by way of criminal offences. Yet the aims of the two pieces of legislation appear to be similar: the purpose of the 2010 Act is to promote the maintenance of a sound and efficient insurance sector and to promote public confidence. Again, the Act sets standards for insurers and provides for them to be held accountable for failing to comply.
- 1.13 The differences in legislative approach may be a reflection more of the novel nature of civil pecuniary penalties than anything else. But, they indicate that a first principles review is needed.

“Stealth sanctions”

- 1.14 Opponents of civil pecuniary penalties argue that they wrongly prioritise the need for efficiency in regulation over legal principle. Forms of civil penalty in the United Kingdom have been described as “stealth sanctions” which “seek to avoid the safeguards of criminal procedure by ... the pretence that they are civil debts”.⁶ It is thought that by avoiding those safeguards they are easier to investigate and impose than criminal penalties. Yet they retain a punitive function and impact.
- 1.15 Civil pecuniary penalties, then, are a relatively new form of enforcement tool which challenges the traditional distinction between the criminal and civil law. Historically, the criminal-civil divide has been central to how we

6 See R M White “It’s Not a Criminal Offence—Or Is It? Thornton’s Analysis of ‘Penal Provisions’ and the Drafting of ‘Civil Penalties’” (2011) 32(1) Statutes LR 17.

think about the law. The criminal law is concerned with how the State punishes people who act in a way that Parliament has decided is worthy of condemnation as a criminal offence. Criminal offences are prosecuted through the criminal courts using the rules of criminal procedure. Prosecution can result in imprisonment and a criminal conviction – an enduring form of sanction which can have life-long implications for employment prospects, freedom to travel and other opportunities. Because criminal conviction results in our legal system’s gravest implications for the defendant, criminal procedural rules provide the greatest protections available.

- 1.16 In contrast, the civil law is concerned with disputes between, or the vindication of rights of, private individuals or bodies. Civil litigation is pursued according to civil procedural rules which allow the defendant fewer protections.
- 1.17 Civil pecuniary penalties blur the line between the criminal and civil law.⁷ They are punitive rather than compensatory. Liability is established on the civil standard of proof – on the balance of probabilities – rather than the criminal standard of proof beyond reasonable doubt. And they are imposed through a civil trial, without the protections given to those defending a criminal charge. Yet the outcome can be very grave. In some cases it can be more severe in monetary terms than a criminal prosecution for the same conduct.
- 1.18 Civil pecuniary penalties are not alone in straddling the criminal-civil divide. For example, the civil remedy of exemplary damages is punitive rather than compensatory and the sentence of reparation, handed down by criminal courts, is designed to compensate the victim. So, there are instances where the line has been breached. However, in this Issues Paper we suggest that where such a breach is to occur, it should be done with a robust rationale and in a manner which is fair.

Experience abroad

- 1.19 Forms of civil penalty exist in most other jurisdictions (see appendix 2). In particular, Australian and United States legislation contains numerous civil pecuniary penalty provisions that are similar or identical to ours. Those provisions have given rise to a considerable amount of case law and there has been some discussion about their use and design.⁸

⁷ The points made here are expanded upon in chapter 3.

⁸ See for example V Comino “Effective Regulation by the Australian Securities and Investment Commission: The Civil Penalty Problem” (2009) 33 MULR 802; M Gillooly and NL Wallace-Bruce “Civil Penalties in Australian Legislation” (1994) 13 Univ Tas LR 269; K Mann “Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law” (1992) 101(5) Yale LJ 1795; T Middleton “The Difficulties of Applying Civil Evidence and Procedure Rules in ASIC’s Civil Penalty Proceedings under the Corporations Act” (2003) 21 C&SLJ 507; A Rees “Civil penalties: Emphasising the Adjective or the Noun” (2006) 34 ABLR 139; P Spender “Negotiating the Third Way: Developing Effective Process in Civil Penalty Litigation” (2008) 26 C&SLJ 249.

- 1.20 The debate in Australia has resulted from apparent judicial discomfort about the imposition of State sanctions through normal civil processes and because of the novelty of civil pecuniary penalties. Commentators suggest that this discomfort has led courts to introduce criminal or quasi-criminal protections and procedures in civil pecuniary penalty cases in such a way that reduces the benefits that civil pecuniary penalties were designed to deliver. Vicky Comino sums up the problem as follows:⁹

[N]egotiating an effective civil penalty procedure on a case-by-case basis is problematic and carries the danger of “lead[ing] to indeterminacy or default to criminal procedure”.

- 1.21 Their novelty has meant that courts have been required to engage in close analysis of the legislative provisions which, as in New Zealand, are not uniform across the Acts. The result is that procedure may vary depending on the terms of each Act and that lengthy and costly litigation has eventuated.¹⁰ This is undesirable.
- 1.22 Courts in Europe and the United States have also struggled with the nature of a variety of non-criminal penalties and have, at times, imposed constitutional or human rights protections on their imposition.¹¹
- 1.23 It must be acknowledged that, thus far, these concerns have not arisen in civil pecuniary penalty cases in New Zealand. Civil pecuniary penalties have been imposed in around 60 cases. Most have arisen under the Commerce Act 1986. In the majority of those cases, the Commerce Commission and defendant have reached an agreed penalty which has been approved by the Court. There has therefore been little substantial judicial analysis of the nature of civil pecuniary penalties. It is possible that defendants will continue to accept their imposition and that our courts will continue to approach them in this manner. However, as the numbers of civil pecuniary penalty provisions grow, in a wider range of statutory settings, it is likely that there will be more litigation. As they are imposed on a wider range of persons they may be more robustly defended. It is notable that, to date, very few cases have been taken against individuals as opposed to bodies corporate. It may be that our courts will be required to tackle the sorts of issues that have vexed courts in other jurisdictions. Moving forward, consistency and principle in the design and use of civil pecuniary penalties may assist in reducing the risk of litigation.

9 Comino, above at 829 quoting Spender, above.

10 Rees, above n 8 at 143.

11 We discuss these issues further in chapters 6 and 8. See also appendix 2.

Other work

- 1.24 As noted, the LAC has taken an interest in civil pecuniary penalties and the possibility of a new chapter in the LAC Guidelines, devoted to civil pecuniary penalties, has been raised.¹² Also, in 2007, the Ministry of Justice produced a draft consultation paper on civil penalty guidelines.¹³ It noted the lack of available guidance. The aim of the paper was to consult on guidelines primarily for use within the Ministry of Justice, but which might also be helpful to other government agencies considering the introduction or revision of civil pecuniary penalties. Other priorities have prevented further LAC or Ministry of Justice work from progressing.

OUR APPROACH

- 1.25 It is important to acknowledge at the outset that civil pecuniary penalties have featured in legislation for a number of years, are viewed as playing a valuable role in regulatory law and have been embraced by regulators. The regulated communities they touch have voiced little concern about them.
- 1.26 The Law Commission acknowledges that civil pecuniary penalties have a role to play in our justice system. Our task, then, is not to question whether they should exist at all in New Zealand. Rather, in this Issues Paper we describe their current use, ask questions and make suggestions about their future role and design. We intend to release a final report with recommendations about civil pecuniary penalties in the middle of 2013.

THIS ISSUES PAPER

- 1.27 In chapter 2 of this Issues Paper we describe the range of civil pecuniary penalties in New Zealand and make some observations about the scope of our review. In chapter 3 we consider the nature of civil pecuniary penalties. We conclude that they are a grave form of State punishment that can have serious financial and reputational implications for an offender. We characterise them as a “hybrid” because they are imposed through civil proceedings, without the benefit of criminal procedural protections. We conclude that hybrid sanctions may have a valuable role to play, but suggest that they should be subject to robust justification. In the light of this, in chapter 4 we ask questions about the circumstances when their use in a statutory regime might be warranted or justified. In chapter 5 we describe the principles that we consider should dictate the design of civil pecuniary penalties and discuss the impact of the New Zealand Bill of Rights Act 1990. Chapters 6 and 7 deal with the wide range of procedural and legislative design issues that arise for civil pecuniary

12 Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (Wellington, 2001). See < www2.justice.govt.nz/index.html > .

13 Ministry of Justice *Draft Civil Penalties Guidelines Consultation Paper* (Wellington, 2007).

penalties. Finally, in chapter 8 we ask what form our recommendations should take. Is guidance for officials considering civil pecuniary penalty regimes sufficient, or should we propose the enactment of legislative rules?

Chapter 2

Civil pecuniary penalties in New Zealand and the scope of our review

- 2.1 There is a wide range of non-criminal “penalties”, “orders” and “notices” on the statute book that share some of the characteristics of civil pecuniary penalties. A variety of terminology is used. They include “civil penalties”,¹⁴ civilly-enforced “fines”,¹⁵ “penalties”,¹⁶ “civil infringement notices”,¹⁷ and “administrative penalties”. It is not possible to review all of these in the context of this review, and we have had to make some difficult decisions as to the breadth of the project. There has necessarily been an element of arbitrariness about some of our scoping decisions. Certainly, however, the terminology used has not been determinative.
- 2.2 In this chapter we describe the range of civil pecuniary penalties and the current extent of their use. We also explain the scope of the project and give a brief overview of other forms of civilly-enforced penalties and remedies on the statute book. A description of the various penalties and remedies on the statute book reinforces some of the general points made in this review. They illustrate that legislators are turning to an ever-widening range of interventions to ensure that legislation is effectively enforced. There is growing inconsistency around the terminology used and an appearance of piecemeal and ad hoc development of some of these solutions. Our aim in this review is to avoid any such future development of civil pecuniary penalties and to ensure that there is a principled and considered framework for their use.

14 Fisheries Act 1996 / Fisheries (Demerit Points and Civil Penalties) Regulations 2001, Forests (Permanent Forest Sink) Regulations 2007, Tax Administration Act 1994.

15 Building Act 2004, s 318 under the heading “disciplinary penalties”.

16 Employment Relations Act 2000, s 134.

17 Telecommunications Act 2001 / Telecommunications (Civil Infringement Notice) Regulations 2007.

EXISTING CIVIL PECUNIARY PENALTY REGIMES

- 2.3 Fifteen statutes provide for civil pecuniary penalties to be imposed by the High Court. A full list can be found in appendix 1. At the time of writing, three Bills before Parliament contain civil pecuniary penalties. Civil pecuniary penalty provisions feature in:
- the regulation of commercial or corporate transactions;¹⁸
 - the regulation of securities and financial markets and the conduct of some financial market participants;¹⁹
 - the regulation of some major industries;²⁰
 - environmental protection legislation;²¹
 - anti-money laundering and countering the financing of terrorism legislation;²² and
 - legislation targeting unsolicited commercial electronic spam.²³
- 2.4 In some fields, civil pecuniary penalties provide a comprehensive response to a wide range of behaviour, but in others their adoption has been less broad. For example, they feature in the regulation of securities and securities markets and, on the passing of the Financial Markets Conduct Bill, will be even more prevalent.²⁴ In contrast, while they feature to an extent in environmental legislation, they are absent from a great deal of it too. And while the participants in some major industries are regulated by way of civil pecuniary penalties, others are subject to criminal offences.²⁵
- 2.5 This is because the civil pecuniary penalty is a comparatively recent phenomenon. Their numbers have grown since the mid-1980s as new areas of activity have come to be regulated or as older Acts have been amended. For

18 Commerce Act 1986, Overseas Investment Act 2005 / Overseas Investment Regulations 2005, Takeovers Act 1993.

19 Securities Act 1978, Securities Markets Act 1988, Securities Trustees and Statutory Supervisors Act 2011, Financial Advisers Act 2008, Financial Service Providers (Registration and Dispute Resolution) Act 2008, Anti-Money Laundering and Countering Financing of Terrorism Act 2009.

20 Dairy Industry Restructuring Act 2001 / Dairy Industry Restructuring (Raw Milk) Regulations 2001, Telecommunications Act 2001 / Telecommunications (Civil Infringement Notice) Regulations 2007, Telecommunications (Interception Capability) Act 2004.

21 Biosecurity Act 1993, Hazardous Substances and New Organisms Act 1996.

22 Anti-Money Laundering and Countering Financing of Terrorism Act 2009.

23 Unsolicited Electronic Messages Act 2007.

24 Financial Markets Conduct Bill (342-2), cl 600. The Bill was reported back from the Commerce Committee on 7 September 2012 and at the time of publication is awaiting its second reading.

25 Compare for example the use of civil pecuniary penalties in the Dairy Industry Restructuring Act 2001 with the use of criminal offences in the Railways Act 2005.

example, the Hazardous Substances and New Organisms Act 1996 (HSNO Act) was amended in 2003 in response to concern about genetically modified and other new organisms. Civil pecuniary penalties were introduced to the Act for certain breaches relating to these “new organisms”.²⁶ However the older part of the Act, which regulates the assessment, importation, storage, use, etc of other “hazardous substances”,²⁷ is enforced by way of criminal and infringement offences.

- 2.6 Both individuals and corporate bodies may incur civil pecuniary penalties. The maximum penalty for the latter is generally substantially higher than the former (for example, \$100,000 for an individual under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 and \$2m for a body corporate). In some cases they are used in closely regulated industries with limited specialised participants. For example, part 2, subpart 5 of the Dairy Industry Restructuring Act 2001 deals with Fonterra’s obligations as the dominant player in the dairy industry. Those obligations are enforced by way of civil pecuniary penalties. In other cases, civil pecuniary penalties have been enacted to deal with conduct by less narrowly defined groups or persons. For example, civil pecuniary penalties in the Unsolicited Electronic Messages Act 2007 (UEM Act) are targeted at any person sending a commercial electronic message. Similarly, under the Commerce Act 1986 civil pecuniary penalties may be imposed on any individual or body corporate for anti-competitive contraventions under parts 2 and 3 of the Act.²⁸
- 2.7 In civil pecuniary penalty proceedings, the State enforcement agency must prove in the High Court that, on the balance of probabilities, the defendant carried out the contravention. In most regimes there is no express requirement for any element of knowledge or intent on the part of the defendant. As such, most civil pecuniary penalty provisions appear to carry strict liability and the State does not have to prove anything regarding the defendant’s state of mind. However, the Court is *usually* directed to take into account the defendant’s degree of intent, awareness or other subjective factors in determining penalty quantum.

26 Including genetically modified organisms, eradicated species and species not present in New Zealand before July 1998: Hazardous Substances and New Organisms Act 1996, s 2A.

27 Defined as “any substance—(a) With one or more of the following intrinsic properties: (i) Explosiveness: (ii) Flammability: (iii) A capacity to oxidise: (iv) Corrosiveness: (v) Toxicity (including chronic toxicity): (vi) Ecotoxicity, with or without bioaccumulation; or (b) Which on contact with air or water (other than air or water where the temperature or pressure has been artificially increased or decreased) generates a substance with any one or more of the properties specified in paragraph (a) of this definition.”: s 2(1).

28 Part 2 prohibits restrictive trade practices: practices (including contracts, joint buying and promotion activities) that substantially lessen competition; take advantage of market power; or amount to resale price maintenance (for example inducements by suppliers or others to artificially set prices and withholding or preventing the supply of goods). Part 3 prohibits business acquisitions likely to, or having the effect of, substantially lessening competition.

- 2.8 Civil pecuniary penalties are sought by a range of enforcement bodies, depending on the Act (see appendix 1). In respect of civil pecuniary penalties, the enforcement bodies generally have information-gathering, search and seizure powers that match their criminal investigatory powers. Civil pecuniary penalties often feature with a range of other enforcement measures which have been designed to give an enforcement body a range of responses to non-compliance.
- 2.9 While some are directed at minor technical breaches of the regime, most are directed at the core behaviour targeted by the legislation. Civil pecuniary penalties may be the most serious enforcement mechanism within the Act (such as in the UEM Act) or the Act may also contain criminal offences (such as in the Securities Act 1978). Also, civil pecuniary penalties sometimes form a “parallel” sanction to a criminal offence. In those cases, civil pecuniary penalties and criminal offences tend to be differentiated on the basis of the degree of knowledge or intent required. So, for example, a contravention may be enforced by way of a criminal offence under the HSNO Act where it was performed with intent or recklessness.²⁹

USE OF CIVIL PECUNIARY PENALTIES

- 2.10 The vast majority of civil pecuniary penalties have been sought and imposed under the Commerce Act 1986. Most of these have been resolved by an admission of liability by the defendant and an agreement between the defendant and the Commerce Commission as to the level of penalty which should be imposed. Such agreements must be approved by the High Court. More than 50 substantive penalty proceedings have been commenced since the first penalty was imposed in 1990.³⁰ The penalty in that case, imposed for restrictive trade practices, amounted to \$5 per defendant. The highest penalty imposed, also for restrictive trade practices, was against Telecom New Zealand in 2011 and was set at \$12m.³¹ The vast majority of the Commerce Act penalties have been imposed on corporate bodies rather than individuals. The table below shows the number and size of penalties imposed under the Commerce Act since 2006:³²

29 Hazardous Substances and New Organisms Act 1996, ss 109, 124B.

30 *Commerce Commission v Otago and Southland Vegetable and Produce Growers' Association (Inc)* (1990) 4 TCLR 14 (HC).

31 *Commerce Commission v Telecom Corporation of New Zealand Ltd* HC Auckland CIV-2004-404-1333, 19 April 2011; upheld by the Court of Appeal in *Telecom Corporation of New Zealand Ltd v Commerce Commission* [2012] NZCA 344.

32 Email from Rebecca McAtamney (Chief Adviser, Competition, Commerce Commission) to Susan Hall (Law Commission) (25 November 2011).

Year	Number of penalties imposed	Total monetary amount of penalties
06/07	7	\$6.07m
07/08	0	–
08/09	1	\$1.05m
09/10	0	–
10/11	10	\$35.05m

- 2.11 By comparison, civil pecuniary penalties have formed a minimal part of the enforcement of the Securities Act 1978 and the Securities Markets Act 1988. Both those Acts are also enforced by way of criminal offences (unlike the bulk of the Commerce Act), and up until 2002 civil penalty proceedings for insider trading under the Securities Markets Act were instituted by the issuer of the security, not the Securities Commission.³³ New Zealand's securities law will be overhauled on the passing of the Financial Markets Conduct Bill.³⁴ It will introduce considerably more civil pecuniary penalty provisions in this area.
- 2.12 The Overseas Investment Act 2005 civil pecuniary penalties have been sought very rarely.³⁵ Three civil pecuniary penalties have been imposed under the UEM Act, totalling \$250,000. Those penalties were imposed against individuals.³⁶ The Department of Internal Affairs, which enforces the Act, has commenced two further proceedings in 2011³⁷ and 2012.³⁸
- 2.13 Although the HSNO Act, Dairy Industry Restructuring Act 2001, and the Telecommunications Act 2001 civil pecuniary penalty provisions have been in place for some time, no penalties have been sought under those Acts. The HSNO Act penalties target breaches related to “new organisms”. We understand that there have been no full approvals for release of new organisms from research facilities, and no penalties have been imposed. The relevant provisions of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 are not in force.³⁹

33 J Diplock and L Longdin “The Journey Towards Effective Insider Trading Regulation in New Zealand” (2007) 13 NZBLQ 290 at 295.

34 Above, n 24.

35 The Overseas Investment Office reports that they have been sought “perhaps 4 times”. See email from Annelies McClure (Manager, Overseas Investment Office) to Susan Hall (Law Commission) (18 November 2011).

36 *Department of Internal Affairs v Atkinson* HC Christchurch CIV-2008-409-2391, 19 December 2008.

37 Anti-Spam Compliance Unit, Department of Internal Affairs “High Court action against alleged spammer” (press release, 17 February 2011).

38 Anti-Spam Compliance Unit, Department of Internal Affairs “Internal Affairs takes action against spammer” (press release, 22 April 2012).

39 They come into force on 30 June 2013: Anti-Money Laundering and Countering Financing of Terrorism Act Commencement Order 2011.

PENALTIES OUTSIDE THE SCOPE OF OUR REVIEW

- 2.14 As set out in chapter 1, the civil pecuniary penalties which concern us share a number of characteristics. Notably, they are imposed by the High Court in civil proceedings and the Court has discretion as to the quantum of the penalty. However, there are a number of other non-criminal sanctions on the statute book which share some of the features of civil pecuniary penalties. Each has distinguishing characteristics that led us to place them outside the scope of our review. We describe these briefly below and explain our scoping decisions. These penalties are described in greater detail in appendix 3.

Variable civil penalties

- 2.15 Five statutes provide for the imposition of variable civil penalties by a body other than a court. Most notably, “Rulings Panels” can impose civil penalties of up to \$20,000 under the Gas Act 1992⁴⁰ and \$200,000 under the Electricity Industry Act 2010.⁴¹ These penalties are almost identical in design to civil pecuniary penalties. But for the most part we have excluded them from our review because they are imposed by a quasi-judicial body and therefore raise distinct issues. We consider the desirability of such a model, however, in chapter 7.
- 2.16 The third statute is the Overseas Investment Act 2005, which contains civil pecuniary penalties of the type that fall within our review, but also provides for other variable “administrative penalties” to be imposed by the Overseas Investment Office. Those penalties are for retrospective filing of a consent (required under the Act for overseas investment in sensitive New Zealand assets) and have a maximum of \$20,000. Here, the regulator has discretion as to imposition and the size of the penalty.⁴² Administrative penalties for retrospective consent are used more frequently than civil pecuniary penalties, with 15 imposed in 2010/2011 ranging from \$3,000 to \$15,000.⁴³

40 Gas Governance (Compliance) Regulations 2008, reg 52.

41 Section 54.

42 In determining the amount, the regulator must consider whether the penalty would be unduly harsh or oppressive given the value of consideration for the asset in the overseas investment transaction or the nature of or reasons for the retrospective consent: Overseas Investment Act 2005, s 32(2).

43 Email from Annelies McClure (Manager, Overseas Investment Office) to Susan Hall (Law Commission) (18 November 2011).

- 2.17 The fourth statute is the Tax Administration Act 1994, under which the Commissioner of Inland Revenue can impose “shortfall penalties”, which can be sizeable and require the exercise of discretion by the Commissioner as to the errant taxpayer’s level of intent. So, a taxpayer is liable for a penalty of 20 per cent of the shortfall where they did not take reasonable care; 40 per cent where there is gross carelessness; 100 per cent where they take an “abusive tax position”; and 150 per cent where there is tax evasion.⁴⁴
- 2.18 We have excluded these two forms of penalty from our review. Again, however, we touch on the desirability of such models in chapter 7.
- 2.19 The fifth statute is the Employment Relations Act 2000, which provides for the Employment Relations Authority to impose penalties of up to \$10,000 (individuals) and \$20,000 (bodies corporates) for breaches of the Act or an employment agreement.⁴⁵ In addition, 13 occupational licensing statutes include a standard provision for a “fine” to be imposed by a disciplinary body or tribunal established under the Acts, for various breaches of the relevant Act or licensing conditions.⁴⁶ The maximum fines range from \$2,000 (private security guards and private investigators) to \$30,000 (health practitioners, lawyers and conveyancers and veterinarians).
- 2.20 We have also excluded these from our review. Both types of fine have a long history. Equivalent provisions have featured in employment law since 1908⁴⁷ and occupational schemes have contained such fines since at least 1949.⁴⁸ While these penalties meet most of the criteria for “civil pecuniary penalties”, they are not among the civil penalties that have raised concern and prompted our review. They have been imposed by occupational bodies and tribunals for years without a great deal of concern or debate. They do not feature the same drafting techniques that accompany Court-imposed penalties. However, they have given rise to some case law which is relevant to the issues at hand, and where relevant, we have drawn on that.

44 Note also that the Commissioner can increase any shortfall penalty by 25 per cent if the taxpayer obstructs the Commissioner in determining the correct tax position: Tax Administration Act 1994, s 141K.

45 Employment Relations Act 2000, s 134.

46 The statutes regulate architects, builders, engineers, health practitioners, immigration advisers, lawyers and conveyancers, plumbers, gasfitters and drainlayers, private security personnel and private investigators, real estate agents, social workers, valuers and vets. Other occupations are regulated in a similar way, but without provision for a monetary penalty (e.g. auditors).

47 Industrial Conciliation and Arbitration Amendment Act 1908, s 13. See also Industrial Conciliation and Arbitration Act 1925, s 129, Industrial Conciliation and Arbitration Act 1954, s 199, Industrial Relations Act 1973, 148, Labour Relations Act 1987, s 202 and Employment Contracts Act 1991, s 53.

48 Physiotherapy Act 1949, s 24.

Administrative penalties

- 2.21 We have also excluded what are commonly referred to as “administrative penalties”. Generally the term “administrative penalty” is used to mean fixed, non-discretionary penalties which are imposed by a regulator.⁴⁹ Their fundamental distinguishing characteristic is that they are imposed in administrative, not judicial, processes. They are usually lower in quantum and involve the exercise of less discretion.

Infringement notices

- 2.22 This review does not deal with infringement offences. Over the last 30 years, infringement offence regimes have become established as an integral part of the justice system. Infringement fees are set by legislation – the prosecuting authority has no power to vary the penalty. On payment of an infringement fee, no conviction results. Infringement offences raise numerous questions of consistency and design themselves and have previously been the subject of a joint Law Commission and Ministry of Justice review.⁵⁰ Indeed, there have been recent calls for further review of infringement offences.⁵¹
- 2.23 We have also excluded the expedited penalty “notices” – referred to as “civil infringement notices” – found in two civil pecuniary penalty statutes.⁵² These enable the relevant enforcement body to require direct payment of a fixed penalty. They are closer in nature to administrative penalties than civil pecuniary penalties.

Other civil remedies

- 2.24 We have limited our scope to pecuniary penalties, thus excluding orders such as management bans⁵³ and licence revocations.⁵⁴ These are sometimes used in combination with civil pecuniary penalties. While they can have a punitive effect, they also have a protective element that is absent from a

49 See Australian Law Reform Commission *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC R95, Sydney, 2002) at [2.64].

50 Law Commission *The Infringement System: A Framework for Reform* (NZLC SP16, Wellington, 2005).

51 In *Down v R* [2012] NZSC 21 at [36] William Young J expressed the view that criminal infringement regimes lack consistent legislative pattern and that a comprehensive legislative review is warranted.

52 Unsolicited Electronic Messages Act 2007, s 24, Telecommunications Act 2001, s 156D. See also Therapeutic Products and Medicines Bill (103–1), cl 89.

53 See for example Securities Act 1978, s 60A, under which a banning order may be made for up to 10 years if a pecuniary penalty order is made. The order bans or restricts the person (without leave of the Court) from being a director/promoter of or in any way (directly or indirectly) concerned in the management of an incorporated or unincorporated body.

54 See for example Securities Trustees and Statutory Supervisors Act 2011, s 32, under which the Financial Markets Authority may revoke or vary a licence.

purely pecuniary penalty.⁵⁵ We have also excluded compensation orders given their compensatory, non-penal nature.⁵⁶

Criminal gain disgorgement penalties

- 2.25 Criminal gain disgorgement penalties can be imposed where there has been criminal offending, in addition to any criminal sanction, and are designed to strip away the gains made from criminal conduct. The Criminal Proceeds (Recovery) Act 2009 contains penalties that target offending generally. A range of other Acts also provide for the disgorgement of criminal gains by way of an additional penalty, supplementary to any criminal sanction.⁵⁷ Determining the quantum of the penalty is a discretionary exercise undertaken by the courts, so criminal gain disgorgement penalties bear some resemblance to civil pecuniary penalties. Critically, they are imposed on the balance of probabilities, rather than on the criminal standard. We have not included these penalties in our review as they are linked to criminal conduct in a way that purely civil pecuniary penalties are not.

Statutory damages under the Credit Contracts and Consumer Finance Act 2003

- 2.26 The Credit Contracts and Consumer Finance Act 2003 contains a mechanism whereby, if a creditor, lessor, transferee or buy-back promoter breaches various contractual disclosure obligations, the other party to the contract is entitled to “statutory damages” calculated as a function of the credit that accrued during the period of the breach.⁵⁸ The statutory damages are non-compensatory, since they are unrelated to actual loss and the Act makes separate provision for compensatory orders.⁵⁹ They may be penal in nature. But unlike civil pecuniary penalties, they are not paid to the Crown, so we do not consider them here.

55 They were not included in the review by the Australian Law Reform Commission for a similar reason. See Australian Law Reform Commission above n 49 at [3.17].

56 See for example Securities Markets Act 1988, s 42ZA, under which the Court may order compensation where an aggrieved person has suffered or is likely to suffer loss or damage because of the contravention of a civil remedy provision.

57 See for example the Civil Aviation Act 1990, s 47, Fair Trading Act 1986, s 40A, Health Act 1956, s 69ZZW, Immigration Advisers Licensing Act 2007, s 72, Resource Management Act 1991, s 339B, United Nations Convention on the Law of the Sea Act 1996, s 8 and Waste Minimisation Act 2008, s 67.

58 Section 88.

59 Section 94.

Chapter 3

The nature of civil pecuniary penalties

- 3.1 On one view, strict adherence to a criminal-civil divide is unrealistic. Indeed, it fails to reflect accurately our current justice system, where the criminal-civil dichotomy has been compromised legitimately for a variety of policy reasons. Supporters of civil pecuniary penalties argue that, while they breach the traditional divide, they are an appropriate response to certain types of contravention that are not adequately deterred by criminal offences, do not demand the moral disapprobation that accompanies criminality, or for which criminalisation is otherwise inappropriate. In particular, they are an important tool in the enforcement of regulatory regimes which have been put in place for particular policy reasons and in the public interest. Those imperatives, it is argued, warrant the use of civil pecuniary penalties.
- 3.2 On the other hand, opponents of civil penalties argue that they wrongly prioritise the desire for efficiency in regulation over legal principle. They are “stealth sanctions” which “seek to avoid the safeguards of criminal procedure by ... the pretence that they are civil debts”.⁶⁰ Or a “noxious hybrid”⁶¹ that illegitimately straddles the traditional divide between criminal law and civil law. The argument is that there is a fundamental distinction between the purposes of the criminal law and the procedure by which it achieves its objectives on the one hand, and the compensatory or injunctive functions of the civil law and the procedures by which those objectives are achieved on the other.⁶² The purist view is that penalties should remain solely within the remit of the criminal law, with the benefit of its particular procedural safeguards.

60 See R M White “It’s Not a Criminal Offence—Or Is It? Thornton’s Analysis of ‘Penal Provisions’ and the drafting of ‘Civil Penalties’” (2011) 32(1) *Statutes LR* 17.

61 T Greenwood “Corporate Officers—Bounden Duty and Service ... and Reasonable Lively Sacrifice” (1992) 6 *Butterworths Corporate Law Bulletin* 61.

62 Ministry of Economic Development *Reform of Securities Trading Law: Volume Three: Penalties, Remedies and the Application of Securities Trading Law Discussion Document* (May 2002) at [281].

- 3.3 In this chapter we describe the traditional differences between the criminal and civil branches of law. We then consider the nature of civil pecuniary penalties and determine that they are a “hybrid”: that is, they display traditional features of both branches of law. We take the position that there is nothing wrong with a hybrid sanction per se, but suggest that the adoption of any such model should take place in the light of robust analysis and be guided by principle.

THE CRIMINAL-CIVIL DIVIDE

- 3.4 The distinction between the branches of criminal and civil law is deeply ingrained in common law justice systems. Dr Kenneth Mann describes how the foundations of the distinction were laid down in the 14th and 15th centuries and quotes Lord Mansfield, writing in 1776: “Now there is no distinction better known, than the distinction between civil and criminal law; or between criminal prosecutions and civil actions.”⁶³ This is not to say that overlaps have not always existed, but the distinction has been central to how we think about the law. Much of this is attributable to the particular aims and functions of the criminal law. Traditionally, it is defined by the following features:
- Criminal process is initiated by the State.⁶⁴ Criminal prosecution is a manifestation of the State, on behalf of society, bringing its power to bear upon its citizens. To this end, the State has uniquely invasive powers of investigation at its disposal.
 - A criminal offence is a breach of a duty owed to the public as a whole. As such, the notion of “social harm” or violation of the collective interest by the mere conduct of the breach is enough to justify the imposition of a penalty.⁶⁵ Criminal prosecution can therefore proceed whether or not any harm has been suffered as a result of the breach and the penalty is paid to the State.

63 K Mann “Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law” (1992) 101(5) *Yale LJ* 1795.

64 Although private prosecution is provided for in s 15 of the Criminal Procedure Act 2011, the great majority of criminal proceedings are prosecuted by the Crown.

65 Mann, above n 63 at 1806–1807.

- Conventionally, criminal law, as distinct from other kinds of law, is concerned with the punishment of culpable wrongdoing⁶⁶ and, for conviction to result, the commission of a criminal offence must be accompanied by proof of subjective liability (i.e. proof of mens rea on the part of the accused).⁶⁷
 - While the respective weight given to the various goals of the criminal law has fluctuated over time, those goals are accepted to be to exact retribution or “just desserts”, to deter criminal behaviour both generally and specifically and to protect (by incarceration) the public from further harm.
 - A finding of guilt carries with it the enduring stigma of a conviction and can, for the gravest offending, result in the deprivation of liberty.
- 3.5 The question of degrees of “harm” is not included in the above list. This is because, while it is common to describe criminal law as being directed at what society considers the most serious wrongs, it is not true to say that it targets only serious wrongs. There are many criminal offences which are directed at comparatively benign conduct, such as dropping litter. As Andrew Ashworth puts it:⁶⁸
- There are many offences for which criminal liability is merely imposed by Parliament as a practical means of regulating an activity, without implying the element of social condemnation which is characteristic of major or traditional crimes. There is thus no general dividing line between criminal and non-criminal conduct, or between seriously wrongful or other conduct.
- 3.6 Instead, Ashworth emphasises that the idea of crime is that it is something that rightly concerns the State rather than just the victims of the wrongdoing. Many crimes are also civil wrongs, and in the civil sphere it is for the injured party to decide whether or not to sue for damages. What distinguishes crime is that the decision has been made that there is a public and therefore State interest in ensuring that the conduct does not happen and in punishing it when it does.⁶⁹
- 3.7 Criminal justice is administered in a particular way in recognition of the inequality of power between the two parties and the potential gravity of a criminal sanction. In particular, criminal procedure has developed to ensure that the innocent are not punished and that individuals are protected against abuses of the State’s power. Accordingly, criminal trial is accusatorial: the prosecutor must make out a case and the accused may remain silent. Trial

66 R Duff “Theorising Criminal Law; a 25th Anniversary Essay” (2005) 25 OJLS 353.

67 Mann, above n 63 at 1805. Strict and absolute liability offences are exceptions to this presumption and are discussed below.

68 A Ashworth *Principles of Criminal Law* (6th ed, Oxford University Press, Oxford, 2009) at 2.

69 Ashworth, above at 2.

by jury exists for the most serious offences. A decision-maker cannot convict unless satisfied of guilt beyond reasonable doubt, and the defendant is presumed innocent until guilt is so established. Criminal trials are directed by strict rules of procedure and restrictive rules of evidence. These are fundamental legal tenets that are given specific and heightened protection in the New Zealand Bill of Rights Act 1990 (NZBORA). The NZBORA protections come into play from the moment of a person's arrest or detention.

- 3.8 It is difficult to describe satisfactorily the traditional features of civil action. For example, for the most part, civil actions rely on different notions of guilt than the criminal law; however, that is not to say that some do not require proof of some degree of intention. And while, unlike the criminal law, a successful action for damages generally requires that the defendant's actions resulted in harm to the plaintiff, this is not true for all civil wrongs.⁷⁰ Generally, the goals of the civil law differ from the criminal law – for example they include the resolution of disputes between individuals, the vindication of rights and the determination of who should bear the cost of harms that have occurred. For these purposes, civil remedies include the payment of compensation; the restoration of a claimant to the position he or she would have been in without the wrong; or the stopping of defined conduct. But other remedies do more than restore and may have a punitive or deterrent purpose.
- 3.9 The Commission considers that the key distinction for the purposes of this Issues Paper, however, relates to the *State's* involvement in civil proceedings. Generally, the State's role is limited to providing the forum for the resolution of civil disputes. When a government body is involved in civil proceedings directly, it does so from a standpoint of protecting its interests as if it were a private party, rather than acting on behalf of society as a whole.⁷¹ Civil proceedings, then, are considered to take place between more equally matched individuals, both of whom are engaging in litigation to protect their own private interests. And, unlike in the criminal field where criminal fines are paid to the Crown, compensation won in civil proceedings is paid directly to the victim.
- 3.10 As is the case with criminal law, civil justice is administered in a way which reflects its goals and outcomes. Civil procedure is characterised by a level playing field between litigants. The default position is for disclosure between the parties in the interests of justice. Generally, civil cases are heard before a judge alone and the court need only be persuaded of liability on the balance of probabilities. While s 27(1) of NZBORA protects a person's right to the observance of the principles of natural justice in civil proceedings, the protections afforded in criminal proceedings do not generally apply. However,

70 An example is defamation which is a strict liability civil wrong.

71 And in those circumstances, the Crown Proceedings Act 1957 applies. The Act was enacted to ensure that the Crown does not enjoy a privileged position in litigation so that citizens can bring just claims against the Crown, and to allow the Crown to appropriately defend claims.

courts retain the discretion to adjust proceedings according to the individual needs of justice.

WHAT IS THE NATURE OF CIVIL PECUNIARY PENALTIES?

- 3.11 Formally, the penalties that fall within this review are civil in nature. This follows from the statutory application of the rules of civil procedure and the civil standard of proof⁷² and from their classification as “civil penalties” or “civil remedies”.⁷³ Civil pecuniary penalty proceedings, then, are commenced and progressed in the same way as standard civil proceedings.⁷⁴ Subject to the protection of privilege and the discretion of the Court, a defendant is required to provide answers to accusations and, essentially, to state her/his own case. In contrast, criminal procedures apply only to those contraventions that Parliament has classed as “criminal offences”.⁷⁵
- 3.12 Commentators have made much of the misalignment between form and substance where civil penalties are concerned.⁷⁶ The criticism is that by terming them “civil”, legislators are illegitimately promoting form (the legislative direction to employ civil rules of procedure) over substance (their public and punitive nature). By doing so, enforcement bodies have found a way of punishing people while avoiding the procedural protections that accompany criminal proceedings. On one view, then, civil pecuniary penalties are a calculated and cynical invention whose true attraction lies in the ease with which they can be imposed. They are “charges which are treated as civil in order to suit the administrative convenience of government departments”.⁷⁷
- 3.13 Courts in some jurisdictions have entered into a substantive examination of how to identify a “crime” and have not felt bound by terminology in their determination of what procedural protections should apply. For instance, the European Court of Human Rights (ECtHR) has found that sanctions

72 See for example Securities Act 1978, s 57D: “The proceedings under sections 55A to 57A are civil proceedings and the usual rules of the court and rules of evidence and procedure for civil proceedings apply (including the standard of proof).”

73 Most Acts either refer to them as “civil penalties” or class them as “civil remedies”.

74 That is, by statement of claim. Civil penalty proceedings are not subject to the special or originating application rules under Parts 4 and 4A of the High Court Rules.

75 Note that the Crimes Amendment Act (No 4) 2011, due to come into force on 17 October 2013, will repeal the definition of “crime” and “offence”. At present, “offence” is defined as “any act or omission for which any one can be punished under this Act or under any other enactment, whether on conviction on indictment or on summary conviction”. See Crimes Act 1961, s 2(1).

76 See for example Mann, above n 63; S Klein “Redrawing the Criminal–Civil Boundary” [1999] 2 Buff Crim LR 681; A Rees “Civil Penalties: Emphasising the Adjective or the Noun” (2006) 34 ABLR 139 at 141; RM White “‘Civil Penalties’: Oxymoron, Chimera and Stealth Sanction” (2010) 126 LQR 593. See also *Rich v ASIC* [2004] HCA 42, (2004) 209 ALR 271.

77 M Pearson “Taxing Crimes” (2001) Solicitors J 939.

which are expressed to be civil in nature may in substance be criminal and thus subject to European Convention protections if (a) the proceedings are brought by a public authority, and (b) there is a culpability requirement, or (c) there are potentially severe consequences (such as imprisonment or a significant financial penalty).⁷⁸ Andrew Ashworth describes the ECtHR's position as an “‘anti-subversion device’, created by the Strasbourg Court to prevent governments from manipulating the criminal/civil boundary and thereby avoiding those extra procedural rights.”⁷⁹ Australian and United States courts have also, from time to time, imposed criminal or quasi-criminal protections in civil pecuniary penalty cases in instances where they have considered that the true nature of the penalty is so severe as to warrant them.⁸⁰

- 3.14 In substance, New Zealand civil pecuniary penalties reflect more traditional features of the criminal law than civil law. First, the aim of civil pecuniary penalties is the punishment of breaches of rules or standards with a view to securing specific and general deterrence. Much of the thinking behind civil pecuniary penalties focusses on their deterrent value. Most are designed with the integrity of the particular regulatory system in mind and so maximum civil pecuniary penalties are set at a level to deter contraventions. The deterrent effect is dependent on them being punitive.⁸¹ This is accepted by New Zealand courts. In *Commerce Commission v Cargolux*,⁸² for example, Potter J said:

The primary purpose of pecuniary penalties for anti-competitive conduct is deterrence, whereas deterrence is only one of the many competing considerations involved in criminal sentencing. The importance of deterrence in this area is well established. The aim of imposing pecuniary penalties for anti-competitive conduct is to send the message to persons in the commercial community contemplating engaging in such activity that they will be penalised.

- 3.15 In *Commerce Commission v Roche Products (New Zealand) Ltd*⁸³ Fisher J referred to the “penal nature” of the proceedings for pecuniary penalties under the Commerce Act 1986. Fisher J went on to refer to the “penalty proceedings” as being “quasi-criminal”.⁸⁴

78 *Engel v Netherlands* (1979–80) 1 EHRR 647 (ECHR), *Ozturk v Germany* (1984) 6 EHRR 409 (ECHR), *Bendenoun v France* (1994) 18 EHRR 54 (ECHR).

79 Ashworth, above n 68 at 3.

80 See further appendix 2 and see generally Klein, above n 76.

81 Mann, above n 63 at 1839.

82 *Commerce Commission v Cargolux* HC Auckland CIV-2004-404-8355, 5 April 2011 at [24]–[25]. See also *New Zealand Bus Ltd v Commerce Commission* [2008] 3 NZLR 433 (CA) at [199]: “... the overwhelming weight of authority in Australasia presently is that deterrence must be the prime objective”.

83 *Commerce Commission v Roche Products (New Zealand) Ltd* [2003] 2 NZLR 519 (HC) at [57].

84 See also *Port Nelson Ltd v Commerce Commission* [1994] 3 NZLR 435 (CA) at 437.

- 3.16 The view is also reflected in governmental and Parliamentary observations of civil pecuniary penalties. For example, the Select Committee Report on the Commerce Amendment Bill 2001 which increased the available civil pecuniary penalties for anti-competitive conduct stated:⁸⁵

The dominant reason for penalties under competition law is the forward looking aim of promoting general deterrence. To promote deterrence, illegal conduct must be profitless, which means that the expected penalty should be linked to the expected illegal gain. The courts should severely penalize today's offender to discourage others from committing similar acts.

- 3.17 It was also the position taken by the Australian Law Reform Commission:⁸⁶

[Civil penalty provisions] are clearly founded on the notion of preventing or punishing public harm. ... Dr Kenneth Mann has called these penalties 'punitive civil sanctions'. These penalties differ from traditional private civil remedies in that they do not necessarily bear any close relationship to the actual damage caused (that is, they are noncompensatory).

- 3.18 The inclusion of provisions that bar subsequent proceedings and double punishment support a characterisation of civil pecuniary penalties as punitive.⁸⁷ As do instances where the statute provides expressly for compensation orders (which are imposed when damage has occurred or is likely to occur) in addition to civil pecuniary penalties (which can be imposed irrespective of actual damage).⁸⁸ There are civil pecuniary penalty provisions which enable a pecuniary penalty to be diverted to some other person for remedying harm caused by the breach or for cost recovery by the enforcement agency.⁸⁹ However, these examples appear to be auxiliary to the main purpose

85 See also Ministry of Economic Development, above n 62 at 39, 56 and 61.

86 Australian Law Reform Commission *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC R95, Sydney, 2002) at [2.47]–[2.48], quoting Mann, above n 63 at 1799.

87 See for example Commerce Act 1986, s 79B, Securities Trustees and Statutory Supervisors Act 2011, s 43, Anti-Money Laundering and Countering Financing of Terrorism Act 2009, s 74(1). See further discussion of these types of provisions from para 6.95.

88 See for example Commerce Act 1986, s 89, Securities Act 1978, s 55G, Securities Markets Act 1988, s 42ZA, Securities Trustees and Statutory Supervisors Act 2011, s 42, Takeovers Act 1993, s 33K, Unsolicited Electronic Messages Act 2007, s 46. In the context of the Corporations Act 2001 (Cth), Middleton has stated that such compensatory provisions make it “clear that the object of the pecuniary penalty in s 1317G is to punish the offender”: T Middleton “The Difficulties of Applying Civil Evidence and Procedure Rules in ASIC’s Civil Penalty Proceedings under the Corporations Act” (2003) 21 C&SLJ 507 at 516.

89 See for example Anti-Money Laundering and Countering Financing of Terrorism Act 2009, s 90(1), Overseas Investment Act 2005, s 48, Unsolicited Electronic Messages Act 2007, s 45. See also Biosecurity Act 1993, s 160(9): the Court may order all or part of a pecuniary penalty be paid to the departmental bank account of the Ministry for the Environment, if it considers that the breach was a material cause of a need to undertake a response activity such as minimising the impact or controlling the spread of or eradicating an unwanted organism; and Hazardous Substances and New Organisms Act 1996, s 124D: the Court may, instead of or in addition to a pecuniary penalty, order the defendant to mitigate or remedy any adverse effects on people or the environment.

of the penalty. Furthermore, the maximum penalty levels and statutory guidance given to New Zealand courts for the setting of civil pecuniary penalties show that, while neutralising any profit made from a breach is relevant to penalty level, it is not the sole or even main factor to be taken into account. In our view, it is clear that the primary objectives of civil pecuniary penalties are to punish and deter.

- 3.19 Secondly, and critically, like criminal offences their imposition is pursued by the State, on behalf of society as a whole. They are public actions rather than, as is the case for standard civil proceedings, private actions. A consequence of this is that investigation is undertaken by a statutorily established enforcement body with resources dedicated to the punishment of breaches of the relevant statute and a raft of investigatory powers at its disposal. By virtue of the Search and Surveillance Act 2011, enforcement bodies have the same search and surveillance powers available to them for the investigation of civil pecuniary penalty proceedings as they do for criminal offending. Furthermore, generally, a breach of a civil pecuniary penalty is a breach of a duty owed to the public as a whole. As such, proceedings can be taken whether or not the breach has caused any harm and whether or not there is any identifiable victim.⁹⁰ Their purpose, then, is not to repair harm to identifiable individuals⁹¹ – other means exist for this purpose – but to single out conduct deserving general condemnation and label it as such. Like crimes, they are “acts which have a particularly harmful effect on the public and do more than interfere with merely private rights”.⁹²
- 3.20 However, civil pecuniary penalty provisions differ from criminal offences in two fundamental ways. They do not result in a criminal conviction and there is no chance of a loss of liberty. The significance of these two distinctions should not be understated. Civil pecuniary penalty proceedings carry no chance of arrest, remand in custody or on bail and no threat of a sentence of imprisonment – the gravest form of criminal penalty. Furthermore, the branding of criminality carries with it a degree of stigma arguably beyond the reputational impact that is likely to result from the imposition of a civil pecuniary penalty. And the practical consequences that a conviction can have on travel, employment prospects and other appointments will not apply. The business community’s resistance to the prospect of the criminalisation of

90 Although under certain Acts a pre-requisite to seeking a civil pecuniary penalty includes where there has been material prejudice to individuals’ interests; likelihood of damage to the New Zealand market, or conduct that is otherwise serious: Securities Act 1989, s 55C, Securities Markets Act 1988, s 42T, Takeovers Act 1996, s 33M.

91 Although, a handful of civil penalties may be directed towards mitigating adverse effects: see above n 89.

92 J C Smith and B Hogan *Criminal Law* (7th ed, Butterworths, London, 1992) at 16. Smith and Hogan go on to quote C Allen *Legal Duties* (1931) at 233–234: “Crime is crime because it consists in wrongdoing which directly and in serious degree threatens the security or well-being of society, and because it is not safe to leave it redressable only by compensation of the party injured.”

cartel conduct indicates that the threat of a criminal conviction is thought to be considerably more serious than civil pecuniary penalties in that area.⁹³

- 3.21 Civil pecuniary penalties also differ from criminal offences in that the moral responsibility and social blame that accrue with criminal offending are not generally a feature of their design. Circuitously, such blame does not accrue because they do not result in the branding of criminality. But also because intent – or moral blameworthiness – is not generally required.⁹⁴
- 3.22 In this regard, the concerns relating to civil pecuniary penalties are not so grave as those that have accompanied developments in proceeds of crime legislation. The change in approach introduced in the Criminal Proceeds (Recovery) Act 2009, which has been mirrored in other jurisdictions, saw a shift from a requirement of criminal conviction before forfeiture, to forfeiture when the High Court is satisfied on the balance of probabilities that relevant property was either acquired as a result of significant criminal activity; or directly or indirectly derived from significant criminal activity.⁹⁵ Here, alleged criminal behaviour remains at the core of the matter: “although the court does not need to establish to the criminal standard of proof that the respondent is responsible for criminal behaviour or for a specific criminal offence ... the blameworthiness of the respondent remains fundamental to the seizure of the assets”.⁹⁶ Such regimes have been criticised.⁹⁷ Some of the same issues arise with civil pecuniary penalty provisions, but to a lesser degree. While civil pecuniary penalty provisions involve punishment on the civil standard of proof, they do not imply “criminality”.

93 Under the Commerce (Cartels and Other Matters) Amendment Bill (341–1).

94 Most civil penalty provisions carry strict liability. See further the discussion on intent in chapter 6.

95 Criminal Proceeds (Recovery) Act 2009, s 5(1), definition of tainted property: “(a) means any property that has, wholly or in part, been—(i) acquired as a result of significant criminal activity; or (ii) directly or indirectly derived from significant criminal activity; and (b) includes any property that has been acquired as a result of, or directly or indirectly derived from, more than 1 activity if at least 1 of those activities is a significant criminal activity”. See also s 50.

96 L Campbell “Theorising Asset Forfeiture in Ireland” (2007) JCL 71.

97 See for example P Wright “Criminal Punishment without Civil Rights: the Criminal Proceeds and Instruments Bill’s Punitive Civil Sanctions” (2006) 37 VUWLR 623 and G Faramarzi “Criminal Proceeds Recovery” [2010] NZLJ 205.

- 3.23 However, each of these differences with the criminal law demands further analysis. For example, while there is no mens rea element accompanying most civil pecuniary penalty provisions, this is not exclusively the case. There are examples of civil pecuniary penalties on the New Zealand statute book that require some mental element in the form of knowledge or constructive knowledge and there is nothing to prevent further civil pecuniary penalty provisions being drafted so as to require establishment of some degree of moral culpability.⁹⁸ Furthermore, a distinction on this basis is questionable given the very many strict liability criminal offences on the statute book.
- 3.24 Also, while a civil pecuniary penalty does not carry the consequences of a criminal conviction, the question of “stigma” is not so straightforward. The publicity that goes with civil pecuniary penalty proceedings can have a significant impact on reputation and it is reasonable to question the extent to which the public might differentiate between the reporting of a criminal and civil “fine”. Any civil pecuniary penalty proceeding involves an allegation of law-breaking and illegitimate practice. Furthermore, some of the same consequences can result: the management ban provisions of the Securities Act 1978 apply in the same way to those who have had a civil pecuniary penalty imposed as those convicted of a criminal offence.⁹⁹ Similarly, the Financial Markets Authority (which is responsible for enforcing that Act) has the same asset preservation orders available to it whether the action is civil or criminal. Excepting the stigma that attaches to conviction and imprisonment, the distinction between civil and criminal proceedings in terms of the impact on reputation may be fine.

98 See for example Securities Markets Act 1988, s 8D, Takeovers Act 1993, s 33M(c). Also some provisions connote notions of intent or awareness of conduct, such as prohibitions on “advising” or “encouraging” trading: Securities Markets Act 1988, s 8E (see also Financial Markets Conduct Bill (342–2), cl 237). Also see Unsolicited Electronic Messages Act 2007, s 13(1) which prohibits the use of address-harvesting software or lists with the intention of sending unsolicited commercial electronic messages (although the burden of proving lack of intention is on the defendant: s 14).

99 Securities Act 1978, s 60A.

- 3.25 Finally, while imprisonment is not possible for civil pecuniary penalties, there are many criminal offences with maximum monetary penalties that are far inferior to civil pecuniary penalties. There are a number of non-imprisonable offences in the Summary Offences Act 1981 with fines that do not exceed \$2,000. And the Financial Advisers Act 2008 contains non-imprisonable offences, with fines ranging from \$5,000 to \$300,000. Also, the criminal penalty that is available for some conduct under the Commerce Act 1986 is considerably lower than the equivalent civil pecuniary penalty for the same but non-intentional conduct.¹⁰⁰ A similar disparity exists under other Acts with parallel civil pecuniary penalties and criminal offences.¹⁰¹ This gives the impression that there may have been some attempt to “price” the cost of a criminal conviction; and that its impact can be replicated in some way by a higher financial penalty. If that is the case, it could well be argued that the civil pecuniary penalty is just as punitive as the equivalent criminal offence. This question of disparity raises considerable issues. Why is it appropriate for criminal procedural protections to apply to the imposition of a fine of \$500 for minor offending,¹⁰² but not to the imposition of a \$1m civil pecuniary penalty?

Conclusion

- 3.26 Civil pecuniary penalties are not the same as criminal penalties. Incarceration is not a possibility and they do not result in a criminal conviction. However, they are a grave form of State punishment that can have serious financial and reputational implications for an offender. They can involve the imposition of a financial penalty that is greater than many criminal penalties but without the same protections in place. By using the label “civil” the restraints that are otherwise considered an essential accompaniment to the imposition of a penalty are side-stepped.

100 Civil pecuniary penalties for contraventions of Part 4 (Regulated goods or services) are set at \$500,000 (individuals) and \$5m (bodies corporate): Commerce Act 1986, ss 86 and 87. Committing the same conduct with intent is a criminal offence, for which the maximum criminal fine is a lesser amount: \$200,000 (individual) and \$1m (bodies corporate): Commerce Act 1986, ss 86B and 87B.

101 For example under the Biosecurity Act 1993, the maximum civil pecuniary penalty for any breach is \$500,000 for an individual and for a body corporate is the greater of \$10,000,000 or 10 per cent of turnover or three times the commercial gain (s 154J). The parallel criminal penalty for a breach of s 16A, for example, is only \$100,000 for a body corporate (and \$50,000 and/or 3 months in prison for individuals) (s 157(3)). Under the Hazardous Substances and New Organisms Act 1996, the maximum civil pecuniary penalty for breach of s 124B, for a body corporate, is the greater of \$10,000,000 or 10 per cent of turnover or three times the commercial gain (s 124C), but the maximum criminal fine for the parallel offence (s 109(1)(b)) is \$500,000 or 3 months in prison (s 114(1)).

102 See A Butler and P Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) at [21.5.4] for a discussion of the application of NZBORA to minor offending.

- 3.27 Civil pecuniary penalties, then, are a “hybrid” action.¹⁰³ They mirror all but the two most grave features of serious criminal offending (conviction and imprisonment), and all but one of the features (conviction) of more minor criminal offending. For these reasons they have been referred to as “quasi-criminal” relief.¹⁰⁴ In the next section we ask whether there is anything wrong with the existence of an action which imposes a State penalty outside of the normal criminal processes.

