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PECUNIARY PENALTIES

GUIDANCE FOR
LEGISLATIVE DESIGN

A stylized, low-angle view of the Law Commission logo and text, rendered in a light blue color against a dark green background. The logo features the coat of arms of New Zealand, and the text reads "LAW · COMMISSION" and "TE · AKA · MATUA · O · TE · TURE".

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PECUNIARY PENALTIES

GUIDANCE FOR LEGISLATIVE DESIGN

The Law Commission is an independent, 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.

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10 August 2014

The Hon Judith Collins
Minister Responsible for the Law Commission
Parliament Buildings
WELLINGTON

Dear Minister

NZLC R133—PECUNIARY PENALTIES: GUIDANCE FOR LEGISLATIVE DESIGN

I am pleased to submit to you the above Report under section 16 of the Law Commission Act 1985.

Yours sincerely

A handwritten signature in blue ink that reads "Grant Hammond". The signature is fluid and cursive, with the first name "Grant" being more prominent than the last name "Hammond".

Sir Grant Hammond
President

Foreword

Traditionally, both in New Zealand and cognate legal systems, the law has been divided into criminal law and civil law. Different doctrines and considerations apply to these two large subsets. Essentially, the task of the criminal law is to deter unlawful behaviour and to punish infractions of it. The essential purpose of civil law is to afford compensation or other relief to a plaintiff who has been “wronged”.

In recent years statutes that affect large subsets of human endeavour have begun to emerge. These statutes do not observe the traditional sharp distinctions between the civil and the criminal law. Amongst other things they create “pecuniary penalties”. These significant statutes have been overdue, for some little time now, for a first principles review.

Pecuniary penalties are imposed by the High Court of New Zealand under the authority of a statute for a breach of that legislation. The primary purposes of such a regime are to secure compliance with the statutory requirement and to penalise non-compliance.

The decision made by the High Court is discretionary. It can involve very large sums of money. This is done without a criminal trial or a conviction being entered. As a technique pecuniary penalties have drawn increasing attention from ministries of the State. It is attractive because it avoids the protracted and expensive litigation associated with a criminal trial, and it is a more flexible regulatory tool.

At the suggestion of the Legislation Advisory Committee, and as referred to us by the Minister of Justice, the Commission has undertaken a first principles review as to whether such penalties are desirable, how they should be formulated and applied, and in particular what safeguards should attend their employment.

These issues are fundamentally important given the widespread resort to pecuniary penalties in New Zealand statutes today. They are a valid statutory tool and the Commission anticipates that they will be included in new legislation with growing frequency.

This Report sets out the Commission’s view of the present state of the law relating to 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.

This area of the law has been something of a “sleeper”. However, the use of these statutes is becoming more widespread and will have an impact on all levels of institutional and legal practice. The area is important also to those within government involved in the conception and design of statutory regimes where tools are required for the purposes of enforcement. The Report is therefore important on a whole-of-government basis. It should also be of benefit to courts, which have to grapple with the emerging issues in this regime.



Sir Grant Hammond
President

Acknowledgements

We are grateful to all the people and organisations that provided input during this review. We would like to thank the members of the Legislation Advisory Committee and all of those who made submissions or with whom we consulted during the review. A list can be found in Appendix C of this Report.

The project was led by the Honourable Sir Grant Hammond. The Legal and Policy Advisers were Susan Hall, Joanna Hayward, Mihiata Pirini and Tania Chin, and the Research Clerk was Asher Emanuel.

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Summary

PART 1: ABOUT THIS REVIEW

Chapter 1: Introduction

- 1 This Report examines the use and design of pecuniary penalties. It considers their benefits, their role as a tool of enforcement, and whether they are imposed in a way that is fair and proportional.
- 2 The Law Commission has defined pecuniary penalties for the purpose of this Report as monetary penalties that are imposed:
 - by a court after a trial conducted under the rules of civil procedure and evidence, in which:
 - liability is established on the civil standard of proof;
 - the monetary penalty can be very substantial;
 - neither imprisonment nor criminal conviction can result; and
 - the penalty is paid to the Crown, rather than any victim.
- 3 The Report concludes that pecuniary penalties are punitive measures. They are not intended or designed to compensate people affected by a breach, but to punish the contravention and deter future contraventions. However, they are imposed on a lower standard of proof than criminal offences, and in civil proceedings that lack many of the procedural protections offered by the criminal law. There has been concern that pecuniary penalties illegitimately challenge the traditional distinction between the criminal and civil law. This is one of the factors that prompted the Commission's review.
- 4 Pecuniary penalties are also a relatively novel form of penalty. They have been adopted into statutes in an ad hoc manner, especially since 2000. Apparent inconsistencies among existing pecuniary penalty provisions suggest a lack of clear principles guiding their use. These were other factors driving the Law Commission's review.
- 5 In undertaking this review, the Commission has been guided by three principles:
 - Fairness. Pecuniary penalties should be imposed in a way that is fair to defendants, taking into account the needs of the statute or regulatory regime where they are found. An accurate assessment of the nature and impact of pecuniary penalties on defendants is key to identifying what procedural safeguards are needed to ensure fairness.
 - Effective and efficient regulation. The design of pecuniary penalties also needs to take into account the wider public interest objectives of individual regulatory regimes. Sometimes, it is necessary to relax or adjust procedural safeguards to reflect the wider public interest.
 - Certainty. Given their novelty, the Commission has placed a high value on clearly drafted pecuniary penalties and, so far as is possible, consistency of design across different regimes.
- 6 We have reached the view that pecuniary penalties can be a valid tool of enforcement and may be desirable in some circumstances. In this Report we identify what those circumstances are. We have concluded that, for the most part, the rules of evidence and procedure that accompany pecuniary penalties are appropriate. However, we have identified one area where

the current design of pecuniary penalties does not appropriately balance the principles of fairness and effective and efficient regulation. We make one recommendation for legislative change to adequately reflect their punitive nature.

- 7 The Report contains eight other recommendations for action by the Government and public agencies.
- 8 The remainder of the proposals in the Report are in the form of Guidelines for policymakers about the appropriate design of pecuniary penalty statutes. These Guidelines should be used when consideration is given to creating new pecuniary penalty statutes, or when existing statutes are amended.

Chapter 2: Guidance for future pecuniary penalty regimes

- 9 In Chapter 2 we consider the need for guidance for policymakers who are considering when and how to use pecuniary penalties in the future. Effective guidance will help in the creation of principled and, so far as desirable, consistent pecuniary penalty provisions. Existing pecuniary penalty regimes are inconsistent in their approach to a range of matters, including procedural safeguards. Not all of these inconsistencies are justified. A common approach should be taken to those aspects.
- 10 Chapter 2 considers a range of options for giving guidance to policymakers creating pecuniary penalties. It makes four recommendations:
 - The Legislation Advisory Committee (LAC) should incorporate guidelines on pecuniary penalties into its *Guidelines on Process and Content of Legislation*.
 - Existing pecuniary statutes that come up for review should be re-evaluated in light of our Report.
 - The Parliamentary Counsel Office should draft model provisions for frequently used pecuniary penalty provisions.
 - The Ministry of Justice should be consulted on proposals for new or revised pecuniary penalty statutes.
- 11 On balance we are not persuaded that sufficiently strong arguments exist for enacting a generic statute that provides for the core default features of pecuniary penalties. However, we suggest that this option be revisited in three to five years' time.

Chapter 3: The current landscape

- 12 In Chapter 3 we set out the current statutory landscape of pecuniary penalties. At present, 18 statutes contain pecuniary penalties. Both individuals and corporate bodies may incur pecuniary penalties.
- 13 We note that pecuniary penalties are a comparatively new development and that they are primarily used to punish and deter commercial wrongdoing, although their use has expanded. They were first introduced in New Zealand in the Commerce Act 1986 and the vast majority of pecuniary penalty orders have been sought and imposed under that Act. They now feature heavily in the regulation of securities and securities markets and will form a key part of that enforcement regime.
- 14 However, their use across the statute book is patchy. While some major industries are regulated by way of pecuniary penalties, others are subject instead to criminal offences. Penalties feature in some environmental legislation but are absent from a great deal of it too.

- 15 Similarly, we note that the purpose pecuniary penalties serve within a regime also varies. While some are directed at minor technical breaches of a regime, many others are directed at the core behaviour that the legislation seeks to regulate. Pecuniary penalties may be the most serious enforcement mechanism within an Act, or that role may be fulfilled by criminal offences. In some regimes a contravention will be enforced by way of a criminal offence where it is performed with intent or recklessness, but by way of a pecuniary penalty where there is no proof of intent or recklessness.

PART 2: THE NATURE AND ROLE OF PECUNIARY PENALTIES

Chapter 4: Nature of pecuniary penalties

- 16 In Chapter 4, we make the point that pecuniary penalties should be designed according to an accurate and principled conceptualisation of their nature. That conceptualisation needs to be independent of the existing regimes where they are found. This is especially important as their use across the statute book expands, which we predict it is likely to do.
- 17 Chapter 4 identifies the following as being fundamental features of pecuniary penalties:
- They are investigated, sought and imposed by the State for breaches of statutory prohibitions.
 - They aim to deter breaches by the threat of punishment.
 - They can result in the imposition of a severe penalty.
- 18 Although they do not result in a criminal conviction, pecuniary penalties are a grave form of state-imposed punishment. Their design needs to give appropriate recognition to the potential imbalance between the parties concerned. Moreover, procedural protections should not be designed with the best-armed and most capable defendant in mind. Rather, they should protect the potentially vulnerable. However, we also note that this does not mean that the relaxation of procedural protections would never be warranted, depending on the particular needs of some regimes.

Chapter 5: Role of pecuniary penalties

- 19 Policymakers who are deciding whether or not to include pecuniary penalties in a statute should consider pecuniary penalties alongside all the other main forms of penalty that could be included in the regime. What is required is a robust and transparent analysis of the circumstances when each form of penalty would be appropriate. When weighing the appropriateness of different forms of penalty policymakers should consider the following:
- **The effectiveness and efficiency of the proposed penalty.** Any policy decision about the inclusion of one or more forms of penalty in a regime should take into account whether the penalty will be effective and efficient in achieving the desired outcomes of the regime. Pecuniary penalties may be effective and efficient where:
 - a regime is designed around theories of responsive regulation, where a regulator needs a range of tools to enable it to effectively obtain compliance;
 - a regime targets corporate contraventions for financial gain, although any policy proposal for them must properly assess the nature of the actors and conduct at hand;
 - it is intended that an enforcement body should be able to seek both to obtain compensatory orders and punish breach in a single set of proceedings.

- **Practical considerations.** Policymakers should consider whether any practical considerations have a bearing on which form of penalty to adopt. For example, with pecuniary penalties there is a need for an enforcement body that is capable of bringing proceedings.
- **The harm caused or the nature of the conduct.** One of the key questions facing policymakers is whether the form of penalty is appropriate given the harm caused and the nature of the conduct. This question needs to be openly addressed.

20 Merely stating that a legislative regime is “regulatory” in nature is an inadequate justification for using pecuniary penalties to enforce it.

PART 3: THE CORE PROCEDURAL RULES

21 Part 3 covers the appropriate procedural protections for pecuniary penalties. They are fundamentally based on our assessment of the nature and role of pecuniary penalties and on the principles of fairness, effective and efficient regulation, and certainty. Our proposals in this area should be considered the default approach. However, we agree that in some specific circumstances modifying or relaxing that approach may be justified.

Chapter 6: Application of the New Zealand Bill of Rights Act 1990

22 It is not yet clear whether the criminal procedural safeguards in sections 25 and 26 of the New Zealand Bill of Rights Act, which apply to “offences”, also apply to pecuniary penalties. It is clear, though, that the right to natural justice in section 27(1) of the Act applies. In any event, as a matter of good legislative practice, pecuniary penalties should be designed in a way that minimises the risk of a breach of the rights in the New Zealand Bill of Rights Act.

23 The alternative creates a risk for the Crown that a court will declare an aspect of a pecuniary penalty regime to be inconsistent with that Act. Pecuniary penalties will be best protected from challenge under the Act if procedural safeguards are modified or limited no more than is reasonable and demonstrably justifiable, in terms of section 5 of that Act.

24 We note that pecuniary penalties should be designed in a way that gives appropriate recognition to their punitive substance as opposed to their “civil” form. We note that European and Canadian courts, when asked to determine whether an order is in substance an “offence”, have taken a substantive and expansive approach to that question.

Chapter 7: Standard of proof

25 In Chapter 7 we conclude that pecuniary penalties should continue to be imposed on the civil standard of proof, or in other words, on the balance of probabilities. The arguments to apply a criminal standard of proof are outweighed by the arguments against it, including that doing so could undermine the regulatory effectiveness of pecuniary penalties, and could lead policymakers to revert to using criminal offences for conduct that does not deserve the disapprobation of the criminal law. Also, the potential unfairness of the lower standard is moderated by the fact that New Zealand courts apply the civil standard of proof having regard to the consequences of a finding against the defendant. A claim that would have a serious financial or reputational impact on the defendant must be proved by evidence having sufficient probative force.

Chapter 8: Burden of proof

26 The burden of proof in criminal law is imposed on the prosecution. This serves an important purpose in curbing the intrusive power of government and justifying the use of the State’s

coercive powers. We note in Chapter 8 that, because pecuniary penalties are also coercive and punitive, the allocation of the burden of proof in pecuniary penalty proceedings also raises procedural fairness issues. We conclude that pecuniary penalty provisions should impose a burden of proof on defendants only in reasonable and demonstrably justifiable circumstances. Those circumstances are set out in the chapter. We also conclude that, because of their novelty, pecuniary penalty provisions should be very clear about who carries the burden of proof for all elements of the alleged breach.

Chapter 9: The penalty privilege

- 27 Officials can investigate pecuniary penalty breaches in much the same way as they can criminal offences. It follows that the same concerns about coercion and the reliability of evidence obtained in those circumstances can be present. In Chapter 9, we recommend that individuals should have the benefit of a privilege against compelled self-exposure to a pecuniary penalty (a “penalty privilege”) when faced with possible pecuniary penalty proceedings. Such a privilege would be the equivalent of the privilege against self-incrimination in the criminal context.
- 28 The rationales for the privilege against self-incrimination in the criminal sphere apply equally to investigations and proceedings that can give rise to pecuniary penalties. The potential penalty can be very significant, and can result in stigma and reputational harm. Also, there is no evidence that the apparent removal of the penalty privilege by the Evidence Act 2006 was undertaken in the light of consideration of the nature of pecuniary penalties.
- 29 The scope of the penalty privilege should be the same as that of the privilege against self-incrimination. It would be able to be relied upon at the investigatory, pre-trial and trial stage. However, in light of the principles of regulatory efficiency and effectiveness, the proposed penalty privilege should be able to be modified or removed by individual statutes where a case can be made that to do so is necessary and justifiable.
- 30 To give effect to the privilege we recommend that the Evidence Act 2006 should be amended to provide for it, as this approach has the benefit of setting a clear standard for pecuniary penalties that is distinct from any of the regimes in which they are used.

Chapter 10: Double jeopardy

- 31 Given their punitive nature, pecuniary penalties raise double jeopardy concerns. The principle against double punishment means that in principle a statutory bar should be in place against double punishment through imposition of a pecuniary penalty and a criminal penalty for the “same conduct”.
- 32 Double jeopardy also protects individuals against the stress and financial burden of being pursued through the courts twice for the purpose of penalising the same conduct. Pecuniary penalty statutes should usually provide that once criminal proceedings have been determined there should be no pecuniary penalty proceedings based on the same conduct, and vice versa.
- 33 We accept that in rare cases, there could be a rational reason for allowing a pecuniary penalty and imprisonment for the same conduct. However, this would only be appropriate where a specific statutory breach could encompass a range of conduct from the truly inadvertent through to intentional conduct with knowledge of substantial harm. For these types of breaches we accept a case may be made that a pecuniary penalty statute may provide for imposition of imprisonment after a pecuniary penalty if subsequent evidence comes to light.
- 34 We also note in Chapter 10 that policymakers should give thought to whether a series of related acts constitutes “the same conduct” and if so how this may be expressed in legislation.

Otherwise, issues are likely to arise about the similarity or otherwise of the conduct, acts, transactions in issue, or similar, that are being targeted by the pecuniary penalty provision.

Chapter 11: Intention and strict liability

- 35 We conclude in Chapter 11 that pecuniary penalties should not be precluded from being used where mens rea is a relevant element of the contravention and there may be an aspect of moral blameworthiness. Precluding this could unduly limit their scope, and since pecuniary penalties have a punitive function they may be used to target morally blameworthy conduct. Mens rea may therefore be a required element.
- 36 We note that, as there are no settled principles to determine the approach to the mental element of a pecuniary penalty provision that is silent as to fault, the provisions should be as clear as possible as to the required mental element.
- 37 The LAC Guidelines that provide guidance about the use of strict liability offences – those with no specific mental element – apply equally to pecuniary penalties. These factors should form the basis for guidance as to the use of strict liability pecuniary penalties. For clarity, strict liability provisions should state that they are imposed on the basis of strict liability and statutes should explicitly identify any applicable defences.

PART 4: OTHER ASPECTS OF LEGISLATIVE DESIGN

Chapter 12: Rules of procedure

- 38 Our research and consultation did not indicate that the courts are encountering particular difficulties or raising particular objections when applying civil procedural rules to pecuniary penalties. Those rules were not designed with a State-sought and State-imposed penalty in mind. Therefore, pecuniary penalties differ from the forms of proceeding for which the rules are most apt. However, rule 1.4(4) of the High Court Rules, which allows the court to determine any questions about the application of the rules and give any directions it thinks just, arguably provides judges with sufficient scope to depart from particular rules where, given the nature of the proceedings, they will lead to unfairness. On balance, then, we propose that the civil rules of evidence and procedure should continue to apply. However, we note the need for policymakers, when devising new “civilly-imposed” orders, to consider the practicalities of whether aspects of the standard civil court process will be inappropriate or unnecessary.

Chapter 13: Imposition

- 39 Although penalties imposed by regulators can create certainty and cost savings, penalties imposed by the courts – the primary model in New Zealand – means there is a transparent, independent assessment of the appropriate penalty and protection against abuse, or the appearance of abuse, of regulators’ powers. Therefore, we propose in Chapter 13 that variable monetary penalties should generally only be imposed by a court. It follows that enforcement agencies and defendants should not be able to “settle” penalties outside the court, except where there is a legislative requirement to publicise details of the circumstances and the nature of the breach and the quantum of the payment. This increases transparency and certainty. Enforcement bodies with such a power should make public their policy for approaching settlement negotiations with parties suspected of breach.

Chapter 14: Individual and corporate liability

- 40 Based on our research and consultation, the apportionment of penalties between corporations and individuals does not seem to be causing difficulties for the courts and guidance on these

matters does not seem necessary. However, we understand that policymakers would find it useful to have guidance about the various means of attributing liability between a body corporate and its officers, including the need for certainty within the statute as to who is liable and how. We set out this guidance in Chapter 14.

Chapter 15: Insurance and indemnity

- 41 The issue of whether insurance and indemnification should be available to a defendant to meet the costs of defending pecuniary penalty proceedings raises both policy and legislative design questions. The position is uncertain at present as there are no express provisions, and pecuniary penalty regimes should pre-empt argument on these matters by expressly authorising or confirming the extent to which such measures are available. The availability of indemnification and insurance may have a disciplinary effect that contributes to the deterrence objectives of pecuniary penalty regimes. However, there may also be arguments to place a bar on indemnification and insurance under the statute and to reinforce the impact of a pecuniary penalty by expressly penalising indemnification against statutory liability.

Chapter 16: Fixing penalties

- 42 The setting of maximum penalties in statute raises a range of issues. In Chapter 16 we set out some principles to guide policymakers when doing so, but there is a clear case for a thorough inter-disciplinary review of how this is done. We found significant inconsistencies across the regimes that may not be justified, and we note that maximum penalties have been set unsystematically in the criminal sphere as well. We therefore recommend a review of how maximum criminal and pecuniary penalties are set in legislation.
- 43 Most statutes provide a set of factors that a court should take into account when determining what penalty to impose. While these will be highly context-dependent, we set out in Chapter 16 a set of “core” factors, and “additional” factors that policymakers should consider including within a penalty regime as statutory factors that the court must consider.

Chapter 17: Appeals

- 44 In Chapter 17 we conclude that the general right of appeal in section 66 of the Judicature Act 1908 should apply to pecuniary penalties imposed by the High Court. It is important for the Court of Appeal to have appellate jurisdiction over procedural matters and quantum, given pecuniary penalties’ novelty and their high amounts. For the same reason, penalties imposed by the District Court should be subject to the general appeal rights contained in sections 72, 75 and 76 of the District Courts Act 1947.

Chapter 18: Limitation periods

- 45 Existing pecuniary penalty statutes have five distinct approaches towards limitation periods, including not dealing with them expressly. In the interests of consistency and certainty, we propose in Chapter 18 that each pecuniary penalty regime deals explicitly with the limitation question, and we propose an approach that is tailored to the hybrid features of pecuniary penalties.
- 46 The tailored model is based on a limitation period of three years following reasonable discoverability, with a 10-year longstop period. Discoverability is used in a number of New Zealand statutes as the basis for limitation periods. The advantages of using a discoverability period (it is more flexible and provides a greater incentive to enforcement agencies) outweigh the disadvantages (including lack of certainty), which can be addressed in other ways, such as through the inclusion of a 10-year longstop period.

- 47 We conclude that applying the Limitation Act 2010 model in its entirety to pecuniary penalties could result in overly long limitation periods that do not fit with the regulatory function of pecuniary penalties. However, a regime should be able to specify that the Limitation Act applies in full where there is specific policy justification for that.

Chapter 19: Crown and State sector defendants

- 48 All the current pecuniary penalty statutes purport to bind the Crown. However, variation in drafting means there is uncertainty as to whether the Crown would in fact be liable for a pecuniary penalty under current provisions.
- 49 Given the reach of the activities of contemporary government, certainty on this issue is desirable. We have recommended that as each existing pecuniary penalty statute is reviewed or amended it should be assessed against the Guidelines proposed in the Report, and in Chapter 19 we suggest that the assessment should include whether there is sufficient certainty and clarity about the liability of the Crown or State sector defendants.
- 50 For a similar reason, increased guidance for policymakers is also desirable. Therefore, in Chapter 19 we set out a number of considerations for policymakers when they are considering pecuniary penalties, relating to the liability of the Crown and the State sector. These include: identifying whether the Crown or parts of the State sector should be potentially liable in the event of contraventions; legislative drafting that makes the matter clear; considerations as to the form of penalty that should apply, or any alternatives; and potential substantive and procedural issues when imposing pecuniary penalties on the Crown and State sector.
- 51 Finally, given the potential for pecuniary penalties to impose quasi-criminal liability on public sector defendants, we recommend that the Cabinet circular procedure be supplemented by a requirement to disclose, to Cabinet, the impact of any new Bills concerning the liability of the Crown for pecuniary penalties.

Chapter 20: Publication of enforcement policies

- 52 In Chapter 20 we observe that public and industry confidence in enforcement agencies will be maximised if they use their powers transparently, consistently and responsibly. We therefore recommend that enforcement agencies devise and publish enforcement guidelines and policies, specific to the statutory regime they oversee, which set out the factors governing their enforcement decisions, including whether or not to commence court proceedings; whether these should be civil or criminal; when it is appropriate to enter negotiations for settlement; and the settlement process that will be followed.

Recommendations

- R1 The Ministry of Justice should be consulted on all proposals for pecuniary penalties at the policy development stage, in the same manner as for criminal offences, as directed by Cabinet and paragraph 7.31 of the Cabinet Manual.
- R2 The Legislation Advisory Committee should draft a section of its *Guidelines on Process and Content of Legislation* on best legislative practice for pecuniary penalty regimes. The section should refer to and build on the Guidelines in Appendix A of this Report.
- R3 The Parliamentary Counsel Office should draft model provisions for common pecuniary penalty provisions.
- R4 When existing pecuniary penalty statutes come up for review their pecuniary penalty provisions should be re-evaluated in light of the Guidelines in Appendix A of this report.
- R5 The Evidence Act 2006 should be amended:
 - (a) To provide for a privilege against self-exposure to a pecuniary penalty. The scope of the privilege should be the same as the scope of the privilege against self-incrimination.
 - (b) To make it clear that an enactment can remove the privilege either expressly or by necessary implication.
 - (c) To provide that defendants in pecuniary penalty proceedings can, when giving evidence in court, refuse to answer questions on the grounds of the privilege against self-exposure to a pecuniary penalty.
- R6 If the limitation or removal of the penalty privilege can be justified under any of the existing pecuniary penalty statutes, those statutes should be amended to give effect to that limitation at the same time that the Evidence Act 2006 is amended.
- R7 The Government should instigate a review of how maximum criminal and pecuniary penalties should be set in legislation.
- R8 Cabinet should consider supplementing the current requirements in Cabinet Office Circular CO (02) 4 ("Acts binding the Crown: procedures for cabinet decisions") relating to the impact of legislative proposals on the criminal liability of the Crown, to require departmental analysis of the impact on the liability of the Crown of legislative proposals to introduce pecuniary penalty regimes.
- R9 Enforcement agencies with the power to commence pecuniary penalty proceedings should develop and publish enforcement policies.

Part 1

ABOUT THIS REVIEW



Chapter 1

Introduction

- 1.1 The purpose of this review has been to assess pecuniary penalties¹ as a comparatively new legislative tool for enforcing legal rules and standards. Pecuniary penalties are monetary penalties that are imposed by a court after a trial conducted under the rules of civil procedure and evidence where:
 - liability is established on the civil standard of proof;
 - the monetary penalty can be very substantial;²
 - neither imprisonment nor criminal conviction can result; and
 - the penalty is paid to the Crown, rather than any victim – that is, pecuniary penalties are not intended or designed to compensate.³
- 1.2 This review has not been concerned with other non-criminal forms of penalty. Those include penalties imposed by a body other than a court (for example by “rulings panels” under the Gas Act 1992 and Electricity Industry Act 2010); administrative penalties (those being fixed, usually low-value, non-discretionary penalties imposed directly by a regulator); tax penalties; infringement notices; criminal gain disgorgement penalties; or non-monetary civil remedies such as management bans and licence revocations.⁴
- 1.3 Three factors prompted the review. First, pecuniary penalties are imposed without the protections that we normally take for granted as part of the criminal law. Yet they can result in a very substantial penalty. Often the penalty can be greater in monetary terms than a criminal fine. As a result, concerns have been raised that they illegitimately challenge the traditional distinction between the criminal and civil law.⁵ Pecuniary penalties are not alone in straddling the “criminal–civil divide”. The civil remedy of exemplary damages, for instance, 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 compromised.
- 1.4 However, the question for this review has been whether pecuniary penalties are used in circumstances that justify this compromise, and whether the appropriate balance has been struck in terms of how they are imposed. The review has also highlighted some of the difficulties that can arise when hybrid forms of remedies and penalties are created.

1 In this Report, we have adopted the term “pecuniary penalties” in place of “civil pecuniary penalties”, which we used in our Issues Paper (see Law Commission *Civil Pecuniary Penalties* (NZLC IP33, 2012) [Issues Paper]). We explain the reason for this at [4.14] of this Report, and propose that that term should be adopted uniformly in future legislation.

2 The highest available maximum pecuniary penalties on the statute book are: (a) in the case of an individual, \$500,000; and (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, three times the value of any commercial gain resulting from the contravention; or (iii) if the commercial gain cannot be readily ascertained, 10 per cent of the turnover of the body corporate and all of its interconnected bodies corporate.

3 There are some limited examples of pecuniary penalties directed at repairing harm, but this is incidental to the penalty and the amount of reparation required does not determine the quantum of the penalty.

4 For a broader description of the scope of the review see the Issues Paper, above n 1, at [2.14]–[2.26] and Appendix 3.

5 Forms of civil penalty in the United Kingdom have been described as “stealth sanctions” that are effectively criminal penalties being treated as civil debts. 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 *Statutes LR* 17 and R M White “‘Civil Penalties’: Oxymoron, Chimera and Stealth Sanction” (2010) 126 *LQR* 593 at 593, 597.

- 1.5 Secondly, pecuniary penalties are relatively novel. Although New Zealand's first pecuniary penalty provisions appeared nearly 30 years ago, the majority have been introduced since 2000. Increasingly they are being adopted as a central feature of statutory regimes. Their adoption in legislation has appeared to be relatively ad hoc, and it is not clear that it has been consistently guided by principle. There is little guidance in place for government agencies considering whether to include pecuniary penalties in legislation, and very little debate has occurred about their benefits, drawbacks and design.
- 1.6 As a result of the lack of guidance, the third factor that prompted the review is the inconsistencies among existing pecuniary penalty provisions. Although there are some common approaches, current statutes deal in a variety of ways with matters such as procedural rules, guidance about penalty levels and when a penalty should be imposed, privilege and double punishment. There is also a lack of consistency in when pecuniary penalties have or have not been included in a legislative scheme. For example, while they feature heavily in some environmental protection legislation, they are entirely absent from other areas of environmental law. The differences in legislative approach may reflect the novel nature of pecuniary penalties. Again, however, the inconsistencies suggest the absence of clear principles to guide their adoption.
- 1.7 Pecuniary penalties have resulted in a number of difficult legal disputes in other jurisdictions. Most notably, Australian courts have struggled with some of their features.⁶ Controversy has arisen over their design and over how the courts have interpreted pecuniary penalty provisions.⁷ To date, little substantial judicial analysis of the nature of pecuniary penalties has occurred in New Zealand. Indeed, many of the penalties have never been used. Over time, it is likely that there will be more litigation involving pecuniary penalties, and it may be that our courts will be required to tackle the sorts of issues that have vexed courts in other countries. Consistency and principle in the design and use of pecuniary penalties should help reduce the risk of future litigation here.

OUR TASK

- 1.8 The Law Commission's task has been to consider the benefits of pecuniary penalties, to consider their role as a tool of enforcement, and to assess whether they are imposed in a way that is fair and proportional.
- 1.9 The task has been challenging. Pecuniary penalties provide many benefits. They tend to feature in areas of "regulatory law",⁸ and enable enforcement agencies effectively and efficiently to obtain compliance with the regimes they oversee. They avoid the need for the agency to establish criminal guilt, and the defendant is not subject to the risk of conviction or imprisonment. Admissions of liability can be obtained without the need for a defendant to admit to criminal activity. More often, then, trial can be avoided on that question, resulting in substantial savings for the agency, the defendant and the court system. Pecuniary penalties also give regulatory agencies flexibility in how they address non-compliant behaviour. Those agencies can effectively encourage compliance and penalise breaches, while reserving the criminal law for the most egregious contraventions. Since successive Parliaments have been

6 See the Issues Paper, above n 1, at Appendix 2.

7 See for example 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.

8 Note, however, the sometimes indiscriminate use of this term, discussed at [1.24].

willing to set very high maximum penalties for pecuniary penalties, such penalties can be particularly effective where offending is carried out with financial gain in mind. They can operate as a powerful deterrent by targeting the pockets of those who contemplate a breach, by ensuring not only that any gain from the breach will be stripped away, but also that the breach will be punished. Often, they are targeted at breaches by corporate bodies, which can be difficult to prove to the criminal standard. Very high maximum penalties can compensate for any degree of deterrence that is lost as a result of the lower risk of misconduct being discovered.

- 1.10 However, many of these benefits exist because pecuniary penalties are imposed through the civil courts, on the civil standard of proof, and without the protections we normally take for granted in the criminal law.
- 1.11 We have reached the view that imposing penalties in this manner can be justifiable and may be desirable in some circumstances. However, it will not always be appropriate. Our impression, for instance, is that often pecuniary penalties are viewed as acceptable because they are imposed on deep-pocketed corporate bodies or commercial actors, who have chosen to operate in tightly regulated industries, and who offend against industry standards for financial gain. This view is true for many pecuniary penalty provisions. However, it is not an accurate description of the entire current field in which pecuniary penalties operate: in fact, they can be imposed on a wide range of actors, including individuals and one-person and small- to medium-sized enterprises.
- 1.12 The main questions we have had to tackle, then, are: (a) whether there are circumstances where the use of pecuniary penalties is particularly appropriate and circumstances where it is not; and (b) in any event, given the potentially wide field of application of pecuniary penalties, whether the wholesale application of civil rules of evidence and procedure is appropriate, or whether greater protection should be afforded to the defendant.

First principles review

- 1.13 The Commission has approached this as a first principles review. We have not regarded current ideas of what pecuniary penalties are as determinative, but rather have considered what they *should* be. In assessing the nature, role and design of pecuniary penalties, we have been guided by three principles: fairness, effective and efficient regulation, and certainty.

Fairness

- 1.14 As a matter of policy and good legislative practice, fairness must be central to the design of pecuniary penalties. Exactly what this means for how they should be drafted is not necessarily fixed, as our concept of fairness (also referred to as natural justice) varies, rightly, according to context. As Tucker LJ put it in *Russell v Duke of Norfolk*:⁹

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.

- 1.15 Therefore, what is fair in terms of when and how pecuniary penalties are imposed may vary according to the context. For example, the wider public interest that a statutory regime is designed to serve may mean that some ideas of what is fair can justifiably be relaxed. On the other hand, an accurate account of the nature of pecuniary penalties and their impact on defendants is also absolutely key to identifying what safeguards might be needed to ensure fairness. We provide this account in Chapter 4. Also, the standards set by the New Zealand

⁹ *Russell v Duke of Norfolk* [1949] 1 All ER 109 (CA) at 118.

Bill of Rights Act 1990 are relevant. We discuss that Act's application to pecuniary penalties in Chapter 6.

Effective and efficient regulation

- 1.16 Each existing pecuniary penalty statute has been designed with particular public objectives and 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”.¹⁰ Key to these outcomes is the need for investors to have confidence that obligations on advisers and issuers will be enforced. 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 deterring and detecting money laundering and financing of terrorism, contributing to public confidence in the financial system, and maintaining and enhancing New Zealand's international reputation.¹¹
- 1.17 Procedural safeguards that protect individual rights may have a commensurate limiting effect on an enforcement body's ability to enforce its statute effectively and meet these public interest objectives. There is nothing new in the proposition that achieving wider public interest objectives may sometimes justify the relaxation or adjustment of procedural safeguards. With this in mind, we have remained cognisant of the challenges faced by regulatory agencies and their need to oversee and police their regimes effectively. However, fairness must be compromised no more than is justifiable to achieve those wider objectives.

Certainty

- 1.18 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. To do this, there must be certainty in the law, or “fair warning” about the scope of a person's potential duties and liabilities.¹² Certainty can also bring with it efficiency, lower costs and confidence for the regulated community. Uncertainty about the procedural protections that accompany pecuniary penalties can encourage further litigation as defendants seek to protect or clarify the nature of their rights under pecuniary penalty regimes.
- 1.19 Given that pecuniary penalties are a comparatively novel, hybrid sanction, we consider the need is heightened for greater consideration and specification of their procedural rules. At the same time there is an interest in leaving some discretion to enforcement bodies and the courts, and to maintaining a degree of flexibility, so that new or different classes of misconduct can be addressed. In summary, while the need for certainty is not absolute,¹³ this Report places a high value on clearly drafted pecuniary penalties and, where possible, consistency of design across different regimes.

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

11 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 > at 2.

12 A Ashworth *Principles of Criminal Law* (6th ed, Oxford University Press, Oxford, 2009) at 63. See also Bruce Dyer “Determining the Content of Procedural Fairness” (1993) 19 Mon LR 165.

13 See generally Ashworth, above n 12, at 57–68.

RECOMMENDATIONS AND GUIDELINES

- 1.20 This Report makes specific proposals about the circumstances when pecuniary penalties should be considered for inclusion in a statute, and about the procedural rules and fundamental safeguards that should accompany their imposition. Some of our proposals are in the nature of Recommendations for action by the Government or Crown agents. They include one Recommendation for the amendment of existing legislation.
- 1.21 Our other proposals are in the form of Guidelines for public officials about when and how pecuniary penalties should be used. The Guidelines set out the best practice for aspects of the design of pecuniary penalties, and describe matters that public officials should be taking into account. The Guidelines should be followed whenever a pecuniary penalty regime is to be amended or introduced. The Guidelines are set out in Appendix A.¹⁴

OUR CONCLUSIONS

- 1.22 We have concluded that while the intent behind pecuniary penalties is to encourage compliance with statutory regimes, they do so by threat of punishment. Their nature as a state-imposed punitive measure needs to be given adequate attention in their design. We consider that they play a valid role as one of a number of penalties and other orders that are available to lawmakers in New Zealand. We also anticipate that the number of pecuniary penalty provisions on the statute book will continue to grow, and that they will be used to deter and penalise a growing range of undesirable conduct.
- 1.23 For the most part, at present, their design is appropriate for their purpose. However, in light of our assessment of the nature of pecuniary penalties and the potential for them to be used with greater frequency, we consider that some aspects of their current legislative design are inappropriate.
- 1.24 More broadly, in the course of our research and analysis a number of themes have emerged. They concern the general approach that should be taken when any new or hybrid form of statutory order or penalty (including pecuniary penalties) is being considered. We highlight these themes here as “key findings” of our review. They should be given adequate attention throughout the policy design process.

Key findings

- The punitive nature of an order or penalty, and its potential impact on the range of possible defendants, must be openly assessed and given adequate emphasis when that penalty is being designed. It is this nature that should dictate what safeguards are put in place.
- At the same time, there must be scope for context-specific approaches. Occasionally the safeguards will need to be adjusted or compromised to meet competing policy objectives. However, such adjustments and compromises should be made only when justified through robust and transparent analysis.
- The label “civil” is not determinative of the safeguards or procedures that should be afforded to novel forms of orders or penalties. Providing for a new form of order or penalty to be imposed through the civil courts does not neutralise the punitive effect of the order or penalty, and so does not remove responsibility from policymakers of assessing whether greater safeguards should be applied or aspects of standard civil procedure modified.

¹⁴ They are also set out in the main body of this Report.

- The terms “regulation” and “regulatory law” are able to be too broadly defined. It follows that they should be relied upon to justify any particular design aspect of an order or penalty. It is not satisfactory to use those terms to explain why pecuniary penalties, strict liability offences or other options have been chosen for a new legislative scheme. Nearly any law can be labelled “regulatory”.
- Procedural safeguards should be designed with the spectrum of potential defendants in mind, from the most vulnerable to the powerful. Safeguards should not be omitted to the detriment of more vulnerable defendants.
- Existing pecuniary penalty regimes should not uncritically be relied upon as a template for new regimes. The design process should be comprehensive and robust for each new context in which pecuniary penalties are created.

STRUCTURE OF THIS REPORT

- 1.25 This Report is presented in four parts. Part 1 (Chapters 1 to 3) provides an overview of our approach and findings. Chapter 2 deals with the form of our proposals. In particular, it notes the need for the effective implementation of the Guidelines in our Report and explores the means by which this should be achieved. Chapter 3 describes the statutes in which pecuniary penalties are currently found and sets out the areas of inconsistency in the existing provisions.
- 1.26 Part 2 (Chapters 4 and 5) contains our account of the nature and role of pecuniary penalties. Chapter 4 argues that pecuniary penalties are grave, state-imposed punitive measures. Chapter 5 contains guidance for policymakers when deciding whether pecuniary penalties should or should not be included in a statute.
- 1.27 Part 3 (Chapters 6 to 11) is entitled “The core procedural rules”. Chapter 6 contains a discussion of the impact of the New Zealand Bill of Rights Act 1990 on the design of pecuniary penalties. The remaining chapters deal with how five key procedural safeguards should be applied to pecuniary penalties.
- 1.28 Part 4 (Chapters 12 to 20) deals with the remaining aspects of legislative design for pecuniary penalties.
- 1.29 We consider that the position reached in each chapter achieves the appropriate balance between fairness, regulatory efficiency and effectiveness, and certainty, taking into account the nature of pecuniary penalties.

Chapter 2

Guidance for future pecuniary penalty regimes

- 2.1 Our intention is that this Report will result in our proposals for best practice being employed in future pecuniary penalty regimes. To ensure this takes place, we would like to see the development and implementation of effective guidance that delivers principled and, so far as desirable, consistent pecuniary penalty provisions.
- 2.2 In our Issues Paper, we asked whether there is a need for a form of guidance for policymakers, and whether there is an argument for a legislative response, perhaps in the way of a “Pecuniary Penalties Act”. Some submitters supported standard pecuniary penalty statutory provisions¹⁵ or expressly favoured consistency across regimes.¹⁶ However, the majority did not think a general pecuniary penalty statute was required.¹⁷ Most of those submitters considered that amending legislation might be needed if specific failings were identified in specific Acts. Otherwise, the New Zealand Law Society thought the focus should be on developing general principles as a guide to future legislation. The Parliamentary Counsel Office (Commercial Team) (PCO) was very doubtful about the benefit of a set of standard provisions and/or amending existing regimes. They suggested that PCO could develop model provisions and guidelines.