IS THERE ANYTHING WRONG WITH A “HYBRID”?

- 3.28 There is a view that the State should not impose penalties through civil processes.¹⁰⁵ Such a view would hold that civil procedure has not developed with the imposition of penalties in mind and, so, it is not suited to the task. Viewing it another way:¹⁰⁶

The extraordinary procedural protections surrounding the criminal sanction are sensible only on the assumption that the criminal law is unlike other bodies of law ... the criminal law is different in that it subjects persons to state punishment.

- 3.29 An alternative view is that any rigid description of the criminal-civil divide fails to reflect reality. As Rosen-Zvi and Fisher put it:¹⁰⁷

The civil-criminal procedural dichotomy is inappropriate for the realities of the twenty-first century. Even assuming that, in some distant past, at the time the civil-criminal divide was set—when criminal law was much “thinner” and institutional actors as well as the

103 *Commerce Commission v New Zealand Milk Corporation Ltd* [1994] 2 NZLR 730 (HC) at 732: “The form of proceeding prescribed by the Act for the recovery of penalties is something of a hybrid of criminal and civil procedure.” See also S Klein “Redrawing the Criminal–Civil Boundary” [1999] 2 Buff Crim LR 681 at 682; K Mann, above n 63 at 1799; White, above n 76.

104 See for example *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* [2007] 2 NZLR 805 (HC) at 828 and *Commerce Commission v Roche Products (New Zealand) Ltd* [2003] 2 NZLR 519 (HC) at [57].

105 See for example *United States v United Mine Workers* 330 US 258 (1974) at 364: “[T]he idea that a criminal prosecution and a civil suit for damages or equitable relief could be hashed together in a single criminal-civil hodgepodge would be shocking to every American lawyer and to most citizens.” As cited in Klein, above at n 76 at 681.

106 D Husak “The Criminal Law as Last Resort” (2004) 24 OJLS 207 at 211. See also Ashworth, above n 68 at 5, talking broadly about new statutory civil remedies and preventative orders: “These orders may be regarded as one manifestation of a more general movement away from the paradigms of the criminal law, and the consequent side-lining [of] the protections of criminal procedure. Thus the greater use of diversion, of fixed penalties, of summary trials, of hybrid civil-criminal processes, of strict liability offences, of incentives to plead guilty, and of preventive orders—all of these challenge the paradigm of the criminal law, and challenge the way it is traditionally presented.”

107 I Rosen-Zvi and T Fisher “Overcoming Procedural Boundaries” (2008) 94 VA L Rev 79 at 133. See also P Spender “Negotiating the Third Way: Developing Effective Process in Civil Penalty Litigation” (2008) 26 C&SLJ 249 at 257: “[the] bipolarity [of the civil-criminal divide] obscures the complex characteristics of a modern legal system”.

government were less involved in civil litigation—it corresponded to the values underlying procedure, this is no longer the case.

- 3.30 The Commission agrees that the divide between the two is not absolute. The distinction is blurred in a host of ways neither imprisonment nor jury trial have ever been entirely alien to the civil sphere;¹⁰⁸ As noted in chapter 1, the sentence of reparation, handed down by criminal courts, is designed to compensate the victim;¹⁰⁹ courts have long recognised that the civil law may have a punitive function through the remedy of exemplary damages; and, civil pecuniary penalties have existed in disciplinary statutes for many years.
- 3.31 Also, the growth in infringement offences – which do not result in a criminal conviction if the offender pays the prescribed fee – has seen the decriminalisation of a considerable amount of minor offending.¹¹⁰ The adoption of such infringement or administrative offence regimes, with low penalties, is used widely in some European countries as a way of dealing swiftly, effectively and fairly (or “not-unfairly”¹¹¹) with non-serious wrongdoing.
- 3.32 The growth of regulation has also seen the criminal law expand into what were previously civil violations. Increased use of strict liability offences for regulatory or administrative infractions means that there is “a mountain of new ‘crimes’ that carry no moral condemnation”.¹¹² While strict liability offences are not a “hybrid” in that prosecution and conviction follow, they are an example of where traditional criminal precepts have been compromised for policy imperatives.

108 For example, civil contempt may be punished by way of imprisonment; and s 19A of the Judicature Act 1908 provides that civil proceedings in which the only relief claimed is payment of a debt or pecuniary damages or the recovery of chattels over a value of \$3000 may be tried by a judge and jury. See generally Law Commission *Review of the Judicature Act 1908: Towards a Consolidated Courts Act* (NZLC IP29, Wellington, 2012) ch 9.

109 Section 32 of the Sentencing Act 2002 provides that “(1) A court may impose a sentence of reparation if an offender has, through or by means of an offence of which the offender is convicted, caused a person to suffer—(a) loss of or damage to property; or (b) emotional harm; or (c) loss or damage consequential on any emotional or physical harm or loss of, or damage to, property.” Reparation is specified as one of the purposes of sentencing under s 7(1)(d) of the Act. It is intended to provide “a simple and speedy means of compensating those who suffer loss from criminal activities” so that they do not need to seek a civil remedy: *R v O’Rourke* [1990] 1 NZLR 155 at 158 (CA).

110 Summary Proceedings Act 1957, s 21.

111 Ashworth, above n 68 at 4.

112 P H Robinson “The Criminal–Civil Distinction and the Utility of Desert” (1996) 76 BU L Rev 201 at 210. Robinson cites Coffee as reporting that in the United States there are now more than 300,000 federal regulations that may be enforced criminally: J C Coffee “Does ‘Unlawful’ Mean ‘Criminal’?: Reflections on the Disappearing Tort/Crime Distinction in American Law” (1991) 71 BU L Rev 193 at 215–221.

- 3.33 So there is a strong argument that the test of punishment alone is already a “jurisprudentially unsatisfactory”¹¹³ way of determining what should be subjected to full criminal process and protections and what should not. Hybrids already exist and have for some time.
- 3.34 Furthermore, a pragmatic view is that developments such as the growth in infringement and regulatory or “public welfare” offences are an inevitable and sensible response to the demands of an increasingly complex society. They are examples of how our justice system has been adapted to meet changing needs. Being open to such adaptations is necessary if we are to retain an effective, proportional and flexible legal system.¹¹⁴
- 3.35 Our justice system needs to respond in more sophisticated ways because it regulates a broader range of conduct. For example, we have greater expectations about public safety, standards of service and professional behaviour than in the past. Breaches of those standards may be undesirable but they may not be so grave as to demand criminalisation. The characteristics of a particular form of behaviour that lead us to outlaw it today may not be the same as those that led us to criminalise conduct in the past.
- 3.36 Society’s views of what conduct demands criminal punishment also change over time. Our understanding of what sorts of interventions are the most effective also develops. Criminal diversion, community-based sentences and initiatives such as the drug court pilot in Auckland¹¹⁵ are all examples of how the justice system is attempting to deal with criminal offending in a more targeted way.
- 3.37 Proportionality also favours gradations of sanctions. Regulatory regimes deal with a range of behaviour, from minor, technical breaches to grave, intentional contraventions. If an enforcement body had only criminal sanctions at its disposal it would be prevented from taking a proportional approach to its enforcement activities and restricted to opting for the most costly sanction in terms of investigation and prosecution; with the greatest corresponding costs to business. To leave a State-funded regulator hamstrung with insufficient tools at its disposal would be to give the taxpayer poor value for money. There may also be further flow on costs: if a regulator can access only criminal sanctions it may be less likely to take prosecutions as frequently. In turn it may have a lower profile as a regulator and risks appearing weak. This is likely to make the regulated community consider its chance of getting caught and punished to be lower, reducing the deterrent effect of the regulatory system.

113 Smith and Hogan, above at n 92 at 21.

114 See Campbell, above n 96 at 105, citing D Garland *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, Oxford, 2001).

115 Simon Power, Georgina te Heuheu “Drug Court Pilot announced for Auckland” (press release, 19 October 2011) < www.beehive.govt.nz/release/drug-court-pilot-announced-auckland > .

- 3.38 Finally, arguments have also been made that the criminal law should remain the last resort.¹¹⁶ The distinction needs to be maintained to “prevent the dilution of the criminal law’s blaming function and maintain criminal punishment as an effective and powerful mechanism of social control”.¹¹⁷ On one hand, this argument has been used to defend the criminal law against hybrid actions, but there is also an argument that alternative ways of punishing breaches and obtaining compliance are desirable so that the criminal law can be retained for what society considers to be the most serious conduct.

The need for policy justification for hybrids

- 3.39 In the Law Commission’s view, modern conditions mean that hybrids can be both necessary and desirable. However, they involve a compromise. Both criminal procedure and civil procedure have developed, in the particular contexts of their respective aims and consequences, with fairness in mind. Civil pecuniary penalties are punitive measures that represent a novel combination of those procedures, aims and consequences.
- 3.40 In our view, where hybrids or compromises of the standard criminal or civil approach exist, there should be two forms of protection around their use. First, there needs to be robust analysis about and policy justifications for those compromises. It is accepted that there is a need to justify the criminalisation of conduct “by reference to democratic principles, and ... sufficient reasons for invoking this coercive and censuring machinery against individual subjects.”¹¹⁸ Civil pecuniary penalties are also coercive and censuring machinery used by the State against its citizens, so similar justification should be required. The decision to use civil pecuniary penalties in a statute must take into account the fact that criminal procedural protections do not apply: the question is not so much about whether to punish, but whether it is justifiable to punish *in this way*.
- 3.41 Secondly, the procedure for their imposition and protections around their use should be submitted to similarly rigorous analysis and justification, and fairness needs to be maintained. We discuss issues of procedure in chapters 6 and 7.
- 3.42 Existing hybrids adhere to these two requirements. They are exceptional – that is they operate in limited fields – and there is an articulated policy reason for their use. To a greater or lesser extent, the procedure or protections accompanying them have also been worked out.

116 See for example D Husak, above n 106 and M Nehme “Birth of a New Securities Law Regulator: The Financial Markets Authority and the Powers at its Disposal” [2011] NZLR 475 at 490.

117 Rosen-Zvi and Fisher, above n 107 at 108. See also Coffee “Paradigms Lost” 101 (1992) Yale LJ 1875 at 1877 and Sayre “The Present Significance of Mens Rea in the Criminal Law” in R Pound (ed) *Harvard Legal Essays* (Harvard University Press, Cambridge, Massachusetts, 1934) at 409.

118 Ashworth, above n 68 at 22.

- 3.43 For example, exemplary damages may now be imposed in very restricted circumstances in New Zealand.¹¹⁹ Justice Tipping described the limits of their legitimate operation in *Couch v Attorney-General (No 2)*:¹²⁰

Exemplary damages are anomalous. Civil remedies are not generally designed to punish. The reach of exemplary damages should therefore be confined rather than expanded. Outrageousness is not a satisfactory sole criterion. The concept lacks objective content and does not contain sufficient certainty or predictability. Exemplary damages should be confined to torts which are committed intentionally or with subjective recklessness, which is the close moral equivalent of intention

- 3.44 The implication from *Couch* is that, since exemplary damages are a form of civil punishment, the occasions for their award are limited.¹²¹ Furthermore, the majority of the Court of Appeal in *Daniels v Thompson* held that exemplary damages are not available where a defendant has been convicted of a criminal offence and sentenced (including being discharged), on the basis that this would entail double punishment.¹²²

119 See generally G Hammond “Exemplary Damages” in S Degeling, J Edelman, J Goudkamp *Torts in Commercial Law* (Thomson Reuters Australia, 2011) at 449.

120 *Couch v Attorney-General (No 2)* [2010] NZSC 27; [2010] 2 NZLR 149 at [178]. Previously, the received wisdom was that for exemplary damages to be awarded, the defendant must have acted with outrageous, flagrant, high-handed or contumelious disregard for the plaintiff’s rights. See for example *Dehn v Attorney-General* [1988] 2 NZLR 564 (HC), *McLaren Transport Ltd v Somerville* [1996] 3 NZLR 424 (HC) at 434 and *Ellison v L* [1998] 1 NZLR 416 (CA) at 418 and 419.

121 The largest awards in New Zealand to date are \$85,000 and \$100,000, both in situations of very serious physical and sexual abuse. Exemplary damages have otherwise not exceeded \$40,000. See generally B Marten “Exemplary Damages” in Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2011) at 544 and 548.

122 *Daniels v Thompson* [1998] 3 NZLR 22 at 48 (CA). The Court also held that they are not available where a defendant has been acquitted because of the criminal law’s primacy in imposing “discretionary Court-based sanctions” for criminal offending (at 51); and that where a prosecution is likely but has not yet commenced, a claim for exemplary damages could be stayed (at 52–53). However, the Accident Compensation Act 2001, s 319(2) now provides that a court may award exemplary damages in spite of a person being charged with a criminal offence for conduct resulting in personal injury under that Act.

3.45 Infringement schemes provide another example. In the last 30 years they have become an essential means of ensuring effectiveness and proportionality in our justice system. In 2005 the Law Commission reported that infringement offences dealt with more than 2.5 million breaches of the law each year.¹²³ A very large proportion of those are resolved between the defendant and prosecuting authority without the need for recourse to the court system. Because they compromise full criminal processes however, they are considered to be appropriate only in certain circumstances. The LAC Guidelines note that the infringement notice procedure is not suited for use in connection with:¹²⁴

- offences requiring proof of mens rea; or
- offences that are punishable by imprisonment; or
- offences that are not easy to establish (for example, offences relating to the breach of a general statutory duty requiring expert evidence).

3.46 The LAC Guidelines also state that the procedure is best suited for those offences that are offences of strict liability; are committed in large numbers; involve misconduct that is generally regarded as being of comparatively minor concern by the general public; and involve acts or omissions that involve straightforward issues of fact.

3.47 The trade-off involved in infringement offences is also recognised in that the LAC Guidelines state that “[t]he level of infringement fee should generally be less than \$500”,¹²⁵ and by the process for their imposition which is set out in statute: in return for accepting the penalty and so supporting the expediency of the process, the offender escapes criminal conviction.¹²⁶ Furthermore, defendants retain the right to challenge an infringement notice, and to be prosecuted through normal criminal processes.

123 Law Commission *The Infringement System: A Framework for Reform* (NZLC SP16, Wellington, 2005) at 1.

124 Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (Wellington, 2001) at [12.5.3]. See < www2.justice.govt.nz/lac/index.html >

125 Legislation Advisory Committee, above at [12.5.3]. Although higher infringement fees exist: see for example Fisheries Act 1996, s 297(1)(c) (\$3,000), Building Act 2004, s 402(1)(z) (\$20,000), and Gambling Act 2003, s 360 (\$10,000 for individuals and \$50,000 for licencees).

126 Summary Proceedings Act 1957, s 21.

- 3.48 Strict liability offences are also considered only to be appropriate in certain circumstances. A strict liability offence requires that the prosecution prove, beyond reasonable doubt, only that the conduct making up the offence has been carried out. The defendant's subjective mental state is not relevant. The defendant has the burden of proving that, notwithstanding that the criminal contravention occurred and may be attributed to him or her, s/he is not at fault for it – either through establishing a specific statutory defence or through the common law defence of total absence of fault.¹²⁷
- 3.49 In some instances, an offence is expressly drafted as a strict liability one. However, where an offence is silent as to mens rea, the courts have developed a number of factors to assist them in determining whether it might be categorised as a “public welfare regulatory” offence carrying strict liability.¹²⁸ These factors are reflected in the LAC Guidelines, as follows:¹²⁹
- An offence may properly be categorised as a strict liability offence (where there is no need for the prosecution to prove mens rea, but there is a defence if the defendant proves total absence of fault) if:
- (a) the offence involves the protection of the public from those undertaking risk-creating activities. These offences (commonly described as public welfare regulatory offences) usually involve the regulation of occupations or trades or activities in which citizens have a choice as to whether they involve themselves; and
 - (b) the threat of criminal liability supplies a motive for persons in those risk-generating activities to adopt precautions, which might otherwise not be taken, in order to ensure that mishaps and errors are eliminated; and
 - (c) the defendant is best placed to establish absence of fault because of matters peculiarly or primarily within the defendant's knowledge.
- 3.50 Strict liability offences still operate against the background of the NZBORA protections, notwithstanding the inherent encroachment on the presumption

127 See *Civil Aviation Department v MacKenzie* [1983] NZLR 78 (CA).

128 We discuss the categorisation of regulatory breaches further at para 4.4. The factors employed by the courts for strict liability offences can be summarised as: (a) The misconduct involved falls short of the moral disapproval that would be reserved for criminal offending: it involves behaviour that is “not criminal in any real sense, but ... acts which in the public interest are prohibited under a penalty”. (b) The purpose of the legislation is: to protect the public from those undertaking risk-creating activities rather, in general, than individual interests; to encourage compliance with certain standards of behaviour and the adoption of precautions for those undertaking risk-creating activities; and to regulate occupations, trades or activities in which citizens have a choice as to whether they involve themselves. (c) The defendant is likely to be in a far better position than the prosecution to know how the breach of the law occurred. This is particularly the case where the defendant is an organisation. (d) There may be no identifiable victim. See generally, J November “Public Welfare/Regulatory Offences: Judicial Criteria for Definition and Classification (I)” (1990) NZLJ 236 and J November “Public Welfare/Regulatory Offences: Judicial Criteria for Definition and classification (II)” (1990) NZLJ 365.

129 Legislation Advisory Committee, above n 124 at [12.2.3]. See <www2.justice.govt.nz/lac/index.html>

of innocence. In light of the limited sphere within which strict liability offences are considered appropriate, they are regarded, under s 5 of NZBORA, as a justified limit on the presumption of innocence.¹³⁰

Conclusion

- 3.51 The Commission's view is that there is a place for hybrid sanctions and procedures in the law. However, modifications to or compromises of the core legal tenets that mould our system of justice should be undertaken in the light of robust analysis and guided by principle. Civil pecuniary penalties represent a major shift in the way that the State controls and punishes illegal behaviour. Yet there has been little consideration and analysis of their nature and use. They are becoming increasingly popular, and we anticipate that they will be introduced to a growing range of legislation. There may be circumstances when they are inappropriate and undesirable. Furthermore, there may be areas of regulation that do not use civil pecuniary penalties that would benefit from their introduction.
- 3.52 We propose, then, that guidance should be developed about the circumstances when civil pecuniary penalties may be justified or desirable, and when they should not be used. In the following chapter we consider what that guidance should say.

130 Absolute liability offences are those where even a total absence of fault is not a defence. Given the greater compromise of NZBORA rights that they involve, the Legislation Advisory Committee Guidelines suggest that such offences should only be contemplated in legislation if: (a) there is an overwhelming national interest in using the criminal law as an incentive to prevent certain behaviour occurring, regardless of fault; and (b) there is a cogent reason in the particular circumstances for precluding a defence of total absence of fault (this will be rare): Legislation Advisory Committee, above n 124 at [12.2.3].

Chapter 4

What circumstances might justify the use of civil pecuniary penalties?

- 4.1 The arguments for including civil pecuniary penalty regimes in statutes have not always been well articulated. Also, some of the justifications that have been used have a more solid foundation than others. In this chapter we set out the generally espoused arguments that favour inclusion of a civil pecuniary penalty regime and we assess the validity of those arguments.
- 4.2 To the extent that they have been articulated, the factors that may lead to the introduction of such a regime are:
- The nature of regulatory law. Included under this heading are the following arguments:
 - Civil pecuniary penalties are a useful addition to the regulatory “toolkit”.
 - They are effective at deterring corporate offenders.
 - They can be more appropriate than criminal penalties for regulatory contraventions.
 - The compromise inherent in civil pecuniary penalties is justified where participants have voluntarily entered a closely regulated industry.
 - They can act as a proxy in areas where it may be unlikely that individuals will exercise their own rights to civil remedies.
 - Civil pecuniary penalties may be appropriate where the offending is less serious.

- Civil pecuniary penalties are easier to prove and so offer efficiencies and cost savings when compared to criminal proceedings.
- Civil pecuniary penalties may be desirable because of the need for international alignment.
- They build on precedents in other regulatory regimes.

4.3 Below, we assess these justifications in turn.

REGULATION AND CIVIL PECUNIARY PENALTIES

4.4 Civil pecuniary penalties are thought appropriate in “regulatory” contexts, for use against regulatory contraventions, or to encourage regulatory compliance. The Ministry of Justice draft consultation paper stated:¹³¹

Civil penalties can be used when the regulator wants to protect the public interest by encouraging regulatory compliance and also penalise those individuals who are operating in breach of a highly regulated environment.

4.5 A 2003 Cabinet paper on genetically modified organisms and the possibility of introducing civil pecuniary penalties into the Hazardous Substances and New Organisms Act 1996 stated:¹³²

If the aim is to create optimal incentives to encourage compliance with the regulatory regime, and, through that, the taking of precautions, a civil penalty regime for certain breaches could play a crucial role.

This raises the question of what is meant by terms such as “regulatory compliance”, a “highly regulated environment”, and “regulatory regime”.

4.6 The concept of regulation itself is fluid and subject to different interpretations. One definition is “the promulgation of rules by government accompanied by mechanisms for monitoring and enforcement, usually assumed to be performed through a specialist public agency”.¹³³ This accords with core understandings of regulation as a form of “command and control”: regulation of a specialised field by the State through the use of legal rules backed by sanctions. But a broader analysis of regulation would include within its definition all mechanisms of social control or influences on behaviour. For example, Julia Black defines regulation as any “sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified

131 Ministry of Justice *Draft Civil Penalties Guidelines Consultation Paper* (Wellington, 2007).

132 Cabinet Paper “Government Response to the Royal Commission on Genetic Modification: Legislative changes for new organisms – Paper 5: Liability Issues for GM” at 13; and Cabinet Business Committee “Additional Item: Government Response to the Royal Commission on Genetic Modification: Legislative Changes for New Organisms: Paper 5: Liability Issues for Genetic Modification” CBC Min (03) 3/16 (10 February 2003).

133 J Black “Critical Reflections on Regulation” (2002) 27 *Aust J Legal Philosophy* 1 at 11.

outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behaviour modification”.¹³⁴ Under such a broad view of regulation it becomes difficult or impossible to define a fixed, objective category of “regulatory” law. Equally, various answers are possible to the question of why and who we regulate. Early definitions of regulation centred on correcting market failure¹³⁵ and controlling the provision of public utilities.¹³⁶ Today regulation may also aim to manage and distribute risk; improve access to justice; or improve public participation.¹³⁷ For this reason it is difficult to argue there is a category of law that can clearly be set aside as “regulatory”.

- 4.7 As noted, the courts have embarked on this analysis in the course of attempting to identify what criminal offences should be strict liability offences. In undertaking this analysis the Court of Appeal has acknowledged that “public welfare regulatory offence” is a useful characterisation rather than a fixed definition.¹³⁸
- 4.8 The point, then, is that justifying the use of hybrid sanctions such as civil pecuniary penalties by mere use of the term “regulation” is unsatisfactory. There is no settled definition of the term and it could arguably capture any legal rule relating to conduct in any field. The following five sections deal with more specific arguments that are thought relevant to the regulatory field.

134 Black, above at 25–26.

135 Black, above at 9.

136 See for example the definition employed in the *International Encyclopaedia of the Social Sciences* (MacMillan, London, 1968) vol 113, cited by Black, above n 133 at note 54.

137 See for example C Parker *Just Lawyers: Regulation and Access to Justice* (Oxford University Press, Oxford, 1999); and M Bennett and J Colon-Rios “Public Participation and Regulation” in S Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (Wellington, LexisNexis, 2011) at 21.

138 *Millar v Ministry of Transport* [1986] 1 NZLR 660 (CA) at 668–669.

Civil pecuniary penalties are a useful aspect of the regulatory “toolkit”

- 4.9 In recent years the strategic theory of regulation has been influential in the design of regulatory schemes. “Responsive regulation”¹³⁹ is a term coined by Ian Ayres and John Braithwaite and is underpinned by that theory.¹⁴⁰ Responsive regulation holds that regulatory compliance is most likely to be secured where the requirements of a regulatory scheme are backed up by a hierarchy of sanctions. It assumes that those who are regulated are rational actors who will undertake a cost-benefit approach to their decisions about compliance. Ayres and Braithwaite argue that regulators best secure compliance when they can resort to a pyramid of enforcement measures. The base of the pyramid comprises benign actions such as education and negotiation, which are backed up by a range of interventions that increase in gravity, culminating in strong sanctions at the apex of the pyramid. Non-compliance at any level on the pyramid can be tackled by an appropriate intervention or sanction, but the regulator retains the ability to resort to more serious sanctions if required. The person is encouraged to comply because of the threat of greater sanctions. The effect is to encourage early cooperation at the base of the pyramid and, in doing so, to save costs for both the actor and regulator. Strategic regulation theory, then, is appropriate in a resource-limited environment: indeed, a limited resource environment is the starting premise for the theory.¹⁴¹
- 4.10 A hierarchy of sanctions is thought to work best where the pyramid has enough tiers to be representative of the cost-benefit trade off and is comprised of a flexible range of sanctions to counteract the range of factors that might motivate someone to fail to comply.¹⁴² This warrants the inclusion of both monetary and non-monetary sanctions and of both civil and criminal enforcement measures.¹⁴³

139 See generally H Bird “The Problematic Nature of Civil Penalties in the Corporations Law” 1996 C&S LJ 405; M Welsh “Civil Penalties and Responsive Regulation: The Gap Between Theory and Practice” (2009) 33 MULR 908; G Gilligan, H Bird, I Ramsay “Civil Penalties and the Enforcement of Directors’ Duties” (1999) 22 UNSWLJ 417.

140 I Ayres and J Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, New York, 1992).

141 Gilligan, Bird and Ramsay, above n 139 at 441.

142 Bird, above n 139 at 410.

143 Although see Bird, above n 139 at 411 on academic debate about the deterrence value of non-monetary penalties.

- 4.11 Responsive regulation has been influential in the introduction of civil pecuniary penalties in New Zealand. A number of our regimes expressly employ a pyramid of enforcement model.¹⁴⁴ The theory also underpinned amendments to the Australian Corporations Act 2001 (Cth) which introduced civil pecuniary penalties for breaches of directors' duties that involved no "criminality".¹⁴⁵ It also informed the Australian Law Reform Commission's review of civil and administrative penalties and the Hampton and Macrory reviews into regulatory justice and enforcement in England.¹⁴⁶
- 4.12 There has undoubtedly been a change in New Zealand from a distinct command economy to an economy which is more responsive to the domestic and international markets. One consequence has been the need for more flexibility in regulatory supervision, if adopted. In itself this economic factor has been one of the drivers for more responsive regulation.
- 4.13 Criminal penalties by their very nature are long term and static. This is one of the reasons why criminal law policy-makers have emphasised more "fluid" responses to contemporary economic "wrongs". The flexibility of civil pecuniary penalties is one of their chief attractions. A second is that, in everyday terms, they are more of a carrot than a stick. In economic terms they are more of an incentive, rather than turning on the strict deterrence theory which drives many features of the criminal law.
- 4.14 We agree that the theory of responsive regulation may rightfully dictate our approach to the design of regulatory enforcement regimes in New Zealand. We also agree that monetary penalties may arm regulators with different levers than non-monetary sanctions such as banning orders. And any monetary penalty that can be imposed through a means other than through a standard criminal trial is likely to be attractive because achieving its imposition will be less exacting for the regulator, and because its impact

144 See J Farrar (ed) *Company and Securities Law in New Zealand* (Brookers, Wellington, 2008) at 1127 where it is noted that the penalties and enforcement provisions of the Securities Markets Act 1988 were amended in 2006 in a manner which reflects this theory, although it is noted that strategic regulation theory is not specifically referred to in the policy development papers. See also Commerce Commission *Statement of Intent 2012–2015* (Commerce Commission, Wellington) at 13, Financial Markets Authority, Reserve Bank and Department of Internal Affairs *Anti-Money Laundering and Countering Financing of Terrorism: Supervisory Framework* < www.dia.govt.nz > at 8, and Department of Internal Affairs *Minimising Harm – Maximising Benefit: The Department of Internal Affairs' Approach to Compliance and Enforcement 2012* (Department of Internal Affairs, Wellington, 2012) at 7.

145 Senate Standing Committee on Legal and Constitutional Affairs *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (1989) ("Cooney Committee report"). See also Gilligan, Bird and Ramsay above n 139 and British Columbia Administrative Justice Office *Administrative Monetary Penalties: A Framework for Earlier and More Effective Regulatory Compliance – Discussion Paper* (2008).

146 See Australian Law Reform Commission *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC R95, Sydney, 2002), P Hampton *Reducing Administrative Burdens: Effective Inspection and Enforcement* (HM Treasury, 2005) and R B Macrory *Regulatory Justice: Making Sanctions Effective* (2006).

may be felt more immediately. However, we query whether the theory of responsive regulation dictates anything about the format and design of our civil pecuniary penalties.

Civil pecuniary penalties are effective at deterring corporate contraventions

4.15 The received wisdom is that regulatory offences are often carried out by corporate actors. The Ministry of Justice draft paper cited the perceived ineffectiveness of the criminal law at controlling corporate offending as being largely responsible for the growth in civil pecuniary penalties. Civil pecuniary penalties are considered to be useful for targeting corporate actors for a number of reasons. First, where the actor is a company rather than an individual, certain features of the criminal law carry less weight. The stigma and practical consequences of a criminal conviction do not attach in the same manner and there is no risk of loss of liberty: a corporation cannot be imprisoned. It follows that the deterrent value of the criminal law may be diminished for corporate actors, especially where it is difficult to sheet criminal responsibility home to the individual directors or employees involved.

4.16 Furthermore, the benefit to a body corporate of not complying with a regulatory requirement will normally be a financial one. It follows that the most effective deterrent is likely to be a financial penalty which can be set with a view to eliminating the gain or benefit accrued from non-compliance.¹⁴⁷ This proposition was made in support of a regime of civil pecuniary penalties for breaches of the Unsolicited Electronic Messages Act 2007¹⁴⁸ and in the Departmental Report on the New Organisms and Other Matters Bill 2003. In the latter report it was said:¹⁴⁹

... Pecuniary penalties are intended to be an additional mechanism for ensuring compliance with HSNO so that MAF can choose the most effective enforcement method in a particular case. For example, a pecuniary penalty order may be more effective against a body corporate that has made significant commercial gains from breaching HSNO.

147 Macrory, above at [2.11].

148 Cabinet Economic Development Committee paper *Unsolicited Electronic Messages Bill—Enforcement Regime Options* (2004) see EDC Min (04) 24/13.

149 Ministry for the Environment *Departmental Report on New Organisms and Other Matters Bill 2003* at chapter 21. See also Cabinet Paper *Government Response to the Royal Commission on Genetic Modification: Legislative Changes for New Organisms—Paper 5: Liability Issues for GM* (2003) at [45]–[46]. These papers preceded the introduction of civil pecuniary penalties in the Hazardous Substances and New Organisms Act 1996.

- 4.17 Arguably the point is reinforced by media coverage of the civil proceedings commenced against six directors of Hanover Finance Ltd, United Finance Ltd and Hanover Capital Ltd in April 2012. As the National Business Review put it, “the Hanover Six will not end up with criminal convictions if they lose, but they could be hit harder in the pocket”.¹⁵⁰
- 4.18 The deterrent value of a criminal offence is further diminished where it is perceived that there is a low chance of conviction. It can be difficult to prove corporate offending to the criminal standard, especially where an offence includes elements that relate to the offender’s state of mind. Strict liability offences have been thought effective in this regard as there is no need to prove moral guilt on the part of the offender. This argument has also been used to support the introduction of civil pecuniary penalties for insider trading and market misconduct.¹⁵¹ The problem is particularly acute in areas where there is no identifiable victim and any harm is so widely dispersed as to be difficult to detect. In those circumstances, the information that can lead to proof that a breach has taken place is often peculiarly in the hands of the alleged offender. Civil pecuniary penalties, it is thought, offer an alternative sanction and an effective deterrent in circumstances where the breach is particularly hard to prove.
- 4.19 It can also be argued that the imbalance between the State and the accused that criminal procedural rules seek to address is not as acute where corporate offending is concerned. Large corporate bodies will have considerable resources at their disposal to assist them in defending proceedings. In those circumstances it might be thought that the full range of protections afforded by the criminal law is less necessary. Instead, in a civil pecuniary penalty regime, allowances may be made for differences in the size of offending companies when it comes to determining the amount of penalty imposed.¹⁵²
- 4.20 However, these arguments are not without their weaknesses. They lose some weight when it is acknowledged that in all cases where civil pecuniary penalties can be imposed on bodies corporate in New Zealand, there is also a civil pecuniary penalty for individuals. The limitations relating to the perceived effectiveness of the criminal law and difficulties of proving state of mind may not apply to natural persons in the same way as they apply to bodies corporate. And, unless the individual has the backing of a large

150 Georgina Bond “FMA Following the Money on Hanover Legal Action” *The National Business Review* (online ed, New Zealand, 2 April 2012).

151 See S Rubenstein “The Regulation and Prosecution of Insider Trading in Australia: Towards Civil Penalty Sanctions for Insider Trading” (2002) C&SLJ 89 at 111.

152 For example, some regimes allow the penalty to be calculated as a function of the company’s turnover, where the financial gain made from the breach is not “readily ascertainable”: see for example the Biosecurity Act 1993, s 154J, Commerce Act 1986, s 80(2b), and Hazardous Substances and New Organisms Act 1996, s 124C. Also, the court can take into account the size of the corporation in setting pecuniary penalties under the Commerce Act, although in the past it has been reluctant to place too much weight on that factor: see J Mallon “Penalties for Corporate Offenders” 2001 [NZLJ] 389 at 391.

employer, s/he may have no greater access to a well-resourced defence than any alleged criminal. This point applies equally to smaller corporate bodies.¹⁵³

4.21 Also, the business community's unhappy response to the criminalisation of cartel conduct suggests that criminal conviction is considered a more severe penalty in that context.¹⁵⁴ Arguably then, criminal law remains more of a deterrent for the individuals working within corporations.

4.22 There is also a flaw in the argument that civil pecuniary penalties are desirable because corporate actors respond well to financial penalties. Financial penalties are also a feature of criminal punishment. In reality, what distinguishes criminal fines and civil pecuniary penalties is that the former are harder to impose and Parliament has, in general, been open to enacting considerably higher maximum civil pecuniary penalties than criminal fines. Moreover, there are concerns about monetary sanctions generally:¹⁵⁵

- They may give the impression that offences are purchasable commodities or the cost of doing business.
- They may be subject to evasion through the use of incorporated subsidiaries and other avoidance techniques, such as asset stripping.
- Corporations can easily shift the burden of a fine. As a consequence, shareholders, workers and consumers, rather than the responsible officers of an offending corporation, may carry the burden of a large monetary sanction.
- A large monetary penalty may also force a corporation into liquidation. A court may thus be faced with a choice between putting a corporation out of business or imposing a penalty that does not reflect the seriousness of the offence.
- Large penalties may affect innocent corporations associated with the fined corporation, and their shareholders.

4.23 Finally there has long been concern about the differential treatment of white collar offenders and more "traditional" criminals. Why is it defensible to criminalise and imprison those who cannot pay substantial financial

153 For example, defendants to Commerce Act 1986 proceedings have included a group of driving instructors (*Commerce Commission v Wellington Branch of New Zealand Institute of Driving Instructors* [1990] 8 NZAR 559 (HC)) and an association of vegetable and produce growers (*Commerce Commission v Otago and Southland Vegetable and Produce Growers' Association (Inc)* (1990) 4 TCLR 14 (HC)).

154 Under the Commerce (Cartels and Other Matters) Amendment Bill (341-1).

155 These apply equally to criminal and civil fines. M Nehme "Birth of a New Securities Law Regulator: The Financial Markets Authority and the Powers at its Disposal" [2011] NZLR 475 at 492, summarising Mirko Bagaric and Jean Du Plessis "Expanding Criminal Sanctions for Corporate Crimes—Deprivation of Right to Work and Cancellation of Education Qualifications" (2003) 21 C&SLJ 7 at 13-14.

penalties, but to allow white collar law-breakers to avoid conviction and the risk of incarceration? Arguably the principle should be that the State should treat us as equals in protecting our interest not to be punished.¹⁵⁶

- 4.24 Some of these concerns can be addressed by returning to the demands of responsive regulation. A regulatory system needs to be tailored in the way that best achieves its desired outcomes. It needs, therefore to be effective in achieving compliance. If there is evidence that corporate actors are likely to respond most effectively to financial penalties which have a high likelihood of imposition then there may be an adequate argument to employ them.

Civil pecuniary penalties can be more appropriate than criminal penalties for some regulatory contraventions

- 4.25 Regulatory regimes frequently set standards or requirements for a wide range of behaviour. Regulatory contraventions can range from a serious, intentional breach of a core rule to the breach of a minor technical requirement where there was no knowledge or intent. Criminal offences are often used for the gravest breaches, but they may be an excessive response to the less serious contraventions under a regulatory scheme. They may be disproportionate both in terms of the impact of the penalty on the offender and the cost to the regulator. Some contraventions, then, while needing some form of sanction to maintain the integrity of the regulatory structure, may not be so serious as to justify criminalisation. In particular, contravening conduct may be considered non-criminal and so apt for enforcement by way of civil pecuniary penalties when it involves no moral culpability. There is a view that civil pecuniary penalties provide a more balanced response to such contraventions.¹⁵⁷ This view appears to be supported by regulators who have previously reported a gap in the range of interventions that they have available to them; and by the regulated community which has voiced little or no concern about the compromise posed by civil pecuniary penalties.
- 4.26 The majority of these breaches are currently enforced by way of strict liability offences. At present, then, criminal conviction arises irrespective of the technical and non-intentional nature of the breach. There may be an argument that civil pecuniary penalties are the lesser evil.

156 See generally D Husak “The Criminal Law as Last Resort” (2004) 24 OJLS 207 at 212.

157 For example, R Macrory and M Woods “Environmental Civil Penalties: A More Proportionate Response to Regulatory Breach” (Study undertaken for the Department of Environment, Food, and Rural Affairs, University College London, 2003) at [5.17].

Voluntary participation in a regulated activity

- 4.27 There is an argument that the compromise involved in civil pecuniary penalties is justified where individuals or corporations have willingly entered a closely regulated industry. This is the “licensing” or “consent” theory.¹⁵⁸ It posits that rational actors have exercised free choice to participate (or to continue to participate) in the activity in the knowledge that it is subject to State regulation. The argument continues that:¹⁵⁹

Those who choose to participate in regulated activities have ... placed themselves in a responsible relationship to the public generally and must accept the consequences of that responsibility ... those who engage in regulated activity should ... be deemed to have accepted certain terms and conditions applicable to those who act within the regulated sphere.

- 4.28 In the present context, the relevant “term” or “condition” is that breach of the regulatory requirements can lead to the imposition of a substantial financial penalty in civil proceedings, on the civil standard of proof.
- 4.29 There are critics of the licensing theory. For example, Andrew Butler suggests that it is inaccurate to presume that every person participating in an activity has automatically acquiesced to this condition in this manner. He also states that the choice presented is a stark one: participate in the activity under these conditions, or do not participate at all:¹⁶⁰

The most that can be said of the licensing theory is that when one enters into a regulated activity, one is put on notice that regulation will occur ... There is no question of consent, just advance notice. This, though, provides no justification (nor does it provide any clear basis) for distinguishing regulatory offences from true crimes.

- 4.30 In our view, the extent to which the licensing theory carries weight depends on the nature of the activity being regulated and so the scope of the regime at hand. There is a considerable difference between the context of the civil pecuniary penalty regime under the Dairy Industry Restructuring Act 2001 (DIRA) and provisions of the Commerce Act 1986 and the Unsolicited Electronic Messages Act 2007 (UEM Act). The DIRA was designed to enable the restructuring of the dairy industry, and its civil pecuniary penalty regime is designed to assist in ensuring that Fonterra, as the dominant market player, does not abuse its position. In comparison, the Commerce Act and UEM Act regimes have very broad application. Civil pecuniary penalties under those regimes could be imposed on any person undertaking commercial activities in

158 A Butler “Regulatory Offences and the Bill of Rights” in G Huscroft and P Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995) at 354.

159 See *R v Wholesale Travel Group Inc* (1991) 84 DLR (4th) 161 at 213 per Cory J, quoted in R Glover “Regulatory Offences and Reverse Burdens: The ‘Licensing Approach’” (2007) JCL 71.

160 Butler in Huscroft and Rishworth, above n 158 at 354. Butler quotes Lamer CJ in *Quebec v 143471 Canada Inc* [1994] 2 SCR 339 (SC) at 348 who also criticises the theory.

New Zealand.¹⁶¹ It is difficult to contend that every one of those persons has voluntarily consented to the potential compromise inherent in civil pecuniary penalties.

A proxy for other civil action or cost recovery

- 4.31 Civil pecuniary penalties can fill a gap where the threat of private civil action fails to supply a deterrent. A 2004 Ministry of Economic Development paper which discussed civil remedies noted the difficulties that can be encountered with some private actions:¹⁶²

This approach also addresses other issues with traditional private civil actions, including: identifying the parties that have actually suffered loss as a result of the alleged wrong, particularly where there is a large group of potential plaintiffs (for example in the case of issuers of securities to the public, this could conceivably be the market generally); calculating levels of compensation; and where the harm is slight, justifying the cost of private civil action.

- 4.32 The threat of private civil action is thought to act as a deterrent against intentional or careless conduct that may lead to harm. However, the extent to which it deters depends on the degree of certainty of being sued. The harm that results from some regulatory breaches is widely dispersed, affecting a wide range of persons, yet the harm may be slight on a victim by victim basis. The Hazardous Substances and New Organisms Act 1996, Commerce Act 1986 and securities law regimes are examples that fall into this category. The Ministry of Economic Development has noted that “overseas and New Zealand experience suggests that private enforcement of insider trading prohibitions is not an effective means of deterrence. The effort required in detecting and proving breaches of the prohibitions means that private actions are only likely in very serious cases where public action is not being taken.”¹⁶³
- 4.33 This issue was also addressed in a 1998 Ministry of Commerce discussion document.¹⁶⁴ The Ministry noted that it is highly unlikely that 100 per cent

161 For example, the Unsolicited Electronic Messages Act 2007 impacts on all organisations that use email, text messages or other similar platforms to promote goods or services. The legislation is concerned with both legitimate promotion and marketing as well as illegitimate fraudulent scams. The Act kicks in immediately—no minimum number of messages is required. Fiona Campbell notes “pretty well all organisations are caught one way or another” and also points to two changes made at Select Committee which make the scope of the Act “exceptionally wide”: the deletion of the “primary purpose” qualifier and the extension of the definition of “commercial electronic message”: F Campbell “Unsolicited Electronic Messages Act” 2007 [NZLJ] 130.

162 Ministry of Economic Development *Review of the Financial Reporting Act 1993 Part II* (Wellington, 2004) at 27.

163 Ministry of Economic Development *Reform of Securities Trading Law: Volume Three: Penalties, Remedies and the Application of Securities Trading Law Discussion Document* (Wellington, 2002) at [249].

164 Ministry of Commerce *Penalties, Remedies and Court Processes under the Commerce Act 1986* (Wellington, 1998) at 37.

of the victims of price-fixing will pursue legal action. Even if litigation is successfully pursued by a group of people who incurred 40 per cent of the harm, the offender will escape repairing more than half of the harm. Where the gain to the offender is monetary, effective deterrence would require that the offender anticipated that s/he would have to compensate all of the harm, and thus obtain no gain themselves. In these circumstances, statutory provision for civil pecuniary penalties can assist in plugging the gap.

- 4.34 It is important that this argument is not confused, however, with a suggestion that civil pecuniary penalties have a reparative purpose. There is a difference between the aim and outcome of private civil action and civil pecuniary penalties: the former being to secure compensation for harm and the latter to punish. In the vast majority of existing statutes, civil penalties go to the Crown. Civil pecuniary penalties may be reparatory if the penalty can be diverted to those who have suffered harm. However, this is possible under only three civil pecuniary penalty regimes. For example, s 90(1) of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 provides:¹⁶⁵

On the application of the relevant AML/CFT supervisor, the High Court may order a person to pay a pecuniary penalty to the Crown, or to any other person specified by the court, if the court is satisfied that that person has engaged in conduct that constituted a civil liability act.

- 4.35 Even then, it is not clear that the penalty is to be diverted for compensatory purposes. We do not therefore consider that it is valid to view civil pecuniary penalties as a proxy for *compensation*. A more appropriate alternative to the reparative function of private civil action is found in the form of statutory compensation orders. Those are provided for in a number of statutes that also provide for civil pecuniary penalties.¹⁶⁶
- 4.36 Unlike criminal fines, civil pecuniary penalties can assist in cost recovery for agencies enforcing a regulatory regime. For example, s 160(9) of the Biosecurity Act 1993 provides for all or part of the pecuniary penalty to be paid to the departmental bank account of the Ministry if the Court considers that the breach was a material cause of the Ministry having to undertake a response activity. A “response activity” includes minimising the impact or controlling the spread of or eradicating an unwanted organism.¹⁶⁷ The Financial Markets Conduct Bill also provides that in making a pecuniary penalty order the Court must order that the penalty must be applied first to pay the Financial Markets Authority or Commerce Commission’s actual

165 See also Overseas Investment Act 2005, s 48(1), and Unsolicited Electronic Messages Act 2007, s 45(1).

166 See for example Financial Advisers Act 2008, s 137L, Financial Service Providers (Registration and Dispute Resolution) Act 2008, s 79A(3), Hazardous Substances and New Organisms Act 1996, s 124D, Securities Act 1978, s 55G, Securities Markets Act 1988, s 42ZA.

167 Biosecurity Act 1993, s 100Y(3).

costs in bringing the proceedings.¹⁶⁸ By itself, this is not in our view a valid justification for opting for a civil pecuniary penalty regime rather than criminal offences.

OTHER JUSTIFICATIONS FOR CIVIL PECUNIARY PENALTIES

Civil pecuniary penalties are appropriate for “less serious” contraventions

- 4.37 The discussion under this heading differs from the one above concerning the difference between “criminal” and “non-criminal” contraventions within a regulatory scheme. Here, the question is whether civil pecuniary penalties should be introduced for a wider range of human conduct. Is there general social behaviour currently dealt with by way of criminal offences that does not warrant criminalisation and that could instead be dealt with by civil pecuniary penalties? A 2004 Cabinet Paper discussing the merits of a civil pecuniary penalty regime for unsolicited electronic messages states:¹⁶⁹

The merits of a criminal penalty regime are that for some people it reflects the seriousness with which they view professional spammers that send out millions of junk emails to market various goods or services. ... A criminal penalty regime was not, however, favoured by the majority of respondents to the Government's discussion paper as a civil penalty regime was seen as a more appropriate way of dealing with the *simple issue of electronic messages sent without consent*. Where spam is used as a means to commit acts such as fraud or inflicting damage to another person's computer network there are already criminal sanctions in place to deal with this more serious level of conduct.

- 4.38 There is some suggestion in this that civil pecuniary penalties are appropriate because the “simple issue” of electronic spam does not justify criminal sanction. Is there an argument, then, that civil pecuniary penalties are appropriate for a wider range of less serious contraventions? And if so, what do we mean by “less serious”? For example, is it less serious because less harm results? Where the Unsolicited Economic Messages Act 2007 is concerned, is the implication that the harm that results – perhaps mere irritation – justifies the use of civil rather than criminal sanctions? And what else is relevant to an assessment of what is “less serious” offending? Might most non-intentional breaches fall into this category?
- 4.39 The Commission has concerns about whether it is appropriate or feasible to use gradations of “harm” to justify the introduction of civil pecuniary penalties. As noted at the outset of chapter 3, a wide range of behaviour which results in a similarly wide range of comparative harm is marked as criminal. An effort to single out conduct which is liable to criminal rather than civil condemnation purely on the basis of harm may appeal to a sense of order. But any such assessment necessarily involves a value judgment, which will differ between people and over time. An extensive degree of decriminalisation

168 Financial Markets Conduct Bill (342–2), cl 476.

169 EDC Min (04) 24/13 (22 November 2004).

of minor offending has been achieved already by the infringement offence procedure. It is the minor (in terms of penalty) and high volume nature of such offences which assist in justifying this decriminalisation. The harm that could result from some infringement offences (for example speeding) is in fact considerable. In comparison, a low degree of harm does not accurately characterise many of our existing civil pecuniary penalties. The harm – for example, the loss of a person’s life savings – that can follow from inaccurate disclosure in investment documents can be very considerable. Equally, the harm that could result to New Zealand’s economy from an inability to export agricultural products because of a breach relating to genetically modified organisms or biosecurity could be extremely severe.

- 4.40 There are circumstances where the degree of harm that results from an activity will clearly warrant criminalisation. An example is where the harm is such that protective measures such as arrest, remand in detention and incarceration are necessary. It follows that there may be an argument that any guidelines or statute should make it clear that civil pecuniary penalties are never justifiable when such protective measures might be necessary. However, the line between whether and when criminal or civil sanctions should be used for other types of contravention would be hard to draw.
- 4.41 To what extent can and should delineating levels of seriousness assist in justifying the use of civil pecuniary penalties? And how relevant is it that any attempt to articulate a degree of seriousness which lends itself to civil rather than criminal punishment could lead to an argument for the use of civil pecuniary penalties for a substantial proportion of existing criminal offending? This would signal a substantial reordering of the way we categorise and punish illegal behaviour. It would also have practical consequences. For example, it would shift a considerable amount of criminal court work to the civil jurisdiction.
- 4.42 Also, to what extent might the broader use of civil pecuniary penalties have an impact on their design? To what extent should their procedural provisions be influenced by (a) the type of defendant and (b) the type of behaviour they are targeting? If a form of sanction only targets well-resourced corporate offenders operating in industries which are closely regulated, then it may be justifiable to allow some inroads into orthodox criminal procedural protections. However, if the sanction were to target more traditional criminal conduct, which tends to be carried out by individuals who are likely to be less well-resourced and in a position of considerably less power than the State, then perhaps greater protections should apply.

Cost and efficiency

- 4.43 Civil pecuniary penalties are promoted as cheaper to investigate, pursue and impose than criminal penalties.¹⁷⁰ They are viewed as a “swift and inexpensive enforcement option”.¹⁷¹ It might be thought that the lower standard of proof results in savings at every stage of the enforcement process: the investigation and preparation of civil pecuniary penalty proceedings is less labour intensive than for a criminal prosecution; and civil proceedings demand less of the accusing party than a criminal trial. If this is true, it presents considerable advantages to enforcement bodies which operate against a background of limited resources. In turn, it might be thought that the comparative ease with which civil pecuniary penalties can be imposed and the fact that they might have a more immediate impact than criminal prosecution increases their deterrent effect.¹⁷²
- 4.44 Savings may also be made because “settlement” may be reached more readily in civil cases. Most reported cases under the Commerce Act 1986 have resulted in a penalty being agreed by the Commerce Commission and defendant. The penalty must then be approved by the Court. In none of the reported cases has the Court departed from the proposed penalty. This outcome – a negotiated penalty and abbreviated court process – can take place with civil pecuniary penalties in a way that it cannot with criminal prosecutions.¹⁷³

170 “Theoretically, proceedings for a civil penalty should have lower transaction costs than criminal proceedings due to streamlined procedure”: P Spender “Negotiating the Third Way: Developing Effective Process in Civil Penalty Litigation” (2008) 26 CS&LJ 249 at 251.

171 V Comino “Effective Regulation by the Australian Securities and Investments Commission: The Civil Penalty Problem” 33 (2009) MULR 802 at 828.

172 See for example P H Robinson and J M Darley “Does Criminal Law Deter? A Behavioural Science Investigation” (2004) OJLS 173 at 182. Jeremy Bentham suggested three aspects of a penalty which influence its deterrent effect: the probability of it being imposed, the size of the penalty and the delay with which it may follow the event: J Bentham *The Rationale of Punishment* (R Heward, 1830) at ch VI.

173 See further the discussion at para 7.11 onwards.

- 4.45 Notwithstanding these observations, we have two reservations about the justification of civil pecuniary penalties on the basis of cost and efficiency. First, the assertion that proceedings will be less costly than criminal proceedings requires evidence. Civil pecuniary penalty proceedings in Australia have been more aggressively defended than they have in New Zealand. There, cases have resulted in numerous interlocutory hearings on procedural matters, many because of the relatively novel nature of civil pecuniary penalties. In some of these cases Australian courts have required that “quasi-criminal” procedures be followed to afford protection to defendants. In an aggressively defended action the cost savings in civil pecuniary penalty proceedings may not be as great as thought.¹⁷⁴
- 4.46 Secondly, there is no reason why this argument could not be made for the abandonment of criminal proceedings for all offending. The cost and efficiency arguments can only be sound if they are accompanied by other justifications for civil pecuniary penalties.

International cooperation and alignment

- 4.47 New Zealand law reform needs to take account of international conditions and standards to optimise its productivity and economic growth. Conflicts or a lack of harmonisation between regulatory regimes can create costs for those wishing to do business in New Zealand and for New Zealanders wishing to trade abroad. Increasingly then, New Zealand needs to consider the means of regulation adopted abroad and to weigh the need for alignment with foreign regimes. This is true of the international environment generally, but is particularly the case in the light of New Zealand’s Closer Economic Relationship (CER) with Australia, which is aimed at creating a seamless trans-Tasman business environment.¹⁷⁵
- 4.48 A core aim of the reform of New Zealand’s securities law is to align our regulatory regime with overseas regulatory systems.¹⁷⁶ International developments also influenced the format adopted for our anti-spam legislation, which sought to ensure that New Zealand was participating in international regulatory arrangements to curb the growth of spam.¹⁷⁷ Our Act mirrors the one adopted in Australia.¹⁷⁸

174 Comino cites the example of *ASIC v Rich* [2009] NSWSC 1229, (2009) 236 FLR 1 which took many years to complete, involved more than 60 evidential and procedural rulings during the course of the substantive hearing, and a judgment which runs to 3015 pages. See Comino, at n 171 at 817, 828.

175 See generally < www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Australia/index.php >.

176 Ministry of Economic Development *Review of Securities Law: Discussion Paper* (2010) at 12. See also Nehme, above n 155 at 476.

177 Hon David Cunliffe MP “Unsolicited Electronic Messages Bill—First Reading” (13 December 2005) 628 NZPD 1043.

178 Similar policy imperatives influenced the drafting of the Therapeutic Products and Medicines Bill: see Therapeutic Products and Medicines Bill 2006 (103–1) (explanatory note) at 2.

- 4.49 Notwithstanding this, we query the extent to which international alignment justifies the inclusion of civil pecuniary penalties in statutes. While there may be a need for the alignment of rules between different jurisdictions in the interest of promoting the accessibility of markets and ease of trade, it does not necessarily follow that the form and design of penalty needs to be the same. Indeed, civil pecuniary penalties imposed by a court feature only in a handful of jurisdictions. The trend in the United Kingdom and the United States, for example, is to hand greater enforcement powers to the regulators themselves.

Precedents in other regulatory regimes

- 4.50 The format of a particular legislative regime is often repeated in later legislation because officials become familiar with it and because it is perceived to provide an effective and appropriate response. We suggest that the fact that precedents exist in other legislation will rarely be an adequate reason on its own for the inclusion of a civil pecuniary penalty regime in a statute.

CONCLUSION

- 4.51 Some of the arguments set out above are more persuasive than others. Each has its limits and most involve a more complex weighing of factors than may first appear. Furthermore, none of the arguments, by themselves, necessarily justify the use of civil pecuniary penalties as against other sanctions or remedies that may be available to policy-makers. Why, in a proposed regime, should civil pecuniary penalties be employed rather than strict liability offences, infringement offences or fixed administrative penalties, for example?
- 4.52 There is no absolute answer to the question of which arguments are valid and which are not. Usually a combination of them will be employed to support a proposal for a new regime. Ultimately, what should be required is that any policy proposal for a civil pecuniary penalty regime adequately and robustly addresses the limits and complexities of the arguments.
- 4.53 We are interested in feedback on the validity of each of the arguments set out above. Also, are there any policy justifications that we have missed? In our final report we anticipate recommending some form of guidance for policy-makers when they are considering proposing a civil pecuniary penalty regime. Responses to these questions will feed into that guidance.

Q1 What circumstances favour the inclusion of civil pecuniary penalties in legislation?

Q2 To what extent is there scope to broaden the use of civil pecuniary penalties to target more traditional criminal offending, for example, where there is a comparatively low level of harm?

Q3 Is there any conduct for which civil pecuniary penalties are *not* suited?

Chapter 5

Design of civil pecuniary penalties – guiding principles

- 5.1 What factors should guide the design of civil pecuniary penalties? They are not criminal sanctions, so it seems clear that traditional criminal procedures should not apply. However, if our analysis of their nature is to be accepted, there is a question whether traditional civil procedures should be used in their imposition. To put it another way, should conventional civil procedural rules be applied to what might be considered unconventional civil law?¹⁷⁹ Writing in 1992, Kenneth Mann argued for the acceptance of a “middleground” procedural approach to civil pecuniary penalties that would draw on the criminal law and civil law “to form a hybrid jurisprudence in which the sanction’s purpose is punishment, but its procedure is drawn primarily from the civil law”.¹⁸⁰
- 5.2 At present, this “middleground” is being worked out on an incremental basis by courts in other jurisdictions with forms of civil penalty. Thus far, New Zealand courts have shown little apparent discomfort with the nature of civil pecuniary penalties. However, as the field of such penalties expands and the likelihood of more vigorous defence of civil pecuniary penalty proceedings increases, this could change. In chapters 6 and 7 we consider in detail the procedure for the imposition of civil pecuniary penalties and other aspects of

179 T Middleton “The Difficulties of Applying Civil Evidence and Procedure Rules in ASIC’s Civil Penalty Proceedings under the Corporations Act” (2003) 21 C&SLJ 507 at 516 and K Mann “Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law” (1992) 101(5) Yale LJ 1795 at 1798.

180 Mann, above at 1799. And see at 1813: “... the paradigmatic criminal process and the paradigmatic civil process accurately describe only part of the empirical arena of sanctioning processes. They fail to capture the special combination of punitive purposes and civil procedural rules that characterizes hybrid sanctions, which occupy a vast middleground between criminal and civil law. The middleground is not *sui generis* in the sense that it possesses distinctive characteristics found in neither of the paradigms; rather, it mixes the characteristics of these paradigms in new ways.”

their legislative design. We also consider the extent to which it is desirable for courts to, over time, develop a “middleground” jurisprudence or whether there should be greater legislative direction about how civil pecuniary penalties should be imposed.

- 5.3 In tackling these questions we have sought to balance appropriately the following considerations:
- (a) fairness;
 - (b) the need for effectiveness in the enforcement of regulatory regimes; and
 - (c) the interest in certainty.
- 5.4 Before we set out what we understand by each of these considerations, it is worth observing again that decisions about the procedure for civil pecuniary penalties might be influenced by the circumstances of their use. Civil pecuniary penalties have been designed at least in part because of the difficulties of proving breaches by corporate bodies and concerns about the effectiveness of the criminal law in deterring corporate offending. Are the same compromises justified for individuals?¹⁸¹ If a decision is made that they should be embraced for a wider field of conduct, should their design be different?

FAIRNESS

- 5.5 As a matter of policy and good legislative practice, fairness must remain central to the design of civil pecuniary penalties. Exactly what this means for how they should be drafted is a matter for debate. This is because the common law rules of procedural fairness – or natural justice – are not fixed. They vary according to context. As Tucker LJ put it in *Russell v Duke of Norfolk*:¹⁸²

The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.

- 5.6 In the next two chapters we discuss the extent to which, given our views on the nature of civil pecuniary penalties, fairness should influence specific aspects of their design.

181 See I Rosen-Zvi and T Fisher “Overcoming Procedural Boundaries” (2008) 94 VA L Rev 79, where the writers argue that the design of court procedures should be influenced by the relative strength of the opponents.

182 *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 118 (CA).

Impact of the New Zealand Bill of Rights Act 1990

- 5.7 The application of the New Zealand Bill of Rights Act 1990 (NZBORA) demands examination under this heading. Procedural fairness is protected by NZBORA. Sections 23 to 26 set out specific fundamental rights and standards to be observed in the investigation and prosecution of criminal offences. Those rights are given express legislative backing because of the grave consequences of criminal trial, the power asymmetries involved and the interest in not convicting the innocent.
- 5.8 The right to natural justice is also protected in broader terms by s 27(1) of NZBORA:
- Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.
- 5.9 The application of these rights to civil pecuniary penalties has not been the subject of judicial consideration or other commentary.¹⁸³ The issue is relevant from two perspectives. First, what should these provisions mean for the design of civil pecuniary penalties? Secondly, might a court challenge to them be founded on these NZBORA rights?

NZBORA's influence on the policy development of civil pecuniary penalties

- 5.10 Drawing on the language of the White Paper on the Bill of Rights, Paul Rishworth argues that NZBORA should be the standard for policy: its set of “navigation lights”.¹⁸⁴ On this ground he suggests that policy makers should always be vigilant in properly analysing and labelling proposals for laws. They need to ask whether the laws will invade personal liberty and, if so, can they be justified under the heightened standard that the broad and expansive rights in NZBORA (such as s 27(1)) ought to require? In turn, this means that possible breaches of NZBORA demand justification under s 5. That is, if rights might be impaired, the limits upon them must be no more than is “reasonable and demonstrably justified in a free and democratic society”.¹⁸⁵

183 With the exception of *Commerce Commission v North Albany Motors Ltd* (1997) 7 TCLR 575 (HC) at 580–581, where Robertson J said: “Although this is a civil proceeding it does have much of the flavour or complexion of at least a quasi criminal case. Establishment of wrongdoing will lead to the infliction of a penalty. The need for the timely dispatch of the coercive powers of the State is underlined by the [NZBORA]. Although not directly applicable the philosophy which permeates that legislation should not be ignored.” See also the subsequent Court of Appeal decision where Robertson J’s observation was noted without further comment: *Commerce Commission v Giltrap City Ltd* (1998) 11 PRNZ 573 at 577 (CA).

184 P Rishworth “The Making of Quality Legislation: Some External Constraints and Constitutional Principles” (paper presented at Legislation Advisory Committee/Office of the Clerk seminar *The Making of Quality Legislation*, Wellington, 11 July 2012) at 7. See also G Palmer “A Bill of Rights for New Zealand: A White Paper” [1984–1985] I AJHR A6 at 6.

185 Rishworth, above at 8.

By their nature, civil pecuniary penalties infringe upon liberty just as any sanction does. If it is the case that NZBORA rights might be infringed by them, any such breach should be acknowledged and justified during the policy process.¹⁸⁶

The possibility of court challenges

- 5.11 There is some New Zealand case law which may give an indication of how NZBORA might be applied to civil pecuniary penalties. Also, forms of non-criminal proceeding or penalty have been the subject of constitutional or rights-based challenges in other jurisdictions (see appendix 2). In some of those cases, additional procedural protections have been required.

“Criminal offence”

- 5.12 The first question is whether the protections afforded in criminal proceedings under NZBORA apply to civil pecuniary penalty proceedings. Section 24 sets out the rights of persons “charged with an offence”¹⁸⁷ and s 25 lists the rights of a person in the determination of the charge.¹⁸⁸ Section 26(2) provides: “No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.” These protections would be

186 See for example the Ministry of Justice’s report for the Attorney-General on the compliance of the Unsolicited Electronic Messages Bill with the New Zealand Bill of Rights Act 1990. The report assessed the Bill’s strict liability civil penalties against s 25(c) of NZBORA (the right to the presumption of innocence) and concluded they would amount to a reasonable limit on that right in terms of s 5: Ministry of Justice *Consistency with the New Zealand Bill of Rights Act: Unsolicited Electronic Messages Bill* (22 June 2005).

187 Section 24 provides: “**Rights of persons charged** Everyone who is charged with an offence— (a) Shall be informed promptly and in detail of the nature and cause of the charge; and of the charge; and (b) Shall be released on reasonable terms and conditions unless there is just cause for continued detention; and (c) Shall have the right to consult and instruct a lawyer; and (d) Shall have the right to adequate time and facilities to prepare a defence; and (e) Shall have the right, except in the case of an offence under military law tried before a military tribunal, to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for more than 3 months; and (f) Shall have the right to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance; and (g) Shall have the right to have the free assistance of an interpreter if the person cannot understand or speak the language used in court.”

188 Section 25 provides: “**Minimum standards of criminal procedure** Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights: (a) The right to a fair and public hearing by an independent and impartial court: (b) The right to be tried without undue delay: (c) The right to be presumed innocent until proved guilty according to law: (d) The right not to be compelled to be a witness or to confess guilt: (e) The right to be present at the trial and to present a defence: (f) The right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution: (g) The right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty: (h) The right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both: (i) The right, in the case of a child, to be dealt with in a manner that takes account of the child’s age.”

directly applicable to civil pecuniary penalty proceedings if the term “offence” were to be interpreted to include them.

- 5.13 There is no definition of “offence” in NZBORA. At present, it is defined in the Crimes Act 1961, s 2 as “any act or omission for which any one can be punished under this Act or under any other enactment, whether on conviction on indictment or on summary conviction.”¹⁸⁹ The meaning of the term has been considered in a handful of cases. In *Daniels v Thompson*,¹⁹⁰ the Court of Appeal considered its scope under s 26(2). It determined that the term refers only to criminal proceedings. It did so on the grounds that s 26(1)¹⁹¹ relates only to criminal proceedings and because of the use of the terms “acquitted or convicted” in s 26(2). Also relevant was the fact that the common law principle of *autrefois acquit*, on which the provision was based, did not apply to civil proceedings. The Court also placed emphasis on the Crimes Act definition of “offence”. Given its reading of the provision as a whole, the Court considered that the term “punished” in s 26(2) cannot have a different connotation.¹⁹² It followed, the Court found, that there was no complete bar to exemplary damages after a criminal conviction under s 26(2).
- 5.14 The meaning of “offence” was also considered in *Drew v Attorney-General*¹⁹³ where the appellant was a prisoner who was subject to prison disciplinary proceedings. He sought judicial review of a decision imposing a penalty of a loss of seven days’ remission of his sentence, on the grounds that he had not been entitled to legal representation for the proceedings. John Hansen J in the High Court adopted the approach of the Supreme Court of Canada in *R v Wigglesworth* and *R v Shubley* in considering whether Drew had a right to legal representation under s 24(f) of NZBORA.¹⁹⁴ He concluded that breach of prison discipline rules did not amount to an “offence” under s 24 because (a) the nature of the proceedings was not criminal and (b) the penalty did not involve the imposition of “true penal consequences”.¹⁹⁵ Rather than being a penalty, loss of remission was loss of a privilege. And the nature of the rules at hand was not criminal because Drew was not being called upon to account to society for a crime which violated the public interest. Instead, the aim of the rules was to control prison discipline. Drew appealed John Hansen J’s decision, but the Court of Appeal resolved the matter on other grounds

189 However, this definition is to be repealed by the Crimes Amendment Act (No 4) 2011 (which comes into force on 17 October 2013 or earlier by Order in Council: s 2).

190 [1998] 3 NZLR 22 (CA).

191 Which states: “No one shall be liable to conviction of any offence on account of any act or omission which did not constitute an offence by such person under the law of New Zealand at the time it occurred.”

192 At 33–34.

193 [2000] 3 NZLR 750 (HC).

194 See *R v Wigglesworth* [1987] 2 SCR 541 and *R v Shubley* [1990] 1 SCR 3.

195 See discussion on *R v Wigglesworth* at para 5.17 below.

and expressly refrained from dealing with the definition of “offence” under NZBORA.¹⁹⁶

- 5.15 In 2010 the Supreme Court had cause to consider the term in *Siemer v Solicitor-General*.¹⁹⁷ Like John Hansen J in *Drew v Attorney-General*, the Court adopted *R v Wigglesworth*. Siemer was found to be in contempt of a court order. He was sentenced to six months’ imprisonment by the High Court and appealed on the grounds that proceedings for contempt were by nature criminal proceedings and that he should have been able to elect trial by jury, as dictated by s 24(e) of NZBORA.¹⁹⁸ The Supreme Court noted that a purposive interpretation of NZBORA had to be applied. Delivering the majority judgment, Blanchard J quoted Richardson J in *Ministry of Transport v Noort* where it was said:¹⁹⁹

A purposive approach to the interpretation of the Bill of Rights Act requires the identification of the particular right. The Act’s guarantees are cast in broad and imprecise terms and the identification of the object of the particular right allows for the inclusion within its scope of conduct that truly comes within that purpose and the exclusion of activity that falls outside ...

- 5.16 The Supreme Court went on to find that the effect of a finding of contempt was the equivalent to conviction for a statutory offence. McGrath J noted that “the protections are extended because of the nature of the consequences to an individual of a determination of guilt of an offence, including exposure to the punishment that will follow.”²⁰⁰

R v Wigglesworth

- 5.17 As noted, New Zealand courts have drawn on the jurisprudence of the Canadian Supreme Court. Most notably, in *R v Wigglesworth*,²⁰¹ the majority of that Court considered the scope of s 11(h) of the Canadian Charter of Rights and Freedoms which provided for the rule against double jeopardy.²⁰² The majority adopted a “narrow” interpretation of the section. It concluded that its protections were available to persons prosecuted by the State for criminal, quasi-criminal and regulatory offences. However, in determining whether a person had been charged with such an offence, two questions were to be considered. First, was the very nature of the proceeding criminal?

196 [2002] 1 NZLR 58 (CA).

197 [2010] NZSC 54, [2010] 3 NZLR 767.

198 See above n 187.

199 [1992] 3 NZLR 260 (CA) at 279.

200 [2010] NZSC 54, [2010] 3 NZLR 767 at [16]. The Court concluded that it was not possible to require trial by jury for all contempt hearings. It followed that imprisonment for contempt had to be restricted to a maximum of three months.

201 [1987] 2 SCR 541 (SCC).

202 Section 11 provides: “Proceedings in criminal and penal matters Any person charged with an offence has the right: ... (h) if finally acquitted of the offence, not to be tried for it again”

Secondly, did the accused face “true penal consequences”? A “true penal consequence” was “imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity.”²⁰³ The majority also stated that if a particular matter was of a public nature, intended to promote public order and welfare within a public sphere of activity, then the matter fell within s 11. However, if it was a private, domestic or disciplinary matter which was regulatory, protective or corrective and which was primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity, the Court held that it would not.²⁰⁴ Justice Wilson, delivering the majority judgment, also stated that a factor which led her to adopt a narrow definition of the opening words of s 11 was a concern for the future coherent development of the section if it were made applicable to a wide variety of proceedings.²⁰⁵

European Court of Human Rights

- 5.18 The European Court of Human Rights has also developed a test for determining what falls within the ambit of the term “criminal charge” under art 6 of the European Convention on Human Rights.²⁰⁶ In *Engel v*

203 *R v Wigglesworth*, above n 194 at [24].

204 *R v Wigglesworth*, above n 194 at [23]. Note then that in *Martineau v MNR* [2004] 3 SCR 737, 2004 SCC 81 the appellant claimed that s 11 of the Charter applied to a penalty to pay \$315,458 under the Customs Act, RSC 1985, c 1 (2nd Supp) and that he could not be ordered to make discovery. The Supreme Court found that the penalty was regulatory, not penal in nature, based on the objective of the Act, the provision in question and the purpose of the sanction.

205 *R v Wigglesworth*, above n 194 at [20]. The test in *R v Wigglesworth* was adopted in the majority decision of the Supreme Court of Canada in *R v Shubley*, above n 194, where it was held that a prison disciplinary proceeding to which the appellant was subjected was not by its very nature, criminal because the appellant was not being called to account to society for a crime violating the public interest. Rather, he was being called to account to the prison officials for breach of his obligation as an inmate of the prison to conduct himself in accordance with prison rules. Furthermore, the internal disciplinary proceedings lacked the essential characteristics of a proceeding for a public, criminal offence. Their purpose was not to mete out criminal punishment, but to maintain order in the prison.

206 Article 6(1) requires a fair and public hearing by an independent and impartial tribunal in the determination of both a person’s “civil rights and obligations” and “of any criminal charge against him”. Articles 6(2) and (3) apply only to those charged with a “criminal offence” and provide: “(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. (3) Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and the facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”

*Netherlands*²⁰⁷ the question was whether the offences at hand, which were classified in Netherlands law as “military disciplinary offences”, were criminal in nature. The Court decided that the term “criminal charge” in art 6 has an autonomous meaning: signatory states could not unilaterally determine whether any particular contravention was a “criminal charge” and thus attracted the art 6 protections. It stated that:²⁰⁸

If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal ... the operation of the fundamental clauses of [art] 6 ... would be subordinated to their sovereign will. ... The Court therefore has jurisdiction ... to satisfy itself that the disciplinary does not improperly encroach upon the criminal.

5.19 The Court concluded that three factors were relevant to whether a provision fell within the term “criminal charge”:²⁰⁹

- (a) domestic classification of the offence was relevant but was only a “starting point” and of “formal and relative value”;
- (b) the nature of the offence, which was a “factor of greater import”; and
- (c) the nature and degree of severity of the penalty.

5.20 The Court found that on these criteria some of the charges, while classified as disciplinary, did indeed come within the criminal sphere.²¹⁰ On the facts, however, the Court found only one breach of art 6.²¹¹ In *Ozturk v Germany*²¹² the Court provided further guidance about the application of the above factors. That case involved minor road traffic offences which attracted fines and were classified as “administrative offences” in Germany.²¹³ The Court found a breach of art 6(3) on the basis that the offences were, in nature, criminal. It held that the offences:²¹⁴

... retained a punitive character, which is the customary distinguishing feature of criminal penalties. The rule of law infringed by the applicant has ... undergone no change of content. It is a rule that is directed, not towards a given group possessing a special status

207 (1979–80) 1 EHRR 647 (ECHR). See generally R M White “‘Civil Penalties’: Oxymoron, Chimera and Stealth Sanction” (2010) 126 LQR 593 at 600–602.

208 *Engel v Netherlands*, above at [81].

209 *Engel v Netherlands*, above at [82].

210 *Engel v Netherlands*, above at [85].

211 The Court found that there was a long-standing exception to this test that excluded disciplinary proceedings, such as those in *Engel v Netherlands*, from the term “criminal charge”. However, such hearings still concerned “civil rights and obligations” and so engaged art 6(1). Since the complainants were tried in camera, art 6(1) was breached: at [82] and [89].

212 (1984) 6 EHRR 409 (ECHR) at [48].

213 Classified as *Ordnungswidrigkeiten*, or regulatory offences, in Germany. Such offences operate in a similar manner to our infringement offences: see appendix 2.

214 *Ozturk v Germany*, above n 212 at [49].

– in the manner, for example, of disciplinary law – but towards all citizens in their capacity as road users ... Indeed, the sanction ... seeks to punish as well as to deter.

- 5.21 The Court made the same observation as in *Engel*, that a signatory to the convention could not avoid the protections in art 6 merely by calling a contravention “regulatory” rather than criminal. In *Bendenoun v France*,²¹⁵ the Court also found that arts 6(2) and (3) applied to certain tax penalties because they operated on the public at large, the penalties were not compensatory, but punitive and deterrent, and because the penalties were very substantial. The majority of the English Court of Appeal followed this approach in *Han v Commissioners of Customs and Excise*²¹⁶ when it found that the imposition of penalties for alleged dishonest evasion of tax under the Value Added Tax Act 1994 (UK) and Finance Act 1994 (UK) amounted to the determination of criminal charges within the meaning of art 6(1).²¹⁷ The approach in *Han* was followed in *International Transport Roth GmbH v Secretary of State for the Home Department*²¹⁸ which involved breaches of immigration legislation relating to hauliers who were responsible for “clandestine entrants” to the United Kingdom and thus liable for fixed strict liability civil penalties.²¹⁹

215 (1994) 18 EHRR 54 (ECHR) at [44]–[48]. The *Engel v Netherlands* and *Ozturk v Germany* tests have also been cited approvingly by the European Court in subsequent cases: see for example *AP, MP and TP v Switzerland* (1998) 28 EHRR 541 (ECHR).

216 [2001] EWCA Civ 1040, [2004] All ER 687. See also *King v Walden* CH/2000/APP/001 53 (18 May 2001) (UK Ch D) and *R v Securities and Futures Authority Ltd, ex p Fleurose* [2001] All ER (D) 189 (APR). See generally M Pearson “Taxing Crimes” (2001) Solicitors J 939. See also G McFarlane “Civil Penalties in Indirect Taxation: A Human Rights Dimension” (2001) 151 NLJ 1122.

217 Malcolm Pearson notes that Potter LJ played down the significance of the decision in *Han v Commissioners of Customs and Excise*, stating that the art 6(1) requirements for a fair trial and the implicit recognition of the right to silence and privilege against self-incrimination were “of a general nature and are not prescriptive of the precise means or procedural rules by which domestic law recognises and protects such rights”: [2001] EWCA Civ 1040, [2004] All ER 687 at [83]. M Pearson “Taxing Crimes” (2001) Solicitors J 939 at 941. Even if the courts find that a penalty should be categorised as the determination of a criminal charge, questions remain around what procedural safeguards are required to achieve compatibility with art 6(1) and its requirement for a fair and public hearing. See further appendix 2.

218 [2002] EWCA Civ 158.

219 Of \$2000 per entrant—a sum that was considered “substantial”. The relevant provisions allowed two defences: (a) duress; and (b) that the responsible person did not know and had no reasonable grounds for suspecting that there may be a person concealed in their vehicle; that there was an effective system for preventing the carriage of clandestine persons in place; and that the person had operated that system properly. See Immigration and Asylum Act 1999 (UK), s 34.

What might be the position in New Zealand?

- 5.22 New Zealand courts may be likely to refrain from extending the interpretation of the phrase “charged with an offence” to include civil pecuniary penalties. Thus far, where the phrase has been given a broad interpretation, the penalty has involved imprisonment.²²⁰ Furthermore, a strained interpretation of NZBORA is not permitted.²²¹ The Court of Appeal has emphasised that that rule authorises only NZBORA-consistent meanings that can be “reasonably” or “properly” given; such interpretations must be “fairly open” and “tenable”.²²²
- 5.23 On the other hand, the Supreme Court has been influenced by the Canadian Supreme Court in *R v Wigglesworth*. While Wilson J in that case stated that she was taking a “narrow” interpretation of s 11, she indicated that “true penal consequences” could result from a “fine”.
- 5.24 New Zealand courts have not thus far been influenced by the European jurisprudence in this area. The European courts have taken a more expansive approach to determining what is, in nature, a criminal offence.²²³ As a result, non-criminal penalties have been found to fall within the term. The penalties dealt with under the European and UK cases are not directly akin to ours. They have involved fixed penalties imposed directly by enforcement agencies, rather than by the court. They mirror more closely the administrative penalties found in our tax legislation and our infringement regimes. However, the matters raised are relevant.
- 5.25 A number of factors have been influential in the European cases. In *Han* it was relevant that the breach concerned fraud or dishonesty in respect of the tax payable. The level of “criminality” involved, then, did not differ significantly from parallel criminal offences under the tax regime. Also, whether the “offence” applies generally to the public at large or is restricted to a specific group is relevant. And if a punitive and deterrent penalty is attached, courts will be more likely to find a contravention to be criminal. On the other hand, if the offence is limited to a restricted group, for example

220 There is also precedent that infringement offences are not captured, although there has been some criticism of that decision. See *Llewelyn v Auckland City Council* (HC AK, AP174/97, 8 December 1997, Cartwright J) and A Butler and P Butler *The New Zealand Bill of Rights Act: A Commentary* (Wellington, LexisNexis, 2005) at [21.5.5].

221 *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667 (CA) at 674, per Cooke P, *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at 542 per Thomas J, *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 272 per Cooke P, and *Police v Smith and Herewini* [1994] 2 NZLR 306 (CA) at 313.

222 See *Ministry of Transport v Noort* above at 272 and 286, *Quilter v Attorney-General* at 581 per Tipping J, and *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754 (CA). See also *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [167].

223 Butler and Butler suggest that the format of art 6 of the European Convention on Human Rights, which is a more general provision than our ss 23 to 26, may offer some explanation for the expansive view of the notion of “criminal charge”: Butler and Butler, above n 220 at [21.15.12].

as disciplinary offences are, the courts will be less likely to classify a charge as criminal unless it involves or may lead to a loss of liberty.²²⁴ Finally, the purpose of the regime is also relevant.²²⁵

- 5.26 If New Zealand courts were to adopt the approaches of the European and Canadian courts, some civil pecuniary penalties may be susceptible to a finding that they amount to a “criminal offence” under NZBORA. They display features that have been relevant in those courts. Critically, they are public in nature and, while some are directed at a specific group, others capture the conduct of a broad range of society. Furthermore, they are intended to be punitive and deterrent. In addition, some civil pecuniary penalties contain a mens rea element and so involve a degree of moral culpability akin to criminal offences. And while there is no threat of imprisonment, the level of potential financial penalty outstrips many criminal financial penalties.
- 5.27 Ultimately, however, courts may not see the need to determine this issue, given the existence of s 27(1) of NZBORA.

Section 27(1)

- 5.28 The White Paper which preceded the enactment of NZBORA notes that s 27(1) largely reflects basic principles of the common law which go back at least to the 16th century and, in keeping with Tucker LJ’s statement, that the principles will have a varying application in differing circumstances.²²⁶ The commentary also states that the more serious the matter, the nearer the procedures adopted will need to approximate the protections in ss 23 to 26. This point has been reiterated since. For example in *Ali v Deportation Review Tribunal*²²⁷ Elias J stated: “The more significant the decision the higher the standards of disclosure and fair treatment.”

224 *Han v Commissioners of Customs and Excise* above n 216 at [66].

225 In *Han v Commissioners of Customs and Excise*, for example, the majority “reluctantly” found that the charge was criminal in nature. It was reluctant because of the rationale of the particular tax scheme which: “sought to achieve a just balance between the legitimate interests of Customs and Excise in improving the collection of a tax in relation to which widespread evasion was prevalent, and the interests of the taxpayer in avoiding the travails of criminal prosecution and the stigma of a conviction.” See above n 216 at [74].

226 G Palmer “A Bill of Rights for New Zealand: A White Paper” [1984–1985] I AJHR A6 at [10.168].

227 [1997] NZAR 208 at 220 (HC). And see Butler and Butler, above n 220 at [25.2.12].

- 5.29 Express language must be employed to preclude the operation of s 27.²²⁸ Butler and Butler note that the result of s 6 of NZBORA is that it is likely that a statutory provision granting a broad discretion to a decision maker about procedure will be read as subject to the obligation under s 27(1).²²⁹ However, if the procedures laid down by the statute are clear and unambiguous, there will be no scope for the implication of different natural justice requirements.²³⁰
- 5.30 In *Drew v Attorney-General*,²³¹ the Court of Appeal ultimately decided the case on the common law principles of natural justice which were “necessarily affirm[ed] and strengthen[ed]” by the guarantee in s 27. The Court indicated that, depending on the circumstances of the case, including the seriousness of penalties or consequences involved, the right to legal representation may be protected by s 27(1).
- 5.31 Section 27 clearly applies to civil pecuniary penalty proceedings.²³² It is clear then that breaches of natural justice by the imposition of civil pecuniary penalties need to be justified under s 5. It may also be that the applicable rights in ss 24 and 25, most notably those relating to access to legal advice and representation and arguably those relating to the right to be presumed innocent and not to be compelled to be a witness need to be given some degree of protection.

Section 5

- 5.32 Section 5 requires that:

Subject to s 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

- 5.33 In his minority judgment in *Siemer v Solicitor-General*,²³³ McGrath J weighed the nature of contempt proceedings against their objective in assessing whether they could be justified under s 5. He noted that the aim of the summary process for contempt was to protect the ability of the courts to exercise their constitutional role of upholding the rule of law. Effective administration of justice required that they were able to ensure that court orders were adhered to and, in the event of breach, that a person was quickly

228 *Paki v Maori Land Court* [1999] 3 NZLR 700 (HC) at [80].

229 Section 6 reads: “Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.”

230 Butler and Butler, above n 220 at [25.2.27].

231 [2002] 1 NZLR 58 (CA) at [67].

232 The Court of Appeal made it clear in *Combined Beneficiaries Union Inc v Auckland City COGS Committee* [2008] NZCA 423, [2009] 2 NZLR 56 that s 27 is to be given a wide interpretation.

233 [2010] 3 NZLR 767 (SC) at [22] onwards.

brought to account. Also, in *Drew v Attorney-General*,²³⁴ John Hansen J was persuaded by the Attorney-General's arguments that the refusal of legal representation to prisoners in prison disciplinary hearings was justified under s 5, in part because of the purpose of such hearings and the need for their speedy disposition. In relation to civil pecuniary penalties, the discussion below about the need for effectiveness in regulatory regimes is relevant to the impact of s 5.

EFFECTIVE ENFORCEMENT OF REGULATORY REGIMES

- 5.34 The need for fairness in civil pecuniary penalty regimes needs to be balanced against their purpose. Each Act, and associated civil pecuniary penalty regime, has been designed with the effectiveness of the respective regulatory scheme in mind. For example, the objective of securities law is “to facilitate capital market activity, in order to help businesses grow and to provide individuals with opportunities to develop their personal wealth.”²³⁵ Key to these outcomes is the need for investors to have confidence that obligations on advisers and issuers will be enforced. The Unsolicited Electronic Messages Act 2007 was introduced to combat unsolicited commercial email, or spam. Spam was considered to be becoming a significant social and economic issue which was a “drain on ... business and personal productivity” and which “[impeded] the effective use of email and other communication technologies for personal and business communications” so threatening growth and acceptance of legitimate e-commerce.²³⁶ The Anti-Money Laundering and Countering Financing of Terrorism Act 2009 targets the method by which criminals disguise the illegal origins of their wealth and protect and enjoy their assets. Its objectives include to detect and deter money laundering and the financing of terrorism, contribute to public confidence in the financial system, and maintain and enhance New Zealand's international reputation.²³⁷
- 5.35 Procedural restrictions which favour individual rights may have a commensurate limiting impact on enforcement bodies' ability to effectively enforce the Act and meet these public interest objectives. It may follow that the interest in fairness should bow to some extent to regulatory imperatives in the design of civil pecuniary penalties. However, fairness must be compromised no more than necessary to achieve those aims. One question to be considered in this chapter is whether, at present, we have got the balance between regulatory expediency and fairness right.

234 [2000] 3 NZLR 750 (HC) at [64]–[74].

235 Cabinet Paper “Securities Law Reform” (February 2011) at [19], [20] < www.med.govt.nz >

236 Hon David Cunliffe MP “Unsolicited Electronic Messages Bill—First Reading” (13 December 2005) 628 NZPD 1043.

237 The Act was introduced to increase New Zealand's compliance with the international standards set out in the Financial Action Task Force (FATF) Recommendations: see Financial Markets Authority, Reserve Bank and Department of Internal Affairs *Anti-Money Laundering and Countering Financing of Terrorism: Supervisory Framework* < www.dia.govt.nz >

CERTAINTY

- 5.36 The rule of law demands that those who are governed by the law can reliably be guided by it. That is, they need to be able to find out what the law is and to be sure enough of its meaning to make informed choices about their actions. An aspect of this is the need for certainty in the law: there needs to be “fair warning” about the scope of a person’s potential duties and liabilities.²³⁸ Certainty can also bring with it efficiency, lower costs and confidence for the regulated community. Uncertainty about the procedural protections that accompany civil pecuniary penalties can encourage further litigation as defendants seek to protect or clarify the nature of their rights under civil pecuniary penalty regimes.
- 5.37 Given that civil pecuniary penalties are a comparatively novel, hybrid sanction there is a need for greater consideration and specification about their procedural rules. Furthermore, any lack of certainty in how civil pecuniary penalty proceedings should be pursued is exacerbated where civil pecuniary penalty provisions differ among themselves. In the following chapters we highlight a considerable lack of consistency between our civil pecuniary penalty statutes.
- 5.38 This is not to say that the need for certainty is absolute.²³⁹ There is also an interest in leaving areas of discretion to enforcement bodies and the courts. This way flexibility can be retained, new variations of misconduct can be dealt with and different classes of offender can be catered for. In short, the court’s approach can be tailored to the circumstances of the particular case.
- 5.39 Notwithstanding this, we suggest that the comparative novelty of civil pecuniary penalties and lack of a substantial body of judicial consideration of them in New Zealand heightens the need for certainty. This will be assisted by clarity in their drafting and, where possible, consistency across regimes.

238 A Ashworth *Principles of Criminal Law* (6th ed, Oxford University Press, Oxford) at 63. See also Bruce Dyer “Determining the Content of Procedural Fairness” (1993) 19 Mon LR 165.

239 See generally Ashworth, above at 57–68.

Chapter 6

The critical issues

PROCEDURAL AND EVIDENTIAL RULES

- 6.1 New Zealand statutes differ in their treatment of the procedural and evidential rules that should be employed for civil pecuniary penalty proceedings. Some are silent on the issue. Five, including the Securities Act 1978, s 57D contain a common provision:²⁴⁰

The proceedings under this subpart are civil proceedings and the usual rules of court and rules of evidence and procedure for civil proceedings apply (including the standard of proof).

- 6.2 This provision is in similar terms to s 1317L of the Australian Corporations Act 2001 (Cth) which has been the focus of argument in Australia in favour of uniform procedural rules.²⁴¹ Middleton has observed that the meaning of the words “civil evidence and procedure rules” in s 1317L is unclear.²⁴² He also notes that the Australian Securities and Investments Commission, which enforces the Corporations Act, has expressed concern that there is uncertainty about which procedural rules will apply.
- 6.3 As in Australia, there is a question as to the import of s 57D. What, for example, does the term “usual” imply? Is it possible to identify what the “usual rules of evidence and procedure for civil proceedings” are? Alternatively, is the term “usual” a qualification? That is to say, must it be the “usual” rules rather than the exceptional or unusual rules of civil procedure that are used? For example, might an argument be made that this wording supports establishing a case on the typical balance of probabilities standard

240 See also Securities Markets Act 1988, s 42ZI, Securities Trustees and Statutory Supervisors Act 2011, s 43, Takeovers Act 1993, s 43B, Unsolicited Electronic Messages Act 2007, s 49, Financial Markets Conduct Bill (342–2), cl 487.

241 See further para 8.11.

242 T Middleton “The Difficulties of Applying Civil Evidence and Procedure Rules in ASIC’s Civil Penalty Proceedings under the Corporations Act” (2003) 21 C&SLJ 507 at 508, citing Australian Law Reform Commission *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC R95, Sydney, 2002) at [3.58]–[3.59].

rather than taking a flexible approach to the standard of proof depending on factors such as the seriousness of the alleged act or conduct?²⁴³

- 6.4 The issue is further complicated by some of the differences between the civil pecuniary penalty statutes. For example, s 79A of the Commerce Act 1986 provides that:²⁴⁴

In any proceedings under this Part for a pecuniary penalty—... (b) the Commission may, by the order of the Court, obtain discovery and administer interrogatories.

- 6.5 The Anti-Money Laundering and Countering Financing of Terrorism Act 2009, Dairy Industry Restructuring Act 2001 and Hazardous Substances and New Organisms Act 1996 contain identical provisions. None of these four Acts contain the Securities Act formulation. There is a question as to why it is has been thought necessary to provide specifically for discovery and interrogatories in some Acts? If the received wisdom is that civil pecuniary penalty proceedings are civil proceedings, discovery and interrogatories should occur as a matter of normal practice under the High Court Rules. What, then, is the import of s 79A(b), and what is the import of its omission from other civil pecuniary penalty statutes?

- 6.6 There are further inconsistencies. Section 79 of the Commerce Act provides:

In the exercise of its jurisdiction under this Part of this Act, except in respect of criminal proceedings and proceedings for pecuniary penalties of this Act, the Court may receive in evidence any statement, document, or information that would not be otherwise admissible that may in its opinion assist it to deal effectively with the matter.

- 6.7 That section provides that, in general under the Act, relaxed rules of evidence apply, but that the normal (stricter) rules of evidence apply in criminal proceedings and proceedings for pecuniary penalties. In contrast, while the Securities Markets Act 1988 also provides for enforcement by way of both criminal offences and pecuniary penalties, s 43V provides:

In the exercise of its jurisdiction under this Act, the Court may receive in evidence any statement, document, or information that would not be otherwise admissible that may in its opinion assist it to deal effectively with the matter.

In all proceedings under that Act, then, the relaxed rules apply.

- 6.8 Two questions arise. First, should more specific direction about procedure for civil pecuniary penalties be given, rather than the broad Securities Act, s 57D formulation? Secondly, should we be striving for consistency across our civil pecuniary penalty statutes, and if so, how is it to be achieved?

243 See further para 6.15 onwards.

244 Anti-Money Laundering and Countering Financing of Terrorism Act 2009, s 72, Commerce Act 1986, 79A(b), Dairy Industry Restructuring Act 2001, s 144 and Hazardous Substances and New Organisms Act 1996, s 124E.

- 6.9 There is a public interest in the effective and efficient enforcement of the regulatory schemes which employ civil pecuniary penalties. The use of inconsistent and broadly framed provisions such as that in s 57D poses two risks. They could invite a number of interpretations and consequent procedural challenges which may add cost and delay to civil pecuniary penalty proceedings. Again, this concern has been raised in Australia.²⁴⁵ A United Kingdom commentator has also observed that:²⁴⁶

The means of exacting the penalty in the case of criminal offences is the law of criminal procedure. This certainly contains variations and alternatives, most obviously the differences between summary and indictable/solemn procedures. However, it remains a more or less coherent whole, and applies to all criminal offences. Thus, their means of enforcement is well-known, standardized, and predictable, involving relatively clear procedures such as arrest, charging, caution, prosecution, guilty pleas, trial and appeal.

On the evidence of the three civil penalties examined, there is no more or less coherent standardised means of civil enforcement. Indeed the civil procedures differ substantially not only from those of criminal procedure but also among themselves.

- 6.10 Civil pecuniary penalties are thought to be a speedy and efficient means of enforcement. Any savings and benefits that do in fact accompany them may be lost if their formulation leads to extended litigation. There may therefore be an argument for a greater degree of specificity and certainty than exists in s 57D. The other risk is that a lack of certainty will give courts the room to default to “quasi-criminal” protections. Again, this has been a concern in Australia.
- 6.11 On the other hand, there are arguments that favour retention of the broad wording. It provides the Court with maximum flexibility, which enables it to ensure that the procedure adopted in the individual case is fair so that justice can be afforded. The ability to adapt procedure may be particularly warranted in the case of civil pecuniary penalties, given the potential gravity of the outcome for defendants and the range of defendants that may be involved. Civil courts have long had the discretion to adapt procedure accordingly and are well-versed in the practice. Also, where fairness requires that greater specification about particular rules of procedure or evidence is necessary, separate provision can be made. In this regard, see for example the discussion about the privilege against self-exposure to a non-criminal penalty, below.
- 6.12 Another matter which favours a broadly worded procedural provision is the difficulty of identifying what any more specific wording would say. Thomas Middleton suggests that an Australian “code” should deal with matters such as:
- The standard of proof;

245 See for example Middleton, above n 242 at 512. See below para 8.11.

246 R M White “It’s Not a Criminal Offence—Or Is It? Thornton’s Analysis of ‘Penal Provisions’ and the Drafting of ‘Civil Penalties’” (2011) 32(1) *Statutes LR* 17 at 36.

- The operation of the privilege against self-incrimination, the penalty privilege and any associated evidential immunities.
- The general principles on the availability (or otherwise) and scope of cross-examination in civil proceedings under the Corporations Act where there may be subsequent criminal proceedings.
- Whether the concept of “prosecutorial fairness” applies in civil pecuniary penalty proceedings, and provision as to matters such as the appropriate rules of disclosure.

6.13 In the past, the Criminal Justice Division of Australia’s Attorney-General’s Department published a *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.²⁴⁷ The guide has now been updated and no longer deals with civil pecuniary penalties,²⁴⁸ however in its previous form it gave a useful indication of the matters that might be dealt with either by guidelines or more formal rules. In addition to the matters listed above, it dealt with:

- The legislative framing of civil penalty provisions, including fault elements, defences, maximum penalties and drafting style;
- Provisions such as who may impose a penalty, who may apply for one, limitation provisions, criteria for determining the amount of a pecuniary penalty;
- Persons involved in contravening civil penalty provisions (e.g. those who aid, abet, etc a breach; and derivative / collective responsibility);
- Gathering information for a pecuniary penalty proceeding;
- Issues around double jeopardy and subsequent or parallel criminal and civil proceedings;
- The status and drafting of declaration of contravention provisions.

²⁴⁷ Attorney-General’s Department (Criminal Justice Division) *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (December 2007 ed). The guide was first published in March 2004.

²⁴⁸ Now see Attorney-General’s Department (Criminal Justice Division) *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011 ed) < www.ag.gov.au > . See further at para 8.12.

- 6.14 However, in terms of a broad statement of what procedural provisions should apply, the guide simply stated: “*Civil evidence and procedure rules to apply*: It is preferable to include a provision specifying the applicable rules of evidence in proceedings for a pecuniary penalty order ...”²⁴⁹ The guide gave as an example a provision framed in much the same way as the Corporations Act 2001 (Cth) provision.²⁵⁰ We deal with the formulation of the specific rules listed in the bullet points above in the following paragraphs. For present purposes our question is whether there should be a broad provision such as the one in s 57D of the Securities Act in civil pecuniary penalty statutes.

Q4 Should civil pecuniary penalty statutes contain a broad instruction to the effect that “civil pecuniary penalty proceedings are civil proceedings and the usual rules of court and rules of evidence and procedure for civil proceedings apply”?

STANDARD OF PROOF

- 6.15 Most civil pecuniary penalty statutes specify that the usual standard of proof in civil proceedings applies.
- 6.16 Two Acts are silent as to the standard of proof.²⁵¹ The Overseas Investment Act 2005 provides a different formulation:²⁵²

For the purposes of this section, the Court must determine whether a person’s conduct falls within subsection (1) (contravention of Act, etc) on a *balance of probabilities*.

Determining what is the “usual standard of proof” employed in civil proceedings is open to some debate. It is true that New Zealand common law recognises a single civil standard of proof. But the courts’ “flexible” application of the standard to meet the demands of justice in a particular case has created some confusion as to its exact nature, and in some civil proceedings, a criminal standard of proof applies.

- 6.17 It is possible that the standard of proof will arise for debate in proceedings for civil pecuniary penalties in the future. It has been considered briefly in cases under the Commerce Act 1986, and in more depth in Australian case law.

249 Attorney-General’s Department, above n 247 at 69.

250 The provision was the Commonwealth Authorities and Companies Act 1997, sch 3, cl 8: “The Court must apply the rules of evidence and procedure for civil matters when hearing proceedings for: (a) a declaration of contravention; or (b) a pecuniary penalty order.”

251 The Financial Advisers Act 2008, s 137K and Financial Service Providers (Registration and Dispute Resolution) Act 2008, s 79A state that the Court must be “satisfied” of a contravention before ordering a pecuniary penalty. The courts have held that use of the term “satisfied” does not connote any notion of the correct standard of proof to apply: see *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [96].

252 Overseas Investment Act 2005, s 48(4) (emphasis added).

- 6.18 In the Law Commission's view, there should be a consistent provision on the standard of proof in civil pecuniary penalty statutes. Below, we consider what it should say.

Legal standards of proof

- 6.19 New Zealand common law recognises only two standards of proof:²⁵³ the civil standard; and the criminal standard, requiring proof beyond reasonable doubt. Other standards might also be imposed by statute in respect of particular offences or causes of action, although there are no examples of this in New Zealand.²⁵⁴

The civil standard of proof

- 6.20 The civil standard of proof is widely understood to require facts to be proved on the balance of probabilities, or shown as more probable than not. In crude mathematical terms, this might be described as meaning that the party whose case reaches a probability threshold of at least 51 per cent will meet the required standard of proof.²⁵⁵ However, this standard may be "flexibly applied".²⁵⁶ This means that the court will take into account the seriousness of the alleged act or conduct and the potential consequences to the defendant if it is proved, when determining whether or not the standard has been reached.²⁵⁷ So, where civil proceedings involve particularly grave matters, the court may require stronger evidence before it is satisfied the civil standard has been reached: examples include cases concerning fraudulent misrepresentations;²⁵⁸ professional misconduct;²⁵⁹ establishing paternity;²⁶⁰ the question of whether

253 *Z v Dental Complaints Assessment Committee*, above n 251 at [26].

254 Some statutes use a threshold of "reasonable grounds to suspect" for preliminary matters, such as for the exercise of police powers under the Search and Surveillance Act 2012. Previously, orders under the Securities Markets Act 1988 could be made where a court had "reasonable grounds to suspect" non-compliance, but courts expressed discomfort with the combination of a low standard of proof and the range of serious penalties available: see *Meridian Global Funds Management Asia Ltd v Securities Commission* [1994] 2 NZLR 291 (CA) at 296 and *Ithaca (Custodians) Ltd v Perry Corp* [2004] 1 NZLR 731 (CA) at 743. The Act now specifies that "the usual civil standard of proof applies": Securities Markets Act 1988, s 42ZI.

255 See D Hamer "The Civil Standard of Proof Uncertainty: Probability, Belief and Justice" (1994) 16 Syd LR 506 at 509.

256 *Z v Dental Complaints Assessment Committee*, above n 251; *Honda New Zealand Ltd v New Zealand Boilermakers' etc Union* [1991] 1 NZLR 392 (CA).

257 *Z v Dental Complaints Assessment Committee*, above n 251; *Honda New Zealand Ltd v New Zealand Boilermakers' etc Union*, above.

258 *Real Estate Institute of NZ Inc v Private Sale Co (Auckland Central) Ltd* [1996] 2 NZLR 371 (HC), *BMW NZ Ltd v Pepi Holdings Ltd* (1996) 7 TCLR 357 (HC) and *Newark Engineering (NZ) Ltd v Jenkin* [1980] 1 NZLR 504 (CA).

259 *Z v Dental Complaints Assessment Committee*, above n 251; *Guy v Medical Council of New Zealand* [1995] NZAR 67 (HC).

260 *Cook v Gibbons* (1986) 3 FRNZ 257 (HC).

someone is an undischarged bankrupt;²⁶¹ access orders in family law;²⁶² administratively imposed penalties under the Social Security Act 1968;²⁶³ and tax penalties.²⁶⁴

- 6.21 The Supreme Court has said this approach is long-established and sound in principle and that “in general, it should continue to apply to civil proceedings in New Zealand.”²⁶⁵
- 6.22 This approach to the civil standard of proof reflects courts’ ability to tailor their procedures to give effect to the demands of justice. It is the seriousness of the act or conduct and its potential consequences if proved that is relevant, rather than the procedural or legal setting.²⁶⁶ In *Z v Dental Complaints Assessment Committee* a majority of the Supreme Court confirmed that this approach does not amount to a third, modified standard of proof under common law:²⁶⁷

In New Zealand it has been emphasised that no intermediate standard of proof exists, between the criminal and civil standards, for application in certain types of civil case. Balance of probabilities still simply means more probable than not. Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet this standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.

- 6.23 This approach is also generally accepted in the United Kingdom²⁶⁸ and in Australia, where it has been enshrined in statute by s 140 of the Evidence Act 1995 (Cth):²⁶⁹

261 *Harlow Finance & Leasing Ltd v Sterling Nominees Ltd* (2001) 15 PRNZ 633 (HC) per Rodney Hansen J.

262 *M v Y* [1994] 1 NZLR 527 (CA).

263 *Director-General of Social Welfare v Ilyes* [1997] NZAR 292 (HC).

264 *Gregoriadis v Commissioner of Inland Revenue Department* [1986] 1 NZLR 110 (CA).

265 *Z v Dental Complaints Assessment Committee*, above n 253 at [112] (citation omitted).

266 *Managh v Wallington* [1998] 3 NZLR 546 (CA) at 549 per Tipping J.

267 Above n 251 at [102] (citations omitted). See also *T v M* (1984) 2 NZFLR 462 (CA) at 463–464 per Woodhouse P and *TruTone Ltd v Festival Records Retail Marketing Ltd* [1988] 2 NZLR 352 at 358 (CA).

268 See for example *Hornal v Neuberger Products Ltd* [1957] 1 QB 247 (CA), *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 (UKHL) at 586–587 per Lord Nicholls and *R(N) v Mental Health Review Tribunal (Northern Region)* [2006] QB 468 (CA). It has been suggested that in the United Kingdom the possibility of a third standard of proof was laid to rest by the House of Lords in *Re B (children) (sexual abuse: standard of proof)* [2008] 4 All ER 1 (UKHL); although Peter Mirfield has suggested later case law may have reopened the issue: P Mirfield “How Many Standards of Proof Are There?” (2009) 125 LQR 31.

269 Section 140 was enacted after a recommendation of the Australian Law Reform Commission in *Evidence* (ALRC R38, Sydney, 1987) at [72] (Summary of recommendations) and [236] (Commentary).

140 Civil proceedings: standard of proof

- (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
- (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:
 - (a) the nature of the cause of action or defence; and
 - (b) the nature of the subject matter of the proceeding; and
 - (c) the gravity of the matters alleged.

6.24 There has been much debate about the courts' application of this standard in Australia, stemming largely from conflicting interpretations of their foundational case in that jurisdiction, *Briginshaw v Briginshaw*,²⁷⁰ and Sir Owen Dixon's assertion in that case of the need for an "actual persuasion" or "belief" in the matters to be proved on the civil standard. However it now seems clear that the *Briginshaw* approach does not represent a third standard of proof, as is reinforced by s 140.²⁷¹

The criminal standard of proof

6.25 In contrast to the civil standard, the criminal standard of proof – beyond reasonable doubt – is more rigid and is generally strictly adhered to throughout common law jurisdictions. Neither the standard itself nor the evidence required to meet it is said to fluctuate. This is because of the inherent seriousness of criminal matters and the need to protect the accused, and in particular the need to protect innocent persons from conviction.²⁷² While it is referred to as the criminal standard, proof beyond reasonable doubt is also required in proceedings for civil contempt, because there is a risk of imprisonment²⁷³ and for orders under the Children, Young Persons, and Their Families Act 1989 declaring that a child or young person is in need of care or protection on the grounds that he or she has committed an offence.²⁷⁴

270 *Briginshaw v Briginshaw* (1938) 60 CLR 336, [1938] ALR 334.

271 See *Witham v Holloway* (1995) 183 CLR 525 at 547.

272 AAS Zuckerman *The Principles of Criminal Evidence* (Clarendon Press, Oxford, 1989) at 125–128.

273 *Duff v Communicado Ltd* [1996] 2 NZLR 89 (HC); *Solicitor-General v Miss Alice* [2007] 2 NZLR 783 (HC) at [30].

274 Section 198.

- 6.26 Proof beyond reasonable doubt is also the standard on which pecuniary penalties are imposed for contractual and statutory breaches under the Employment Relations Act 2000. The use of that standard gained an established history in the Labour Court, on the grounds that the penalties are imposed on the basis of absolute liability.²⁷⁵ Contrastingly, proceedings to recover arrears of wages or for compliance orders under that Act are imposed on the civil standard. The Act's penalties are clearly viewed in a serious light which warrants the use of a higher standard, even though enforcement proceedings are civil in character.²⁷⁶ The Employment Court continues to impose penalties on the criminal standard of proof, although judges have expressed reservations about the appropriateness of that standard.²⁷⁷

A third standard of proof?

- 6.27 As noted, New Zealand does not recognise a third standard of proof, however the position in the United States is different. There, the common law provides for a third standard of proof, which falls between the criminal and civil standards. The standard has been variously described as requiring "clear and convincing", "clear, convincing and satisfactory" or "clear, cogent and convincing" evidence.²⁷⁸ It is generally applied in high-stakes proceedings involving deprivations of individual rights not rising to the level of criminal prosecution (for example in cases about termination of parental rights²⁷⁹ and deportation²⁸⁰); and in cases where stronger evidence is required because there is thought to be "special danger of deception" (for example, suits to establish the terms of a lost will²⁸¹ and suits for the specific performance of an oral contract²⁸²). It has not been applied to actions for civil pecuniary penalties.

275 *Inspector of Awards v Hartley* [1986] ACJ 344. See for example the Labour Court's use of the criminal standard in *Otago Clerical Workers IUOW v McLeod Bros (Ltd)* [1988] NZILR 1308.

276 *Osborne v Robertson* [1985] 2 NZLR 680 (HC).

277 *Service Workers Union of Aotearoa Inc v Southern Pacific Hotel Corporation (NZ) Ltd* [1993] 2 ERNZ 513 (EmpC) at 533; *Jury v Fonseca* [1998] 2 ERNZ 548 (AEC 36/98) (EmpC).

278 JW Strong (ed) *McCormick on Evidence* (4th ed, West Publishing, St Paul (MN), 1992) at §340.

279 *Santosky v Kramer* 455 US 745 (1982).

280 *Woodby v INS* 385 US 276 (1966).

281 *In re Ainscow's Will* 42 Del 3, 27 A.2d 363, 365 (1942).

282 *Hyder v Newcomb* 236 Ark 231, 365 S.W.2d 271, 274 (1963).

Standard of proof in civil pecuniary penalty proceedings

- 6.28 In *Commerce Commission v Siemens AG*, Woodhouse J applied the civil standard of proof to s 27 of the Commerce Act 1986, noting that “[t]he standard of proof is the balance of probabilities, but it is to be applied ‘flexibly’; with due regard to the gravity of what is alleged, taking into account the seriousness of the matters to be proved”²⁸³ A similar approach was taken to penalties sought under the business acquisitions provisions of the Commerce Act (what was then s 50) in *Commerce Commission v Fletcher Challenge*.²⁸⁴
- 6.29 There may still be some room, however, for debate about whether this approach to the civil standard is correct for all civil pecuniary penalties. It has advantages and disadvantages. Its flexibility enables a court to tailor its procedures according to the demands of justice. In civil pecuniary penalty proceedings the size of the penalty; the nature of the conduct targeted; and broader public policy may feed into that assessment. This could be useful where a single civil pecuniary penalty provision targets a range of conduct that varies in seriousness and potential consequences for the defendant if proven.²⁸⁵ However, the corollary to this flexibility is inconsistency and uncertainty. Different courts and judges are likely to take different views on a penalty, so the flexible application of the standard is more likely to lead to inconsistent results than if a fixed standard were settled on.²⁸⁶ This may make it hard for regulators and defendants to know how much evidence is required to establish a contravention.
- 6.30 The standard itself has also been criticised as conceptually confused and lacking transparency. There is conflict as to its underlying rationale²⁸⁷ and in some cases it has led to suggestions that it is employed as an intermediate standard,²⁸⁸ although as noted this has since been firmly rejected by our Supreme Court in *Z v Dental Complaints Assessment Committee*. Yet, even in that case the Supreme Court was divided as to the value of this approach

283 (2010) 13 TCLR 40 (HC) at [33].