THE NEED FOR EFFECTIVE GUIDANCE

- 2.3 At present 18 statutes contain pecuniary penalties. Each deals to a greater or lesser extent with matters such as:
- the rules of court and standard of proof;
 - the fact that the penalty is paid to the Crown, and is to be enforced as a civil debt;
 - factors to be taken into account by the court when setting a penalty;
 - double jeopardy;
 - the staying of pecuniary penalty proceedings;
 - limitation periods on bringing pecuniary penalty proceedings;
 - evidential issues; and
 - the relationship between compensatory, remedial, or cost recovery orders and pecuniary penalties.
- 2.4 Few statutes deal with these issues in the same way. There are differences in both substance and the approach to drafting. The Law Commission supports the general interest in achieving, where possible, consistency in legislation for a number of reasons:

¹⁵ Federated Farmers and Air New Zealand.

¹⁶ New Zealand Bankers' Association and the Institute of Directors.

¹⁷ New Zealand Law Society, Parliamentary Counsel Office (Commercial Team), Donald Mathieson QC, Ministry for Primary Industries, Financial Markets Authority and the New Zealand Bar Association.

- Consistency in the way legislation deals with similar issues can reduce the weight of litigation that may result from the court needing to interpret the meaning and import of differently designed pecuniary penalty provisions.
 - Consistency in legislation encourages the development of a consistent body of practice and case law that will make the law easier to understand and adhere to for individuals and businesses.
 - Promotion of regulatory efficiency is likely to be encouraged, as enforcement bodies will develop a better understanding of how their (sometimes numerous) pecuniary penalty statutes are to be implemented.
 - Adopting a common approach reduces the need for each agency and legislative drafters to negotiate and “reinvent the wheel” each time a new pecuniary penalty regime is considered.
 - Transparency can also be boosted. The presumption that a common approach will be adopted is likely to encourage open debate about why, in a given case, there should be a departure from that common approach.
- 2.5 We do not consider that consistency must be achieved at all costs. Nevertheless, some aspects of legislative design are a product of, and should be driven by, the distinctively punitive nature of pecuniary penalties. A common approach should be taken to those aspects.
- 2.6 Without effective guidance and direction, the existing degree of inconsistency between regimes is likely to continue. In fact, the range of variants may well expand. At present, policymakers contemplating pecuniary penalty regimes have 18 New Zealand precedents to turn to, from which they can pick and choose provisions and tailor them for their particular statute. In excess of 50 Australian statutes now contain pecuniary penalties, and in a diverse range of fields.¹⁸ Although New Zealand may not adopt pecuniary penalties in all those same fields, we anticipate that the number of pecuniary penalty provisions will grow.

OPTIONS

- 2.7 A number of options could be used to achieve endorsement and implementation of our guidance. They are:
1. A Cabinet or Cabinet Office direction that any proposal for a new pecuniary penalty regime must follow the Guidelines set out in Appendix A of this Report; that departures from the Guidelines need to be justified; and that the Ministry of Justice should be consulted at the policy development stage on all proposals for pecuniary penalties.
 2. The addition of a subsidiary question under Question 3.4 of Cabinet’s disclosure requirements for government legislation.¹⁹ A new Question 3.4.2 could ask whether the Guidelines set out in Appendix A of this Report were complied with and, if not, why any departures from the Guidelines are necessary.
 3. Inclusion of guidance on the circumstances when pecuniary penalties should be considered for inclusion in legislation and on features of their design in the Legislation Advisory Committee’s (LAC) *Guidelines on Process and Content of Legislation*.

¹⁸ Australian examples, which may indicate areas for pecuniary penalty growth in New Zealand, include the Broadcasting Services Act 1992 (Cth); Clean Energy Act 2011 (Cth); Do Not Call Register Act 2006 (Cth); Energy Efficiency Opportunities Act 2006 (Cth); Future Fund Act 2006 (Cth); Health Insurance Act 1973 (Cth); Migration Act 1958 (Cth); Shipping Registration Act 1981 (Cth); Road Safety Remuneration Act 2012 (Cth); Water Act 2007 (Cth); and Work Health and Safety Act 2011 (Cth).

¹⁹ In accordance with Cabinet Office Circular “Disclosure Requirements for Government Legislation” (4 July 2013) CO 13/3. See also The Treasury *Disclosure Statements for Government Legislation: Technical Guide for Departments* (June 2013).

4. Model provisions drafted by the PCO for frequently used pecuniary penalty provisions.
 5. Review of existing pecuniary statutes in light of our Guidelines.
 6. A pecuniary penalty statute that provides for common features of their design.
- 2.8 At this point in time, we recommend that options three, four and five should be implemented. We also recommend that the Ministry of Justice should be consulted on proposals for new or revised pecuniary penalty statutes. On balance we are not persuaded that arguments for a stand-alone statute are strong enough to justify new legislation now. However, we suggest that the remaining option be revisited in three to five years' time. To assist, below we set out the arguments for and against a statute.

CABINET ENDORSEMENT

- 2.9 Adherence to the Guidelines in Appendix A is likely to be assisted by some form of additional authoritative endorsement. One option could be for Cabinet to endorse those Guidelines. This could be achieved by Cabinet or the Cabinet Office issuing a direction that requires that:
- (a) submissions to Cabinet with proposals to establish or amend pecuniary penalty regimes note their compliance with the Guidelines; and
 - (b) submissions justify any departure from the Guidelines.
- 2.10 This direction could be by way of Cabinet Office Circular. The Cabinet Office issues circulars on matters of general interest to ministers and departments. Cabinet Office circulars complement the Cabinet Manual and CabGuide, providing detailed guidance on central government processes. Circulars are incorporated into the Cabinet Manual or the CabGuide when the publications are updated.
- 2.11 An example is the Cabinet Office circular on Disclosure Requirements for Government Legislation.²⁰ It is directed at all ministers, chief executives, the Chief Parliamentary Counsel, Clerk of the House of Representatives, all senior private secretaries, all private secretaries and all officials involved in the preparation of legislation. The circular explains and brings squarely to the attention of all recipients Cabinet's expectations about disclosures about proposed legislation.
- 2.12 Such an endorsement would help to ensure our Guidelines are given due weight.
- 2.13 The Cabinet Manual already requires that the Ministry of Justice should be consulted on any proposal for pecuniary penalties. Paragraph [7.31] of the Manual states:²¹
- The Ministry of Justice must also be consulted on all proposals to create new criminal offences or penalties or alter existing ones, to ensure that such provisions are consistent and appropriate.
- 2.14 The Ministry of Justice vets new criminal offences with the aim of increasing consistency across the statute book, and to ensure important matters (such as requirements as to intention) are given careful consideration. Our understanding is that it is not standard practice for the Ministry of Justice to be consulted on pecuniary penalties, even though they raise many of the same issues. We recommend that there should be a clear expectation that policy proposals for new pecuniary penalties, or to amend existing ones, should be consulted upon with the Ministry of Justice. In recommending this, we are conscious of the need to avoid the risk of duplicating work or adding unnecessarily to the Ministry's workload. However, as the lead justice sector

²⁰ Above n 19.

²¹ Cabinet Office *Cabinet Manual* 2008 at [7.31].

agency the Ministry plays a key role in having oversight of the way penalties are imposed in our justice system. A requirement for it to be consulted should reduce the risk of an ad hoc approach and help ensure that an appropriate balance between fairness and regulatory effectiveness is maintained. This is not, however, an invitation for other agencies to ask the Ministry of Justice to do their work for them. Responsibility for the policy development must of course remain with the originating agency.

- 2.15 Proper adherence to this requirement would, we suggest, reduce the need for a Cabinet Office circular, so we make no recommendation on that point.

DISCLOSURE REQUIREMENTS

- 2.16 Disclosure statements are departmental documents that provide information about the development and content of legislation proposed by the Government. They are intended to assist the parliamentary and public scrutiny of a Bill. Departments are required to answer a range of questions about the policy behind and legislative content of a Bill. Reading the disclosure statement is intended to alert members of Parliament and others to significant or unusual features of legislation that are expected to be used with care. Disclosure is intended to reinforce these expectations and facilitate better scrutiny of legislation, in order to support the production of legislation that is robust and consistent with good legislative practice.
- 2.17 Question 3.4 of a disclosure statement asks:
- Does this Bill create, amend, or remove:
- (a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?
- 2.18 In the event that the answer to Question 3.4 is yes, subsidiary Question 3.4.1 asks “Was the Ministry of Justice consulted about these provisions?” In addition, Question 4.4 asks:
- Does this Bill:
- (a) create or amend a strict or absolute liability offence?
 - (b) reverse or modify the usual burden of proof for offences, *including for civil liability under a civil pecuniary penalty regime*?
- 2.19 We have considered whether an additional question could be added that asks:
- Were the Guidelines in Appendix A of the Law Commission’s Pecuniary Penalties Report complied with?
- If not, describe the departures from the Guidelines and explain why they are necessary.
- 2.20 On balance, we are persuaded that the existing questions referring to pecuniary penalties provide adequate scope for disclosure to be made about their use in a statute. This Report and our Guidelines set out the appropriate design for pecuniary penalty provisions. We describe, for example, what the “usual burden of proof” for pecuniary penalties should be. We expect our Report and Guidelines to form the basis for alerting policymakers to aspects of their draft legislative proposals that should be disclosed. For that reason, we make no recommendation on this point.

LEGISLATION ADVISORY COMMITTEE GUIDELINES

- 2.21 We suggest that a section dedicated to pecuniary penalties should be added to the *LAC Guidelines on Process and Content of Legislation* (LAC Guidelines).²² The LAC provides advice on the development of legislation. Its overarching purpose is to help improve the quality of law making. The LAC Guidelines set out central aspects of the process and elements of the content of legislation that should always be addressed when creating legislation. 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 LAC Guidelines.²³
- 2.22 The section on pecuniary penalties should do two things. First, it should advise when pecuniary penalties should and should not be introduced into a statutory scheme. This advice should be based on the recommendations in this Report and the discussion in Chapters 4 and 5. Second, it should set out best practice for their design. This could be achieved by the adoption of the Guidelines in Appendix A of this Report.
- 2.23 We suggest that consideration could be given to the pecuniary penalties section forming part of the LAC Guidelines that deals with other forms of statutory penalty (notably criminal offences and infringement offences), so that they provide comprehensive advice as to when one or another form of penalty might be appropriate.

MODEL PROVISIONS DRAFTED BY THE PARLIAMENTARY COUNSEL OFFICE

- 2.24 We also suggest that the PCO should draft model provisions for pecuniary penalties.²⁴ The LAC could consider whether it would be useful to include those model provisions in its LAC Guidelines. It would be preferable if such model provisions became the default drafting style, rather than agencies picking and choosing from the existing range of approaches.

REVIEW OF EXISTING PECUNIARY PENALTY STATUTES

- 2.25 In this Report, we make one specific recommendation for statutory amendment, relating to the “penalty privilege” discussed in Chapter 10. It is in this area that existing statutes commonly depart from our proposals, and those departures could have an immediate and material impact on individual rights and interests.
- 2.26 However, in a number of other areas existing statutes are silent on or depart, to a greater or lesser degree, from the best practice set out in our Guidelines. As we noted in our Issues Paper, this was inevitable because of the inconsistent approaches taken in existing legislation. It is undesirable because existing statutes tend to become de facto precedents for new regimes, enabling agencies to pick and choose their favoured approach and tailor it to their needs. While some tailoring might be desirable, the current situation encourages the number of variants to multiply.
- 2.27 We recommend, then, as statutes that already contain pecuniary penalties come up for review, their existing provisions should be reassessed in light of the Guidelines in this Report. Where inconsistencies cannot be justified, we recommend that those inconsistencies be removed when the statutes are amended.

²² *Legislation Advisory Committee Guidelines on Process and Content of Legislation* (Wellington, 2001).

²³ Cabinet Office, above n 21, at [7.60(e)] and [7.61].

²⁴ As suggested in the submission of the Parliamentary Counsel Office (Commercial Team) at 13.

- 2.28 In time, the unjustifiable variation that is currently a feature of pecuniary penalty regimes will be removed from the statute book.

A PECUNIARY PENALTY STATUTE

- 2.29 As indicated above, we are not convinced a case exists for a stand-alone statute at this time. The combination of options three, four and five should provide sufficient direction for the approach to take in the future. However, we think the question is finely balanced. Indeed, there may be a risk in delaying, as a more complex alignment exercise may be needed in the future when the number of statutes has grown. If existing inconsistencies are not remedied, and if the range of variants continues to grow, we suggest that the question should be reconsidered in the future. If it is, to assist, we set out the arguments for and against a statute.
- 2.30 A statute containing standard provisions could take one of two forms. It could be a default regime, so that:
- whenever a new statute provided for a pecuniary penalty, the provisions of the pecuniary penalty statute would apply; but
 - the new statute could, by express provision, depart from some or all of the pecuniary penalty statute provisions.
- 2.31 In this way it would operate similarly to section 21 of the Summary Proceedings Act 1957. Section 21, in 25 subsections, sets out the procedure for imposing infringement offences. It applies to all offences that are expressed in any statute to be “infringement offences”. However, some Acts expressly depart from the requirements of section 21.²⁵
- 2.32 Alternatively, it could operate as a “plug in” statute, whose provisions would only apply when another statute expressly adopted them.²⁶

Arguments for a statute

- 2.33 A statute would be the most direct form of guidance, so may be the most likely to ensure a principled and consistent approach. As noted above, policymakers currently have a number of precedents to choose from when designing new regimes. A statute would provide a single, authoritative precedent that would be the first port of call.
- 2.34 It would also boost transparency. The public nature of an Act should encourage more open debate about any departures from it. Such a debate would be more likely to take place early in the policy process, so is more likely to be appropriately robust, informed and effective. Although debate may still take place with LAC Guidelines in place, it may not occur until after a Bill has been introduced to Parliament, by which time policy positions have often become entrenched.
- 2.35 A statute could also provide the vehicle for amendments to the existing statutes. The alternative will be for our proposed amendments to be made by omnibus bill, or to wait until each individual Act is being amended.
- 2.36 A pecuniary penalty statute would probably be the most effective means of achieving the desired aims of having quality, principled legislation, reducing the risk of litigation, promoting regulatory efficiency, and simplifying and reducing the length of the statute book.

25 For example, the Land Transport Act 1998 provides for a process for “short form” infringement notices (ss 139–140) and the Biosecurity Act 1993 provides for accelerated payment timeframes (s 159A).

26 This is the Australian model, described below.

Arguments against a statute

- 2.37 On balance, the following arguments have persuaded us not to recommend a statute at this time. First, as indicated above, we hope that options three, four and five above are sufficient to ensure that our Guidelines are followed. If so, it is difficult to justify expending more significant resources to enact special legislation.
- 2.38 Secondly, such a statute could make the statute book less accessible, since in some cases it will be necessary to consult both the pecuniary penalty statute and the substantive statute.
- 2.39 Thirdly, there may be a risk of “regulatory creep”, whereby the provisions under the pecuniary penalty statute will be tacked on to new or amended statutes as a matter of course, with inadequate consideration of whether they should actually apply.
- 2.40 Fourthly, it may be difficult to obtain agreement on the design of the provisions in a statutory form.

Australian developments

- 2.41 We note that the Regulatory Powers (Standard Provisions) Bill 2014 (Cth) is before the Australian House of Representatives. In May 2014, the Senate’s Legal and Constitutional Affairs Legislation Committee reported back on the Bill and recommended its passage.
- 2.42 The purpose of the Bill is to prescribe a framework for use in all Commonwealth regulatory schemes that include:²⁷
- monitoring and investigation powers;
 - civil penalty provisions;
 - infringement notices;
 - enforceable undertakings; and
 - injunctions.
- 2.43 The Bill will only apply to regulatory schemes that trigger its provisions through primary legislation. It is intended that the Bill will reduce the time it might otherwise take the Office of Parliamentary Counsel to negotiate drafting issues with relevant agencies.
- 2.44 We have considered whether the steps taken towards an Australian statute may strengthen the argument for a New Zealand pecuniary penalty statute.²⁸ We reiterate the fact that Australia now has in excess of 50 federal pecuniary penalty statutes. We consider this to be a persuasive factor that may indicate a case exists for a statute. As noted above, we suggest that the need for a statute should be kept under review if and when the number of pecuniary penalty statutes increases in New Zealand.

²⁷ Regulatory Powers (Standard Provisions) Bill 2014 (Cth) (explanatory memorandum) at 2.

²⁸ The provisions of the Bill relating to investigatory powers are similar to New Zealand’s Search and Surveillance Act 2012. Section 21 of New Zealand’s Summary Proceedings Act 1957, supplemented by ss 78B–78C, already provides for a standard infringement notice procedure.

RECOMMENDATIONS

- R1 The Ministry of Justice should be consulted on all proposals for pecuniary penalties at the policy development stage, in the same manner as for criminal offences, as directed by Cabinet and paragraph [7.31] of the Cabinet Manual.
- R2 The Legislation Advisory Committee should draft a section of its *Guidelines on Process and Content of Legislation* on best legislative practice for pecuniary penalty regimes. The section should refer to and build on the Guidelines in Appendix A of this Report.
- R3 The Parliamentary Counsel Office should draft model provisions for common pecuniary penalty provisions.
- R4 When existing pecuniary penalty statutes come up for review their pecuniary penalty provisions should be re-evaluated in light of the Guidelines in Appendix A of this report.

Chapter 3

The current landscape

WHAT ARE PECUNIARY PENALTIES?

3.1 Pecuniary penalties are a comparatively new development. Primarily, they are used to punish and deter commercial wrongdoing. They were first introduced in New Zealand in the Commerce Act 1986 to deal with anti-competitive practices. The number of pecuniary penalty provisions has grown considerably in the last decade. They currently feature in 18 enacted pieces of legislation, which are set out in Appendix B of this Report.²⁹ At the time of writing, one Bill before Parliament contains pecuniary penalties.³⁰

3.2 An example of a pecuniary penalty is in the Hazardous Substances and New Organisms Act 1996. Sections 124B and 124C provide:

124B Pecuniary penalty order

- (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.

124C Amount of pecuniary penalty

- (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).

²⁹ There will be 16 Acts once the penalties in the Financial Markets Conduct Act 2013 come into effect, and the Securities Act 1978 and the Securities Markets Act 1988 are repealed.

³⁰ Therapeutic Products and Medicines Bill 2006 (103-1).

3.3 Pecuniary penalties feature in:

- certain statutes that regulate commercial and corporate practices and transactions;³¹
- statutes that regulate securities and financial markets, and the conduct of some financial market participants;³²
- statutes that regulate some major industries;³³
- environmental protection and biosecurity statutes;³⁴
- anti-money laundering and countering the financing of terrorism legislation;³⁵ and
- legislation targeting unsolicited commercial electronic spam.³⁶

3.4 In some fields, pecuniary penalties provide a comprehensive response to a wide range of behaviour, but in others their adoption has been less broad. For example, they now feature heavily in the regulation of securities and securities markets.³⁷ In contrast, while the participants in some major industries are regulated by way of pecuniary penalties, others are subject only to criminal offences.³⁸ And, while they feature to an extent in environmental legislation, they are absent from a great deal of it too. For example, the Hazardous Substances and New Organisms Act 1996 was amended in 2003 in response to concern about genetically modified and other new organisms. Pecuniary penalties were introduced to the Act for certain breaches relating to these “new organisms”.³⁹ However, the older part of the Act, which regulates the assessment, importation, storage and use of other “hazardous substances”,⁴⁰ is enforced by way of criminal and infringement offences.

31 Commerce Act 1986; Overseas Investment Act 2005 and Overseas Investment Regulations 2005; and Takeovers Act 1993.

32 Financial Markets Conduct Act 2013 (pecuniary penalty provisions yet to come into force); Securities Act 1978; Securities Markets Act 1988; Securities Trustees and Statutory Supervisors Act 2011; Financial Advisers Act 2008; and Financial Service Providers (Registration and Dispute Resolution) Act 2008.

33 Dairy Industry Restructuring Act 2001 and Dairy Industry Restructuring (Raw Milk) Regulations 2001; Telecommunications Act 2001 and Telecommunications (Civil Infringement Notice) Regulations 2007; Telecommunications (Interception Capability and Security) Act 2013; and Electricity Industry Act 2010.

34 Biosecurity Act 1993; and Hazardous Substances and New Organisms Act 1996.

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

36 Unsolicited Electronic Messages Act 2007.

37 Under the Financial Markets Conduct Act 2013 which, once the relevant provisions are in force, will replace the relevant regulatory provisions in the Securities Act 1978 and Securities Markets Act 1988.

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

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

40 “Hazardous substances” are defined in s 2(1) as:
any substance—

(a) with 1 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 1 or more of the properties specified in paragraph (a) ...

- 3.5 Both individuals and corporate bodies may incur pecuniary penalties. The maximum penalty for the latter is generally substantially higher than for the former (for example, \$100,000 for an individual under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 and \$2 million for a body corporate).⁴¹
- 3.6 In pecuniary penalty proceedings, the enforcement agency must prove that, on the balance of probabilities, the defendant carried out the contravention. Most regimes have no express requirement for the defendant to have had any degree of knowledge or intent. As such, most pecuniary penalty provisions appear to carry strict liability, and the enforcement agency does not have to prove anything regarding the defendant's state of mind. However, the courts are often directed to take into account the defendant's degree of intent, awareness or other subjective factors in determining penalty quantum.
- 3.7 Enforcement bodies that can seek pecuniary penalties generally have information-gathering, and search and seizure powers that match the powers they have for investigating criminal offences. The enforcement agency often has access to pecuniary penalties as one of a range of enforcement measures, which is designed to give an enforcement body a range of responses to non-compliance.
- 3.8 While some pecuniary penalties are directed at minor technical breaches of a regime, many are directed at the core behaviour that the legislation seeks to regulate. Pecuniary penalties may be the most serious enforcement mechanism within an Act (such as in the Unsolicited Electronic Messages Act 2007)⁴² or the Act may also contain criminal offences (such as in the Securities Act 1978).⁴³ Also, pecuniary penalties sometimes form a parallel sanction to a criminal offence. In those cases, pecuniary penalties and criminal offences tend to be differentiated on the basis of the degree of knowledge or intent the defendant must be shown to have. So, for example, a contravention may be enforced by way of a criminal offence under the Hazardous Substances and New Organisms Act where it is performed with intent or recklessness, but by way of a pecuniary penalty where there is no proof of intent or recklessness.⁴⁴

USE OF PECUNIARY PENALTIES

- 3.9 The vast majority of 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 that 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 1990.⁴⁵ 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 \$12 million.⁴⁶ The vast majority of 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 2006:⁴⁷

⁴¹ Section 90(3).

⁴² Part 3 of the Act contains the enforcement provisions and s 19 sets out the range of possible responses to a "civil liability event". The Act creates no criminal offences.

⁴³ Sections 55A to 57A deal with civil liability, while ss 58 to 60 provide for criminal liability.

⁴⁴ Hazardous Substances and New Organisms Act 1996, ss 109 and 124B.

⁴⁵ *Commerce Commission v Otago and Southland Vegetable and Produce Growers' Association (Inc)* (1990) 4 TCLR 14 (HC).

⁴⁶ *Commerce Commission v Telecom Corporation of New Zealand Ltd* (2011) 13 TCLR 270 (HC). Upheld by the Court of Appeal in *Telecom Corporation of New Zealand Ltd v Commerce Commission* [2012] NZCA 344.

⁴⁷ Email from Rebecca McAtamney (Chief Adviser, Competition, Commerce Commission) to Susan Hall (Law Commission) (25 November 2011); email from Daire Queenan (Adviser, Competition, Commerce Commission) to Mihiata Pirini (Law Commission) (9 May 2014).

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
11/12	2	\$5.275m
12/13	7	\$26.2m

- 3.10 By comparison, pecuniary penalties have so far formed a minor 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 pecuniary penalty proceedings for insider trading under the Securities Markets Act were instituted by the issuer of the security, not the Securities Commission.⁴⁸
- 3.11 New Zealand's securities law will be overhauled once the Financial Markets Conduct Act 2013 comes into force. Several parts of that Act have already come into effect, and the penalty provisions will come into force on 1 April 2017 or earlier as provided by Order in Council. The enforcement regime is more prescriptive and contains more statutory rules that are enforced by way of pecuniary penalties, so a wider range of conduct may result in pecuniary penalties under the new regime than under the Securities Act and Securities Markets Act.⁴⁹
- 3.12 Pecuniary penalties in the Overseas Investment Act 2005 have been sought very rarely.⁵⁰
- 3.13 A number of proceedings have been brought under the Unsolicited Electronic Messages Act since it came into force and a number of penalties have been imposed. Penalties totalling \$250,000 were imposed on three individuals in 2008,⁵¹ one penalty of \$95,000 was imposed on an individual in 2013,⁵² and the largest single penalty under that Act of \$120,000 was imposed (by agreement between the defendant and the Department of Internal Affairs) on a corporate entity in 2014.⁵³
- 3.14 Although the penalties in the Hazardous Substances and New Organisms Act, the Dairy Industry Restructuring Act 2001, the Takeovers Act 1993 and the Telecommunications Act 2001 have been in place for some time, none have been sought under those Acts.⁵⁴
- 3.15 The relevant provisions of the Anti-Money Laundering and Countering Financing of Terrorism Act came fully into force on 30 June 2013 and thus far no penalties have been sought under that Act.⁵⁵

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

49 Financial Markets Authority *A Guide to the Financial Markets Conduct Act 2013 Reforms* (November 2013).

50 The Overseas Investment Office reports that they have been sought "perhaps 4 times". Email from Annelies McClure (Manager, Overseas Investment Office) to Susan Hall (Law Commission) (18 November 2011).

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

52 *Department of Internal Affairs v Mansfield* [2013] NZHC 2064.

53 *Department of Internal Affairs v Image Marketing Group Ltd* [2014] NZHC 139.

54 For instance, we were told during consultation that the penalties in the Hazardous Substances and New Organisms Act 1996 would most likely be used only once a research facility had released new organisms, but at the time of the release of the Issues Paper (several years after the introduction of the penalties themselves), there had been no full approvals for release of new organisms in any case (Law Commission *Civil Pecuniary Penalties* (NZLC IP33, 2012) [Issues Paper]).

55 Email from Kate Reid (Department of Internal Affairs) to Mihiata Pirini (Law Commission) (6 March 2014); email from Rob Edwards (Reserve Bank of New Zealand) to Mihiata Pirini (Law Commission) (6 March 2014); email from Kirsty Campbell (Financial Markets Authority) to Mihiata Pirini (Law Commission) (6 March 2014).

Part 2

THE NATURE AND ROLE OF PECUNIARY PENALTIES



LAW • COMMISSION
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Chapter 4

Nature of pecuniary penalties

INTRODUCTION

- 4.1 The design of pecuniary penalties must be driven by an accurate statement of their nature and role. Importantly, that statement needs to be independent of the existing regimes where they are found. It is the nature and role of pecuniary penalties as a *form of penalty and tool of enforcement* that is important, rather than as a tool of enforcement of securities or environmental law, for example. In this review we have strived to conceive of pecuniary penalties outside the confines of the existing regimes. This approach has been important because, until now, the design of pecuniary penalties has, to a substantial extent, been driven by the perceived challenges of the particular regimes where they have been adopted. Also, because new regimes have relied on the design of pre-existing statutes, some aspects of current practice have become somewhat entrenched.
- 4.2 The Law Commission is persuaded that the design of pecuniary penalties should be influenced primarily by principle, rather than those precedents. This is not to say that all existing pecuniary penalty provisions should be discarded. However, whether particular provisions are appropriate or not should depend fundamentally on an accurate and principled conceptualisation of pecuniary penalties, rather than on past practice. In this part of this Report, we set out our view of what is an accurate, principled conceptualisation of pecuniary penalties. Parts 3 and 4, which describe our conclusions on the optimal design of pecuniary penalty provisions, are fundamentally reliant on this view of pecuniary penalties.
- 4.3 This approach accords with, and is reinforced by, the way fundamental procedural protections have been developed and applied in the criminal law. The context in which criminal offences are used is not determinative of the principled starting point. The same should be the case for pecuniary penalties. It is important to stress that this does not mean that the particular challenges faced in certain regimes, or with certain types of conduct, might not justify the modification of that principled starting point. In the criminal law, the concept of the strict liability offence provides the best example of where it has become accepted that certain fundamental rights can justifiably be removed where the particular context or the form of offending demands it. The same may be said of certain contexts in which pecuniary penalties are used. However, those exceptional cases should not dictate the principled starting point.
- 4.4 In taking this approach, the Commission has been influenced by the growing number of pecuniary penalties in legislation. Regulatory policymakers appear to have an enthusiasm for them. New Zealand's adoption of pecuniary penalties has also been strongly influenced by practice in Australia, where their use is expanding.
- 4.5 Here, they have been a core aspect of two very recent law reform enterprises (the Financial Markets Conduct Act 2013 and the Biosecurity Law Reform Act 2012). They feature in the new Telecommunications (Interception Capability and Security) Act 2013. The Reserve Bank is consulting on their inclusion in legislative proposals for the prudential supervision of non-

bank deposit takers,⁵⁶ and the Commerce Commission would like consideration to be given to whether they should be included in the Fair Trading Act 1986.⁵⁷

- 4.6 We anticipate that they will continue to be introduced into New Zealand legislation as older Acts are reviewed, or as new areas of conduct come to be regulated. Pecuniary penalties, then, will feature increasingly heavily on our statute book, and will increasingly be the way that some breaches of the law will be punished. In assessing which safeguards should apply, it is important that their likely growth is acknowledged. In the Commission's view, this makes it even more important to get the right level of protection.

FUNDAMENTAL FEATURES OF THE NATURE OF PECUNIARY PENALTIES

- 4.7 In the Issues Paper, we described pecuniary penalties as a grave form of State punishment that can have serious financial and reputational implications for a defendant. We noted, however, that pecuniary penalties are not as severe as criminal offences because they do not carry the stigma of criminal conviction. Clearly the penalty is less severe than one of imprisonment.
- 4.8 No one has disagreed with this view. Submitters considered pecuniary penalties to be a “middleground” or “quasi-criminal” sanction, whose severity should be acknowledged.
- 4.9 The Commission identifies, then, the following features as being fundamental to the nature of pecuniary penalties:
- Pecuniary penalties are investigated, sought and imposed by the State for breaches of statutory prohibitions.
 - They aim to deter such breaches by the threat of punishment.
 - They can result in the imposition of a severe penalty.
- 4.10 We expand on these features below. It is notable that they are shared to some extent with both criminal offences and infringement offences.

Pecuniary penalties are investigated, sought and imposed by the State for breaches of statutory prohibitions

- 4.11 Pecuniary penalties are sought by the State against its citizens, acting in and on behalf of the public interest (rather than as a litigant in its own interests). In investigating conduct that can result in a pecuniary penalty, State enforcement bodies are armed with intrusive investigative powers to identify and establish breach. For the enforcement bodies in question, those powers are the same as, or may in some ways be more profound than, the powers they use in criminal investigations.⁵⁸
- 4.12 This has a number of implications for how pecuniary penalties ought to be imposed. In particular, their design needs to give appropriate recognition to the potential imbalance between the parties concerned. In some circumstances, that imbalance will be less acute than others – for example because of the resources that well-funded defendants may have at their disposal. However, while many pecuniary penalty provisions have been designed with large corporate offenders in mind, they can also be imposed on individuals, sole traders, and small- and medium-sized enterprises.

⁵⁶ Reserve Bank of New Zealand *Report for the Minister of Finance on the operation of the prudential regime for non-bank deposit takers* (September 2013) at 62–68.

⁵⁷ See Commerce Commission “Commerce Commission Submission on the Consumer Law Reform Bill (Bill no. 287-1)” at [48].

⁵⁸ They are more profound in those regimes where the person being investigated can rely on the privilege against self-incrimination where the ultimate penalty may be a criminal one, but where there is no recognition of a privilege against self-exposure to a pecuniary penalty.

- 4.13 It is the Commission's view that procedural protections should not be designed with the best-armed and most capable defendant in mind. Rather, they should protect the potentially vulnerable. As we emphasise repeatedly in this Report, however, this does not mean that the relaxation of procedural protections would never be warranted depending on the particular needs of some regimes.
- 4.14 For immediate purposes, this feature of pecuniary penalties means that describing them as "civil" is inapt. Adoption of that term has been driven by the fact that the New Zealand court system exhibits a fundamental dichotomy between civil and criminal proceedings. Any matter that is not pursued in criminal proceedings is liable to be branded, by process of elimination, as "civil" within that dichotomy.⁵⁹ In reality, the term "civil" relates to matters concerning citizens, and "civil law" is the branch of law that deals with the resolution of legal issues between private parties.⁶⁰ Pecuniary penalties do not arise in this context: like criminal offences, they arise within the field of public law, which concerns the relationship between the State and its citizens. Therefore, application of the term "civil" is liable to mislead. In its submission, Bell Gully expressed concern that the use of that label risks encouraging the unthinking application of civil rules, and a perception that pecuniary penalties are an easy way to punish and deter, while neatly sidestepping the rules and protections of the criminal law. We agree that is a risk.
- 4.15 Throughout this Report, we have adopted, instead, the term "pecuniary penalty". We acknowledge that the term "pecuniary" may strike some as obscure. However, it is important that statutes adopt a consistent term that differentiates these penalties from others on the statute book. The term "pecuniary penalty" is already used in a number of the existing statutes. It should be used uniformly in the future. The goals of consistency between statutes and accessibility of the law favour the amendment of existing pecuniary penalty statutes where they employ a different term.

GUIDELINE

G1 The term "pecuniary penalty" should be used consistently to describe non-criminal monetary penalties that are imposed by a court in civil proceedings

Consistent terminology should be used in statutes for novel forms of penalty or order. Use of consistent terminology makes the statute book clearer and more accessible. It helps the public understand the nature of their liabilities and removes the need for enforcement bodies and the court to assess how to employ novel tools and impose them fairly.

Pecuniary penalties aim to deter breach of the law by the threat of punishment

- 4.16 Pecuniary penalties are one of a number of orders on the statute book designed to tackle illegal conduct. Others include: criminal penalties; infringement offences; administrative penalties;⁶¹ compensation orders; management bans; injunctions or cease and desist orders; orders for the disposal of property;⁶² the seizure of forfeited goods;⁶³ and other orders that can follow criminal charges, such as diversion, reparation, and orders that seek to remove the proceeds

59 See for example *Pallin v Department of Social Welfare* [1983] NZLR 266 (CA), where the Court found that for the purposes of ss 32 and 33 of what was then the Evidence Amendment Act (No 2) 1980, which related to medical privilege, there was no class of litigation that was not either civil or criminal.

60 Including, sometimes, the state acting as a private party.

61 Fixed monetary penalties imposed by an enforcement body officer, such as those under tax legislation.

62 For example, under s 47 of the Overseas Investment Act 2005.

63 For example, under s 226 of the Customs and Excise Act 1996.

of criminal offending or strip any financial gain.⁶⁴ Those orders serve different purposes and place varying emphasis on the interests of denunciation, deterrence, protection of the public, rehabilitation, reparation of harm, stripping of profit and encouragement of compliance with the law. They have a varying impact on a person's freedom, solvency, business and property interests, reputation, and employment opportunities. Any policy decision to introduce one or more of these orders into legislation must be taken in light of the purpose they serve, and their design must take account of their varying impacts.

- 4.17 Pecuniary penalties are primarily concerned with deterring illegal conduct. In general, it can be said that they differ from many criminal offences in this respect because, while the criminal law aims to deter, its greatest emphasis is generally on denunciation. However, this does not mean that pecuniary penalties have no denunciatory impact or purpose. Pecuniary penalties deter by the threat of punishment. They single out a person or entity as having breached the law and inflict a negative consequence. Their purpose is also therefore both deterrent and denunciatory.
- 4.18 Although they may be used in concert with other measures – for example, compensation orders and management bans – their impact is punitive. The vast majority of penalties play no role in providing compensation for victims or repairing harm.⁶⁵ While many have the impact of stripping financial gain, that is not the measure of the penalty. It is clear from policy documentation, legislation and case law that the actual penalty imposed should exceed mere profit-stripping. Pecuniary penalties must also be distinguished from compensatory and profit-stripping measures because they can be imposed whether or not harm has been caused, and whether or not profit has been made as a result of the law-breaking activity. Mere breach is enough.
- 4.19 Pecuniary penalties are sometimes described as having the predominant aim of promoting compliance with the law. Certainly, they are often used within regimes where a regulator's prime task is to promote compliance, and where it has an escalating hierarchy (or pyramid) of tools at its disposal to fulfil this task.⁶⁶ The range of tools usually includes more benign interventions such as education and warning notices. However, the fact that pecuniary penalties are included in regimes with this overall aim does not diminish their position near the apex of the hierarchy, as the “stick” that is used to punish non-compliance. It is possible that the aim of promoting compliance influences some aspects of the design of pecuniary penalties (such as the maximum penalty quantum that is set by the statute). However, we do not consider it should be determinative of which core procedural protections should apply.

Pecuniary penalties can result in the imposition of a severe penalty

- 4.20 Pecuniary penalties carry potentially very significant maximum penalties. Those penalties must be viewed in the light of the actors they target and the sums actually imposed. To date, pecuniary penalties are most frequently found in statutes relating to corporate contraventions undertaken for financial gain: the maximum penalties are set with this context in mind, at a level that aims to effectively deter the most deep-pocketed corporate actors. From one point

64 Examples of “financial gain” penalties can be found in the Civil Aviation Act 1990, s 47; Electricity Act 1992, s 62E (repealed); Exclusive Economic Zone and Continental Shelf (Environmental Effects) Amendment Act 2013, cl 39 (new s 134L); Fair Trading Act 1986, s 40A; Health Act 1956, 68ZZW; Immigration Advisers Licensing Act 2007, s 72; Maritime Transport Act 1994, s 409; Resource Management Act 1991, s 339B; Waste Minimisation Act 2008, s 67; and Electricity Industry Reform Act 1998, s 55.

65 Two pecuniary penalty statutes do provide for this to some extent. Under s 160(9) of the Biosecurity Act 1993, 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. Under s 124D of the Hazardous Substances and New Organisms Act 1996, 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. Some other pecuniary penalty statutes make separate provision for compensation orders.

66 The idea of a pyramid of tools or interventions that escalate in seriousness is a feature of Ayres' and Braithwaite's theory of “responsive regulation”. We return to this concept at [5.25]–[5.28], below.

of view, it follows that they are not excessively severe, since the penalty imposed may not be that substantial in terms of the actual impact on the defendant.⁶⁷ However, as noted above, most pecuniary penalties can be imposed on a range of potential defendants of varying size and financial capacity.

- 4.21 We have considered how pecuniary penalties compare to other punitive measures. The two most analogous are criminal penalties and infringement offences. When Parliament is considering how to deter conduct by way of the threat of a penalty, these three options are open. At the extremes, criminal penalties are clearly more punitive, and infringement penalties considerably less punitive, than pecuniary penalties.⁶⁸ A finding of criminal guilt results in a conviction and sometimes the deprivation of liberty. However, at the margins there may be overlap in the severity of criminal and pecuniary penalties. First, some maximum pecuniary penalties are higher than the monetary criminal penalties that target similar behaviour. For example, the Securities Act 1978 has both pecuniary penalties and criminal offences for misstatement in an advertisement or registered prospectus. The maximum pecuniary penalties are \$500,000 (individual) or \$5 million (body corporate). The maximum criminal penalties are five years' imprisonment or \$300,000. There may be some valid reasons for why criminal offences tend usually to carry lower maximum financial penalties. We discuss these in Chapter 14. However, for our purposes here, the point is that pecuniary penalties pose the risk of a very high monetary penalty.
- 4.22 Secondly, where only corporate offenders are concerned, it is arguable that criminal and pecuniary penalties are indistinguishable in their impact on an offender as corporate bodies cannot be incarcerated. Differences might arise because of any additional stigma that attaches because of the label of criminality. However, views differ on the extent to which such stigma attaches to corporate bodies.⁶⁹ The question of stigma is complex and we discuss it further at [4.24] below.
- 4.23 For an individual, a criminal offence is likely to be considered substantially graver, because pecuniary penalties do not involve imprisonment, nor do they have the “arguably unique sanctioning characteristic of criminal liability”, namely, the stigma of criminal conviction.⁷⁰ As we stated in the Issues Paper, the significance of these two distinctions should not be understated. Pecuniary penalty proceedings involve no chance of arrest, remand in custody or on bail, or imprisonment. At least for the individual, one would expect that the stigma of criminality is worse than the reputational impact that may be caused by a pecuniary penalty. The business community's current resistance to the prospect of the criminalisation of cartel conduct indicates that the threat of a criminal conviction is considered to be far more serious than pecuniary penalties in that area.⁷¹

67 As previously noted, the highest imposed penalty is \$12 million against Telecom (found to have taken advantage of its market power, in wholesale and retail markets for data transmission, in order to deter potential or existing competitors, in breach of s 36 of the Commerce Act 1986). The maximum penalty available in that case was \$279.2 million, assessed as 10 per cent of Telecom's turnover in 2011. By contrast, \$12 million amounted to 0.43 per cent of its turnover. In a case under the Unsolicited Electronic Messages Act 2007, the High Court agreed that a penalty of \$100,000 should be paid by the defendant for illegally sending 2,006,632 electronic messages, which resulted in commission payments to him of around \$1.6 million.

68 Although the highest infringement penalty on the statute book is now \$50,000 under the Financial Markets Conduct Act 2013. There is High Court precedent to the effect that defended proceedings for infringement offences are not subject to protection of the New Zealand Bill of Rights Act 1990, although that decision has been criticised as not according with Canadian and European jurisprudence: see *Llewelyn v Auckland City Council* HC Auckland AP174/97, 8 December 1997; and A Butler and P Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) at [21.5.5].

69 See for example Jonathan M Karpoff and John R Lott Jr “The Reputational Penalty Firms Bear from Committing Criminal Fraud” (1993) 36 *JL & Econ* 757 at 758: “Reputational cost ... constitutes most of the cost incurred by firms accused or convicted of fraud.” Compare R A Posner *Economic Analysis Of Law* (4th ed, Little, Brown and Company, Boston, 1992) at 422: “[C]orporate punishment carries with it little or no stigma ...”. Both cited in V S Khanna “Corporate criminal liability: what purpose does it serve?” (1996) 109 *Harvard LR* 1477 at 1497.

70 Khanna, above n 69, at 1497.

71 Proposed under the Commerce (Cartels and Other Matters) Amendment Bill 2011 (341–2).

- 4.24 Consideration needs to be given to the weight that should be accorded to a criminal conviction as a unique penalty in its own right. It is true that practical consequences flow from a criminal conviction. It can impede an individual's ability to travel and find work. In some cases this is as a result of legislation. For example, a person may not be registered as a health practitioner if he or she has been convicted of an offence punishable by imprisonment for a term of three months or longer, unless the responsible authority is satisfied that the offence does not reflect adversely on the person's fitness to practise.⁷² However, in other cases the practical consequences are matters of convention only. If pecuniary penalties are more widely adopted to deal with law-breaking conduct, employers and immigration agencies may start to ask individuals whether they have ever been found liable to pay one. The extent of the negative impact that pecuniary penalties might have on a person's prospects may therefore increase.
- 4.25 The second relevant feature of a criminal conviction is what is generally referred to as its stigmatising effect – that is, the disgrace or discredit it attaches to a person and the consequent negative impact on that person's reputation. It is not the case that a quantifiable or uniform degree of stigma attaches to each criminal conviction; rather, it varies according to factors such as the type of offending, how many people know about the conviction, the background of the offender, and the views and experience of the people who know about it. The same is true of the stigma attaching to criminal offences and pecuniary penalties. Some people may view more seriously a finding of liability for a pecuniary penalty for making untrue statements in a registered prospectus that led to financial loss for investors, than a conviction for careless driving. Individual and general public perceptions of the particular conduct that led to the penalty will have an influence. Therefore, the stigmatising effect of a pecuniary penalty may sometimes be less than or sometimes more akin to that of a criminal conviction. In some instances, a penalty's impact on reputation will be very significant. Media coverage of pecuniary penalties reinforces this point, since it rarely makes it clear to the reader that the breach is civil rather than criminal, and frequently adopts language, including the words “fine” and “offending”, that is associated with the criminal law.⁷³
- 4.26 Our point in this discussion is to illustrate that it is simplistic to state that pecuniary penalties should be dealt with entirely differently from criminal offences simply because a conviction does not result. There are differences between the punitive impacts of criminal and pecuniary penalties. Conviction and imprisonment remain the gravest forms of penalty and condemnation in our law. But the potential severity of pecuniary penalties is such that it should not be ignored or minimised when decisions are made about how they ought to be imposed.

72 Health Practitioners Competence Assurance Act 2003, s 16(c). See also, for example, s 151 of the Companies Act 1993 and s 199K of the Companies Act 1955, which prohibit a person becoming a director of a company within five years of being convicted of a specified offence (an offence relating to the promotion, formation or management of a company, an offence under any of sections 461 to 461D of the 1955 Act, or of any crime involving dishonesty as defined in section 2(1) of the Crimes Act 1961) unless the person has leave of the court.

73 Occasionally the media reports on pecuniary penalties using identical terms as for criminal offences. See for example “Trio face \$200,000 fines in first spam prosecution” *The Dominion Post* (online ed, Wellington, 15 October 2008) (emphasis added):

Three men are each facing a \$200,000 fine in the first *prosecution* in New Zealand under tough anti-spamming laws ... Internal Affairs alleges the men sent more than two million unwanted e-mail advertisements ... It marks the first prosecution since the Unsolicited Electronic Messages Act was passed in September 2007. ... It is illegal to send unsolicited electronic messages, such as e-mail or text messages, without permission or implied permission.

See also Hayley Hannan “Alleged spammer faces \$700,000 in fines” *The New Zealand Herald* (online ed, Auckland, 14 September 2011). See also Department of Internal Affairs “Spammer to pay \$100,000 penalty” (press release, 22 December 2008), which refers to payment of a “financial penalty of \$100,000” but does not make it clear that it refers to a pecuniary rather than criminal penalty.

GUIDELINE

G2 Pecuniary penalty regimes must be designed with their punitive nature in mind

Although their primary purpose may be deterrence, pecuniary penalties are punitive in nature. They can have a potentially severe impact on a person or entity's solvency, property interests, reputation and opportunities. Pecuniary penalty regimes must be designed with this in mind.

Chapter 5

Role of pecuniary penalties

- 5.1 At the outset of this review, the Law Commission had reservations about pecuniary penalties. At first glance, they appeared an unprincipled measure, created to side-step criminal procedural protections, and so make it easier for enforcement agencies to have substantial penalties imposed. There may be some truth to this. In some cases, the decision to use pecuniary penalties in a statutory regime may have been influenced by this thinking. Despite this, the Commission has reached the view that, provided they are developed in a principled manner and accompanied by appropriate procedural safeguards, pecuniary penalties serve a valid purpose.
- 5.2 This view was reflected in the submissions we received. Although views differed as to what procedural protections should be in place, there was general agreement that, in light of the need to effectively and efficiently regulate conduct and punish breaches of the law, and for trans-Tasman harmonisation, pecuniary penalties have a place. We expect the use of pecuniary penalties to grow in New Zealand. Here and abroad, there is growing acceptance that the criminal law is not the only or best way to penalise and deter law-breaking. However, at stake are important principles of justice that should not be neglected or ignored.
- 5.3 In this chapter, we describe our view of the purpose and role of pecuniary penalties. This is intended to assist policymakers when they are determining whether to include pecuniary penalties in a legislative regime.

WHY IS THERE A PLACE FOR PECUNIARY PENALTIES?

- 5.4 The Commission accepts that, provided the appropriate procedural protections are in place, there is scope for a broader range of legislative tools for achieving compliance with legislation, and appropriately and effectively deterring law-breaking. This is because an increasingly broad range of conduct is regulated today. The public has 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 the full measure of the criminal law. Developments such as the growth of pecuniary penalties (and in the past, infringement and regulatory or “public welfare” offences) are a valid 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 efficient, proportional and flexible legal system.⁷⁴
- 5.5 It is also clear that infringement offences – the other main alternative penalty to criminal prosecution – are not equipped to deal with all forms of offending that, while undesirable, should not be criminalised. Infringement offences are appropriate for offences of strict liability that 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 are easy to establish involving straightforward issues of fact.⁷⁵ They give rise to comparatively low, fixed

⁷⁴ See L Campbell “Theorising Asset Forfeiture in Ireland” (2007) JCL 71 at 105, citing D Garland *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, Oxford, 2001).

⁷⁵ Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (Wellington, 2001) at [12.5.3].

penalties that cannot be adjusted to take account of individual circumstances. Given the wide range of conduct regulated today, it is not surprising that some conduct that might not warrant a criminal penalty is also not suited to the infringement regime.

- 5.6 Also, in the past strict liability criminal offences have been the key tool in encouraging compliance with technical, statutory standards and duties. In many cases where strict liability criminal offences might have been used in the past, pecuniary penalties now provide the incentive to comply. There is an argument that in some circumstances pecuniary penalties, notwithstanding their potentially severe penalty, are to be preferred since they avoid the imposition of a criminal conviction.
- 5.7 Taking account of the demands of regulating the broad range of conduct in modern society, we consider that pecuniary penalties can play a valid role in any statute where they are the appropriate form of penalty, taking into account the type of conduct and the persons involved.

Consideration alongside other forms of State penalty

- 5.8 Implicit in the points made above and in the previous chapter is that pecuniary penalties cannot be considered without reference to the other main forms of penalty available to lawmakers. Punishment for breaches of a statute can be inflicted by criminal offences, pecuniary penalties and infringement offences. Each form of penalty has unique features that make it more or less appropriate for different types of breaches of the law.
- 5.9 Pecuniary penalties need to be considered alongside these other forms of penalty. For this reason, we recommend that the Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (LAC Guidelines) should address the subject of “penalties” broadly, and should provide guidance on the circumstances when each type should be used.
- 5.10 We suggest that the factors relevant to the choice of penalty are:
 - effectiveness and efficiency;
 - practical considerations; and
 - the harm caused or the nature of the conduct.
- 5.11 The third of these is the most challenging and possibly controversial. In our view, it has not been adequately or overtly addressed in policy material relating to proposed pecuniary penalties. In fact, it is one of the most important factors to consider when a form of penalty is being proposed.
- 5.12 Below, we describe the types of breaches of the law that pecuniary penalties are most effective for, set out practical considerations for their inclusion in regimes, and provide a framework to assist policymakers in assessing whether pecuniary penalties are appropriate, given the type of harm and conduct being targeted. Answering these three questions in relation to criminal offences and infringement offences is not strictly within the remit of this project. However, we make observations about them, founded largely on the current LAC Guidelines.

Inadequacy of the term “regulation”

- 5.13 First, however, we wish to state strongly that labelling a legislative regime as “regulatory” is an inadequate basis on which to justify the inclusion of pecuniary penalties. As the Productivity

Commission noted recently, there are numerous definitions of regulation, each displaying varying degrees of specificity and breadth.⁷⁶ Some examples are:

- the promulgation of rules by government, accompanied by mechanisms for monitoring and enforcement, usually assumed to be performed through a specialist public agency;
- any form of direct State intervention in the economy, whatever form that intervention might take; and
- all mechanisms of social control or influence affecting all aspects of behaviour from whatever source, whether they are intentional or not.

5.14 In legal terms, then, “regulation” can encompass a range of different statutes: from one that sets standards, monitoring processes and enforcement mechanisms for a narrow range of readily identifiable actors who voluntarily enter a closely regulated activity; to one that sets down broad rules for the conduct of the general population. This range is reflected in the existing statutes where pecuniary penalties are found. For example, the anti-competitive rules within the Commerce Act 1986 apply to any person resident or carrying on business in New Zealand that affects a market in New Zealand.⁷⁷ In contrast, the Telecommunications Act 2001, in that it regulates the supply of telecommunication services,⁷⁸ clearly applies only to those supplying telecommunications services. Grouping these two statutes under the “regulatory” banner does not, of itself, explain why pecuniary penalties should be included in them.

5.15 The “regulatory” label is likely attached to pecuniary penalty regimes because of its use in relation to strict liability offences. Where an offence is silent as to mens rea, the courts have developed a number of factors to help them determine whether it can be categorised as a “public welfare regulatory” offence carrying strict liability. These factors are reflected in the LAC Guidelines, as follows:⁷⁹

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.

5.16 Because strict liability offences shift the onus of exculpation on the defendant, they are considered to involve an inherent encroachment on the presumption of innocence. However, because they operate within the apparently limited “public welfare regulatory” sphere, strict liability offences are regarded, under section 5 of the New Zealand Bill of Rights Act 1990, as a justified limit on the presumption of innocence.

⁷⁶ New Zealand Productivity Commission *Regulatory Institutions and Practices* (Issues Paper, August 2013) at 2, citing J Black “Critical Reflections on Regulation” (Centre for Analysis of Risk and Regulation, 2002).

⁷⁷ Commerce Act 1986, s 4.

⁷⁸ Telecommunications Act 2001, s 3.

⁷⁹ Legislation Advisory Committee *Guidelines on Process and Content of Legislation*, above n 75, at [12.2.3].

- 5.17 Policy material will frequently justify the inclusion of a strict liability offence on the grounds that the offending is of a “regulatory” nature.
- 5.18 A justification for a form of penalty is not the same as a positive reason for using it. We prefer the approach that pecuniary penalties should be accompanied by adequate safeguards, and used in the circumstances where they are appropriate, taking into account questions of effectiveness and efficiency, practical concerns and the nature of the harm and conduct at hand.
- 5.19 We are quite clear in the following chapters that our proposed procedural protections are the starting point for pecuniary penalties. There may be circumstances where their relaxation or modification may be justified, as with the strict liability form of criminal offences.

EFFECTIVENESS AND EFFICIENCY

- 5.20 Any policy decision about the inclusion of one or more forms of penalty in a regime should take into account whether the penalty will be effective and efficient in achieving the desired outcomes of the regime. For example, a desired outcome will usually be the deterrence of the law-breaking conduct. This may be for a number of reasons, including: to uphold the integrity of the law; to protect the public interest; and because deterrence is the best way to ensure the efficient and effective operation of a particular sector or industry (for example by minimising market distortions). The question, then, is what sort of penalty will effectively and efficiently deter the type of conduct and potential offender at hand?
- 5.21 It follows that a form of penalty should not be used where it would be an *ineffective* deterrent. For example, large monetary penalties may serve a limited purpose against conduct where usually there is little chance of the offender being able to pay. Equally, small monetary penalties may not be effective where they can easily be absorbed by the offender.
- 5.22 Another factor to consider is the economic argument that the most socially desirable penalty is the cheapest one to impose and administer.⁸⁰ For instance, pecuniary penalties might create efficiencies because they are considered more likely to “settle” (by the parties coming to an agreement about a penalty) than criminal offences. In both cases, in fact, out-of-court settlement is not possible, as both pecuniary penalties and criminal penalties have to be imposed by a court.⁸¹ However, a substantial difference between pecuniary penalties and criminal offences is that an admission of liability on the part of a defendant to a criminal charge is likely to result in a conviction. It might also be thought that since pecuniary penalties can only result in a monetary penalty, the penalty itself is cheaper to administer. Finally, there are wider social consequences to making people criminals, in terms of the potential impact on their employment and travel opportunities. A penalty that effectively deters while not imposing a conviction may sometimes be desirable.
- 5.23 Notwithstanding the above, whether a form of penalty will be effective and efficient should not be the only consideration as to what penalty/penalties should be included in a statute. It may be that while pecuniary penalties will effectively and efficiently deter a form of conduct, public opinion about the type of offending will only support accountability in the form of

80 See R Rose “Corporate Criminal Liability: A Paradox Of Hope” (2006) 14 Waikato L Rev 52 at 57, n 40:

Civil liability is efficient because it avoids criminal law’s costly procedural protections, including the jury trial right and the beyond-reasonable doubt standard of proof”: and “civil liability is better because it imposes less stigma – ‘an inherently wasteful means of inflicting disutility’: no one receives the corporation’s lost reputation, whereas someone (government or a private party) receives the fine.

81 In all regimes currently in force, the court needs to approve a settlement of pecuniary penalty proceedings, although see the discussion in ch 13 about s 46A of the Financial Markets Authority Act 2011. In the criminal sphere, sentence negotiation – whereby a prosecutor and defendant agree on a proposed sentence in return for a guilty plea – is not permitted in New Zealand: see Crown Law Office *Solicitor-General’s Prosecution Guidelines* (2013) at [18.7.3].

criminalisation in the traditional sense. Nevertheless, an assessment that considers the effectiveness and efficiency of the penalty is essential.

In what circumstances might pecuniary penalties be effective and efficient?

- 5.24 In our Issues Paper, we noted that a number of circumstances exist in which pecuniary penalties are thought to be an effective and efficient form of penalty. We describe these below. However, we also noted that there are limitations to some of the arguments involved. We caution that, because of the limitations, it will always be necessary for policymakers to carefully assess the regimes for which they are responsible and robustly make the case for one form of penalty over another. We emphasise that it is not desirable to simply adopt an existing pecuniary penalty regime as a precedent without engaging fully and transparently in the necessary policy analysis.

Responsive regulation

- 5.25 Pecuniary penalties are an effective enforcement tool where they are designed to provide a form of intermediate penalty, consistent with theories of “responsive regulation”.⁸² This view was strongly supported by submissions from regulators and government agencies. They suggested that regulators are less able to effectively deter behaviour and enforce compliance with their regimes if they are confined to a choice between criminal offences (targeting severe breaches) and infringement offences (targeting low-level breaches). This is thought particularly pertinent where the overriding purpose of a statutory regime is to obtain compliance with legislative standards, rather than merely seeking to outlaw certain conduct and condemn breach. The lack of an intermediate form of penalty may leave regulators hamstrung between two choices: deterring beneficial, regulated activities by having to use the “blunt stick” of criminal offences; or failing to adequately punish breach by having only minor sanctions at their disposal. For instance, if all compliance failures are punished by way of criminal offence, people may be deterred from running companies or innovating in regulated fields. These arguments are strongest for those regimes that seek to impose legislative standards on the conduct in question, rather than making it completely illegal.
- 5.26 The theory of responsive regulation posits that regulatory compliance is most likely to be achieved when a regulatory regime is enforced by way of a hierarchy (or pyramid) of interventions. Lower-level responses can be followed by a range of orders and penalties that progressively increase in seriousness, so that non-compliance at any level on the pyramid can be tackled by the appropriate intervention or sanction. Theories of responsive regulation have dominated academic debate about regulatory law for the past three decades.⁸³ They also feature prominently in the policy material of pecuniary penalty regimes in both Australia and New Zealand. The Commission agrees that regulators should not be hamstrung by having inadequate tools at their disposal to oversee and enforce their regimes, and accepts that pecuniary penalties can play an important role.
- 5.27 We note, however, that not all existing pecuniary penalty regimes in New Zealand reflect the responsive regulation model. In many cases, pecuniary penalties are not an intermediate penalty, but are the gravest form of penalty for the particular conduct under the statute. The absence of criminal penalties in those regimes arguably conflicts with ideas of responsive regulation, which acknowledge that regulation of corporate conduct is at its most effective when a “dynamic and integrated approach to enforcement is made available, that is, when a range of sanctions, civil and criminal, individual and corporate can potentially be applied”.⁸⁴

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

83 See, for example, R Baldwin and J Black “Really Responsive Regulation” (2008) 71 MLR 59.

84 B Fisse and J Braithwaite *Corporation, Crime and Accountability* (Cambridge University Press, Cambridge, 1993) at 122.

Where pecuniary penalties are to be used alongside criminal penalties, it is not always clear why criminal penalties might have been used for some breaches of the regime and pecuniary penalties for others. Nor is it always clear how a regulator is expected to exercise its discretion as to which penalty to pursue in individual circumstances, when it has the option of both.

- 5.28 The point to be reiterated, then, is that while pecuniary penalties ought to be considered for statutory regimes where an enforcement agency needs a range of tools to enable it to effectively obtain compliance with the regime, this, in itself, will not be where the policy development process should stop. Further consideration needs to be given to how they will be used and which particular breaches they are appropriate for, in concert with other forms of penalty and orders.

Corporate breach

- 5.29 Pecuniary penalties are considered effective and efficient at deterring breaches in the corporate context. First, corporate actors usually breach a regime for financial gain. As substantial monetary penalties, pecuniary penalties directly target the benefit sought from the breach. In general, Parliament has been receptive to setting very high maximum penalties for pecuniary penalties – often, higher than for monetary criminal penalties.⁸⁵ This has meant that they can be set at a level that will (it is hoped) deter even the largest corporate offenders.
- 5.30 Secondly, it can be difficult to prove corporate offending to the standard required for a criminal offence. Often complex evidence is required to establish the contravention, and numerous people may have played some role in the transaction or events concerned. Therefore, the circumstances of the breach can be hard to prove. Where there is a requirement to prove some degree of intention or knowledge on the part of the offender, it may be extremely difficult to identify who had that intention or knowledge and is therefore morally responsible. In these circumstances, pecuniary penalties may therefore be more effective than criminal penalties in both deterring breach (because the person thinks there is a higher chance of being caught) and in punishing breach (because the conduct only needs to be established to the civil standard).
- 5.31 Thirdly, there is an assumption that corporate offenders are likely to enter into a comparatively detailed cost-benefit analysis of their offending. They are more likely to take a measured assessment of the likely gain from breach when compared to the potential penalty and risk of getting caught. Penalties that directly target the motivation for the offending, threaten a very high maximum penalty, and that might be easier to prove, are likely to be effective against such people.
- 5.32 Fourthly, corporate contraventions often fall into the category where the emphasis is more squarely on preventing breach before it happens, rather than merely penalising offending after the event. This is because of the difficulties of identifying the offending, and also because of the nature of some forms of corporate offending. For example, the Biosecurity Act 1993 aims to minimise the risk that harmful organisms will be released or spread, an occurrence that could have a substantial negative impact on the environment, the economy and public health. The emphasis under that Act is rightfully on the prevention of release, rather than merely penalising breach after the fact. The regime needs a form of penalty that will encourage a person to comply with its standards and requirements from the outset. Substantial financial penalties that might reduce the appeal of the cost savings that accompany “corner cutting”, for example, are likely to be effective.

⁸⁵ However, see now the Commerce (Cartels and Other Matters) Amendment Bill 2012 (341-2), cl 14, which sets the criminal fine at the same, very substantial, level as the pecuniary penalty.

- 5.33 All of these factors might indicate that pecuniary penalties are particularly useful in the corporate context. But again, the limitations to the arguments must be considered. Notably, the perceived need for substantial maximum monetary penalties should not necessarily lead to pecuniary penalties. Criminal penalties include monetary penalties: arguably Parliament could be asked to increase maximum fines for certain criminal offences. Indeed, it is being asked to do so in the Commerce (Cartels and Other Matters) Amendment Bill.⁸⁶
- 5.34 Also, the arguments above rely on assumptions about deterrence. They do not give a full answer as to why pecuniary penalties might be favoured over other forms of penalty. For example, while pecuniary penalties might deter corporate breach well, do they deter it *better* than criminal penalties would? One of the policy justifications for the criminalisation of hardcore cartel conduct is that pecuniary penalties are, in that area, an inadequate deterrent.
- 5.35 Furthermore, the extent to which the lower standard of proof makes pecuniary penalties a better deterrent is unclear: to what extent do corporate actors really assess the relevant standard of proof when deciding whether or not to breach the law? It may also be asked whether the lower standard of proof is that much easier to meet, given that courts apply it in a way that takes the gravity of the penalty into account.⁸⁷ In its submission, the Commerce Commission said:
- ... we believe that the ease of obtaining civil penalties is significantly overstated. It is certainly not the case that we inevitably succeed in our civil proceedings ... [P]art of the reason for this is ... that where we allege serious commercial wrong-doing courts have held us to a high standard of proof by flexibly applying the balance of probabilities standard. The practical outcome is that we do not perceive a marked difference between the standard we have to meet for the civil cases we take, as opposed to the criminal cases we take.
- 5.36 In any event, the statement that pecuniary penalties should be used because the lower standard of proof makes them easier to establish has obvious dangers. The same argument could be made about any form of offending.
- 5.37 Once again, the key message is that although pecuniary penalties may be an effective deterrent for some corporate contraventions, any policy proposal for them must properly assess the nature of the actors and conduct at hand.

An alternative to private civil action

- 5.38 Arguments have been made that pecuniary penalties can “plug a gap” where the deterrent value of private civil action is reduced. This may be thought to occur where any harm caused by the breach may be so widely dispersed that private individuals are unlikely to sue, or it may be difficult to measure the harm in a way that would lead to a substantial damages award.⁸⁸ Pecuniary penalties, then, are sometimes used to supply the lacking deterrence.
- 5.39 This argument does not fully justify the use of pecuniary penalties. To the extent that such a gap might exist, it could be plugged in other ways, for example by criminal offences, or an enforcement body being able to seek compensation orders on behalf of others. In any event, the degree of deterrence supplied by the threat of private civil action is very difficult to measure. On its own, then, this argument is not a sufficient reason to adopt pecuniary penalties.
- 5.40 However, they can provide a benefit as a practical tool that enables regulators to reduce the need for litigation by combining penalty and compensation actions in one set of civil proceedings.

⁸⁶ Commerce (Cartels and Other Matters) Amendment Bill 2012 (341-2), cl 22.

⁸⁷ See the discussion in ch 7.

⁸⁸ For example, under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009, the “harm” targeted is harm to public confidence in the financial system and New Zealand’s international reputation.

Where, then, it is unlikely that third parties will take civil proceedings, the pecuniary penalty model can create efficiencies and cost savings, because the regulator can both obtain a penalty for the purpose of condemning the breach, and access compensation on behalf of victims, through one set of proceedings.

Conclusion

- 5.41 The circumstances described above may justify using pecuniary penalties in a statutory regime and are, undoubtedly, relevant factors to be worked through as part of a policy process that leads to the adoption of pecuniary penalties. The strength of the argument for pecuniary penalties depends on how many of the circumstances are present. Nevertheless, any policy process needs transparently to take into account the limitations described above.

PRACTICAL CONSIDERATIONS

- 5.42 Some practical considerations need to be addressed when a determination is being made as to what type or types of penalty should be included in a regime. Most notably, any proposal for a pecuniary penalties regime will need to identify an adequately resourced enforcement body or agent, which should make its decisions as to investigations and proceedings independently. At present, most statutes provide for pecuniary penalties to be sought by independent statutory bodies, such as the Commerce Commission, Financial Markets Authority and Takeovers Panel. Under other statutes, the role of commencing proceedings is given to the chief executive of a department or ministry,⁸⁹ or in the case of the Unsolicited Electronic Messages Act 2007, to the Department of Internal Affairs.⁹⁰
- 5.43 One pecuniary penalty statute – the Telecommunications (Interception Capability and Security) Act 2013 – provides for the Police to investigate conduct that might lead to a pecuniary penalty, and to commence the proceedings.⁹¹ That Act also provides for the New Zealand Security Intelligence Service, Government Communications Security Bureau and “a specified law enforcement agency within the meaning of section 50 of the Search and Surveillance Act 2012 that is approved by an Order in Council under that section to use interception devices”,⁹² to be enforcement agencies for the purpose of pecuniary penalty proceedings.⁹³ It may be argued that this approach makes sense in the context of that Act as the breach involved (serious non-compliance with duties under the Act⁹⁴ or contravention of a compliance order) may come to the attention of the Police during the conduct of its normal practices. However, outside of those circumstances, it would be very unusual for the Police to be given this role. It follows that pecuniary penalties will not be appropriate where a suitable enforcement agency cannot be identified.
- 5.44 A further practical consideration is the operational limitation of pecuniary penalties being enforced as civil debts. This means that the tools available for the enforcement of criminal fines

89 The Chief Executive of the Ministry for Primary Industries is responsible for commencing pecuniary penalty proceedings under the Biosecurity Act 1993 and the Hazardous Substances and New Organisms Act 1996. The Chief Executive of Land Information New Zealand is responsible for commencing pecuniary penalty proceedings under the Overseas Investment Act 2005 (delegated to the Overseas Investment Office: see ss 30 and 48(1)).

90 Sections 4 and 45(1). The Department of Internal Affairs and Reserve Bank of New Zealand are also among the enforcement bodies under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009.

91 Telecommunications (Interception Capability and Security) Act 2013, ss 5, 97 and 3, definitions of “law enforcement agency” and “surveillance agency”.

92 Currently this is the Department of Internal Affairs or the New Zealand Customs Service.

93 See Telecommunications (Interception Capability and Security) Act 2013, s 3, definitions of “intelligence and security agency”, “law enforcement agency”, and “surveillance agency”.

94 All network operators must ensure that their public telecommunications networks and telecommunications services have full interception capability.

– including the seizure of property and making compulsory deductions from income or a bank account – are not available. Pecuniary penalties are likely to be ineffective, then, against people who cannot afford to pay.

- 5.45 In contrast, there should be caution against a view that cost savings can be made by the use of pecuniary penalties, without clear evidence. It might be thought that pecuniary penalties present an option for reducing the burden on the criminal justice system. However, the alternative view is that the growth in pecuniary penalties will increase the burden on the court system as a whole. This may be particularly the case where it is anticipated that regulators are more likely to take pecuniary penalty proceedings than criminal ones. Furthermore, where pecuniary penalties are introduced instead of criminal offences, the exercise will have the effect of merely shifting costs from the criminal to the civil justice system. Therefore it is unclear whether and to what extent cost savings will occur, particularly since, at present, most pecuniary penalties are High Court matters.⁹⁵

HARM CAUSED OR NATURE OF CONDUCT

- 5.46 In a number of regimes, pecuniary penalties have been adopted as the sole form of penalty. For example, criminal offences are entirely absent from the Unsolicited Electronic Messages Act 2007. This is not to say that criminal offences targeting related or similar conduct do not already exist under other legislation: section 250 of the Crimes Act 1961 provides for the offence of damaging or interfering with a computer system.⁹⁶ Conduct that breaches the Unsolicited Electronic Messages Act could also fall foul of this offence. However, pecuniary penalties have been considered adequate for breaches of the scheme established by the Unsolicited Electronic Messages Act itself. It is at least implied that specific criminal offences were not considered to be warranted.
- 5.47 In other regimes a distinction has been drawn between forms of conduct or harm that do warrant criminalisation and forms that do not. Under the Anti-Money Laundering and Countering the Financing of Terrorism Act 2009, pecuniary penalties are available for any breach of the legislation, with criminal offences becoming available where the breach is knowing or reckless. The implication is that, under that regime, criminal offences should be reserved for the most morally culpable breaches of the law, and in like manner, those guilty of non-intentional breach should not be subjected to a criminal conviction.
- 5.48 The Financial Markets Conduct Act 2013 takes a similar approach. The explanatory note to the Bill preceding the Act acknowledged the spectrum of penalties noted above:⁹⁷

The Bill introduces an infringement notice regime, which will provide an effective remedy for minor compliance-type contraventions. The Bill places an increased emphasis on civil liability for contraventions of the regime, including the ability of the Financial Markets Authority to take civil pecuniary penalty proceedings in a wide variety of circumstances. Serious criminal offences that include

95 In ch 13, we propose that pecuniary penalties that fall within the District Court's civil jurisdiction should be heard there, provided that there is not some other matter that warrants High Court attention, such as where the statute deals with complex commercial matters.

96 Section 250 provides:

(1) Every one is liable to imprisonment for a term not exceeding 10 years who intentionally or recklessly destroys, damages, or alters any computer system if he or she knows or ought to know that danger to life is likely to result.
(2) Every one is liable to imprisonment for a term not exceeding 7 years who intentionally or recklessly, and without authorisation, knowing that he or she is not authorised, or being reckless as to whether or not he or she is authorised,—
(a) damages, deletes, modifies, or otherwise interferes with or impairs any data or software in any computer system; or
(b) causes any data or software in any computer system to be damaged, deleted, modified, or otherwise interfered with or impaired; or
(c) causes any computer system to—
(i) fail; or
(ii) deny service to any authorised users.

97 Financial Markets Conduct Bill 2011 (342-1) (explanatory note) at 6.

the possibility of imprisonment are targeted at egregious violations of the law, such as where the conduct in question involved knowledge or recklessness.

- 5.49 We have reached the view that this approach can be entirely appropriate. That is, we consider that some law-breaking activity requires a punitive response but: (a) is undeserving of a criminal conviction; and (b) cannot be effectively deterred and penalised by infringement offences. An alternative view could be posited that all breaches of the law must, on point of principle, be categorised as criminal offences.⁹⁸ That is, a person who is proved to have breached the law should be subject to a criminal conviction. We do not agree with this proposition and consider that pecuniary penalties can appropriately fill a gap. A number of arguments support this view.
- 5.50 First, it is inevitable that, over time, our ideas of what amounts to “criminal” behaviour changes. 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. The Unsolicited Electronic Messages Act is an example of a statute that targets a relatively new form of conduct which has unwanted consequences. We agree that while there are good reasons for deterring commercial electronic spam, many people would not think it warrants the imposition of a criminal penalty. And, given that commercial spam can take place on a variety of levels and can result in substantial financial gain, infringement offences are not always going to be an effective response.
- 5.51 Secondly, the existence of the infringement notice procedure itself, and of minor offences in the past, illustrate that society has long been willing to accept that there is a difference between minor and grave breaches of the law. Dealing with certain breaches of the law outside the criminal courts is not a new proposition.
- 5.52 Thirdly, we have sympathy for the argument that the criminal law should remain the last resort.⁹⁹ 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”.¹⁰⁰ On one hand, this argument has been used to defend the criminal law against hybrid actions such as pecuniary penalties. On the other hand, it could also be argued 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 morally culpable breaches of the law.

For what types of harm or conduct might pecuniary penalties be appropriate?

Submitters’ views

- 5.53 Submitters were generally agreed that pecuniary penalties are inappropriate for “traditional” criminal offending. What is meant by traditional criminal offending is, to an extent, indicated by submitters’ main objections to the expansion of pecuniary penalties into this area. First, it was suggested that pecuniary penalties might not achieve the intended aims of outlawing such conduct: pecuniary penalties might not be as effective a deterrent for traditional offending, and (impliedly) the people who carry it out, as criminal offences. That is, a burglar or shoplifter is

98 Although under our present system, this already excludes those that are so numerous and technical that sufficient administrative efficiencies may be achieved by treating them as infringement offences.

99 See for example D Husak “The Criminal Law as Last Resort” (2004) 24 OJLS 207; and Dr Marina Nehme “Birth of a New Securities Law Regulator: The Financial Markets Authority and the Powers at its Disposal” [2011] NZ L Rev 475 at 490.

100 I Rosen-Zvi and T Fisher “Overcoming procedural boundaries” (2008) 94 VA L Rev 79 at 108. See also J Coffee “Paradigms Lost: The Blurring of the Criminal and Civil Law Models – And What Can Be Done About It” (1992) 101 Yale LJ 1875 at 1877; and F Sayre “The Present Significance of Mens Rea in the Criminal Law” in R Pound (ed) *Harvard Legal Essays* (Harvard University Press, Cambridge (Mass), 1934) 399 at 409.

more likely to be deterred by the threat of arrest, conviction or imprisonment, than by a mere monetary penalty.

- 5.54 Secondly, it was observed that pecuniary penalties are inappropriate for dealing with conduct that warrants the stigma of criminal conviction (such as conduct involving physical violence, sexual offending, serious fraud, bribery and corruption).
- 5.55 Thirdly, there was concern that although pecuniary penalties might be more appropriate than criminal offences for certain kinds of conduct, the inherent removal of criminal procedural protections might raise an issue. In other words, the concern centred around the ability of people allegedly involved in more traditional forms of law-breaking to be adequately protected from the power inequalities involved, without the extra protection of criminal procedures.
- 5.56 We agree with the first two concerns above. In relation to the third, where there was general public agreement that a form of conduct should not result in a criminal conviction, we think it would be perverse for a criminal offence to be introduced onto the statute book rather than a pecuniary penalty, merely for the purpose of making the usual criminal procedural protections available. It is preferable that the individual should avoid the risk of a conviction, and that a lesser form of penalty be used. However, what the concern does highlight is that it is imperative to get the procedural design of pecuniary penalties right.

Our views

- 5.57 Decisions as to whether a form of conduct should be penalised by a criminal offence, a pecuniary penalty, or an infringement offence, based on the nature of the harm and conduct, will rarely be clear cut. This point is made in the current LAC Guidelines, where it is stated:¹⁰¹
- ... it must be acknowledged that the proper scope of the criminal law is a matter involving political and ethical judgments, and there is room for opposing views on the question ...
- 5.58 We have considered what more useful advice can be provided on this question. To an extent it is difficult to identify guidance that does not result in a degree of circularity. For example, one observation in the LAC Guidelines is that “criminal offences ... must reflect current societal values about the type of conduct which is sufficiently serious to warrant the punishment of the criminal law”.¹⁰² As a means of distinguishing criminal conduct and harm from pecuniary penalty conduct and harm, this will not be of much help, since it merely leads to a further statement that “use of pecuniary penalties ... must reflect current societal values about the type of conduct which is not sufficiently serious to warrant the punishment of the criminal law; but is sufficiently serious to warrant a pecuniary penalty.”
- 5.59 Notwithstanding this difficulty, we have tried to identify questions that policymakers should ask themselves when assessing whether a pecuniary penalty is appropriate based on the nature of the harm and conduct.
- 5.60 In terms of harm, we suggest that pecuniary penalties will rarely if ever be appropriate where there has been:
- physical harm, threats of physical harm or risk of physical harm to the person;
 - emotional harm or threats of emotional harm to the person;
 - bribery, corruption or threats to the administration of law and justice;

101 Legislation Advisory Committee *Guidelines on Process and Content of Legislation*, above n 75, at [12.1.2].

102 At [12.1.2].

- widespread, substantial and irreversible harm to the economy or environment; or
 - substantial harm to property.
- 5.61 We suggest that the following forms of conduct may be so morally reprehensible that pecuniary penalties will rarely, if ever, be appropriate:
- conduct that involves intent or recklessness in the knowledge that the harm described above might eventuate;
 - conduct that involves a very substantial degree of intent, premeditation, dishonesty or recklessness, in the knowledge that harm to the economy, environment or property might eventuate.
- 5.62 Ultimately, the question requires members of Parliament to exercise their judgment in a manner one would expect will reflect the majority view of the rest of the population.

CONCLUSION

- 5.63 In the Commission's view, pecuniary penalties have a potential role where they will be an effective and efficient penalty and deterrent to law-breaking; where the practical considerations support their use; and where the nature of the harm and conduct involved in the offending is such that the public would support a non-criminal penalty. This last factor will always involve a question of political and ethical judgment.
- 5.64 In the policy material about pecuniary penalties to date, there has been little express debate about this political and ethical judgment. We consider that it is central to the debate about pecuniary penalties. In any circumstances, where it is proposed that a form of penalty should be included in a statute, all the factors that influenced the decision as to which penalty is preferred over others need to be clearly and robustly expressed and argued.

A cautious approach

- 5.65 While the Commission has reached the view that pecuniary penalties can play a useful role in these circumstances, we emphasise the need for a cautious approach.
- 5.66 In the first place, the procedural rules and protections that presumptively attach to pecuniary penalties should reflect the need for caution. These will be addressed in the following chapters. To illustrate, a feature of the design of pecuniary penalties is that they tend to have very high maximum monetary penalties. It appears to the Commission that that practice has grown up fairly unchecked. It has been driven by the emphasis on the need to deter breach by the largest corporate bodies.
- 5.67 It should not be assumed that very high monetary penalties are a defining feature of pecuniary penalty regimes, and they should not be adopted as a matter of course. The level of maximum penalty needs to be properly justified in light of the context, conduct and type of potential contravener.¹⁰³
- 5.68 Upfront acknowledgement and caution is also needed about the risk of unfair treatment of different types of offenders. The greater use of pecuniary penalties may lead to the perception and reality of differential treatment of white collar contraveners compared to "traditional" offenders. Parliament should be guided by the principle that like conduct should be treated alike: that is, instances of the same type of law-breaking should be treated in the same way, whether

103 See ch 14.

committed by a banker or a beneficiary. The risk of unfair treatment makes it particularly important for legislative proposals for pecuniary penalties to tackle head-on the value judgments that are being considered, so that they can be debated openly. In particular, pecuniary penalties should not be adopted wholesale into corporate law (or any area of law) without adequate consideration and debate as to whether the conduct targeted is viewed by the general public as worthy (or not) of criminal condemnation.