284 [1989] 2 NZLR 554 (HC) at 573 per McGechan J. Also, in *TruTone Ltd v Festival Records Retail Marketing Ltd*, the Court of Appeal confirmed this was the correct approach in proceedings for injunctive relief and damages, for which the Commerce Act is silent as to standard of proof: above n 267, at 358.

285 *Z v Dental Complaints Assessment Committee* above n 251 at [113].

286 Australian Law Reform Commission, above n 242 at [3.52].

287 See for example M Redmayne “Standards of Proof in Civil Litigation” (1999) 62 MLR 167 at 184–185 and Hamer, above n 255 at 512–513. See also *Re B (children) (sexual abuse: standard of proof)* [2008] UKHL 35, [2008] 4 All ER 1 at [5].

288 For example in *AMI Insurance Ltd v Devcich* [2011] NZCA 266, the Court of Appeal corrected the statement of the trial judge that the applicable standard was “not far removed from” the criminal standard: at [13]–[15]. Similarly, an intermediate standard of proof requiring a “high degree of probability” was disapproved, and the ordinary civil standard adopted, by the Court of Appeal in *Tru Tone Ltd v Festival Records Retail Marketing Ltd*, above n 267 at 358.

to the civil standard: McGrath J on behalf of the majority approved it as “a straightforward test with conceptual integrity”,²⁸⁹ but Elias CJ thought that it risked inconsistency and inequality in the treatment of like cases.²⁹⁰ In Australia, despite statutory codification of the test, courts are still said to apply a heightened standard which more closely approximates the criminal standard of proof, an approach that has been criticised for fettering the regulatory effectiveness of civil pecuniary penalties.²⁹¹ Similar debates have arisen in the United Kingdom.²⁹²

What should statutes using civil pecuniary penalties provide?

- 6.31 One option is that civil pecuniary penalties should be imposed on the criminal standard of proof. This option might be favoured if it is considered that the nature of civil pecuniary penalties is so grave as to approximate to criminal punishment. It might also be favoured if it is accepted that only two standards of proof are recognised in New Zealand, and that the civil standard does not adequately acknowledge their punitive nature. Imposition of the criminal standard, however, would remove what must, admittedly, be considered to be the attraction of civil pecuniary penalties for enforcement bodies: that is that they are easier to impose.
- 6.32 A second option would be to legislate for an intermediate standard of proof applicable to actions for civil pecuniary penalties – requiring, for example, “clear and convincing” evidence or some similar formulation such as in the United States. It might be thought that such a standard would appropriately balance the punitive nature of civil pecuniary penalties against the need for regulatory effectiveness. There are, however, no New Zealand precedents for such a standard.
- 6.33 One of these two options might be thought particularly appropriate if it is envisaged that civil pecuniary penalties should expand outside a narrower “regulatory” field, into the broader range of human conduct.

289 *Z v Dental Complaints Assessment Committee*, above n 251 at [114].

290 *Z v Dental Complaints Assessment Committee*, above n 251 at [49]. Elias CJ favoured the use of the criminal standard of proof, regarding it as more straightforward and more consistent.

291 A Rees “Civil Penalties: Emphasising the Adjective or the Noun” (2006) 34 ABLR 139.

292 *Mirfield*, above n 268 at 35.

- 6.34 A third option would be to dictate that civil pecuniary penalties should be subject to a strict and inflexible application of the civil standard of proof. If this option were taken, it might be seen to prioritise the interest in regulatory effectiveness over fairness. This approach has been contended for in Australia, on the grounds that the civil standard as it is currently applied has been used by the courts to effectively require a standard of proof that too closely resembles “beyond reasonable doubt”, and thereby inhibits the adequate enforcement of regulatory regimes.²⁹³ It could also be argued for on the basis that, in civil pecuniary penalty proceedings, the seriousness of the conduct should be taken into account at the penalty setting stage, not at the stage of determining liability.
- 6.35 We note that this approach might currently be more likely under the Overseas Investment Act 2005 given that Act’s explicit reference to the balance of probabilities, although this may simply reflect a change in drafting approach.²⁹⁴
- 6.36 A fourth option is to retain the status quo. That is to include a provision that the “usual” civil standard of proof applies. If it were thought that there was a lack of clarity in this formulation, however, consideration could be given to giving courts greater guidance in how they determine whether the standard has been reached by following the precedent set by s 140 of the Evidence Act 1995 (Cth). Would this add desirable clarity and consistency to the application of the civil standard of proof in civil pecuniary penalty proceedings?

Q5 Should civil pecuniary penalty statutes contain a uniform standard of proof provision and, if so, what should it contain?

BURDEN OF PROOF

- 6.37 The question of who carries the burden or onus of proof essentially determines who is responsible for convincing the court of a particular matter in proceedings. In both criminal proceedings and private civil actions, the legal burden of establishing the case is on the person who instituted proceedings (the prosecution or the plaintiff). This is also the case for civil pecuniary penalties. But various burdens may be carried in respect of a range of matters. Few statutes comprehensively address these matters so, where legal argument arises, the courts allocate the burden based on the elements of the cause of action, policy concerns and practical considerations.

293 See for example V Comino “Effective Regulation by the Australian Securities and Investment Commission: The Civil Penalty Problem” (2009) 33 MULR 802, Middleton, above n 242, Rees, above 291, and P Spender “Negotiating the Third Way: Developing Effective Process in Civil Penalty Litigation” (2008) 26 C&SLJ 249.

294 This might suggest a purely probabilistic application of the civil standard requiring the contravention to be established only to a threshold of 51 per cent: see Hamer, above n 235 at 509.

What is the burden of proof?

- 6.38 There are two burdens of proof. The *legal* burden refers to the duty carried by the person “who has the risk of any given proposition on which the parties are at issue – who will lose the case if he does not make this proposition out, when all has been said and done”.²⁹⁵ The *evidential* burden refers to the duty to raise, “on the evidence in the case, an issue as to the matter in question fit for consideration by the tribunal of fact”.²⁹⁶ The evidential burden does not prove anything, but only raises evidence sufficient to make an issue live.
- 6.39 In criminal actions, it is clear that NZBORA applies. The presumption of innocence, protected by s 25(c) generally demands that the prosecution carries the legal burden of proving all the elements of an offence. The defendant can respond by attacking an element of the actus reus or mens rea (for example, claiming an alibi or mistake) and there is no evidential burden to discharge before the prosecution must address it. However the accused must discharge an evidential burden if s/he relies on a common law defence.²⁹⁷
- 6.40 If the accused relies on a statutory defence, at present he or she carries the *legal* burden in respect of offences tried summarily; but only an *evidential* burden in respect of indictable offences.²⁹⁸ This is by virtue of s 67(8) of the Summary Proceedings Act 1957, which provides:
- Any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany the description of the offence in the enactment creating the offence, may be proved by the defendant, but, subject to the provisions of section 17, need not be negated in the information, and, whether or not it is so negated, no proof in relation to the matter shall be required on the part of the informant.
- 6.41 This is understood to impose a legal burden on defendants in summary proceedings to prove the availability of any statutory defence. Prima facie this amounts to a breach of the presumption of innocence under NZBORA, and its general application across the statute book has raised concerns. Hence, the new Criminal Procedure Act 2011 will repeal s 67(8).²⁹⁹ Now, any criminal offence that puts the legal burden of establishing a defence on the defendant must state that clearly within the relevant Act.

295 James B Thayer *A Preliminary Treatise on Evidence at the Common Law* (1898) at 355.

296 *Sheldrake v DPP* [2005] 1 AC 264, [2005] 1 All ER 237 at [1].

297 Such as self-defence, intoxication, duress, accident, and mistake: B Robertson (ed) *Adams on Criminal Law* (online looseleaf ed, Brookers) at [CA20.05]. An exception is where the defendant pleads a defence of insanity, for which he or she bears the legal burden: Crimes Act 1961, s 23(1).

298 *R v Rangi* [1992] 1 NZLR 385 (CA).

299 The Criminal Procedure Act 2011 comes into force on the earlier of a date appointed by the Governor General by Order in Council, or two years after the date the Act received the Royal assent (17 October 2011): s 2. It will also abolish the distinction between indictable and summary proceedings.

- 6.42 In private civil actions, the basic starting point is that the plaintiff, as the party that instigated the litigation, carries the legal burden of establishing the essential elements of the cause of action.³⁰⁰ The defendant may cast doubt on one of the elements of the cause of action, or may raise an affirmative defence (such as contributory negligence). In the latter case the defendant carries the legal burden in respect of that defence (but must only discharge that burden to the civil standard of the balance of probabilities). Hence in private civil actions the onus of establishing an affirmative defence is likely to be carried by the defendant, whereas for most criminal offences the presumption of innocence imposes this burden, *prima facie*, on the prosecution.

Burden of proof in civil pecuniary penalty proceedings

- 6.43 Civil pecuniary penalty statutes rarely refer explicitly to who carries the burden of proof for a particular issue. However most penalty provisions suggest the enforcement body carries the burden of establishing the essential elements of the penalty, through their obligation to “satisfy” the Court of the contravention. For example, under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009:

90 Pecuniary penalties for civil liability act

- (1) On the application of the relevant AML/CFT supervisor, the High Court may order a person to pay a pecuniary penalty to the Crown, or to any other person specified by the court, if the court is satisfied that the person has engaged in conduct that constituted a civil liability act.
- 6.44 Burden of proof arguments may arise in respect of a range of matters at various stages of the civil pecuniary penalty proceeding (pre-trial; in the liability judgment; the penalty judgment; and on appeal). The Court will play an essential role in this. But it may also be possible for clear statutory drafting to minimise confusion and argument about who has to prove what in civil pecuniary penalty proceedings.

Establishing the ingredients of the civil pecuniary penalty provision

- 6.45 The High Court has said that in proceedings under the Commerce Act 1986, the Commerce Commission must prove the facts on which the penalty “fundamentally rests”.³⁰¹ The facts on which a penalty “fundamentally rests” will necessarily vary between regimes. The penalty provision itself provides the authoritative source for determining the ingredients of the cause of action. But some penalty provisions are framed in such a way that arguably creates confusion about what is an element of the cause of action (to be proved by the plaintiff). For example, s 156L of the Telecommunications Act 2001 states:

300 CR Williams “Burdens and Standards in Civil Litigation” [2003] 25 Syd LR 165 at 172.

301 *Commerce Commission v Taylor Preston Ltd* [1998] 3 NZLR 498 (HC) at 511; *Commerce Commission v NZ Bus Ltd* HC Wellington BC200662042, 29 September 2006 at [42].

156L Pecuniary penalty

- (1) The High Court may order a person to pay to the Crown any pecuniary penalty that the Court determines to be appropriate if the High Court is satisfied, on the application of the Commission, that—
 - (a) the person has failed, without reasonable excuse, to comply with a separation undertaking under Part 2A; or
 - (b) the person has failed, without reasonable excuse, to comply with an undertaking under Part 4AA; or
 - (c) the person has committed a breach of any of the provisions set out in section 156A.

- 6.46 It is unclear from the face of the provision whether the absence of a reasonable excuse is a fact on which the penalty “fundamentally rests”, which must be proved by the enforcement body. The existence of a reasonable excuse could also be characterised as a defence which must be proved by the defendant. Similar drafting issues arise in criminal offences,³⁰² and there the courts may take into account such matters as the underlying mischief at which the provision is aimed; practical considerations including the ease or difficulty the respective parties would have in discharging the burden of proof;³⁰³ and the structure of the provision – for example if the element in question does not appear in the clause creating the offence but in a subsequent provision, this may indicate Parliament’s intention to treat it as a defence.³⁰⁴
- 6.47 The similarity of drafting between civil pecuniary penalty provisions and offences suggests the Court may employ the same approach towards similarly ambiguous civil pecuniary penalty provisions. Notably, civil pecuniary penalties often target defendants who themselves hold the knowledge necessary to exonerate themselves from liability, a factor that would feature in the Court’s inquiry of whether a “reasonable excuse” is a statutory defence to be proved by the defendant. The Australian Law Reform Commission referred to this as one justification put forth for reversing the onus of proof in a civil pecuniary penalty provision. Other justifications discussed were that some contraventions may be considered so serious by the community that reversing the onus of proof is justified to ensure someone is found guilty and punished for it; where the contravention only affects a particular segment of society that is considered capable of safeguarding its own interests; and where it is felt necessary to overcome difficulties in assigning liability to certain parties.³⁰⁵

302 See for example *Juken Nissho Ltd v Northland RC* [2000] 2 NZLR 556 (CA) at [24]. See also *Bay of Plenty Regional Council v Bay Milk Products Ltd* [1996] 3 NZLR 120 (HC).

303 *R v Rangi*, above n 298.

304 *R v Hunt* [1987] AC 352 (UKHL) at 374.

305 Australian Law Reform Commission, above n 242 at [8.57].

- 6.48 However, there is no test that can determine these matters before they arise, as the policy and practical considerations that persuade a court one way in respect of a provision using particular language will not necessarily have the same effect elsewhere, even where the same language is used. Commentary emphasises that these are matters that must be determined within the branch of the substantive law.³⁰⁶ This speaks strongly in favour of clear drafting of civil pecuniary penalty provisions and predictable, established language indicating clearly where the burden of proof lies.

Establishing a statutory defence

- 6.49 A number of civil pecuniary penalty regimes contain statutory defences.³⁰⁷ Some of these, such as s 12 of the Unsolicited Electronic Messages Act 2007 (UEM Act), impose the burden of proving the defence on the defendant in very clear terms:

12 Defences

- (1) A person who sends an electronic message, or causes an electronic message to be sent, in contravention of section 9, 10, or 11 has a defence if—
 - (a) that person sent the message, or caused the message to be sent, by mistake; or
 - (b) the message was sent without that person's knowledge (for example, because of a computer virus or a malicious software programme).
 - (2) A person who wishes to rely on a defence in subsection (1) has the onus of proof in relation to that matter.
- 6.50 In other cases it may be inferred from the drafting of the provision. For example s 124B(3) of the Hazardous Substances and New Organisms Act 1996 (HSNO Act), states that the Court must not impose a penalty “if the person satisfies the court that the person did not know, and could not reasonably have known, of the breach”. Similar language is also used in s 41 of the Takeovers Act 1993.
- 6.51 It is important that civil pecuniary penalty statutes indicate clearly who carries the burden of establishing a statutory defence. In its initial form, the Financial Markets Conduct Bill (342–1) did not make this clear.³⁰⁸ If it is not clear, arguments may be made that, as in the criminal law, imposing the burden of proving something on the defendant infringes their rights. If this is

306 D Mathieson (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [2.3.2].

307 See for example Hazardous Substances and New Organisms Act 1996 Act, s 124B(3); Securities Act 1978, ss 56, 57, 57A; Securities Markets Act 1988, ss 10, 10A–10D; Takeovers Act 1993, s 41; Unsolicited Electronic Messages Act 2007 Act, s 12.

308 See for example Financial Markets Conduct Bill 2010 (342–1), cl 472(4) (defence against defective disclosure for director taking reasonable precautions and exercising due diligence). Now see Financial Markets Conduct Bill 2010 (342–2), cls 482A–482E, which put the onus on the defendant to prove the defence.

not the intention of the civil pecuniary penalty provision, it should be clearly stated.

Other matters

6.52 There are various other matters relevant to civil pecuniary penalty proceedings where burden of proof issues could arise, and where arguments may be made to adapt the orthodox position usually taken in civil proceedings. For example, who carries the burden in respect of:

- claims of privilege;
- statutory limitations or time limits;³⁰⁹
- the similarity or otherwise of conduct pursued by a civil pecuniary penalty and by a criminal sanction, or by multiple civil pecuniary penalties;
- calculating the loss or gain made from a breach or damage caused by a breach, for quantum purposes;
- appeal rights.

6.53 The question is whether, if these matters arise, the Court will allocate the burden of proof keeping in mind the quasi-punitive nature of civil pecuniary penalties and the possibility that defendants in these proceedings are under an additional disadvantage. Or will it address them as in any other civil proceeding? Introducing as much certainty as possible in the drafting of such provisions will minimise the need for legal argument on these issues.

Q6 Do you agree that civil pecuniary penalty provisions should be drafted to maximise certainty over the allocation of the burden of proof?

PRIVILEGE AGAINST SELF-EXPOSURE TO A NON-CRIMINAL PENALTY

6.54 The privilege against self-incrimination enables individuals to refuse to answer questions or provide information on the grounds that to do so might expose them to criminal prosecution. It is provided for in the Evidence Act 2006, s 60 and aspects of it are protected by the New Zealand Bill of Rights Act 1990, ss 23(4), 25(d).³¹⁰ Before the introduction of the Evidence Act, New Zealand courts also recognised the common law “penalty privilege”

309 See the discussion in *Humphrey v Fairweather* [1993] 3 NZLR 91 (HC) and in B Robertson “Limitations and Burdens” [1994] NZLJ 203. See also Financial Markets Conduct Bill 2010 (342–2), which places the burden of making out the limitation defence expressly on the defendant: cl 485A(3).

310 New Zealand Bill of Rights Act 1990, s 23(4): everyone who is (a) arrested; or (b) detained under any enactment for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right; and s 25(d): the right not to be compelled to be a witness or to confess guilt.

which gave protection against answering questions or providing information in a way that might expose oneself to a non-criminal penalty. The penalty privilege had been recognised as giving potential protection to defendants in civil pecuniary penalty cases.³¹¹

- 6.55 The position has changed under the Evidence Act. The Act provides for the privilege against self-incrimination but omits reference to the penalty privilege. In doing so, it implements the Law Commission's recommendation in its 1999 Evidence report that the penalty privilege should not be retained. It appears, then, that defendants in civil pecuniary penalty cases can no longer rely on the privilege, unless the particular civil pecuniary penalty statute provides for it specifically. In fact, most civil pecuniary penalty statutes are silent on the privilege. However, a handful do provide some protection against the subsequent use in criminal and civil pecuniary penalty proceedings of statements made by a person in answer to questions.³¹² Those statutes treat protection against self-exposure to a civil pecuniary penalty in the same way as self-incrimination.
- 6.56 In the light of the growth in civil pecuniary penalty regimes and their punitive nature, we suggest that there is a need to revisit whether the penalty privilege should apply both during the investigation of civil pecuniary penalty proceedings and the proceedings themselves. The inconsistent approach adopted by existing civil pecuniary penalty statutes also suggests that the issue demands consideration. We also query whether judicial interpretation of the provisions of the Evidence Act that concern the relationship between the Act and pre-existing common law rules could lead to the judicial reintroduction of the penalty privilege in New Zealand in some areas.

The impact of the Evidence Act 2006

- 6.57 In 1999 the Law Commission completed its review of the law of evidence and proposed a new Evidence Code.³¹³ That review led to the enactment of the Evidence Act. In its discussion paper on the privilege against self-incrimination, the Commission proposed retaining the privilege against self-exposure to a non-criminal penalty.³¹⁴ In reaching this position, the Commission focussed on the same rationales that exist for the privilege against self-incrimination, those being the potential for abuses of power,

311 *Port Nelson Ltd v Commerce Commission* [1994] 3 NZLR 435 (CA). The case involved a civil penalty proceeding under s 80 of the Commerce Act 1986. However, the Court of Appeal found that the privilege was not a ground for limiting its power to order the advance exchange of briefs of evidence. See also *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.

312 Commerce Act 1986, s 106, Dairy Industry Restructuring Act 2001, s 145, Telecommunications Act 2001, s 15, Takeovers Act 1993, s 33C. See also Electricity Industry Act 2010, s 48, Gas Act 1992, s 43V.

313 See Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55, Wellington, 1999) vol II and Law Commission *Evidence: Reform of the Law* (NZLC R55, Wellington, 1999) vol I.

314 Law Commission *The Privilege Against Self-Incrimination* (NZLC PP25, Wellington, 1996) at 59.

the power imbalance in civil pecuniary penalty proceedings and a person's interest in maintaining their privacy.

- 6.58 However, the weight of submissions persuaded the Commission to change its view. Submitters advocated against retention of the privilege on the grounds that it is difficult to determine whether some existing legislative sanctions amount to a penalty in law; and that the existence of the privilege is difficult to justify when no protection exists for other serious forms of civil liability, such as loss of custody of a child, injunctive orders or substantial damages.³¹⁵ As a result the Commission's code was silent on the privilege, and s 60 of the Act provides only for the privilege against self-exposure to a *criminal* penalty.³¹⁶ The authors of *The Evidence Act 2006: Act and Analysis* state that the "restriction of s 60 to criminal acts and punishments eliminates the common law protection in New Zealand against self-incriminating exposures to a civil penalty".³¹⁷ This reflects the position taken by the Commission and there is no evidence that the government or Parliament of the time took express exception to this view.
- 6.59 Notwithstanding this background, we have considered whether, because of changes made to the Commission's draft code before the enactment of the Evidence Act, there is a possibility that courts may still recognise the existence of the common law penalty privilege. This is relevant because Australian experience tells us that challenges to civil pecuniary penalties might well be made on this basis.
- 6.60 The Commission had proposed that s 10 of the new code should provide:³¹⁸
- This Code is to be liberally construed in such a way as to promote its purpose and principles and is not subject to any rule that statutes in derogation of the common law should be strictly construed.
- The commentary to the code stated that the section was designed to be a "reminder that it is to the purpose and principles of the Code, rather than to the common law, that judges and lawyers should look for answers to evidential issues".
- 6.61 However, changes made to the Bill before its introduction to Parliament included the amendment of proposed s 10. As enacted, the provision now reads:

315 Law Commission *Evidence: Reform of the Law*, above n 313 at [278].

316 The definitions of "incriminate" and "self-incriminate" in s 4 of the Evidence Act 2006 refer solely to criminal prosecutions.

317 R Mahoney and others *The Evidence Act 2006: Act and Analysis* (2nd ed, Brookers, Wellington, 2007) at [EV60.06(6)], citing the Law Commission *Evidence: Evidence Code and Commentary*, above n 313 at [C253].

318 See Law Commission *Evidence: Evidence Code and Commentary*, above n 313 at 36–37. See also Law Commission *Evidence: Reform of the Law*, above n 313 at 9.

Interpretation of Act

(1) This Act—(a) must be interpreted in a way that promotes its purpose and principles; and (b) is not subject to any rule that statutes in derogation of the common law should be strictly construed; but (c) may be interpreted having regard to the common law, but only to the extent that the common law is consistent with—(i) its provisions; and (ii) the promotion of its purpose and its principles; and (iii) the application of the rule in s 12 ...

6.62 Section 10 should be read with ss 11 and 12 which state:

11 Inherent and implied powers not affected

(1) The inherent and implied powers of a court are not affected by this Act, except to the extent that this Act provides otherwise. (2) Despite subsection (1), a court must have regard to the purpose and the principles set out in sections 6, 7, and 8 when exercising its inherent or implied powers.

12 Evidential matters not provided for

If there is no provision in this Act or any other enactment regulating the admission of any particular evidence or the relevant provisions deal with that question only in part, decisions about the admission of that evidence—(a) must be made having regard to the purpose and the principles set out in sections 6, 7, and 8; and (b) to the extent that the common law is consistent with the promotion of that purpose and those principles and is relevant to the decisions to be taken, must be made having regard to the common law.

6.63 The authors of *The Evidence Act 2006: Act and Analysis* note that the amendment to s 10 was made as a “helpful addition to aid interpretation” however they also note that the effect of these provisions is that, as enacted, the Act is no longer a code.³¹⁹ Recent judicial statements suggest that these provisions may give rise to some difficult questions of interpretation about the application of the common law under the Act. In *New Zealand Institute of Chartered Accountants v Clarke* Keane J described the prevailing situation as follows:³²⁰

Section 10(1), which governs interpretation, sets the balance. The Act is the starting point and may well be the end point. It speaks for itself and is not to be read subject to the common law. If it speaks explicitly and completely there can be no resort to the common law. If it speaks less than definitively and completely there can and may need to be, but only in so far as the common law marches with the purposes, principles and letter of the Act.

319 R Mahoney and others, above n 317 at [EV10.01].

320 *New Zealand Institute of Chartered Accountants v Clarke* [2009] 3 NZLR 264 (HC) at [38].

- 6.64 On this basis, he concluded that the common law has “a continuing place in setting the boundaries” of s 57 (which relates to the privilege for settlement negotiations or mediation). On the question of the penalty privilege itself, the Chief Employment Court judge stated, in *NZ Air Line Pilots Assn v Jetconnect Ltd*:³²¹

Although acknowledging that the Act is a code, it is arguable that “*privilege*” dealt with under the Evidence Act 2006 relates to exposure to criminal liability and the common law of privilege affecting claims to civil penalties may have been left untouched by Parliament.

- 6.65 Recently, the Court of Appeal considered the impact of ss 10 to 12 of the Evidence Act. It noted that:³²²

- (a) Under s 10(1)(c) of the Evidence Act, the Act may be interpreted having regard to the common law to the extent that the common law is consistent with its provisions, the promotion of its purpose and its principles and the application of the rule in s 12.
- (b) Under s 11 the inherent and implied powers of a court are not affected by the Act except to the extent that the Act provides otherwise, although a court must have regard to the purpose and the principles set out in ss 6, 7 and 8 when exercising those powers.
- (c) Under s 12 if there is no provision in the Act or any other enactment regulating the admission of any particular evidence or the relevant provisions deal “with that question only in part”, decisions about the admission of that evidence must be made having regard to the purpose and principles set out in ss 6, 7 and 8. To the extent that the common law is consistent with the promotion of that purpose and those principles and is relevant to the decisions to be taken, regard must be had to the common law. In particular s 6(c) provides that a purpose of the Act is to help secure the just determination of proceedings by “promoting fairness to parties and witnesses”.

- 6.66 The Court concluded that there remains a general common law discretion to exclude evidence where its admission would be unfair, notwithstanding silence as to that discretion in the Evidence Act, and specifically in s 30 (which relates to improperly obtained evidence).³²³ It reached this conclusion on the basis that to refuse to do so would be inconsistent with the common law and the purpose of the Evidence Act. The purpose of the Act is set out in s 6:

The purpose of this Act is to help secure the just determination of proceedings by—

- (a) providing for facts to be established by the application of logical rules; and

321 *NZ Air Line Pilots Assn v Jetconnect Ltd* AC 23A/09, ARC 33/09, 19 June 2009 (EmpC) at [23].

322 An order is in force prohibiting publication of the judgment and any part of the proceedings of the relevant case until final disposition of the trial.

323 Section 30 of the Evidence Act 2006 applies only to criminal proceedings. The Act does not specifically control the re-use of improperly obtained evidence in civil proceedings other than to the limited extent provided for by ss 53(4) and 90.

- (b) providing rules of evidence that recognise the importance of the rights affirmed by the New Zealand Bill of Rights Act 1990; and
- (c) promoting fairness to parties and witnesses; and
- (d) protecting rights of confidentiality and other important public interests; and
- (e) avoiding unjustifiable expense and delay; and
- (f) enhancing access to the law of evidence.

6.67 Section 7 contains the “fundamental principle” that relevant evidence is admissible. Evidence is “relevant” if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.³²⁴ We have considered whether there is scope for a court to determine that the combined effect of the provisions set out above makes room for the continuation of the common law penalty privilege in New Zealand. We think that this would be unlikely: any court doing so would be acting in the face of the Law Commission’s express view that the privilege should not be retained. However, judges have shown some willingness to place greater emphasis on a broad reading of the interpretation aids in the Act than on the Commission’s recommendation that the Act should be a code. Where civil pecuniary penalty statutes are silent on the matter, then, there may presently be some uncertainty as to the position for those resisting civil pecuniary penalty investigations and proceedings.

Should civil pecuniary penalty statutes protection against self-exposure to a non-criminal penalty?

6.68 The roots of the penalty privilege were considered by the High Court of Australia (HCA) in *Rich v Australian Securities Investment Commission*.³²⁵ The privilege bears some similarity to the privilege against self-incrimination and is one element of the rule that “a party cannot be compelled to discover that which, if answered, would tend to subject him to any punishment, penalty, forfeiture, or ecclesiastical censure.”³²⁶ It had its origins in the rules of equity relating to discovery, when discovery and interrogatories were provided for under rules made under the Judicature Act. Equity’s principle was that an order for discovery or for the administration of interrogatories in favour of the prosecutor, whether the prosecutor was the Crown or a common informer or some other person, should not be made where the proceeding was

324 Section 8 of the Evidence Act 2006 is also relevant: “General exclusion (1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will (a) have an unfairly prejudicial effect on the proceeding; or (b) needlessly prolong the proceeding. (2) In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.”

325 [2004] HCA 42, (2004) 209 ALR 271.

326 *Redfern v Redfern* [1891] P 139 at 147 per Bowen LJ. See also *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 336, 355.

of such nature that it might result in a penalty or forfeiture.³²⁷ The rule has long been recognised by the common law as being of general application.³²⁸

- 6.69 The privilege applied to exposure to penalties – that is those designed to punish or discipline. It did not apply to compensatory awards. However, historically wide scope was placed on the term “penalty”. The majority of the HCA listed exposure to loss of office, petitions for bankruptcy, cases of forfeiture of estate, and breaches of covenants in leases, among other things as examples when the privilege has been relied upon.³²⁹ In determining whether the common law privilege applied in *Rich*, the majority held, what is important is not the classification of the orders sought – for example, whether they are “punitive” or “protective”, rather attention must be focused upon the *nature* of the orders.³³⁰
- 6.70 Drawing on the discussion in chapter 5, above, it is not clear whether the privilege might be protected in the context of civil pecuniary penalties by s 25(d) or 27(1) of NZBORA.³³¹
- 6.71 Arguments in favour of and against the penalty privilege were made in the Commission’s 1996 discussion paper on the privilege against self-incrimination.³³² In favour of retention the Commission made the point that civil pecuniary penalties can be as severe as criminal offences and can be feared by the witness and investigated by officials in much the same way. These similarities suggest that the rationales for the privilege of self-incrimination may be applicable, at least in some situations, to liability to a civil pecuniary penalty. In its 2002 report, the Australian Law Reform Commission recommended statutory expression of the penalty privilege on these grounds.³³³

327 A common informer was a person who took proceedings for breaches of certain statutes solely for the penalty which, according to the statute, was paid to the one who gave information of the breach. When a common informer sued for a penalty, the courts refused to assist in any way and allowed the person sued to avoid giving any evidence at all. See Law Commission *The Privilege Against Self-Incrimination*, above n 314 at [177].

328 *Rich v Australian Securities Investment Commission*, above n 325 at [23]–[24]. Compare the statement of the majority of the same court in *Pyneboard Pty Ltd v Trade Practices Commission*, above n 326 at 337 that “the better view is that equity looked to the existing model of the common law and applied the rule which it had established”.

329 *Rich v Australian Securities Investment Commission*, above n 325 at [26]–[28].

330 *Rich v Australian Securities Investment Commission*, above n 325 at [34].

331 It may be that s 27(1) captures the privilege against self-incrimination. Before NZBORA was enacted, the Court of Appeal held in *Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461 that answers given under the compulsion of Anton Piller orders may not be used to prosecute the person answering. It would be possible for a court to hold that such a result was now dictated by s 27(1). See also *Natural Gas Corporation Holdings Ltd v Grant* [1994] 2 NZLR 252 (HC).

332 Law Commission *The Privilege Against Self-Incrimination*, above n 314.

333 Australian Law Reform Commission *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC R95, Sydney, 2002) at [18.20].

It is apparent that some civil and administrative penalties carry consequences that are just as serious as traditional criminal punishments. ... the conventional common law readiness to remove the privilege more easily in relation to non-criminal penalties may require reassessment in light of the convergence of the severity of criminal punishments and non-criminal penalties.

- 6.72 The rationales for the privilege against self-incrimination are said to be those summarised by Justice Goldberg in the United States Supreme Court case *Murphy v Waterfront Commission*:³³⁴

The privilege against self-incrimination “registers an important advance in the development of our liberty – one of the great landmarks in man’s struggle to make himself civilized.” It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates “a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load”; our respect for the inviolability of the human personality and of the right of each individual “to a private enclave where he may lead a private life”; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes “a shelter to the guilty”, is often “a protection to the innocent”.

- 6.73 The privilege recognises the severity of criminal penalty, the imbalance between state and individual in criminal proceedings and our desire not to penalise the innocent. These same arguments can easily apply to civil pecuniary penalty proceedings. In our view, the question is whether the lack of criminal conviction distinguishes civil pecuniary penalties enough from criminal offences to warrant treating them differently when it comes to the privilege. As we observe in chapter 3, although the lack of conviction is not an insignificant distinction, the stigma and punitive effect of civil pecuniary penalties may differ little from a criminal penalty.
- 6.74 Practice abroad may also favour recognition of such a privilege. As noted above, Australian case law recognises a common law privilege against the self-exposure to a forfeiture or penalty. The penalty can be abrogated, but only by express words in the legislation. The United Kingdom Civil Evidence Act 1968 provides for the penalty privilege as follows:

14 Privilege against incrimination of self or spouse or civil partner

- (1) The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would

334 378 US 52 at 55 (1964). See also the Australian Law Reform Commission, above at [18.5]–[18.8] which concluded that the prevailing view in Australia is that the privilege is based on the protection of individual human rights and protects “personal freedom, privacy and dignity” from the power of the state.

tend to expose that person to proceedings for an offence or *for the recovery of a penalty*—

- (a) shall apply only as regards criminal offences under the law of any part of the United Kingdom *and penalties provided for by such law*; ...

6.75 In favour of abolition of the privilege, in our 1996 discussion paper we quoted Murphy J's minority opinion in *Pyneboard*:³³⁵

[i]t is an absurd state of the law if a witness, in a civil or criminal trial, can lawfully refuse to answer because the answer may tend to expose him or her to ... a civil action for penalties, but may not refuse if the exposure is to some other civil loss, such as an action for damages, even punitive damages. In so far as such absurdity has been introduced or maintained by judicial decision ... it can and should be erased by judicial decision. Whatever their standing in judicial proceedings, I see no reason for recognizing such privileges outside judicial proceedings.

6.76 This view echoes the one that led the Law Commission to change its view and recommend abrogation of the penalty privilege. That is, if there is justification for the privilege existing for pure "penalties" imposed under civil law, then there should be equal justification for it applying to other civil orders which may have a punitive effect. Existence of such a privilege would seriously impede the ability of plaintiffs to make out their case in a wide range of civil proceedings.

6.77 This argument is significant in the regulatory context of civil pecuniary penalties. To enable persons to avoid providing information or answering questions on the basis of the penalty privilege would hinder enforcement bodies in obtaining compliance and punishing breaches. We return to this point below.

"Penalty"

6.78 First, however, we query the suggestion that a distinction cannot be made on the basis of the nature of the order involved. While it may be true that, historically, the privilege has not been confined to pure monetary penalties,³³⁶ it does not follow that this must be the approach of a new statutory iteration of the privilege.

6.79 The majority of the HCA in *Rich* raised three objections to reliance on a distinction based on whether an order is "punitive" or "protective":³³⁷

- First, neither the purpose which an applicant may have in seeking relief, nor the effects on persons other than the defendant of obtaining that relief

335 *Pyneboard Pty Ltd v Trade Practices Commission*, above n 326 at 346.

336 *Rich v Australian Securities Investment Commission*, above n 328 at [26].

337 *Rich v Australian Securities Investment Commission*, above n 328 at [31]–[33]. In doing so, the Court overruled the decision the Federal Court in *Australian Securities Commission v Kippe* (1996) 67 FCR 499, 137 ALR 423: at [38].

bears upon whether the proceedings expose the defendant to penalties. The impact of a disqualification order on the defendant himself or herself was to be determinative.

- Secondly, the distinction between “punitive” and “protective” proceedings or orders was at best elusive. This is illustrated by the fact that in criminal sentencing account must be taken of the need to protect society, deter both the offender and others, to exact retribution and to promote reform.
- Thirdly, such a distinction was inconsistent with the principles revealed by the case law on the matter.

6.80 Although the High Court was of this view, we consider that it is possible to distinguish validly between the types of orders contained in many of the regulatory schemes dealt with in this review. With limited exceptions, the monetary civil pecuniary penalties under review have a primarily and almost solely punitive function. They seek to deter breaches and promote compliance by the threat of punishment. Management bans, licence revocation and other similar orders have a punitive impact on the recipient but they serve an additional purpose. They are also aimed at protecting others from harm arising from future breaches. A policy argument can be made that this additional aim of protection justifies the greater compromise of the defendant’s rights.

6.81 This distinction is now made in the Corporations Act 2001 (Cth). Section 1349 provides that the privilege against exposure to penalty does not apply in proceedings relating to a disqualification order.³³⁸ This approach was taken because of concerns that application of the privilege to investigation of and proceedings for banning orders would severely limit the effectiveness of Australian Securities and Investments Commission’s power to conduct a hearing to determine whether a banning order should be made.³³⁹ However, the Act does not abrogate the privilege in relation to pecuniary penalty orders.

338 It is also abrogated in relation to various proceedings for declarations, banning, suspension or cancellation orders, requirement to give an undertakings, etc under the Act. Section 1349(2) of the Corporations Act 2001 (Cth) provides that subsection (1) applies whether or not the person is a defendant in, or a party to, the proceeding or any other proceeding.

339 T Middleton “The Privilege against Self-Incrimination, the Penalty Privilege and Legal Professional Privilege under the Laws Governing ASIC, APRA, the ACCC and ATO–Suggested Reforms” (2008) 30 Aust Bar Rev 282 at 314.

Conclusion

- 6.82 Notwithstanding the Commission's previous position in its 1999 Evidence report, the civil pecuniary penalties falling under this review are growing in number and they carry very significant maximum penalties. There was no direct consideration of the nature of these penalties in the preliminary paper or reports on the Evidence project. Given their growing popularity, we think there is a strong argument for reconsideration of the penalty privilege in this context.
- 6.83 This is not to say that the privilege should be given full effect in civil pecuniary penalty regimes. Instead, the question is whether the privilege should be treated in the same manner as the privilege against self-incrimination. A number of existing regimes remove the protection offered by the privilege against self-incrimination. Removal in those regimes will have been considered a justified and proportionate breach of NZBORA. It may have been warranted in recognition of the policy imperatives of the particular regulatory schemes.
- 6.84 However, removal of the privilege is usually accompanied by restrictions on the subsequent use of the information. Usually this is in the form of a "use immunity" which prevents answers to questions and/or information supplied from being admitted into evidence against that person in subsequent proceedings.³⁴⁰ Less commonly there is provision for a "derivative use immunity" which extends also to preventing admission of evidence obtained as a result of further inquiries made on the basis of the answers given/information supplied. These immunities give recognition to NZBORA.
- 6.85 We anticipate that enforcement bodies would hold considerable concerns that the protection afforded by the penalty privilege would significantly diminish their ability to obtain compliance and punish breaches of their legislation. This point has been argued forcefully in Australia. It has been claimed that the application of the privilege to civil pecuniary penalty proceedings will have a "profound effect on civil penalty proceedings" and that, along with other procedural decisions made by Australian courts in those proceedings, it will "rapidly [diminish]" their utility as a remedy.³⁴¹
- 6.86 As noted, it is not clear that the letter of NZBORA requires: (a) the protection of the penalty privilege, or (b) equivalent immunities in the case of civil pecuniary penalties. But there is certainly an argument that recognition of

340 Except (usually) in proceedings for perjury.

341 See P Spender "Negotiating the Third way: Developing Effective Process in Civil Penalty Litigation" (2008) 26 C&SLJ 249 at 249, 253; V Comino "Effective Regulation by the Australian Securities and Investment Commission: The Civil Penalty Problem" (2009) 33 MULR 802 at 819, and T Middleton "The Privilege against Self-Incrimination, the Penalty Privilege and Legal Professional Privilege under the Laws Governing ASIC, APRA, the ACCC and ATO—Suggested Reforms" (2008) 30 Aust Bar Rev 282.

the privilege in the context of civil pecuniary penalties would better reflect the balance between fairness and regulatory effectiveness. Should, then, the penalty privilege be dealt with in the same way as the privilege against self-incrimination?

Q7 Should civil pecuniary penalty statutes recognise a privilege against self-exposure to a non-criminal penalty?

DOUBLE JEOPARDY

6.87 Some statutes contain parallel criminal sanctions and civil pecuniary penalties, which are the same in all respects except for the requirement of mens rea for the criminal offence. For example under the Hazardous Substances and New Organisms Act 2001 (HSNO Act) a person could be convicted of knowingly importing a new organism into New Zealand under s 109; and be liable for a civil pecuniary penalty for importing a new organism into New Zealand (for which no mental element is required) under s 124G. It may also be possible under some statutes for a single course of conduct to contravene numerous civil pecuniary penalty provisions. Both of these scenarios raise the need to consider rules that protect defendants from double jeopardy.

6.88 The term double jeopardy refers to the concept, expressed by Black J in *Green v United States*, that:³⁴²

[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continual state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

6.89 The concept is more immediately associated with the criminal law, but it has arisen for consideration in respect of non-criminal remedies and proceedings.³⁴³ Given the punitive nature of civil pecuniary penalties, we suggest that the principles of double jeopardy require consideration in their design. Some existing civil pecuniary penalty statutes deal with such issues. However at present they take a variety of approaches. Some are fairly comprehensive but others are silent or ambiguous on various points. This can lead to conceptual confusion and a lack of certainty for both enforcement bodies and defendants.

342 *Green v United States* (1957) 355 US 184 at 187–188.

343 These issues have also briefly been raised in some penalty setting cases under the Commerce Act 1986: see for example *Commerce Commission v Ophthalmological Society of NZ Inc* [2004] 3 NZLR 689 (HC); *Commerce Commission v Wrightson NMA Ltd* (1994) 6 TCLR 279 (HC) at 285; *Commerce Commission v Accent Footwear Ltd* (1993) 5 TCLR 448 (HC) at 451.

6.90 The Commission suggests that civil pecuniary penalty statutes should state clearly how the risk of double jeopardy is to be addressed. We consider the following considerations are relevant:

- the need to pay proper consideration to the underlying rationales for the rules against double jeopardy;
- the need to avoid punishing the same conduct twice;
- the need to allow regulators some flexibility as to the enforcement route they take.

The rule against double jeopardy

6.91 The principle of double jeopardy is expressed in s 26(2) of NZBORA which provides:

No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

6.92 Section 26(2) makes it clear that the rule against double jeopardy prohibits not only double punishment, but also protects individuals from repeated attempts by the State to prosecute them for the same offence.³⁴⁴ Aspects of the rule are also expressed in s 10(4) of the Crimes Act 1961 which provides that “no one shall be liable ... to be punished twice in respect of the same offence.” This includes two different offences that contain the same or substantially the same elements.³⁴⁵

344 Kirby J emphasised in *Pearce v R* (1998) 194 CLR 610 that a person is entitled to protection from both the risk of double punishment and from vexation by repeated or multiple prosecution and trial: at 636–637. The majority in that case also confirmed that the expression “double jeopardy” is employed in relation to several different stages of the criminal justice process: prosecution, conviction and punishment: at 614.

345 See for example *R v Moore* [1974] 1 NZLR 417 (CA) at 422. See also B Robertson (ed) *Adams on Criminal Law* (online looseleaf ed, Brookers) at [CA10.02]. We discuss similarity of offences, compared to the similarity of conduct, further at para 6.119.

6.93 Double punishment under the criminal law was discussed by the High Court of Australia in *Pearce v R*.³⁴⁶ In seeking to proscribe a range of acts, legislatures may (intentionally or otherwise) create offences with overlapping elements. There are instances where an offender's conduct will fall into that area of overlap. But punishing them twice on that basis amounts to "punish[ing] offenders according to the accidents of legislative history, rather than according to their just deserts."³⁴⁷ Accordingly:

To the extent to which two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are common.

6.94 There are a number of commonly advanced justifications for the rules against double jeopardy, which are encompassed by Black J's statement above. First, double jeopardy rules protect the harassment of an accused by repeated prosecution for the same matter. Once a defendant has been acquitted, this can come as a great relief and brings an end to a difficult and trying process. Reopening that process is likely to be at great cost to the defendant and may also cause distress to third parties such as family, witnesses and the alleged victim.³⁴⁸

6.95 Secondly, the rule against double jeopardy can promote confidence in the administration of justice because it prevents harassment and brings finality.³⁴⁹ Thirdly, if we accept that in exceptional cases a defendant who is factually innocent is found guilty, then allowing repeated trials necessarily increases the likelihood of wrongful conviction.³⁵⁰ Finally, allowing repeated prosecutions might act as a disincentive to the Crown carrying out a thorough and efficient investigation the first time around.³⁵¹

346 *Pearce v R* (1998) 194 CLR 610.

347 Above, at 623.

348 Law Commission *Acquittal Following Perversion of the Course of Justice* (NZLC R70, Wellington, 2001) at [12]–[13].

349 Above, at [14].

350 Above, at [15].

351 Above, at [16].

Double jeopardy and civil pecuniary penalties

- 6.96 Courts have found that s 26(2) of NZBORA applies only to criminal proceedings relating to an offence against the law.³⁵² However it is also accepted that this fact does not preclude the underlying principles being invoked in respect of conventional civil proceedings.³⁵³ As Thomas J put it, double jeopardy and double punishment remain an affront to common notions of fairness.³⁵⁴ In *Daniels v Thompson* a majority of the Court of Appeal applied the rule against double jeopardy to bar an award of exemplary damages where punishment has already been exacted under the criminal law and to provide grounds for striking out a claim for exemplary damages as an abuse of process where a defendant has been acquitted of essentially the same facts.³⁵⁵ The nature of an award of exemplary damages, being to punish and deter, was central to the Court's decision.³⁵⁶ The High Court has also considered the potential for double punishment when setting civil pecuniary penalties under the Commerce Act 1986.³⁵⁷
- 6.97 Given their punitive nature, the issue of double jeopardy is clearly relevant to civil pecuniary penalties. We would contend that the issue is of greater significance in this context than where exemplary damages are concerned because of the public – State-imposed – nature of civil pecuniary penalties. Breach of the principle can arise in a number of ways: a regulator may commence civil proceedings and then also commence criminal proceedings; criminal proceedings may be brought unsuccessfully and a regulator may then seek a civil pecuniary penalty in respect of the same conduct; or a regulator may bring successful proceedings in one jurisdiction and still seek a penalty in the other. There may also be scope for the imposition of more than one civil pecuniary penalty or of other forms of civil remedy such as management bans or compensation orders.

352 *Daniels v Thompson* [1998] 3 NZLR 22 (CA) at 33.

353 Above at 57.

354 Above at 57–58.

355 Above n 352. Compare Accident Compensation Act 2001, s 319(2) which provides that the court may award exemplary damages in spite of a person being charged with criminal offence for conduct resulting in personal injury under that Act.

356 *Daniels v Thompson*, above n 352 at 46.

357 See *Commerce Commission v Ophthalmological Society of New Zealand Inc* [2004] 3 NZLR 689 at [44]; *Commerce Commission v Wrightson NMA Ltd* (1994) 6 TCLR 279 at 285; *Commerce Commission v Accent Footwear Ltd* (1993) 5 TCLR 448 at 451. It was also considered by Judge Aitken in the District Court when imposing statutory damages under the Credit Contracts and Consumer Finance Act 2003: *Commerce Commission v Galistair Enterprises Ltd* DC Auckland CR-2007-004-4009, 6 December 2007.

- 6.98 Below, we consider how civil pecuniary penalty statutes do or should deal with these situations. Possible approaches include statutory bars on the taking of one set of proceeding after another has been commenced or completed; reliance on judicial discretion to stay proceedings for abuse of court process; protection against the use of evidence given in one proceeding being used in another; and/or greater guidance for courts when setting penalties.

(a) Commencing criminal proceedings while civil pecuniary penalty proceedings are ongoing

- 6.99 This scenario could arise where an allegedly criminal element to the offending, or evidence establishing such an element, has come to the attention of the regulator after civil pecuniary penalty proceedings have been commenced. In those circumstances, there appears to be a strong argument for the regulator being able to commence criminal proceedings. Allowing this also gives regulators flexibility, so that once they have opted for the civil pecuniary penalty enforcement track, they are not prevented from taking later criminal proceedings.³⁵⁸ The question is what should happen to the existing civil proceedings.
- 6.100 At present most Acts are silent on this question. However, the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (AML/CFT Act) and HSNO Act both provide that criminal proceedings may be commenced provided that any existing civil pecuniary penalty proceedings are stayed.³⁵⁹ From a double jeopardy perspective there is a question as to whether a defendant should be required to defend contemporaneous efforts by the State to pursue a penalty against him or her. This seems objectionable. However, aspects of the design of a number of civil pecuniary penalty statutes (which we endorse in this paper) mean that the situation can be complex. Under some statutes, third parties can rely on a “declaration of contravention” – an order the Court must make if a pecuniary penalty has been applied for and a breach made out. Such a declaration can be relied upon in compensation proceedings. The staying of the pecuniary penalty

358 Australian Law Reform Commission *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (R95, Sydney, 2002) at [11.49].

359 Section 73 of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 provides: “(1) Criminal proceedings for an offence under this Part may be commenced against a person in relation to particular conduct whether or not proceedings for a civil penalty under this Part have been commenced against the person in relation to the same or substantially the same conduct. (2) Proceedings under this Part for a civil penalty against a person in relation to particular conduct are stayed if criminal proceedings against the person are or have been commenced for an offence under this Part in relation to the same or substantially the same conduct. ...”
Section 124F of Hazardous Substances and New Organisms Act 1996 provides: “(1) Criminal proceedings under this Act may be started against a person whether or not proceedings for an order under s 124B have been started against the person for the same act or omission or substantially the same act or omission in respect of which the criminal proceedings have been started. (2) Uncompleted proceedings for an order under s 124B must be stayed if criminal proceedings are started or have already been started against the person for the same act or omission or substantially the same act or omission in respect of which the order is sought.”

proceedings may delay the Court making a declaration of contravention and so delay applications for compensation.³⁶⁰

- 6.101 Under its inherent jurisdiction, the High Court can already stay civil proceedings when there are pending criminal proceedings. In *Daniel v Thompson* the majority of the Court of Appeal found that where a criminal prosecution had been commenced or was likely, it would be appropriate to stay proceedings for exemplary damages to prevent an abuse of process.³⁶¹ It may also be appropriate to grant a stay in circumstances where the defendant persuades the Court that his or her position in the criminal trial would be prejudiced. This could arise, for example, where the pretrial civil procedures would force them to reveal their line of defence, thereby depriving them of their right to silence. The criteria for granting such a stay were set out in *Wells v Lewis*, where the High Court noted that it was important to balance the proper concerns of both litigants.³⁶²
- 6.102 It may be that the question of staying civil pecuniary penalty proceedings where criminal proceedings are subsequently commenced should be left to the High Court on this basis. However, we question whether, in contrast to standard civil proceedings, the fact that civil pecuniary penalty proceedings and criminal proceedings under a particular regulatory regime are pursued and litigated by the same complainant – the State – warrants a statutory direction that the existing civil proceedings must be stayed, as provided for under the AML/CFT Act and HSNO Act. Our initial view is that it does. We return to the question of how statutes should deal with lifting a stay of proceedings at paragraph 6.113 below.

Q8 Should a regulator be able to commence criminal proceedings if civil pecuniary penalty proceedings concerning the same conduct have already been started?

360 For example, under the Securities Act 1978 and the Takeovers Act 1993. Third parties will not require a declaration of contravention in order to seek compensation, but it serves as a useful order they can “piggyback” on so they do not have to re-establish the breach.

361 *Daniels v Thompson*, above n 352 at 52. A majority of the Court said: “If a prosecution has been commenced, clearly it would be an abuse of process to pursue a civil claim when there is a likelihood that its very basis will disappear. It would also be quite inappropriate to pursue a civil action when the same issues were being ventilated in the criminal Court.” Section 405 of the Crimes Act 1961 states that no civil remedy shall be suspended by reason that such act or omission amounts to an offence. However (as noted by the Court at 53) this does not prohibit a civil remedy being suspended where the stay is on other grounds than the criminal nature of the conduct impugned (for example to protect against an abuse of court process).

362 *Wells v Lewis* (1990) 3 PRNZ 454 (HC). Factors which would indicate that a stay would be the proper course would include: (a) The fact that the civil proceedings were due very shortly before the criminal proceedings; (b) a real danger that disclosure of the defence case might lead to prosecution witnesses fabricating evidence; (c) a real danger of publicity which might influence jurors. In *Wells v Lewis*, the Court found that the plaintiff’s trading position meant that she would be severely prejudiced by a stay and that the defendants had not established that the plaintiff’s ordinary rights should be interfered with. See generally R Saunders “To Stay or not to Stay: Concurrent Civil and Criminal Proceedings” [2001] LJ 57.

Q9 Should civil pecuniary penalty statutes require that, if criminal proceedings are commenced, the civil pecuniary penalty proceedings must be stayed?

6.103 In addition to providing for the stay of civil pecuniary penalty provisions, the AML/CFT Act provides:

75 Restriction on use of evidence given in civil penalty proceedings

- (1) Evidence of information given, or evidence of production of documents, by a person is not admissible in criminal proceedings against the person for an offence under this Part or any other enactment if—
 - (a) the person previously gave the evidence or produced the documents in civil penalty proceedings under this Part against him or her, whether or not a civil penalty was imposed; and
 - (b) the proceedings for the civil penalty related to conduct that was the same or substantially the same as the conduct constituting the offence.

6.104 Such a provision provides protection so that evidence adduced under civil procedural rules cannot be used in later criminal proceedings, which operate under more restricted rules of evidence. Should such a provision be included in all civil pecuniary penalty statutes?

6.105 A similar provision is found in s 1317Q of the Corporations Act 2001 (Cth). The Australian Law Reform Commission (ALRC) noted opposition to that provision on the basis that once evidence has been given by a person in proceedings for a civil pecuniary penalty order against that person, the evidence is forever inadmissible in criminal proceedings against the same person.³⁶³ This requires regulators to be mindful when obtaining and using evidence in civil pecuniary penalty investigations and proceedings, so as not to preclude or undermine a later criminal proceeding. The ALRC has also observed that there is nothing preventing “derivative use” of that evidence, ie, allowing the regulator to adduce, in a criminal trial, evidence flowing from a chain of inquiry started by evidence given in civil pecuniary penalty proceedings.³⁶⁴

Q10 Should there be a statutory restriction on the use in criminal proceedings of evidence adduced in civil pecuniary penalty proceedings?

(b) Commencing civil pecuniary penalty proceedings after criminal proceedings have failed or been withdrawn

6.106 These scenarios are currently *possible* under a number of statutes but they are not explicitly addressed. Because of the lower standard of proof employed

363 Australian Law Reform Commission *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (R95, Sydney, 2002) at [11.80].

364 Above, at [11.82].

in civil pecuniary penalty proceedings, there may be an obvious attraction to pursuing a civil pecuniary penalty after the Crown has failed to establish the parallel criminal offence beyond reasonable doubt.³⁶⁵ On one hand this clearly can give rise to the impression that regulators are being given “a second bite at the cherry”.³⁶⁶ However, the ability to commence civil pecuniary penalty proceedings in these circumstances was supported by the ALRC, on the basis that the desirability of allowing regulators flexibility outweighs concerns about double jeopardy (subject to clear principles governing the exercise of regulator discretion).³⁶⁷ The ALRC does not draw any distinction between acquittal and withdrawal of prosecution.

- 6.107 As noted above, in *Daniels v Thompson* a majority of the Court of Appeal found that the rule against double jeopardy was grounds for striking out a claim for exemplary damages as an abuse of process where a defendant has been acquitted of an offence on essentially the same facts.³⁶⁸ It may be that courts would take the same approach with civil pecuniary penalty proceedings in these circumstances. However, again there is a question whether civil pecuniary penalty statutes should include a statutory bar on such proceedings. Once a regulator has failed on the criminal enforcement and investigative path, should they be able to commence civil pecuniary penalty proceedings?
- 6.108 It seems to us that the situation is clearer in the case of the withdrawal of criminal proceedings. Such proceedings may be withdrawn for any number of reasons. The need for flexibility noted by the ALRC, we suggest, supports regulators being able to commence civil pecuniary penalty proceedings in those circumstances.