- 5.69 The Commission also cautions against unnecessary growth in the number of pecuniary penalties on the statute book. In principle, no form of penalty should be introduced into law without sound justification. Parliament should feel no less cautious about the introduction of pecuniary penalties than it has previously about criminal penalties. The proliferation of criminal offences on the statute book has led to concerns about protecting the rule of law and preserving the powerful stigma of the criminal law. But those concerns do not justify the wholesale uptake of pecuniary penalties. Although some offences on the statute book may be better dealt with by way of pecuniary penalty, any proposal to increase any penalty on the statute book should be carefully considered.

GUIDELINE

G3 There should be robust reasons for employing pecuniary penalties in any regime

Pecuniary penalties are one of a range of penalties that policymakers can include in legislative regimes, along with criminal offences and infringement offences. Any decision to employ one or more of those penalties in a statute should be based on a robust and transparent assessment of its appropriateness in responding to the particular contravention.

The assessment should take into account the following:

- (i) effectiveness and efficiency;
- (ii) practical considerations; and
- (iii) the nature of the harm caused or the conduct involved.

Part 3

THE CORE PROCEDURAL RULES



Chapter 6

Application of the New Zealand Bill of Rights Act 1990

- 6.1 Part 3 of the Report sets out our Recommendations and Guidelines about the core procedural rules and safeguards that should apply to the imposition of pecuniary penalties. The balance we have achieved is fundamentally based on our assessment of the nature and role of pecuniary penalties as set out in the previous two chapters; and on the principles of fairness, effective and efficient regulation, and certainty as described in Chapter 1.
- 6.2 Achieving the right balance between the principles of fairness, and effective and efficient regulation is absolutely fundamental to our review. This is because of the statutes where pecuniary penalties are commonly found: they often feature where a dedicated and resourced enforcement agency has been established to oversee an activity, and to ensure that it is carried out in a way that meets various public objectives. It follows that there is a recognised public interest in such oversight, and that the agency should be empowered to carry out its role effectively and in a way that ensures the efficient use of public money.
- 6.3 We have had at the forefront of our minds that any recommendations for enhanced procedural safeguards might be viewed as impeding enforcement agencies' ability to oversee and enforce their regimes, and so might be met with concern. Because of this we have been very careful only to propose enhanced protections where we are fully persuaded that there is a sound basis for them in law and principle.
- 6.4 In the Issues Paper, we began our discussion of the core procedural safeguards with a section on the relevance of the New Zealand Bill of Rights Act 1990 to pecuniary penalties.¹⁰⁴ In sections 5, 25, 26 and 27, that Act provides a framework for both policymakers and the courts on how the appropriate balance between fundamental rights in criminal proceedings, and circumstances when those rights can justifiably be limited, is to be struck. There is a question as to how much that framework can and should inform the balance to be achieved where pecuniary penalties are concerned.
- 6.5 We noted in the Issues Paper that the application of the criminal procedural safeguards in sections 25 and 26 of the New Zealand Bill of Rights Act to pecuniary penalties is uncertain. New Zealand courts have not had an opportunity to rule on the issue, nor has it been the subject of other commentary.¹⁰⁵ Whether or not they apply depends on whether the term "offence", in section 25, can be interpreted to include pecuniary penalties. In essence, this depends on the extent to which courts are willing to adopt an approach that focuses on the substance of a penalty, rather than its form. Courts applying similar provisions in other jurisdictions have, in

104 Law Commission *Civil Pecuniary Penalties* (NZLC IP 33, 2012) [Issues Paper] at [5.7].

105 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 New Zealand Bill of Rights Act. 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: *Commerce Commission v Giltrap City Ltd* (1998) 11 PRNZ 573 (CA) at 577.

some circumstances, taken a substance over form approach, and so have found that, even where a penalty or order is not labelled “criminal”, its substance is such that criminal procedural protections should nonetheless apply. A discussion of the relevant New Zealand and foreign case law on the point can be found in Chapter 5 of the Issues Paper, and we do not repeat it here.

6.6 It is unclear whether New Zealand courts will apply a similar approach to the term “offence” in section 25, and will examine pecuniary penalties in terms of substance rather than form. Thus far, the term “offence” has only been given a broad interpretation where there has been a risk of incarceration¹⁰⁶ or where the orders have had close links with criminal proceedings and procedure.¹⁰⁷

6.7 On the other hand, the Supreme Court has noted the need for a purposive interpretation of the Act.¹⁰⁸ That Court has also been influenced by the Canadian Supreme Court’s finding in *R v Wigglesworth*¹⁰⁹ that, in determining whether a person had been charged with an “offence”, two questions must be considered. First, was the very nature of the proceeding criminal? Secondly, did the accused face “true penal consequences”? A “true penal consequence” was:¹¹⁰

...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.

6.8 European courts have taken an even more expansive approach to determining what is, in substance, a criminal offence.¹¹¹ So far New Zealand courts have not been influenced by that European jurisprudence. However, pecuniary penalties have characteristics that were relevant to those courts’ determinations. Critically, pecuniary penalties are public in nature and, while some are directed at a specific group, others capture the conduct of a broad cross-section of society. They are intended to be punitive and deterrent. In addition, some pecuniary penalties contain a requirement of intent and so involve a degree of moral culpability akin to criminal offences. And while there is no threat of imprisonment, the potential quantum of the penalty outstrips many criminal financial penalties.

6.9 If New Zealand courts were to adopt the approaches of the European and Canadian judges, some pecuniary penalties may be susceptible to a finding that they amount to an “offence” for the purposes of sections 25 and 26 of the New Zealand Bill of Rights Act.

6.10 In any event, the right to natural justice is protected in broader terms by section 27(1) of the Act:

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.

6.11 Section 27(1) clearly applies to pecuniary penalty proceedings.¹¹² However, again, it is not clear what the provision requires in terms of procedural protections for pecuniary penalties.

106 *Siemer v Solicitor-General* [2010] NZSC 54, [2010] 3 NZLR 767; and *Drew v Attorney-General* [2002] 1 NZLR 58 (CA).

107 *Belcher v the Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA).

108 *Siemer v Solicitor-General*, above n 106, at [14]. See also *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 279.

109 *R v Wigglesworth* [1987] 2 SCR 541.

110 At [24].

111 Butler and Butler suggest that the format of art 6 of the European Convention on Human Rights, which is a more general provision than ours ss 23–26, may offer some explanation of the expansive view of the notion of “criminal charge”: A Butler and P Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) at [21.15.12].

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

The challenge under that provision is to identify the breadth of the protection offered by “the principles of natural justice”. Breaches of natural justice by the imposition of pecuniary penalties would need to be justified under section 5 of the Act.

- 6.12 At the outset of this chapter, we said that there is a question as to the extent to which these provisions of the New Zealand Bill of Rights Act should be kept in mind by policymakers and courts when creating and applying pecuniary penalties. In light of the above, we have drawn three conclusions on this question.
- 6.13 First, pecuniary penalties should be designed so that the risk of a breach of the rights in the New Zealand Bill of Rights Act is minimised. This is preferable from a perspective of good legislative practice, and also because the alternative creates a risk for the Crown that a court will declare an aspect of a pecuniary penalty regime to be inconsistent with the Act. That risk is even more acute with other potential forms of coercive order that are to be imposed through the civil courts. Examples of these sorts of orders can be found in the Public Safety (Public Protection Orders) Bill currently before Parliament,¹¹³ and the Vulnerable Children Bill, as it was introduced.¹¹⁴
- 6.14 Our second conclusion is that pecuniary penalties will be best protected from challenge under the New Zealand Bill of Rights Act if section 5 of that Act is used as the benchmark for determining when procedural safeguards can be limited. Section 5 provides:
- Subject to section 4, 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.
- 6.15 We agree that in some circumstances the procedural protections we propose should be able to be modified or limited. In essence, this will be where the interest in effective and efficient regulation outweighs the interest in fairness. However, modifying or limiting a procedural safeguard should not be done lightly. Applying the test in section 5 will ensure that limits on, for example, the penalty privilege proposed in Chapter 9, will be no more than is reasonable and demonstrably justifiable.
- 6.16 Third, pecuniary penalties, and other new forms of coercive or punitive orders that are to be imposed through the civil courts, must be designed in a way that gives appropriate recognition to substance over form. Any assessment of such orders that limits itself to a perfunctory labelling of them as “civil” is unacceptable. Imposition of punitive or coercive orders through the civil courts should not be considered as making them immune from consideration under the ambit of the New Zealand Bill of Rights Act.
- 6.17 These conclusions are supported by Professor Paul Rishworth QC’s views expressed in a paper presented in 2012.¹¹⁵ He argued that policymakers 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, whether they can be justified under the heightened standard that the broad and expansive rights in the Act (such as section 27(1)) ought to require. In turn, he suggested that this means that possible breaches of New Zealand Bill of Rights Act demand justification under section 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”.¹¹⁶ The Law Commission endorses this approach.

113 Public Safety (Public Protection Orders) Bill 2012 (68-2).

114 Note that the proposed form of coercive, civilly imposed order (“child harm prevention orders”) under the Vulnerable Children Bill 2014 (150-2) as it was introduced to Parliament has now been removed.

115 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).

116 At 8.

Chapter 7

Standard of proof

- 7.1 In our Issues Paper, we asked the question: “Should pecuniary penalty statutes contain a uniform standard of proof provision and, if so, what should it contain?”
- 7.2 Most existing pecuniary penalty statutes specify that the “usual standard of proof in civil proceedings” applies to pecuniary penalty proceedings. Two Acts are silent as to the standard of proof.¹¹⁷ Section 48(4) of the Overseas Investment Act 2005 contains a slightly different formulation: “the court must determine whether a person’s conduct [contravenes a pecuniary penalty provision] on a balance of probabilities”.

SUBMISSIONS

- 7.3 Submitters generally supported the need for consistency across pecuniary penalty statutes. However, views differed on what the standard of proof should be.
- 7.4 The majority of submitters favoured retention of the civil standard.¹¹⁸ Some of these expressly argued against the introduction of an intermediate or criminal standard of proof.¹¹⁹ One submitter thought it was worth exploring the option of an intermediate standard as is currently employed in some United States statutes, such as a requirement to have “clear and convincing” evidence of a contravention.¹²⁰
- 7.5 In contrast, the Law Society and one individual submitted that statutes should provide that no pecuniary penalty may be imposed unless the elements of the breach have been established beyond reasonable doubt. The Institute of Directors thought that pecuniary penalties with an element of intent or knowledge, or those carrying large penalties, should require proof beyond reasonable doubt.

RETENTION OF THE CIVIL STANDARD OF PROOF

- 7.6 The Commission recommends that pecuniary penalties should continue to be imposed on the civil standard of proof, or in other words, on the balance of probabilities. It does not favour the adoption of the criminal standard of proof. The argument in favour of moving to the criminal standard focuses on the nature of pecuniary penalties as a grave, state-imposed sanction that serves much the same ends as a criminal penalty. The argument continues that courts should not impose a pecuniary penalty without a high degree of confidence that the defendant has committed the breach, and that society has the same interest in ensuring that it does not penalise the innocent as it does with criminal offences. We have some sympathy for this argument but, on balance, we disagree.

117 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].

118 Financial Markets Authority, Donald Mathieson QC, Parliamentary Counsel Office (Commercial Team), Ministry for Primary Industries, Meredith Connell, New Zealand Bar Association, Commerce Commission, Federated Farmers and Air New Zealand.

119 See in particular, submissions of Ministry for Primary Industries and Meredith Connell.

120 Bell Gully.

- 7.7 Criminal cases demand that proof beyond reasonable doubt is established because of the very grave consequences of criminal conviction. Those are:¹²¹
- ... its substantial stigmatizing effect, the possibility of imprisonment, and the fact that it serves not merely to impose costs on the defendant but also to express the condemnation of the community.
- 7.8 A reading of this quote, alongside the discussion in Chapter 4 of this Report, will indicate that the position is finely balanced. As noted in that chapter, it is possible that pecuniary penalties may sometimes have as stigmatising an effect as some criminal convictions, and they also exist not merely to impose costs on the defendant but also to express the condemnation of the community. However, criminal conviction remains the gravest penalty available, and the criminal trial is unique in that it can, in many cases, result in the deprivation of liberty. Because of these consequences the need is heightened to ensure that only the guilty should be found guilty and punished, even at the cost of some wrongful acquittals. The fact that the risk of conviction and incarceration does not arise with pecuniary penalties supports a view that the application of the civil standard of proof is justifiable.
- 7.9 A number of submitters voiced concerns about the practical impact that a shift to the criminal standard for pecuniary penalties would have. There was concern that it would undermine the statutory regimes where pecuniary penalties usually feature by inhibiting regulators from using them in the manner intended: to act as a tool that fills an existing gap between criminal offences and lesser forms of penalty or intervention. If a criminal standard were imposed, it would be difficult to see what role pecuniary penalties would play in the regulatory environment.
- 7.10 One submitter suggested that policymakers might revert to using criminal offence provisions, including strict liability offences, and increasing criminal fines, thereby broadening the field of criminal liability more than would otherwise be required.¹²² If correct, a proliferation of criminal offences could result for conduct that does not deserve the disapprobation of the criminal law, or it could lead to the proliferation of offences that are difficult to prove and therefore rarely, if ever, prosecuted.
- 7.11 Another practical concern is that some regimes align orders for compensation, injunctions and management bans with a finding of liability for a pecuniary penalty. The practical benefits offered by this approach might be lost if pecuniary penalties were to be proved to a higher standard.
- 7.12 Retaining the civil standard of proof is also supported by the way that New Zealand courts have applied that standard, as described by the Supreme Court majority in *Z v Dental Complaints Assessment Committee*.¹²³ The majority rejected the application of the higher standard of proof in disciplinary cases. In that case, the consequences for the defendant dentist were very grave indeed. He had previously been charged with three counts of indecent assault on patients, two of which involved administering a sedative at higher levels than recommended. The dentist was found not guilty of all the criminal charges, but sought judicial review of a subsequent disciplinary decision of the Dental Complaints Assessment Committee. The question on appeal to the Supreme Court was whether the criminal standard of proof should apply to the disciplinary proceedings. The majority concluded that it should not.¹²⁴ It noted the wide range of conduct that may be the subject of disciplinary proceedings, including professional inadequacy

121 B Underwood "The Thumb on the Scales of Justice, Burdens of Persuasion in Criminal Cases" (1977) 86 Yale LJ 1299 at 1339, quoted in J November *Burdens and Standards of Proof in Criminal Cases* (Butterworths, Wellington, 2001) at 8.

122 Meredith Connell.

123 *Z v Dental Complaints Assessment Committee*, above n 117.

124 Elias CJ dissented, preferring the application of the criminal standard.

at one end, and serious criminality at the other. It concluded that the universal application of the criminal standard to all disciplinary proceedings would be overly rigid.¹²⁵

- 7.13 To cater for this range of conduct, the majority noted that an alternative approach could be for a court to exercise discretion as to when and when not to require the criminal standard, but only for the most serious of allegations. However, it also noted the difficulty that there was little guidance on when it would be appropriate to require the criminal standard.¹²⁶
- 7.14 The other factor that weighed in favour of retaining the civil standard was the “long-established” and “sound in principle” approach to it taken by the courts, which requires that serious allegations must always be proved by evidence having sufficient probative force.¹²⁷ Although referring to this as the “flexible application of the civil standard of proof”, McGrath J for the majority clarified the approach as follows:¹²⁸
- ... it is not the position that flexibility is “built into” the civil standard, thereby requiring greater satisfaction in some cases. Rather, the quality of the evidence required to meet that fixed standard may differ in cogency, depending on what is at stake.
- 7.15 The majority considered that in disciplinary proceedings this approach gave proper protection to the person subject to the process, who would face penalties and stigma if found guilty of misconduct.
- 7.16 Not all of the arguments relied upon in *Z v Dental Complaints Assessment Committee* carry the same weight in relation to pecuniary penalties. The statutory purpose of pecuniary penalties differs from disciplinary hearings. The latter, as the majority found, have as their purpose public protection. Pecuniary penalties aim to protect the public too, but their emphasis is more markedly on deterrence by way of substantial penalty. They have more in common with criminal proceedings than disciplinary proceedings in this respect.
- 7.17 However, pecuniary penalties do share some of the features referred to by the Supreme Court. They too target a wide range of technical and more substantial breaches of the law. In the former cases, it would be expected that the penalty would be considerably lower. Importantly, they also carry the benefit for the defendant that they avoid the imposition of a criminal conviction. Therefore, in our view the civil standard of proof is appropriate in principle. New Zealand courts’ approach to its application reinforces this view.

ALTERNATIVE OPTIONS

- 7.18 Two other options for the standard of proof were addressed in submissions. First, the Institute of Directors suggested that the criminal standard should be required for intentional breaches and for the “gravest” pecuniary penalties.
- 7.19 It would be possible for statutes to provide for this. However, we do not favour this option. In our view, it flows from the discussion above that the nature of the penalty is relevant to which standard of proof should apply. Whether or not a pecuniary penalty provision involves an element of intention, or whether it can be described as “grave”, no conviction or risk of imprisonment results. On balance, we consider that appropriate protection from any difference in the quantum of a pecuniary penalty, or the stigma that results from such a breach, can be afforded to the defendant by the courts’ approach to the civil standard.

125 *Z v Dental Complaints Assessment Committee*, above n 117, at [113].

126 At [114].

127 At [112].

128 At [101].

- 7.20 Furthermore, in our view, whether intentional and knowing conduct should be dealt with on the criminal standard is better addressed by an open debate on whether the proposed “intentional” or “grave” breach of the law ought instead to be a criminal offence.
- 7.21 Finally, a proposal to use the criminal standard for the gravest pecuniary penalties raises the question of what is “grave”. A line could be drawn based on the size of the maximum penalty, or the type of conduct that is covered. However, this would require drawing arbitrary lines that may not reflect commercial realities. For instance, a one-person company may regard a maximum penalty of \$50,000 to be grave, whereas the same may be regarded as trivial by a large multi-national. For these reasons, the proposal is not favoured.
- 7.22 Bell Gully favoured the option of exploring statutory provision for an intermediate standard of proof, as exists in some circumstances in the United States. Such a standard, they suggested, could more properly reflect the function and severity of pecuniary penalties without making it unduly difficult for the regulator to obtain an order in appropriate cases.
- 7.23 United States law recognises a third standard of proof, which falls between the criminal and civil standards. The standard has variously been described as requiring evidence that is “clear and convincing”, “clear, convincing and satisfactory” or “clear, cogent and convincing”.¹²⁹ It is generally applied in high-stakes proceedings involving deprivations of individual rights not rising to the level of criminal prosecution (for example, cases involving termination of parental rights or deportation), 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 will, and suits for the specific performance of an oral contract).¹³⁰ It has not been applied in proceedings for the United States equivalent of pecuniary penalties.
- 7.24 A new statutory formulation of the standard of proof will demand fresh interpretation by the courts and a period of uncertainty, which increases litigation risk. This risk needs to be weighed against the benefits that a new formulation could provide. Given that our courts are well versed in applying the civil standard of proof in the manner described above, it is not clear what a new formulation could add. In the absence of evidence that the existing standard of proof is creating difficulties for the courts, we do not favour this proposal.

GUIDELINE

G4 Pecuniary penalties should be imposed on the civil standard of proof

Pecuniary penalties should continue to be imposed on the civil standard of proof, or in other words, on the balance of probabilities, rather than the criminal standard of proof.

129 *Woodby v INS* 385 US 376 (1966); *Addington v Texas* 441 US 418 (1979); and *Santosky v Kramer* 455 US 745 (1982).

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

Chapter 8

Burden of proof

INTRODUCTION

8.1 The burden of proof determines who is responsible for convincing the court of a matter at issue in a proceeding. Two different burdens of proof are commonly referred to: the legal burden of proof and the evidential burden of proof. The legal burden refers to the need to convince the court of the particular point in issue in order to succeed on that point or on the case overall. If the person who carries the legal burden of the overall case fails to discharge that burden, his or her case will fail. The evidential burden refers to the need to raise sufficient evidence about a matter to make it “live”: that is, a matter the court will need to consider and that the opposing side will need to address. An example is the evidential burden imposed on the defendant in relation to certain criminal defences: the defendant must raise sufficient evidence to make the defence live before the prosecution is required to rebut it as part of its case.

8.2 As a general principle, in both the civil and criminal sphere, the party that initiates the proceeding bears the legal burden of proving its case. As observed by the Australian Senate Standing Committee on Constitutional and Legal Affairs, writing on the burden of proof in 1982:¹³¹

A civil litigant who invokes the state’s aid through its judicial system, or a prosecutor who has the full resources of the State to press charges against an accused person, should assume the burden of proving what he [or she] alleges.

8.3 Special significance attaches to the fact that the legal burden is borne by the prosecution in criminal proceedings. Criminal law theory and jurisprudence maintains that the punitive nature of the criminal law, and the risk of imprisonment and/or stigma, entitles a defendant to a criminal proceeding to be presumed innocent until proven guilty. The presumption of innocence is really another way of expressing the fact that the burden of proof is on the prosecution. It serves at least two important purposes: (1) it curbs the intrusive power of government; and (2) it justifies the use of the state’s coercive powers.¹³² The presumption of innocence has been described as the “golden thread” of the criminal law.¹³³

8.4 The burden of proof is a central matter in pecuniary penalty proceedings, as it is in any legal proceeding. We propose that questions as to how the burden of proof should be addressed in pecuniary penalty provisions be guided by the following principles:

- The provision should be clear as to who has the burden of proving the elements of the contravention of a penalty provision, and whether that is a legal or evidential burden.
- The burden of proving the elements of the contravention should lie presumptively on the enforcement agency, as the person bringing the proceedings.

131 Senate Standing Committee on Constitutional and Legal Affairs *The Burden of Proof in Criminal Proceedings* (Canberra, 1982) at [3.1].

132 WH Charles, TA Cromwell and KB Jobson *Evidence and the Charter of Rights and Freedoms* (Butterworths, Canada, 1989) at 152–153.

133 *Woolmington v DPP* [1935] AC 462 (HL) at 481.

- The burden of proof should be imposed on a defendant only to the extent that is reasonable and can be demonstrably justified in the circumstances.

THE NEED FOR CLARITY AND CERTAINTY

- 8.5 We noted in the Issues Paper that some pecuniary penalty provisions are drafted in a way that creates uncertainty about whether the enforcement agency or the defendant has the burden of proving certain matters.¹³⁴ All submitters who addressed the burden of proof agreed that pecuniary penalty provisions should be drafted in a way that minimises any ambiguity over the allocation of the burden of proof, although one submitter thought that the provisions were already sufficiently clear, so no redrafting was necessary. As one submitter noted, any uncertainty over whether the enforcement body has established all the facts necessary to make out its overall case will make an appeal more likely.
- 8.6 An example of a pecuniary penalty provision that is clear about who must prove what is section 9 of the Unsolicited Electronic Messages Act 2007. It states:
- 9 Unsolicited commercial electronic messages must not be sent**
- (1) A person must not send, or cause to be sent, an unsolicited commercial electronic message that has a New Zealand link.
 - (2) If a recipient uses an unsubscribe facility in accordance with section 11(1)(a), the recipient's consent to receiving a commercial electronic message from the sender is deemed to have been withdrawn with effect from the day that is 5 working days after the day on which the unsubscribe facility was used.
 - (3) A person who contends that a recipient consented to receiving a commercial electronic message has the onus of proof in relation to that matter.
- 8.7 Section 9(1) clearly states the basic conditions that must be proved by the enforcement body to establish the defendant's liability for a penalty:
- a person who sent, or caused to be sent;
 - an "unsolicited commercial electronic message";
 - with a New Zealand link.
- 8.8 Section 9(3) is, in effect, a statutory defence of consent: if the defendant wishes to argue consent, he or she has the onus (or burden) of proving it. The effect of section 9(2) is that establishing that an unsubscribe facility has been used is sufficient proof of withdrawal of consent. The defendant would have to rebut evidence of use of an unsubscribe facility in order to succeed on the defence of consent.
- 8.9 In contrast, section 156L of the Telecommunications Act 2001 is an example of a provision that is ambiguous about the burden of proof. This is because the condition of liability for a penalty (failure to comply with an undertaking under Part 2A or Part 4AA) is found in the same sentence of the provision as the exception that exonerates a defendant from liability (having a reasonable excuse for the failure to comply):

¹³⁴ Law Commission *Civil Pecuniary Penalties* (NZLC IP33, 2012) [Issues Paper] at [6.45].

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 an undertaking under Part 2A ...
- 8.10 On the face of it, section 156L does not tell us whether the enforcement body bears the burden of proving the absence of a reasonable excuse, or whether the existence of a reasonable excuse is a statutory defence that must be proved by the defendant. We note that the Parliamentary Counsel Office drafting guidelines for statutory provisions recommend that conditions and exceptions should not be placed in the same sentence.¹³⁵
- 8.11 Policymakers should be alert to the risks created by using imprecise terminology or particular structural conventions that inadvertently create ambiguity around the burden of proof. As we note throughout this Report, pecuniary penalties are a novel and hybrid creation and any statutory ambiguity will put a greater burden on courts to clarify and interpret them. The fixing of the burden of proof by the courts in such circumstances necessarily involves questions of policy.¹³⁶ It is also unclear whether the courts will or should draw on criminal law jurisprudence relating to burden of proof matters.¹³⁷
- 8.12 In response to our question about the need for certainty about the allocation of the burden of proof, one submitter suggested that if a legal burden is intended to be imposed, the statute should refer explicitly to the legal burden of proof. At present, pecuniary penalties tend to state that a person must “satisfy” the court of a particular matter or that a person has the “burden” or “onus” of proof on a matter. This is taken to mean that the person referred to has the legal burden of proof.¹³⁸ Since a change of that nature would need to apply to the statute book as a whole, we make no recommendation on it.

IMPOSING A BURDEN OF PROOF ON DEFENDANTS

- 8.13 Occasionally in the law, a burden of proof is imposed on a person who is defending proceedings. The circumstances in which that occurs are constrained, because it departs from the general principle noted at [8.2] above, that the person who brings proceedings, and who seeks to move the court in his or her favour, should bear the burden of establishing what he or she seeks to prove. Particularly in the criminal sphere, imposing a burden on defendants should, as a general rule, be done rarely and only in circumstances where that is a reasonable and justified limit on the defendant’s criminal law right to be presumed innocent until proven guilty. In New Zealand, the defendant’s right to be presumed innocent of a criminal offence is protected by section 25(c) of the New Zealand Bill of Rights Act 1990.

¹³⁵ Parliamentary Counsel Office “Principles of clear drafting” <www.pco.parliament.govt.nz> at [3.10]. Note also that Australian Commonwealth offence guidelines recommend that the defence of “without reasonable excuse” be avoided entirely: Attorney-General’s Department “A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers” (September 2011) at [4.3.3].

¹³⁶ J Stone “Burden of Proof and the Judicial Process: A Commentary on *Joseph Constantine Steamship, Ltd v Imperial Smelting Corporation, Ltd*” (1944) 60 LQR 262 at 283.

¹³⁷ The courts take into account a range of matters to determine where the burden of proof lies when facing such ambiguities in statutory offences: see for example *R v Rangi* [1992] 1 NZLR 385 (CA) and *Juken Nissho Ltd v Northland RC* [2000] 2 NZLR 556 (CA). See the Issues Paper, above n 134, at [6.47].

¹³⁸ Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (Wellington, 2001) [LAC Guidelines] at [12.3.3]:

The need for clarity suggests that if legislators wish to impose a legal burden on the defendant to establish an exception or defence, words like ‘prove’ or ‘proved’ should be used.

Note, however, that this differs from a statutory formulation where the court is required to be satisfied of a particular matter, which it is said imports no burden of proof: *Angland v Payne* [1944] NZLR 610 (CA) at 626 and *Re Supreme Court Registrar to Alexander Dawson Inc* [1976] 1 NZLR 615 (SC) at 627.

- 8.14 As we note in Chapter 6, the extent to which section 25 – which safeguards the procedural rights of those “charged with an offence” – should be applied to defendants to a pecuniary penalty is not clear. However, we also suggest that statutes should generally take a protective approach towards the rights of defendants to pecuniary penalties. As we note in that chapter, this approach reflects best legislative practice, and it also serves to minimise litigation risk. In our view, it follows that pecuniary penalty provisions should only impose the burden of proof on defendants in rare circumstances. Not only does this follow generally from our approach in Chapter 6, but, where reversals of the burden of proof specifically are concerned, it is reinforced by the fact that pecuniary penalties are imposed on the balance of probabilities. This means that where a burden is imposed on the defendant, the onus on the enforcement body to establish its case is particularly low. It is objectionable, in principle, for such substantial State penalties to be able to be imposed in this manner without strong and genuine justification.
- 8.15 In the Law Commission’s view this strengthens the argument that section 5 of the New Zealand Bill of Rights Act should be used as the benchmark where reversals of the burden of proof are concerned. Pecuniary penalty provisions should impose a burden of proof on defendants only in reasonable and demonstrably justifiable circumstances. We describe what some of these circumstances might be, below.

JUSTIFICATIONS FOR IMPOSING A BURDEN OF PROOF ON DEFENDANTS

- 8.16 A number of policy reasons have been put forward as justification for legislation departing from the “golden thread” of the criminal law, and purporting to impose a burden of proof on defendants, whether legal or evidential.¹³⁹ We discuss the justifications generally and then go on to discuss the legal and evidential burdens specifically.
- 8.17 One is that it is justified to impose a burden on the defendant where the conduct in question is “regulatory” in nature. While it is rarely stated explicitly, based on our assessment and understanding of the regimes in question, “regulatory” conduct in that context seems to mean the following:
- the conduct in question will put the public at a risk of harm if not carried out correctly; and
 - the people undertaking that conduct:
 - have often entered into those activities voluntarily;
 - need to be encouraged to adopt extra risk-managing precautions; and
 - may be taken to know and be able to comply with the standards imposed, or to show why they failed to comply with them, when called upon to do so.
- 8.18 In such circumstances, it is thought appropriate to impose a burden on the whole industry to demonstrate it is meeting the required standard.
- 8.19 For example, advice to the Attorney-General on strict liability offences in the Building Amendment Bill (No 3) 2010 (253–1) states that:¹⁴⁰

Strict liability offences were chosen to achieve the objectives of the Act because of a desire to ensure participants involved in building design and construction take responsibility for their own work. The offences place the burden on participants in the building industry to keep records verifying their compliance with the Act and to give these records to Building Consent Authorities.

¹³⁹ This section draws on departmental advice to the Attorney-General on legislative provisions that may infringe s 25(c) of the New Zealand Bill of Rights Act 1990, background policy papers of legislative regimes containing provisions that reverse the burden of proof, and the LAC Guidelines on when it may be appropriate to reverse the burden of proof.

¹⁴⁰ Ministry of Justice *Legal Advice: Consistency with the New Zealand Bill of Rights Act 1990: Building Amendment Bill (No 3)* (12 November 2010).

- 8.20 A similar justification was given for offences in the Food Bill 2010 (160-1) that reversed the burden of proof, as follows “Those who choose to participate in regulated industries should be expected to meet certain expectations of care and accept the enhanced standards of behaviour required of them.”¹⁴¹
- 8.21 These arguments rest on a number of implicit assumptions that must be worked through for each regime. For instance, the standards imposed must be clear and well-known to the regulated actors for the incentives to be successful. Simply stating that the target conduct is “regulatory” in nature is not sufficient policy justification for reversing the burden of proof. Rather, policymakers should carefully consider whether the characteristics in [8.17] are truly present and, in addition, whether it will achieve the proposed Act’s objectives to place the burden on the industry participants themselves.
- 8.22 Another circumstance in which imposing a burden on defendants is said to be justified is where it is substantially easier or more convenient for a defendant to prove the matter in issue, or where the defendant has “peculiar knowledge” of the matter. A commonly cited example is where a defendant must have a licence or certificate as evidence of their status or entitlement to carry out a particular activity. The argument is that since the defendant can produce the licence relatively easily, the burden should be on the defendant to produce it to the court.
- 8.23 For instance, an amendment to the Citizenship Act 1977 required a person to return a certificate of New Zealand citizenship to the authorities.¹⁴² They would be criminally liable if they failed to do so knowingly and without reasonable excuse.¹⁴³ Advice to the Attorney-General on the amending Bill’s compliance with the New Zealand Bill of Rights Act 1990 was that the provision imposed a burden on defendants by requiring them to show the existence of a reasonable excuse, but that it was justified because:¹⁴⁴
- In such cases, it is easier for the defendant to explain why he or she took (or failed to take) a particular course of action than it is for the Crown to prove the opposite. In the present case, there could be genuine reasons why the citizenship certificate was not returned such as the person being sick or being overseas. The defendant is best placed to show why he or she did not return the certificate.
- 8.24 On its own, the fact that matters are said to be within the “peculiar knowledge” of the defendant is not sufficient justification for imposing a burden of proof on defendants. Facts relevant to many criminal defences are often peculiarly within the knowledge of the defendant (such as facts going to self-defence), but the legal burden of disproving them still rests on the prosecution. The English Court of Appeal in *R v Spurge*¹⁴⁵ noted that there is no general rule that, where facts are peculiarly within the knowledge of the defendant, the burden of establishing them shifts to the defendant. Rather, policymakers should consider whether it would be significantly more difficult and costly for the enforcement body to disprove the matter than for the defendant to establish it. These circumstances are likely to be exceptional where pecuniary penalties are concerned because the enforcement agency needs to establish its case on the balance of probabilities rather than to the criminal standard. Enforcement agencies are further assisted because of the powers they have to gather the evidence required to enforce the regime. It may also be counter-productive to place the burden on the defendant because if the enforcement agency is under no obligation to check the appropriate records before bringing the enforcement

141 Ministry of Justice *Legal Advice: Consistency with the New Zealand Bill of Rights Act 1990: Food Bill* (25 March 2010). See also Crown Law Office *Aviation Security Legislation Bill: Consistency with the New Zealand Bill of Rights Act 1990* (5 March 2007) at [4.1]: “It is accepted that voluntary participation in a sensitive and closely regulated activity, such as travel by air, entails a reduced expectation of privacy among participants”.

142 Citizenship Amendment Bill 2010 (226-1), cl 15.

143 Clause 16.

144 Ministry of Justice *Legal Advice: Consistency with the New Zealand Bill of Rights Act 1990: Citizenship Amendment Bill* (21 September 2010).

145 *R v Spurge* [1961] 2 QB 205 (CA).

action, time and expense may be spent on bringing unnecessary proceedings. And if the licence is administered by the State, it may be assumed that the State would have ready access to those records. These points were made by the Australian Senate Standing Committee:¹⁴⁶

[T]he evidential burden in respect of issues which can be relatively easily proved or ascertained, such as licensing matters, should rest on the Crown. In an age where the storing and processing of records and other data can be greatly simplified by computers, the argument for saddling the defendant with an evidential burden in such matters is very weak. There are obvious advantages to the individual, as well as to society, in reducing to a minimum the possibility of unnecessary or unwarranted legal proceedings ...

- 8.25 While the Committee refers specifically to an evidential burden here, its critique of the justification for reversing the burden applies whether that burden is an evidential or a legal one.
- 8.26 It is also often argued that if the penalty in question is low, imposing a burden of proof on defendants is more justifiable.¹⁴⁷ However, we think that the fact that a penalty is low is not sufficient justification for departing from the basic principle that the burden of establishing the case rests on the person who initiates proceedings. As we note in Chapter 5, the fact that a policy decision can be justified is not the same as making a principled argument in its favour.
- 8.27 In summary, there is no particular category of conduct for which it is always appropriate to impose a burden of proof on the defendant. The decision should be made on a case-by-case basis. Considerations of justice and fairness must be weighed in the balance, as well as the public interest objectives of the regulatory regime.
- 8.28 As a starting point, we suggest that the range of circumstances when it is appropriate to impose a burden of proof on a defendant is limited. Examples may be where:
- the person bringing proceedings would face serious difficulty proving the matter in question, and the defendant may be presumed to have peculiar knowledge of the relevant facts; or
 - it would be extremely difficult or expensive to require the person bringing proceedings to provide proof that could be readily and cheaply provided by the defendant.
- 8.29 The need to do justice and fairness towards defendants must always be taken into account alongside the public interest objectives of the regulatory regime. It may be easier to justify imposing a legal burden on defendants where:
- the matter which the defendant must prove is not central to the question of liability for the penalty; or
 - the penalty is relatively low.
- 8.30 If it is decided that it is necessary to impose a burden of proving a matter on a defendant, that decision must adequately be justified and explained with reference to the particular policy context. Policy papers may need to outline the hypothetical factual scenarios that could arise and the difficult investigatory hurdles likely to be faced by the enforcement agency. They should explain, making reference to the wider regulatory context, why it is appropriate that the burden of demonstrating compliance should be shifted onto the regulated community.
- 8.31 This guidance applies equally for questions about the burden of proof in criminal offences.

146 Senate Standing Committee on Constitutional and Legal Affairs, above n 131, at [6.1.2].

147 See for example Ministry of Justice *Legal Advice: Consistency with the New Zealand Bill of Rights Act 1990: Biofuel Bill* (14 August 2007); Ministry of Justice *Legal Advice: Consistency with the New Zealand Bill of Rights Act 1990: Animal Welfare Amendment Bill* (12 April 2013); Ministry of Justice *Legal Advice: Consistency with the New Zealand Bill of Rights Act 1990: Biosecurity Law Reform Bill* (15 November 2010); and Ministry of Justice *Legal Advice: Consistency with the New Zealand Bill of Rights Act 1990: Climate Change Response (Emissions Trading) Amendment Bill* (9 November 2007).

Evidential or legal burden

- 8.32 If a burden is imposed on the defendant, the next question is whether it is necessary for that to be a legal burden of proof or whether an evidential burden would suffice. The point has been made that the same regulatory objectives can be achieved by requiring the defendant to produce sufficient evidence that rebuts the matter alleged (in other words, imposing an evidential burden). This intrudes less on a defendant's right to be presumed innocent.¹⁴⁸ A defendant's relative ease of access to the means of proof does not necessarily mean that a legal burden should be imposed on him or her. Requiring the defendant to raise evidence necessary to make the issue triable (an evidential burden) might be enough to overcome difficulties of access to proof. If an evidential burden is imposed, the defendant will still be required to show some evidence that discharges that burden.
- 8.33 Generally, if good reasons exist for imposing a burden of proof on a defendant, policymakers should always consider whether the desired regulatory outcome can be achieved by requiring defendants to make the matter a triable issue, rather than imposing a legal burden on them. A legal burden should only be imposed if it is clear that the desired regulatory outcome cannot be achieved by imposing only an evidential burden.

WAYS OF REVERSING THE BURDEN OF PROOF

- 8.34 Below, we give examples of ways that the burden of proof may be placed on a defendant, reiterating our principled position that any proposal to do so must be robustly justified and referring to the points made at [8.28] to [8.30].

Statutory defences

- 8.35 One way in which a burden is imposed on a defendant is through including a matter in a statutory defence, instead of requiring the person bringing the proceedings to prove the matter as part of their case. Here, the defendant bears the burden of raising the matter to bring it into evidence (an evidential burden), or positively establishing that the defence is made out (a legal burden). There may be times where it is appropriate for the defendant to carry the legal burden for a statutory defence. But that should always be made clear and should be carefully justified in the particular policy context.
- 8.36 In Australia, the Regulatory Powers (Standard Provisions) Bill 2014 (Cth), which is before the House of Representatives at the time of writing, will create a general rule that wherever the defendant wishes to rely on a statutory defence created by a penalty provision, the defendant bears only the evidential burden; that is, the burden to raise the defence.¹⁴⁹ The enforcement agency would then have to show the defence did not apply. We do not go so far as recommending a general rule to this effect. However, we do recommend that every statutory defence makes it clear whether it places a legal or an evidential burden on the defendant.¹⁵⁰ This will determine whether the defendant merely has to raise evidence that puts the defence in issue, or whether he or she must convince the court that the defence is made out. Section 9 of the Unsolicited Electronic Messages Act provides a good example of a provision that clearly specifies that the legal burden of establishing the statutory defence is on the defendant.