Q11 Should a regulator be able to commence civil pecuniary penalty proceedings if criminal proceedings have failed or been withdrawn?

(c) Commencing criminal proceedings after a civil pecuniary penalty has been imposed

- 6.109 Under some civil pecuniary penalty statutes it is possible to be subjected to a civil pecuniary penalty and a prison term for the same conduct. Some allow the imposition of both a civil pecuniary penalty and imprisonment *and/or*

365 The reverse scenario – ie, prosecuting a parallel criminal offence where the civil penalty has failed – is possible but unlikely, given a higher standard of proof needs to be reached for the criminal offence.

366 Australian Law Reform Commission, above n 363 at [11.64].

367 Australian Law Reform Commission above n 363 at [11.66]–[11.67] and recs [11–2] and [11–5]. See also Attorney-General’s Department (Criminal Justice Division) *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (April 2004 ed).

368 *Daniels v Thompson* [1998] 3 NZLR 22 (CA). But, note that Parliament effectively overruled that finding in relation to personal injury claims: see Accident Compensation Act 2001, s 319(2).

criminal fine for the same conduct. In contrast the AML/CFT Act contains a comprehensive “one penalty only” provision in s 74(1).³⁶⁹ Under that Act, after successful civil pecuniary penalty proceedings, criminal proceedings are barred where the proceedings would relate to “the same or substantially the same conduct”. Arguably this approach gives appropriate recognition to the punitive reality of civil pecuniary penalties.

- 6.110 However, as for scenario (a) above, one argument in favour of allowing criminal proceedings after a civil pecuniary penalty has been imposed is where, initially, there is evidence that would only meet the civil standard, but the regulator subsequently obtains clear evidence of criminality, sufficient to bring a prosecution. The prosecuting authority may consider that the level of criminality involved warrants a term of imprisonment and/or criminal conviction in addition to a pecuniary penalty. It is relevant that a term of imprisonment may be sought not only for its punitive but also its protective function – in this way it serves a purpose that cannot be supplied by a civil pecuniary penalty.
- 6.111 A number of Australian Acts allow the commencement of criminal proceedings after successful civil pecuniary penalty proceedings.³⁷⁰ Australian Guidelines supported this approach, as did the ALRC on the basis that it gives greater flexibility to regulators; retains the ability for truly criminal behaviour to be punished by criminal law; and allows civil orders such as injunctions and disqualification orders to stop offending behaviour quickly, without preventing later criminal proceedings.³⁷¹
- 6.112 Our initial view is that there may be cases where imprisonment and criminal conviction might validly be sought for conduct which has already resulted in a civil pecuniary penalty. Where there is a risk of abuse or oppressiveness, the court can exercise its existing power to strike out the second proceedings. In these circumstances there may be no need for a statutory bar on proceedings. However, as we discuss above, there may be a need to limit the use to which evidence given in the civil proceedings may be put in the later criminal proceedings.

369 Anti-Money Laundering and Countering Financing of Terrorism Act 2009, s 74(1): “If civil penalty or criminal proceedings under this Part are brought against a person in relation to particular conduct, a court may not impose a penalty (whether civil or criminal) on the person if a court has already imposed a penalty under this Part in proceedings relating to the same or substantially the same conduct.”

370 See Corporations Act 2001 (Cth), s 1317P, which states that criminal proceedings may be started against a person for conduct that is substantially the same as conduct constituting a contravention of a civil penalty provision, regardless of whether a pecuniary penalty order has been made against that person. Also see Environment Protection and Biodiversity Conservation Act 1999 (Cth), s 48C and Commonwealth Authorities and Companies Act 1997 (Cth), sch 2.

371 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, above n 363 at [11.4.3] and Attorney-General’s Department (Criminal Justice Division) *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (April 2004 ed).

- 6.113 The nature of a criminal fine, however, is arguably not so different from a pecuniary penalty. In our view, allowing the imposition of one monetary penalty after another is harder to justify. We are therefore attracted to a formulation whereby a person cannot be ordered to pay a criminal fine after a pecuniary penalty has been imposed for the same conduct.³⁷²

Q12 Are there any circumstances in which a regulator should be able to commence criminal proceedings if a civil pecuniary penalty has already been imposed?

(d) Commencing or restarting civil pecuniary penalty proceedings after a criminal sanction has been imposed

- 6.114 This scenario can arise both where civil pecuniary penalty proceedings are commenced after the imposition of a criminal sanction, but also where civil pecuniary penalty proceedings have been stayed pending the outcome of the criminal action. This appears to be possible under the HSNO Act which provides for a stay of civil pecuniary penalty proceedings, but is silent on what should happen after the criminal proceedings have been completed.³⁷³
- 6.115 We cannot think of any circumstances where it should be permissible for a regulator to bring civil pecuniary penalty proceedings after a criminal sanction has already been imposed. To do so might be justifiable if the civil pecuniary penalty serves some auxiliary, non-punitive purpose such as to compensate or rectify damage. However, even in those few narrow cases where civil pecuniary penalty regimes might allow this,³⁷⁴ compensation could be obtained through other means.

³⁷² See for example Overseas Investment Act 2005, s 48(3), Takeovers Act 1993, s 44X, Securities Act 1978, s 65F, Securities Markets Act 1988, s 43ZC.

³⁷³ Hazardous Substances and New Organisms Act 2001, s 124F.

³⁷⁴ Pecuniary penalties may be paid to the Crown or “any other person specified by the Court” under the Anti-Money Laundering and Countering Financial of Terrorism Act 2009, s 90, Overseas Investment Act 2005, s 48(1) and Unsolicited Electronic Messages Act 2007, s 45. In other instances, the court’s discretion to make an additional compensatory or remedial order is triggered by the pecuniary penalty order or an application therefor: Financial Advisers Act 2008, s 137L, Financial Service Providers (Registration and Dispute Resolution) Act 2008, s 79B, and Hazardous Substances and New Organisms Act 1996, s 124D.

- 6.116 A bar on taking civil pecuniary penalties after criminal conviction was the preferred approach put forth in the Ministry of Justice draft guidelines. Australian guidelines also supported this position.³⁷⁵ Where civil proceedings have been stayed, the Australian guidelines referred to the Environment Protection and Biodiversity Conservation Act 1999 (Cth) as a model, which states that the stayed proceedings “may be resumed if the person is not convicted of the offence. Otherwise, the proceedings for the order are dismissed.”³⁷⁶

Q13 Should all statutes containing criminal offences and civil pecuniary penalties state that no person may be liable for a civil pecuniary penalty and a criminal sanction for the same conduct?

Q14 Are there any circumstances in which a regulator should be able to commence civil pecuniary penalties proceedings if a criminal sanction (whether a fine or imprisonment) has already been imposed?

Imposition of multiple civil pecuniary penalties

- 6.117 Double jeopardy concerns also arise where one act or course of conduct could lead to the imposition of a number of civil pecuniary penalties. A number of statutes envisage this and state that only one penalty may be imposed in these cases, although proceedings may be brought in respect of any one or more of the contraventions. For example, Part 2 of the Commerce Act 1986 deals with restrictive trade practices. There is a general prohibition in s 27 on entering into contracts and arrangements that substantially lessen competition. An arrangement between two persons to enter into price fixing would breach both s 27 and the express provision against price fixing (s 30). The Act makes it clear that the regulator can bring proceedings in respect of either or both contravention, but only one penalty can be imposed.³⁷⁷

Where conduct by any person constitutes a contravention of 2 or more provisions of Part 2, proceedings may be instituted under this Act against that person in relation to the contravention of any 1 or more of the provisions; but no person shall be liable to more than 1 pecuniary penalty under this section in respect of the same conduct.

375 Ministry of Justice *Draft Civil Penalties Guidelines Consultation Paper* (Wellington 2007); Attorney-General's Department *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (December 2007 ed) at 67–69 and Environment Protection and Biodiversity Conservation Act 1999 (Cth), s 486A.

376 Environment Protection and Biodiversity Conservation Act 1999 (Cth), s 486B(2).

377 Commerce Act 1986, s 80(6). See also Dairy Industry Restructuring Act 2001, s 144(5) and Telecommunications Act 2001, s 156L(6).

- 6.118 The Law Commission supports this approach and suggests such a provision should be included in any statute where it is possible for the same conduct to breach a number of different penalty provisions. The Ministry of Justice draft guidelines, 2007 Australian guidelines and Australian Law Reform Commission report all favour the inclusion of such a provision in civil pecuniary penalty statutes.³⁷⁸ This should also be taken into account if the same conduct can lead to penalties being imposed under different statutes.³⁷⁹ We note, however, problems around determining what is “the same conduct”, and discuss this below.
- 6.119 Some statutes also prohibit imposing more than one management ban for the same conduct.³⁸⁰ However a number of regimes clearly authorise making more than one civil order (for example a pecuniary penalty order, compensatory order and banning order) for the same conduct.³⁸¹ Section 48 of the Unsolicited Electronic Messages Act 2008 provides that a person may be liable for a pecuniary penalty, compensation *and* damages for the same civil liability event, but the Court must have regard to whether the person has already had another civil liability remedy imposed for the same event.³⁸² We think it is appropriate not to allow a person to be subject to more than one management ban for the same conduct. However, there may be cases where it is appropriate to specify in a statute that a management ban and a civil pecuniary penalty can be imposed for the same conduct on the grounds that management bans also serve a protective function.³⁸³ However, management bans can have serious financial consequences on the individual, and there may be a case for requiring the Court to take this into account when determining the quantum of a pecuniary penalty for the same conduct.³⁸⁴

378 Ministry of Justice, above n 375 appendix A; Attorney-General’s Department, above n 375 at 70–71 (suggesting such a provision be included even though it has not traditionally been included in Commonwealth legislation thus far); Australian Law Reform Commission, above n 363 at [11.105] and rec [11-4].

379 See for example Securities Markets Act 1988, s 43J: only one management ban may be imposed for the same conduct, including where the provisions are in separate statutes. See also Securities Trustees and Statutory Supervisors Act 2011, where contravention of a licensee obligation could occur under that Act as well as one of a number of other Acts containing these obligations: s 4, definition of “licensee obligation”.

380 Securities Act 1978, s 60D, Securities Markets Act 1988, s 43J, Takeovers Act 1993, s 44I.

381 For example, Securities Act 1978, s 57B, Securities Markets Act 1988, s 42ZG, Takeovers Act 1993, s 43.

382 Unsolicited Electronic Messages Act 2007, s 48(2). See also Commerce Act 1986, s 82A: the Court must take into account whether a civil pecuniary penalty has been ordered when deciding whether to impose exemplary damages for a breach of part 2.

383 See for example Securities Act 1978, s 57B, Securities Markets Act 1988, s 42ZG, Takeovers Act 1993, s 43. See also Australian Law Reform Commission, above n 363 at [27.50] and [27.53].

384 Australian Law Reform Commission, above n 363 at [30.62].

Q15 If the same conduct can contravene multiple civil pecuniary penalty provisions, should the statute provide that proceedings may be brought in respect of any one or more of the contraventions, but that a person cannot be liable for more than one civil pecuniary penalty for the same conduct?

Q16 When imposing penalties, should courts be required to take into account whether a management ban or other civil remedy has been imposed for the same conduct?

What is “the same conduct”?

- 6.120 The orthodox approach to double jeopardy issues in criminal proceedings is to focus on the similarity of the *offences*, rather than whether the two offences sought to be charged arise out of the same *facts*.³⁸⁵ A substantial body of criminal case law has discussed whether multiple offences sought to be charged by the prosecution are sufficiently similar, in whole or in part, for a plea of previous acquittal or conviction under s 358 of the Crimes Act 1961 to succeed.³⁸⁶
- 6.121 By contrast, civil pecuniary penalty statutes focus on the similarity of the *conduct or acts* targeted. Therefore if the imposition of multiple penalties or sanctions are said to be barred by statute, the focus will be on the factual acts, matters or transactions in the particular case.
- 6.122 The position is complex where the regulator seeks a number of separate penalties for a series of related acts or transactions that all took place in a short timeframe. There are likely to be questions around whether these should be characterised as one course of related conduct; or whether each act is a separate contravention. If a penalty was imposed in respect of each separate contravention, would this amount to imposing multiple penalties for

385 *R v Moore* [1974] 1 NZLR 417 (CA); *R v Clarke* [1982] 1 NZLR 654 (CA); B Robertson (ed) *Adams on Criminal Law* (online looseleaf ed, Brookers) at [CA10.01] and [CA358.03].

386 See for example *Rex v Holland* (1914) 33 NZLR 931 (CA) (incitement to resist the police is different from sedition); *Ngaamo v Ministry of Transport* [1987] 1 NZLR 170 (HC) (causing death by reckless driving, and causing death while driving with excess blood alcohol as different offences); *R v Kerr (No 2)* (1988) 4 CRNZ 91 (HC) (assault with a weapon different from assault with intent to commit sexual violation); *Ministry of Transport v Hyndman* [1990] 3 NZLR 480, (1990) 6 CRNZ 148 (HC) (driving with excess blood alcohol a different offence from driving while under the influence of drink or drugs); *R v Brightwell* (1995) 12 CRNZ 642, partially reported at [1995] 2 NZLR 435 (CA) (presenting firearm without lawful excuse different from assault with a weapon); and *Connolly v R* [2010] NZCA 129 at [53] (sexual conduct with consent induced by threats under s 129A(1) of the Crimes Act 1961 different from compelling the provision of commercial sexual services under s 16 of the Prostitution Reform Act 2003). By contrast a sufficient identity of offending was found in *R v Lee* [1973] 1 NZLR 13 (CA) (possession of cannabis and possession of cannabis for sale); *R v Pene* [1982] 2 NZLR 652 (riotous assembly and riotous damage charges supported by essentially similar evidence) and *R v Morgan* [2005] 1 NZLR 791 (CA) (wounding with intent to injure and assault using a knife).

“the same conduct”? This is the formulation currently used by a number of statutes, but other statutes refer to “substantially the same conduct”;³⁸⁷ “the same or substantially the same act or omission”;³⁸⁸ the same “conduct, events, transactions or other matters”³⁸⁹ or the same “contravention”.³⁹⁰ All of these could raise difficult questions of statutory construction.

- 6.123 This was the issue in *Commerce Commission v Accent Footwear*³⁹¹ in respect of multiple civil pecuniary penalties sought for five separate acts relating to resale price maintenance, which occurred within a number of months. The Commission argued that each was a contravening act. The defendant argued that the acts in aggregate amounted to the “practice of resale price maintenance” prohibited by s 37(2), and therefore amounted to the same conduct for which a single penalty should be imposed. Williamson J viewed each as a separate act but took a totality approach drawn from the criminal law, viewing all the contraventions in the round and imposing penalties to reflect the overall position.³⁹²
- 6.124 Given that issues are likely to arise around the similarity or otherwise of the conduct, acts, transactions, etc in issue, we suggest, again, that there is a need for civil pecuniary penalty provisions to be drafted clearly. Thought should be given to whether a series of related acts constitutes “the same conduct” and if so, how this may be expressed in legislation.
- 6.125 An example of a provision that addresses these matters in greater detail (although in respect of criminal offences, not civil pecuniary penalties) is s 214 of the Australian Consumer Law, under the Competition and Consumer Act 2010 (Cth). That provision mitigates the risk of double punishment at penalty setting stage, by limiting the penalty a court may impose where a person is convicted of more than one offence which “appear to the court (i) to have been of the same nature or a substantially similar nature; and (ii) to have occurred on at or about the same time”.³⁹³

387 Anti-Money Laundering and Countering Financing of Terrorism Act 2009, s 73.

388 Hazardous Substances and New Organisms Act 1996, s 124F.

389 Commerce Act 1986, s 79B.

390 Securities Trustees and Statutory Supervisors Act 2011, s 43.

391 (1993) 5 TCLR 448 (HC). See also *TPC v Bata Shoe Co of Australia Pty Ltd* (1980) ATPR 40,161 (Lockhart J).

392 *Commerce Commission v Accent Footwear* above at 452. Williamson J imposed a penalty of \$10,000 for each of the first, fourth and fifth breaches: at 453.

393 Competition and Consumer Act 2010 (Cth), sch 2 (Australian Consumer Law). The former version of this provision (Trade Practices Act 1974 (Cth), s 79(2)) was considered in *Ducret v Colourshot Pty Ltd* (1981) 35 ALR 503 (FCA). Smithers J held that the offences in question would have been committed at “about the same time” under that section if they had occurred within at most three days of each other: at 508–509.

- 6.126 As noted at paragraph 6.52 above, a further issue that may arise is who carries the onus of establishing the similarity of the conduct, acts, contraventions or similar.³⁹⁴

Q17 Should statutes specify in more detail what constitutes “the same conduct” for the purposes of multiple civil pecuniary penalties and criminal sanctions?

Q18 Where there is sufficient similarity of conduct, should this be dealt with through a statutory bar or through guidance for the courts in penalty setting?

The need for enforcement policies

- 6.127 One further matter arises which relates to the issues faced by enforcement bodies when they have parallel criminal offence and civil pecuniary penalties at their disposal. When faced by a suspected breach in those circumstances, enforcement bodies need to determine whether to opt for the commencement of a prosecution or an alternative route, such as civil pecuniary penalty proceedings. In doing so, they will be guided by the Solicitor-General’s *Prosecution Guidelines*.³⁹⁵ There may be concern that the terms of the Guidelines might tend to encourage the use of measures such as civil pecuniary penalties instead of criminal offences. This may be the case particularly in the light of guideline 6.9.13 which states that the availability of any proper alternatives to prosecution should weigh against a decision to prosecute.
- 6.128 Our consultation with enforcement agencies suggests that some operate under, or are in the process of developing, their own enforcement guidelines to ensure consistency and transparency around the factors that will be taken into account when an enforcement decision is made. Such enforcement guidelines or policies will need to be drafted in the light of the Solicitor-General’s Guidelines.
- 6.129 We suggest that the development of such guidelines and policies should be a key response by enforcement agencies armed with a range of sanctions and remedies, such as civil pecuniary penalties. We note that some United Kingdom statutes require this of their regulatory agencies (or, in the absence of a particular agency, the appropriate Secretary of State), particularly where the agency has the power to impose substantial civil penalties itself.³⁹⁶

394 Note that the onus of establishing that s 79(2) of the Trade Practices Act 1974 (Cth) applied was on the defendant: *Ducret v Colourshot Pty Ltd* (1981) 35 ALR 503 (FCA) at 509.

395 Crown Law Office *Prosecution Guidelines* (2010).

396 See for example Identity Cards Act 2006 (UK), s 34. See also the Regulatory Enforcement and Standards Act 2008 (UK), s 63 which requires that regulators publish guidance as to their use of sanctions under that Act.

Transparency will be best achieved by the publication of such policies on enforcement bodies' websites.

Q19 Do you agree that enforcement bodies should develop and publish enforcement guidelines or policies?

INTENTION AND DEFENCES

- 6.130 Civil pecuniary penalty provisions are drafted in very much the same manner as criminal offences. They set out the physical elements of the contravention (for example, failure to comply with a condition of a consent or exemption under the Overseas Investment Act 2005).³⁹⁷ Some also set out certain elements of intention or knowledge that must be established before liability can be imposed. As with criminal offences, the mental elements of civil pecuniary penalties can take different forms. Some are direct, requiring that the defendant knew, or ought reasonably to have known, of the conduct constituting the breach.³⁹⁸ Other provisions imply, by the terms used, that the defendant must act with a degree of awareness and intent. For example, under the Securities Markets Act 1988 “an information insider of a public issuer must not *advise or encourage* another person to trade or hold securities of the public issuer”.³⁹⁹ The use of active terms like “advise” and “encourage” may impute a requirement of awareness and intent, on behalf of the defendant, to carry out the prohibited conduct.⁴⁰⁰ The great majority, like many criminal offences, are silent as to fault. As a result it is assumed that they are to be treated as strict or absolute liability contraventions.
- 6.131 All of this mirrors the way that criminal offences are drafted. However, whereas the interpretation and application of criminal offences are guided by well-established rules and presumptions, the civil pecuniary penalty is a relatively novel creation. There is a question whether the rules and presumptions that apply to intent for criminal offences apply equally to civil pecuniary penalties. We consider this in the following paragraphs.
- 6.132 The rationale for requiring proof of mens rea for criminal offences is based on the inherently punitive nature of the criminal law, which punishes and condemns certain conduct and can inhibit personal liberty. Particular moral and social stigma accompanies a criminal conviction. Generally it is thought

397 Overseas Investment Act 2005, s 48(1)(d).

398 Securities Markets Act 1988, ss 8D, 11, 11B and 22–27 and Takeovers Act 1993, s 33M(c). The latter is supplemented by s 41, under which the court can excuse a contravention of the takeovers code if it is satisfied that it ought to be excused, having regard to factors going to the defendant's intent and level of control over the contravention.

399 Securities Markets Act 1988, s 8E.

400 See for example A van Schie *Insider Trading, Nominee Disclosure and Futures Dealing: An Analysis of the Securities Amendment Act 1988* (Butterworths, Wellington, 1994) at 53.

only just to impose such a sanction on persons who are morally responsible for their acts – persons whose subjective mental state, as well as their conduct, is blameworthy. The significance of mens rea is reflected in the stringent requirements for proving it. Importantly for our purposes, the courts also presume that Parliament intends all serious criminal offences to be imposed on the basis of mens rea, unless there is something sufficiently weighty to displace that presumption. The requirement of mens rea, then, is the rule.

6.133 Strict and absolute liability offences are exceptions to the rule. The LAC Guidelines state that strict liability offences may be appropriate where:⁴⁰¹

- The offence involves the protection of the public from those undertaking risk-creating activities; and
- The threat of criminal liability supplies a motive for persons in those risk-generating activities to adopt precautions, which might otherwise not be taken, in order to ensure that mishaps and errors are eliminated; and
- The defendant is best placed to establish absence of fault because of matters peculiarly or primarily within the defendant's knowledge.

6.134 Strict liability involves the prosecution having to prove only the physical elements of the contravention.⁴⁰² The defendant can exonerate him or herself either through establishing a specific statutory defence or through the common law defence of total absence of fault, which the defendant must prove on the balance of probabilities.⁴⁰³

6.135 In the case of absolute liability offences, legal responsibility is imposed in the absence of any fault or moral blameworthiness. The prosecution is only required to prove the physical elements of the offence and, even if the defendant is completely free of fault, this will not constitute a defence. The LAC Guidelines state that there is very limited scope for the creation of new absolute liability offences in New Zealand. They go on:

Where an offence provision is ambiguous as to its fault requirements, the court will rarely hold that it imposes absolute liability and only where there is clear legislative indication of Parliamentary intent. The use of an absolute liability offence should be contemplated only if -

- (a) there is an overwhelming national interest in using the criminal law as an incentive to prevent certain behaviour occurring, regardless of fault; and
- (b) there is a cogent reason in the particular circumstances for precluding a defence of total absence of fault (this will be rare).

401 Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (Wellington, 2001) at chapter 12.

402 *Colonial Mutual Life Assurance Society Ltd v Wilson Neill Ltd* [1994] 2 NZLR 152 (CA) at 161.

403 *Civil Aviation Department v MacKenzie* [1983] NZLR 78 (CA) at 81 and *Millar v Ministry of Transport* [1986] 1 NZLR 660 (CA) at 668.

- 6.136 A court will only find absolute liability where the statute imposes it in clear terms or by necessary implication.
- 6.137 To what extent do these rules and presumptions apply to civil pecuniary penalties? On one hand, since they have been drafted in the same manner as criminal offences, it might be thought that the same rules have been borne in mind in their creation. However, civil pecuniary penalties are imposed through civil proceedings on the balance of probabilities and do not result in criminal conviction. To what extent might this have an impact on their interpretation when it comes to the extent or existence of a required mental element?

Civil pecuniary penalties requiring mens rea

- 6.138 Should all intentional or knowing breaches of the law be punished by criminal conviction? Mens rea is a hallmark of the criminal law.⁴⁰⁴ It illustrates the criminal law's subjective approach to fault and its focus on the defendant's state of mind. Where parallel criminal and civil pecuniary penalty provisions exist, this is commonly the distinguishing factor: proof of mens rea is the threshold for criminal liability.⁴⁰⁵ Indeed it might be said that knowing or intentional breaches of a legal requirement are what *defines* criminal behaviour. If this is correct, might there be an argument that civil pecuniary penalties should not be used for knowing or intentional breaches?
- 6.139 Alternatively, should there be no bar on civil pecuniary penalty provisions containing a mens rea element? In the criminal law, mens rea provides procedural protection for defendants. It demands greater certainty as to the defendant's liability and so reduces the likelihood that criminal punishment will be imposed on the morally blameless. The criminal law demands proof of mens rea because of the high stakes that are involved and because of the inequality of the parties involved. Where civil pecuniary penalties require the establishment of some element of knowledge or intention, such a requirement plays a similar role.⁴⁰⁶ Given that civil pecuniary penalties can result in very high monetary penalties, this may be desirable.

404 Australian Law Reform Commission *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, above n 378 at [4.8].

405 Attorney-General's Department (Criminal Justice Division) *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007) at 65.

406 Although to a lesser degree, because of the application of the civil standard of proof.

- 6.140 Also, there is nothing unusual about requiring a degree of blame for the imposition of civil liability. A person cannot be sued successfully in tort unless s/he was negligent – that is, fell below a hypothetical standard based on the state of mind of a reasonable person confronted with the same set of circumstances – and a nexus exists between that negligence and the harm caused.⁴⁰⁷
- 6.141 Moreover, as discussed in chapter 4, in part the premise of civil pecuniary penalties is that, in a regulatory context, there may be breaches of the law that, for certain reasons do not warrant the imposition of a criminal penalty but still require some sanction. If this premise is accepted, it may be thought that there will inevitably be contraventions which are targeted by civil pecuniary penalties which involve a fault element. On this basis, we can see no reason why some civil pecuniary penalties should not be drafted to include an element of moral culpability.

Q20 Do you agree that there should be no prohibition on civil pecuniary penalties being used for contraventions which entail some degree of moral blameworthiness?

What issues are raised by imposing civil pecuniary penalties on the basis of strict or absolute liability?

- 6.142 Most existing civil pecuniary penalty provisions are silent as to fault. In those circumstances, the enforcement body has to prove only the physical elements of the contravention on the balance of probabilities.⁴⁰⁸ In many cases the defendant can exonerate him or herself on the basis of a specific statutory defence. An example is s 124B of the HSNO Act which provides that the Court can order a pecuniary penalty if the regulator establishes the physical requirements of the contravention, for example, that a person imported a new organism in breach of the Act. But the Court must not make the order “if the person satisfies the court that the person did not know, and could not reasonably have known, of the breach”. The defendant has the burden of proving the lack of knowledge on the balance of probabilities. In contrast, some Acts are silent as to any defence.
- 6.143 This raises a number of questions:
- (a) Does silence as to any fault requirement mean that the provision is necessarily a strict or absolute liability one?
 - (b) How might the Court decide between strict and absolute liability?

407 Equally, not all civil liability requires a degree of blameworthiness. For example, there is provision for strict civil liability under the Defamation Act 1992 and the Hazardous Substances and New Organisms Act 1996, s 124G.

408 *Colonial Mutual Life Assurance Society Ltd v Wilson Neill Ltd* above n 402 at 161.

- (c) What are the available defences and, in particular, does the common law defence applicable to strict liability criminal offences – of total absence of fault – apply?

6.144 Below we consider these questions. We determine that the answers to them are not entirely clear. This, we suggest, means that there is a need for civil pecuniary penalty provisions to be drafted in a manner as to be express about intention and defences.

(a) What does silence about fault in civil pecuniary penalty provisions mean?

6.145 In the criminal field, where a provision is silent about fault, the starting point is that it is presumed that proof of mens rea is nonetheless required.⁴⁰⁹ In support of this presumption, New Zealand case law has drawn on Lord Reid's statement in the House of Lords decision in *Sweet v Parsley* that:⁴¹⁰

It is a universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted.

6.146 In deciding whether to override the presumption, the court will determine whether the provision is a "public welfare regulatory" one, rather than one that is "truly criminal", and so whether it should apply strict liability. This is a question of statutory interpretation. It involves consideration of the wording of the provision, the nature of the offending in terms of the degree of moral condemnation elicited by the offence, the basis on which it has been outlawed (for example, whether it arises in the regulation of a specialist regime), the purpose and scheme of the legislation, and the severity of the punishment.⁴¹¹

6.147 Is it intended that the Court should undertake a similar process for civil pecuniary penalty provisions which are silent as to fault? That is, should there be a presumption that fault is required unless it is plain from the statute that the provision was intended to be one of strict or absolute liability? It could well be argued that Lord Reid's statement in *Sweet v Parsley* applies equally to civil pecuniary penalties: that if a penal provision is capable to two interpretations, the more favourable should be preferred.

6.148 On the other hand it may also be significant that many civil pecuniary penalty provisions already arise in a context of either regulatory or specifically "public welfare regulatory" breaches: those in the fields of dairy and telecommunications regulation, environmental law and the regulation of securities and financial markets clearly fall into these categories. This may favour a more straightforward assumption of strict liability. However, it

409 See *Millar v MOT*, above n 403 at 668, 676.

410 [1970] AC 132 (UKHL) at 149. See *Civil Aviation Department v MacKenzie*, above n 403 at 81 and *Millar v MOT*, above n 403 at 668. See generally A P Simester and W J Brookbanks *Principles of Criminal Law* (2nd ed, Brookers, Wellington, 2002) at 162.

411 See generally Simester and Brookbanks, above at 163–164.

might be less clear that the overseas investment regime, for example, meets these characteristics. What approach should or might the Court take under that statute?

- 6.149 There has been little judicial discussion of this issue in New Zealand. The matter has arisen in the context of alleged insider trading breaches, where the issue has been whether, under the Securities Markets Act 1988, breach of insider conduct rules requires mere possession of the information or whether the information had to be actually used in dealing. In *Colonial Mutual Life Assurance Society Ltd v Wilson Neill Ltd (No 2)*⁴¹² Heron J suggested that the provision may be one of strict liability (that is mere possession is enough), subject to the *MacKenzie* defence of total absence of fault although he did not finally decide the matter.⁴¹³ Again without finally deciding the matter, the Court of Appeal disagreed, indicating that while absence of moral fault would be important to setting the size of a penalty, it had no bearing on liability. The Court considered that since the Act provided for exceptions from liability (for example in Chinese wall situations) there was no room for the principle applied in *MacKenzie* and *Millar*.⁴¹⁴ Subsequently, in *Haylock v Southern Petroleum NL*⁴¹⁵ the Court of Appeal determined that:

The logical approach begins with the statute. In the words and scheme of the provision imposing liability there is no requirement for proof of use of inside information linking its possession to the conduct giving rise to liability. On the contrary the indications are the other way.

- 6.150 On its interpretation of the legislative scheme and the policy on which the provisions were founded, the Court considered that the scheme could “operate effectively on the basis of absolute liability” and that “the provisions as drafted are workable and avoid the complexities inherent in proof of motivation or influence”.
- 6.151 In these cases the courts have approached the issue as one of statutory interpretation. There has been no discussion of whether the nature of civil pecuniary penalties has a bearing on the issue. The cases give no express support to any suggestion that there should be a presumption in favour of a requirement of moral culpability.

412 [1993] 2 NZLR 657 at 673 (HC).

413 See *Civil Aviation Department v MacKenzie*, above n 403. The breach in *Wilson Neill* concerned insider trading and arose under then s 7 of the Securities Amendment Act 1988: “Liability of insider who deals in securities of a public issuer (1) An insider of a public issuer who has inside information about the public issuer and who (a) Buys securities of the public issuer from any person; or (b) Sells securities of the public issuer to any person is liable to the persons referred to in subsection (2) of this section. ... (4) The amount of any pecuniary penalty shall not exceed (a) The consideration for the securities or (b) Three times the amount of the gain made or the loss avoided by the insider in buying or selling the securities whichever is the greater.”

414 *Colonial Mutual Life Assurance Society Ltd v Wilson Neill Ltd* above n 402 at 162 (CA).

415 [2003] 2 NZLR 175 (CA).

(b) How might courts decide between strict and absolute liability?

- 6.152 Is it anticipated that civil pecuniary penalties that are silent as to fault should be imposed on strict or absolute liability? Examples arise in the overseas investment and anti-money laundering regimes which are silent as to whether any mental element is required for the imposition of a civil pecuniary penalty but also do not list any defences.
- 6.153 In the criminal field, where courts have displaced the presumption of mens rea, their preference has been for strict rather than absolute liability, with a general defence of total absence of fault. What is the appropriate reasoning where civil pecuniary penalties are concerned? Drawing again on Lord Reid's statement, there is a strong argument that strict liability should be favoured on the basis that civil pecuniary penalties are punitive in nature. However, thus far the case law does not expressly favour any suggestion that strict liability should be preferred to absolute liability.

(c) What defences are available?

- 6.154 In *Colonial Mutual Life*, the Court of Appeal disagreed with Heron J in the High Court as to whether the civil pecuniary penalty provision at hand was "subject to the *MacKenzie* defences".⁴¹⁶ However, it did so on the basis of its interpretation of the statute rather than any express debate about there being a potential difference between criminal and civil strict liability. The Court of Appeal suggested that because the legislative scheme included other exceptions and defences, there was no room for a defence of total absence of fault.⁴¹⁷ It may be inferred from this that courts will apply the total absence of fault defence in circumstances where they conclude that the relevant statute does not rule it out. However, again, the position is not clear.

Conclusion

- 6.155 Two issues arise from the preceding discussion. First, we suggest that there is an even greater need for clarity and specification in the drafting of civil pecuniary penalties when it comes to the physical and mental (if any) elements of the breach and the available defences than for criminal offences. It is not clear whether and to what extent it has been anticipated by policy makers that the rules and presumptions of the criminal law should apply to civil pecuniary penalties. This may present problems of interpretation for the courts. The courts already have a difficult task in determining whether a criminal offence is a mens rea, strict or absolute liability one. Given the novelty of, and lack of discussion about, the nature of civil pecuniary penalties these problems may be exacerbated. We suggest, then, that civil pecuniary penalties should be drafted expressly to apply or exclude fault and should set out all the available defences.

416 *Colonial Mutual Life Assurance Society Ltd v Wilson Neill Ltd* above n 402.

417 Above n 402 at 162.

- 6.156 Secondly, what guidance should be in place for policy makers about the decision to opt for mens rea, strict or absolute liability civil pecuniary penalties? In particular, should the same restrictions that are suggested in the LAC Guidelines about absolute liability civil pecuniary penalties apply?

Q21 Should civil pecuniary penalty provisions be drafted to expressly require or exclude fault and to set out all the available defences?

Q22 What guidance should be in place for policy makers about the decision to opt for mens rea, strict or absolute liability civil pecuniary penalties? Specifically, should there be guidance that absolute liability civil pecuniary penalties should be contemplated only in rare circumstances when :

- (a) there is an overwhelming national interest in using them as an incentive to prevent certain behaviour occurring, regardless of fault; and
- (b) there is a cogent reason in the particular circumstances for precluding a defence of total absence of fault?

Ancillary liability in civil penalty provisions

- 6.157 Like criminal offences, some civil pecuniary penalties can be imposed not only on the person who produces the result which is prohibited by the penalty provision, but also on persons who are somehow involved: those who assist or encourage others (accessories); those who organise the contravention of the provision by others (conspiracy); and those who try to contravene the provision but fail (attempts). We use the global term “ancillary liability” to refer to this kind of liability. An example is found in s 83 of the Commerce Act 1986 (pecuniary penalties for breach of business acquisition prohibitions) which imposes liability on those who contravene s 47 and those who attempt to contravene; who conspire to contravene; and who aid, abet, counsel, procure, induce or attempt to induce, or are knowingly concerned in or party to a contravention.
- 6.158 Ancillary liability can also occur in private civil claims (for example, inducing breach of contract)⁴¹⁸ although it is more limited than in the criminal sphere.⁴¹⁹
- 6.159 Without assessing in depth the policy justifications for ancillary liability in each civil penalty regime, we highlight two issues concerning statutory drafting and statutory interpretation which may deserve further consideration.

418 Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) at 13.2.

419 See for example Davies’ critique of lack of liability for knowingly assisting in a tort: P S Davies “Accessory Liability for Assisting Torts” (2011) 70 CLJ 353.

Ancillary liability in the criminal law

- 6.160 The extension of liability to ancillary contraventions is an established feature of the criminal law. *Howard's Criminal Law* states the rationale for the imposition of ancillary liability:⁴²⁰

... the criminal law as an instrument of social regulation would be seriously defective if it confined itself to [primary contraventions]. Little reflection is needed to perceive that one who attempts a crime is hardly less a menace to society than one who achieves it and that an accomplice or conspirator, by reason of his organisational ability, often is considerably more of a menace than the principal offender.

- 6.161 The Crimes Act 1961 contains a number of provisions addressing how and when ancillary liability arises for attempts, accessories, and conspiracy.⁴²¹ Section 66(1) sets out the liability of accessories (or parties) to an offence:

66 Parties to offences

- (1) Every one is a party to and guilty of an offence who—
- (b) does or omits an act for the purpose of aiding any person to commit the offence; or
 - (c) abets any person in the commission of the offence; or
 - (d) incites, counsels, or procures any person to commit the offence.
- 6.162 The mens rea required under s 66(1) is intent. Not only must the accessory intend their own actions, they must also act with the intent thereby to aid, abet, incite, counsel or procure the conduct of the primary offender.⁴²²

Ancillary liability for civil pecuniary penalties

- 6.163 The Commerce Act 1986, the Unsolicited Electronic Messages Act 2008 (UEM Act) and the Financial Markets Conduct Bill all contain ancillary liability provisions. These vary in terms of whether they cover attempts; assisting or encouraging; and/or conspiring to contravene.⁴²³ For example, s 15 of the UEM Act covers assisting and conspiring, but not attempts. It states:

15 Third party breaches of Act

A person must not—

- (a) aid, abet, counsel, or procure a breach of any of sections 9 to 11 and 13; or
- (b) induce, whether by threats or promises or otherwise, a breach of any of sections 9 to 11 and 13; or

420 B Fisse (ed) *Howard's Criminal Law* (5th ed, Law Book Company Ltd, Sydney, 1990) at 317–318.

421 See for example Crimes Act 1961, ss 66, 72, 310, 311.

422 *R v Samuels* [1985] 1 NZLR 350 (CA).

423 Commerce Act 1986, ss 80, 83, Unsolicited Electronic Messages Act 2007 Act, s 15, Financial Markets Conduct Bill 2010 (342–2), cl 509.

- (c) be in any way, directly or indirectly, knowingly concerned in, or party to, a breach of any of sections 9 to 11 and 13; or
 - (d) conspire with others to effect a breach of any of sections 9 to 11 and 13.
- 6.164 It is not surprising that some civil pecuniary penalties provide for ancillary liability, and draw on statutory language and formulations used in the criminal law.⁴²⁴ Like criminal offences, civil pecuniary penalties are a State-sought regulatory instrument seeking to modify behaviour. Their effectiveness might be constrained if they were limited to the primary person in breach.
- 6.165 We note in chapter 3 that “hybrid” forms of regulation such as civil pecuniary penalties need robust analysis and policy justification. Similarly robust analysis is required when determining whether to extend liability for these penalties to ancillary contraventions, and whether defences or immunities should be made available for third parties not intended to be caught under the regulatory regime.⁴²⁵
- 6.166 Space does not permit an in-depth critique of when and where this is appropriate, but the following points give an idea of *why* ancillary liability provisions might be used. For example, providing for accessory liability can be a method of making a body corporate a party to the breach of its individual officers,⁴²⁶ or to extend liability to professional advisers implicated in the breach. A conspiracy provision may assist in breaking down powerful groups in which some parties do not directly contravene the provision but provide opportunities to do so.⁴²⁷
- 6.167 We wish to draw attention to two issues concerning the comparison between ancillary liability in the criminal law and for civil pecuniary penalties. The first is the disparity between accessorial liability under s 66 of the Crimes Act and accessorial liability as provided for in the Commerce Act, the UEM Act and the Financial Markets Conduct Bill. The latter provisions capture those who are “in any way, directly or indirectly, in any way knowingly concerned” in the breach – which provides for a markedly broader extension of liability than in s 66, which would apply if a criminal offence were used. Given the lower standard of proof, there is a question whether it is appropriate for the boundaries of ancillary liability for a civil pecuniary penalty to extend beyond the orthodox Crimes Act formulation.

424 In *Yorke v Lucas* (1985) 158 CLR 661, the High Court of Australia observed in respect of section 75B of the Trade Practices Act that the words “aiding, abetting, counselling or procuring” are taken from the criminal law: at 667.

425 For example, the Unsolicited Electronic Messages Act 2007 contains an express exemption for telecommunications service providers whose services are used to send spam, if sent without their knowledge: s 16.

426 See further discussion on liability of bodies corporate below.

427 B Fisse, above n 420 at 318.

- 6.168 The second issue concerns how the courts will apply orthodox criminal law understandings of ancillary liability in civil pecuniary penalty proceedings. An example of this is the discussion in *Commerce Commission v NZ Bus Ltd*⁴²⁸ of the level of awareness required to establish accessorial liability under s 83 of the Commerce Act (business acquisitions). In the High Court the vendors in a transaction that breached s 47 had been found liable as accessories.⁴²⁹ On appeal, Hammond J noted that the orthodox criminal law approach is taken to accessory liability for restrictive trade practices, that is, the accessory must know of the essential facts which make up the contravention, and intentionally participate in it.⁴³⁰ But he suggested this approach might not be appropriate for business acquisitions, because of the potential for “grey areas” around the facts that establish the substantial lessening of competition and the difficulty of stating what the alleged accessory had to know about them.⁴³¹ He suggested instead a test of “dishonest participation”, in which the knowledge of the alleged accessory would be directly relevant but not determinative.⁴³²
- 6.169 Ultimately the Court of Appeal determined that the vendors should not have been found liable as accessories whichever of the tests was used. But the case illustrates that criminal law tests may not be appropriate for all civil pecuniary penalties, depending on the nature of the contravention and the regulatory area. In terms of s 83, the approach taken will have a direct bearing on the liability of professional advisers to merger transactions. As noted by the courts, an overly broad approach risks over-deterrence of professional advisers but too narrow an approach could negate the effectiveness of the section.⁴³³

Q23 Should civil pecuniary penalty provisions be more explicit as to the degree and nature of knowledge required to establish ancillary liability?

Individual and corporate liability

- 6.170 Notions of corporate liability are important as many civil pecuniary penalties may be imposed on a body corporate as well as one or several natural persons (such as its directors, officers or employees). At present the statutes take a range of approaches to determining when each person is liable for a breach, Common law tests of corporate responsibility may also apply.

428 *Commerce Commission v NZ Bus Ltd* [2008] 3 NZLR 433 (CA).

429 *Commerce Commission v NZ Bus Ltd* (2006) 11 TCLR 679 (HC).

430 This is also the approach taken for accessory liability to strict liability offences: *Megavitamin Laboratories (NZ) Ltd v Commerce Commission* (1995) 6 TCLR 231 at 250; *van Nieukoop v Registrar of Companies* [2005] 1 NZLR 796 at [96].

431 *Commerce Commission v NZ Bus Ltd* above n 428 at [141].

432 Above, n 428 at [156]–[158].

433 *Commerce Commission v NZ Bus Ltd* above n 429 at [221], *Commerce Commission v NZ Bus Ltd* above n 428 at [112]–[115].

- 6.171 Corporate responsibility is a complex area of law which we cannot cover in detail. But two points particularly relevant to civil pecuniary penalties are worth making.
- 6.172 First, it is possible under some civil pecuniary penalty regimes for both an individual and a body corporate to be principally liable for a breach. Section 90(2) of the Commerce Act provides that any conduct engaged in on behalf of a body corporate by a director, servant, or agent of the body corporate acting within the scope of his actual or apparent authority shall be deemed to have been engaged in also by that body corporate. In *Giltrap City Ltd v Commerce Commission*,⁴³⁴ the Court of Appeal held that by dint of section 90(2) there were two principal contraveners of s 27: the dealer principal of the car dealership company and the company itself. Similar provisions to section 90(2) appear in, for example, the HSNO Act⁴³⁵ and the Financial Markets Conduct Bill.⁴³⁶ Therefore, as in *Giltrap*, the Court will be in a position to impose penalties for two principal contraveners in respect of a single act.
- 6.173 What is the correct approach to penalty quantum in this situation and should the legislation provide more guidance for the Court? Currently no civil pecuniary penalty statutes give guidance on how this should affect the discretion to impose a penalty and if so, how much.⁴³⁷ Since its amendment in 2001, the Commerce Act provides a greater focus on penalising individuals unless there is good reason not to. But determining penalty quantum is still a matter of court discretion. In previous Commerce Act penalty proceedings, concerns over double punishment have led the Court to share out a single penalty between the individual and the corporate, rather than imposing separate penalties on each.⁴³⁸ Is this appropriate? Should the legislation provide more explicit guidance on penalty quantum in these situations?
- 6.174 The second issue is whether it would be useful to have guidance regarding the statutory mechanisms for imposing liability on a body corporate and its individual officers. Just one example is deemed liability: making individual directors of a company liable by virtue of their position, even if they were not themselves involved in the breach. Directors may also be liable as accessories to the company's breach if the regime provides for accessory liability. Guidance might be considered useful if there are identifiable situations where a particular approach is preferable or desirable. For example, if a statute contains parallel criminal offences and civil pecuniary penalties, should corporate liability be imposed on the same basis for both? Are there policy

434 [2004] 1 NZLR 608 (CA).

435 Hazardous Substances and New Organisms Act 1996, s 124I(2).

436 Financial Markets Conduct Bill 2010 (343–2), cl 509C.

437 See the discussion in chapter 7 on factors relevant to penalty quantum.

438 See *Commerce Commission v Ophthalmological Society of New Zealand Inc* [2004] 3 NZLR 689 (HC) and *Commerce Commission v Wrightson NMA Ltd* (1994) 6 TCLR 279 (HC).

arguments that justify taking different approaches towards corporate liability for criminal sanctions and civil pecuniary penalties within a single regulatory regime?

Q24 Should civil pecuniary penalty statutes provide guidance to courts determining penalty quantum in cases where both a company and an individual are principally liable for the same contravention?

Q25 Should there be guidance for policy makers about the methods of attributing or ascribing liability between a body corporate and its officers in a civil pecuniary penalty regime?

Chapter 7

Other elements of legislative design

TERMINOLOGY AND CLASSIFICATION

7.1 In chapter 2 we note that there is a wide range of civil and criminal monetary and non-monetary penalties and remedies on the statute book. At present a range of terms is employed for these and their use is not always consistent. Terminology is not, therefore, a good indicator of the nature of a given penalty. Clarity of the law would be assisted by the adoption of consistent drafting practice in relation to the various penalties and remedies on the statute book. We suggest that any penalty:

- that involves substantial maximum financial penalties;
- that is imposed by the High Court after a civil trial, according to the rules of civil procedure and evidence;
- where liability is established on the civil standard of proof;
- where payment of the penalty is enforced in the civil courts, as a debt due to the Crown; and
- where neither imprisonment nor criminal conviction can result.

should be referred to as a "civil pecuniary penalty".

Q26 Do you agree that any penalty:

- that involves substantial maximum financial penalties;
 - that is imposed by the High Court after a civil trial, according to the rules of civil procedure and evidence;
 - where liability is established on the civil standard of proof;
 - where payment of the penalty is enforced in the civil courts, as a debt due to the Crown; and
 - where neither imprisonment nor criminal conviction can result;
- should be referred to in legislation as a "civil pecuniary penalty"?

IMPOSITION

- 7.2 All of the civil pecuniary penalties covered in this review are imposed by the High Court.⁴³⁹ New Zealand, Australia and to a degree, the United States differ from many other common law countries in this regard. Where similarly large civil pecuniary penalties are provided for in other jurisdictions, there is often provision for them to be imposed by the regulator itself, with subsequent court oversight on appeal.⁴⁴⁰
- 7.3 The New Zealand model means that there is judicial oversight of their imposition and the ability for penalty levels to be set with open and due consideration of any aggravating or mitigating factors. Judicial imposition provides protection against possible abuses, or the appearance of abuse, of regulators' powers. There can be no criticism that an enforcement body is both complainant and judge of an alleged breach.
- 7.4 Savings might be obtained by regulator imposition of such penalties, with an appeal route to the court. Under such a model it is possible that fewer cases would make it to court, with resulting savings in judge and court time and lower costs for regulators and the accused in cases where the latter opts not to appeal. There may also be an argument that the deterrent effect of such a model would be greater as more penalties might be imposed where the regulator does not have to weigh up the risks of taking a case to court.
- 7.5 However, for the reasons set out in paragraph 7.3 we are not attracted to this model. The combined factors of the discretion as to penalty level, very high maximum penalties and relative novelty of civil pecuniary penalties means that High Court imposition is both desirable and warranted.

⁴³⁹ For the exceptions, see para 7.6, below.

⁴⁴⁰ Increasingly, there is provision for this to happen in the US. See appendix 2.

- 7.6 Notwithstanding the above, there are existing exceptions to the standard judicially imposed civil pecuniary penalties in New Zealand. Under the Gas Act 1992 and Electricity Industry Act 2010 variable civil penalties of a maximum of, respectively, \$20,000 and \$200,000 may be imposed by Rulings Panels.⁴⁴¹ The panels are made up of members appointed for up to five years by the Minister. In both cases, the members must have the necessary knowledge, skills, and experience to sit on the panel.⁴⁴² However, neither Act requires that any of the members should have legal experience.⁴⁴³
- 7.7 Both panels undertake quasi-judicial functions in determining complaints and deciding upon and issuing orders, including civil penalty and compensation orders, in relation to complaints. The imposition of civil pecuniary penalties by such bodies may in very rare circumstances be warranted because of the specialist nature of the field at hand: expert knowledge may be necessary for the effective oversight of the activity. However, in our view such a model should only be adopted where specialist knowledge is absolutely essential to the resolution of disputes and to decisions on breach and liability. Furthermore, tribunals exercising such a role would benefit from a statutory requirement for legal expertise. All are involved to some extent in applying standards to facts and all need to apply the principles of natural justice. Such a model should also be accompanied by an adequate appeal and review process. The Law Commission has previously written about the appropriate powers and functions of administrative tribunals and that discussion is relevant to these bodies.⁴⁴⁴
- 7.8 In two cases, variable civil penalties are imposed by the regulator itself. The Overseas Investment Regulations 2005 provide for the chief executive of the regulating department to impose a penalty of not more than \$20,000 for the retrospective filing of a consent. In determining the amount of the penalty, the regulator must consider whether “requiring the applicant to pay that amount would be unduly harsh or oppressive given (a) the value of the consideration for the asset that was acquired under the relevant overseas

441 Under the Gas Act 1992, there is also provision for the Energy Commission to administer penalties for breaches of gas governance regulations or rules, however the provision (s 43ZZL) is not in force.

442 Under the Electricity Industry (Enforcement) Regulations 2010 members of the panel must have, “in the Minister’s opinion, the appropriate knowledge, skills, and experience to assist the Rulings Panel to perform its functions” (reg 91). Under the Gas Governance (Compliance) Regulations 2008 members “must have the requisite knowledge, skills, and experience to carry out the obligations to be performed by the Panel” and must have been nominated by the industry body (regs 61 and 69).

443 As at September 2012, the Electricity Panel is comprised of five members with a mix of legal and industry expertise: Peter Dengate Thrush (Chair); Geraldine Baumann (Deputy Chair); Nicola Wills; Susan Roberts; John O’Sullivan. The Gas Panel is currently comprised of one person: Justice John Hansen, appointed on 16 June 2009 until 13 June 2014: National Party media release at < www.national.org.nz/Article.aspx?articleId=30191 > .

444 Law Commission *Tribunal Reform* (NZLC SP20, 2008). See in particular at [7.32] regarding the need for legal experience.

investment transaction; or (b) the nature of, and the reasons for, the retrospective consent.⁴⁴⁵ Under the Tax Administration Act 1994,⁴⁴⁶ “shortfall penalties” can be sizeable and require the exercise of discretion by the Commissioner of Inland as to the errant taxpayer’s level of intent. A taxpayer is liable for a penalty of 20 per cent of the shortfall where they did not take reasonable care; 40 per cent where there is gross carelessness; 100 per cent where they take an “abusive tax position”; and 150 per cent where there is tax evasion.⁴⁴⁷

- 7.9 Under both these schemes there may be concern about the regulator being both complainant and judge. Such a concern may arise with any regulator-imposed penalty, but is exacerbated where the penalty is not a fixed one – that is where the regulator can exercise discretion about the *level* of the penalty in any given case. With such regimes, there may also be a perception that such penalties are used for revenue-gathering purposes. These concerns create an elevated need for adequate appeal and review processes.
- 7.10 We consider the Overseas Investment Regulations and tax regime penalties to be anomalies. They are not repeated elsewhere in New Zealand legislation. And, while we anticipate that there may be a desire for enforcement bodies increasingly to be given the power to impose penalties themselves, practice suggests that these will be in the form of infringement offences. It may have been preferable, for example, for the Overseas Investment Regulations penalty to have been an infringement offence, and so to operate within the confines of the infringement offence procedure. Generally, we suggest that the imposition of variable monetary penalties by non-judicial bodies should be discouraged.

Q27 Do you agree that the imposition of variable monetary penalties by non-judicial bodies should be discouraged?

⁴⁴⁵ Regulation 32.

⁴⁴⁶ They include late filing penalties (max \$500), non-electronic filing penalties (the greater of \$250 or \$1 per employee); late payment penalties (an initial late payment penalty equal to the total of 1 % of the unpaid tax; and 4 % of the amount of tax to pay at the end of the sixth day after the day on which a penalty is imposed).

⁴⁴⁷ Note also that the Commissioner of Inland Revenue can increase any shortfall penalty by 25 % if the taxpayer obstructs the Commissioner in determining the correct tax position.

Enforceable undertakings and settlements

7.11 If enacted, the Financial Markets Conduct Bill will introduce a new s 46A to the Financial Markets Authority Act 2011.⁴⁴⁸ The change will make it possible for the Financial Markets Authority (FMA) to accept undertakings which may include requirements as to compensation or penalties. Draft s 46A provides:

- (1) An undertaking under s 46 may include—
 - (a) an undertaking to pay compensation to any person or otherwise to take action to avoid, remedy, or mitigate any actual or likely adverse effects arising from a contravention or possible contravention of any provision of the financial markets legislation:
 - (b) an undertaking to pay to the FMA an amount in lieu of a pecuniary penalty.
- (2) The FMA must ensure that each amount paid under subsection (1)(b) is paid into a Crown Bank Account (after deducting the FMA's actual costs incurred in connection with the matter) ...

7.12 This will enable the FMA effectively to “settle” with parties whom it would otherwise seek civil pecuniary penalties from. At present it is not expressly possible for any enforcement agency to settle with a defendant out of court because civil pecuniary penalties must be imposed by the High Court.⁴⁴⁹ What happens in practice is that enforcement bodies come to an agreement as to the level of a civil pecuniary penalty with a party which has admitted a breach. The parties then go to Court for its approval of the recommended penalty. This has happened frequently under the Commerce Act 1986.⁴⁵⁰ The Court then goes through a process of assessing the agreed penalty and deciding whether to make the requested order, or vary the quantum.

7.13 On one view, this process is cumbersome. Where a party is content to admit a breach and s/he or it has settled on an agreed penalty with the enforcement body, there is an argument that it is unnecessary to involve the Court. The ability to enter into a formal settlement without the need for Court sign off will save costs for both the enforcement body and defendant. From this perspective, the proposed s 46A seems desirable.

7.14 On the other hand, there may be concerns about civil pecuniary penalty settlements taking place behind closed doors. First, agreed penalties may be lower than those imposed by a Court because a discount is likely to be applied in recognition of the defendant's cooperation. There may therefore be a risk of innocent defendants feeling pressured into accepting liability and agreeing to a penalty to avoid the risks of litigation and the possibility of a higher

448 See Financial Markets Conduct Bill (342–2), cl 600. The Bill was reported back from the Commerce Committee on 7 September 2012 and at the time of publication is awaiting its second reading.

449 Although we understand that informal settlements do occur from time to time under some Acts.

450 See also *Department of Internal Affairs v Atkinson* HC Christchurch CIV-2008-409-2391, 19 December 2008.

penalty. This echoes the traditional concerns about plea bargaining in the criminal context.⁴⁵¹ There is now acceptance that plea negotiations may serve a useful purpose in preventing a contested criminal trial. However, there are protections for the defendant around how these may be commenced and undertaken.⁴⁵² Furthermore, sentence negotiation – whereby a prosecutor and defendant agree on a proposed sentence in return for a guilty plea – is not permitted in New Zealand.⁴⁵³

- 7.15 A second concern is that if settlements are taking place behind closed doors there will be no public scrutiny of the penalties that are being imposed. The general public and victims of civil pecuniary penalty provision breaches may be concerned about well-resourced defendants negotiating low penalties with an enforcement body. The more private nature of settlements may also give rise to a risk that penalties will be imposed inconsistently. Transparency not only assists in ensuring that the power invested in the enforcement body is exercised in a legitimate manner, but also helps to uphold public confidence in the administration of justice.⁴⁵⁴
- 7.16 Thirdly, there is an argument that the novel nature of civil pecuniary penalties favours Court oversight of penalty setting. There are relatively few reported cases. Courts are still developing their approach to the imposition and setting of penalties. No penalties at all have been imposed under a number of the regimes. The development of a body of case law and principles is important for providing guidance to Courts, alerting the public to the boundaries and extent of their potential liability and to assisting those accused of breaches to make educated decisions about whether and how to defend themselves.
- 7.17 There is a question, then, as to whether provisions such as the proposed s 46A are warranted. Alternatively, if they are to be employed, should there be protections around their use? For example, should any such provision be accompanied by a legislative requirement to publicise details of (a) the agreed circumstances and nature of the breach and (b) the quantum of the compensation or payment? This is achieved to some extent by draft s 46A(3), which provides “[i]f an undertaking referred to in sub-s (1)(b) is given, the FMA must give notice of that undertaking on its Internet site ...” Also, should enforcement bodies with such a power make public their own policy for approaching settlement negotiations with accused parties?

Q28 Should enforcement agencies be able to “settle” with parties that they would otherwise seek to have civil pecuniary penalties imposed upon?

451 See generally, Law Commission *Criminal Prosecution* (NZLC R66, 2000) at ch 9.

452 See Crown Law Office *Prosecution Guidelines* (2010) at ch16.

453 Above at [16.4].

454 C Noonan “Of Arsenic, Antitrust and Agreed Penalties for Price Fixing” (2006) 12 NZBLQ 253 at 267.

Q29 If so, should there be a requirement to publicise details of the settlement, including (a) the agreed circumstances and nature of the breach and (b) the quantum of the agreed penalty?

Q30 Should enforcement bodies with such a power make public their policy for approaching settlement negotiations?

INSTIGATION OF PROCEEDINGS

- 7.18 Civil pecuniary penalty proceedings may be instigated only by the relevant enforcement body or agency. Civil pecuniary penalties differ from other civil remedies under the statutes. Any aggrieved person may apply for a compensatory order and any “entitled person” for a management ban under the Securities Markets Act 1988. Similarly, a range of persons (and any person, with the leave of the Court) can apply for civil remedy orders, injunctions and compensatory orders under the Takeovers Act 1993⁴⁵⁵ but only the Takeovers Panel can pursue pecuniary penalty proceedings. Based on the current field of civil pecuniary penalties, in our view this approach should continue.
- 7.19 The position differs for criminal offences: any person may commence a criminal proceeding.⁴⁵⁶ While the right to private prosecution can be confined by statute, this is rare.⁴⁵⁷ The right to private criminal prosecution has a long history in common law jurisdictions and is justified on the grounds that:⁴⁵⁸
- It provides protection where a public prosecutor fails, for whatever reason, to exercise his or her discretion to prosecute: it plays a role, then, in the protection against the abuse of public power; and
 - It provides an outlet for an individual’s need for vindication of personal grievances.

455 See ss 33F, 33K, 33I, 35.

456 See Crimes Act 1961, s 345(2) and, prospectively, Criminal Procedure Act 2011, s 10 (not in force).

457 For example, under the Factories and Commercial Premises Act 1981, s 65 prosecution may be taken only by the relevant enforcement body.

458 See generally, Law Reform Commission of Canada *Private Prosecutions* (Working Paper 52, 1986).

- 7.20 The right is not absolute: the Criminal Procedure Act 2011 will formalise existing practice by providing that a District Court judge may require a private prosecutor to establish a *prima facie* case prior to accepting a charging document, or may refuse to accept it if it is otherwise an abuse of process.⁴⁵⁹ The provision is aimed at preventing vexatious and unprincipled private prosecutions from proceeding.⁴⁶⁰
- 7.21 The Commission does not consider that there is a strong argument for allowing persons other than enforcement bodies to commence civil pecuniary penalty proceedings. This is particularly the case where such proceedings are an alternative to criminal proceedings for a given form of conduct. There, potential claimants have other means of redress: they are able to pursue private prosecutions, standard civil proceedings and (in some cases) can apply for statutory compensation orders. The enforcement agency's decision of whether or not to seek a civil pecuniary penalty will also be open to judicial review. These routes appear adequate for the vindication of any personal grievances and provide sufficient recourse in the event of a failure on the part of the enforcement body to act.
- 7.22 There are other policy reasons which favour limiting the ability to commence such proceedings to the enforcement agency. That body has been created with the purpose of overseeing and enforcing the relevant regulatory system. It is resourced and given the investigatory powers to do so. In some cases, the civil pecuniary penalty procedure itself has been introduced as a proxy for other civil action where it is considered that, for various reasons, private individuals will not take private action themselves. In this type of regulatory context, the justifications that favour private prosecution are arguably less relevant.
- 7.23 However, we query whether the position might be different if civil pecuniary penalties move further into the field of punishing traditional criminal behaviour. If civil pecuniary penalties were to replace criminal proceedings for a broader range of conduct, the justifications for private prosecution set out above may start to carry greater weight.

Q31 Are there any circumstances when individuals should be able to commence civil pecuniary penalty proceedings?

459 Criminal Procedure Act 2011, s 26 (not in force).

460 See Law Commission *Criminal Prosecution* (NZLC R66, 2000) at ch 10.

Declarations of contravention

- 7.24 Some statutes provide for a process whereby, if a regulator applies for a civil pecuniary penalty, the Court *must* make a “declaration of contravention” in the penalty proceedings if it is satisfied that a contravention has occurred.⁴⁶¹ Its purpose is to allow persons bringing later proceedings for compensation to rely on the declaration of contravention as conclusive evidence of the breach, so they do not have to re-establish it themselves. The declaration must state which provision was contravened, by whom, and the conduct that constituted the contravention. The declaration is therefore an additional mandatory Court order in certain civil pecuniary penalty proceedings. Whether the two orders are made in a single proceeding, or whether the Court makes an order for a declaration and deals with the question of penalty in later proceedings depends on the circumstances of the case.
- 7.25 Where a third party can bring an action for damages or compensation based on the same conduct already addressed in a civil pecuniary penalty proceeding, it is sensible for the party not to have to re-establish the facts. The declaration of contravention process is not presently used under the Hazardous Substances and New Organisms Act 1996⁴⁶² and the Commerce Act 1986⁴⁶³ but it might be equally appropriate there, and in other regimes.

Separating questions of liability and penalty

- 7.26 Even where the statute does not provide for a “declaration of contravention”, current practice frequently sees the Court delivering separate judgments on liability and quantum.⁴⁶⁴ In numerous cases under the Commerce Act, the Court has made its finding on liability before considering penalty quantum: that is they have been treated as two separate endeavours. This is analogous to procedure in the criminal field, where a finding of guilt precedes the sentencing process (although both may take place in the same hearing). There is a question as to whether the “declaration of contravention” might also add something useful here. Should it be adopted as a matter of course in civil pecuniary penalty statutes merely as a useful tool or form of terminology that assists the Court in separating its decision on liability and penalty? This is not to suggest that two hearings must take place. Although, as occurs in the criminal field, this may be desirable to allow the parties to adduce further evidence as to factors that might impact on the penalty setting exercise.

461 Securities Act 1978, ss 55C–55E, Securities Markets Act 1988, ss 42T–42V, Takeovers Act 1993, ss 33M–33O. See also the Financial Markets Conduct Bill (342–2), cl 471.

462 See s 124G, which retains civil liability in damages for breaches relating to new organisms.

463 See s 87A, person must apply for compensation for breach of a price-quality requirement within 1 year of the date of the pecuniary penalty order.

464 See for example the penalty judgments of *Commerce Commission v Telecom Corporation of NZ Ltd* [2011] NZCCLR 19, *Commerce Commission v Ophthalmological Society of NZ Inc* [2004] 3 NZLR 689, *Commerce Commission v Giltrap City Ltd [Penalty]* (2002) 10 TCLR 305.

Q32 Should all civil pecuniary penalty regimes provide for a declaration of contravention to be made?

SETTING MAXIMUM PENALTIES IN CIVIL PECUNIARY PENALTY LEGISLATION

7.27 Civil pecuniary penalties are notable for their very high maximum penalties. In some cases the maximum penalty is set as a fixed sum. For example the Takeovers Act 1993 provides for maximum penalties of \$500,000 for an individual or \$5m for a body corporate.⁴⁶⁵ In other cases the maximum is set as a multiple of the value of any commercial gain resulting from the contravention; or a percentage of the turnover of the body corporate and all of its interconnected bodies corporate. Section 80 of the Commerce Act provides that the maximum penalty for breach of the restrictive trade practices provisions by a body corporate is:⁴⁶⁶

the greater of–

(i) \$10,000,000; or

(ii) either–

(A) if it can be readily ascertained and if the Court is satisfied that the contravention occurred in the course of producing a commercial gain, 3 times the value of any commercial gain resulting from the contravention; or

(B) if the commercial gain cannot be readily ascertained, 10% of the turnover of the body corporate and all of its interconnected bodies corporate (if any).

7.28 Other Acts contain similar formulations in that they allow the Court to link the penalty to the financial gain made from the breach or amount of loss avoided.⁴⁶⁷

7.29 In the criminal sphere, maximum penalties have been set in a fairly unsystematic way: there has been no agreed methodology or approach for determining the relative seriousness of an offence when it is created. The Ministry of Justice (and before 1995, the Department of Justice) has performed a vetting function in relation to statutory provisions creating new offences or penalties. Nevertheless, in the end the selection of a quantum has been largely intuitive. Furthermore, while a maximum penalty may accurately indicate Parliament's view as to the relative seriousness of an offence, it is an assertion of seriousness for that particular Parliament and

⁴⁶⁵ Section 33M.

⁴⁶⁶ See also Biosecurity Act 1993, s 154J, Hazardous Substances and New Organisms Act 1996, s 124C, Dairy Industry Restructuring Act 2001, s 141.

⁴⁶⁷ Overseas Investment Act 2005, s 48, Securities Markets Act 1988, s 42W. For breaching an enforceable matter under the Telecommunications Act 2001 the court may order a maximum penalty equal to the amount of any commercial gain less any compensatory damages the court chooses to award: s 156R.

in light of the political and social circumstances when it was enacted. As a result, many maximum penalties are anomalous, do not reflect the relative seriousness of the offence and bear little or no relationship to current sentencing practice. The Law Commission has undertaken a review of maximum criminal penalties which will be published in the near future as a Study Paper.

- 7.30 Given the approach to setting maximum penalties for criminal offences, it is difficult to assert that a more scientific or satisfactory approach can be adopted with civil pecuniary penalties. Nevertheless, the Commission suggests that some degree of guidance can and should be provided.
- 7.31 First, as far as is possible, consistency should be achieved. By this, we do not mean consistency of maximum civil pecuniary penalties across the statute book, but rather that a consistent approach to penalty setting should be undertaken. As the Australian Law Reform Commission has observed, “in a rational system of punishment it is desirable that penalties prescribed by law correspond to offence seriousness in a consistent fashion”.⁴⁶⁸
- 7.32 Secondly, penalties need to balance the promotion of good behaviour with ensuring that business is willing to take sensible commercial risks, in order to optimise growth and business development.⁴⁶⁹ We note, for example, the concern that high maximum civil pecuniary penalties might have had the consequence of the cessation of genetic modification research in New Zealand.⁴⁷⁰ Civil pecuniary penalties need to be set at a level which does not deter legitimate commercial endeavour or sensible risk-taking.
- 7.33 Thirdly, we agree that the policy aims of civil pecuniary penalties provide some justification for the very high maximum penalties that feature on the statute book. Criminal penalties are set based on relative offence seriousness and the maximum penalties reflect the worst class of case in each particular category. They are directed at achieving the aims of criminal law which include retribution, rehabilitation and deterrence. Since most offending does not fall within the bracket of “worst class of case”, statutory maximum penalties tend to be set far above the sentences that would be appropriate for the ordinary run of offences of each type coming before the courts.
- 7.34 The setting of civil pecuniary penalties should be based on similar imperatives. However, the policy aims of civil pecuniary penalties differ slightly from the aims of the criminal law. While they are directed at the punishment and denunciation of wrongdoers, greater emphasis is placed on their role in creating optimal incentives for participants to comply with the regulatory regime. The dominant imperative, then, is said to be the deterrence of non-compliance.

468 Australian Law Reform Commission *Sentencing: Penalties* (DP30, 1987) at [89].

469 The Treasury *Review of Sanctions in Corporate Law* (Canberra, 2007) at vii.

470 Ministry for the Environment *Departmental Report on New Organisms and Other Matters Bill* (2003) at ch 21.

- 7.35 Since many civil pecuniary penalties are targeted at corporate actors, it is inevitable that higher maximum penalties may be required to adequately deter the wealthiest potential contraveners. There is also an argument that the more difficult a breach is to detect or prove, the higher the penalty that is justified. As noted in chapter 4, where the offender is a body corporate, evidence of the breach may be harder to establish. It follows that high maximum penalties for corporate offending may well be acceptable, particularly since the Court is able to take account of factors such as the comparative size of the corporate body when imposing the penalty.
- 7.36 However, the result of such high maximum penalties, which can be applied to such a broad range of behaviour, is that they give courts a great deal of discretion as to penalty quantum in any given case. For this reason, and given the limited case law on civil pecuniary penalties, it may be desirable for detailed statutory guidance to be provided to courts when imposing a penalty. We discuss this further below.

Parallel criminal and civil pecuniary penalties

- 7.37 There is a variety of approaches where criminal offences and civil pecuniary penalties exist for the same or similar conduct. In some cases, the maximum monetary penalties are the same for both civil and criminal breaches, but conviction for a criminal offence may also be accompanied by a term of imprisonment. Under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 the monetary penalty for the equivalent criminal offence exceeds the civil pecuniary penalty maximum. However, under other statutes it is possible to have a higher civil than criminal monetary penalty imposed. For instance, breach of a price-quality requirement or order, or an information disclosure requirement or order under the Commerce Act 1986, is an offence if done intentionally, or can be punished by civil pecuniary penalty. The maximum civil pecuniary penalty is \$500,000 for individuals and \$5m for a body corporate, but the maximum criminal penalty is \$200,000 for individuals and \$1m for a body corporate.⁴⁷¹
- 7.38 Where parallel criminal and civil pecuniary penalties target the same conduct or breach, the respective criminal and civil pecuniary penalties must be set appropriately. We query whether, in those circumstances, maximum civil pecuniary penalties should be set lower than the equivalent maximum monetary criminal penalty. Otherwise, there may be a perverse incentive to take civil pecuniary penalty proceedings rather than a criminal prosecution.⁴⁷² Furthermore, where parallel criminal and civil pecuniary penalties exist, the

471 See also the Biosecurity Act 1993, ss 154J, 157 where the maximum civil penalty is \$500,000, whereas criminal prosecution for the same conduct may result in a maximum \$100,000 fine, or five years in prison.

472 See generally M Welsh “Civil Penalties and Responsive Regulation: The Gap Between Theory and Practice” (2009) 33 MULR 908.

former should surely be reserved for graver conduct than civil pecuniary penalties. Should the respective penalties reflect this?

- 7.39 The Tokelau (Territorial Sea and Exclusive Economic Zone) Act 1977 provides an alternative approach. Breaches of the Tokelau (Exclusive Economic Zone) Fishing Regulations 1988 may be dealt with by way of civil pecuniary penalty (although none have been enacted). Section 8(n) of the Act provides that any penalties created may not exceed one-third of the maximum criminal fine available for the breach.⁴⁷³

Continuing penalties

- 7.40 The Telecommunications (Interception Capability) Act 2004 contains a daily penalty for continuing contraventions. The Court can order payment of up to \$50,000 for each day the breach continues (on top of an initial penalty of up to \$500,000).⁴⁷⁴ In relation to continuing criminal offences, the LAC Guidelines state that:⁴⁷⁵

Continuing offences with daily penalties introduce the possibility of large, indeterminate fines. Generally, such a penalty will not be desirable, as certainty is a cornerstone of the criminal law. A more appropriate remedy may be an order requiring discontinuance, or some other relief designed to end the unlawful activity.

- 7.41 Should this guidance also apply to civil pecuniary penalties?

Q33 Should the setting of maximum civil pecuniary penalties in legislation be guided by the following principles?

Maximum penalties:

- should reflect the worst class of case in each particular category;
- should be designed to encourage compliance with the regulatory system at hand and so be set at a level to deter the classes and sizes of participants in that regulatory field;
- should balance the promotion of compliant behaviour with ensuring that business remains willing to enter the market and/or take sensible commercial risks.

473 Maximum criminal fines are: \$100,000 for owner or master of an unlicensed foreign fishing craft and \$5,000 for any crew member; \$25,000 for licensee or master of a licensed foreign fishing craft and \$1,500 for any crew member: Tokelau (Territorial Sea and Exclusive Economic Zone) Act 1977, s 8(k).

474 Telecommunications (Interception Capability) Act 2004, s 27.

475 Legislation Advisory Committee *Guidelines on Process and Content of Legislation* < www2.justice.govt.nz/lac/index.html > at [12.6.2].

Q34 Where parallel criminal and civil pecuniary penalties target the same conduct or breach, is it ever appropriate for maximum civil pecuniary penalties to be higher than the equivalent maximum monetary criminal penalty?

GUIDANCE AS TO WHETHER TO IMPOSE A PENALTY

- 7.42 Most civil pecuniary penalty statutes provide that the High Court *may* impose a civil pecuniary penalty on a person in breach. That is, where a relevant breach of the statute has been proven, the Court has discretion as to whether to make an order for a civil pecuniary penalty. This is also the case for those regimes where a declaration of contravention *must* be made if the contravention has been established.⁴⁷⁶
- 7.43 Most civil pecuniary penalty statutes leave the position at that – they give no further guidance as to how this discretion is to be exercised.⁴⁷⁷ Others set out factors which the Court must consider before a penalty should be imposed. Where guidance to this effect is provided, it varies from statute to statute. So, for example, the Securities Trustees and Statutory Supervisors Act 2011 specifies that the following factors should be considered when determining whether to impose a penalty:⁴⁷⁸
- (a) the nature and extent of the contravention:
 - (b) (in the case of a contravention relating to a security) the likelihood, nature, and extent of any damage to the integrity or reputation of New Zealand's securities markets as a result of the contravention:
 - (c) the nature and extent of any loss or damage suffered by security holders or residents because of the contravention:
 - (d) the circumstances in which the contravention occurred:
 - (e) whether or not the licensee has previously contravened a licensee obligation:
 - (f) the public benefit in encouraging prompt and honest self-reporting of breaches or possible breaches of licensee obligations:
 - (g) any other circumstances that the court considers relevant.

476 See for example Takeovers Act 1993, s 33M.

477 The following are silent: Anti-Money Laundering and Countering Financing of Terrorism Act 2009, Biosecurity Act 1993, Commerce Act 1986, Dairy Industry Restructuring Act 2001, Financial Advisers Act 2008, Financial Service Providers (Registration and Dispute Resolution) Act 2008, Hazardous Substances and New Organisms Act 1996, Overseas Investment Act 2005, Telecommunications (Interception Capability) Act 2004, Telecommunications Act 2001. See also Therapeutic Products and Medicines Bill, cl 37(1).

478 Section 41(2). The same factors are to be taken into account when determining the amount of any penalty.

- 7.44 Under the Unsolicited Electronic Messages Act 2007, the Court is directed to take into account whether another penalty or order has been imposed in respect of the same act or omission and if so, its amount and effect.⁴⁷⁹ The result is that the Court will take into account whether multiple penalties are appropriate in the circumstances. Courts have also considered this issue under the Commerce Act 1986,⁴⁸⁰ although it is not explicitly mentioned in that Act, nor in other civil pecuniary penalty regimes.
- 7.45 Section 80(2) of the Commerce Act is unique in that it directs the Court to impose a penalty on an individual in breach of part 2 of the Act unless it considers there is good reason not to.⁴⁸¹ The provision was introduced to address the Court's historical tendency *not* to impose individual penalties for a breach of part 2 of that Act, especially where they have already been imposed on the body corporate.⁴⁸²
- 7.46 Finally, s 33M of the Takeovers Act 1993 takes a different approach. It provides:⁴⁸³

If the Panel applies for a pecuniary penalty order against a person under this Act in accordance with s 35, the court— ...

- (c) may order the person to pay a pecuniary penalty that the court considers appropriate to the Crown if satisfied that the person has contravened the takeovers code, that the person knew or ought to have known of the conduct that constituted the contravention, and that the contravention—
 - (i) materially prejudices the interests of offerees, the code company, the offeror or acquirer, competing offerors, or any other person involved in or affected by a transaction or event that is or will be regulated by the takeovers code, or that is incidental or preliminary to a transaction or event of that kind; or
 - (ii) is likely to materially damage the integrity or reputation of any of New Zealand's securities markets; or
 - (iii) is otherwise serious.

479 Section 48(2).

480 See for example *Commerce Commission v NZ Bus* HC Wellington BC200662042, 29 September 2006, *Commerce Commission v Ophthalmological Society of New Zealand Inc* [2004] 3 NZLR 689 (HC), *Commerce Commission v Wrightson NMA Ltd* (1994) 6 TCLR 279 (HC), and *Commerce Commission v Accent Footwear Ltd* (1993) 5 TCLR 448 (HC).

481 This was one of a number of provisions enacted by the Commerce Amendment Act 2001 to provide a greater focus on penalising individuals within a firm who are responsible for making the decisions which led to the proscribed conduct.

482 J Mallon and J Stevens "Commerce Act Penalties for Individuals" [2001] NZLJ 339. See for example *Commerce Commission v NZ Bus Ltd*, above n 480, in which Miller J declined to impose a penalty on individuals party to the body corporate's contravention.

483 See also Securities Markets Act 1988, s 42T(1)(c), Securities Act 1978, s 55C(c).

- 7.47 The effect of s 33M(c) is to set a threshold which the conduct must reach before a penalty may be imposed. That is, where a contravention is established, the Court's discretion to impose a penalty is limited by these factors and pecuniary penalties should only be imposed for sufficiently serious breaches.
- 7.48 Two matters arise. First, in what circumstances should Acts contain guidance as to when to impose a civil pecuniary penalty, and what should that guidance be? To what extent should civil pecuniary penalty statutes strive for consistency on this front and is there a list of standard factors which go to whether a civil pecuniary penalty should be imposed? Or do those factors need to be influenced by the particular regime involved?
- 7.49 Secondly, are there difficulties in providing for a "threshold" of seriousness as in the Takeovers Act, above? Is it better that matters such as "material prejudice" form part of the element of the contravention? Or that the degree of prejudice should be relevant instead to the level of penalty imposed? One of the reasons for having s 33M(c) appears to be to enable the Court to find a breach on a strict liability basis. A pecuniary penalty, then, differs from the granting of a declaration of contravention.

Q35 In what circumstances should Acts contain guidance as to when to impose a civil pecuniary penalty, and what should that guidance be?

Q36 Are there difficulties in providing for a "threshold" of seriousness as in the Takeovers Act 1993?

GUIDANCE AS TO THE LEVEL OF PENALTY

- 7.50 Most existing civil pecuniary penalty regimes set out factors that should be taken into account when setting the level of penalty, although, again, some are silent on the matter.⁴⁸⁴ An example is s 90(4) of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 which provides:

In determining an appropriate pecuniary penalty, the court must have regard to all relevant matters, including—

- (a) the nature and extent of the civil liability act; and
- (b) the likelihood, nature, and extent of any damage to the integrity or reputation of New Zealand's financial system because of the civil liability act; and
- (c) the circumstances in which the civil liability act occurred; and
- (d) whether the person has previously been found by the court in proceedings under this Act to have engaged in any similar conduct.

⁴⁸⁴ Overseas Investment Act 2005 and Telecommunications (Interception Capability) Act 2004.

7.51 The following “relevant matters” are common to a number of civil pecuniary penalty statutes:⁴⁸⁵

- The nature and extent of the breach;
- The nature and extent of any loss or damage caused by the breach;
- The nature and extent of any financial gain made from the breach;
- Whether the breach was intentional, inadvertent or negligent;⁴⁸⁶
- The level of civil pecuniary penalties that have been imposed in previous similar situations;⁴⁸⁷
- The circumstances in which the breach took place;
- Any other matters the Court considers relevant.

7.52 As under the Anti-Money Laundering and Countering Financing of Terrorism Act, some statutes give additional, specific statutory guidance relating to the purpose of the regime itself. For example, s 144(1) of the Dairy Industry Restructuring Act 2001 states that the Court must have regard to the purpose and principles of the subpart containing civil penalties, as expressed in ss 70 and 71 (broadly, to ensure the efficient operation of New Zealand dairy markets and encourage competition). Section 42Y of the Securities Markets Act 1988 states the Court must have regard to any purpose and criteria stated in the Act that apply to the civil remedy provision, and to the likelihood, nature and extent of any damage to the integrity of any of New Zealand’s securities markets.⁴⁸⁸

7.53 An alternative to setting out guidance in the statute would be to leave absolute discretion to the Courts. We suggest, however, that guidance should be

485 See for example the Commerce Act 1986, s 83(2) (for business acquisitions substantially lessening competition), Takeovers Act 1993, s 33Q, Securities Act 1976, s 55F(2), Securities Markets Act 1988, s 42Y, Anti-Money Laundering and Countering Financing of Terrorism Act 2009, s 90(4) Financial Advisers Act 2008, s 137K(3), Financial Service Providers (Registration and Dispute Resolution) Act 2008, s 79A(3), Dairy Industry Restructuring Act 2001, s 144, Telecommunications Act 2001, s 156L(2). See also the Electricity Industry Act 2010, s 56(2) and Gas Governance (Compliance) Regulations 2008, reg 52(3).

486 Financial Advisers Act 2008, s 137K(3)(c), Financial Service Providers (Registration and Dispute Resolution) Act 2008, s 79A(3)(c), Commerce Act s 86(4)(b) (breach of an information disclosure requirement) and s 87(4)(c) (breach of a price-quality requirement). See also Electricity Industry Act 2010, s 56(2)(c) and Gas Governance (Compliance) Regulations 2008, reg 52(3)(c).

487 Gas Governance (Compliance) Regulations 2008, reg 52(2)(a).

488 See also s 33Q of the Takeovers Act 1993 which states the Court must have regard to the principles contained in the takeovers code; and s 137K(3)(b) of the Financial Advisers Act 2008 and s 79A(3)(b) of the Financial Service Providers (Registration and Dispute Resolution) Act 2008 which state the Court must take into account the nature and extent of any loss or damage suffered by a person as a result of the contravention, including the effect on a person of the loss of an opportunity to make a complaint to an approved dispute resolution scheme.

included. In comparison with the criminal field, there is limited civil pecuniary penalty case law from which guidance can be taken. The case law that exists is largely limited to the imposition of civil pecuniary penalties under the Commerce Act 1986. The Court of Appeal has made it clear in the context of criminal sentencing that:⁴⁸⁹

Judges must today “do the arithmetic”. That is they must indicate, in some manner which is amenable to review, where they started from and how they got to the sentence actually imposed.

- 7.54 Even where, in that field, there are many sentencing decisions that can be drawn upon, there is widespread international acceptance of the need for further direction for judges, whether it be in the form of sentencing guidelines or guideline judgments, to achieve greater consistency.
- 7.55 Transparency and consistency is also important when it comes to the setting of civil pecuniary penalties. Given the limited case law, there is arguably a heightened need for statutory guidance because of the very high maximum penalties that feature in the legislation, which can be applied to a broad range of behaviour and a broad range of offenders.
- 7.56 If guidance is advisable, there is a question as to whether there is a list of core factors that should be included in civil pecuniary penalty statutes, such as those listed at paragraph 7.51 above. Other factors may also be relevant. For example:
- Whether the respondent has committed previous breaches.⁴⁹⁰
 - Whether other particular orders have already been made in respect of the breach.⁴⁹¹
 - Whether there is a need to impose a lower penalty to ensure that the offender’s pool of resources are set aside for compensation claims.
 - Whether individuals are implicated alongside a body corporate or other professional body. In *Commerce Commission v Wrightson NMA Ltd*, the Court penalised a single course of conduct and divided the penalty between the company and the individual concerned.⁴⁹²

489 *R v S* [2007] NZCA 243 (CA) at [79].

490 See for example Unsolicited Electronic Messages Act 2007 Act, s 45(2)(c). See also Electricity Industry Act 2010, s 56(2)(e) and Gas Governance (Compliance) Regulations 2008, reg 52(3)(e). Noonan suggests this is more appropriate for inclusion in a retributive framework than one aimed at general deterrence: see Noonan, above n 454 at 258–259.

491 Commerce Act 1986, 80(2A)(a): when setting a penalty for breach of Part 2 (restrictive trade practices), the Court is directed to consider whether an order for exemplary damages has already been made against the person for the same conduct.

492 *Commerce Commission v Wrightson NMA Ltd*, above n 480.

- Whether the breach was an attempt or the person in breach was an accessory. Ancillary liability may be considered deserving of a lesser penalty than primary liability.
- Whether discounts should be made for an admission of liability and/or cooperating against other defendants. For instance, Williams J allowed a 50 per cent discount in *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd*, drawing an analogy to sentence reductions in the criminal law for entering an early guilty plea.⁴⁹³
- The financial circumstances of the defendant.⁴⁹⁴

7.57 Also relevant is the extent to which the interest in deterrence should be emphasised. Chris Noonan argues for courts to use economic analysis to guide the imposition of penalties in commercial and economic regulation cases.⁴⁹⁵ Deterrence would be a primary factor in that analysis, and would also provide the goal against which to assess various other factors relevant to penalty. For example, deterrence theory requires making the expected costs of price fixing greater than the expected gains to be made. This suggests courts should be able to quantify penalties based on the expected gain from the breach, not just the actual gain (which would also assist in cases where it is particularly difficult to quantify the gain made or loss avoided). Similarly, a deterrence-based penalty would not focus on the number of individual technical contraventions, but the expected effects of those contraventions assessed in a holistic manner.⁴⁹⁶ Noonan also suggests that when penalising cartels, lower penalties may be sufficient to deter contraventions if an effective leniency policy is in place. Conversely, deterrence theory supports imposing higher penalties on ringleaders.⁴⁹⁷ These are detailed economic-based theories which might not have universal application. Nevertheless, it may be desirable to give statutory guidance about matters that reflect these theories where they are thought relevant to a particular regime or contravention.

493 *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* (2006) 11 TCLR 581 (HC). See also discussion in B Hamlin and M Sumpter “Fixing the Price of Commerce Act Breaches” [2011] NZLJ 230 at 233–234.

494 Although Noonan suggests that in some price fixing cases, a penalty that effectively forces a firm out of business may nonetheless be justified: above n 454 at 263.

495 Noonan, above n 454.

496 Noonan, above n 454 at 257.

497 Noonan, above n 454 at 257–258.

7.58 The Australian Attorney-General's 2007 *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* recommended that statutes should specify a list of factors relevant to quantum, citing those factors put forth by the Australian Law Reform Commission in its 2002 report.⁴⁹⁸ Some of those factors do not appear in our own civil pecuniary penalty statutes, such as:

- whether professional advice had been obtained about the contravention, prior to the breach;
- in the case of a natural person, the attitude of the offender.

And, where the defendant is a body corporate:

- the level in the organisation at which the contravening conduct occurred;
- whether the corporation exercised due diligence; and
- whether it has a corporate culture conducive to compliance.

A framework for penalty setting

7.59 Including a non-exhaustive list of statutory factors is helpful, but it is also necessary for courts to articulate why each factor is significant and their relative significance, if penalties are to be just, predictable, and serve as a deterrent.⁴⁹⁹ Some have argued that in addition to a statutory list of factors, courts should draw on criminal sentencing practice.⁵⁰⁰

7.60 The modern approach to criminal sentencing, while discretionary and subject to variation where appropriate, involves three basic steps:

- First, the court must arrive at a “starting point” by considering the aggravating and mitigating factors relevant to the offence committed;
- Second, the court considers factors relating to the circumstances of the offender, to determine whether a sentence higher or lower than the starting point is required; and

498 Attorney-General's Department (Criminal Justice Division) *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (September 2007 ed) at 69–70, citing Australian Law Reform Commission *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (R95, Sydney, 2002) at 882, R29–1. The 2007 edition of the Attorney-General's Guide has now been revised: see para 8.12.

499 Noonan, above n 454 at 254.

500 Hamlin and Sumpter, above n 493 at 233–234.

- Third, the court discounts the sentence to take account of the entry of a guilty plea and any assistance to the authorities provided by the offender.⁵⁰¹

7.61 The High Court has already implicitly and explicitly adopted aspects of criminal sentencing in its penalty judgments under the Commerce Act,⁵⁰² and use of a framework broadly based on the criminal law sentencing approach has been praised as more transparent and predictable than previous cases, where the Court has tended to list the factors relevant to the exercise of its discretion and then arrive at a global penalty figure.⁵⁰³ However, Rodney Hansen J has warned against taking the analogy too far, as the objectives of criminal sentencing may differ markedly from those served by civil pecuniary penalties.⁵⁰⁴ In addition, while predictability is important, it may be desirable to avoid the imposition of penalties being perceived as a tariff that is simply a cost of doing business in the relevant area.

7.62 In conclusion, our tentative view is that the factors relevant to determining a penalty should be decided on a regime-by-regime basis. Having said that, the appearance in several regimes of the same factors suggests there is an identifiable core that it may be desirable to include in every civil pecuniary penalty regime.

Q37 Do you agree that civil pecuniary penalty statutes should include guidance for the courts as to the setting of the level of a penalty?

Q38 Is there a core list of factors that could be set out in legislation for courts to take into account when determining the quantum of a penalty and if so, what should it include? What other additional factors are or are not relevant?

Q39 To what extent should courts draw on criminal sentencing practice when determining the quantum of a penalty?

501 *R v Taueki* [2005] 3 NZLR 372 (CA) as modified by *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.

502 *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) at [14].

503 Hamlin and Sumpter, above n 493 at 231.

504 *Commerce Commission v EGL Inc* HC Auckland CIV 404-2010-5474, 16 December 2010 at [13]–[14].

APPEALS

- 7.63 There seems little doubt that appeals from civil pecuniary penalty proceedings fall within the general right of appeal to the Court of Appeal contained in s 66 of the Judicature Act 1908. Section 66 provides for the Court of Appeal to have appellate jurisdiction over “any judgment, decree, or order” of the High Court.⁵⁰⁵ This was confirmed by the Court of Appeal in *NZ Bus v Commerce Commission*.⁵⁰⁶ Since the Supreme Court decision in *Siemer v Heron*⁵⁰⁷ it is also clear that any appeals on interlocutory decisions or orders made in the High Court are brought before the Court of Appeal under s 66.⁵⁰⁸ A further appeal to the Supreme Court may only be granted by way of leave from that Court under the Supreme Court Act 2003.⁵⁰⁹
- 7.64 An appeal under s 66 is as of right on questions of both fact and law, and is undertaken by way of rehearing.⁵¹⁰ It is available both to defendants and the enforcement body taking the proceedings.

505 Section 66 provides: “The Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment, decree, or order save as hereinafter mentioned, of the [High Court], subject to the provisions of this Act and to such rules and orders for regulating the terms and conditions on which such appeals shall be allowed as may be made pursuant to this Act.”

506 [2008] 3 NZLR 433 (CA) at [65].

507 [2011] NZSC 133, [2012] 1 NZLR 309.

508 The Law Commission is currently reviewing the Judicature Act 1908: Law Commission *Review of the Judicature Act: Towards a Consolidated Courts Act* (NZLC IP29, Wellington, 2012) at [11.1]. Its final report is due in December 2012.

509 Supreme Court Act 2003, s 12. The Supreme Court must be “satisfied that it is necessary in the interests of justice for the Court to hear and determine the proposed appeal.” This is where: (a) the appeal involves a matter of general or public importance; or (b) a substantial miscarriage of justice may have occurred, or may occur unless the appeal is heard; or (c) the appeal involves a matter of general commercial significance: s 13(1)–(2). A statute may exclude an appeal to the Supreme Court by stating that the decision of the Court of Appeal is final (see for example s 428(3) of the Maritime Transport Act 1994) but no civil penalty regimes contain such provisions.

510 The appeal is decided on the record of the evidence given in the court below, although the appellate court has discretion to rehear evidence or receive further evidence. It must come to its own finding on the evidence and is not restricted by any findings the lower court has made, but acknowledges the advantage enjoyed by the first instance decision-maker which may have seen and heard the witnesses. This is in contrast to an appeal *de novo*, in which the appellant receives an entirely new hearing and the appeal body is not bound by the presumption that the decision appealed from is correct. See *Shotover Gorge Jet Boats Ltd v Jamieson* [1987] 1 NZLR 437 (CA) at 439–441 and *Hutton v Palmer* [1990] 2 NZLR 260 (CA) at 268.

- 7.65 The alternative approach would be for each statute to specify the appeal route for civil pecuniary penalty proceedings. Such specification might be desirable if there was a need to restrict appeals for reasons such as cost, delay, the significance of the subject matter, the specialist competence and expertise of the first-instance decision maker, or the need for finality.⁵¹¹ However, our initial view is that it is appropriate for civil pecuniary penalties to be subject to the broad right of appeal in s 66. They are a comparatively novel form of action which involves the imposition of sizeable monetary penalties. As such it may be likely that challenges will be brought relating both to procedural matters and penalty setting. This warrants full supervisory oversight by the Court of Appeal. A general appeal on fact and law ensures there is an opportunity to correct both factual and legal errors, while an appeal by way of rehearing strikes an appropriate balance between correcting errors and resolving appeals expeditiously.⁵¹²
- 7.66 Furthermore, the Court of Appeal hears the first-tier appeal from a civil pecuniary penalty decision. In principle then the appeal right should not be confined, unless one of the factors listed in the preceding paragraph applies.⁵¹³ The Commission has previously expressed the view that a cautious approach should be taken to limiting appeals to questions of law, because of the difficulties that may arise in trying to distinguish between matters of fact and law.⁵¹⁴

511 Legislation Advisory Committee, above n 475 at [13.1.1].

512 Above at [13.4.1]. See also Law Commission *Tribunal Reform* (NZLC SP20, 2008) at [8.8].

513 Generally only second-tier appeals should be confined to matters of law: Law Commission, above at [8.9]. And see Legislation Advisory Committee, above n 475 at [13.3.2].

514 Law Commission, above n 512 at [8.10]. These issues are discussed in T Endicott “Questions of Law” (1998) 114 LQR 292.

- 7.67 Any argument for narrowing the appeal route for civil pecuniary penalties might be based on their “quasi-criminal” nature. Criminal appeal rights have more formal restrictions. For example, the Crimes Act 1961 sets out four specific grounds for allowing an appeal against conviction for an indictable offence.⁵¹⁵ For summary offences, the Summary Proceedings Act 1957 states how evidence must be heard where the appeal concerns questions of fact,⁵¹⁶ and the Crown’s right of appeal is more circumscribed than the defendant’s.⁵¹⁷ When the relevant provisions of the Criminal Procedure Act 2011 come into force they will mainly consolidate and update existing appellate processes without making major substantive reforms.⁵¹⁸
- 7.68 The more formal restrictions on the right to appeal in the criminal law relate to the need to afford deference to the jury (or the initial fact-finder) on factual matters.⁵¹⁹ The jury is expressly given the task of determining whether the defendant is factually guilty or not. It is thought more competent to determine factual issues, for example by virtue of having seen the witnesses first-hand.⁵²⁰ By contrast, appellate bodies have tended to exercise wider powers in the civil jurisdiction.⁵²¹ Richard Nobles and David Schiff cite, for example, the decline in civil juries as leading to an increase in the ability of appeal courts to review civil proceedings.⁵²² As currently drafted, s 66 facilitates broad oversight of civil appeals, which might be particularly appropriate for civil pecuniary penalty proceedings. For example, if the government’s disproportionate power in civil pecuniary penalty proceedings distorts trial outcomes, then the right of appeal may serve as a corrective measure.⁵²³
- 7.69 For these reasons, we consider that appeals from civil pecuniary penalties should continue to be brought under the broadly framed right in s 66. Narrowing the right of appeal available for civil pecuniary penalties may

515 Section 385(1): Where the verdict of the jury is unreasonable or cannot be supported having regard to the evidence; where the decision was wrong on a question of law; where there was a miscarriage of justice; or where the trial was a nullity. While the grounds are broadly worded, the Supreme Court has emphasised the limited supervisory role played by the appellate court especially on matters of fact: *Owen v R* [2007] NZSC 102, [2008] 2 NZLR 37 at [13].

516 Section 119(2).

517 Summary Proceedings Act 1957, ss 115, 115A.

518 On the earlier of a date appointed by the Governor-General by Order in Council, or two years after the date the Act received the Royal assent (17 October 2011): Criminal Procedure Act 2011, s 2.

519 R Nobles and D Schiff “The Right to Appeal and Workable Systems of Justice” (2002) 65 MLR 676 at 689 onwards.

520 Above at 690.

521 Nobles and Schiff, above n 519 at 684 onwards.

522 Nobles and Schiff, above n 519 at 685. Although in the civil jurisdiction courts may also be exhorted to take a more deferential approach to questions of fact. See for example statements of Lord Jauncey in *Clark Boyce v Mouat* [1993] 2 NZLR 641 (PC) at 647.

523 H L Dalton “Taking the Right to Appeal (More or Less) Seriously” (1985–86) 65 Yale LJ 62 at 103–104.

also cause practical difficulties. In particular, declarations of liability under a number of existing regimes can give rise to other types of order – such as compensation orders – in addition to civil pecuniary penalties.⁵²⁴ Any argument to restrict civil pecuniary penalty appeal rights due to their quasi-criminal nature may not carry for the other available orders. To provide for a range of appeal rights under such a statutory scheme would be complex.

Q40 Do you agree that appeals from civil pecuniary penalties should continue to be brought under the broadly framed right in s 66 of the Judicature Act 1908?

LIMITATION PERIODS

- 7.70 Limitation periods provide a time within which legal proceedings must be initiated, either by providing a defence to proceedings brought after that date or by negating the enforceability of the right which is the subject of the proceedings.
- 7.71 Most civil pecuniary penalty regimes set a specific time limit within which proceedings must be commenced. The majority are of two or three years.⁵²⁵ The shortest is the 12 month time limit in the Commerce Act 1986 for applying for a penalty for breach of an undertaking, from the date the relevant obligation in the undertaking was required to be met.⁵²⁶ An example of a longer time limit is in the Anti-Money Laundering and Countering Financing of Terrorism Act 2009, in which “an application for a civil pecuniary penalty ... may be made no later than 6 years after the conduct giving rise to the liability to pay the civil pecuniary penalty occurred.”⁵²⁷
- 7.72 A number of these time limits begin to run from the time the breach occurred.⁵²⁸ However, a number also begin to run from the time the breach

524 Securities Act 1978, s 55D, Securities Markets Act 1988, s 42U, Takeovers Act 1993, s 33N. So for example in a case under the Commerce Act 1986, Hammond J in the Court of Appeal observed that the Commerce Commission had sought in the High Court a declaration, an order cancelling the agreement, an injunction and orders for pecuniary penalties. The appeal to the Court of Appeal was a general appeal from a series of determinations: *New Zealand Bus Ltd v Commerce Commission* [2008] 3 NZLR 433 (CA) at [65].

525 See Commerce Act 1986, s 83(5) (for business acquisitions substantially lessening competition), s 86(6) (for contravening an information disclosure requirement), Dairy Industry Restructuring Act 2001, s 144(4), Financial Advisers Act 2008, s 137K(5), Financial Service Providers (Registration and Dispute Resolution) Act 2008, s 79A(5).

526 Commerce Act 1986, s 85A(7).

527 Anti-Money Laundering and Countering Financing of Terrorism Act 2009, s 72(1). Also see penalties for breach of a price-quality requirement in Commerce Act 1986, s 87(6) and penalties for breach of Therapeutic Products and Medicines Bill 2006, cl 251(1).

528 Anti-Money Laundering and Countering Financing of Terrorism Act 2009, s 72, Commerce Act 1986, s 83(5), Dairy Industry Restructuring Act 2001 s 144(4), Financial Advisers Act 2008, s 137K(5), Financial Service Providers (Registration and Dispute Resolution) Act 2008, s 79A(5).

was discovered or ought reasonably to have been discovered.⁵²⁹ One of these, for Commerce Act restrictive trade practices penalties, contains a “longstop” period of 10 years.⁵³⁰ This means that even if the claim remained undiscovered for a long period of time, if 10 years have passed since the date of the act or omission on which the claim is based, the regulator cannot apply for a penalty. A number of penalties incorporating reasonable discoverability tests do *not* contain a longstop period.⁵³¹ This means that a latent civil pecuniary penalty proceeding could survive indefinitely.

- 7.73 When a civil pecuniary penalty regime does not stipulate a time limit, the Limitation Act 2010 will apply.⁵³² It appears that civil pecuniary penalties fall within the definition of “money claim” in that Act, as:⁵³³

... a sum that is recoverable under an enactment and is, or is by way of, a forfeiture or a penalty, but does not include the following to which a person is liable on conviction for an offence:

- (a) a fine:
- (b) an amount of compensation, reparation, or restitution.

- 7.74 As money claims under the Act, civil pecuniary penalties may be sought:

- within six years of the act or omission (the primary period); or
- within three years of the date on which the plaintiff knew or ought to have known of the facts in s 14 (the late knowledge period)⁵³⁴ but no later than 15 years after the date of the act or omission (the longstop period). The longstop period does not apply if the plaintiff can show lack of knowledge by reason of the defendant’s fraud.

529 Takeovers Act 1993, s 43C, Securities Act 1978, s 57E(1), Securities Markets Act 1988, s 42ZJ(1), Telecommunications Act 2001, ss 156L, 156Q, Telecommunications (Interception Capability) Act 2004, s 27(5), Unsolicited Electronic Messages Act 2007 Act, s 50, Commerce Act 1986, s 74D(5) (for restrictive trade practices or breaching a cease and desist order). See also the Electricity Industry Act 2010, s 52.

530 See also the Electricity Industry Act 2010, s 52.

531 This is the case for civil penalties in the Takeovers Act 1993, the Securities Act 1978, Securities Markets Act 1988, Telecommunications Act 2001, Telecommunications (Interception Capability) Act 2004, Unsolicited Electronic Messages Act 2007 Act and the Commerce Act 1986 (breaching a cease and desist order).

532 Section 12(2)(d).

533 Limitation Act 2010, s 4.

534 Limitation Act 2010, s 14(1)(a)–(e) section 14(1)(a)–(e): the fact that the act or omission occurred; that it was attributable to or involved the defendant; that the claimant suffered damage or loss; that the claimant did not consent to the act or omission; that the act or omission on which the claim is based was induced by fraud or mistaken belief. The Law Commission recommended that a late knowledge date based on reasonable discoverability be introduced to the Limitation Act 1950 in its 2000 report: Law Commission *Limitation of Civil Actions* (NZLC PP39, 2000) at [85].

- 7.75 Those limitation periods provide a defence to penalty proceedings.⁵³⁵
- 7.76 For penalties for acts or omissions before 1 January 2011, its predecessor Act, the Limitation Act 1950, will apply.⁵³⁶ Under that Act, most civil proceedings are subject to a general six year limitation period. However, in s 4(5) it provides expressly that:
- An action to recover any penalty or forfeiture, or sum by way of penalty or forfeiture, recoverable by virtue of any enactment shall not be brought after the expiration of 2 years from the date on which the cause of action accrued:
- Provided that for the purposes of this subsection the expression penalty shall not include a fine to which any person is liable on conviction of a criminal offence.
- 7.77 “Penalty” in that Act is not defined, but case law suggests it broadly accords with this Issue Paper's definition of a civil pecuniary penalty.⁵³⁷
- 7.78 In the remainder of this section we consider how civil pecuniary penalty statutes should approach issues of limitation.

Time limits for civil and criminal proceedings

- 7.79 Limitation law operates quite differently in the civil and criminal spheres. Both involve a balancing of interests intended to achieve just outcomes for a range of parties although their underlying rationale and operation differs relatively significantly.

Civil proceedings

- 7.80 Both the 2010 and 1950 Acts set down a general six year limitation period for bringing an action or claim. Both contain specific limitation periods tailored for particular classes of claimants and types of claim, reflecting the need to strike a balance between various interests. The 2010 Act provides a late knowledge period for claims, allowing claimants to bring proceedings even if the initial limitation period has expired where they can show they did not reasonably know of facts relevant to the claim. The 1950 Act did not include a late knowledge period, but during the life of that statute some causes of action were made subject to a common law test of “reasonable discoverability”. The cause of action would only accrue once the loss or damage caused by

535 The regimes that do not specify civil pecuniary penalty time limits are the Biosecurity Act 1993, Overseas Investment Act 2005, Hazardous Substances and New Organisms Act 1996, Securities Trustees and Statutory Supervisors Act 2011. See also the Gas Act 1992 and the Financial Markets Conduct Bill (342-2).

536 Limitation Act 2010, s 59.

537 Case law stated that s 4(5) would not cover: actions against directors for debts of a liquidated company under the Companies Act 1995 (*Re Network Agencies International Ltd* [1992] 3 NZLR 325 (HC)); payment demanded for the deemed value of fish unintentionally caught without quota under the Fisheries Act 1996 (*Pacific Trawling Ltd v Ministry of Fisheries* HC Napier CP 17/99, 28 July 2000); or a demand for repayment from a vendor acting in contravention of the Hire Purchase Act 1971 (*Technic Holdings Ltd v Lou Bernard Stonnell* HC New Plymouth AP 15/92, 14 May 1993).

the wrongful act or omission was or ought to have been discovered by the plaintiff. Neither Act applies in the case of express statutory provision to the contrary.

- 7.81 Under the Acts, the limitation periods operate as a defence that must be pleaded by the defendant. This means that the establishment of the defence does not extinguish any right, but prevents the Court granting relief.
- 7.82 A defendant in civil proceedings can also invoke the equitable defence of laches or acquiescence, if there is undue delay on the part of the plaintiff in bringing the claim after becoming aware of their right to do so. The Court then has discretion to refuse relief even if time has not expired or where no limitation provision applies, if it would be inequitable or unreasonable to allow the claim to be brought. An equitable defence is generally only available where the claimant knew or reasonably should have known of the existence of a cause of action *and* where that delay was actually prejudicial to the defendant.⁵³⁸
- 7.83 Limitation periods are required to achieve certainty and finality, particularly for defendants. By providing claimants with an incentive to bring their claims without delay, limitation periods ensure claims are decided on fresh evidence, minimising the potential for injustice to the defendant by having to defend stale proceedings.⁵³⁹ They also recognise that, with the passage of years, people should be able to order their lives according to the status quo, without fear of being held to account for ancient obligations. However, limitation regimes must also work fairly for claimants, who have an interest in ensuring they have as much time as possible to seek relief for a meritorious claim.⁵⁴⁰
- 7.84 Other interests are also relevant, such as the interest of the State in deciding claims fairly on fresh evidence, and in avoiding expense and time spent litigating matters that may have diminished in significance over the years. Third parties may also require certainty as to the status quo, such as to ensure security of title where property is transferred.⁵⁴¹

538 Law Commission *Limitation of Civil Actions* (PP39, 2000) at [16].

539 While this disadvantage may also affect plaintiffs, defendants may be at a more substantial disadvantage. For example, the events giving rise to the plaintiff's claim may be one of a series of similar transactions (such as a claim for the negligent supply of services) and the defendant may have no particular reason to recall them or to preserve any related evidence: Law Commission *Limitation of Actions* (Consultation Paper 151, London, 1998) at [1.26].

540 Above at [136].

541 Limitation Bill, Regulatory Impact Statement.

Criminal proceedings

- 7.85 There is no general statute of limitation for criminal proceedings. However, s 25(b) of NZBORA protects the rights of defendants to be tried without undue delay. A defendant may allege that right has been breached if there is significant delay by prosecuting authorities in bringing the case to trial. The Court can also strike out criminal proceedings for delay as part of its inherent power to prevent abuse of its processes, whether the delay is caused by the prosecution or because there has been a long time between when the offence occurred and when it was reported. The delay must cause actual prejudice to the accused.⁵⁴²
- 7.86 At present, limitation periods are set down in the Crimes Act 1961 and the Summary Proceedings Act 1957 for specific types of offences. For offences that may only be dealt with summarily, unless specific provision is made to the contrary, the information must be laid within six months from the time the “matter of the information arose”.⁵⁴³ For offences punishable by less than three years imprisonment or a fine of less than \$2,000, whether summary or indictable, s 10B of the Crimes Act sets a 10 year limitation period, unless a shorter period of limitation has been specified by statute.⁵⁴⁴ The Acts are silent about offences with greater penalties than these. So, unless there is specific provision about an offence in its own statute, no limitation period applies.
- 7.87 These provisions will be overtaken by s 25 of the Criminal Procedure Act 2011 once it comes into force.⁵⁴⁵ That section imposes various time limits for when a charging document may be filed, depending on the category of the offence. The most serious offences (category 4 offences) will continue to have no general statutory time limit, while other time limits will be between six months and five years, depending on the seriousness of the penalties available for the offence.⁵⁴⁶ The new time limits form part of the reorganisation and rationalisation of criminal procedure under that new Act.

542 *Watson v Clarke and Lawlor* [1990] 1 NZLR 715 (HC).

543 Summary Proceedings Act 1957, s 14.

544 Or if the Attorney-General gives his or her prior consent to the prosecution: Crimes Act 1961, s 10B(1).

545 On the earlier of a date appointed by the Governor-General by Order in Council, or two years after the date the Act received the Royal assent (17 October 2011): Criminal Procedure Act 2011, s 2.