148 Charles, Cromwell and Jobson, above n 132, at 196.

149 Regulatory Powers (Standard Provisions) Bill 2014 (Cth), cl 96.

150 See the Issues Paper, above n 134, at [6.49]–[6.51].

Statutory presumptions

- 8.37 Another way of placing the burden of proving a particular matter on a defendant is by way of statutory presumption.¹⁵¹ In this context, a statutory presumption means that if the enforcement agency proves fact A, then fact B arises by way of presumption, which can only be rebutted by the defendant convincing the court of the alternative. There are a small number of examples of such statutory presumptions in existing pecuniary penalty regimes.¹⁵² There are a number of reasons why such presumptions may be used within a penalty regime, including to overcome evidential difficulties that would otherwise make it impossible to assign liability to certain parties.¹⁵³
- 8.38 Wherever they *are* used, statutory presumptions should make it clear whether they can be rebutted merely by raising evidence to the contrary (an evidential burden of proof), or whether the defendant bears the burden of convincing the court of the alternative (a legal burden of proof).¹⁵⁴ Not all existing penalty provisions do this. Again, section 9 of the Unsolicited Electronic Messages Act provides a useful example of a provision that makes such matters clear. Under section 9(2), evidence that the recipient of the message used the unsubscribe facility creates a presumption that he or she withdrew consent. The legal burden of rebutting that presumption, and establishing that there was in fact consent to receive the message, is on the defendant, as is made clear by section 9(3).
- 8.39 Statutory presumptions (and deemed liability provisions, discussed below) may be desired to achieve regulatory objectives efficiently. However, as noted in the Australian Law Reform Commission's report on civil penalties:¹⁵⁵
- ... legislators must always balance efficacy arguments for reversing the onus of proof against fairness issues such as the harshness of the penalty and the impact on the segment of the regulated community that is likely to be subject to the deeming provision.
- 8.40 We note that Australian guidelines recommend that the use of presumptions should be kept to a minimum.¹⁵⁶

151 For discussion of the different uses of the term “statutory presumption” see Charles, Cromwell and Jobson, above n 132, at 130–131; and R Eggleston *Evidence, Proof and Probability* (2nd ed, Weidenfeld and Nicolson, London, 1983) at 106–109. See also D Mathieson (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [2.7]; and Bruce Robertson (ed) *Adams on Criminal Law* (online looseleaf ed, Brookers) at [ED1.08].

152 Commerce Act 1986, ss 42 and 90; and Financial Markets Conduct Act 2013, s 535. Section 42 of the Commerce Act concerns proceedings commenced against a supplier for resale price maintenance. If the following facts are established then it shall be presumed, in the absence of evidence to the contrary, that the supplier acted “on account of” one of the matters in s 37(3)(d) or (e):

- the supplier has refused to supply requested goods to another person;
- immediately before doing so the supplier had been supplying those goods to that person or a person carrying on a similar business; and
- during the six months prior to refusing to supply those goods the supplier became aware of one of the matters referred to in s 37(3)(d) or (3).

153 EM Morgan has listed seven reasons for the creation of a statutory presumption, including:

- to avoid a procedural impasse created by the impossibility of securing legally competent evidence of the presumed fact;
- to produce a result in accordance with the preponderance of probability;
- to require the party having peculiar means of access to the facts and evidence of the facts to make them known to the court; and
- to reach a result deemed socially desirable wherever fact A exists.

EM Morgan “How to Approach the Burden of Proof and Presumptions” (1953) 25 Rocky Mountain LR 34 at 43–44, cited in Charles, Cromwell and Jobson, above n 132, at 135–136.

154 When a statute says that a presumption will operate “unless the contrary is proved”, it places a burden of proof on the party who seeks to rebut the presumption: Robertson, above n 151, at [ED1.08].

155 Australian Law Reform Commission *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC R95, 2003) at [8.61].

156 This is because they place a legal burden on the defendant. Where it is intended for a presumption to be created, this should be clear on the face of the legislation: Attorney-General's Department “A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers” (September 2011) at [5.1].

Deemed liability provisions

- 8.41 Deemed liability provisions also have the effect of imposing a burden of proof on defendants. Deemed liability means that, if the enforcement agency establishes the liability of person A, the liability of person B is deemed also to have been established. The burden is on person B to exonerate him or herself (or itself) from liability. For instance, a company may be deemed liable where the liability of the directors is made out, or vice versa.¹⁵⁷
- 8.42 Again, deemed liability provisions require robust policy justification and a balancing of regulatory efficiency with fairness. This is even more important because deemed liability provisions reverse the burden of proof for the defendant's entire liability for the penalty, not just one element of the defendant's liability.

Penalty quantum

- 8.43 The final matter for discussion is who has the burden of proving contested facts relevant to penalty quantum. In the criminal sphere, if facts relevant to sentencing are disputed, the Sentencing Act 2002 provides that the prosecutor must prove the existence of disputed aggravating facts and must disprove any disputed mitigating facts raised by the defendant.¹⁵⁸ The burden of proving contested facts relevant to sentencing is therefore clearly on the prosecution.
- 8.44 The courts have essentially applied a criminal sentencing framework to pecuniary penalties: the court determines a starting figure and then takes mitigating and aggravating factors into account. But the question of who has the burden of proving or disproving the mitigating or aggravating factors in question does not appear to have been considered.
- 8.45 Arguments about penalty quantum may be particularly likely where courts are trying to determine the extent of financial damage or gain caused by the defendant's conduct. Both sides may put forward competing expert analysis of complex evidence – for example, the extent to which the defendant's conduct lessened competition in a market. That is likely to be contested, particularly if large sums are involved.
- 8.46 We suggest that policymakers consider whether to address these matters by imposing the burden of establishing disputed facts on the enforcement agency. That will depend on the particular regulatory regime. Such an approach may not be appropriate for penalty regimes involving large corporate entities and where a policy decision has been made to allow penalty quantum to be set as a percentage of company turnover, expressly to deal with situations where commercial gain cannot be readily ascertained.¹⁵⁹

157 See for example s 534 of the Financial Markets Conduct Act 2013, titled "Directors treated as having contravened in case of defective disclosure". If the court is satisfied that an entity named in s 534(1) has contravened a particular provision, then under s 534(3), every director of the entity "must be treated as also having contravened the provision". Such directors have a statutory defence to liability under s 501, but they carry the burden of establishing it.

158 The mitigating fact must not be wholly implausible or manifestly false, and the burden is on the defendant where the fact does not relate to the nature of the offence or the offender's part in the offence: Sentencing Act 2002, s 24(2)(c).

159 See for example the Commerce Act 1986 and the Court of Appeal's statements as to determining penalty quantum in such situations in *Telecom Corporation of New Zealand Ltd v Commerce Commission* [2012] NZCA 344 at [29].

GUIDELINE

G5 The burden of proving all the elements of a contravention that results in a pecuniary penalty should usually be on the enforcement agency bringing proceedings

A pecuniary penalty provision should only place the burden of proving a matter in issue on a defendant where doing so is reasonable and can be demonstrably justified. This might include where:

- the person bringing proceedings would face serious difficulty in proving the matter, and the defendant has peculiar knowledge of the relevant facts; or
- it would be extremely difficult or expensive to require the person bringing proceedings to provide proof, and that proof could be provided readily by the defendant; or
- a policy decision has been made that it is appropriate, in the particular circumstances, for the regulated community to be encouraged to comply with certain standards or take certain precautions, having regard to wider considerations of justice and fairness.

Where it is justifiable to impose a burden of proof on a defendant, this should generally be an evidential rather than legal burden. A legal burden should only be imposed on a defendant if it is clear that the desired regulatory outcome cannot be achieved by imposing only an evidential burden.

Pecuniary penalty provisions should be drafted to minimise any ambiguity as to:

- who has the burden of proving all matters in issue, including the elements of the breach, defences, and matters relating to penalty quantum; and
- whether a burden is an evidential or legal one.

Chapter 9

The penalty privilege

- 9.1 In our Issues Paper, we asked whether pecuniary penalty statutes should recognise a privilege against compelled self-exposure to a pecuniary penalty. In this Report, we refer to this privilege as the “penalty privilege”.
- 9.2 Before the Evidence Act 2006, the penalty privilege was recognised in New Zealand at common law. It 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 by the Court of Appeal as giving potential protection to defendants in pecuniary penalty cases.¹⁶⁰ As discussed in the Issues Paper, there is a strong argument that the Evidence Act 2006 abrogated the privilege, as it was not provided for in the new statute. At best, there is considerable lack of clarity as to whether it still exists.
- 9.3 None of the existing pecuniary penalty statutes provide for the privilege. However, the Commerce Act 1986 does provide some degree of protection against self-exposure to a pecuniary penalty. It states:¹⁶¹

106 Proceedings privileged

- (5) A statement made by a person in answer to a question put by or before the Commission shall not in criminal proceedings or in proceedings for pecuniary penalties [of this Act], be admissible against that person.
- 9.4 To that extent at least, the Act gives the same protection to those pursued for pecuniary penalties as it does to those pursued for criminal offences.¹⁶²
- 9.5 Other pecuniary penalty regimes deal with the question in variety of ways. Some are silent on the matter. Some state that penalty proceedings are “civil” proceedings to which the “usual” rules of evidence apply.¹⁶³ Some give statutory recognition to the privilege against self-incrimination but remain silent on the penalty privilege. For example, section 133 of the

160 *Port Nelson Ltd v Commerce Commission* [1994] 3 NZLR 435 (CA). The case involved a pecuniary penalty proceeding under s 80 of the Commerce Act 1986. The Court of Appeal recognised the existence of the privilege but found that it 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 (HCA).

161 See also Takeovers Act 1993, s 33C:

(1) A self-incriminating statement made orally by a person summoned under section 31N (whether or not the statement is recorded in writing) in the course of answering any question before, or providing any information or document to, the Panel, or a member, officer, or employee of the Panel,—

(a) ... is not admissible in—

(i) criminal proceedings against that person; or

(ii) proceedings under this Act, the Securities Act 1978, or the Securities Markets Act 1988 for a pecuniary penalty order against that person ...

162 In contrast, the Act removes the privilege against self-incrimination in relation to information provided under the Act, or on appearing before the Commerce Commission, but is silent on the penalty privilege in that respect. See s 106(4):

A person shall not be excused from complying with any requirement to furnish information, produce documents, or give evidence under this Act, or, on appearing before the Commission, from answering any question or producing any document, on the ground that to do so might tend to incriminate that person.

See also the Takeovers Act 1993, s 33B:

No person is excused from answering any question or providing any information or document under this Act on the ground that to do so would or might incriminate or tend to incriminate that person.

163 See for example the Takeovers Act 1993, s 43B; the Unsolicited Electronic Messages Act 2007, s 49; and the Financial Markets Conduct Act, s 509.

Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (relating to on-site inspections) states that a person is not required to answer a question if the answer would or could incriminate the person.

- 9.6 It should be noted that every pecuniary penalty regime introduced *before* the enactment of the Evidence Act 2006 was conceived in an environment where the penalty privilege existed at common law.¹⁶⁴ None of those regimes, except the Commerce Act, modified or excluded the application of that common law privilege, although there is no policy material indicating whether or not that was a conscious choice.

SUBMISSIONS

- 9.7 Submitters were in two camps on this question. Five favoured the reintroduction of the penalty privilege for pecuniary penalties.¹⁶⁵ In particular, Bell Gully noted that the privilege against self-incrimination is one of the key safeguards upon which the integrity of the criminal law depends. In Bell Gully's view, if a party could at some point in the future face quasi-criminal proceedings under a regulatory statute, he or she should be entitled to invoke the penalty privilege.
- 9.8 Six submitters did not support recognising a penalty privilege.¹⁶⁶ They voiced three concerns. First, they thought it would undermine the efficacy of pecuniary penalties as a regulatory tool. Secondly, a number noted that reintroduction of the privilege would impair the ability of private plaintiffs to pursue actions for compensation in those regimes where such actions can be taken alongside pecuniary penalty proceedings. Thirdly, some noted that the protection of the privilege was not warranted because of the lack of risk of conviction and imprisonment. We address these concerns below.

COMMISSION VIEW

- 9.9 The Law Commission recommends that individuals should have the benefit of the penalty privilege when faced with possible pecuniary penalty proceedings. The Commission recognises that some existing enforcement agencies may have concerns about this recommendation. However, we are persuaded that the basis is sound, both in law and principle, for this protection to apply.
- 9.10 The protection should not be absolute. There will be regimes where the privilege should be limited because of the greater public interest in the effective and efficient oversight of the statute. Our recommendations make it clear that, like the privilege against self-incrimination, individual statutes should be able to exclude the application of the penalty privilege either expressly or by necessary implication.¹⁶⁷ However, the nature of pecuniary penalties as a potentially grave State penalty clearly supports a presumption in favour of the penalty privilege.
- 9.11 In the criminal sphere, the rationales for the privilege against self-incrimination are:
- the threat of a significant penalty;

¹⁶⁴ Those regimes are the Dairy Industry Restructuring Act 2001; Hazardous Substances and New Organisms Act 1996; Overseas Investment Act 2005; Securities Act 1978; Securities Markets Act 1988; Takeovers Act 1993; Telecommunications Act 2001; and Telecommunications (Interception Capability and Security) Act 2013.

¹⁶⁵ The New Zealand Law Society, Bell Gully, Business New Zealand, Federated Farmers, and one individual.

¹⁶⁶ Ministry for Primary Industries, Financial Markets Authority, Donald Mathieson QC, Meredith Connell, the New Zealand Bar Association, and one individual.

¹⁶⁷ See Evidence Act 2006, s 63(3).

- the imbalance between the State and individual in penalty investigations and proceedings; and
 - concerns about the reliability of evidence obtained in those potentially coercive circumstances.
- 9.12 These same rationales may be applied to investigations and proceedings that can give rise to pecuniary penalties. The potential penalty can be very significant, indeed it can be substantially larger than many criminal monetary penalties. While pecuniary penalties cannot result in conviction or imprisonment, they can still result in stigma and reputational harm, as we explained in Chapter 4.
- 9.13 While some defendants to pecuniary penalty proceedings might be very large and well-resourced corporate actors, pecuniary penalties can be used against a wide range of more vulnerable people. Therefore the imbalance between the State and defendant might sometimes be just as acute in pecuniary penalty proceedings as it is in criminal proceedings.
- 9.14 To investigate potential statutory breaches punishable by pecuniary penalties, State enforcement bodies can use intrusive investigatory powers. Pecuniary penalty breaches can be investigated by officials in much the same way as criminal offences. It follows that the same concerns about coercion and the reliability of evidence obtained in those circumstances can be present.
- 9.15 At present, New Zealand is out of step with Australia on this issue. In *Rich v Australian Securities Investment Commission*,¹⁶⁸ the High Court of Australia confirmed that the common law privilege applies to pecuniary penalties there. In response to that decision, the Federal Parliament amended the Corporations Act 2001 (Cth) to abrogate the privilege in proceedings for disqualification orders, but retained it for pecuniary penalties. In its 2002 report on civil and administrative penalties, the Australian Law Reform Commission also recommended statutory expression of the penalty privilege, saying:¹⁶⁹
- It is apparent that some civil and administrative penalties carry consequences that are just as serious as traditional criminal punishments. ... [T]he 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.
- 9.16 A general penalty privilege is also recognised by section 14 of the United Kingdom's Civil Evidence Act 1968 (emphasis added):

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 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; and
 - (b) shall include a like right to refuse to answer any question or produce any document or thing if to do so would tend to expose the spouse or civil partner of that person to proceedings for any such criminal offence *or for the recovery of any such penalty*.

¹⁶⁸ *Rich v Australian Securities and Investment Commission* [2004] HCA 42, (2004) 209 ALR 271.

¹⁶⁹ Australian Law Reform Commission *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC R95, 2002) at [18.20]. The Regulatory Powers (Standard Provisions) Bill 2014 (Cth), currently before the Australian House of Representatives, does not refer to the privilege.

- (2) In so far as any existing enactment conferring (in whatever words) powers of inspection or investigation confers on a person (in whatever words) any right otherwise than in criminal proceedings to refuse to answer any question or give any evidence tending to incriminate that person, subsection (1) above shall apply to that right as it applies to the right described in that subsection; and every such existing enactment shall be construed accordingly.

- 9.17 The conclusions we have drawn in Chapter 6 of this Report about the manner in which pecuniary penalties statutes need to be designed with the New Zealand Bill of Rights Act 1990 in mind reinforces the need for the privilege. Provision for the privilege (with the potential for it to be limited where justifiable) is preferable because it minimises the risk that the rights in that Act will be breached. The penalty privilege creates perhaps the most fertile ground for rights-based challenges to pecuniary penalties, which may also be strengthened by the Australian case law. An argument could be made under section 27(1) of the Act that a defendant in quasi-criminal proceedings such as those for a pecuniary penalty is entitled to the protection of the privilege. The fact that the Evidence Act 2006 never expressly abrogated the privilege may further increase the likelihood of a challenge.¹⁷⁰
- 9.18 There may also be grounds for challenge where pecuniary penalty regimes are supported by investigatory powers. Where such powers exist, section 21 of the New Zealand Bill of Rights Act, which guarantees the right to be free from unreasonable search, will be relevant. Section 6 of that Act requires that, where possible, legislation should be interpreted consistently with the rights contained in it. Arguably, the privilege needs to be afforded to those subject to the exercise of those powers to ensure that the search is considered to be reasonable under section 21. This is particularly so where there is a criminal offence for failure to comply with the exercise of the search power.¹⁷¹
- 9.19 Finally, we note that, on its face, this recommendation departs from the Law Commission's conclusions in its 1996 review of the privilege. However, there is no evidence that the removal of the privilege by the Evidence Act 2006 was undertaken in the light of specific consideration of pecuniary penalties. In a 1996 discussion paper on the privilege against self-incrimination, the Law Commission favoured retaining the broad penalty privilege for the reasons set out above.¹⁷² However, submitters argued against the codification of the privilege on two grounds: first, that it is difficult to determine whether some existing legislative sanctions amount to a "penalty" in law; and secondly, that the existence of the privilege is difficult to justify when no protection exists for other serious civil orders, such as loss of custody of a child, injunctive orders or substantial damages. Based on these submissions, the Commission did not recommend the inclusion of the penalty privilege in the Evidence Code.
- 9.20 In contrast, the question in our review is whether a penalty privilege should be in place specifically and only for those investigated and pursued in court for a pecuniary penalty. We are not concerned with the wider, pre-existing common law penalty privilege.
- 9.21 We think that, on this question, there are strong arguments that counter the concerns raised by submitters to the 1996 review and that those arguments were not given adequate attention in that review. This is not surprising given that there were very few pecuniary penalty provisions on the statute book at that time, and the statutes that did provide for them in 1996 dealt specifically themselves with the question of privilege.¹⁷³

170 See in particular the discussion on the impact of ss 10 and 12 of the Evidence Act 2006 in Law Commission *Civil Pecuniary Penalties* (NZLC IP33, 2012) [Issues Paper] at [6.57]–[6.67].

171 See for example s 103 of the Commerce Act 1986.

172 Law Commission *The Privilege Against Self-Incrimination* (NZLC PP25, 1996).

173 Those being the Commerce Act 1986 and Takeovers Act 1993.

- 9.22 We have no difficulty in determining that pecuniary penalties are penalties in law. In addition, they clearly differ from the examples used by submitters to the 1996 review, which have as their purpose resolving issues around family separation, and the protection from or reparation of harm. It is our strong view that the nature of pecuniary penalties, when combined with the justifications for the privilege against self-incrimination, mean that the privilege should be afforded to those faced by them. In reaching this decision, we do not take issue with the view reached by the Commission on the penalty privilege in its original review of the law of evidence. Rather, that review was undertaken against the background of a different legislative environment.

Impact of the privilege on regulatory efficiency and effectiveness

- 9.23 Concerns about the general impact of the privilege on regulatory regimes are illustrated by the Financial Markets Authority's (FMA) observation in its submission that its:

... application in the context of financial markets legislation would create practical difficulties for FMA in carrying out its functions as they relate to civil penalty enforcement and other civil remedies. We do not think that there is, in terms of their public policy objectives, so sharp a distinction between civil penalties and other civil remedies that FMA may pursue. Ultimately the full range of actions is designed to provide incentives to encourage compliance – or to deter non-compliance in a fair and proportionate manner.

- 9.24 A key finding of this Report is that, while public policy objectives are relevant to the way a penalty is designed, procedural safeguards must also reflect the true nature and impact of that penalty on the full range of potential defendants.
- 9.25 We have signalled clearly that regulatory efficiency and effectiveness should be a guiding principle where the design of pecuniary penalties is concerned. We have also suggested that regimes will be best protected from challenge under the New Zealand Bill of Rights Act if section 5 of that Act is used as the benchmark for when procedural safeguards can justifiably be limited. Clearly, on some occasions the public policy objectives referred to by the FMA will be such that they demonstrably justify the reasonable limitation of the penalty privilege. The ability to limit the privilege in this manner, we consider, addresses concerns that the privilege will impede regulatory efficiency and effectiveness. We think there will be adequate justification to limit the application of the penalty privilege in some existing pecuniary penalty regimes, and we would support its limitation where that justification exists.

Limiting or removing the privilege

- 9.26 Circumstances that may justify the modification or removal of the privilege are:
- where the ability of the enforcement body to access information about the regulated parties is essential to the overall effectiveness of the regime, and where the existence of the privilege would make it impossible for an enforcement agency to effectively monitor compliance;
 - where the policy of the statute is directed at protecting the public by regulating a limited group who voluntarily engage in a specified activity;
 - where a person may reasonably expect some compromise of their rights, such as where they are engaged in a highly regulated activity (for example, international travel), or where the information is business-related rather than personal; and
 - where the illegal conduct concerned is, by its nature, particularly hard to identify and establish (for example, because knowledge of a breach is likely to be peculiarly within the

hands of the offender, or because of the particular complexity of the conduct involved), such that the existence of the privilege would make it particularly difficult to uncover.

- 9.27 As set out above, the Commerce Act 1986 provides that the privilege against self-incrimination is not available to those investigated under that Act. In its place, section 106(5) provides for immunity against the use of statements made in answer to questions put by or before the Commerce Commission in both criminal and pecuniary penalty proceedings.
- 9.28 Where a case can be made to limit the privilege, a question arises as to whether the approach taken in the Commerce Act should be repeated. An alternative formulation might be that individuals cannot refuse to answer questions or provide information to the enforcement agency, but that “specific information” provided in response to those questions or requests for information cannot be used against them in subsequent pecuniary penalty proceedings. This approach would be consistent with the Evidence Act.
- 9.29 Ultimately, however, the approach in each statute must be justified on a case-by-case basis. Any limitation of the penalty privilege will need to be context-specific and, we recommend, done in a manner that adopts the approach in section 5 of the New Zealand Bill of Rights Act.

Impact of the privilege on regimes with associated civil orders

- 9.30 Some submitters raised a practical concern that under certain regimes the privilege will impair the ability of enforcement bodies and private plaintiffs to pursue actions for compensation and other orders. Under a number of statutes, a finding of liability in proceedings taken by the enforcement body can form the basis both for the imposition of a pecuniary penalty in favour of the Crown, and for compensation orders in favour of those who have suffered loss. Nine existing statutes provide for this, in a variety of ways. One example is section 124D of the Hazardous Substances and New Organisms Act 1996, which provides:¹⁷⁴

Other orders instead of or in addition to pecuniary penalty order

- (1) At the conclusion of proceedings for an order for the payment of a pecuniary penalty under section 124B, the court may, instead of or in addition to making the order, make—
 - (a) an order that the person mitigate or remedy any adverse effects on people or the environment—
 - (i) caused by or on behalf of the person; or
 - (ii) relating to any land that the person owns or occupies; or
 - (b) an order to pay the costs of mitigating or remedying the adverse effects specified in paragraph (a).
 - (2) At the conclusion of proceedings for an order for the payment of a pecuniary penalty under section 124B, the court may, instead of or in addition to making the order, make an order for the destruction of the new organism involved in the breach.
 - (3) To avoid doubt, the court may make an order under either or both of subsections (1) and (2) against the same person in respect of the same breach.
- 9.31 This aspect of the design of pecuniary penalty statutes provides considerable benefits. For example, victims of a finance company collapse can rely on the Financial Markets Authority’s liability proceedings to obtain compensation. This enables savings for victims, enforcement

¹⁷⁴ See also Financial Markets Conduct Act 2013, ss 487, 489 and 498; Takeovers Act 1993, ss 33L, 33M and 33N; Unsolicited Electronic Messages Act 2007, s 19; Overseas Investment Act 2005, s 48; Commerce Act 1986, ss 80, 82 and 82A; Financial Advisers Act 2008, ss 137K and 137L (those provisions are replicated in the Financial Service Providers (Registration and Dispute Resolution) Act 2008); and Securities Trustees and Statutory Supervisors Act 2011, ss 41 and 42.

bodies and the court system. It also preserves defendants' funds for meeting compensation claims rather than defending further litigation.

- 9.32 Difficulty arises because any protection afforded by a penalty privilege, in the investigation and pursuit of pecuniary penalty proceedings, might inhibit findings of liability and so impede the award of compensation orders under those particular provisions. Some of those consulted emphasised their concerns about this.
- 9.33 In addressing this concern, it is necessary to consider the scope of the proposed privilege.

Scope of the penalty privilege

- 9.34 We propose that the penalty privilege should have the same scope as the privilege against self-incrimination. This makes sense from a principled point of view if the rationale for both forms of the privilege is the same. It is also the most straightforward approach. Varying the scope of the two privileges would pose practical difficulties for agencies administering Acts that provide for both criminal offences and pecuniary penalties for the same conduct.
- 9.35 The privilege against self-incrimination is provided for by section 60 of the Evidence Act:
- (1) This section applies if—
 - (a) a person is (apart from this section) required to provide specific information—
 - (i) in the course of a proceeding; or
 - (ii) by a person exercising a statutory power or duty; or
 - (iii) by a Police officer or other person holding a public office in the course of an investigation into a criminal offence or possible criminal offence; and
 - (b) the information would, if so provided, be likely to incriminate the person under New Zealand law for an offence punishable by a fine or imprisonment.
 - (2) The person—
 - (a) has a privilege in respect of the information and cannot be required to provide it; and
 - (b) cannot be prosecuted or penalised for refusing or failing to provide the information, whether or not the person claimed the privilege when the person refused or failed to provide the information.
 - (3) Subsection (2) has effect—
 - (a) unless an enactment removes the privilege against self-incrimination either expressly or by necessary implication; and
 - (b) to the extent that an enactment does not expressly or by necessary implication remove the privilege against self-incrimination.
 - (4) Subsection (2) does not enable a claim of privilege to be made—
 - (a) on behalf of a body corporate; or
 - (b) on behalf of any person other than the person required to provide the information (except by a legal adviser on behalf of a client who is so required); or
 - (c) by a defendant in a criminal proceeding when giving evidence about the matter for which the defendant is being tried.
 - (5) This section is subject to section 63.

9.36 Three points should be made. First, the privilege against self-incrimination only applies to “specific information”. “Information” is defined in the section 51(3) of Evidence Act as:

... a statement of fact or opinion given, or to be given,—

- (a) orally; or
- (b) in a document that is prepared or created—
 - (i) after and in response to a requirement to which any of those sections applies; but
 - (ii) not for the principal purpose of avoiding criminal prosecution under New Zealand law.

9.37 The privilege against self-incrimination does not, therefore, protect pre-existing documents. Nor does it apply to “things”.¹⁷⁵ Use of the term “specific” in section 60 is intended to make it clear that the privilege cannot be used as the basis for blanket refusals to provide information. It can only be claimed in relation to specifically identified information.

9.38 Secondly, the privilege relates only to *compelled* self-exposure. Use of the words “in response to a requirement” within the definition of “information” connotes the requirement of compulsion.

9.39 Thirdly, the privilege does not extend to bodies corporate. One of the most compelling reasons for this is that bodies corporate, as distinct from their officers, cannot be pressured into making unreliable statements, nor are they affected by abuses of power of a direct physical or psychological nature.¹⁷⁶

9.40 The result is that the protection afforded by the privilege against self-incrimination, by virtue of the Evidence Act, is relatively narrow. It is intentionally narrower than under the pre-existing common law.¹⁷⁷

9.41 Concern about the impact of the proposed penalty privilege on pecuniary penalty statutes with associated compensatory orders must be seen in this light. It will only impede access to statutory compensation orders where:

- the privilege itself directly results in an unsuccessful civil liability or pecuniary penalty proceeding; or
- where an enforcement body chooses not to take proceedings in a given case because the privilege has prevented it from obtaining some evidence.

In other words, it would only impact where the success of the proceedings hinged on having access to evidence that could only be obtained through compelled disclosure of “specific information” by the individual defendant.

9.42 The extent to which this will be materially problematic depends on the context of the regime and conduct it targets. For example, we understand that in its investigations into unsolicited electronic messages, the Department of Internal Affairs’ anti-spam unit relies most heavily on

175 This reflects the Law Commission’s view in its 1996 Preliminary Paper that “real evidence” should not be protected because of its comparative reliability, the absence of a communicative aspect coming from the person supplying the evidence and, pragmatically, the importance of such evidence as a means of detecting offenders: Law Commission *The Privilege Against Self-Incrimination*, above n 172, at [199]–[202]. In *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [47], the Court said of the privilege against self-incrimination:

The privilege is now dealt with by s 60 of the Evidence Act 2006. The definition of “information” in s 51(3) restricts the privilege to a right not to provide information that is in the form of an oral or documentary “statement”. A refusal to produce real evidence emanating from a person in the form of a urine sample does not engage the privilege.

176 Law Commission *The Privilege Against Self-Incrimination*, above n 172, at 71.

177 The Law Commission has noted that in New Zealand, the privilege had expanded (by justifying a refusal to provide an object or document that existed before the demand for the information was made) beyond its original historical origins as a reaction to the inquisitorial oath: see Law Commission *Evidence: Reform of the Law* (NZLC R55, 1999) at [279]. See also at [282] for discussion about the removal of the privilege from bodies corporate.

- evidence such as pre-existing records of email traffic to establish whether a breach has occurred, rather than compelled self-disclosure.
- 9.43 However, where the regime or conduct at hand is such that investigations and access to statutory compensatory orders would be materially impeded by the privilege, this will be a factor to be taken into account when deciding whether the privilege should be limited.
- 9.44 Other matters further reduce the concern about the impact the privilege might have on pecuniary penalty/compensatory regimes. First, wherever a pecuniary penalty statute contains criminal offences for the same or similar conduct, an enforcement body's investigation would in any event be inhibited by the privilege against self-incrimination. For example, all breaches of the Anti-Money Laundering and Countering the Financing of Terrorism Act 2009 can be punished by a pecuniary penalty or, if done knowingly or recklessly, by a criminal offence. Any investigation under that Act could potentially lead to prosecution, and so an individual could rely on the privilege against self-incrimination. Application of the penalty privilege in these circumstances would not place any greater impediment on the enforcement body at the investigatory stage.
- 9.45 Secondly, victims will still have available to them the usual avenue of taking their own proceedings for compensation. This reflects the position with the award of compensatory orders in relation to criminal offending. It is true that criminal courts can order reparation under section 32 of the Sentencing Act 2002. Reparation 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.¹⁷⁸ However, it can only be ordered after a finding of criminal guilt, meaning that the defendant will have had the benefit of the privilege against self-incrimination. Whether or not guilt is established, the victim still has the option of seeking compensation through the civil courts.
- 9.46 In short, we do not view the concern about the practical impediment to obtaining compensation orders as a basis for defeating the point of principle that the penalty privilege should be available to those facing pecuniary penalties. However, it might be a factor that favours the limitation of the privilege in certain statutes.

Impact of the privilege on court procedure

- 9.47 If the penalty privilege is to apply to pecuniary penalty proceedings, a question arises as to what, if any, impact it should have on court procedure, both at the pre-trial stage (because of the information that is required to be disclosed), and at trial (if a defendant is required to take the stand and give evidence).

Pre-trial

- 9.48 The privilege has had an impact on the manner in which pecuniary proceedings are run in Australia. There, defendants are not generally required to file a detailed defence, other than indicating whether allegations in the statement of claim are admitted, not admitted or denied. However, orders may be made requiring defendants to identify any positive defence or statutory ground of dispensation to be relied upon. Courts have also inhibited enforcement bodies' ability to counteract the limits on defence disclosure, by taking a narrow approach to when enforcement bodies can adduce additional evidence after their case is closed. In *Rich v Australian Securities Investment Commission*,¹⁷⁹ the High Court of Australia noted that the privilege has its origins in the rules of equity relating to discovery. Equity's principle was that

¹⁷⁸ *R v O'Rourke* [1990] 1 NZLR 155 (CA) at 158.

¹⁷⁹ *Rich v Australian Securities Investment Commission*, above n 168.

an order for discovery or for the administration of interrogatories in favour of the prosecutor, whether the prosecutor was the Crown, a common informer or some other person, should not be made where the proceeding was of such nature that it might result in a penalty or forfeiture.¹⁸⁰

- 9.49 The objective of the New Zealand High Court Rules is to “secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application”.¹⁸¹ The Rules are designed for the determination of civil proceedings. The procedure for criminal cases in the High Court is dictated by the Criminal Procedure Act 2012 and Criminal Procedure Rules 2012.
- 9.50 Some High Court rules demand that both parties to proceedings must disclose full information, including information that is adverse to their case. Examples are:
- Rule 5.48(2), relating to statements of defence, states that denials of allegations of fact in the statement of claim must not be evasive. When a matter is alleged with circumstances, it is not sufficient to deny it as alleged with those circumstances. In all cases, “a fair and substantial answer must be given”.
 - Rule 8.7(b), relating to standard discovery, requires each party to disclose the documents that are or have been in that party’s control, and that are “documents that adversely affect that party’s own case”.
 - Rule 8.39(2), relating to answers to interrogatories, states that it is only permissible to object to answering an interrogatory on one or more of the following grounds:¹⁸²
 - (a) that the interrogatory does not relate to a matter in question between the parties involved in the interrogatories:
 - (b) that the interrogatory is vexatious or oppressive:
 - (c) that the information sought is privileged:
 - (d) that the sole object of the interrogatory is to ascertain the names of witnesses.
- 9.51 On their face, it is possible that each of these rules may impinge on the proposed penalty privilege for pecuniary penalty hearings. However, the High Court Rules may already provide the court with adequate flexibility to vary procedure in pecuniary penalty proceedings, where it is required to give effect to the privilege. For instance, rules 8.8 and 8.9 provide for tailored discovery, which “must be ordered when the interests of justice require an order involving more or less discovery than standard discovery would involve”.¹⁸³ Under rule 8.36, a judge may order that answers to interrogatories under rule 8.34 are not required, or need only be given to specified interrogatories or classes of interrogatories, or to specified matters that are in question in the proceeding.

180 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 172, at [177].

181 High Court Rules, r 1.2.

182 Rule 8.40.

183 However, under r 8.9:

... it is to be presumed, unless the Judge is satisfied to the contrary, that the interests of justice require tailored discovery in proceedings—

- (a) where the costs of standard discovery would be disproportionately high in comparison with the matters at issue in the proceeding; or
- (b) that are on the commercial list; or
- (c) that involve 1 or more allegations of fraud or dishonesty; or
- (d) in which the total of the sums in issue exceeds \$2,500,000; or
- (e) in which the total value of any assets in issue exceeds \$2,500,000; or
- (f) in which the parties agree that there should be tailored discovery.

These standard requirements do not expressly touch on matters of fairness or privilege, although it might be inferred that this is the reason for the reference to “allegations of fraud or dishonesty”. Otherwise, tailored discovery appears to be directed at cost and efficiency concerns.

9.52 Most notably, rule 1.4(4) provides:

If in any civil proceedings any question arises as to the application of any provision of these rules, the court may, either on the application of a party or on its own initiative, determine the question and give any directions it thinks just.

9.53 Our impression is that judges are alert to the punitive nature of pecuniary penalty proceedings and do vary procedures where necessary. On balance we consider that rule 1.4(4), in particular, may provide judges with adequate flexibility to give due recognition to the penalty privilege. However, we note the growing number of existing and proposed forms of coercive or punitive orders that are imposed through the civil courts. Questions of privilege and fairness arise equally in relation to those orders. If such orders continue to be introduced, we suggest that there may be a case for the Rules Committee to consider whether more tailored processes and rules are required.

At trial

9.54 Under section 73(1) of the Evidence Act, a defendant in a criminal proceeding cannot be compelled to be a witness in that proceeding.¹⁸⁴ Once giving evidence, a criminal defendant cannot claim any protection from the privilege against self-incrimination.¹⁸⁵ In essence, he or she waives the privilege by choosing to give evidence. However, this lack of protection is compensated for by the defendant's non-compellability.

9.55 Defendants in civil proceedings can be compelled to give evidence. If they are summoned to do so, such a defendant may be able to refuse to answer a question on the grounds of the privilege against self-incrimination, since section 62 of the Evidence Act provides:

62 Claiming privilege against self-incrimination in court proceedings

- (1) If in a court proceeding it appears to the Judge that a party or witness may have grounds to claim a privilege against self-incrimination in respect of specific information required to be provided by that person, the Judge must satisfy himself or herself that the person is aware of the privilege and its effect.
- (2) A person who claims a privilege against self-incrimination in a court proceeding must offer sufficient evidence to enable the Judge to assess whether self-incrimination is reasonably likely if the person provides the required information.

9.56 At present, defendants have no such protections when they are at risk of exposing themselves to a pecuniary penalty. In those circumstances, they may be both compelled to give evidence and required to disclose information that exposes them to a pecuniary penalty.

9.57 In Australia, the Evidence Act 1995 (Cth) deals with this matter by providing:¹⁸⁶

128 Privilege in respect of self-incrimination in other proceedings

- (1) This section applies if a witness objects to giving particular evidence, or evidence on a particular matter, on the ground that the evidence may tend to prove that the witness:
 - (a) has committed an offence against or arising under an Australian law or a law of a foreign country; or

184 See also s 25(d) of the New Zealand Bill of Rights Act 1990, which affirms the right of a person charged with an offence "not to be compelled to be a witness or to confess guilt".

185 Section 60(4)(c) provides that if a defendant in a criminal proceeding chooses to give oral evidence in his or her defence, he or she is not able to claim the privilege while giving that evidence.

186 See also s 128A in relation to privilege in respect of self-incrimination where the court makes a "disclosure order" ("an order made by a federal court or an ACT court in a civil proceeding requiring a person to disclose information, as part of, or in connection with a freezing or search order, but [not including] an order made by a court under the Proceeds of Crime Act 2002").

- (b) is liable to a civil penalty.
- (2) The court must determine whether or not there are reasonable grounds for the objection.
- ...
- (4) The court may require the witness to give the evidence if the court is satisfied that:
 - (a) the evidence does not tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country; and
 - (b) the interests of justice require that the witness give the evidence. ...

As in New Zealand, bodies corporate cannot claim this privilege.

- 9.58 In our view, defendants to pecuniary penalty proceedings should not be compelled to expose themselves to a penalty when they give evidence at trial. To allow this would clearly defeat the protection afforded by the privilege.
- 9.59 This position should not be achieved by making defendants non-compellable witnesses in pecuniary penalty hearings. Instead, we propose that such defendants should be able to refuse to answer questions that might expose them to a pecuniary penalty. The protection afforded by this should be the same in scope as that proposed for the penalty privilege. As such, it should not allow blanket refusals to answer. As under section 62(2) of the Evidence Act, and section 128 of the Australian Evidence Act, the judge hearing the proceedings should determine whether the claim of privilege is valid.

How should the penalty privilege be provided for?

- 9.60 There are two options for providing for the penalty privilege for pecuniary penalties. Each pecuniary penalty statute could be amended to allow specifically for it. Alternatively, the Evidence Act could be amended. We prefer the latter approach. Inclusion of the privilege in the Evidence Act would have the benefit of setting a clear standard for pecuniary penalties that is distinct from any of the regimes in which they are used. It would make the default rule clear, irrespective of regimes that take a modified approach. It would also mean any proposal to depart from it would have to be clearly signalled, and so more likely to be the subject of appropriate debate. As in section 60(3) of the Evidence Act, the new provision should state that the penalty privilege has effect:
 - (a) unless an enactment removes the privilege, either expressly or by necessary implication; and
 - (b) to the extent that an enactment does not expressly, or by necessary implication, remove the privilege.
- 9.61 Work towards amendment of the Evidence Act to provide for the penalty privilege must be done alongside work to identify the existing regimes where limitation of the privilege will be justifiable. Those Acts will require amendment to give effect to any such limitation.

RECOMMENDATIONS

- R5 The Evidence Act 2006 should be amended:
- (a) To provide for a privilege against self-exposure to a pecuniary penalty. The scope of the privilege should be the same as the scope of the privilege against self-incrimination.
 - (b) To make it clear that an enactment can remove the privilege either expressly or by necessary implication.
 - (c) To provide that defendants in pecuniary penalty proceedings can, when giving evidence in court, refuse to answer questions on the grounds of the privilege against self-exposure to a pecuniary penalty.
- R6 If the limitation or removal of the penalty privilege can be justified under any of the existing pecuniary penalty statutes, those statutes should be amended to give effect to that limitation at the same time that the Evidence Act 2006 is amended.