546 A charging document may be filed at: (1) any time for a category 4 offence; (2) for a category 3 offence, within five years of the date the offence was committed, if it specifies a penalty of no more than three years' imprisonment (unless the Solicitor-General gives prior consent), or otherwise at any time; (3) for a category 1 or 2 offence, within five years of the date the offence was committed if no penalty is specified (unless the Solicitor-General gives prior consent), or within six or 12 months depending on the penalty. The limits are made subject to any provision in any other enactment that provides a different limitation period: Criminal Procedure Act 2011, s 25.

- 7.88 In criminal limitation law there is no private claimant to consider, but there is a public interest in ensuring that the passage of time does not allow criminal conduct to go unpunished. Balanced against this is the public interest in incentivising efficient criminal investigations and prompt prosecutions, in the interest of efficiency and fairness but also to minimise the likelihood that a defendant will be acquitted because of unreliable evidence or prejudicial delay. The prosecution has an interest in having as much time as possible within which to investigate and instigate proceedings but defendants have a right, after a time, to get on with life without the threat of a criminal proceeding hanging over their head.
- 7.89 It appears that the dominant factor affecting criminal time limits is the seriousness of the offence. The time for filing an information lengthens with the severity of the criminal sanction. However, this calls for the exercise of prosecutorial discretion. Crown prosecution guidelines list the long passage of time between an offence taking place and the likely date of trial as a factor weighing in the decision of whether prosecution is in the public interest.⁵⁴⁷
- 7.90 As offences decrease in seriousness, the public interest in prosecution also decreases.⁵⁴⁸ Public interest is a key factor taken into account by the Crown when determining whether to prosecute. The six month limitation period currently in place for purely summary offences is thought adequate for the Crown to investigate and prepare its case, although that may be extended by statute where the offence involves a risk of serious harm to health and safety or involves fraud or dishonesty that is difficult to detect.⁵⁴⁹

547 Crown Law *Prosecution Guidelines* (January 2010) at [6.9.4].

548 Above at [6.7].

549 Legislation Advisory Committee *Guidelines on Process and Content of Legislation* at [12.7.3] < www2.justice.govt.nz/lac/index.html > .

Civil pecuniary penalties and limitation law

- 7.91 Currently, of 15 civil pecuniary penalty statutes, three are silent as to limitation periods and will therefore be subject to the 2010 (or 1950) Act.⁵⁵⁰ The remaining Acts contain internal limitation periods. These appear to be modelled on s 14 of the Summary Proceedings Act, usually providing that proceedings may be commenced within a certain time from when the matter occurred, arose or was discovered.⁵⁵¹ The language used is inconsistent and could give rise to legal arguments.⁵⁵² Very few statutes go beyond stating the length of the limitation period and whether time starts to run from the date of the breach or discovery of the breach. They do not address who must discover the breach, what constitutes discovery, or when time starts to run for a series of related breaches or continuing breaches.
- 7.92 Another difficult question of interpretation likely to arise for these regimes is whether their internal limitation provisions displace or exist alongside the 2010 Act. It was clear that no part of the 1950 Act applied if the relevant statute set its own time limits.⁵⁵³ But s 40 of the 2010 Act states:

550 Biosecurity Act 1993, Hazardous Substances and New Organisms Act 1996, Overseas Investment Act 2005. It is likely that few civil penalty proceedings will now be subject to the 1950 Act, since it sets a two year time limit on seeking a civil penalty after the date the cause of action accrued, which for civil penalties will usually be the date of the breach. Most proceedings for civil penalties under the 1950 Act will therefore be out of time by 1 January 2013 (although an exception in rare circumstances may be where no loss or damage results, and it is held that therefore no cause of action accrues, for a long time after the breach).

551 See comments of Fisher J in *Commerce Commission v Roche Products (NZ) Ltd* [2003] 2 NZLR 519 (HC) at [24]. Section 14 states: “**Time for laying information** Except where some other period of limitation is provided by the Act creating the offence or by any other Act, every information for an offence (other than an offence which may be dealt with summarily under s 6) shall be laid within 6 months from the time when the matter of the information arose.”

552 For example some existing regimes refer to the time a matter “arose” and others to when it “occurred”. In *Commerce Commission v Roche Products (NZ) Ltd*, the Commission argued that “arose” in s 80(5) of the Commerce Act 1986 (prior to its 2001 amendment) meant “was discovered or became discoverable”. Fisher J held that the statutory purpose of the Act required an interpretation as “occurred”: above n 551at [14]–[40].

553 Limitation Act 1950, s 33. See *T v H* [1995] 3 NZLR 37 (CA).

40 Other enactments may displace or affect defences

- (1) A defence under Part 2 or 3 does not apply to a claim if an enactment other than this Act—
 - (a) prescribes for the claim a limitation period or any other kind of limitation defence; or
 - (b) provides for the determination or fixing of the time before which, or period within which, the claim must be made.
- (2) However, this section does not limit or affect the operation of enactments other than this Act that—
 - (a) do what is specified in subsection (1) but apply to a claim not instead of, but as well as, this Act; or
 - (b) alter, extend, limit, or prevent this Act's application or operation.

7.93 For instance, the Takeovers Act 1993 states that civil pecuniary penalties may be sought within two years of the date on which the breach was discovered, but does not impose any longstop on that limitation period. Will the 15 year longstop period in the 2010 Act apply?

Is the categorisation of civil pecuniary penalties under the Limitation Act 2010 correct?

- 7.94 Given the nature of civil pecuniary penalties as punitive proceedings initiated by the State, should they be subjected to the six year limitation period applicable to more orthodox civil claims? The period set down by the Limitation Act 2010 can always be departed from, but it will provide the starting point for policy makers determining the length and operation of statutory limitation provisions.⁵⁵⁴ Any such determination will need to balance the various interests concerned, taking into account the nature and function of civil pecuniary penalties. Criminal limitation law may be relevant to that inquiry.
- 7.95 Money claims under the 2010 Act now encompass claims for a civil pecuniary penalty. In contrast under the 1950 Act, they were dealt with separately from other types of civil claim and were subject to a two year limitation period. There is little detailed discussion of the policy decision to bring civil pecuniary penalty claims within the general category of money claims. One possibility relates to the abolition of the common informer procedure in England. Our 1950 Act is based on the English Limitation Act 1939, and s 4(5) seems to be drawn directly from a similar English provision.⁵⁵⁵ Commentary on the English Act notes the English provision appeared to become redundant since the abolition of the common informer procedure in 1951.

⁵⁵⁴ Legislation Advisory Committee, above n 549 at [11.4.3].

⁵⁵⁵ Limitation Act 1930 (UK), s 18(5).

- 7.96 In *Re Network Agencies International Ltd*,⁵⁵⁶ the High Court suggested one reason for the reduced 1950 Act time period for civil pecuniary penalties is their punitive nature. Greater protection may be afforded to those faced with a punitive measure through the use of shorter limitation periods. The Court stated:

At least so far as the first of those considerations is concerned, it might well have been thought that those faced with punitive measures should receive greater protection than those faced with mere civil litigation over private compensation between two private citizens. Punitive measures commonly involve a moral stigma. Their quantum frequently exceeds the loss suffered by the victim. Consistent with the view that for those reasons those faced with a penalty have the most to lose, one might expect that where legislation confers a cause of action for the recovery of a sum of money, the choice between short and long limitation periods will turn upon whether the predominant purpose is to punish or to compensate.

- 7.97 The aim of the 2010 Act was also to simplify the law. This may have warranted removing the differential treatment of various civil claims. However this reasoning is not evident in other parts of the 2010 Act. For example, in 1992, defamation claims were carved out and made subject to a three year limitation period under the 1950 Act, and the reduced period was taken over into the 2010 Act. Other distinct categories created under the 1950 Act have also been largely carried over to the 2010 Act, such as claims to recover land and claims for contribution.
- 7.98 There may be a question, then, as to whether civil pecuniary penalties should be dealt with in the pool of general money claims in the 2010 Act. One reason for returning to a shorter period may be that those charged with seeking civil pecuniary penalties (regulators) usually have information-gathering powers at their disposal and the power to amend pleadings once the proceedings have been commenced.⁵⁵⁷ Notably, however, LAC Guidelines suggest that in general the Crown should be placed in neither an advantageous nor disadvantageous position with other litigants in relation to the setting of civil limitation periods.⁵⁵⁸
- 7.99 Arguments may also be made that civil pecuniary penalty proceedings should be treated differently because commercial certainty arguments are particularly relevant to them. However, this may be true of some civil pecuniary penalties – such as those that target businesses and professionals – but not all. There are also public interest factors to consider which weigh both ways in the balancing exercise. The interest in pursuing proceedings quickly, before evidence becomes stale and social circumstances change, favours a shorter period. The competing interest in allowing ample time to investigate

556 *Re Network Agencies International Ltd*, above n 537 at 328–329.

557 *Securities Commission v Midavia Rail Investments* [2006] 2 NZLR 207 (HC) at [110].

558 Legislation Advisory Committee, above n 549 at [11.4.3].

and commence proceedings to increase the likelihood of success favours a longer period.

- 7.100 We also note that the new six year periods for civil pecuniary penalties increases the disparity between the parallel criminal/civil pecuniary penalties in the Hazardous Substances and New Organisms Act 1996. Prosecution of the parallel criminal offence must be commenced within two years of the time the matter arose, but its civil counterpart may now be sought up to six years after the event, and longer where late knowledge is established.⁵⁵⁹ Should the civil pecuniary penalty limitation period be allowed to extend significantly beyond its criminal counterpart, and is the disparity an argument for returning to the former two year limitation period? This is also the case for limitation periods in the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 – the parallel offence must be sought within three years; but the civil penalty proceeding can be commenced within up to six years.⁵⁶⁰
- 7.101 Australian states have their own specific limitations enactments and further provisions are spread throughout various pieces of legislation at both state and federal level. The Australian Guidelines only recommend that civil pecuniary penalty statutes specify a time limit on proceedings, in order to give potential defendants certainty as to their liability. The Environment Protection and Biodiversity Conservation Act 1999 (Cth) sets a time limit of six years for seeking a civil pecuniary penalty.⁵⁶¹

Transitional issues for existing regimes

- 7.102 An important point to note is that the treatment of civil pecuniary penalties as money claims under the 2010 Act will mean that civil pecuniary penalty provisions previously reliant on the 1950 Act are now subject to quite different limitation rules. For those civil pecuniary penalty provisions that fall under the 2010 Act, the two year limit will give way to a primary claim period of six years, a statutory late knowledge period and a longstop period of 15 years. Many civil pecuniary penalties that were never subject to common law concepts of reasonable discoverability will now provide for the plaintiff to have “late knowledge” of a breach. The initial policy decisions that drove reliance on the 1950 Act may need re-evaluating to determine whether the 2010 Act should now apply in its place.⁵⁶²

559 Biosecurity Act 1993, s 162 and Hazardous Substances and New Organisms Act 1996, s 109A(2)).

560 Sections 72(1) and 99.

561 Section 481(1).

562 Similar issues may arise in relation to the Financial Markets Conduct Bill (342–2), which relies on the 2010 Act. The conduct targeted under that Bill is presently handled under the Securities Markets Act 1988 and Securities Act 1978, which set their own time limits.

How should civil pecuniary penalty statutes deal with limitation periods?

- 7.103 The Law Commission's preliminary view is that the setting of limitation periods for civil pecuniary penalties should be a conscious policy decision, taking into account the range of penalties that may be sought under a particular regime. Wholesale reliance on the 2010 Act is not necessarily desirable, since some civil pecuniary penalties cover a range of conduct of varying seriousness and some civil pecuniary penalty regimes contain a number of different penalties which may require separate limitation periods, such as the Commerce Act 1986.⁵⁶³ Also, non-monetary civil orders such as management bans are not covered by the Limitation Act 2010. Policy makers may need to examine carefully the range of orders in a single statute and think about how limitation periods apply to each, not just to the scheme as a whole. They will also need to clearly specify the extent to which a statute's internal limitation rules displace or exist alongside the 2010 Act.
- 7.104 There may be a case for the provision of guidance about when it might be appropriate for a civil pecuniary penalty statute to provide different or more detailed internal limitation periods than those set down by the 2010 Act. The LAC Guidelines discuss some considerations relevant to civil remedies generally, although these have not been updated since the move to the 2010 regime. For example, shorter periods may be required where:⁵⁶⁴
- the wrong or thing complained of is relatively trivial, such as for some regulatory requirements;
 - early resolution or finality is essential to ensure that the government or some other body or regime can operate effectively.
- 7.105 Longer periods may be required where it is obvious from the outset that the wrong complained of is serious and unlikely to be discovered for some years after the relevant act or omission occurred.⁵⁶⁵ For example it has been argued that price fixing under the Commerce Act is more likely to be covert by nature,⁵⁶⁶ whereas insider trading under the Securities Markets Act may be more likely to be overt by nature.⁵⁶⁷ Whether these observations are correct, and what influence they may have in other areas, is open to further analysis. Similar considerations may also influence whether the limitation period should incorporate a period for "late knowledge", to adopt the terminology of the 2010 Act. This may justify shortening the initial period of limitation.

563 Limitation periods are 12 months for breach of an undertaking; three years for restrictive trade practices (with provision for reasonable discoverability); and three years for business acquisitions that substantially lessen competition with no provision for reasonable discoverability.

564 Legislation Advisory Committee, above n 549 at [11.4.3].

565 Above.

566 *Commerce Commission v Roche Products (NZ) Ltd* above n 551 at [35], [54].

567 *Securities Commission v Midavia Rail Investments*, above n 557 at [85]. See also *Securities Commission v Midavia Rail Investments* [2007] 2 NZLR 454 (CA) at [56].

Conversely if a long initial period of limitation is used, adopting a late knowledge period as well may be unnecessary or unfair.⁵⁶⁸ Extending limitation periods may also make it more difficult for professionals or businesses to get insurance against legal claims, and the higher insurance cost will be passed on to consumers.⁵⁶⁹ Should this be taken into account when setting limitation periods for civil pecuniary penalties that predominantly target professionals or businesses?

- 7.106 There are additional issues to consider beyond merely the length of the limitation period. For example, from when should time start to run? In previous reports on limitation periods the Law Commission has supported the move towards calculating limitation periods from the time of the act or omission, rather than relying on concepts of accrual, and incorporating a concept of reasonable discoverability if necessary, and this is also the approach taken in the 2010 Act.⁵⁷⁰
- 7.107 The next question is when time should start to run if there are a series of related breaches for which one penalty proceeding has been commenced, or where there is a continuing breach, such as under s 27 of the Telecommunications (Interception Capability) Act 2004. Should time run from the first or last act or omission, or from when the continuing breach began or when it ended? These issues are likely to arise but few statutes deal with them, nor does the 2010 Act. Is it desirable to deal with these matters in statute or to leave them to be determined as a matter of judicial discretion according to the statutory context and the justice of the case? As the Law Commission noted in its 1988 report on limitation defences, fixed rules may act unfairly, but broad judicial discretions may undermine the need for certainty and repose which underlies all limitation periods.⁵⁷¹
- 7.108 If a late knowledge period is used, further questions arise, namely (i) whose knowledge is relevant; and (ii) what constitutes “knowledge”. The first point is important for penalties sought by a regulator for conduct which led to damage or loss being incurred by others. Does time start to run from when the regulator gains knowledge of the act or omission, when the person or persons who suffered loss gain knowledge, or some other alternative? The various options were discussed in the Court of Appeal and Supreme Court in a case concerning an action for civil remedies under the Fair Trading Act 1986 sought by the Commerce Commission on behalf of consumers.⁵⁷² A similar

568 [2007] 2 NZLR 454 (CA) at [53]–[56].

569 Law Commission *Limitation of Civil Actions* (NZLC PP39, 2000) at [40].

570 See for example Law Commission, above at [85].

571 Law Commission *Limitation Defences in Civil Proceedings* (NZLC R6, 1988) at [126].

572 *Commerce Commission v Carter Holt Harvey* [2008] 1 NZLR 387 (HC), *Carter Holt Harvey Ltd v Commerce Commission* [2009] NZLR 535 (CA), *Commerce Commission v Carter Holt Harvey Ltd* [2009] NZSC 120 (SC). See *Gault on Commercial Law* (online looseleaf ed, Brookers) at [FT43.06] for a summary of the approach taken by individual judges in each court.

scenario may be envisaged in civil pecuniary penalty proceedings. Should this be specified in civil pecuniary penalty limitation periods? We note that under s 135(5) of the Employment Relations Act 2000, concerning limitation periods for penalties, the relevant knowledge is that of the person bringing the action.

- 7.109 Another question is at what point in a regulator's investigation it will be held that knowledge of a contravention was obtained. For instance this could be when the regulator had knowledge of the circumstances that would lead to a chain of inquiry as to the breach; or it might require knowledge of facts which would indicate a breach without significant further investigation. The relevant facts that must be known are set out in the 2010 Act, but not the degree of knowledge of those facts that is required. Should it be set out in civil pecuniary penalty statutes?

Q41 Do you agree that civil pecuniary penalty statutes should deal expressly with the issue of limitation?

Q42 Do you agree that guidance should be provided to policy makers on the matters influencing the choice of limitation periods?

Chapter 8

What form should our recommendations take?

- 8.1 In our final report, we intend to make recommendations about:
- The circumstances when civil pecuniary penalties might be warranted or desirable in a statutory regime; and
 - Each of the matters of procedure and design discussed in chapters 6 and 7 of this Issues Paper.
- 8.2 We would like feedback on the form that our recommendations should take. Is a form of guidance for policy makers desirable? And is there an argument for a legislative response?

GUIDANCE FOR POLICY MAKERS

- 8.3 A chapter dedicated to civil pecuniary penalties could be added to the LAC Guidelines. The LAC provides advice on the development of legislation. Its overarching purpose is to help improve the quality of law-making. Its *Guidelines on Process and Content of Legislation* set out central aspects of the process and elements of the content of legislation that should always be addressed when creating legislation.⁵⁷³ They have been approved by Cabinet, and ministers and officials are required to confirm to the Cabinet Legislation Committee that a draft bill complies with the legal principles and obligations identified in the Guidelines.⁵⁷⁴
- 8.4 A chapter on civil pecuniary penalties could do a number of things. First, it could advise on when civil pecuniary penalties should and should not be introduced into a statutory scheme. This advice could be based on the Commission's recommendations that arise from responses to the questions in

573 Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (Wellington, 2001). See < www2.justice.govt.nz/lac/index.html >

574 *Cabinet Manual* (2008) at [7.60(e)] and [7.61]. See < www.cabinetmanual.cabinetoffice.govt.nz > .

chapter 4 of this Issues Paper. For example, chapter 12 of the LAC Guidelines presently gives such guidance as to when an offence may properly be categorised as a strict liability offence.⁵⁷⁵

- 8.5 Secondly, such a chapter could set out best practice for their design based on our recommendations arising from chapters 6 and 7 of this Issues Paper. Guidance, then, could be given on the approach to:
- The appropriate procedural and evidential rules;
 - The standard and burden of proof;
 - The operation (if any) of the privilege against self-exposure to a non-criminal penalty;
 - Double jeopardy;
 - Intention, defences and ancillary liability;
 - Terminology;
 - The imposition of civil pecuniary penalties and provisions enabling settlement;
 - The instigation of proceedings;
 - Setting maximum penalties in civil pecuniary penalty legislation;
 - Guidance as to whether and at what level to impose a penalty;
 - Appeals; and
 - Limitation periods.
- 8.6 Thirdly, with the assistance of the Parliamentary Counsel Office, the chapter could contain model provisions.
- 8.7 In our view, at the very least the first of these would be worthwhile. As noted in chapter 4, it is our impression that the arguments for civil pecuniary penalties have not always been well articulated. Officials, then, might be assisted by concise guidance on these matters which they can consult when contemplating a new civil pecuniary penalty regime. The LAC Guidelines seem an ideal vehicle for such guidance.

575 When (a) the offence involves the protection of the public from those undertaking risk-creating activities – these offences (commonly described as public welfare regulatory offences) usually involve the regulation of occupations or trades or activities in which citizens have a choice as to whether they involve themselves; and (b) the threat of criminal liability supplies a motive for persons in those risk-generating activities to adopt precautions, which might otherwise not be taken, in order to ensure that mishaps and errors are eliminated; and (c) the defendant is best placed to establish absence of fault because of matters peculiarly or primarily within the defendant's knowledge.

LEGISLATION

- 8.8 In addition, there is a question as to whether there is a need for a legislative framework for civil pecuniary penalties. Two matters may justify enacting legislation.
- 8.9 First, our recommendations about design and procedural rules will differ from some existing civil pecuniary penalty provisions. This is inevitable because of the inconsistent approaches taken in the existing legislation. There may be a need for legislation to remedy those inconsistencies. Non-material variations – those that, in practice, will have little or no impact on rights and interests – are unlikely to warrant a legislative response. However, if we determine that an existing provision conflicts with principle to such an extent that it may infringe upon rights and interests, legislation might well be warranted. The position that some existing statutes take on double jeopardy could fall into this category. Similarly if we were to recommend that defendants should benefit from some form of protection on the grounds of a privilege against self-exposure to a non-criminal penalty in civil pecuniary penalty proceedings, amendments to all but perhaps one of the existing Acts may be desirable.
- 8.10 Secondly, a more comprehensive legislative response may be warranted if there is sufficient concern that the combination of the novel and hybrid nature of civil pecuniary penalties, and the inconsistencies that currently feature, give rise to the risk of otherwise avoidable litigation. In those circumstances, might there be an argument for a civil pecuniary penalty statute such as that proposed in Australia? Such a statute could contain generic provisions which apply to each civil pecuniary penalty regime.

Australian proposals

- 8.11 In 2002, after its review of federal civil and administrative penalties, the Australian Law Reform Commission (ALRC) recommended the enactment of a Regulatory Contraventions Statute.⁵⁷⁶ It was proposed that the statute would deal with the law and procedure governing a range of non-criminal contraventions. The ALRC's recommendations included proposed provisions about, among other things, fault requirements, corporate responsibility and liability, the exercise of regulator discretion, double jeopardy, various aspects of procedural fairness, protection against self-exposure to a non-criminal penalty and the setting of monetary penalties both in legislation and by the court.
- 8.12 There has been no formal response to the ALRC's report from the Commonwealth Government. The ALRC website notes, however, that the report has been influential in a number of developments. Most notably, in

⁵⁷⁶ Australian Law Reform Commission *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (R95 Sydney 2002).

April 2004, the Attorney-General's Department published on its website *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.⁵⁷⁷ The Guide was a resource to assist in the framing of proposed criminal offences, civil penalties and certain other enforcement provisions that are intended to become part of Commonwealth law. Many of the provisions in the Guide are based on principles discussed in the ALRC's report and in many circumstances it refers users directly to the ALRC report. We note, however, that the Guide has since been amended and the material on civil penalties has been removed, to better reflect the scrutiny role that is undertaken by the Criminal Law and Law Enforcement Branch of the Attorney-General's department.⁵⁷⁸

8.13 In addition, a number of Australian academics have proposed a “uniform code” of procedural provisions for civil pecuniary penalties.⁵⁷⁹ This argument is grounded in concerns that silence in civil pecuniary penalty statutes, or room for different interpretations of their terms, has meant that courts have been free to introduce protections into civil pecuniary penalty proceedings that were not intended by Parliament. As Middleton notes, courts understandably may be concerned to do so because of the punitive nature of civil pecuniary penalties and to protect defendants from the excessive exercise of State power.⁵⁸⁰ And Spender acknowledges that a hybrid such as civil pecuniary penalties necessarily involves a balance of civil and criminal procedure.⁵⁸¹ She suggest that it is the methodology of the case by case development of such a balance which is problematic, to the extent that the courts' approach is limiting the very benefits that civil pecuniary penalties are supposed to offer.

8.14 Quoting Spender, Comino describes the problem as follows:⁵⁸²

... negotiating an effective civil penalty procedure on a case-by-case basis is problematic and carries the danger of 'lead[ing] to indeterminacy or default to criminal procedure',

577 Attorney-General's Department (Criminal Justice Division) *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (April 2004 ed).

578 Email from Simone Clare (Criminal Law and Law Enforcement Branch, Attorney-General's Department) to Susan Hall (Law Commission) (13 April 2012). Now see Attorney-General's Department (Criminal Justice Division) *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011 ed) < www.ag.gov.au > .

579 P Spender “Negotiating the Third way: Developing Effective Process in Civil Penalty Litigation” (2008) 26 C&SLJ 249; T Middleton “The Difficulties of Applying Civil Evidence and Procedure Rules in ASIC's Civil Penalty Proceedings under the Corporations Act” (2003) 21 C&SLJ 507; V Comino “Effective Regulation by the Australian Securities and Investment Commission: The Civil Penalty Problem” (2009) 33 MULR 802 and T Middleton “The Privilege against Self-Incrimination, the Penalty Privilege and Legal Professional Privilege under the Laws Governing ASIC, APRA, the ACCC and ATO—Suggested Reforms” (2008) 30 Aust Bar Review 282.

580 Middleton, above at 510, 516.

581 Spender, above n 579 at 249, 257.

582 Comino, above n 579 at 829, quoting Spender, above n 579 at 257, 249 (footnotes omitted).

... This occurs to some extent because ‘it is endemic to the judicial power and function to be zealous about fair procedure’, and ‘[z]ealousness about fair procedure has led to the development of a gold standard which belongs to the criminal law rather than the negotiated standard’ which characterises civil proceedings.

8.15 The flexibility offered by Australian provisions⁵⁸³ has given judges the freedom to make a number of decisions or statements favouring the imposition of certain procedural protections, including:

- That those defending civil proceedings for a management ban can rely on the common law privilege against self-exposure to a penalty and so can limit their disclosure accordingly;
- Implying a duty of “prosecutorial fairness” on the enforcement body in its pursuit of civil pecuniary penalties;
- Inhibiting the enforcement body’s ability to combat limits on defence disclosure by taking a “quasi-criminal” approach to whether it can adduce additional evidence after its case is closed.

8.16 Critics of these decisions suggest that they are diminishing the ability of civil pecuniary penalties to be a “swift and inexpensive enforcement option”.⁵⁸⁴ Critics also suggest that the courts are treating civil pecuniary penalty proceedings in at least a quasi-criminal manner and so are undermining Parliament’s aim in introducing the regime in the first place. This view was echoed by Kirby J in his dissenting opinion in *Rich v ASIC*, where he described the national and global regulatory context for the Corporations Act 2001 (Cth) and cited the need for an “appreciation of [the] major debates about economic and social regulation and differentiated legislative responses”.⁵⁸⁵

8.17 The solution which has been proposed is a set of uniform procedural rules, in the form of a statute, code or court rules, which would set out the “law and procedure” for civil pecuniary penalty proceedings.⁵⁸⁶ As noted in chapter 6, Middleton suggests that the “code” should deal with matters such as:

- The standard of proof;
- The operation of the privilege against self-incrimination, the penalty privilege and any associated evidential immunities;

583 Most notably s 1317L of the Corporations Act 2001 (Cth) which provides that: “The Court must apply the rules of evidence and procedure for civil matters when hearing proceedings for: (a) a declaration of contravention; or (b) a pecuniary penalty order.”

584 Comino cites the example of *ASIC v Rich* [2009] NSWSC 1229 (unreported, Austin J, 18 November 2009) which took many years to complete, involved more than 60 evidential and procedural rulings and a judgment which runs to 3015 pages. See Comino, above n 579 at 817, 828.

585 *Rich v ASIC* [2004] HCA 42, 209 ALR 271 at [108].

586 Comino, above n 579 at 830, Spender, above n 579 at 257.

- The general principles on the availability (or otherwise) and scope of cross-examination in civil proceedings under the Corporations Act 2001 (Cth) where there may be subsequent criminal proceedings;
- Whether the concept of “prosecutorial fairness” applies in civil pecuniary penalty proceedings, and provision as to matters such as the appropriate rules of disclosure.

A set of procedural rules for New Zealand civil pecuniary penalties?

- 8.18 The use of the term “uniform code” is inappropriate in a New Zealand setting. What might instead be envisaged is a set of standard provisions for all civil pecuniary penalties, which could be departed from by express provision in individual statutes. The standard provisions could be considered akin to s 21 of the Summary Proceedings Act 1957 which, in 25 subsections, sets out the procedure for the imposition of infringement offences.⁵⁸⁷ The procedure in s 21 applies to all offences that are expressed to be infringement offences, although minor departures exist.⁵⁸⁸ Adopting this model, then, whenever a statute included a “civil pecuniary penalty” the standard civil pecuniary penalty procedural provisions would apply.
- 8.19 Whether such a statute would reduce the risk of costly litigation is a moot point: it would depend on the drafting of its provisions. And clearly legislation would not remove the possibility of procedural or rights-based review. However, reducing the risk of litigation should be an aim of such a statute. The statute would serve three additional purposes. It would have the effect of making a clear statement of principle about each procedural rule for civil pecuniary penalties. It would also ensure consistency across the range of civil pecuniary penalty provisions. This would assist in enabling the public to access and understand the law, and to understand their potential liabilities. This in turn can bring with it efficiencies and confidence for the regulated community. It would also remove the need for policy makers to revisit the design of civil pecuniary penalties for each new statute.
- 8.20 Although Parliament would be free to introduce variations to the standard model in individual Acts, the existence of the standard model would suggest that additional consideration would need to be given to any such policy proposal and that the departure would need to be justified.
- 8.21 If submissions to this Issues Paper favoured a standardised legislative framework for civil pecuniary penalties, consideration would need to be given to the appropriate home for the provisions. One option would be a stand-

⁵⁸⁷ See also s 41: the right to plead guilty by notice to the Registrar; s 78A; conviction not to be recorded for an infringement offence; and s 78B: the power to correct irregularities in proceedings for infringement offences.

⁵⁸⁸ See for example the Land Transport Act 1998, ss 139–140 (“short form” infringement notices), and the Biosecurity Act 1993, s 159A (accelerated payment timeframes).

alone statute. Such a statute would give substantial recognition to the civil pecuniary penalty.

- 8.22 Another option may be for the provisions to be contained in the High Court rules. These contain the general rules of civil procedure for the High Court and are made under the authority of s 51 of the Judicature Act 1908. Section 51 authorises the making of rules “regulating the practice and procedure of the High Court” in all civil proceedings. The content of the rules must not extend beyond regulating the practice and procedure of the High Court (that is, they must not extend beyond the scope of s 51).⁵⁸⁹ There is therefore a question as to whether provisions relating to the procedure for civil pecuniary penalties are appropriate for the High Court rules. If it were thought that they were appropriate, there would be a need for an enabling provision in primary legislation.

Q43 Should we recommend the addition to the Legislation Advisory Committee Guidelines of a chapter relating to civil pecuniary penalties? Are there any other forms of guidance that would assist?

Q44 Is there a need for (a) legislation to amend existing civil pecuniary penalty regimes to ensure that they are principled and consistent; and/or (b) a set of standard civil pecuniary penalty statutory provisions?

⁵⁸⁹ In 2008, the Rules Committee identified a number of areas where the content of the rules might expand beyond s 51. Among others they included attachment orders, discovery against non-parties, freezing orders and search orders. See Minutes of the Rules Committee, 9 June 2008.

Appendix 1

Table of civil pecuniary penalty provisions

Act	Regulatory body	Civil pecuniary penalty provision(s)	Maximum penalty amount	Reference to rules of court or evidence	Parallel criminal offences	Double jeopardy protections
Anti-Money Laundering and Countering Financing of Terrorism Act 2009	<p>s 130(1): One of three “supervisors”, depending on the reporting entity:</p> <ul style="list-style-type: none"> Reserve Bank (banks, life insurers, non-bank deposit takers) Financial Markets Authority (issuers of securities, trustee companies, futures dealers, collective investment schemes, brokers, financial advisers) 	<p>s 78: failure by a reporting entity to comply with any AML/CFT requirements as set out in Part 2, including failure to comply with s 78(a)–(g), for example:</p> <ul style="list-style-type: none"> failing to conduct customer due diligence; failing to adequately monitor accounts and transactions; failing to implement an AML/CFT programme. 	<p>s 90: for a breach of s 78(b), (c) (d) or (g)–</p> <ul style="list-style-type: none"> \$100,000 (individual) \$1m (body corporate) <p>and for a breach of s 78(a), (e) or (f)–</p> <ul style="list-style-type: none"> \$200,000 (individual) \$2m (body corporate). 	s 72(2): the enforcement body may, by order of the Court, obtain discovery and administer interrogatories.	s 91: an offence to breach the same requirements knowingly or recklessly.	<p>s 74: no civil pecuniary penalty and criminal sanction for same or substantially same conduct.</p> <p>s 73: civil pecuniary penalty proceedings must be stayed if prosecution is commenced, but the stay can be lifted once the prosecution is complete.</p>

Act	Regulatory body	Civil pecuniary penalty provision(s)	Maximum penalty amount	Reference to rules of court or evidence	Parallel criminal offences	Double jeopardy protections
	<ul style="list-style-type: none"> Department of Internal Affairs (casinos, non-deposit taking lenders, money changers, and other reporting entities) 					
Biosecurity Act 1993	s 154H and s 2: Chief Executive of the Ministry for Primary Industries.	<p>s 154J: failure to comply with–</p> <ul style="list-style-type: none"> ss 16A, 16B, 16C (importers' duties); ss 18(1)(b), 24D(1)(a), 25(1), (2), (8), (9), 27A, 29(1), 29(2) (clearance of risk goods); s 40(6) (duties of operators of transitional/containment facilities); ss 52, 53 (handling of pests/unwanted organisms); s 122 (inspectors' directions); 	s 154J: \$500,000 (individual); for a body corporate, the greater of \$10m; 3 x commercial gain (if gain readily ascertainable); or 10 per cent of turnover (if gain not readily ascertainable).	s 154J(5): the Chief Executive may, by order of the Court, obtain discovery and administer interrogatories.	Breach of a number of civil pecuniary penalty provisions is also an offence, including for example ss 16A, 18, 29(1), 52, 53.	<p>s 154L(2)–(3): existing uncompleted civil pecuniary penalty proceedings must be stayed if a prosecution is commenced.</p> <p>s 154L(4): no prosecution may be commenced if a civil pecuniary penalty has been imposed that remains in place after all appeal rights have not been exercised or have been abandoned/exhausted.</p>

Act	Regulatory body	Civil pecuniary penalty provision(s)	Maximum penalty amount	Reference to rules of court or evidence	Parallel criminal offences	Double jeopardy protections
		<ul style="list-style-type: none"> ss 130(3), 134(1) (restrictions on risk areas); regulations made under s 150 (biosecurity emergencies); directions or requirements under Part 7 (exigency actions); requirements in rules or regulations declared to give rise to civil liability. 				
Commerce Act 1986	s 80(1): Commerce Commission.	s 74D: breaching a cease and desist order.	s 74D(2): \$500,000 (against "a person").	s 79A: the Commission may, by order of the Court, obtain discovery and administer interrogatories.		s 79B: once proceedings in either jurisdiction are determined, a penalty or sanction may not be imposed in the alternative jurisdiction for the same conduct, events, transactions or other matters.
		s 80: breaching provisions relating to restrictive trade practices (and for attempt, aiding, abetting, inducing, being knowingly concerned in, conspiring to).	s 80(2B): \$500,000 (individual); for a body corporate, the greater of \$10m; 3 x commercial gain (if gain readily ascertainable); or 10 per cent of turnover (if gain not readily ascertainable).			
		s 80B: breaching s 80A (no indemnity against certain pecuniary penalties).	s 80B(2): 2 x value of indemnity given.			

Act	Regulatory body	Civil pecuniary penalty provision(s)	Maximum penalty amount	Reference to rules of court or evidence	Parallel criminal offences	Double jeopardy protections
		s 83: breaching provisions relating to business acquisitions likely to have effect of substantially lessening competition in market (and for attempt, aiding, abetting, inducing, being knowingly concerned in, conspiring to).	s 83(1): \$500,000 (individual) or \$5m (body corporate), for each act or omission.			
		s 85A: breach of an undertaking given to Commission re business acquisitions (and for attempt, aiding, abetting, inducing, being knowingly concerned in, conspiring to).	s 85A(3): \$500,000 for each act or omission (against "a person").			
		s 86: contravening information disclosure requirement for regulated goods or services (including disclosing false or misleading information) (and for attempt, aiding, abetting, inducing, being knowingly concerned in, conspiring to).	s 86(3): \$500,000 (individual) or \$5m (body corporate).		s 86B: offence of intentionally contravening information disclosure requirement for regulated goods or services (\$200,000 individual, \$1m body corporate).	

Act	Regulatory body	Civil pecuniary penalty provision(s)	Maximum penalty amount	Reference to rules of court or evidence	Parallel criminal offences	Double jeopardy protections
		s 87: contravening price-quality requirement for regulated goods and services (including refusing to comply with quality standards) (and for attempt, aiding, abetting, inducing, being knowingly concerned in, conspiring to).	s 87(3): \$500,000 (individual) or \$5m (body corporate).		s 87B: offence of intentionally contravening price-quality requirement for regulated goods or services (\$200,000 individual, \$1m body corporate).	
Dairy Industry Restructuring Act 2001 / Dairy Industry Restructuring (Raw Milk) Regulations 2001	s 141(1): Commerce Commission.	s 141: conduct breaching part 2, subpart 5—Regulation of dairy markets and obligations of new co-op (Fonterra). s 141: breach of regulations made under s 115—Regulations relating to raw milk.	s 141(2): \$500,000 (individual); for a body corporate, the greater of \$10m or 3 x commercial gain or 10 per cent of turnover.	s 144(3): the Commission may, by order of the Court, obtain discovery and administer interrogatories.	s 118: regulatory offences relevant to part 2, subpart 5, eg failing to provide information required under raw milk regulations.	—
Financial Advisers Act 2008	s 137K(1): Financial Markets Authority.	s 137K: contravening a wholesale certification requirement under s 5E.	s 137K(2): \$100,000 (individual) or \$300,000 (for an “entity”: an incorporated or unincorporated body and sole trustees).	—	—	—
Financial Service Providers (Registration and Dispute Resolution) Act 2008	s 79A(1): Financial Markets Authority.	s 79AK: contravening a wholesale certification requirement under s 49B.	s 137K(2): \$100,000 (individual) or \$300,000 (for an “entity”: an incorporated or	—	—	—

Act	Regulatory body	Civil pecuniary penalty provision(s)	Maximum penalty amount	Reference to rules of court or evidence	Parallel criminal offences	Double jeopardy protections
			unincorporated body and sole trustees).			
Hazardous Substances and New Organisms Act 1996	ss 124B and 124A: Chief Executive of the Ministry for Primary Industries.	s 124B: breaches relating to new organisms (developing, field testing, importing, releasing, possessing, disposing of, failing to comply with regulatory controls).	s 124C: \$500,000 (individual); for a body corporate, the greater of \$10m; 3 x commercial gain (if gain readily ascertainable); or 10 per cent of turnover (if gain not readily ascertainable).	s 124E(b): the Chief Executive may, by order of the Court, obtain discovery and administer interrogatories.	s 109(1)(b): offences relating to new organisms (developing or field testing; knowingly importing or releasing; knowingly, recklessly or negligently possessing or disposing of).	s 124F: existing uncompleted civil pecuniary penalty proceedings must be stayed if a prosecution is commenced.
Land Transport Management Act 2003	–	s 46: provision for civil penalties in regulations, targeting breach of conditions by a tolling authority operating a road tolling scheme – NONE ENACTED.	–	–	–	–
Overseas Investment Act 2005 / Overseas Investment Regulations 2005	s 48(1) and s 30: the Chief Executive of the “regulating department” (Land Information New Zealand, delegated to the Overseas Investment Office).	s 48(1)(a)–(d): <ul style="list-style-type: none"> contravening the Act; committing an offence under the Act; 	s 48(2): greater of (a) \$300,000; or (b) any quantifiable gain (eg increase in value of property since acquisition); or (c) the cost of remedying the breach of condition; or (d) the loss suffered by a person in relation to a breach of condition (against “a person”).	–	ss 42–45: <ul style="list-style-type: none"> giving effect to an overseas investment without consent; 	s 48(3): no civil pecuniary penalty and criminal fine for the same conduct.


Act	Regulatory body	Civil pecuniary penalty provision(s)	Maximum penalty amount	Reference to rules of court or evidence	Parallel criminal offences	Double jeopardy protections
		<ul style="list-style-type: none"> failing to comply with a notice to provide information or a statutory declaration under ss 38–40; failing to comply with a condition of consent or an exemption. 			<ul style="list-style-type: none"> knowingly or recklessly entering into a transaction or executing an instrument or taking any step for the purpose of or having the effect of, directly or indirectly, defeating, evading or circumventing the Act; 	
		s 53: “administrative penalty” for retrospective consent.	reg 32: \$20,000 (against “an applicant”).		<ul style="list-style-type: none"> obstructive or deceptive conduct against a person exercising authority under the Act or regulations; failing to comply with a notice, requirement or condition of the Act or regulations. 	
Securities Act 1978 / Securities Act (Contributory Mortgages) Regulations 1988	s 55C: Financial Markets Authority.	s 55C: engaging in a “civil liability event” that materially prejudices subscribers, is likely to materially damage NZ securities markets, or is otherwise serious:	s 55F(1): \$500,000 (individual) or \$5m (body corporate), for each civil liability event.	s 57D: the usual rules of court and evidence and procedure for civil proceedings apply.	<p>s 58: offence for individuals to distribute prospectus including an untrue statement.</p> <p>s 59: offence of offering, allotting or distributing a registered prospectus relating to an interest</p>	s 57C: no civil pecuniary penalty and criminal fine for the same conduct.

Act	Regulatory body	Civil pecuniary penalty provision(s)	Maximum penalty amount	Reference to rules of court or evidence	Parallel criminal offences	Double jeopardy protections
		<ul style="list-style-type: none"> distributing an advertisement or prospectus including an untrue statement; breaching the contributory mortgages regulations. 			in a contributory mortgage in contravention of regulations.	
Securities Markets Act 1988	s 42T(1): Financial Markets Authority.	<p>s 42T: contravening a “civil remedy provision” that materially prejudices third parties’ interests, is likely to materially damage NZ securities markets, or is otherwise serious:</p> <ul style="list-style-type: none"> insider conduct or market manipulation; breaches relating to continuous and substantial holdings disclosures; breaches relating to unsolicited offers. 	<p>s 42W(1): the greater of: the consideration for the transaction; 3 x the gain made or loss avoided by person carrying out the conduct; or \$1m, for breach of an insider conduct, market manipulation or unsolicited offer prohibition (against “a person”).</p> <p>s 42W(2): \$1m for a breach of any other civil remedy provision (against “a person”).</p>	s 42Zl: the usual rules of court and evidence and procedure for civil proceedings apply.	s 35BA: an offence to know, or being ought to know, of requirements to disclose information in accordance with a substantial holding disclosure obligation and failing to do so.	s 43ZC: no civil pecuniary penalty and criminal fine for the same conduct.

Act	Regulatory body	Civil pecuniary penalty provision(s)	Maximum penalty amount	Reference to rules of court or evidence	Parallel criminal offences	Double jeopardy protections
Securities Trustees and Statutory Supervisors Act 2011	s 41(1): Financial Markets Authority.	<p>s 41: contravention of a licensee obligation contained in:</p> <ul style="list-style-type: none"> • a governing document; • an offer of security; • a Court order relating to a supervised interest; • this Act; • Kiwisaver Act 2006; • Part 5D of the Reserve Bank of New Zealand Act 1989; • Retirement Villages Act 2003; • Securities Act 1978; • Unit Trusts Act 1960. 	s 41(3): \$200,000 if the contravention is materially prejudicial to security holders' or residents' interests; \$100,000 in all other cases (against "a licensee").	s 43(4): the usual rules of court and evidence and procedure for civil proceedings apply.	None in this Act but see offence provisions under other Acts, eg s 29 Retirement Villages Act 2003 requiring statutory supervisors to hold residents' payments in an interest-bearing account.	s 41(4): once proceedings in either jurisdiction are determined, a penalty or sanction may not be imposed in other jurisdiction for the same contravention.
Takeovers Act 1993	s 33M: Takeovers Panel	s 33M(c): prejudicial, damaging or otherwise serious breaches of the takeovers code.	s 33P: \$500,000 (individual) or \$5m (body corporate), for each contravention.	s 43B: the usual rules of court and evidence and procedure for civil proceedings apply.		s 44X: no civil pecuniary penalty and criminal fine for the same conduct.

Act	Regulatory body	Civil pecuniary penalty provision(s)	Maximum penalty amount	Reference to rules of court or evidence	Parallel criminal offences	Double jeopardy protections
Telecommunications Act 2001	s 156L(1): Commerce Commission.	s 156L(1)(a): breaching an undertaking given under Part 2A (structural separation of Telecom).	s 156L(3): \$10m (against "a person").	–	–	–
		s156L(1)(ab): breaching an undertaking given under Part 4AA (providers under Ultra-fast Broadband and Rural Broadband Initiative).				
		s 156L(1)(c): breaching a provision contained in s 156A.	s 156L(3): between \$300,000 and \$10m depending on the provision breached.			
		s 156Q: breach of an enforceable matter filed in the High Court under s 156P(1).	s 156R: the amount of commercial gain less any compensatory damages.			
Telecommunications (Interception Capability) Act 2004	s 27(1) and s 3: a "surveillance agency"– <ul style="list-style-type: none"> • Police • NZ Security Intelligence Service • Government Communications Security Bureau. 	s 27: contravening a High Court compliance order.	s 27: \$500,000 plus \$50,000 per day for continuing contraventions (against "a person").	–	–	–
Tokelau (Territorial Sea and Exclusive Economic Zone) Act 1977	–	s 8(n): provision for civil penalties in regulations, targeting	–	–	–	–

Act	Regulatory body	Civil pecuniary penalty provision(s)	Maximum penalty amount	Reference to rules of court or evidence	Parallel criminal offences	Double jeopardy protections
		breach of controls on foreign fishing in exclusive economic zone – NONE ENACTED.				
Unsolicited Electronic Messages Act 2007	s 45(1) and s 4: the “enforcement department” (the Department of Internal Affairs, Anti-Spam Compliance Unit).	s 45: committing a “civil liability event” – <ul style="list-style-type: none"> • sending unsolicited commercial electronic messages; • sending commercial electronic messages without sender information or unsubscribe facilities; • committing a breach related to address-harvesting software and harvested-address lists. 	s 45(3): \$200,000 (individual). s 45(4): \$500,000 (organisation).	s 49: the usual rules of court and evidence and procedure for civil proceedings apply.	–	–



Appendix 2

Non-criminal penalties in other jurisdictions

INTRODUCTION

Forms of non-criminal penalty are increasingly common in a number of countries, and many have a long-established presence. In this appendix we give a sense of how and where they are being used in overseas jurisdictions and of local responses to their use.

Court-imposed civil penalties of the kind reviewed in this Issues Paper are common in Australia, where their use is also expanding, and in the United States. In the United States, it is possible for many regulators to seek a penalty through the courts as an alternative to, or in addition to, imposing a penalty directly through administrative processes.

Court-imposed civil penalties are uncommon in England and Canada, where greater reliance is placed on discretionary penalties which are imposed directly by regulators, with formalised appeal and review processes to maintain a degree of fairness and impartiality.

Also, forms of civil penalty have been used in civil law jurisdictions for many years. As an example we describe their use in Germany.

AUSTRALIA

Civil penalties are an established part of the Australian regulatory landscape at both state and federal level, and cover broader areas of the law than in New Zealand. They are found for example in competition law, company law, environmental law, superannuation, telecommunications and anti-spam legislation.⁵⁹⁰ As in New Zealand, they are imposed in judicial proceedings.

Their use is growing, for instance the Competition and Consumer Act 2010 (Cth) relies heavily on civil penalties. They have also (along with administrative penalties) been the subject of a comprehensive review by the Australian Law Reform Commission (ALRC), commenced in 2000 (see below). In general, they tend to have attracted a greater degree of scrutiny and interest from various quarters.

As in New Zealand their place in the regulatory regime varies. In some Acts they are the sole enforcement mechanism (along with other civil orders)⁵⁹¹ and in others they provide a parallel enforcement mechanism (alongside criminal penalties) for less egregious, non-intentional contraventions.⁵⁹² The quantum of maximum penalties varies between regimes. Notably, many Australian regimes frame their penalties as “units” defined under the Crimes Act 1914 (Cth). Section 4AA of that Act currently fixes a penalty unit at AD\$110.

590 See for example Corporations Act 2001 (Cth), s 1317G; Commonwealth Authorities and Companies Act 1997 (Cth), sch 2; Superannuation Industry (Supervision) Act 1993 (Cth), s 193; Competition and Consumer Act 2010 (Cth), s 76; Telecommunications Act 1997 (Cth), s 570; Environment Protection and Biodiversity Conservation Act 1999 (Cth), s 481; Water Act 2007 (Cth), s 147.

591 See for example the Spam Act 2003 (Cth) which, like New Zealand’s Unsolicited Electronic Messages Act 2007, is enforced solely by way of injunctions, enforceable undertakings and pecuniary penalties.

592 See for example the Superannuation Industry (Supervision) Act 1993 (Cth), s 202: when a person contravenes a civil penalty provision with intent they are guilty of an offence.

The procedural provisions of the civil penalty regime in the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act) have been put forth as a proposed model capable of being applied to a range of civil penalty regimes by the Attorney-General's *Guide to Framing Commonwealth Offences, Civil Penalties, and Enforcement Powers* (2007 edition).⁵⁹³ The guide defines a civil penalty; gives guidance on when they are appropriate; how they should be framed; their procedural provisions; and guidance for determining quantum. However, the 2007 edition of the guide is not routinely followed. For example it recommends including a provision to the effect that the court must apply the civil rules of evidence and procedure in civil penalty proceedings; but this is not explicitly stated in the Australian Consumer Law (contained in schedule 2 of the Competition and Consumer Act 2010 (Cth)).⁵⁹⁴ The guide has now been replaced and no longer deals with civil penalties.⁵⁹⁵

Report of the Australian Law Reform Commission

In 2002 the ALRC published its final report on the use of administrative and civil penalties in Commonwealth legislation.⁵⁹⁶ The report was broad in scope and covered civil, administrative and quasi-penalties (such as the removal of a licence or benefit) in a number of regulatory fields. The ALRC's essential task was to identify areas in the many disparate federal regulatory and penalties schemes where greater clarity, transparency and consistency could be introduced.

Among other things, the ALRC report considered whether a “hybrid” approach should be created for civil penalty proceedings, but most submitters preferred to maintain the traditional criminal-civil divide.⁵⁹⁷ Ultimately the report recommended that civil penalty regimes state that the usual civil rules of procedure would apply in civil penalty proceedings.⁵⁹⁸ It did not specify when heightened procedural protections should apply – for example, when the court should recognise the common law privilege against self-exposure to a penalty – noting the role of judicial discretion in upholding procedural fairness depending on the particular facts and circumstances.⁵⁹⁹

593 Attorney-General's Department (Criminal Justice Division) *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (December 2007 ed).

594 Competition and Consumer Act 2010 (Cth), sch 2 (Australian Consumer Law), s 228 is titled “Civil action for recovery of pecuniary penalties” and provides only that “the regulator may institute a proceeding in a court for the recovery ... of a pecuniary penalty.”

595 Now see Attorney-General's Department (Criminal Justice Division) *Guide to Framing Commonwealth Offences, Infraction Notices and Enforcement Powers* (September 2011 ed) < www.ag.gov.au > .

596 Australian Law Reform Commission *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (R95, Sydney, 2002).

597 Australian Law Reform Commission *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation* (DP 65, Sydney, 2002) at Q 17–3 and [17.79].

598 Australian Law Reform Commission, above n 596 at R 3–1 and ch 3.

599 Australian Law Reform Commission, above n 596 at [3.52].

The report's overarching recommendation was to enact a Regulatory Contraventions Statute to govern the creation and use of all civil and administrative penalties, in the absence of express legislative provision to the contrary.⁶⁰⁰ This was intended to introduce underlying principles and greater consistency without imposing a "one size fits all" approach. Ultimately no statute was ever enacted, although many of the report's individual recommendations were incorporated into a section of the Attorney-General's *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, from 2004 until 2010.⁶⁰¹

Use by regulatory agencies

Some Australian regulatory agencies have well-developed policies and approaches towards their use and enforcement of civil penalties, such as the Australian Securities and Investment Commission (ASIC) and the Australian Competition and Consumer Commission. These agencies are tasked with overseeing significant civil penalty regimes and both publish relatively comprehensive enforcement policies on their websites.⁶⁰² For example, ASIC makes enforcement decisions based on the seriousness of the conduct and to maximise the available remedies. It also discusses how it decides when to refer cases to the Commonwealth Director of Public Prosecutions and publishes its memorandum of understanding with that body.⁶⁰³

ASIC in particular has come under some scrutiny from academics, the media and the general public in terms of its use of civil penalties. Some academics have taken the view that ASIC has *under*-used civil penalties in favour of criminal prosecutions (see further below). At other times when ASIC has chosen civil over criminal proceedings, it has been obligated to defend its choice in the public arena, in face of concerns that it is soft on crime.⁶⁰⁴

600 Australian Law Reform Commission, above n 596 at 25 (R 6–7 and R 6–8).

601 Attorney-General's Department (Criminal Justice Division) *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (December 2007 ed).

602 Accessible at < www.asic.gov.au > and < www.accc.gov.au > .

603 Australian Securities and Investment Commission and Commonwealth Director of Public Prosecutions "Memorandum of Understanding" (1 March 2006).

604 There was criticism of the Australian Securities and Investment Commission's decision to take only civil proceedings for breaches by Stephen Vizard in his role as director of Telstra Corporation (*Australia Securities and Investment Commission v Vizard* (2005) 145 FCR 57): see for example Jennifer Sexton "Vizard Was 'Too Well Connected' For Jail" *The Australian* (Sydney, 6 July 2005) at 1, cited in V Comino "Effective Regulation by the Australian Securities and Investments Commission: The Civil Penalty Problem" [2009] 33 MULR 802 at note 57. See also M Welsh "Civil Penalties and Responsive Regulation: The Gap Between Theory and Practice" (2009) 33 MULR 908 at 922 and note 85.

Role of the courts

As a court-imposed regulatory tool, civil penalties in Australia have been subjected to robust examination by Australian courts. While the courts have not so much questioned their legitimacy, they have taken a clear stance on their punitive nature, at least where penalties against individuals under the Corporations Act are concerned.⁶⁰⁵ In taking this approach, Australian courts have determined that certain procedural protections should apply in civil penalty actions, or that certain processes may need to be followed to ensure fairness. Judges have made a number of decisions or statements favouring the imposition of certain procedural protections, including:

- That those defending civil proceedings for a management ban can rely on the common law privilege against self-exposure to a penalty and so can limit their disclosure accordingly;
- Implying a duty of “prosecutorial fairness” on the enforcement body in its pursuit of civil penalties;
- Inhibiting the enforcement body’s ability to combat limits on defence disclosure by taking a “quasi-criminal” approach to whether it can adduce additional evidence after its case is closed, and
- Relying on the *Briginshaw v Briginshaw* test for determining the level of proof required by the court before a finding that a contravention has been made out, which states that the strength of the evidence needed to prove facts on the balance of probabilities varies according to what is to be proved.⁶⁰⁶

These protections are considered in more detail in chapter 6 of this Issues Paper.

605 The Australian Law Reform Commission’s Discussion Paper observed that the courts seem to display greater concern about the punitive effect and the use of civil procedure in proceedings against company officers under the Corporations Act, and in customs prosecutions, than they do about civil penalty proceedings under the Trade Practices Act: Australian Law Reform Commission, above n 597 at [17.69]–[17.70].

606 *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361–363 per Dixon J.