GUIDELINE

G6 People investigated or proceeded against for a pecuniary penalty should have the benefit of a privilege against compelled self-exposure to a pecuniary penalty

A statute may limit or remove the privilege against self-exposure to a pecuniary penalty if the limit is reasonable and can be demonstrably justified. Individual rights will be best protected by the adoption of the approach in section 5 of the New Zealand Bill of Rights Act 1990.

Where a case can be made to limit the privilege, the form of the limitation should be context specific. It should balance appropriately the particular needs of the regime at hand with fairness to the individual.

Chapter 10

Double jeopardy

- 10.1 In our Issues Paper, we asked nine questions about whether certain legislative provisions should be included in pecuniary penalty regimes to deal with the issue of double jeopardy.¹⁸⁷ Our questions were based on the variety of provisions that exist in the current pecuniary penalty regimes, and essentially reflect the options that exist.
- 10.2 There are two aspects to the double jeopardy rule. First is the idea that a person should not be subjected to more than one penalty for the same conduct that breaches the law. Second is the principle against requiring a person to defend themselves against simultaneous or numerous penalty actions relating to the same conduct. The justifications for the rule are as follows:
- It protects against the harassment of an accused by repeated prosecution for the same matter. Being acquitted can come as a great relief to the defendant 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.
 - It promotes confidence in the administration of justice because it brings finality.
 - Allowing repeated trials necessarily increases the likelihood of wrongful penalisation.
 - Allowing repeated trials might act as a disincentive to the Crown carrying out a thorough and efficient investigation the first time around.
- 10.3 In the criminal context, the rule is protected by section 26(2) of the New Zealand Bill of Rights Act 1990 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.”
- 10.4 Courts have found that section 26(2) only applies to criminal proceedings relating to an offence against the law.¹⁸⁸ However, it is also accepted that this does not preclude the underlying principles being invoked in respect of conventional civil proceedings.¹⁸⁹ As Thomas J put it, double jeopardy and double punishment remain an affront to common notions of fairness.¹⁹⁰
- 10.5 In the Law Commission’s view, the proposition that in the light of their punitive, publicly-imposed nature,¹⁹¹ pecuniary penalties raise double jeopardy concerns, is uncontroversial. Indeed, the High Court has considered the potential for double punishment when setting pecuniary penalties under the Commerce Act 1986.¹⁹² And, as indicated above, some pecuniary

187 Law Commission *Civil Pecuniary Penalties* (NZLC IP33, 2012) [Issues Paper] at [6.87]–[6.129].

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

189 At 57.

190 At 57–58.

191 See *R v Wigglesworth* (1987) 2 SCR 541 at 560.

192 *Commerce Commission v Ophthalmological Society of New Zealand Inc* [2004] 3 NZLR 689 (HC) at [44]:

I am conscious that there be no element of double punishment arising out of penalties being imposed upon the society and either of the two individual defendants. In fixing a penalty I take that into account, bearing in mind that I am clear that individual penalties are required but of a significantly lesser degree than that on the society.

See also *Commerce Commission v Wrightson NMA Ltd* (1994) 6 TCLR 279 (HC) at 285; and *Commerce Commission v Accent Footwear Ltd* (1993) 5 TCLR 448 (HC) 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 CRI-2007-004-4009, 6 December 2007.

penalty statutes contain a mix of provisions directed at the issue. The range of provisions include:

- the mandatory stay of pecuniary penalty proceedings where criminal proceedings have been commenced;
- a bar on the imposition of a criminal penalty where a pecuniary penalty has been imposed;
- a bar on the imposition of a pecuniary penalty where a criminal penalty has been imposed; and
- a bar on two or more pecuniary penalties for the same conduct.

10.6 However, a range of approaches are taken across the statutes. There may be reasons for this that relate to the nature of the various statutory regimes, but those reasons are not abundantly clear.

10.7 The Commission has concluded that, in principle, a person should not be punished by the imposition of both a pecuniary penalty and a criminal penalty in relation to the “same conduct”,¹⁹³ or by more than one pecuniary penalty.

10.8 We have also considered whether a statutory bar should be placed on an enforcement agency taking both criminal and pecuniary penalty proceedings against a defendant in relation to the same conduct, even where the first set of proceedings has been unsuccessful. In pure terms, the double jeopardy principle is best upheld by such a bar. In general then, we consider that individuals should not be at risk of being pursued through the courts twice for the purpose of penalising the same conduct. A number of statutes already place a bar on this.¹⁹⁴

10.9 Both of these conclusions are best responded to by a statutory bar. An explicit statement on the matter in a statute will be the clearest and most certain approach, particularly for defendants. However, we accept that there may be rare cases where policymakers may wish to leave the courts to determine the question of whether a second penalty can be imposed or second proceedings commenced. For this reason, we have categorised our proposals as Guidelines rather than Recommendations.¹⁹⁵

SUBMISSIONS

10.10 Some submitters suggested a blanket ban on the possibility of double punishment by the State. Accordingly, a number thought that there should never be a pecuniary penalty where a criminal penalty has been imposed for the same conduct, and vice versa.¹⁹⁶

193 We discuss the concept of “same conduct” below.

194 For example, the Anti-Money Laundering and Countering Financing of Terrorism Act 2009, s 73 provides for this as follows [note that the Act refers to “pecuniary penalties” as “civil penalties”]:

(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.

(3) After the criminal proceedings referred to in subsection (2) have been completed or withdrawn, a person may apply to have the stay lifted on the civil penalty proceedings referred to in that subsection.

See also Biosecurity Act 1993, s 154L; Hazardous Substances and New Organisms Act 1996, s 124F.

195 See the explanation of our distinction between Recommendations and Guidelines in ch 1.

196 Bell Gully, Donald Mathieson QC, one individual, New Zealand Law Society, Federated Farmers, New Zealand Bar Association, Institute of Directors and Dr Marina Nehme.

- 10.11 However, other submitters voiced three concerns about this proposition.¹⁹⁷ Some would prefer no statutory bar, and that the risk of abuse or oppressiveness be dealt with by relying on the court's existing power to stay or strike out the second proceedings. Adopting that approach involves accepting that there may be occasions where a second penalty (or second proceedings) would not be abusive or oppressive, or that other circumstances may outweigh the risk of abuse or oppression.
- 10.12 The first concern was that there might be circumstances where an enforcement body should be able to seek a criminal penalty after a pecuniary penalty has been imposed. For example, it may be argued that if there is a level of moral culpability the pecuniary penalty proceedings have not addressed, the regulator should have an ability to bring subsequent criminal proceedings, for example, to seek the additional penalty/protective measure of imprisonment. The Parliamentary Counsel Office (Commercial Team) (PCO) suggested that this argument should only apply if there was a clear distinction between the elements of the civil and criminal liability provisions (such as the need for knowledge/intention for criminal liability). It was also suggested that pecuniary penalty statutes could provide that only imprisonment (and not a fine) could follow a pecuniary penalty, and that the pecuniary penalty could be taken into account by a court in subsequent sentencing.
- 10.13 Secondly, concern was expressed that a rule requiring an enforcement body to make a decision at the outset as to which penalty to seek might have a negative impact on the way it exercises its prosecutorial discretion. PCO was concerned that if such a rule existed, regulators would be unlikely to bring pecuniary penalty proceedings first, or at all, if they have the option of a criminal prosecution. This appears to have been the experience in Australia in the early days of the Australian Securities and Investment Commission (ASIC). A 1999 study found an agency preference in ASIC for criminal prosecution wherever available.¹⁹⁸ The study identified the reasons for this preference as ASIC's enforcement policy and culture; resource constraints; its relationship with the Director of Public Prosecutions and the courts; and early uncertainty as to how the pecuniary penalty regime would be interpreted. Also, in instances where ASIC chose civil over criminal proceedings, it had been criticised in the media for being soft on white collar crime. A subsequent study found that while ASIC used pecuniary penalties ("civil penalties" in Australia) very rarely between 1993 and 1999, their use increased between 2000 and 2009.¹⁹⁹ This was attributed, in part, to the 1999 reform of the Corporations Act 2001 (Cth), which removed a bar on criminal proceedings subsequent to civil penalty proceedings (even if a civil penalty has been imposed).
- 10.14 Thirdly, there was concern that a statutory bar on double punishment by criminal offences and pecuniary penalties would delay compensation and other civil orders. The suggestion was that since regulators are likely to take criminal proceedings first, civil liability proceedings will have to be put on hold. This concern is particularly relevant to regimes that provide for the regulator to obtain a "declaration of contravention" through civil proceedings, on the basis of which a range of orders can be made including pecuniary penalties, management bans, injunctions and compensation orders. This model removes the need for individuals to pursue individual proceedings on liability. As noted elsewhere in this Report, the "declaration of contravention"

197 Commerce Commission, Financial Markets Authority, Ministry for Primary Industries, Ministry of Business, Innovation and Employment, Meredith Connell, and Parliamentary Counsel Office (Commercial Team).

198 George Gilligan, Helen Bird and Ian Ramsay "Civil Penalties and the Enforcement of Directors' Duties" [1999] 22 UNSWLJ 417.

199 Michelle Welsh "The regulatory dilemma: The choice between overlapping criminal sanctions and civil penalties for contraventions of the directors' duty provisions" (2009) 27 CSLJ 370; and Michelle Welsh "Civil penalties and responsive regulation: the gap between theory and practice" (2009) 33 Melb Uni LR 908.

model has clear benefits and can enable significant public and private cost savings.²⁰⁰ The model has considerable support amongst submitters.

COMMISSION VIEW

- 10.15 The rule against double punishment bars the imposition of more than one penalty for the same conduct and so protects citizens against the oppressive use of State power. The principle makes no distinction based on the gravity of the penalty. That is to say, the fact that pecuniary penalties are not accompanied by a criminal conviction is irrelevant. It is enough that they are punitive in nature. Our approach to double jeopardy starts from the premise that pecuniary penalties involve the imposition, through the court process, of a punishment that is sought on behalf of the State. In this regard, pecuniary penalties are substantially similar to criminal penalties.
- 10.16 In our view, it follows from this that, in principle, a bar should be placed on double punishment by the imposition of a pecuniary penalty and criminal penalty in relation to the same conduct. This view is supported by the approach of the majority of the Court of Appeal in *Daniels v Thompson*, which applied the rule against double jeopardy to bar an award of exemplary damages where punishment has already been exacted under the criminal law.²⁰¹ The nature of an award of exemplary damages, being to punish and deter, was central to the Court's decision.²⁰²
- 10.17 The nature and function of pecuniary penalties also distinguishes them from other instances where the double jeopardy principle has been held *not* to apply. They differ, for example, from proceedings before disciplinary bodies, which both the Court of Appeal and Supreme Court have stated do not give rise to double jeopardy concerns. For example, in *Daniels v Thompson*, the majority of the Court of Appeal observed that:²⁰³
- The powers of disciplinary bodies are prime examples.... Breach of a code of conduct can properly bring consequences additional to those imposed by the criminal Court. It has long been held that the striking off of a solicitor convicted of a criminal offence was not an additional punishment for the offence.... Such cases as these do not involve the imposition through the Court process of a second punishment. These are examples of a different principle, that where a particular status is granted a person particular obligations are imposed appropriate to that status, which if breached bring their own consequences.
- 10.18 Pecuniary penalties are different to protective orders or more minor penalties imposed by a body of professionals on one of their peers. They are public in nature, and are intended to deter and denunciate law-breaking conduct.
- 10.19 Our view is also strengthened by the fact that pecuniary penalties tend to feature in regimes that have a dedicated enforcement agency. The agency is charged with overseeing the regime, investigating potential breach, and, where they have the choice, exercising enforcement decisions about whether evidence of a breach supports commencing pecuniary penalty or criminal proceedings. One would expect that, generally, such a body should be in a position where it can exercise those enforcement decisions in a well-informed and responsible manner.

²⁰⁰ See ch 13.

²⁰¹ The Court also considered that the principle provides 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. This position was reversed in relation to personal injury under the 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.

²⁰² *Daniels v Thompson*, above n 188, at 46.

²⁰³ At 48.

Subject to the discussion from [10.22] below, we find it difficult to see why such an agency would ever wish to seek both forms of penalty against a defendant.

- 10.20 We note submitters' concerns that a bar on double punishment might have an undesirable impact on the exercise of prosecutorial decision-making. We do not think that this is an adequate basis on which to sidestep the principle. The extent to which protecting defendants from double punishment will have a perverse effect on enforcement decisions in New Zealand is not clear. Most pecuniary penalty proceedings have been taken under the Commerce Act 1986. That Act provides clearly that where the Commerce Commission has the option of which route to take, once criminal proceedings are "determined", a pecuniary penalty cannot be imposed and vice versa. We are not aware of any evidence that this provision has had an undesirable effect on prosecutorial decision-making. Furthermore, the provision will be retained and extended to the enforcement of the new cartel provisions by the Commerce (Cartels and Other Matters) Amendment Bill.²⁰⁴
- 10.21 In our view, we should expect our enforcement agencies to exercise a high standard of care in their prosecutorial decision-making. This will be assisted as understanding and experience of pecuniary penalty proceedings grow, and by the use and public release by agencies of enforcement guidelines. The Commerce Commission is guided in its enforcement decisions by its *Enforcement Response Guidelines*, which are publicly available on its website.²⁰⁵

A pecuniary penalty and imprisonment?

- 10.22 Notwithstanding the above, there is a particular question whether, given their different nature, both the imposition of a pecuniary penalty and imprisonment should be allowed for the same conduct. As noted above, some submitters supported this idea on the basis that a feature of the breach might subsequently come to light that warrants the imposition of the additional punitive and protective measure of imprisonment.
- 10.23 It is possible for a court to impose both a fine and imprisonment following a single conviction. Section 19(1) and (3) of the Sentencing Act 2002 provide:
- (1) No court may impose a combination of sentences of different types on an offender in respect of 1 or more offences except as provided in this section.
 - ...
 - (3) A sentence of a fine may be imposed with any sentence, but may only be imposed with a sentence of imprisonment in respect of a particular offence if authorised by the enactment specifying the offence.
- 10.24 It is not uncommon for statutes to provide for this. For example, the offences in the Financial Markets Conduct Act 2013 relating to defective disclosure and false statements all provide for the imposition of a term of imprisonment, a fine, or both.²⁰⁶ Other examples of statutes that provide expressly for both imprisonment and a fine are sections 98C and 98D (people smuggling), section 6(4A) (dealing in Class A and Class B controlled drugs) and section 12AB (importing precursor substances) of the Crimes Act 1961, and section 27 (general penalty) of the Misuse of Drugs Act 1975. In these circumstances, a combination of a fine and

²⁰⁴ Clause 13B.

²⁰⁵ See Commerce Commission *Enforcement Response Guidelines* (October 2013) < www.comcom.govt.nz > .

²⁰⁶ Sections 510–512. Section 510(3) provides:

A person who commits an offence under subsection (1) or (2) is liable on conviction,—

(a) in the case of an individual, to imprisonment for a term not exceeding 10 years, a fine not exceeding \$1 million, or both; and
(b) in any other case, to a fine not exceeding \$5 million.

- imprisonment must normally accord with the totality principle, and reflect the overall criminality of the offending.²⁰⁷
- 10.25 A key difference, of course, with the proposition of the imposition of a pecuniary penalty plus imprisonment, is that it would entail two sets of proceedings. In contrast, dual penalties of criminal fine and imprisonment under the statutes listed directly above would only entail one criminal trial.
- 10.26 Also, there is a strong argument that the scenario raised by submitters differs little from one where successful criminal proceedings have resulted in the imposition of a comparatively low fine or a short prison sentence, and where evidence becomes available that the offending was in fact graver than appreciated at trial. In those circumstances the prosecutor has no scope to try again to obtain a stronger penalty. It is true that the Criminal Procedure Act 2011 allows for a second trial in very limited circumstances, but this is only possible after an *acquittal*.²⁰⁸
- 10.27 In the usual course of events, we cannot see a justification for seeking both imprisonment and a pecuniary penalty. We agree that the same form of conduct can be carried out with varying levels of culpability, so that sometimes a pecuniary penalty will be appropriate, and sometimes imprisonment will be appropriate. However, generally it would be preferable that this assessment is carried out before the enforcement route is chosen.
- 10.28 Having said this, the Commission is alert to the concern that this scenario cannot be entirely ruled out. There may be rare cases where a pecuniary penalty has been imposed, but where it subsequently becomes clear, perhaps because of fresh evidence, that the breach was of such a serious and blameworthy nature that imprisonment is warranted. We anticipate that those circumstances would be very uncommon. PCO suggested that this should only occur if there was a clear distinction between the elements of the civil and criminal liability provisions (such as the need for knowledge/intention for criminal liability). We think the imposition of both imprisonment and a pecuniary penalty should be allowed in far more restricted circumstances than this. A number of existing pecuniary penalty statutes provide for parallel criminal offences and pecuniary penalties, with the distinction being made on the degree of knowledge/intention required, but they make it clear that a pecuniary penalty and imprisonment cannot both follow.²⁰⁹
- 10.29 In our view, the possibility should only arise in relation to specific breaches under a statute that could capture a broad range of conduct stretching genuinely from the truly inadvertent that results in no harm, to intentional breaches carried out in the knowledge that substantial harm might result. For these types of breaches, a case may be made that a pecuniary penalty ought to be followed by imprisonment if subsequent evidence comes to light. Again, it is preferable that this matter is considered openly in the policy process, and is provided for specifically in the statute. The risk of potential challenges in court on the basis of double jeopardy will be minimised if the statute is clear. However, if a statute is silent on this question, or indeed any aspect of double jeopardy, we encourage courts to adopt our assessment of the nature of pecuniary penalties in any consideration as to whether subsequent proceedings and/or penalty would offend against the principle, and should be struck out as an abuse of process. We note that the Supreme Court considered the appropriate approach to questions of abuse of

207 *R v Palmer* [2007] NZCA 167, [2007] 3 NZLR 313. See generally Bruce Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Brookers) at [SA19.02]. The exception is a fine imposed under s 38 of the Misuse of Drugs Amendment Act 1978, which is designed to catch illicit gains, and so is additional to the remainder of the penalty.

208 Sections 151–156. In particular section 154 provides for the Court of Appeal to order a retrial if “new and compelling evidence” is discovered.

209 See for example the Anti-Money Laundering and Countering Financing of Terrorism Act 2009, ss 73 and 74.

process on the grounds of double jeopardy in *Z v Dental Complaints Assessment Committee*.²¹⁰ As discussed above, we consider that pecuniary penalty proceedings present different features to the disciplinary proceedings dealt with in that case.

- 10.30 There is no reason to expect that courts would not apply the totality principle to sentencing where a second penalty of any form is sought. It follows that in the scenario dealt with above, the pecuniary penalty should be taken into account in the setting of the term of imprisonment.

Double proceedings

- 10.31 To an extent, where a statute bars the imposition of a double penalty, it deals with the question of double proceedings. Once a penalty has been imposed in one jurisdiction pursuing penalty proceedings in the other would be pointless. However, three questions remain:
- (a) What should be the position if the first proceedings were *unsuccessful*?
 - (b) What should happen under statutes that provide for other civil orders?
 - (c) Should statutes address the question of whether and when proceedings should be stayed?

What should be the position if the first proceedings were unsuccessful?

- 10.32 It seems unlikely that unsuccessful pecuniary penalty proceedings would be followed by criminal proceedings, given the elevated standard of proof for the latter. However, if criminal proceedings have been determined, but breach could not be established to the criminal standard, should enforcement agencies be able to have a “second bite at the cherry” and seek instead a pecuniary penalty, established on the lower civil standard of proof? In its 2002 review of civil and administrative penalties, the Australian Law Reform Commission considered that this should be allowed because regulators would benefit from the flexibility of being able to pursue two sets of proceedings.²¹¹
- 10.33 It is not clear to us how regulatory effectiveness is impeded by a regulator being prevented from pursuing two sets of penalty proceedings. Regulators benefit from flexibility in that they can opt between criminal and pecuniary penalty proceedings (where those options exist). And while it may be true that a regime that has a low success rate in the punishment of breach might suffer from a commensurate reduction in effective deterrence, any connection between a low success rate and a lack of ability to take two sets of penalty proceedings is not obvious.
- 10.34 The question is whether, having been pursued through the courts by the State for one form of penalty, a defendant should be required to defend itself from further State-initiated penalty proceedings for the same conduct. In general, we do not think they should. The double jeopardy principle will be best upheld by a statutory bar on this, as provided in some existing pecuniary penalty statutes. We suggest that policymakers should consider providing for such a bar in pecuniary penalty statutes.
- 10.35 Again, where there is no statutory bar, we anticipate that if an application is made to strike out the second proceedings as an abuse of process on double jeopardy grounds, the courts will make their assessment based on the nature of pecuniary penalties as we have described them in this Report.

²¹⁰ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1.

²¹¹ Australian Law Reform Commission *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (R95, Sydney, 2002) at [3.81]–[3.85]. Past Australian guidelines and the Regulatory Powers (Standard Provisions) Bill 2014 (Cth), currently before the House of Representatives, would also allow for this. See the Attorney General’s Department *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (December 2007).

Statutes that provide for other civil orders

- 10.36 As noted, some pecuniary penalty statutes provide for proceedings to establish civil liability more generally. A finding of civil liability (for example, resulting in a “declaration of contravention”) may result in the award of a number of orders, including pecuniary penalties, compensation and management bans.
- 10.37 Concerns that a strict statutory bar on double proceedings may prevent or inhibit the award of these other civil orders are valid. Clearly this outcome would be undesirable. It does not accord with the fact that the double jeopardy rule does not place a bar on civil claims in other circumstances.
- 10.38 One would expect then that statutes employing this model, while they should usually provide for a bar on the imposition of two penalties for the same conduct, will not provide for a statutory bar on both civil liability and criminal proceedings taking place. Again, it would be for the court to assess whether any subsequent proceedings amounted to an abuse of process; and to determine whether one set of proceedings should be stayed until the other is completed.

Stays of proceedings

- 10.39 At present, pecuniary penalty statutes vary on the question of whether, in the event of double proceedings, the civil proceedings become automatically stayed by virtue of the statute, or whether the question of a stay should be at the discretion of the court. On this question, PCO did not think there was a need for a mandatory stay. It considered it was best left to the courts to determine whether there was a danger of injustice in the particular case, rather than having a blanket legislative rule. Meredith Connell agreed and thought in some situations a stay of civil proceedings might not be appropriate.
- 10.40 The Ministry of Business, Innovation and Employment (MBIE) noted that a key reason for having a stay was to prevent the prosecuting regulator from gaining additional information under the rules of civil procedure that would not be accessible in a criminal proceeding. It characterised this as, in essence, a self-incrimination problem. MBIE preferred that the issue be dealt with by restricting the use of evidence obtained from civil proceedings in criminal proceedings.
- 10.41 We have no objection to statutes that do provide for an automatic stay of proceedings. Nor do we object to the question of the courts being left to exercise their discretion on whether to stay civil proceedings pending the outcome of a criminal trial because of the risk of prejudice to the defendant. As noted above such a stay may be justified because of the civil court’s exploration of the evidence going to civil liability, as well as because of the potential imposition of second penalty. Because of this, the potential for compensation claims to be delayed exists in any event.

“Same conduct”

- 10.42 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*.²¹² As Butler and Butler note, the language of section 26(2) of the New Zealand Bill of Rights Act suggests that the protections it offers only apply where a person faces trial or punishment for the *same offence* as that upon which he or she was previously finally acquitted, convicted or pardoned.²¹³ However, under section 358(1) of the Crimes Act 1961, the protection extends to cases when the accused is charged with a matter which is the “same in whole or

212 *R v Moore* [1974] 1 NZLR 417 (CA); *R v Clarke* [1982] 1 NZLR 654 (CA); Robertson, above n 207, at [CA10.01] and [CA358.03].

213 A Butler and P Butler *The New Zealand Bill of Rights Act: A Commentary* (Wellington, LexisNexis, 2005) at [24.3.16]–[24.3.17].

in part” as a previous offence. As Butler and Butler also note, there is a substantial volume of New Zealand case law on the interpretation of this phrase, which emphasises that the focus should be on the similarity of the *offences*, rather than on the fact that they arise out of essentially the same facts.²¹⁴

- 10.43 By contrast, pecuniary penalty statutes tend to 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.
- 10.44 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. Questions are likely to arise about whether these should be characterised as one course of related conduct, or whether each act is a separate contravention. If a penalty were imposed in respect of each separate contravention, would this amount to imposing multiple penalties for the “same conduct”? This is the formulation used by a number of pecuniary penalty statutes, but other statutes refer to “substantially the same conduct”;²¹⁵ “the same or substantially the same act or omission”;²¹⁶ the same “conduct, events, transactions or other matters”²¹⁷ or the same “contravention”.²¹⁸ All of these approaches could raise difficult questions of statutory construction.
- 10.45 This was the issue in *Commerce Commission v Accent Footwear*²¹⁹ in respect of multiple 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 section 37(2) of the Commerce Act 1986, 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.²²⁰
- 10.46 Given that issues are likely to arise about the similarity or otherwise of conduct, acts and transactions in issue, pecuniary penalty provisions need 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. There is a question as to what is implied by the different formulations set out in [10.44] above. To a substantial extent, what amounts to the same conduct or same contravention will be a context-specific assessment dependent on the actual breaches and conduct under consideration in a particular case. However, it seems clear to us that, over time, the courts’ task in interpreting such provisions would be assisted by a consistent approach to the drafting of double penalty and proceedings provisions in pecuniary penalty

214 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 (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 (HC) (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).

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

216 Hazardous Substances and New Organisms Act 1996, s 124F; and Commerce (Cartels and Other Matters) Amendment Bill (341-2), cl 13B.

217 Commerce Act 1986, s 79B.

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

219 *Commerce Commission v Accent Footwear*, above n 192. See also *TPC v Bata Shoe Co of Australia Pty Ltd* (1980) ATPR 40,161 (FCA).

220 *Commerce Commission v Accent Footwear*, above n 192, at 452. Williamson J imposed a penalty of \$10,000 for each of the first, fourth and fifth breaches (at 453).

statutes. We do not hold a strong view as to which formulation is to be preferred. However, we suggest that, where possible, drafters should employ consistent terminology in the future.

- 10.47 An example of a provision that addresses these matters in greater detail (although for criminal offences, not pecuniary penalties) is section 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 at or about the same time”.²²¹

GUIDELINE

G7 Policymakers must consider how the pecuniary penalty statute will deal with “double jeopardy”

Given their punitive nature, pecuniary penalties can raise double jeopardy concerns.

Pecuniary penalty statutes should usually:

- (i) prohibit a person being punished by the imposition of both a pecuniary penalty and criminal penalty, or by more than one pecuniary penalty, for the “same conduct”; and
- (ii) provide that once criminal proceedings have been determined (whether successfully or otherwise) there should be no pecuniary penalty proceedings based on the same conduct, and vice versa.

Consideration will need to be given to how a statute deals with double jeopardy where:

- (i) The regime will allow for a range of orders to follow from a finding of civil liability or “declaration of contravention”. In such regimes it may be appropriate for questions of double jeopardy to be left to the court to determine.
- (ii) A case can be made that the statute may allow for the imposition of both a pecuniary penalty and a sentence of imprisonment for the same conduct. The potential for such double punishment should be possible only in relation to specific breaches under the statute that can genuinely capture a broad range of conduct, from inadvertent conduct that results in minimal harm, to intentional conduct carried out in the knowledge that substantial harm might result. The statute should provide expressly for this.

Where possible, drafters should employ consistent terminology in dealing with the question of the “same conduct”.

²²¹ Competition and Consumer Act 2010 (Cth), sch 2 (Australian Consumer Law), s 214. 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).

Chapter 11

Intention and strict liability

- 11.1 In this chapter, we consider the extent to which established criminal law rules and principles relating to mens rea²²² and strict liability²²³ should apply to pecuniary penalties.

THE PLACE OF MENS REA IN PECUNIARY PENALTIES

- 11.2 In the Issues Paper, we considered whether contraventions involving an element of intention should be reserved for the criminal law.²²⁴ Our preliminary conclusion was that there should not be a fixed rule of this sort, and that pecuniary penalties should not be barred from including a mental element.
- 11.3 We also considered what principles should apply in deciding whether a particular pecuniary penalty provision should include an element of fault or intention, or whether it should be a strict liability contravention. The primary issue is whether the criminal law presumption that an offence should include an element of fault or intent, with strict liability offences being reserved for “public welfare regulatory offences”, provides an appropriate model for pecuniary penalties, or whether a different approach is required.
- 11.4 On one hand, it might be assumed that given the quasi-criminal nature of pecuniary penalties, the same principles relating to mens rea as those which govern criminal offences should apply. Indeed, the New Zealand Bar Association submitted that including a mens rea element in pecuniary penalties should be the default position. The similarity of drafting and construction between pecuniary penalty provisions and criminal offences suggests the same over-arching criminal law principles have been borne in mind in the drafting process, and that those principles should also govern the use of pecuniary penalties.
- 11.5 However, the distinct regulatory functions and deterrence purposes of pecuniary penalties may suggest that the orthodox criminal law approach to mens rea is not always applicable. We note that the Regulatory Powers (Standard Provisions) Bill, introduced in Australia, makes strict liability the legislative default for pecuniary penalties in that jurisdiction.²²⁵
- 11.6 On balance, we prefer a case-by-case approach to this question. Pecuniary penalty design should be considered in the round, with reference to all relevant principles and factors before

222 A Latin term relating to the mental element that must be proved in prosecuting a criminal offence, described in one case as the “intention to do the act which is made penal by statute or by the common law”: *Allard v Selfridge* [1925] 1 KB 129 at 137.

223 A strict liability contravention is one where there is no need for the enforcement agency to prove any element of knowledge on the part of the defendant, but there is a defence if the defendant proves total absence of fault: see Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (Wellington, 2001) [LAC Guidelines] at [12.2.3].

224 Law Commission *Civil Pecuniary Penalties* (NZLC IP33, 2012) [Issues Paper] at ch 6.

225 Regulatory Powers (Standard Provisions) Bill 2014 (Cth), cl 94:

(1) In proceedings for a civil penalty order against a person for a contravention of a civil penalty provision, it is not necessary to prove:

- (a) the person's intention; or
- (b) the person's knowledge; or
- (c) the person's recklessness; or
- (d) the person's negligence; or
- (e) any other state of mind of the person.

However, a pecuniary penalty provision that contains a specific mental element will override the standard provision (cl 94(4)). The Bill also provides a general “mistake of fact” defence (cl 95).

determining the extent to which fault or intention should feature in a particular penalty provision. We set out our rationale for this conclusion below.

The presumption of mens rea in the criminal law

- 11.7 The use of different classes of criminal offences, both those that involve a mens rea element and those that do not (such as strict and absolute liability offences), is dealt with in the Legislation Advisory Committee Guidelines (LAC Guidelines).²²⁶
- 11.8 Traditionally, the criminal law sanctions those who are morally responsible for their acts – persons whose subjective mental state, as well as their conduct, is blameworthy. Another important facet of mens rea is that the prosecution bears the burden of establishing it, so the requirement of mens rea in criminal offences can also have a protective function for criminal defendants. Besides proving that the physical element of the offence has occurred, the prosecution must also prove that the defendant had the necessary intent or mental state.
- 11.9 In most offence provisions, the mens rea element is denoted through the use of terms of advertence like “intentionally”, “wilfully”, “knowingly” or “recklessly”, or terms of inadvertence like “carelessly” or “negligently”. Inadvertence can also be phrased in the negative, such as where a person fails to “take all reasonable steps”. Where the statute is silent on the question of mental intent, the courts will apply a presumption that Parliament intended the offence in question to require mens rea. In deciding whether to override this presumption, the court will determine, as a matter of statutory interpretation, whether the provision is “truly criminal” – in which case the presumption of mens rea remains – or a “public welfare regulatory offence”²²⁷ – which will allow the court to displace the presumption and apply strict liability. In making this assessment, the court will consider the wording of the statute, 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.²²⁸
- 11.10 Therefore, the requirement for a criminal offence to have a mens rea component is the general rule. If an offence is to be characterised as a strict liability offence, the prosecution need only establish that the person performed the conduct in question. It does not need to prove he or she acted with mens rea; but the defendant may exonerate him or herself either through any specified statutory defence or through the common law defence of total absence of fault.²²⁹

Strict liability

- 11.11 The LAC Guidelines set out when an offence may properly be characterised as one of strict liability.²³⁰
- (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

²²⁶ LAC Guidelines, above n 223, at ch 12, pt 2.

²²⁷ In *Millar v Ministry of Transport* [1986] 1 NZLR 660 (CA) Cooke P described the “public welfare regulatory offence” as “a convenient label rather than an exact definition” (at 666).

²²⁸ See generally AP Simester and WJ Brookbanks *Principles of Criminal Law* (2nd ed, Brookers, Wellington, 2002) at 162.

²²⁹ *Civil Aviation Department v MacKenzie* [1983] NZLR 78 (CA) at 81; and *Millar v Ministry of Transport* [1986] 1 NZLR 660 (CA) at 668.

²³⁰ LAC Guidelines, above n 223, at [12.2.3].

- (c) The defendant is best placed to establish absence of fault because of matters peculiarly or primarily within the defendant's knowledge.

Absolute liability

- 11.12 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, that will not constitute a defence. As a result, courts will only find absolute liability where the statute imposes it in clear terms or by necessary implication. The LAC Guidelines state that there is very limited scope for the creation of new absolute liability offences in New Zealand, and that:²³¹

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).

Mens rea in pecuniary penalties

Should statutory breaches involving mens rea be confined to the criminal law?

- 11.13 In the Issues Paper, we canvassed the arguments in favour of limiting intentional or knowing breaches to the criminal law, but concluded that no reason in principle exists to avoid creating pecuniary penalties that include an element of moral culpability or fault.

- 11.14 Six submitters agreed that there should be no general prohibition on pecuniary penalties being used for contraventions that involve some degree of moral blameworthiness. The New Zealand Law Society noted that the hybrid nature of penalties means it is inevitable that they will overlap with conduct covered by the criminal sphere; accordingly, there is no reason why a penalty could not be imposed for a contravention where some moral blameworthiness is inherent:

Ultimately, if a ... pecuniary penalty is appropriately imposed in relation to a certain category of conduct, which conduct is thereby not seen to be suitable for criminal sanction, it is not solely the presence or absence of moral blameworthiness that will determine the category into which the conduct will fall. It is rather a question of degree.

- 11.15 Meredith Connell and the New Zealand Bar Association noted that, given pecuniary penalties are used in a range of contexts, a flexible approach is required. For instance, as noted in the submission of the Parliamentary Counsel Office (Commercial Team), the liability of accessories to a pecuniary penalty contravention depends on having acted with knowledge of the penalty that they were helping to contravene. It is appropriate, then, for some pecuniary penalty provisions to examine and make relevant the defendant's state of mind.
- 11.16 Conversely, two submitters said that morally blameworthy conduct should be reserved for the criminal law.²³² This approach would preserve strictly the civil/criminal divide. Applying penalties to contraventions that entail some degree of moral blameworthiness could lead to a further erosion of that divide.
- 11.17 In our view, pecuniary penalties straddle both criminal and civil law. This indicates that the civil/criminal divide is not a stark line. Rather, there is now a spectrum of statutory

²³¹ LAC Guidelines, above n 223, at [12.2.3].

²³² Dr Marina Nehme and Air New Zealand.

mechanisms that can be employed to respond to statutory breaches. Relying purely on the criminal law to sanction any breach of law involving a mens rea element would arguably cast a large burden on that area of the law.

- 11.18 Also, on a practical level some contraventions innately involve an intentional element; sometimes fault elements are the key to whether there has been a contravention, such as where intention is an essential element.²³³ Where various policy factors suggest these breaches should be penalised by a pecuniary penalty rather than a criminal penalty, we do not think that the mens rea component should be the sole determinant of categorisation. That would be too inflexible. We prefer a more flexible approach. Our view is that mens rea should be one factor to be weighed with others in determining the appropriate legislative sanction.
- 11.19 As Bell Gully noted in its submission, the monetary amounts that can be imposed by pecuniary penalty statutes can be very significant in order to ensure an effective deterrent. Therefore it is desirable that policymakers give due consideration to whether knowledge or intention should be an element of the provision.
- 11.20 Finally, we are mindful of the overall liabilities faced by directors and managers in the business community, and the concern that the potential for over-penalising “innocent” or “no fault” contraventions is perceived to unduly deter people from engaging in commercial activities. The flexibility to incorporate a mens rea element is a useful design component to ensure that penalties are suitably calibrated, bearing in mind this wider context.
- 11.21 In accordance with the weight of submissions, we are of the view that pecuniary penalties should not be precluded from being used where mens rea is a relevant element of the contravention and there may be an aspect of moral blameworthiness.²³⁴ We agree with those submitters who thought that restricting the use of pecuniary penalties to contraventions that do not include a mens rea element could unduly limit their scope. While commonly used for purposes of deterrence, pecuniary penalties can also have a punitive function and may be used to target morally blameworthy conduct. This may need to be reflected in the design of the contravention provision by including an element of intention.

When should pecuniary penalties have an element of intention?

- 11.22 Four submitters on the Issues Paper specifically commented that it would be useful to have guidance on when a pecuniary penalty provision should or should not incorporate mens rea, and how that might be done in practice. We agree that enhanced guidance in this area is desirable.
- 11.23 In essence, any decision whether to use strict liability penalties, or those where some mental element needs to be established, involves weighing up factors similar to those relevant to the initial decision to include the pecuniary penalty provision in a regime. In particular, it involves a balance between fairness, and regulatory efficiency and effectiveness. The balance of those factors is always going to be context-specific.
- 11.24 On this basis, our view is that the approach to these questions in the criminal law context provides a useful model that can be adapted to pecuniary penalties. However, it is not entirely apt because of the field within which pecuniary penalties are usually employed: they are very commonly used for “public welfare regulatory” breaches, where strict liability offences are also

233 Australian Law Reform Commission *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC R95, 2002) at [4.66]–[4.67].

234 We note that the Australian Law Reform Commission, in its Report, came to the same conclusion: Australian Law Reform Commission, above n 233, at [4.66]–[4.67].

common. And, while they are punitive, they do not bring with them the potential penalties of conviction and imprisonment.²³⁵

- 11.25 For these reasons, we do not go so far as to recommend a presumption in favour of a mens rea element for pecuniary penalties. However, serious consideration should be given to whether a mens rea element should be included in a pecuniary penalty breach. This is because:
- a substantial penalty can result;
 - the mens rea requirement can play an important procedural fairness function, the need for which increases as the penalty increases; and
 - an enforcement agency only has to establish the conduct on the balance of probabilities.
- 11.26 The final point above means that where there is no requirement to prove a form of fault or intent, a defendant has little procedural protection against the penalty's imposition. In principle then, the greater the potential liability of the defendant, the more pressing the need for the inclusion of a mental element to ensure that the penalty provision is fair overall. This mirrors the approach to strict liability offences that are considered more justifiable, or less objectionable, where they are for comparatively minor or technical breaches of a regime, or result in a comparatively lower penalty.
- 11.27 As set out at [11.11], the LAC Guidelines identify three factors that justify strict liability criminal offences. We consider that those factors are equally relevant to determining whether a pecuniary penalty provision should carry strict liability. Those factors form the basis for our guidance as to the use of strict liability pecuniary penalties. We suggest that strict liability pecuniary penalties may be justifiable where:
- (a) Strict liability provides persons with an incentive to adopt compliance processes and procedures to protect against contraventions, and these precautions may not otherwise be taken; and
 - (b) The standards imposed are clear and well-known to the regulated persons, who participate voluntarily in the activity; and
 - (c) The defendant is in the best position to establish a defence. This might include where:
 - the person bringing proceedings would face serious difficulty in proving the matter, and the defendant has peculiar knowledge of the relevant facts; or
 - it would be extremely difficult or expensive to require the person bringing proceedings to provide proof, and that proof could be provided readily by the defendant.
- 11.28 Many pecuniary penalties may fit these criteria. But, as indicated above, the challenge is to weigh properly all the features of the penalty and regime, such as the nature of the conduct, potential defendants and size of the penalty involved, to ensure the particular provision achieves the right balance between fairness and regulatory effectiveness. Where a strict liability penalty is proposed, the availability of other procedural protections (such as the penalty privilege) may need to be assessed to determine whether the design of the penalty overall incorporates sufficient procedural protections. The introduction of an element of fault or intention may address any imbalance in the proposed pecuniary penalty regime.

²³⁵ Although, see the discussion in ch 4.

Defences

- 11.29 As noted in the Issues Paper, it is not clear whether the *MacKenzie* defence of total absence of fault, which applies to strict liability criminal offences, would also apply to pecuniary penalties.²³⁶ Given that uncertainty, policymakers should explicitly identify the applicable statutory defences to make clear the standard of conduct required.²³⁷
- 11.30 A number of pecuniary penalty regimes include defences that should be considered. For instance:
- (a) mistake, lack of knowledge, or other absence of fault;
 - (b) the contravention was necessary (for example, to save or protect life or health, or prevent serious damage to property);²³⁸
 - (c) the contravention was beyond the person's control, could not reasonably have been foreseen, and the person could not reasonably have taken steps to prevent it occurring;²³⁹
 - (d) the person did not know, and could not reasonably have known, of the contravention;²⁴⁰
 - (e) the contravention was a mistake or occurred without the person's knowledge;²⁴¹
 - (f) the contravention was due to reasonable reliance on information supplied by another person;²⁴² or
 - (g) Person A's contravention was due to the default of another person, which was beyond Person A's control, and Person A took precautions to avoid the contravention.²⁴³

Absolute liability

- 11.31 A defendant to an absolute liability offence or penalty has no defence; the defendant will be liable even if they are wholly without fault. In our Issues Paper, we asked whether guidance is needed that absolute liability 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.
- 11.32 There was widespread agreement among submitters to the Issues Paper that absolute liability should only be imposed in rare circumstances.²⁴⁴ The Parliamentary Counsel Office (Commercial Team) and Federated Farmers set out their view that absolute liability should

²³⁶ *Civil Aviation Department v MacKenzie*, above n 229. In *Colonial Mutual Life Assurance Society Ltd v Wilson Neill Ltd* [1994] 2 NZLR 152 (CA), the Court of Appeal set out its provisional view that a defence of total absence of fault was not available because the statute already contained exceptions for liability. 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 courts *may* conclude in the future that the total absence of fault defence applies to pecuniary penalties where the statute does not rule it out, but the position is unclear.

²³⁷ The LAC Guidelines also recommend this for strict liability criminal offences (at [12.3.3]): "Subject to the limitations referred to in guidelines 3 and 4, it is helpful to the public and the courts for legislators to identify and spell out specific defences in the case of public welfare regulatory offences, if it is possible to identify such defences as part of the policy development process".

²³⁸ Biosecurity Act 1993, s 154H(3)(a).

²³⁹ Biosecurity Act 1993, s 154H(3)(b).

²⁴⁰ Hazardous Substances and New Organisms Act 1996, s 124B(3).

²⁴¹ Unsolicited Electronic Messages Act 2007, s 12.

²⁴² Financial Markets Conduct Act 2013, s 499(1)(a).

²⁴³ Financial Markets Conduct Act 2013, s 499(1)(b).

²⁴⁴ See the submissions of the New Zealand Bar Association, the New Zealand Law Society, Ministry for Primary Industries, Parliamentary Counsel Office (Commercial Team), Federated Farmers and Air New Zealand.

only be used for compelling reasons. The New Zealand Law Society noted that absolute liability should be used rarely because it may inhibit the penalty's deterrent value.

- 11.33 Accordingly, we confirm that the appropriate guidance for policymakers is that absolute liability pecuniary penalties should be used very rarely. Any penalty that imposes absolute liability should state this in express terms.

Legislative drafting

- 11.34 If a pecuniary penalty provision requires a mens rea element to be established, it should be clearly specified as an element of the penalty provision.
- 11.35 Our review of existing pecuniary penalty statutes in the Issues Paper revealed a range of approaches to the mental element for liability. Some make specific reference to what the defendant knew or ought to have known.²⁴⁵ Some provisions make conduct a contravention where it is done for a prohibited purpose.²⁴⁶ The great majority do not refer to the defendant's state of mind within the penalty provision itself, although some provide specific defences,²⁴⁷ or only prohibit conduct "without reasonable excuse".²⁴⁸
- 11.36 Unlike the criminal law, no settled principles determine the approach to the mental element of a pecuniary penalty provision that is silent as to fault. Therefore, the mental element of a pecuniary penalty will, if not clearly stated in legislation, be a matter for statutory interpretation. It seems unsatisfactory to leave it to the courts to try to determine what form of liability was intended by Parliament in the relevant provision.²⁴⁹

The difficulties that have arisen in the absence of these express provisions are well known ... Parliament ideally should make its intention clear, rather than leaving it to the courts to grapple with what are fundamental issues of fault, and what defences may or may not be available to a provision imposing the penalty. In the absence of such provisions, the courts are left to discover the intention of Parliament as best they are able which can lead not only to results unintended by the legislature but also to inconsistent decisions.

- 11.37 Clear and precise drafting on the level of intention required for a contravention that attracts a pecuniary penalty is desirable to ensure that the objectives of the regime are not undermined by any ambiguity. To enhance clarity, strict liability penalties should expressly state that they are imposed on the basis of strict liability. Examples of criminal offences that already do this are section 13 of the Animal Welfare Act 1999, sections 154M and 154N of the Biosecurity Act 1993 and section 388 of the Building Act 2004. In addition, the statute should list expressly any defences to the strict liability penalty.

²⁴⁵ See for example the Takeovers Act 1993, s 33M(c): the court can impose a penalty if the defendant "knew or ought to have known of the conduct that constituted the contravention". Section 41 also refers to the defendant's intent and level of control over the contravention as factors that may excuse a contravention.

²⁴⁶ Commerce Act 1986, ss 27–30, 36 and 80.

²⁴⁷ Unsolicited Electronic Messages Act 2007, s 12; Hazardous Substances and New Organisms Act 1996, s 124B.

²⁴⁸ Financial Service Providers (Registration and Dispute Resolution) Act 2008, s 79A.

²⁴⁹ Submission of New Zealand Law Society.

G8 Pecuniary penalty provisions should state clearly:

(i) whether mens rea is an element of the penalty provision; or

(ii) whether the penalty is to be imposed on the basis of strict liability

Consideration should be given to whether intention or fault should be an element of the contravention for which a pecuniary penalty may be imposed.

In assessing whether to include intention or fault as an element of the contravention, it is necessary to weigh up the features of the penalty and regime, such as the nature of the conduct, potential defendants and size of the penalty involved, to ensure that the particular provision achieves the right balance between fairness and regulatory effectiveness.

Strict liability pecuniary penalties may be appropriate where a case can be made that:

- Strict liability provides persons with an incentive to adopt compliance processes and procedures to protect against contraventions, and these precautions may not otherwise be taken; and
- The standards imposed are clear and well-known to the regulated persons, who participate voluntarily in the activity; and
- The defendant is in the best position to establish a defence. This might include where:
 - the person bringing proceedings would face serious difficulty in proving the matter, and the defendant has peculiar knowledge of the relevant facts; or
 - it would be extremely difficult or expensive to require the person bringing proceedings to provide proof, and that proof could be provided readily by the defendant.

It is not clear that the presumptions that exist about strict liability criminal offences apply equally to pecuniary penalties. Strict liability pecuniary penalty provisions should therefore clearly set out any defences, even if it is anticipated that only the defence of absence of fault should be available.

Absolute liability pecuniary penalties should be used very rarely.



Part 4

OTHER ASPECTS OF LEGISLATIVE DESIGN



Chapter 12

Rules of procedure

- 12.1 In the Issues Paper, we noted that New Zealand statutes differ in their treatment of the procedural and evidential rules that apply to pecuniary penalty proceedings. Some are silent on the issue. Five, including section 509 of the Financial Markets Conduct Act 2013, contain a common provision relating to pecuniary penalty proceedings:

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).

- 12.2 The Commerce Act 1986 takes a different approach. Section 79A provides that “[i]n any proceedings under this Part for a pecuniary penalty ... (b) the Commission may, by the order of the Court, obtain discovery and administer interrogatories.”

- 12.3 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 to the Commerce Act. None of these four Acts contain the Financial Markets Conduct Act formulation.

- 12.4 In addition, section 79 of the Commerce Act provides:

In the exercise of its jurisdiction under this Part, except in respect of criminal proceedings and proceedings for pecuniary penalties, 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.

- 12.5 That section implies 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, section 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.

- 12.6 In all proceedings under that Act, then, the relaxed rules apply. Given the nature of pecuniary penalty proceedings, this provision is inappropriate. We note that it is to be repealed on 1 April 2017, or on an earlier date to be appointed by Order in Council, and that the Financial Markets Conduct Act, which will replace the 1988 Act has, quite rightly, omitted the provision.

- 12.7 The intent behind these variations, and the implications (if any) of the different approaches are not clear. In the Issues Paper, we raised two concerns about a formulation like that of section 509 of the Financial Markets Conduct Act. First, such a broadly framed provision could invite a number of interpretations and consequent procedural challenges, which may add cost and delay to pecuniary penalty proceedings. We asked 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? Similar concerns

have been influential in the debate about the need for uniform procedural rules in Australia, and a United Kingdom commentator has observed:²⁵⁰

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.

- 12.8 Secondly, we considered whether New Zealand should share concerns expressed in Australia that lack of certainty in the formulation might mean a default to overly-broad “quasi-criminal” protections.
- 12.9 We asked whether more specific direction should be provided about procedure for pecuniary penalties, rather than the broad section 509 formulation. We also asked whether consistency was desirable across the pecuniary penalty statutes, and if so, how it was to be achieved.
- 12.10 An additional question is whether the application of all of the standard civil rules is appropriate in any event. It may be excessive to require all of the steps that generally take place in standard civil proceedings for this type of matter. In simple terms, in a pecuniary penalty proceeding, an allegation is brought and facts are presented to support it, all of which should be openly disclosed to the defendant. It is then up to the defendant to decide whether to concede the allegation or defend it. On concession or a finding of liability, the matter moves onto appropriateness of penalty. Given the relative simplicity of this process, it may be that a more streamlined set of rules would be appropriate.

SUBMISSIONS

- 12.11 Most submitters did not consider that the statutory formulation in section 509 gives rise to problems. All but one were generally happy with the use of that approach. Some noted that courts have proved able to oversee the application of appropriate evidential and procedural rules, and safeguards that ought to apply according to the nature of the proceedings. A number favoured consistency and so supported that approach as it made it clear that pecuniary penalties are distinct from criminal prosecutions.
- 12.12 However, two submitters suggested that the word “usual” should be omitted. The Ministry for Primary Industries suggested the following: “The Court must apply the rules of evidence and procedure for civil matters when hearing proceedings for a pecuniary penalty order”.
- 12.13 In contrast, the New Zealand Law Society did not support such a provision, since it considered that the punitive aspect of the proceedings must not be obscured. It also thought that pecuniary penalties should not be imposed on the balance of probabilities, and that protections available to criminal defendants ought to be available.

250 RM White “It’s not a criminal offence—or is it? Thornton’s analysis of ‘penal provisions’ and the drafting of ‘civil penalties’” (2011) 32 Statutes LR 17 at 36.

CONCLUSION

- 12.14 The Law Commission does not consider that pecuniary penalty proceedings should take place within the criminal jurisdiction of the courts. At present, the alternative that presents itself is the civil jurisdiction, which brings with it the rules of civil evidence and procedure. But those rules of evidence and procedure were not designed with a State-imposed penalty in mind. Pecuniary penalties therefore differ from the forms of proceeding for which the rules are most apt.
- 12.15 Having said this, where pecuniary penalty cases are concerned, we are not aware of the courts encountering particular difficulties or raising particular objections when applying civil procedural rules.²⁵¹ Submitters did not raise any specific concerns in this area, nor has our subsequent consultation. We have no evidence of substantive unfairness having occurred, or of particular concern on the part of those involved in pecuniary penalty proceedings about the way the courts are handling them. As noted in Chapter 9, High Court judges have at their disposal rule 1.4(4) which provides:
- If in any civil proceedings any question arises as to the application of any provision of these rules, the court may, either on the application of a party or on its own initiative, determine the question and give any directions it thinks just.
- 12.16 This rule arguably provides judges with sufficient scope to depart from particular High Court rules where, given the nature of the proceedings, they will lead to unfairness. On balance, then, we propose that the civil rules of evidence and procedure should continue to apply.
- 12.17 This approach is probably achieved by the standard formulation in section 509, set out above. We are not persuaded that the term “usual” is necessary, and it is possible that it is liable to confuse. However, it appears that even with the inclusion of that word, the majority of submitters have faith in the courts’ ability to adapt the civil procedural rules in a manner appropriate to the nature of pecuniary penalty proceedings.
- 12.18 For completeness, we note that a direction like that in section 43V of the Securities Markets Act 1988 is unlikely ever to be appropriate. We also see no need for additional provisions relating to the ordering of discovery and interrogatories.
- 12.19 In Chapter 9, we raised questions about the appropriateness of some of the High Court rules for pecuniary penalties (regarding a proposed “penalty privilege”).²⁵² Such questions illustrate the, perhaps unforeseen, difficulties of applying standard civil rules to hybrid forms of penalty or order. While “civil” in name, they may have severe implications. We have referred in Chapter 6 to proceedings for orders under the Public Safety (Public Protection Orders) Bill, and another example is proceedings for “civil” forfeiture orders under the Criminal Proceeds (Recovery) Act 2009. We encourage policymakers to consider the appropriateness of applying standard civil rules, in their entirety, to punitive or coercive orders that are to be sought in the civil jurisdiction. Any such policy development process should take into account whether protections such as the penalty privilege are required, and whether aspects of the standard civil court process will be inappropriate or unnecessary.
- 12.20 As suggested in Chapter 9, there may be a case for the Rules Committee to consider whether the High Court Rules have adequate flexibility for courts to deal with pecuniary penalties and similar sorts of orders, or whether a tailored process could be devised.

²⁵¹ For example, in *Chief Executive of the Department of Internal Affairs v Mansfield* [2013] NZHC 2064 at [38], Wylie J stated that: “The ‘usual rules of court’ can only be the High Court Rules. They govern the disposition of civil proceedings.”

²⁵² See for example ch 9 at [9.50].

GUIDELINE

G9 Civil rules of court procedure and evidence should apply to pecuniary penalty proceedings

Pecuniary penalty proceedings take place in the civil courts, where the civil rules of procedure and evidence apply.

Nevertheless, policymakers should always consider potential problems with applying standard civil rules to proposed new punitive or coercive orders. Consideration should be given to whether tailored rules are required to balance principles of fairness, regulatory efficiency and certainty.

Chapter 13

Imposition

COURT IMPOSITION

- 13.1 In New Zealand, pecuniary penalties are generally imposed by a court. Along with Australia and, to a degree, the United States, New Zealand differs from some other countries in this regard. Where similarly large monetary penalties are provided for in other jurisdictions, there is sometimes provision for them to be imposed by the regulator itself, with subsequent court oversight on appeal.²⁵³ Section 46A of the Financial Markets Conduct Act 2013 introduces a process by which the Financial Markets Authority (FMA) can, in essence, impose penalties on defendants to pecuniary penalty actions. However, this can only happen with the consent of the defendant, and where the two parties have agreed on liability and the amount of the penalty. We discuss this further below, but for the most part, the New Zealand model is one of court imposition.
- 13.2 Our model means that a judge must make a determination about liability and the amount of the penalty. The level of the penalty is set with open and due consideration of any aggravating or mitigating factors. Judicial imposition provides protection against possible abuse, or the appearance of abuse, of regulators' powers. No one can level the criticism that an enforcement body is both complainant and judge of an alleged breach.
- 13.3 The approach adopted in some countries, where regulators impose penalties and an appeal route is available, could result in savings here. Under such a model, it is likely that fewer cases would make it to court, with resultant savings in judge and court time, and lower costs for regulators and defendants in cases where the latter opts not to appeal. It may also be argued that such a model would have a greater deterrent effect. Regulators may be likely to impose penalties more frequently, since they would not have to weigh up the risks of taking a case to court.
- 13.4 However, for the reasons set out in [13.2], we do not favour this model. The combined factors of discretion as to penalty level, very high maximum penalties and the relative novelty of pecuniary penalties means that court imposition is both desirable and warranted.
- 13.5 A small number of substantial penalties in New Zealand are imposed by non-judicial bodies. Under the Gas Act 1992 and Electricity Industry Act 2010, variable pecuniary penalties of a maximum of, respectively, \$20,000 and \$200,000, may be imposed by Rulings Panels.²⁵⁴ 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.²⁵⁵ However, neither Act requires that any of the members should have legal experience.²⁵⁶

253 Increasingly, there is provision for this in the United States and the United Kingdom. See Law Commission *Civil Pecuniary Penalties* (NZLC IP33, 2012) [Issues Paper] at Appendix 2.

254 Section 43ZZL of the Gas Act 1992 provides for the Energy Commission to administer penalties for breaches of gas governance regulations or rules, but the provision is not in force.

255 Under reg 91 of 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". Under reg 61 of 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.

256 At the time of writing, the Electricity Rulings Panel has five members with a mix of legal and industry expertise, and the Gas Rulings Panel has one member (Hon Sir John Hansen KNZM).

- 13.6 Both panels undertake quasi-judicial functions by determining complaints and making orders, including for penalties and compensation. The Law Commission accepts that there may be an argument that the imposition of 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 effective oversight of the activity. This view met with some approval by submitters. The New Zealand Law Society, New Zealand Bar Association, Meredith Connell and the Parliamentary Counsel Office (Commercial Team) (PCO) all felt that the option could not be ruled out.
- 13.7 As we note, however, this should be done extremely rarely. Such penalties should only be adopted where specialist knowledge is absolutely essential to making decisions on breach and liability; and/or where there is a particular and justified need for a fast and efficient enforcement system. In this context – where a body is tasked with imposing a potentially substantial penalty and must apply law to facts – it would be preferable to have a statutory requirement that the chair of the tribunal has legal expertise. Such models should also have an appeal and review process. The Commission has previously made recommendations about the appropriate powers and functions of administrative tribunals and that discussion is relevant to these bodies.²⁵⁷
- 13.8 Two New Zealand statutes provide for variable monetary penalties to be imposed by a regulator itself. The Overseas Investment Regulations 2005 provide for the chief executive of the regulating department to impose a penalty of up to \$20,000 for the retrospective filing of a consent. In determining the amount of the penalty, the regulator must consider whether:²⁵⁸
- ... 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 investment transaction; or
- (b) the nature of, and the reasons for, the retrospective consent.
- Under the Tax Administration Act 1994, “shortfall penalties” are imposed by the Commissioner of Inland Revenue. They can be sizeable, and require the exercise of discretion by the Commissioner 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.²⁵⁹
- 13.9 Under both these schemes, concern may be raised about the regulator being, in effect, 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 as to the level of the penalty in any given case. There may also be a perception that such penalties are used for revenue-gathering purposes. These concerns increase the need for appeal and review processes.
- 13.10 We consider the provision under the Overseas Investment Regulations to be an anomaly. It is not repeated elsewhere in New Zealand legislation. While we anticipate that there may be a desire for enforcement bodies increasingly to have 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

²⁵⁷ Law Commission *Tribunal Reform* (NZLC SP20, 2008). See in particular at [7.32] regarding the need for legal experience.

²⁵⁸ Regulation 32.

²⁵⁹ Note also that the Commissioner of Inland Revenue can increase any shortfall penalty by 25 per cent if the taxpayer obstructs the Commissioner from determining the correct tax position.

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.

WHICH COURT?

- 13.11 At present, the majority of pecuniary penalty statutes provide for pecuniary penalties to be imposed by the High Court. However, the Unsolicited Electronic Messages Act 2007 makes it clear that proceedings can be taken in either the District or High Court, depending on the amount of penalty sought. Under section 37(2)(b) of the Act the District Court can impose pecuniary penalties, but only up to a maximum penalty of \$200,000. As a general premise, we have no concerns with this approach. In some cases, pecuniary penalty matters will pose a proposition which differs little to other matters dealt with habitually in the District Court. Pecuniary penalties may therefore be District Court matters, subject to jurisdictional limit and any perceived policy concerns that indicate that a particular statute warrants High Court oversight.

ENFORCEABLE UNDERTAKINGS AND SETTLEMENTS

- 13.12 Section 46A of the Financial Markets Authority Act 2011 was introduced by the Financial Markets (Repeals and Amendments) Act 2013.²⁶⁰ The change will make it possible for the FMA to accept undertakings, which may include a requirement to pay the Crown an amount in lieu of a penalty. Section 46A(1)–(4) provides:

46A Undertaking may include requirements as to compensation or penalties

- (1) An undertaking under section 46 may include—
 - (a) an undertaking to pay compensation to any person or otherwise take action to avoid, remedy, or mitigate any actual or likely adverse effects arising from a contravention, involvement in a contravention, or possible contravention, or involvement in a 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).
 - (3) If an undertaking referred to in subsection (1)(b) is given, the FMA must give notice of that undertaking on its Internet site (whether or not it gives notification of other undertakings given in relation to the same matter).
 - (4) The notice under subsection (3) must include—
 - (a) a statement of the amount that has been undertaken to be paid; and
 - (b) a brief description of the circumstances and nature of the alleged contravention to which the undertaking relates.
- 13.13 Section 46A will enable the FMA to effectively “settle” with parties whom it would otherwise seek pecuniary penalties against. With the exception of this regime, it is not possible for any enforcement agency to settle with a defendant out of court, because all other pecuniary penalties must be imposed by a court.

²⁶⁰ Section 46A will come into force on 1 April 2017 or an earlier date appointed by Order in Council: see Financial Markets (Repeals and Amendments) Act 2013, s 68.

- 13.14 Enforcement bodies have frequently come to an agreement with defendants who have admitted liability as to what level of pecuniary penalty they think should be imposed. However, the parties must still seek court approval of the penalty. This has happened frequently under the Commerce Act 1986.²⁶¹ The court, then, retains discretion as to the level of penalty. It is in no way bound by the penalty agreed to by the parties.
- 13.15 The ability to propose an agreed penalty to the court in this way is considered valuable by both enforcement agencies and those subject to regulation. It is one of the considerable benefits of pecuniary penalty regimes (as opposed to criminal offences). Since the court has generally adopted the proposed penalty, the process results in greater certainty for the defendant, and saves substantially on costs for both parties.
- 13.16 On one view, the process of having to obtain court approval of such an agreed penalty is cumbersome. Where a party is content to admit a breach and has settled on a penalty with the enforcement body, it can be argued that it is unnecessary to involve the court. The ability to enter into a formal settlement without the need for court sign-off would save court time, result in greater cost savings and give complete certainty to the party in breach.
- 13.17 In essence, this is made possible by section 46A. From this perspective, such provisions may be desirable.
- 13.18 On the other hand, there are some valid concerns about pecuniary penalty settlements taking place without court oversight. First, court oversight protects against any risk of innocent defendants feeling pressured into accepting liability to avoid the cost and risk of litigation. This echoes the traditional concerns about plea bargaining in the criminal context.²⁶² It is now accepted that plea negotiations may usefully serve to prevent a contested criminal trial, but there are protections for the defendant on how these may be commenced and undertaken.²⁶³ Sentence negotiation – where a prosecutor and defendant agree on a proposed sentence in return for a guilty plea – is not permitted in New Zealand.²⁶⁴
- 13.19 A second concern is that if settlements take place without court oversight, there will be too little public scrutiny of the penalties being imposed. The general public and victims of pecuniary penalty breaches may be concerned about well-resourced defendants negotiating low penalties with an enforcement body. Alternatively, there may be a risk of agencies pressuring defendants to accept higher penalties than are warranted on the facts. The more private nature of settlements may also give rise to a risk that penalties will be imposed inconsistently. Transparency not only helps ensure 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.²⁶⁵
- 13.20 Thirdly, there is an argument that the novel nature of pecuniary penalties alone 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.

261 See also *Chief Executive, Department of Internal Affairs v Atkinson* HC Christchurch CIV-2008-409-2391, 19 December 2008.

262 See Law Commission *Criminal Prosecution* (NZLC R66, 2000) at ch 9.

263 See Crown Law Office *Solicitor-General's Prosecution Guidelines* (2013) at ch 18.

264 At [18.7.3].

265 C Noonan "Of Arsenic, Antitrust and Agreed Penalties for Price Fixing" (2006) 12 NZBLQ 253 at 267.

- 13.21 While giving a regulatory body the ability to effectively penalise breach of their statute outside of court provides substantial benefits, the reasons just given mean that the potential for provisions such as section 46A to appear on the statute book causes us some concern.

Court approval of agreed penalties

- 13.22 A related issue is how the courts should assess the level of agreed penalty put to them after an enforcement agency and other party have reached an agreement on liability. There has been recent Australian litigation on this issue.
- 13.23 *Australian Securities and Investments Commission v Ingleby*²⁶⁶ arose from the scandal involving payments by the Australian Wheat Board to Iraq under the United Nation's oil for food programme. Mr Ingleby was the Chief Financial Officer of the Australian Wheat Board. The Australian Securities and Investments Commission (ASIC) took pecuniary penalty proceedings against him for breaches of the Corporations Act 2001 (Cth), arising from his involvement in the scheme. ASIC and Mr Ingleby reached an agreement whereby they filed a statement of agreed facts with the court, Mr Ingleby admitted the breaches, and they proposed an agreed penalty of \$40,000 plus a period of disqualification as a director for 15 months. The Trial Court determined that, in light of the content of the statement of agreed facts, the proposed penalty was too harsh. The Judge reduced the penalty to \$10,000 and the period of disqualification to approximately four and a half months.
- 13.24 On appeal, the Victorian Court of Appeal raised concerns about judicial approaches to agreed penalties. It found that the statement of agreed facts in that case had understated Mr Ingleby's involvement in, and culpability for, the breaches. The statement was "less than a desirably sound basis upon which to reach important decisions about appropriate penalties,"²⁶⁷ and did "not place the Court in a position from which it [could] properly discharge its constitutional responsibilities".²⁶⁸ It also questioned ASIC's decision not to pursue Mr Ingleby for wilful breach of the Corporations Act, which the Court considered was "clearly open" to ASIC and would have led to a more substantial penalty.²⁶⁹ The Court of Appeal indicated that, had it not felt bound not to increase the agreed penalty, it would have done so.²⁷⁰
- 13.25 The case highlights the concerns set out above about agreed penalties. They risk accurate detail of the breaches being suppressed by enforcement agencies and defendants in the interests of reaching a settlement. And, where settlements do come before the court, there is a risk that judges will not properly undertake their role in assessing for themselves the evidence, and coming to their own assessment of an appropriate penalty.
- 13.26 These risks have implications for the integrity of regulatory systems as a whole and their ability to effectively deter non-compliance. We doubt that it is in any enforcement agency's interest to limit the general deterrent effect of their regime by underplaying breach or under-sanctioning. However, pressure to understate conduct or agree to a lower penalty in the interests of reaching agreement may always be there.
- 13.27 The Court in *Ingleby* itself notes the need to be pragmatic about the considerable benefits offered by the parties approaching the court with an agreed proposed penalty, and for similar reasons we do not consider that the practice should stop. However, the case highlights the need

266 *Australian Securities and Investment Commission v Ingleby* [2013] VSCA 49 (CA).

267 At [73].

268 At [75].

269 At [96].

270 Mr Ingleby, knowing that ASIC sought only to have the agreed penalty imposed, chose not to participate in the appeal. The Court of Appeal considered that he was entitled to assume that, unless he were first given the right to be heard, it could not increase the penalty (at [98]).

for agencies to act responsibly, for transparent processes and for the court to approach such settlements with due caution.

- 13.28 The Court in *Ingleby* criticised any suggestion that it might presumptively adopt a proposed penalty. The Judges in that case disagreed with what they understood to be the Federal Court of Australia's approach in two cases (*NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission*²⁷¹ and *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd*)²⁷² that, if a judge was satisfied that the proposed pecuniary penalties were within "an appropriate range", the court should uphold them. The Judges in *Ingleby* instead argued that agreed penalties should be treated no differently to any other submission by the parties. As Hargrave AJA put it:²⁷³

When a court is faced with a negotiated settlement in a pecuniary penalty case, the joint submission of the parties as to an "agreed penalty" is an important factor to be considered by the court in performing its judicial role of fixing the appropriate penalty in the circumstances of the case. The court's discretion in such cases should not, however, be fettered by a principle requiring imposition of the agreed penalty if it is within "the permissible range in all the circumstances".

- 13.29 Subsequently, a decision of the Federal Court of Australia, which is expressed as concurring with *NW Frozen Foods* and *Mobil Oil*, spelt out the Australian approach as follows:²⁷⁴

... the principles to be applied may be simply stated. First, the question of an appropriate penalty for a proven contempt or an established breach of a statutory prohibition is a matter for, and function of, the Courts in the exercise of judicial power. Secondly, ... the role of the Court in addressing an agreed penalty is not to exercise an "appellate" role. ... The role of the trial judge is to give such weight to an agreed penalty as is appropriate and to treat the joint submission as it is – a joint submission – to be considered as a factor, an important factor, in the exercise of judicial power of fixing the appropriate penalty in the circumstances of the particular case. ... The role of the Court is to assess what it would do itself based on the facts ... [and] to impose a penalty that is proportionate to the gravity of the contravening conduct. Much of the current debate about the appropriate approach has descended into a debate about which goes first – the Court assessing the penalty having regard to the agreed penalty or assessing whether the agreed penalty is within the appropriate range. For my part, that debate is distracting. It is distracting because it ignores the important role of the fundamental principles of sentencing that must be considered by a trial judge.

- 13.30 New Zealand courts have adopted the *NW Frozen Foods* and *Mobil Oil* approach to agreed penalties. Rodney Hansen J's approach in *Commerce Commission v Alstom Holdings SA*²⁷⁵ is often relied upon:

Finally, in discussing the general approach to fixing penalty, I acknowledge the submission that the task of the court in cases where penalty has been agreed between the parties is not to embark on its own enquiry of what would be an appropriate figure but to consider whether the proposed penalty is within the proper range (see the judgment of the Full Federal Court in *NW Frozen Foods v Australian Competition and Consumer Commission* (1996) 71 FCR 285). As noted by the Court in that case and by Hugh Williams J in *Commerce Commission v Koppers*, there is a significant public benefit when corporations acknowledge wrongdoing, thereby avoiding time-consuming and costly investigation and litigation. The Court should play its part in promoting such resolutions by accepting a penalty within the proposed range. A defendant should not be deterred from a negotiated resolution by fears that a

271 *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* [1996] FCA 1134, (1996) 71 FCR 285 at 290–291 per Burchett and Kiefel JJ.

272 *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72, (2004) ATPR 41-993.

273 *Australian Securities and Investments Commission v Ingleby*, above n 266, at [102].

274 See *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2013] FCA 1014 at [8].

275 *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) at [18].

settlement will be rejected on insubstantial grounds or because the proposed penalty does not precisely coincide with the penalty the Court might have imposed.

- 13.31 We do not dispute this approach. As stated above, we agree that negotiated agreements have substantial advantages, and that defendants need an appropriate level of certainty about the process. However, in light of *Ingleby*, we emphasise the need for the court to scrutinise the material presented to it carefully, and to satisfy itself that the information is sufficient to determine whether the proposed penalty is appropriate.²⁷⁶

What does this mean for provisions such as section 46A?

- 13.32 The *Ingleby* case heightens our concern about agreed penalties being imposed entirely without court oversight. We acknowledge that often both the regulator and defendant may prefer the negotiated route because of the certainty and cost savings it offers. However, we are uncomfortable with the potential for penalties to effectively be imposed by enforcement agents without court oversight of penalty quantum.
- 13.33 In general, the Commission's view is that the imposition of pecuniary penalties is rightly the role of the courts. Courts are best positioned to assess independently the appropriate penalty. In addition, developing an authoritative source of case law to assist both courts and parties to pecuniary penalty proceedings has clear benefits. We think, therefore, that provisions such as section 46A should only be included in statutes in very rare circumstances, where there is no chance of oppression or abuse of the procedure by the enforcement agency. This may be because the actors in the field are exclusively well-resourced to such an extent that there is no imbalance of power.
- 13.34 If such a provision is to be employed, it must be accompanied by two protections. First, there should be a legislative requirement to publicise details of: (a) the circumstances and nature of the breach; and (b) the quantum of the compensation or payment. We note that this approach has been adopted in the Financial Markets Authority Act 2011 for section 46A.
- 13.35 Secondly, enforcement bodies with such a power should make public their policy for approaching settlement negotiations with parties suspected of breach. This is reflected in Recommendation 11 of this Report.²⁷⁷ We would expect any enforcement agency would recognise and emphasise internally the need to act honestly and with complete propriety, fairness and in accordance with the highest professional standards.²⁷⁸

INSTIGATION OF PROCEEDINGS

- 13.36 Pecuniary penalty proceedings may be instigated only by the relevant enforcement body or agency. In this regard, they differ from certain other statutory, "civil" remedies. Any aggrieved person may apply for a compensatory order, and any "entitled person" may apply for a management ban, under the Securities Markets Act 1988. Similarly, a range of persons (and any person with leave of the court) can apply for civil remedy orders, injunctions and compensatory orders under the Takeovers Act 1993,²⁷⁹ but only the Takeovers Panel can commence pecuniary penalty proceedings.

²⁷⁶ *Australian Securities and Investments Commission v Ingleby*, above n 266, at [8].

²⁷⁷ See ch 20.

²⁷⁸ See for example Financial Markets Authority *Model Litigant Policy* < www.fma.govt.nz > .

²⁷⁹ Sections 33F, 33K, 33I and 35.

- 13.37 The position differs for criminal offences, as any person may commence a criminal proceeding.²⁸⁰ The right to private prosecution has a long history in common law jurisdictions and is justified on the grounds that:²⁸¹
- 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 a personal grievance.
- 13.38 The Criminal Procedure Act 2011 places constraints on the exercise of the right by providing that a District Court judge may require a private prosecutor to establish a *prima facie* case before accepting a charging document, or may refuse to accept it if it is otherwise an abuse of process.²⁸² This requirement is aimed at preventing vexatious and unprincipled private prosecutions from going ahead.²⁸³
- 13.39 In the Issues Paper, we stated that we could see no strong argument for allowing persons other than enforcement bodies to commence pecuniary penalty proceedings. This is particularly so because pecuniary penalties are not designed with compensation or the redress of harm in mind. Other routes such as private prosecutions and standard civil proceedings appear adequate for the vindication of any personal grievances.
- 13.40 We also noted that pecuniary penalties often feature where a public body has the purpose of overseeing and enforcing a statutory regime, and is resourced to do so.²⁸⁴ No submitters considered that anyone other than an enforcement agency should be able to commence pecuniary penalty proceedings. Indeed, submitters expressed some concern about the risk of abuse if others were able to commence such actions. We agree.

DECLARATIONS OF CONTRAVENTION

- 13.41 Some pecuniary penalty statutes provide for courts to make a “declaration of contravention”, either before or at the same time as making an order for a pecuniary penalty.²⁸⁵ For example, the Financial Markets Conduct Act 2013 provides as follows:

486 When court may make declarations of contravention

- (1) The court may, on the application of the FMA or any other person, make a declaration of contravention if it is satisfied that a person has—
- (a) contravened a civil liability provision; or
 - (b) been involved in a contravention of a civil liability provision.
- (2) ...

487 Purpose and effect of declarations of contravention

- (1) The purpose of a declaration of contravention is to enable an applicant for a compensatory order or other civil liability order under section 497 to rely on the declaration of contravention in the proceedings for that order, and not be required to prove the contravention or involvement in the contravention.

280 Criminal Procedure Act 2011, s 10.

281 See generally, Law Reform Commission of Canada *Private Prosecutions* (Working Paper 52, 1986).

282 Criminal Procedure Act 2011, s 26.

283 See Law Commission *Criminal Prosecution*, above n 262, at ch 10.

284 See also [6.2] of this Report.

285 Securities Markets Act 1988, ss 42T–42V; Takeovers Act 1993, ss 33M–33O; and Financial Markets Conduct Act 2013, ss 486–489.

- (2) Accordingly, a declaration of contravention is conclusive evidence of the matters that must be stated in it under section 488.

488 What declarations of contravention must state

A declaration of contravention must state the following:

- (a) the civil liability provision to which the contravention or involvement in the contravention relates; and
- (b) the person who engaged in the contravention or was involved in the contravention; and
- (c) the conduct that constituted the contravention or the involvement in the contravention and, if a transaction constituted the contravention, the transaction; and
- (d) the issuer, offeror, or service provider to which the conduct relates (if relevant).

- 13.42 The declaration, then, states the provision that was contravened, the conduct that constituted the contravention, and the person or persons who contravened the provision or were involved in the contravention.²⁸⁶ The purpose of a declaration of contravention is to provide conclusive evidence of the matters within it, so that if other orders are later applied for, the applicant can rely on the declaration instead of being required to prove the contravention again.
- 13.43 The Issues Paper noted that the declaration of contravention model creates cost and time efficiencies. Once a declaration has been obtained, the enforcement agency can rely on it to obtain other orders related to the breach (such as management bans and injunctions), without having to re-establish the matters that have already been before the court in the pecuniary penalty proceeding. Private parties can also do so when seeking compensatory or other orders that may be available to them for the breach. Therefore, this model can save significant court time, and public and private expense.
- 13.44 Some existing regimes do not expressly provide for the making of declarations of contravention, even though there is provision for compensation or other orders. For instance, under section 87A of the Commerce Act, a person can apply for compensation for breach of a price-quality requirement within one year of the date of a pecuniary penalty order being made. However, the Act does not require the court to make a declaration of contravention when ordering a pecuniary penalty.²⁸⁷
- 13.45 Despite the lack of specific statutory provision, the High Court has made declarations of contravention under its inherent jurisdiction in previous Commerce Act pecuniary penalty cases.²⁸⁸ There is some indication, then, that courts would find it useful to have clear statutory provision for a declaration of contravention where it would serve the purpose of the legislation.²⁸⁹
- 13.46 Given this, and that declarations of contravention can provide efficiency and cost benefits, we asked in the Issues Paper whether some or all pecuniary penalty regimes should expressly provide for them. Doing so would also save time and debate in court over a whether or not a court has jurisdiction to make a declaration.²⁹⁰

²⁸⁶ Each regime may also require additional information in the declaration. For instance, declarations under the Financial Markets Conduct Act must state, if relevant, the issuer, offeror or service provider to which the conduct relates.

²⁸⁷ See also s 124G of the Hazardous Substances and New Organisms Act 1996, under which actions for damages can be brought for pecuniary penalty breaches relating to new organisms.

²⁸⁸ *Commerce Commission v Fletcher Challenge Ltd* [1989] 2 NZLR 554 (HC) at 611 and *Commerce Commission v Telecom Corporation of New Zealand Limited* HC Auckland CIV 2004-404-1333 (9 October 2009) at [176].

²⁸⁹ See for example *Commerce Commission v Fletcher Challenge Ltd*, above n 288, at 611, in which McGechan J notes the omission of a declaration of contravention provision from the Commerce Act. Rather than being a situation in which the court's jurisdiction is excluded, he sees it as "more one of a 'gap' in the legislation which should be filled to make the Act work in accordance with legislative intention".

²⁹⁰ See for example *Commerce Commission v Telecom Corporation of New Zealand Limited*, above n 288, at [166]–[187].

- 13.47 There was support among submitters for the declaration of contravention model being used in those regimes where it is possible for separate civil orders to be sought by individuals. The Parliamentary Counsel Office (Commercial Team) noted that the usefulness of the declaration lies in enabling compensation proceedings to be brought more easily. Meredith Connell noted another potential advantage of these declarations, namely that they reduce the risk of a court being asked to rule on the same matter twice and arriving at potentially different results. The Law Society and Ministry for Primary Industries both considered that the issue is probably best considered on a case-by-case basis.
- 13.48 We support the declaration of contravention model being used in pecuniary penalty legislation where other civil orders can be sought by private third parties and/or where several orders can be sought by an enforcement agency, and using a declaration of contravention model would avoid a possible double-up of time and expense by requiring plaintiffs to re-establish the evidence related to the contravention each time. In that context, policymakers may consider that a declaration of contravention, which can be treated as conclusive evidence of the matters stated within it, is a desirable option.