Academic commentary

Australian academics appear to accept civil penalties as a legitimate form of regulation. This may be because theories of strategic and responsive regulation have gained particular traction in Australia, both in legal and policy development and among academics.⁶⁰⁷ Civil penalties did come under some criticism in Australia in the late 1980s and early 1990s (Tony Greenwood described them as a “noxious hybrid”).⁶⁰⁸ But more recent commentary focuses less on the question of their legitimacy and more on how they are formulated and how the courts have interpreted them. Writing in 1994, Gillooly and Wallace-Bruce concluded that their use would, and should, increase in the years to come.⁶⁰⁹ We have not identified a strong voice objecting to civil penalties in the academic literature.

Indeed, the robust judicial approach towards many civil penalties has led some academics to remark that the courts are favouring criminal process values to the detriment of the regulatory rationale of civil penalties.⁶¹⁰ This has led to calls from some for a governing procedural statute to deal with civil penalty formation and imposition, and creation of a third or middle way departing from the traditional criminal-civil division of the law.⁶¹¹

607 See for example Senate Standing Committee on Legal and Constitutional Affairs *Report on the Social and Fiduciary Obligations of Company Directors* (Canberra, November 1989) at 190–191; Treasury *Review of Sanctions in Corporate Law* (2007) at 7; Australian Competition and Consumer Commission *Compliance and Enforcement Policy* (2010) at 3; A Corbett “A Proposal for a More Responsive Approach to the Regulation of Corporate Governance” (1995) 23(2) FL Rev 277; and V L Neilsen and C Parker “Testing Responsive Regulation in Regulatory Enforcement” (2009) 3 Regulation and Governance 376.

608 T Greenwood “Corporate Officers – Bounden Duty and Service ... and Reasonable Lively Sacrifice” (1992) 6 Butterworths Corporate Law Bulletin 61. See also A Freiberg “Civilising Crime: Parallel Proceedings and the Civil Remedies Function of the Commonwealth Director of Public Prosecutions” (1988) 21 Aust and NZ J Criminology 129.

609 M Gillooly and N Wallace-Bruce “Civil Penalties in Australian Legislation” (1994) 13 U Tas LR 269.

610 Comino, above n 604 at 814, JP Knackstredt “The Evolution in Civil Penalty Proceedings” (2006) 24 C&SLJ 56 at 57 and P Spender “Negotiating the Third Way: Developing Effective Process in Civil Penalty Litigation” (2008) 26 C&SLJ 507.

611 Vicky Comino has argued for a sliding scale of procedural protections, taking as its starting point a model set out by Isachar Rosen-Zvi and Talia Fisher: Comino, above n 604 at 832 citing I Rosen-Zvi and T Fisher “Overcoming Procedural Boundaries” (2008) 94 VA L Rev 79. See also T Middleton “The Privilege against Self-Incrimination, the Penalty Privilege and Legal Professional Privilege under the Laws Governing ASIC, APRA, the ACCC and ATO – Suggested Reforms” (2008) 30 Aust Bar Rev 282 and Spender, above. See chapter 8.

ASIC's use of civil penalties has come under particular academic scrutiny and empirical study.⁶¹² Michelle Welsh has suggested that ASIC's default stance is to refer cases for criminal prosecution, and that this diminishes the effectiveness of civil penalties and fails to reflect the policy of "responsive regulation" that led to their insertion in the Corporations Act in 1993. She has suggested ASIC should reserve its use of criminal penalties and institute civil proceedings more frequently than it has done in the past.⁶¹³

UNITED KINGDOM

Unlike in New Zealand and Australia, civil pecuniary penalties, in the sense we have defined them, do not form part of the United Kingdom regulatory environment. Instead, discretionary non-criminal penalties are imposed directly by regulators. Like in New Zealand, criminal sanctions (especially strict liability offences) retain a significant presence in some areas, for example environmental law. However, the introduction of the Regulatory Enforcement and Standards Act 2008 (UK) is likely to result in further growth in the use of non-criminal penalties under a more uniform system than previously (see below).

Existing field of discretionary penalties

Where discretionary civil penalties appear in legislation, they are almost exclusively imposed directly by a regulator (or by an internal enforcement branch or decision-maker). Examples include penalties imposed under the Competition Act 1998 (UK), the Financial Services and Markets Act 2000 (UK), and the Pension Act 1995 (UK).

Penalties under the Competition Act are imposed by the Office of Fair Trading for intentional or negligent breaches of the statutory chapter I or II prohibitions. The penalties are at the discretion of the Office of Fair Trading, but cannot exceed 10 per cent of the turnover of the company in question.⁶¹⁴ Both the decision and the penalty can be appealed to the Competition Appeal Tribunal and then to the

612 H Bird "The Problematic Nature of Civil Penalties in the Corporations Law" (1996) 14 C&SLJ 405; Comino, above n 604; G Gilligan, H Bird and I Ramsay "Civil Penalties and Enforcement of Directors' Duties" [1999] 22(2) UNSWLJ 417; G Gilligan, H Bird and I Ramsay *Regulating Directors Duties: How Effective are the Civil Penalty Sanctions in the Australian Corporations Law?* (Research report, Centre for Corporate Law and Securities Regulation, University of Melbourne, 1999); and M Welsh "The Regulatory Dilemma: The Choice between Overlapping Criminal Sanctions and Civil Penalties for Contraventions of the Directors' Duty Provisions" (2009) 27 C&SLJ 370.

613 Welsh, above n 604. Civil penalties were inserted into the Act following a review by the Senate Standing Committee on Legal and Constitutional Affairs (the Cooney Committee), which found evidence of a perception that the Act's criminal sanctions were too draconian and that courts were instead imposing weak criminal fines. The Committee recommended civil penalties be introduced to allow regulators to pursue a range of enforcement responses better adapted to the seriousness of the breach; Senate Standing Committee on Legal and Constitutional Affairs, above n 607. Now see Corporations Act 2001 (Cth), s 1317P.

614 Competition Act 1998 (UK), s 36(8).

Court of Appeal.⁶¹⁵ Previous penalties imposed have amounted to several millions of pounds.⁶¹⁶

The Financial Services Authority (FSA) regulates financial markets and imposes penalties (for example, for market abuse)⁶¹⁷ under the Financial Services and Markets Act. In practice, penalties are imposed by the Regulatory Decisions Committee, an internal board-appointed sanctioning body, upon recommendation by the FSA. All cases are reviewed by the Litigation and Legal Review Unit before they are transferred to the Regulatory Decisions Committee, which is intended to promote further separation between the investigation and prosecution functions of the FSA.⁶¹⁸ The Act provides for the person subject to the penalty to refer the matter to the Financial Services and Markets Tribunal.⁶¹⁹

Mhairi Fraser has recently commented on the FSA's use of higher penalties and its increased attention on individual culpability, with more individuals being subject to penalties and greater fines being imposed.⁶²⁰

The Occupational Pensions Regulatory Authority (OPRA) regulates occupational pensions schemes under the Pensions Act 1995. It can impose penalties of up to £5000 (individuals) and £50,000 (companies) on trustees or employers who fail to comply with a range of statutory duties. Penalties are imposed by a committee of OPRA board members who decide whether a breach has been committed and if so, what penalty should be imposed. The party can seek an internal review of the penalty within 28 days. OPRA's use of civil penalties is optional – where a criminal offence is suspected, OPRA can bring a criminal prosecution or refer the matter to the Police.

There are some exceptions to the regulator-imposed discretionary civil penalty. Under the Taxes Management Act 1970, penalties for minor income tax infringements are imposed by officers of Her Majesty's Revenue and Customs,⁶²¹ but penalties for more serious infringements are imposed by a tribunal and a court, in proceedings specifically designated "civil".⁶²²

615 Competition Act 1998 (UK), s 49.

616 For example, the Office of Fair Trading recently imposed a £58.5m penalty on British Airways for price fixing in breach of the Competition Act 1998 (UK): Case ref CE/7691–06 (19 April 2012) < www.offt.gov.uk > .

617 Financial Services and Markets Act 2000 (UK), s 123.

618 The creation of the Litigation and Legal Review Unit resulted from a report initiated by the Financial Services Authority, which found a lack of transparency in the operation of the Regulatory Decisions Committee and the need for a more formal separation of investigation, enforcement and determination of liability: Financial Services Authority *Enforcement Process Review: Report and Recommendations* (The "Strachan Report") (Financial Services Authority, London, July 2005).

619 Financial Services and Markets Act 2000 (UK), s 127(4).

620 Mhairi Fraser "Regulators Increase Pressure on Individual Negligence and Crime" *Operational Risk and Regulation* (online ed, London, 1 December 2011).

621 Taxes Management Act 1970 (UK), s 100.

622 Taxes Management Act 1970 (UK), s 100C–D.

Finally, a non-pecuniary civil intervention that has garnered much scrutiny is the anti-social behavioural orders (ASBO) imposed by the magistrates court. These may be sought by a local authority against a person who has acted “anti-socially” and, if imposed, prohibit the person in question from acting in any way specified in the order. ASBOs may be characterised as a non-pecuniary penalty in that breach of the order is a criminal offence. However, the House of Lords has classified them as a civil order in terms of the European Convention on Human Rights.⁶²³

Regulatory Enforcement and Standards Act 2008 (UK)

The Regulatory Enforcement and Standards Act 2008 (RESA) creates a process whereby regulators are able to impose administrative sanctions, including variable monetary penalties, where the regulator is satisfied beyond reasonable doubt that the person has committed a relevant criminal offence.⁶²⁴ It was introduced following a 2008 report which suggested that many sanctioning regimes were ineffective, over-reliant on criminal prosecution and lacking in flexibility and that a wider range of non-court sanctions should be created.⁶²⁵

The RESA sanctions are conferred by ministerial order to listed regulators, who must satisfy the Minister that they will comply with the principles in s 5(2) of the Act: that regulatory activities will be carried out in a way which is transparent, accountable, proportionate and consistent; and will be targeted only at cases in which action is needed.⁶²⁶ RESA also requires that the regulator publish guidance as to its use of the sanctions in the order.⁶²⁷

Examples of RESA orders containing variable monetary penalties are the Environmental Civil Sanctions (England) Order 2010 (containing a maximum penalty of £250,000) and the Political Parties, Elections and Referendums (Civil Sanctions) Order 2010 (maximum £20,000). The maximum penalty amount and the offences for which it is available are listed within each order, though the regulator decides how much to impose in each case. Regulators employing variable monetary penalties must issue a notice of intent to impose, hear objections, provide for circumstances in which a penalty may not be imposed (for example where the regulator is satisfied that the person would not be liable for the offence by reason of a defence) and provide appeal pathways.⁶²⁸

623 *R (on the application of McCann) v Manchester Crown Court* [2003] 1 AC 787 (UKHL).

624 Regulatory Enforcement and Standards Act 2008 (UK), s 42.

625 RB Macrory *Regulatory Justice: Sanctioning in a Post-Hampton World* (Cabinet Office, London, December 2005). That followed an earlier report carried out by Peter Hampton and published by the Treasury, which considered the scope for reducing administrative burdens through more efficient approaches to inspection and enforcement: P Hampton *Reducing Administrative Burdens: Effective Inspection and Enforcement* (HM Treasury, London, 2005).

626 Regulatory Enforcement and Standards Act 2008 (UK), s 66.

627 Regulatory Enforcement and Standards Act 2008 (UK), s 63.

628 Regulatory Enforcement and Standards Act 2008 (UK), s 43.

Role of the courts

As penalties are imposed administratively, the role of the courts is largely limited to assessing the compatibility of civil penalties with art 6 of the European Convention of Human Rights (the Convention) which has been implemented in the UK by the Human Rights Act 1998 (UK). In determining questions relating to Convention rights, UK courts and tribunals must take account of decisions of the European Court of Human Rights, which are not considered binding but are strongly persuasive.⁶²⁹

Art 6(1) of the Convention confers the right to “a fair and public hearing” by an independent tribunal on any person subject to “the determination of any criminal charge”. “Criminal charge” has been given an autonomous meaning by the European Court of Human Rights, meaning that when determining whether the procedural requirements of art 6(1) apply to a penalty, it is the underlying nature of penalty in question which is important, rather than the label assigned to it under domestic law.⁶³⁰

The leading UK case relating to the status of civil penalties under art 6(1) is *Han v Commissioners of Customs and Excise*,⁶³¹ a case concerning tax penalties. Following European Court jurisprudence, the Court of Appeal examined the underlying nature of the penalties for dishonest evasion of VAT and excise duty under the Value Added Tax Act 1994 (UK) and Finance Act 1994 (UK), and determined that they amounted to a “criminal charge” attracting the right to a fair and public hearing by an independent tribunal under art 6(1).

UK courts have since heard a number of cases concerning the compatibility of various penalties deemed civil under domestic law, and the decision of whether these in fact amount to a criminal charge in terms of art 6(1) has varied. In *International Transport Roth GmbH v Secretary of State for the Home Department* the Court of Appeal held that the fixed penalty regime applied to carriers of clandestine entrants to the UK under the Immigration and Asylum Act 1999 (UK) did amount to determination of a criminal charge.⁶³² The Court observed that the regime was “disproportionate to the objective to be achieved”, and particularly objectionable was the lack of an independent decision-maker determining the penalty. Contrastingly, in *Pow Trust v Chief Executive and Registrar of Companies House* the High Court found that fixed penalties of £100 for failure to deliver company accounts under the Companies Act 1985 (UK) were modest, proportionate, and did not attract the protections of art 6(1).⁶³³

629 Human Rights Act 1998 (UK), s 2(1).

630 *Engel v Netherlands* (1979–80) 1 EHRR 647 (ECHR). The criteria applied in that case for determining whether an offence is a “criminal charge” was further developed in *Ozturk v Germany* (1984) 6 EHRR 409 (ECHR). See further chapter 5.

631 *Han v Commissioners of Customs and Excise* [2001] EWCA Civ 1040, [2004] All ER 687.

632 *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158.

633 *Pow Trust v Chief Executive and Registrar of Companies House* [2002] EWHC 2783.

Even if the courts find that a penalty should be categorised as the determination of a criminal charge, questions remain around what procedural safeguards are required to achieve compatibility with art 6(1) and its requirement for a fair and public hearing. This was not clarified in *Han v Commissioners of Customs and Excise*. For example, the UK Competition Commission Appeal Tribunal has observed that even though its proceedings are categorised as “criminal” and subject to art 6(1), it is not obligated to apply the criminal burden of proof to the determination of civil penalties.⁶³⁴

Academic commentary

There were calls in the 1980s for greater use of civil sanctions to control certain behaviour in order to reduce the over-burdening of the criminal system and decriminalise certain regulatory offences. For example in 1981, David Tench (then the legal officer of the Consumer Association) proposed what he described as a “third legal system” between the civil and criminal systems. He recommended the gradual introduction of civil penalties as a preventive means of dealing with regulatory offences.⁶³⁵

More recently, Robin M White has written a number of articles criticising the use of regulator-imposed civil penalties and discussing the importance of maintaining familiar civil-criminal distinctions.⁶³⁶ But civil penalties also have their supporters in the UK; for example in a governmental study undertaken in 2003 Martin Woods and Professor Richard Macrory called for their greater use in environmental law, drawing on comparisons with high financial civil penalties used in the United States for environmental breaches.⁶³⁷

634 *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading*, Case No 1001/1/1/1/01, 15 January 2002 unreported, cited in *The Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa (Pty) Ltd*, 08/CR/Mar 2001 at [51].

635 D Tench *Towards a Middle System of Law* (Consumers Association, 1981). See also the Justices Clerks’ Society *Decriminalisation: An Argument for Reform* (G Sullivan, Bristol, 1981).

636 RM White “‘Civil Penalties’: Oxymoron, Chimera and Stealth Sanction” (2010) 126 LQR 593, RM White “‘Decriminalisation’ – a Pernicious Heresy?” (2009) 13 Edin LR 112, and RM White “Out of Court and Out of Sight: How Often are ‘Alternatives to Prosecution’ Used?” (2008) 12 Edin LR 481.

637 M Woods and R Macrory *Environmental Civil Penalties: A More Proportionate Response to Regulatory Breach* (Study undertaken for the Department of Environment, Food and Rural Affairs, University College London, 2003).

The advent of RESA may generate further interest in this area. For example, early commentary suggests the expanded enforcement powers under RESA raise a need for closer attention to the institutional design of regulatory agencies and proper systems of external accountability.⁶³⁸

CANADA

The Canadian penalty system is centred not on court-imposed civil penalties but primarily on “administrative” penalties commonly referred to as “AMPs”, or administrative monetary penalties. These are usually imposed by administrative officials with prescribed statutory powers. Appeals and reviews are heard by an independent officer or panel tasked specifically with that role. This means that the large majority of penalties are negotiated, imposed, reviewed and disposed of outside of the courts.⁶³⁹ However, there is provision under the Competition Act RSC 1985 for them to be imposed by the Canadian Competition Tribunal, a specialist quasi-judicial body.⁶⁴⁰

638 N Garoupa, A Ogus and A Sanders “The Investigation and Prosecution of Regulatory Offences: Is there an Economic Case for Integration?” (2001) 70 CLJ 229 at 259.

639 A Tait “The Use of Administrative Monetary Penalties in Consumer Protection” (Public Interest Advocacy Centre, May 2007) at 9.

640 Competition Act RSC 1985 c C-34.

The field of AMPs in Canada

AMPs are an accepted part of the regulatory landscape in Canada. In 1977, commentators wrote they were “here to stay”,⁶⁴¹ but they may only have become a favourite tool of regulators more recently.⁶⁴² They are used in a range of fields at both federal level (for example competition law, consumer protection law, environmental law, marine transport, spam and unsolicited telecommunications)⁶⁴³ and provincial level (in Saskatchewan, for example, in securities law, insurance, alcohol and gaming, electricity and gas regulation, forest harvesting, and the environment).⁶⁴⁴ Their use appears to be growing; for example the Law Commission of Ontario recently recommended expanding their use to parking violations.⁶⁴⁵ And, in 1999, major reforms of the federal Competition Act made AMPs a more established presence, extending them to cover all abuses of dominance (previously they could only be used in response to breaches by domestic airlines) and greatly increasing the maximum AMP for deceptive marketing practices provisions: for a first time provision, from CAN\$50,000 to \$750,000 (individuals) and from CAN\$100,000 to \$10m (bodies corporate).⁶⁴⁶ An example of a high penalty paid under the Competition Act is the 2004 *Forzani Group Case*, in which Canada’s largest sporting goods retailer agreed to pay the Canadian Competition Bureau a penalty of CAN\$1.7m (inclusive of the Bureau’s investigative costs) for misleading advertising.⁶⁴⁷

Varying degrees of discretion are involved in imposing AMPs. Some schemes involve limited exercise of discretion, such as customs contraventions. In contrast AMPs under the Competition Act are imposed by a quasi-judicial tribunal comprised of six federal court judges and six government-appointed lay members with specialist expertise. The tribunal operates under its own rules and has, for example, the power to punish litigants for contempt.

641 D Schmeltzer and W Kitze “Administrative Penalties Are Here to Stay – But how Should They Be Implemented?” (1977) 26 Am UL Rev 847.

642 Tait, above n 639 at 7.

643 See for example Canada Consumer Product Safety Act SC 2010 c 21, Competition Act RSC 1985 c C-34, Environmental Violations Administrative Monetary Penalties Act SC 2009 c 14, Fighting Internet and Wireless Spam Act SC 2010 c 23, Marine Transportation Security Act SC 1994 c 40, and Telecommunications Act SC 1993 c 38.

644 See for example Securities Act SS 1988-89 c S-42.2, Saskatchewan Insurance Act RSS 1978 c S-26, Alcohol and Gaming Regulation Act SS 1997 c A-18.011, Electrical Inspection Act SS 1993 c E-6.3, Gas Inspection Act SS 1993 c G-3.2, Forest Resources Management Act SS 1996 c F-19.1, Environmental Management and Protection Act SS 2002 c E-10.3.

645 Law Commission of Ontario *Modernization of the Provincial Offences Act* (Final Report) (Law Commission of Ontario, Toronto, August 2011). Parking violations are currently treated as offences under the Provincial Offences Act RSO 1990 c P-33.

646 Budget Implementation Act SC 2009 c 2, pt 12. See also Canada Competition Bureau “A Guide to Amendments to the *Competition Act*” (22 April 2009).

647 Canada Competition Bureau “Canada’s largest sporting goods retailer pays \$1.7 million for misleading consumers” (press release, 6 July 2004).

Most AMP schemes are relatively comprehensive in their handling of key issues like burden of proof, review and appeal rights, due diligence defences, choice of proceedings and limitation periods. As in New Zealand, some AMPs form part of a dual civil-criminal enforcement regime, and some regimes address double jeopardy issues accordingly. For example, s 41 of the Marine Transportation Security Act SC 1994 provides that if a contravention can be proceeded with as a violation or an offence, the Minister can *either* commence the process for an AMP, *or* can recommend offence proceedings be sought.⁶⁴⁸

AMPs compared with civil pecuniary penalties

AMPs are distinguished from civil pecuniary penalties in some key ways. In general, they are imposed directly by regulators, so in this way they may bear a closer resemblance to forms of administrative penalty in New Zealand. The Law Commission of Ontario suggests that their use is justified by the additional rationale that the people imposing them have expertise in, or knowledge of, the particular regulatory field, and are therefore better placed to impose penalties that take into account all the regulatory variables.⁶⁴⁹

They are generally viewed as non-punitive, and some legislation states this expressly, such as the Fighting Internet and Wireless Spam Act SC 2010, under which “the purpose of a penalty is to promote compliance with this Act and not to punish”.⁶⁵⁰ This also means the factors taken into account when imposing them differ from under some New Zealand penalty regimes. Canadian Competition Act penalties are not intended to put competitors out of business, and the Competition Tribunal is directed by the Act to consider the financial position of the person against whom the order is made. The Canadian Government has said that the criteria relevant to penalty setting are not intended to be linked to the defendants’ blameworthiness; they are not akin to sentencing guidelines.⁶⁵¹

648 Marine Transportation Security Act SC 1994 c 40, s 14. See also Telecommunications Act SC 1993 c 38, s 72.14.

649 Law Commission of Ontario *Modernizing the Provincial Offences Act: A New Framework and Other Reforms* (Law Commission of Ontario, Interim Report, Toronto, March 2011) at 72.

650 Fighting Internet and Wireless Spam Act SC 2010 c 23, s 20(2) (the Act has been passed but is not yet in force).

651 Sheridan Scott, Competition Commissioner “Speech to the Canadian Marketing Association” (Toronto, Ontario, 22 September 2005).

Because AMPs are imposed in the first instance by regulators, AMP regimes are constructed to minimise the risk of allegations of regulator impropriety. For example some AMPs may not be used for the benefit of the regulator or government department. Most schemes incorporate degrees of independence between those who investigate or inspect for compliance; those who impose penalties; and those who hear reviews or appeals. A common procedure is as follows:⁶⁵²

- The decision-maker notifies the person of the violation and the penalty amount that it has determined applies, or may offer to enter a compliance/consent agreement.⁶⁵³
- The person has an opportunity to contest the appropriateness of the penalty in front of an independent officer.
- If the penalty is confirmed there may be a right of review to another independent officer, tribunal or possibly a court, although typically not before the penalty becomes enforceable.

Otherwise, justifications for using AMPs instead of criminal offences focus on regulatory effectiveness and timeliness. They are considered a more flexible tool for regulators; consistent with moves towards responsive regulation. They are a quicker and less expensive option than court proceedings; therefore they are more likely to be enforced and are said to serve as a more effective deterrent.⁶⁵⁴ On this basis they are increasingly being used for what are said to be clear contraventions with minimal impacts, with more serious breaches dealt with through criminal prosecutions.⁶⁵⁵

Role of the courts

Canadian Charter of Rights and Freedoms

AMPs have been challenged on the grounds of s 11 of the Canadian Charter of Rights and Freedoms (the Charter), which protects the privilege against self-incrimination; the presumption of innocence until proven guilty; and the right

652 For example, the Canadian Radio, Television and Telecommunications Commission is responsible for investigating breaches and enforcing the Telecommunications Act SC 1993 c 38. Suspected breaches are investigated by Commission staff; the decision of whether to issue a notice of violation is made by the Vice-Chairperson; and reviews are heard by a panel of Commissioners excluding the Vice-Chairperson which decides, on the balance of probabilities, whether or not the violation occurred.

653 See for example the Marine Transportation Security Act SC 1994 c 40, s 33: if the Minister of Transport, Infrastructure and Communities has reasonable grounds to believe someone has committed a violation, s/he may either issue a notice of violation containing a penalty or may enter into an “assurance of compliance” with that person, which requires the deposit of a security.

654 Law Commission of Ontario, above n 649 at 71.

655 Tait, above n 639 at 21. See for example the Environmental Violations Administrative Monetary Penalties Act SC 2009 c 14, which creates an administrative monetary penalties program for less serious environmental offences.

not to be doubly punished. If the Charter applies, an AMP system may be ruled unconstitutional or in need of additional, court-imposed procedural safeguards.

Courts have tended to take a narrow view of the applicability of Charter rights to AMPs.⁶⁵⁶ In *R v Wigglesworth* the Canada Supreme Court held that s 11 only applied to matters that are criminal or penal by nature, or that lead to a “true penal consequence”.⁶⁵⁷ It does not apply to proceedings that are regulatory, protective and corrective and that are primarily intended to maintain discipline, professional integrity, and professional standards or to regulate conduct within a limited private sphere. Later decisions have reinforced that AMPs fall into the latter category of proceedings. In *Martineau v MNR* the appellant claimed that s 11 of the Charter applied to a customs penalty of CAN\$315,458 and that he could not be ordered to make discovery. The Supreme Court found that the penalty was regulatory, not penal in nature, based on the objective of the Act, the provision in question and the purpose of the sanction.⁶⁵⁸

Government reviews and responses

Federal government

The Canadian federal government has not undertaken a comprehensive review of the use of AMPs specifically. However, federal regulatory policy gives an idea of the Government’s current approach to regulation and provides a contextual backdrop to the use of AMPs. A Cabinet Directive on Regulatory Management⁶⁵⁹ directs agencies to select the appropriate mix of regulatory instruments and demonstrate, among other things, that the regulatory response addresses policy objectives and is proportional.⁶⁶⁰

The federal Government also engaged with the topic in 2004, when it first proposed to significantly increase the AMPs in the Competition Act RSC 1985. Professor Peter W Hogg submitted an opinion on the Bill on behalf of the Retail Council of Canada, in which he rejected the increase as unconstitutional and said that,

656 Case law to date suggests that administrative monetary penalties are unlikely to engage s 7 of the Charter, which protects the right to life, liberty and security of the person: see for example *Lavallee v Alberta (Securities Commission)* [2010] ABCA 48, where the Alberta Court of Appeal held that the maximum CAN\$1m penalty under the Securities Act RSA 2000 c S-4 did not trigger the protections of s 7. Citing *Blencoe v British Columbia (Human Rights Commission)* 2000 SCC 44, [2007] SCR 307, Paperny JA said: “the s 7 security of the person interest is triggered only in exceptional cases where the state interferes in profoundly intimate and personal choices; such choices ‘would not easily include the type of stress, anxiety and stigma that result from administrative or civil proceedings’ ”: at [28].

657 *R v Wigglesworth* [1987] 2 SCR 541. The Court held that a “true penal consequence” is imprisonment; or a fine which is so large that it “would appear to be imposed for the purpose of redressing the wrong done to society at large, rather than to the maintenance of internal discipline within the limited sphere of activity”: at [24].

658 *Martineau v MNR* [2004] 3 SCR 737, 2004 SCC 81.

659 Cabinet Directive on Regulatory Management (1 April 2012) < www.tbs-sct.gc.ca > .

660 Above, at 6D.

under the test in *R v Wigglesworth*, the new maximum levels were so high as to have a “true penal consequence”.⁶⁶¹ The Government of the day issued a rebuttal paper stating that higher penalties were not unconstitutional as the penalties were imposed administratively; that the legislative criteria for setting the penalty were not linked to the defendant’s blameworthiness and were not intended to be punitive; and that high penalties were needed for deterrent purposes, to prevent companies seeing the sanctions as a “cost of doing business”.⁶⁶²

Provincial government

Some provincial governments have looked at AMPs, either as a discrete topic or as part of a wider review of a field of law.

The Law Reform Commission of Saskatchewan recently undertook an examination of administrative penalties. The review did not question the usefulness or desirability of penalties themselves, but sought to identify the minimum natural justice requirements that should be incorporated into penalty regimes. In its final report, published in March 2012,⁶⁶³ it recommended that all administrative penalty regimes include an appeal right to the Court of Queen’s Bench and minimal procedural rules for all regimes, including notice of an intention to impose a penalty; the opportunity to be heard; and reasons for the decision.⁶⁶⁴

The Ontario Law Commission discussed AMPs as an alternative to criminal offences in their Provincial Offences Act RSO 1990 c P-33. The final report, published in August 2011, recommended replacing part 2 of the Act, which deals with parking offences, with AMPs which could be disputed before a hearings officer, outside of court.⁶⁶⁵

661 Opinion letter written on behalf of Diane J Brisebois (President and Chief Executive Officer, Retail Council of Canada) by Peter Hogg (Blake, Cassels & Graydon) “Bill C-19’s proposals respecting Administrative Monetary Penalties” (17 October 2005).

662 Tait, above n 639 at 15. See Scott, above n 651.

663 Law Reform Commission of Saskatchewan *Administrative Penalties: Final Report* (Law Reform Commission of Saskatchewan, Saskatoon, March 2012).

664 Above, at 1: Summary of recommendations.

665 Law Commission of Ontario, above n 645 at 49–72.

In 2008 the British Columbia Administrative Justice Office began a review of statutory decision-makers, with the aim of ensuring they had appropriate and proportionate powers, procedures and authorities to make fair and just decisions.⁶⁶⁶ The Office issued a discussion paper exploring the advantages and common characteristics of AMPs, and asking a series of questions such as the circumstances in which decision-makers should have recourse to AMPs and what an effective framework for an AMP scheme looks like.⁶⁶⁷

UNITED STATES

The United States has a wide range of discretionary monetary penalties at both federal and state level, for example in securities law,⁶⁶⁸ aviation,⁶⁶⁹ water standards,⁶⁷⁰ fraud,⁶⁷¹ consumer safety⁶⁷² and spam.⁶⁷³ Many of these are imposed directly by the regulator; for example since 1978 several federal banking agencies have had the ability to assess monetary penalties for banking violations.⁶⁷⁴

Also, distinct from many other jurisdictions, some regimes have a parallel enforcement approach, in that the regulator can choose to impose penalties through administrative processes and/or seek judicially imposed penalties from the court.

United States Securities Exchange Commission

The United States Securities Exchange Commission (SEC) is one such federal regulator with parallel enforcement powers. Since 1990 it has had the power to impose penalties administratively, supplementing its existing ability to seek judicially imposed penalties from the Federal Court.⁶⁷⁵ The SEC has said that it will

666 British Columbia Administrative Justice Office *Review of Statutory Decision-Makers' Powers, Procedures and Authorities: Developing a Framework for Earlier Solutions, Faster Justice* < www.ag.gov.bc.ca/ajo/popt/overview_sdms.htm > .

667 British Columbia Administrative Justice Office *Administrative Monetary Penalties: A Framework for Earlier and More Effective Regulatory Compliance – A Discussion Paper* (British Columbia Administrative Justice Office, June 2000) < www.ag.gov.bc.ca/ajo/down/amps092008.pdf > .

668 See for example 15 USC § 77t(d)(1).

669 See for example 49 USC § 46301.

670 See for example 33 USC § 1319.

671 See for example 31 USC § 3806.

672 See for example 15 USC § 2069.

673 See for example 15 USC § 7706.

674 MS Morris “The Securities Enforcement Remedies and Penny Stock Reform Act of 1990: By Keeping up with the Joneses, the SEC's Enforcement Arsenal is Modernized” [1993] 7 Admin LJ Am U 151 at [172]. See for example 15 USC § 78u-2(a) (Securities Commission authority to assess money penalties).

675 Securities Enforcement Remedies and Penny Stock Reform Act of 1990. Now see Securities Exchange Act 15 USC § 78u-2.

often commence both types of proceeding in respect of a matter or contravention where both are possible.⁶⁷⁶

While the Court has the power to impose penalties on any person, the SEC's administrative penalty power is limited to certain regulated persons such as brokers, as it can only impose penalties in proceedings brought pursuant to certain sections of the Act.⁶⁷⁷ Also, while the Court possesses broad discretionary authority to impose penalties, the SEC may only do so if it determines there has been a wilful violation and that any penalty is in the public interest.⁶⁷⁸ The SEC may also take into account the person's ability to pay the penalty.⁶⁷⁹

Administrative proceedings initiated by the SEC are designed to incorporate a degree of independence from the enforcement body. They are heard by an independent officer in the first instance, referred to as an administrative law judge, who considers evidence from the SEC and the defendant and issues an initial decision containing factual and legal findings and a recommended sanction. All or part of the decision may be appealed by either party to the SEC. The SEC may affirm, reverse or remand the decision for additional hearings. The SEC's decision can be further appealed to the court.⁶⁸⁰

The SEC's enforcement approach, particularly the question of whether or not to seek a penalty against the body corporate in breach, has come under scrutiny. In response to concerns over its enforcement decisions, in 2006 it issued a statement describing the framework it uses when determining when to employ its administrative powers to impose penalties against body corporates versus individuals.⁶⁸¹ It listed several factors relevant to that determination, principally:

- the presence or absence of a direct benefit to the corporation as a result of the violation; and
- the degree to which the penalty will recompense or further harm the injured shareholders.

Other relevant factors included the need to deter the particular type of misconduct; the extent of the injury to innocent parties; and whether complicity in the violation is widespread throughout the corporation.

However, the SEC's enforcement approach continues to be controversial. Its 2006 enforcement policy has come under critique from current SEC Commissioner Luis

676 United States Securities Exchange Commission "What we do" < www.sec.gov/about/whatwedo.shtml#org > .

677 Securities Exchange Act 15 USC § 78u-2(a)(1).

678 Securities Exchange Act 15 USC § 78u-2(a)(1) and 78u-2(c).

679 Securities Exchange Act 15 USC § 78u-2(d).

680 United States Securities Exchange Commission "What we do" < www.sec.gov/about/whatwedo.shtml#org > .

681 United States Securities and Exchange Commission "Statement of the Securities and Exchange Commission Concerning Financial Penalties" (press release, Washington DC, 4 January 2006).

Aguilar, who has suggested it is outdated and needs to be reviewed.⁶⁸² Further, the SEC's proposed US\$33m settlement against Bank of America in 2009 was rejected on the grounds that it would force shareholders of the bank to pay the penalty for the bank's own misconduct.⁶⁸³

Role of the courts

The courts retain a role in imposing civil penalties. Proceedings for a penalty in the Federal Court proceed basically along accepted civil procedure. Penalties are imposed on the civil standard of proof and on the basis of strict liability.

The courts have assessed the constitutionality of administratively-imposed penalties, particularly in light of constitutional protections against double jeopardy through simultaneous criminal-civil actions and infringements of the defendant's right to privilege.

Kenneth Mann has tracked the Supreme Court's treatment of a wide range of punitive civil sanctions, which has varied widely since the late 1800s. He observes that the Court's initial focus was on substance over form and it treated civil penalties as punitive, requiring heightened procedural protections.⁶⁸⁴ This was followed by a return to focus on form, and the reading down of those protections, in the late 19th century.⁶⁸⁵ In 1989, *United States v Halper*⁶⁸⁶ signalled a brief return to the substantive approach, but that was overruled a few years later in *Hudson v United States*.⁶⁸⁷ Hence US jurisprudence has returned to the original position in which civil penalties are assessed in formal rather than substantive terms.

682 Luis A Aguilar, Commissioner, United States Securities and Exchange Commission "Sustainable Reform Prioritizing Long-Term Investors Requires the Right Orientation" (SEC Speaks, Washington DC, 5 February 2010.)

683 *Securities and Exchange Commission v Bank of America Corporation* 09 Civ 6829 (JSR) (14 September 2009).

684 *United States v Chouteau* 102 US 603 (1880), *Boyd v United States* 116 US 616 (1886).

685 *Stockwell v United States* 80 US (13 Wall) 531 (1871).

686 *United States v Halper* [1989] 490 US 435.

687 *Hudson v United States* [1997] 522 US 93.

Academic commentary

Academic debate has centred on the development of a “middleground” jurisprudence for civil penalties, with commentators both in favour and against.⁶⁸⁸ Kenneth Mann has previously written in support of a middleground jurisprudence, stating that:⁶⁸⁹

[T]he middleground allows for more proportionate punitive sanctioning. When punitive civil sanctions are available, cases otherwise confined to the conventional paradigms shift into the middleground, increasing overall sanctioning while reducing reliance on both criminal sanctions and merely remedial sanctions.

However, other United States commentators have spoken out in favour of retaining a distinct boundary between the civil and criminal law.⁶⁹⁰

GERMANY

Many civil law jurisdictions have for some time used administrative penalties as an alternative to criminal offences. One example is Germany, where a particularly clear distinction is drawn between criminal law and administrative penal law. There, *Ordnungswidrigkeiten* or “administrative offences” have replaced minor criminal offences. They are determined, often on a strict liability basis, by an administrative agency after an inquisitorial hearing. The agency determines the amount of the penalty, primarily based on the seriousness of the violation. The defendant may appeal the decision, after which there is an expedited trial in which the court undertakes an independent review of the facts.

688 See JC Coffee “Paradigms Lost: The Blurring of the Criminal and Civil Law Models – and what can be done about it” (1992) 101 Yale LJ 1875; K Mann “Punitive Civil Sanctions: The Middleground between Criminal and Civil Law” (1992) 101 Yale LJ 1795; J Resnik “The Domain of Courts” (1989) 137 U PA L Rev 2219; CS Steiker “Civil and Criminal Divide” in J Dressler *Encyclopaedia of Crime and Justice* (Macmillan, 2001) at 160; and FE Zimring “The Multiple Middlegrounds Between Civil and Criminal Law” (1992) 101 Yale LJ 1901.

689 Mann, above at 1865 (footnotes omitted).

690 See for example Coffee, above n 688.

The first comprehensive statute providing for *Ordnungswidrigkeiten* was passed in 1952, and in 1975 the category of minor criminal offences was abolished altogether. Today *Ordnungswidrigkeiten* deal with, for example, traffic offences; dangerous animals; noise control; and environmental regulation. They allow penalties to be imposed on companies, which otherwise under German law cannot be attributed the moral blameworthiness necessary to commit a criminal offence.⁶⁹¹ In some instances they are also used for the imposition of significant penalties; for example certain anti-competitive contraventions of the Act Against Restraints of Competition can attract a maximum penalty of EUR\$1m or 10 per cent of annual company turnover.⁶⁹²

691 Woods and Macrory, above n 637 at [4.5]–[4.12].

692 Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*), § 81(4).

Appendix 3

Other forms of penalty

In this appendix we provide additional information about some other forms of State penalties and remedies that are pursued mainly through civil procedures and which fall outside the scope of this review. The intention is to flag interventions that may be said to resemble civil pecuniary penalties and to identify the variations in form and terminology. The range of variations demonstrates a general trend towards more tailored and strategic interventions in some regulatory regimes.

NON-JUDICIAL VARIABLE PENALTIES

As described in chapter 7, the Gas Act 1992 and Electricity Industry Act 2010 provide for variable pecuniary penalties to be imposed by Rulings Panels, up to a maximum of \$20,000 under the Gas Act⁶⁹³ and \$200,000 under the Electricity Industry Act.⁶⁹⁴ The penalties differ from civil pecuniary penalties only in that they are not imposed by the High Court and the maximum penalties are less.⁶⁹⁵

According to the Electricity Authority⁶⁹⁶ and decisions published on the Electricity Panel's website,⁶⁹⁷ the Electricity Rulings Panel has imposed five civil penalties since 2005, ranging in size from \$1,000 to \$17,500. Only one civil penalty, of \$18,900, has been imposed by the Gas Rulings Panel, out of five decisions concerning an alleged breach since 2008.⁶⁹⁸

693 Gas Governance (Compliance) Regulations 2008, reg 52.

694 Electricity Industry Act 2010, s 54.

695 Although the Electricity Rulings Panel has previously suggested the penalty available to it is comparatively low: see for example Electricity Rulings Panel *In the Matter of a hearing on a formal complaint against Meridian Energy Ltd* (22 November 2010) at [94].

696 Email from Ross Hill (General Manager Legal and Compliance, Electricity Authority) to Susan Hall (Law Commission) (24 February 2012).

697 < www.ea.govt.nz > .

698 < www.gasindustry.co.nz > .

Legislation specifies the appeal route for such penalties: in both instances, appeals may be made as of right to the High Court. Under the Electricity Industry Act, any person can appeal a decision on a question of law,⁶⁹⁹ and an affected industry participant can appeal a decision for lack of jurisdiction.⁷⁰⁰ The Electricity Authority or an industry participant may appeal a pecuniary penalty order or the quantum of any order.⁷⁰¹ Under the Gas Act, any person can appeal a decision on a question of law;⁷⁰² and an affected industry participant can appeal a decision for lack of jurisdiction.⁷⁰³ Unlike in the Electricity Industry Act there is no specific provision stating that a pecuniary penalty order or amount may be appealed (although there are for suspension and termination orders).⁷⁰⁴

Neither Act specifies the nature of the appeal, so appeals will be by way of rehearing, under r 20.18 of the High Court Rules.⁷⁰⁵ In determining an appeal, the High Court has broad powers, including to confirm, modify or reverse the decision or any part of it; to exercise any of the powers that could have been exercised by the Rulings Panel; or to refer appeals back to the Rulings Panel for reconsideration.⁷⁰⁶ These powers comply with suggestions of the Law Commission in its 2008 report on tribunal reform.⁷⁰⁷

699 Electricity Industry Act 2010, s 64.

700 Above, s 63.

701 Above, s 65(1)(b).

702 Gas Act 1992, s 43ZA.

703 Above, s 43ZC.

704 Above, s 43ZD.

705 In *Kelly v Legal Services Agency* (2004) 17 PRNZ 449 (HC), Williams J found that r 718 of the High Court rules (now covered by r 20.18) would apply to appeals to the High Court brought under s 59 of the Legal Services Act 2000, which did not otherwise specify the nature of the appeal: at [9].

706 Gas Act 1991, ss 43ZF–43ZH, Electricity Industry Act 2010, ss 67–68.

707 Law Commission *Tribunal Reform* (NZLC SP20, Wellington, 2008) at [8.34].

ADMINISTRATIVE PENALTIES

The term “administrative penalty” is used here to refer to (usually) low-quantum, fixed penalties imposed directly by a regulator. In the main there is no discretion around their imposition, though there may be discretion to waive or remit them.⁷⁰⁸ Most of the Tax Administration Act 1994 penalties would generally be understood to be administrative penalties.⁷⁰⁹ Other examples are in the Charities (Fees Other Matters) Regulations 2006 (for example, failing to file an annual return results in a \$200 penalty)⁷¹⁰ and the Financial Reporting Order 1994 (late filing of financial statements can result in a \$25 or \$100 penalty).⁷¹¹

However, there are exceptions to the generally low quantum of administrative penalties in New Zealand. The “administrative penalty” in the Gambling (Fees) Regulations 2007, while not discretionary as to quantum, can be very large: the penalty for late payment of an annual fee amounts to five per cent of the fee per month. In the first year that the regulations were in force, Sky City Auckland Casino’s annual fee was \$3,006,474, so a late payment penalty would have totalled around \$150,000 per month.

708 See for example the Tax Commissioner’s discretion to remit tax penalties for reasonable cause: Tax Administration Act 1994, s 183A.

709 Penalties in the Tax Administration Act 1994 include late filing penalties (maximum \$500); non-electronic filing penalties (the greater of \$250 or \$1 per employee); late payment penalties (five per cent of unpaid tax, added the day after the penalty falls due, with another one per cent penalty added each month); shortfall penalties (the amount payable is specified as a percentage of the tax shortfall and depends on which of the penalty provisions liability arises under); imputation penalty taxes (10 per cent of the amount of further income tax that gave rise to the liability for the tax); and dividend withholding payment penalty taxes (10 per cent of the amount of the additional payment that gave rise to the liability for the penalty tax).

710 Charities (Fees and Other Matters) Regulations 2006, r 9(2).

711 Financial Reporting Order 1994, r 5. The Registrar has discretion to remit the penalty if it is just and equitable to do so: r 5(3A). A similar fine and waiver provision is in the Retirement Villages (Fees) Regulations 2006.

And, the term “administrative penalty” is used to describe a variety of penalties, some of which occupy an administrative/discretionary middleground. For example, the responsible Minister can impose “civil penalties” under the Fisheries (Demerit Points and Civil Penalties) Regulations 2001⁷¹² and the Forests (Permanent Forest Sink) Regulations 2007.⁷¹³ Under the former, the Minister may record demerit points for certain breaches of the regulations by an “approved service delivery organisation”.⁷¹⁴ The demerit points are converted to penalties at the end of each year. The demerit points and their accompanying penalties are fixed in the regulations; however, the Minister has discretion as to whether to impose them; unlike some other administrative penalties, they do not accrue automatically.⁷¹⁵ We also note that the Land Transport Management Act 2003 and the Tokelau (Territorial Sea and Exclusive Economic Zone) Act 1977 provide for the creation of civil penalties by regulation. None have been made and it is not clear what the process for their imposition would be – whether these would be administrative penalties similar to those just discussed or whether they would be more in the nature of a non-judicial discretionary penalty.⁷¹⁶

Finally, the Fisheries Act 1996 contains what is referred to as an “administrative penalty”, but which differs from those described above. The penalty can be imposed in place of instigating criminal proceedings where the penalty for the offence is up to \$250,000. The Chief Executive may, having regard to all the circumstances including whether the offence was a minor one, and the person’s previous conduct, offer an administrative penalty in place of prosecution. The person can opt to be subject to normal criminal proceedings, or can admit the offence and make submissions as to the level of administrative penalty. They are deemed to have admitted the offence if they do not respond within 28 days. The maximum penalty is one-third of the maximum criminal fine that would otherwise be available, and the Chief Executive cannot commence criminal proceedings if the offence is admitted.

The penalty is enforced as a criminal fine. So, while the term “administrative penalty” is used, this is more akin to an infringement offence but with a much higher fine (see discussion of infringement offences below).

712 The regulations are made pursuant to the Fisheries Act 1996.

713 The regulations are made pursuant to the Forests Act 1949. Here the level of the penalty (for harvesting within a forest sink area during the restricted period unless the harvesting is consistent with approved harvesting practice: reg 7) is determined as a function of the number of forest sinks harvested: reg 9.

714 At present there is only one ASDO, the SeaFood Industry Council, or SeaFIC, which has delegated its role in this area to its subsidiary, Commercial Fisheries Services Ltd, also referred to as “FishServe”: < www.seafoodnewzealand.org.nz > .

715 Fisheries Act 1996, s 296S(1). The Minister must give written notice of his or her intention to impose demerit points and if there is an objection the issue is determined by the District Court on the balance of probabilities: s 296V.

716 These penalties are included in the table in appendix 1.

INFRINGEMENT OFFENCES

The infringement offence system was developed to deal with types of offending which are not considered to require the full extent of criminal process. Infringement offences deal with more than 2.5 million breaches of the law each year, covering an increasingly wide range of conduct. Although the LAC guidelines suggest that the level of any infringement fee should generally be less than \$500,⁷¹⁷ there are a number on the statute book which are higher.⁷¹⁸

Infringement offence fees are set by the legislation – the prosecuting authority has no power to vary the penalty. On payment of an infringement fee, no conviction results. A standard procedure for infringement offences is set out in s 21 of the Summary Proceedings Act 1957, although minor departures from this model can be found in some infringement regimes.⁷¹⁹ Most cases are resolved between the defendant and the prosecuting authority by the payment of the prescribed infringement fee. The court process is only called for where the defendant denies the charge or wishes to make submissions as to penalty. The court will also become involved if the person fails to pay the fee.

Infringement offences are used in the traditional criminal field to deal with high volume, comparatively minor offending, such as traffic breaches. Increasingly, they are also being used as a way to achieve compliance or enforce particular standards of conduct in a range of regulatory regimes; for example, they feature widely in fisheries, environmental and industrial regulation legislation. Upon the enactment of the Financial Markets Conduct Bill, they will also be used in the regulation of securities markets.

717 Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (Wellington, 2001 ed) at [12.5.3].

718 See for example Fisheries Act 1996, s 297(1)(nc) (\$3000), Building Act 2004, s 402(1)(z) (\$20,000); Gambling Act 2003, s 360 (\$10,000 for an individual and \$50,000 for a licensee).

719 See for example the Land Transport Act 1998, ss 139–140 (“short form” infringement notices) and the Biosecurity Act 1993, s 159A (accelerated payment timeframes).

CIVIL INFRINGEMENT NOTICES

The Telecommunications Act 2001 and the Unsolicited Electronic Messages Act 2007 both contain “civil infringement notices”, which allow an expedited penalty process in place of seeking a civil pecuniary penalty in the High Court.⁷²⁰ In these regimes the regulator, or authorised officers working on its behalf, may issue a notice stating the monetary penalty payable which, if paid, avoids the need to go to court. The regulators have a choice between instituting civil penalty proceedings or issuing a civil infringement notice. The Telecommunications Act 2001 is explicit as to the matters the regulator must take into account when deciding what enforcement action to take, such as the seriousness of the alleged breach.⁷²¹

Notices must be in a prescribed form set down in regulations⁷²² and must be issued within 12 months after the day on which the alleged breach occurred. The penalty amount in notices issued under the Telecommunications Act 2001 is fixed at \$2,000, whereas the Unsolicited Electronic Messages Act 2007 sets the penalty, per “civil liability event”, at \$200 for individuals and \$500 for organisations.⁷²³ There is an opportunity to make submissions or objections to the notice and a right of appeal to the District Court.

The civil infringement notice is intended to act as an alternative to a court-imposed civil penalty. The Telecommunications Act 2001 provides that the Commerce Commission may either serve a civil infringement notice or apply to the High Court for an order to pay a pecuniary penalty, and that a non-compliance notice may not be issued if civil penalty or criminal proceedings have already been commenced in respect of the same conduct.⁷²⁴ The Unsolicited Electronic Messages Act 2007 provides that payment of a penalty in a civil infringement notice is a bar to later civil penalty proceedings.⁷²⁵

720 Telecommunications Act 2001, ss 156D–156K, Unsolicited Electronic Messages Act 2007, ss 24–33. See also Therapeutic Products and Medicines Bill 2006 (103–1), cls 89–95.

721 Telecommunications Act, s 156C.

722 Telecommunications (Civil Infringement Notice) Regulations 2007, Unsolicited Electronic Messages Regulations 2007. See also Therapeutic Products Bill 2006 (103–1), cl 95 which provides for the enactment of regulations prescribing the form of non-compliance notices.

723 Unsolicited Electronic Messages Regulations 2007, reg 7. See also Therapeutic Products Bill 2006 (103–1), cl 92(2).

724 Telecommunications Act 2001, s 156B. See also Therapeutic Products Bill 2006 (103–1), cl 93: a non-compliance notice (if paid) is a bar to both civil penalty and criminal proceedings.

725 Unsolicited Electronic Messages Act 2007, s 29(2)(b).

CRIMINAL GAIN DISGORGEMENT PENALTIES

The Criminal Proceeds (Recovery) Act 2009 contains a civil restraint and forfeiture scheme, based on property and profits derived from “significant criminal activity”. Unlike its predecessor (the Proceeds of Crime Act 1991), there is no need for a conviction for the 2009 Act to kick in. A judge can order forfeiture if s/he is satisfied that the property in question is derived from “significant criminal activity”, regardless of whether the offending has been proved beyond reasonable doubt.⁷²⁶

The Act declares proceedings for a whole range of orders to be civil (except for instrument forfeiture orders which require a conviction). Forfeiture orders do not involve imposing a pecuniary penalty, but they can have a significantly punitive effect by depriving someone of their property or assets, despite no criminal offence having been proved. Although the purpose clause of the Act makes no reference to punishment,⁷²⁷ it has been argued that the scheme is punitive because of the stigma that may attach to a person subject to such an order.⁷²⁸

A number of specific Acts also contain criminal disgorgement gain penalties.⁷²⁹ These are dependent on the defendant first being convicted of a criminal offence. But matters such as whether the gain occurred in the course of committing the offence, and the quantum of the gain, are determined on the civil standard of proof. An example is the Fair Trading Act 1986, in which operating a pyramid selling scheme amounts to an offence and defendants can be ordered to pay a financial gain penalty up to the amount of the financial gain.⁷³⁰ Under the Resource Management Act 1993, offences relating to the discharge of waste in marine coastal areas may be subject to an additional penalty of up to three times the value of the financial gain made from the offence.⁷³¹

726 Criminal Proceeds (Recovery) Act 2009, s 5(1) definition of “tainted property” and s 6 definition of “significant criminal activity”.

727 Above, s 3(2). It states: “The criminal proceeds and instruments forfeiture regime established under this Act proposes to— (a) eliminate the chance for persons to profit from undertaking or being associated with significant criminal activity; and (b) deter significant criminal activity; and (c) reduce the ability of criminals and persons associated with crime or significant criminal activity to continue or expand criminal enterprise; and (d) deal with matters associated with foreign restraining orders and foreign forfeiture orders that arise in New Zealand.”

728 See P Wright “Criminal Punishment without Civil Rights: the Criminal Proceeds and Instruments Bill’s Punitive Civil Sanctions” (2006) 37 VUWLR 623 and G Faramarzi “Criminal Proceeds Recovery” [2010] NZLJ 205.

729 For example, the Civil Aviation Act 1990, s 47, Fair Trading Act 1986, s 40A, Health Act 1956, s 69ZZW, Immigration Advisers Licensing Act 2007, s 72, Resource Management Act 1991, s 339B, Telecommunications Act 2001, s 156R, United Nations Convention on the Law of the Sea Act 1996, s 8 and Waste Minimisation Act 2008, s 67.

730 Fair Trading Act 1986, s 40A.

731 Resource Management Act 1993, s 339B.

STATUTORY DAMAGES UNDER THE CREDIT CONTRACTS AND CONSUMER FINANCE ACT 2003

Under s 88 of the Credit Contracts and Consumer Finance Act 2003 creditors, lessors, transferees, and buy-back promoters are liable for statutory damages for breach of various disclosure obligations. For breach of the initial disclosure obligation under a consumer credit contract or consumer lease, the damages amount to the interest and costs of credit accruing during the period of the breach. In all other cases, the damages are 5 per cent of the amount of credit, subject to a \$3,000 cap.

Statutory damages are not expressed to be punitive (in contrast to the Act's predecessor, the Credit Contracts Act 1981, which referred to them as penalties). Nor are they compensatory since they are unrelated to damage or loss (and there is separate provision for compensation under s 94). Yet, the damages are paid to the party to the relevant contract. *Gault on Commercial Law* treats them as a punitive regime, aimed at obtaining compliance with the legislation.⁷³² The regime also contains similar provisions to Australia's uniform consumer credit legislation,⁷³³ and penalties in that jurisdiction have been treated like civil pecuniary penalties akin to the ones covered by this Issues Paper.⁷³⁴

⁷³² Thomas Gault (ed) *Gault on Commercial Law* (online looseleaf ed, Brookers) at [4C.6.02]. See also *Commerce Commission v Galistair Enterprises Ltd* DC Auckland CRI-2007-004-4009, 6 December 2007.

⁷³³ National Consumer Credit Protection Act 2009 (Cth).

⁷³⁴ See Gillooly and Wallace-Bruce, above n 609.