Evidential function of declarations of contravention

- 13.49 The recent Queensland case *ASIC v Managed Investments Ltd*²⁹¹ demonstrates the potential for statutory ambiguity about the use to which declarations of contravention may later be put. While the issue has not arisen here, the wording of the relevant provisions in New Zealand statutes is similar, and could give rise to similar ambiguities. Drafters should be aware of that possibility, and may need to address it in the drafting of future provisions.
- 13.50 In the case mentioned, the Australian Securities and Investments Commission (ASIC) sought a declaration of contravention against a company for a breach caused by the conduct of several of its corporate officers. The entity and its officers were both defendants to the proceedings, but the declaration was only sought against the entity. The fifth defendant, Mr White, was concerned that any declaration of contravention made against the company could be used as conclusive evidence in later proceedings brought against him personally. The substantive issue was whether the Court should exercise its discretion to grant summary judgment in favour of ASIC, for the breach by the corporate entity. The Court had to consider whether the possible later use of the declaration of contravention against Mr White should affect the exercise of its discretion.
- 13.51 The declaration of contravention provision in question in that case was section 1317F of the Corporations Act 2001 (Cth), which provided that “[a] declaration of contravention is conclusive evidence of the matters referred to in subsection 1317E(2)”. The subsection set out the matters to be included in the contravention and, relevantly, they included the conduct that constituted the contravention. Therefore, the declaration would arguably be conclusive evidence of the conduct of Mr White that led the company to be in breach.
- 13.52 Fryberg J considered two possible interpretations of section 1317F. He concluded that it would be too wide an interpretation to suggest that the declaration could be used in later proceedings of any kind. Such a broad reading of the provision would be “plainly wrong”.²⁹² However, he thought that the wording of the provision did not limit declarations to operating only in relation to the person or persons against whom they were originally made (in this case, the corporate entity). He concluded that it would be open to ASIC, and indeed to other parties, to use the

291 *Australian Securities and Investments Commission v Managed Investments Ltd* (No 4) [2013] QSC 15.

292 At [27].

declaration of contravention made in the proceedings against the company in later proceedings against the officers personally. He said:²⁹³

[T]here are proceedings which might be brought by other parties against persons other than the defendant who is the subject of the declaration, to which, on the face of the legislation, the presumption of conclusive evidence might well apply and in respect of which one could imagine a policy reason for it to apply.

- 13.53 The Judge concluded that the possible re-use of the declaration in this way was a relevant factor in his decision whether to grant summary judgment. The Judge also took into account the fact that deciding the substantive case against the corporate entity in advance of any possible later proceedings against the officers would require the officers to deal with the merits of the application and thereby waive their privilege, and that the decision would have an indirect impact on the corporate officers, particularly in relation to their insurers.²⁹⁴
- 13.54 In the New Zealand context, we would be concerned at the prospect of a declaration of contravention provision being used in the manner described by Fryberg J. We have noted at [13.43] the reasons why declarations of contravention are considered useful; reasons that were restated and supported by submitters. These reasons do not extend to using those declarations as conclusive evidence of the conduct of persons who were not the original subject of the declaration. Doing so could, as Fryberg J noted, create a risk of procedural unfairness for the persons concerned. They would also not be in a position to appeal the making of that declaration, since they would not be the subject of it. The question of directors' liability for corporate breach is one that should be examined and designed separately from the matters addressed by a declaration of contravention provision.
- 13.55 If our own courts were faced with a similar issue as arose in *ASIC v Managed Investments Ltd*, it would be open to them to take a similar view of the provision as Fryberg J did. That would concern us for the reasons noted above. Given this, we suggest that PCO ought to consider whether an alternative form of drafting could eliminate any ambiguity on this point.

293 At [33].

294 At [38].

G10 Pecuniary penalties should be imposed by a court

Pecuniary penalties should not be imposed directly by an enforcement agent. This approach should only be departed from in rare cases:

- Where decisions on fact and liability genuinely require assessment by industry experts. In those circumstances there may be a case for imposition of a pecuniary penalty by an industry tribunal or “panel”. There should be a statutory requirement that the chair of the body has legal expertise.
- Where a case can be made that the statute should allow the enforcement agency and defendant to settle the penalty out of court. This should only be provided for in exceptional circumstances, where, within the field regulated, there is no chance of oppression or abuse of the procedure. This may be because all the actors in the field are well-resourced, such that there is no significant imbalance of power.

If such a provision is to be included in a regime, the statute should require that the details of the settlement be publicised, including (a) the circumstances and nature of the breach and (b) the quantum of the agreed penalty.

G11 Pecuniary penalty proceedings should only be commenced by an enforcement body or agent acting under a statutory power

There should be no scope for private persons to seek and obtain pecuniary penalties.

G12 “Declaration of contravention” provisions should be considered where other civil orders can be sought by third parties or where several orders can be sought by an enforcement agency

Provision for a declaration of contravention should be considered where other civil orders can be sought by third parties or where several orders can be sought by an enforcement agency, and where such an approach might result in cost savings.

However, the wording of a declaration of contravention provision should clarify that it is only conclusive evidence of the matters stated in it for the purpose of later proceedings against the same entity or individual against whom the declaration was made. There should be no risk of such declarations being used as a means of attributing liability to others.

Chapter 14

Individual and corporate liability

- 14.1 Pecuniary penalties can be imposed on a body corporate as well as natural persons (such as directors, officers or employees). Pecuniary penalty statutes take a range of approaches towards delineating and attributing corporate and individual liability.
- 14.2 We asked two questions in the Issues Paper:²⁹⁵
- (a) Should 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?
 - (b) Should guidance be provided for policymakers about the methods of attributing and ascribing liability between a body corporate and its officers in a pecuniary penalty regime?
- 14.3 Based on analysis and submissions, we conclude that it is not necessary to provide further guidance to the courts on penalty quantum in such circumstances, but that guidance for policymakers on methods of attributing liability is desirable.

PENALTY QUANTUM

- 14.4 As separate legal persons, it is possible for a corporate entity and an individual each to be concurrently and separately liable for a pecuniary penalty, based on the same conduct. In the Issues Paper, we noted that determining penalty quantum is a matter of court discretion and asked whether pecuniary penalty statutes should give more direction about penalty quantum in these circumstances, given that issues of double punishment and double jeopardy may arise.²⁹⁶
- 14.5 Pecuniary penalty provisions generally do not provide much guidance to the courts on this matter, other than the provision of different maxima for individuals and corporates.²⁹⁷ The one exception is the Commerce Act 1986. The 2001 amendments to that Act, aimed at “promoting general deterrence”,²⁹⁸ created a presumption that pecuniary penalties be awarded against individuals unless a court considers there is “good reason” for not doing so.²⁹⁹
- 14.6 Submitters were divided on the need for further guidance for the courts on this matter. Some thought guidance would be useful.³⁰⁰ Others questioned whether it was practical to provide such guidance, given the wide range of situations giving rise to pecuniary penalties.³⁰¹ Both the Parliamentary Counsel Office (Commercial Team) (PCO) and Donald Mathieson QC noted that the justice of the case would differ depending on the nature of the company and the role of the individual concerned.

295 Law Commission *Civil Pecuniary Penalties* (NZLC IP33, 2012) [Issues Paper] at Q24 and Q25.

296 Issues Paper, above n 295, at Q24.

297 See the discussion in ch 16 on factors relevant to penalty quantum.

298 Commerce Amendment Bill (No 2) 2001 (32-1) (explanatory note) at 1.

299 Commerce Act 1986, s 80(2).

300 The New Zealand Law Society, Ministry for Primary Industries, Air New Zealand, Federated Farmers and Meredith Connell.

301 New Zealand Bar Association, Donald Mathieson QC and Parliamentary Counsel Office (Commercial Team) (PCO).

- 14.7 The New Zealand Bar Association also noted that courts are “experienced in determining penalties in many fact situations including cases where both a company and an individual are principally liable for the same contravention”.³⁰²
- 14.8 We agree that it would be very difficult to provide practical guidance for the apportionment of penalties between corporations and individuals, given the wide range of circumstances in which pecuniary penalties may be imposed. The courts are conscious of the need to ensure that the penalties imposed reflect the relative culpability and involvement of different (corporate and individual) parties, and it does not seem that apportionment is an area causing difficulty.
- 14.9 For example, greater penalties have been imposed on those regarded as a “prime mover” in the contravention, than those imposed on “willing followers” in a breach of section 29 of the Commerce Act.³⁰³ Similarly, a greater penalty was imposed on the “driving force”, than on a defendant who assisted in the arrangements contravening section 27 of the Commerce Act.³⁰⁴ Any guidance (such as the need to consider the individual’s level of involvement, their role and seniority in the corporation, and any personal benefit) is likely to be so general in nature that it is redundant.
- 14.10 A secondary issue raised in our Issues Paper was the appropriateness of courts sharing out a single penalty between the individual and the corporate to avoid double punishment, rather than imposing separate penalties on each. As McGechan J in *Commerce Commission v Wrightson NMA Ltd* said:³⁰⁵
- The infliction of separate penalties would be to penalise twice ... I resolve the problem for this case by penalising the one course of conduct, and dividing the penalty for this course of conduct between the company and the individual concerned.
- 14.11 Likewise, in *Commerce Commission v Ophthalmological Society of NZ Inc*, Gendall J said:³⁰⁶
- I am conscious that there be no element of double punishment arising out of penalties being imposed upon the society and either of the two individual defendants. In fixing a penalty I take that into account, bearing in mind that I am clear that individual penalties are required but of a significantly lesser degree than that on the society.
- 14.12 The New Zealand Bar Association submission questioned the appropriateness of splitting a penalty in this manner. It drew analogies to the criminal law where perpetrators of the same crime each receive an independent penalty as a principal, rather than “sharing” an overall punishment. The Association felt that the punitive and deterrent function of pecuniary penalties may mean that the criminal approach is more appropriate than the approach taken in civil proceedings where the defendants who have caused the same loss or damage are held responsible for a share of the total damage.
- 14.13 We think the situation is more nuanced. We agree that where a corporate and an individual are concurrently liable, or where two different corporations are concurrently liable, it may be appropriate that the penalty is imposed on each defendant, rather than split between them. However, it seems to us that the situation could be different where the individual is associated with the corporation, for instance, by being an employee. There, concurrent liability arises in relation to the same course of conduct, namely the conduct of the individual. The individual’s

302 Submission of the New Zealand Bar Association (21 February 2013) at 7.

303 *Commerce Commission v Wrightson NMA Ltd* (1994) 6 TCLR 279 (HC) at 10.

304 *Commerce Commission v Ophthalmological Society of New Zealand Inc* [2004] 3 NZLR 689 (HC) at [47].

305 *Commerce Commission v Wrightson NMA Ltd*, above n 303, at 11.

306 *Commerce Commission v Ophthalmological Society of New Zealand Inc*, above n 304, at [44].

contravening conduct is carried out on behalf of the corporation.³⁰⁷ In such a situation, we consider that it may be appropriate for the penalty to be split between the corporation and the individual, at the court's discretion.

Regulatory enforcement policy

- 14.14 The PCO submission suggested that the matter of whether enforcement agencies pursue individuals or corporations could be usefully incorporated in enforcement agency guidance. Where an individual and a corporation are each potentially liable to a pecuniary penalty, whether enforcement action is taken against either or both will depend on the context and discretion of the enforcement agency. We agree that it would be useful and desirable for enforcement agency policy to include the factors to be taken into account in the exercise of that discretion. In Chapter 20, we discuss the need for enforcement bodies to provide guidance on how they will enforce their regimes.

GUIDANCE FOR POLICYMAKERS

- 14.15 As a general rule, New Zealand statutes expose both corporations and individuals to pecuniary penalties as principals, by attaching liability to a “person”. This term is defined inclusively in the Interpretation Act 1999 to include a corporation sole, a body corporate, and an unincorporated body.³⁰⁸ In such instances, whether actions are taken against corporations or individuals will depend on the context, and the discretion of the enforcement agency.
- 14.16 In the Issues Paper, we asked whether guidance should be provided for policymakers about the methods of attributing liability between a body corporate and its officers in a pecuniary penalty regime.³⁰⁹ The New Zealand Law Society, New Zealand Bar Association, Ministry for Primary Industries, PCO, Federated Farmers and Air New Zealand all agreed that guidance would be desirable in the interests of consistency and certainty.
- 14.17 PCO noted that different methods of attributing liability involve significant trade-offs, including for the economy. Given the range of contexts in which pecuniary penalties are used, it was of the view that any guidance should set out the advantages and disadvantages of the different approaches, without mandating any particular position.
- 14.18 Pecuniary penalties are used in a range of contexts. We agree with PCO's submission that there is no “one size fits all” approach to individual and corporate liability. What is appropriate will depend on the legislative scheme, what it is trying to achieve and the incentives it seeks to put in place to best achieve that purpose. But it is possible to set out generally applicable principles and direct policymakers towards the full range of considerations that should be taken into account. These principles and considerations will also be of assistance to those designing regimes based on criminal liability.
- 14.19 Pecuniary penalty provisions should be clear about whether corporations and/or individuals are to be liable. Relevant questions include:
- What type of conduct (corporate or personal) is the pecuniary penalty seeking to moderate?
 - Is the conduct the kind that is usually carried out by individuals or corporations?

307 See *Giltrap City Ltd v Commerce Commission* [2004] 1 NZLR 608 (CA) at [52].

308 Interpretation Act 1999, ss 29, 30. Specific pecuniary penalty statutes may also contain a definition of “person”, which will override the Interpretation Act definition. See, for example, s 6 of the Financial Markets Conduct Act 2013 (“person includes any entity”); s 4 of the Unsolicited Electronic Messages Act 2007 (“person means: (a) an individual; and (b) an organisation”); and s 2 of the Commerce Act 1986 (“Person, includes a local authority, and any association of persons whether incorporated or not”).

309 Issues Paper, above n 295, at Q25.

- Is the activity being regulated one in which the costs of paying the pecuniary penalty could easily be passed on to others (for example, consumers or shareholders)?

14.20 If corporations are to be liable, the following should also be considered:

- Are the normal rules of agency sufficient to attribute the actions of individuals to the corporation, or should a specific provision of attribution be included?
- Should individuals also be liable for the corporate misconduct? Relevant considerations include:
 - whether corporate liability alone is sufficient to promote compliance; and
 - whether an individual would be subject to other disciplinary proceedings in the event of corporate non-compliance.

14.21 If there is to be individual liability, a number of forms are available. We discuss these in detail below. They are:

- concurrent principal liability;
- deemed liability;
- imposition of duties; and
- accessory and other forms of secondary liability.

Corporate liability

14.22 A corporation is a legal entity in its own right separate from its shareholders,³¹⁰ and is able to sue and be sued.³¹¹ However, as a corporation can only act and think through its employees, it can only be liable if the actions and/or knowledge of its employees are attributed to the corporation. Primary rules of attribution such as those located in the Companies Act 1993 and a company's constitution set out a formal method of attribution.³¹² General rules of agency and vicarious liability, that apply to all legal persons, provide another means of attribution.

14.23 Outside of these primary and general rules, courts have used the identification principle to determine corporate liability. This principle involves identifying an individual or individuals who form part of the “directing mind and will” of the company and attributing their actions and/or state of mind to that company.³¹³ The identification principle is contained in the oft-referred to House of Lords judgment, *Tesco v Natrass*,³¹⁴ but is perhaps best summed up by Lord Denning in *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd*:³¹⁵

A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than the hands to do the work and cannot be said to represent the mind or will. Others are directors

310 Companies Act 1993, s 15.

311 Susan Glazebrook (ed) *Commercial Law in New Zealand* (online looseleaf ed, LexisNexis) at [CA15.02].

312 See Neil Campbell “Corporate Personality” in Peter Watts, Neil Campbell and Christopher Hare (eds) *Company Law in New Zealand* (LexisNexis, Wellington, 2011) 27 at [2.3].

313 See *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 (HL) at 713 where Viscount Haldane LC states:

... a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.

314 *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 (HL).

315 *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159 (CA) at 172.

or managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.

- 14.24 As stated in *Tesco v Nattrass*, under this approach an individual who represents the directing mind of the company is “acting as the company and his mind which directs his acts is the mind of the company... [h]e is an embodiment of the company”.³¹⁶
- 14.25 The Privy Council (sitting on appeal from the New Zealand Court of Appeal) applied a more nuanced approach in *Meridian Global Funds Management Asia v Securities Commission*.³¹⁷ Lord Hoffman stated that the principal and general rules of attribution are usually sufficient to determine a company’s rights and obligations. However, some situations will remain where the court comes to the conclusion that the law was intended to apply to companies notwithstanding the fact that it excludes ordinary vicarious liability:³¹⁸
- [T]he Court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as an act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy.
- 14.26 The substantive rule at issue in *Meridian* was a requirement to provide notice when a person knows, or ought to know, that they have become a “substantial security holder” in a relevant company. The question was whether the knowledge of the investment managers who acquired the shares could be imputed to the company they worked for. The Privy Council found that it could, as the policy of the Securities Amendment Act 1988 was to compel immediate disclosure. To give effect to this policy, the knowledge of the people who acquired the interest, rather than the Board or senior management, needed to be imputed to the company.
- 14.27 The *Meridian* approach therefore provides a context-specific approach of attribution, rather than one focused on the position of an individual within a company. Whose acts and/or knowledge are to be imputed to a corporation will depend on the construction and policy of the statutory provision.³¹⁹ For this reason, it has been described as a “mechanism of statutory interpretation” rather than a general principle of company law.³²⁰
- 14.28 Legislation may also contain a specific provision of attribution. This has the benefit of clarity as to whose conduct or state of mind can be attributed to a corporation. An example is contained in section 90(1)–(2) of the Commerce Act:

90 Conduct by servants or agents

- (1) Where, in proceedings under this Part in respect of any conduct engaged in by a body corporate, being conduct in relation to which any of the provisions of this Act applies, it is necessary to establish the state of mind of the body corporate, it is sufficient to show that a director, servant or

316 *Tesco Supermarkets Ltd v Nattrass*, above n 314 at 170.

317 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 (PC). For discussion of the case, see Peter Watts “Company Law” (1995) NZ Law Rev 237; LS Sealy “The Corporate Ego and Agency Intertwined” (1995) 54 CLJ 507; and Eilís Ferran “Corporate Attribution and the Directing Mind and Will” (2011) 127 LQR 239.

318 *Meridian Global Funds Management Asia Ltd v Securities Commission*, above n 317, at 12 (emphasis in the original). Other examples where insistence on primary and general rules of attribution may be insufficient may include competition laws and health and safety legislation: see John Farrar and Susan Watson (eds) *Company & Securities Law in New Zealand* (online looseleaf ed, Brookers) at [9.1.5].

319 There is some debate over the effect of the different approaches on a corporate officer’s personal liability to a third party when they are acting on behalf of a company: see generally Peter Watts, Neil Campbell and Christopher Hare (eds) *Company Law in New Zealand* (LexisNexis, Wellington, 2011) at 40–41 and 96–109; and Farrar and Watson, above n 318, at [9.3.1] and [9.3.4].

320 Farrar and Watson, above n 318, at [9.1.5]. See also Lord Cooke “Corporate Identity” (1998) 16 C&SLJ 160 at 163 where he states, “*Meridian* is a useful reminder that questions of corporate criminality arising under statute must ultimately be governed by the terms and purposes of the offence-creating provision.”

agent of the body corporate, acting within the scope of his actual or apparent authority, had that state of mind.

(2) Any conduct engaged in on behalf of a body corporate—

- (a) by a director, servant, or agent of the body corporate, acting within the scope of his actual or apparent authority; or
- (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant, or agent of the body corporate, given within the scope of the actual or apparent authority of the director, servant or agent—

shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate.

Individual liability

14.29 The purpose of a regulatory regime may make it appropriate to limit liability to individuals, and exclude the liability of corporations. As noted in the Financial Markets Authority submission to the Law Commission's Issues Paper:

In some cases our securities law gives primary (or even sole) liability to individuals rather than corporates, recognising that some actions against a company by aggrieved shareholders, for example, simply reduce any value that those shareholders have in the company.

14.30 This reflects the fact that a corporate pecuniary penalty can sometimes unfairly punish innocent parties (such as shareholders) who, in fact, may be amongst the people the regulated regime is seeking to protect. In such instances, it may be appropriate to restrict liability to individuals, provided that the expected standards for compliance are both clear and well understood.

14.31 A separate issue is whether an individual should be liable in addition to a corporation. A number of arguments have been advanced against this approach. First, exposure to a substantial corporate penalty is a significant deterrent that is not limited to the financial penalty imposed, but also includes the reputational damage occasioned by such a penalty.³²¹ This deterrent effect flows through to individuals who are responsible for the organisation's compliance, making personal liability of individuals unnecessary and excessive.

14.32 Secondly, a corporation itself may be in the best position to investigate and moderate the behaviour of individuals that have exposed it to a pecuniary penalty:³²²

Rather than having the state monitor the activities of each person within the organization, which is costly and raises practical enforcement difficulties, it may be more efficient to force the corporation to do this, especially if sanctions imposed on the corporation can be translated into effective action at the individual level.

14.33 Individual actions that contribute to a statutory contravention could damage the employment and advancement prospects of such individuals, as well as put them at risk of disciplinary proceedings. It is also possible that a director's actions that place a corporation in default could breach his or her duties or obligations to the company, which could result in steps for removal or civil action. It can be argued that the possibility of these measures act as an adequate deterrent on individuals.³²³ Nevertheless, there is no guarantee (or even obligation) for a corporation to investigate and moderate the behaviour of its officers and employees.

321 See Brent Fisse and John Braithwaite "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability" (1988) 11 Syd LR 468 at 490 for discussion about the importance of corporate image. See also Brent Fisse "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions" (1983) 56 S Cal L Rev 1141.

322 Law Reform Commission of Canada *Criminal Responsibility for Group Action* (Working Paper 16, 1976) at 31.

323 Corporation and Markets Advisory Committee *Personal Liability for Corporate Fault: Discussion Paper* (May 2005) at 15.

- 14.34 Arguments in favour of individual liability reflect, at their core, the concern that corporate liability on its own is not enough to ensure compliance. Intuitively it seems correct that a specific deterrent on an individual provides an additional incentive for such individuals to take more responsibility for ensuring corporate compliance.³²⁴
- 14.35 At times, an individual's personal interests may not be aligned with the corporate interest in compliance. This risk was targeted by amendments to the Commerce Act, directing that a court "must order an individual who has engaged in any [anti-competitive conduct] to pay a pecuniary penalty, unless the Court considers that there is good reason for not making the order".³²⁵ The Select Committee considering the amendment described the presumption as a "key measure deterring anti-competitive offending" and set out its reasoning thus:³²⁶
- The purpose of the change is to acknowledge that general deterrence is promoted if the individuals within firms that perpetrate offences face a personal pecuniary risk. Even though companies tend to gain the most from breaching the Act, remuneration structures and wider career aspirations can create incentives for individuals to breach the Act in order to directly benefit themselves.
- 14.36 Further, it has been argued that the general deterrent effect of a corporate penalty may be too diffuse to be effective. A corporation may choose to absorb a pecuniary penalty as a cost of doing business, as a form of "licence" fee. These problems can be exacerbated where a corporation is able to pass on the cost of a penalty to others (such as to consumers, insurers or shareholders) thus reducing or even negating their punitive effect.³²⁷
- 14.37 Individual liability, therefore, is expected to promote compliance by providing a personal incentive for individuals to act in a manner that ensures corporate compliance.

Conclusion

- 14.38 Whether a provision should impose liability on individuals, corporations or both will depend on the regime and what it is trying to achieve. If the behaviour being regulated is that of both individual and corporate actors, it will be appropriate for both to be liable.³²⁸ However, in some instances it will be appropriate to limit liability to corporations only, for instance where the legislation solely seeks to regulate corporate behaviour; or to individuals only, for instance where a corporate penalty would punish innocent parties or parties whom the regime is trying to protect, such as under securities legislation.
- 14.39 If a pecuniary penalty is being used as a means to regulate corporate behaviour, corporations should be liable in the first instance.³²⁹ While using the term "person" will automatically expose corporations to liability by virtue of the Interpretation Act, how the actions and/or state of mind of individuals should be attributed to the corporation, or whether general principles of agency apply need to be carefully considered. An attribution provision such as section 90 of the Commerce Act 1986 may be desirable to provide clarity.
- 14.40 If the provision imposes individual liability, consideration of what form this liability should take will be needed. Different forms of individual liability are discussed in the next section.

324 See also Michelle Welsh and Helen Anderson "Directors' Personal Liability for Corporate Fault" (2005) 26 *Adel L Rev* 299 at 301.

325 Commerce Act 1986, s 80(2).

326 Commerce Amendment Bill 1999 (296-2) (select committee report) at 26. See also Jill Mallon and Jenny Stevens "Commerce Act Penalties for Individuals" (2001) *NZLJ* 339 at 339, where the amendments were described as aiming "to deter by increasing the likelihood that individuals will be penalised".

327 Australian Law Reform Commission *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (ALRC R95, 2002) at 310–312; Corporations and Markets Advisory Committee *Personal Liability for Corporate Fault* (September 2006) at 26–27; and Fisse and Braithwaite, above n 321.

328 See for example, the Unsolicited Electronic Messages Act 2007, which targets both individuals and corporations.

329 See Council of Australian Governments principles listed in this Report at [14.59].

Forms of individual liability

- 14.41 This section considers three types of individual liability: concurrent principal liability, deemed liability and imposition of duties, followed by a discussion of ancillary liability. Given the wide range of behaviour that pecuniary penalties apply to, which approach is most appropriate will depend on the circumstances, the legislative context and the purpose of the pecuniary penalty provision. With that in mind, the following discussion explains the different forms of liability, makes some general statements as to when that form of liability may be appropriate, and notes matters requiring consideration in the formulation of the liability provision.
- 14.42 Whichever approach is adopted, the legislative drafting should make it clear who is liable and what they can do to avoid liability. In all cases, it is important that individuals and corporations are clear about their responsibilities, obligations and liability.

Concurrent principal liability

- 14.43 This involves individuals concurrently liable as a principal. It will mean that conduct by an individual could expose both a corporation and that individual to a penalty. Under this form of liability, an individual will only be liable if they have “done everything necessary to commit the offence”.³³⁰
- 14.44 If it is intended that individuals are concurrently liable as principals, the legislative drafting should be clear. As with attribution for corporate liability under *Meridian*, whether a statute allows for concurrent individual liability as a principal is a matter of statutory construction. The policy of the provision will also be relevant in ascertaining parliamentary intention.
- 14.45 If principal liability attaches to both corporates and individuals, it may be possible for both to be concurrently liable as principals for the same course of conduct. As McGechan J stated in *Commerce Commission v Wrightson NMA Ltd*, this is possible because “[t]echnically, of course, each is a separate legal person and separately liable”.³³¹ The matter is discussed in more detail by the Court of Appeal in *Giltrap City Ltd v Commerce Commission*:³³²

The question to be considered is, in short, whether the director, servant or agent is acting *for* the company or as the company ... When a person is acting *for* the company it is easier to view his conduct as both his own and vicariously that of the company. When a person is acting as the company, it is ... more difficult, at least in general terms, to regard the conduct as that of both the person so acting and the company.

- 14.46 Whether corporations and individuals can be concurrently liable will turn on the construction of the statute. Section 27 of the Commerce Act (the general provision relating to substantial lessening of competition) provides an example of a pecuniary penalty that allows concurrent liability. The Court of Appeal considered the construction of section 90(2) to conclude that concurrent liability was available:³³³

Section 90(2) speaks of conduct engaged in *on behalf* of a body corporate. That mode of expression suggests the company is liable vicariously rather than by attribution. The same can be said of the use of the word “also” in the statutory direction that the conduct of the director, servant or agent “shall be deemed ... to have been engaged in *also* by the body corporate” (emphasis added). Not only linguistically but also in policy terms the section should be construed as making the proscribed conduct

330 *Megavitamin Laboratories (NZ) Ltd v Commerce Commission* and *Commerce Commission v Stewart*, (1995) 6 TCLR 231 (HC), at 236.

331 *Commerce Commission v Wrightson NMA Ltd*, above n 303, at 11.

332 *Giltrap City Ltd v Commerce Commission*, above n 307, at [52] (emphasis in the original).

333 *Giltrap City Ltd v Commerce Commission*, above n 307, at [53] and [56] (emphasis in the original). See also *Megavitamin Laboratories (NZ) Ltd v Commerce Commission* and *Commerce Commission v Stewart*, above n 330, at 244–245.

both that of the director, servant or agent and that of the company. That construction is consistent with the statement in s 27 that “no person” shall enter into a proscribed arrangement.

... our conclusion, in short, is that both the language of the enactment and the statutory policy that “no person” shall enter into a contravening arrangement results in both principal and agent having principal liability.

Conclusion

- 14.47 Concurrent individual liability as a principal may be appropriate in some circumstances. A factor that may favour such an approach is where the contravening conduct is likely to be engaged in by one person in a corporation (such as sending electronic spam) rather than multiple individuals within an organisation (such as a corporate merger, in which many people would be involved). If concurrent individual liability as a principal is envisaged, the legislative drafting should be clear that this is the intent (for example, in any attribution provision). If this is not intended, the provision should likewise be clear.

Deemed liability

- 14.48 Deemed liability makes an individual, by virtue of their position or function in an organisation, liable as a consequence of corporate breach. The most common instance is for directors or senior managers to be deemed liable in cases of corporate contravention.
- 14.49 Deemed liability differs from primary or accessorial liability as it does not attach as a consequence of a corporate officer’s involvement in the breach, but because of their position or function within the corporation.
- 14.50 A deeming provision effectively places responsibility for corporate non-compliance on a specified individual or individuals. The advantage of such liability is that it allows an enforcement agency to seek a penalty against a corporate officer simply because they occupy a particular position or perform a certain function within a corporation. Such provisions also provide a strong incentive on corporate officers to put systems and procedures in place to ensure corporate compliance. They also have the benefit of providing certainty as to which corporate officers within a corporation have responsibility for ensuring compliance with the relevant standards.
- 14.51 The general objection to such provisions, however, is that they can expose an individual to a personal penalty merely because of their position in a corporation, regardless of their role in the contravention or whether they had any power to prevent it.³³⁴ A corporate officer’s power to influence corporate conduct will also vary between corporations. Framed broadly and without any substantive defences, a deeming provision could expose a corporate officer to liability even if he or she has no involvement in the corporate breach.
- 14.52 At a broader level, there are concerns that corporate officer liability (generally that of directors) will make it harder to attract quality candidates into these positions.³³⁵ A survey conducted by the Australian Treasury in conjunction with the Australian Institute of Company Directors provides support for the view that the risk of personal liability can have a negative impact on recruitment and retention.³³⁶ The spectre of personal penalty may also cause corporate officers

³³⁴ See the submissions of the New Zealand Bar Association and the Institute of Directors.

³³⁵ Corporations and Markets Advisory Committee, above n 327, at 32.

³³⁶ Australian Institute of Company Directors “AICD welcomes findings on director liability” *Company Director* (Australia, 1 February 2009). See also Parliamentary Joint Committee on Corporations and Financial Services *Inquiry into the Personal Liability for Corporate Fault Reform Bill 2012* (October 2012) at 12; and Australian Institute of Company Directors *Impact of Legislation on Directors* (November 2010) at 4.

- to be unduly risk-averse when making decisions.³³⁷ The proliferation of such provisions could therefore have unintended and adverse effects on the economy or the activity being regulated.
- 14.53 The concerns that deeming provisions give rise to are aptly described in the Australian Government Corporations and Markets Advisory Committee Report.³³⁸ Although that Report is limited to considerations of criminal liability, the same concerns are relevant in the pecuniary penalty context. These include, but are not limited to the following issues:³³⁹
- (a) They attach personal liability to corporate officers even where there is no element of personal fault. Personal liability should require a direct relationship between the actions or omissions of individuals and the corporate contravention.
 - (b) Deeming provisions can be unfair. They can impose liability on individuals who could not reasonably have influenced or prevented the relevant conduct.
 - (c) Exposure to liability can act as a significant disincentive to people taking on directorships or other senior management roles.
- 14.54 The Report concludes:³⁴⁰
- ... as a general principle, individuals should not be made criminally liable for misconduct by a company except where it can be shown that they have personally helped in or been privy to that misconduct, that is, where they were accessories.
- 14.55 The Australian Law Reform Commission (ALRC) *Principled Regulation* Report also recognised the risk of unfairness of deeming provisions. Although recognising that such provisions provide an efficient mechanism for attributing liability to individuals for corporate contraventions, the ALRC Report recommended that deeming provisions “should include a fault element that the individual knew that, or was reckless or negligent as to whether, the contravening conduct would occur”.³⁴¹
- 14.56 Following these reviews, the Council of Australian Governments (COAG) developed a set of principles for imposing liability on individual corporate officers for instances of corporate fault.³⁴² Although the COAG principles only apply to criminal offences and not to pecuniary penalty provisions, the Guidelines for applying the COAG principles state that:³⁴³
- [W]here civil penalty provisions take the same form as offence provisions, and the same conduct may lead to both the contravention of an offence and a civil penalty provision, jurisdictions may wish to consider adopting a consistent approach.
- 14.57 The COAG principles apply to individual personal liability that attaches as a consequence of corporate offending or “deemed liability”. They should therefore be considered if deemed liability is to be used in a pecuniary penalty regime. The principles are:³⁴⁴

337 See generally Ronald J Daniels “Must Boards go Overboard? An Economic Analysis of the Effects of Burgeoning Statutory Liability on the Role of Directors in Corporate Governance” (1994) 24 CBLJ 229; and Welsh and Anderson, above n 324.

338 Corporations and Markets Advisory Committee, above n 327.

339 At 30.

340 At 33.

341 Australian Law Reform Commission, above n 327, at 328–329.

342 Council of Australian Governments *Personal Liability for Corporate Fault – Guidelines for applying the COAG Principles* (July 2012); *Personal Liability for Corporate Fault Reform Bill 2012* (Cth).

343 At [2.2], note 1.

344 At [3.1].

1. Where a corporation contravenes a statutory requirement, the corporation should be held liable in the first instance.
2. Directors should not be liable for corporate fault as a matter of course or by blanket imposition of liability across an entire Act.
3. A “designated officer” approach to liability is not suitable for general application.
4. The imposition of personal criminal liability on a director for the misconduct of a corporation should be confined to situations where:
 - (a) there are compelling public policy reasons for doing so (for example, in terms of the potential for significant public harm that might be caused by the particular corporate offending);
 - (b) liability of the corporation is not likely on its own to sufficiently promote compliance; and
 - (c) it is reasonable in all the circumstances for the director to be liable having regard to factors including:
 - (i) the obligation on the corporation, and in turn the director, is clear;
 - (ii) the director has the capacity to influence the conduct of the corporation in relation to the offending; and
 - (iii) there are steps that a reasonable director might take to ensure a corporation’s compliance with the legislative obligation.
5. Where principle 4 is satisfied and directors’ liability is appropriate, directors could be liable where they:
 - (a) have encouraged or assisted in the commission of the offence; or
 - (b) have been negligent or reckless in relation to the corporation’s offending.
6. In addition, in some instances, it may be appropriate to put directors to the proof that they have taken reasonable steps to prevent the corporation’s offending if they are not to be personally liable.

Examples

14.58 An example of this type of provision is contained in s 154I(4) of the Biosecurity Act 1993 (emphasis added):

- (4) A court that makes an order under section 154H against a body corporate may also make an order against every director or person concerned in the management of the body corporate *if it is proved—*
 - (a) that the act or omission that constituted the non-compliance took place with the director or person’s authority, permission, or consent; or
 - (b) that the director or person knew that the non-compliance was occurring or was to occur and failed to take all reasonable steps to prevent or stop it.

14.59 The framing of this subsection (“if it is proved”) suggests that the enforcement agency has the burden of proving the relevant elements of authority, knowledge and reasonable steps, although it is by no means clear.³⁴⁵ This wording can be contrasted with s 57A(1)(b) of the Securities Act,³⁴⁶ which sets out an affirmative defence that a director has the burden of establishing (emphasis added):

³⁴⁵ See the Issues Paper, above n 295, at [6.45]–[6.48]; above, ch 8.

³⁴⁶ This provision has been repealed by the Financial Markets (Repeals and Amendments) Act 2013, but remains in force in relation to existing contributory mortgages: Financial Markets Conduct Act 2013, s 53.

57A Which persons are liable for breaches of contributory mortgage regulations

- (1) A person is liable for a pecuniary penalty order (section 55C) and for compensation (section 55G) for a breach of regulations made under this Act relating to the offer, sale, or management of interests in contributory mortgages if,—
 - (a) in the case of a contributory mortgage broker who is an individual, the person acts, or is charged with acting, as the contributory mortgage broker for the contributory mortgage at the time that the breach occurred:
 - (b) in the case of a contributory mortgage broker that is a body corporate or other body, the person is—
 - (i) the contributory mortgage broker; or
 - (ii) a director of the contributory mortgage broker that is acting, or is charged with acting, as the contributory mortgage broker for the contributory mortgage at the time that the breach occurred.
- (2) No person who is a director of a contributory mortgage broker shall be liable under subsection (1)(b) *if he or she proves that—*
 - (a) the breach occurred without his or her knowledge or consent; and
 - (b) he or she had reasonable grounds to believe and did, up to the time that he or she learned of the breach, believe that the contributory mortgage broker had complied with the regulations made under this Act; and
 - (c) upon becoming aware of the breach he or she forthwith gave reasonable notice of the breach to the Registrar and any person to whom such notice is required to be given pursuant to regulations made under this Act.

14.60 Section 534 of the Financial Markets Conduct Act 2013 provides that every director of a contravening entity, at the time of the contravention, must be treated as also having contravened the relevant disclosure provision. A director has an affirmative defence if he or she proves that they “took all reasonable and proper steps to ensure that [the relevant entity] complied with [the relevant provision]”.³⁴⁷

Conclusion

- 14.61 Deeming provisions can be appropriate in limited contexts, subject to diligent policy analysis. A careful balance is needed of the public interest in providing corporate officers with a personal incentive to ensure corporate compliance on the one hand, and having high-quality personnel in relevant roles on the other.
- 14.62 Consideration should be given to the personal liability risk that the individual is already subject to. While a deeming provision on (for instance) directors in a single statute may not seem overly onerous, a proliferation of deeming provisions across a range of statutes may significantly deter candidates from taking on such roles. The balance struck must take into account the litigation risk imposed on such personnel in other legislation to ensure it is an appropriate reflection of the overall risk faced by those occupying such positions.
- 14.63 Another factor that must be borne in mind is the risk that such provisions could result in overly cautious decision making. In some contexts, this may be a desirable outcome, such as where decisions relate to public safety. However, in other contexts an overly cautious approach may have adverse effects on, for instance, the economy. Of course, the purpose of individual liability

347 Financial Markets Conduct Act 2013, s 501(2).

is to influence individual decision making. However, it should aim to do so in a manner that still promotes good decision making that is not unduly influenced by personal litigation risk.

- 14.64 With all this in mind, deeming provisions are appropriate in some contexts. One such context may be where there is a very high public interest in corporate compliance because of the risk non-compliance poses to public safety. A deeming provision could be justified to provide corporate officers with a strong personal incentive to take individual responsibility to make sure corporate actions do not endanger the public.
- 14.65 Such provisions may also be appropriate where corporations are voluntarily participating in a highly regulated field. In that context, there is likely to be high awareness of the standards and rules that make up the regulatory regime. The combination of high awareness and voluntary participation may mean it is reasonable to expect corporate officers to bear responsibility for ensuring corporate compliance.
- 14.66 However, it will generally be unreasonable to impose liability on an individual who has acted in a reasonable and diligent manner to ensure corporate compliance. Therefore, such provisions should generally ensure that individuals who have taken reasonable steps to ensure compliance are not liable.
- 14.67 Careful consideration should be given to the framing of the deeming provision. The risks set out above can be reduced if the provision is clear as to when an individual will be exposed to individual liability and what they can do to avoid it. Factors excluding liability may either form part of the “ingredients” of the contravention or an affirmative defence. Such policy decisions will impact on the party that bears the burden of demonstrating the relevant circumstances exist.
- 14.68 As with the framing of defences generally, they should be carefully considered to ensure perverse incentives are not created, such as causing corporate officers to disengage in processes in order to avoid liability.

Imposition of duties

- 14.69 An alternative to a deeming provision is for legislation to impose a duty on specified corporate officers, with failure to comply with that duty exposing them to a pecuniary penalty or criminal offence.³⁴⁸ A duty could be to put policies and procedures in place to ensure corporate compliance with a regulatory regime. As with deeming provisions, specified individuals are tasked with the responsibility for, and provided with an incentive to ensure, corporate compliance. However, those individuals are not made liable merely as a consequence of corporate default. Instead, the approach places a positive obligation on a corporate officer, with liability attaching only if they breach that obligation. Such an approach arguably more clearly links a corporate officer’s liability with their responsibilities.
- 14.70 An example of this approach is contained in the Anti-Money Laundering and Countering Financing of Terrorism Act 2009. Section 56 of the Act sets out an obligation on a “reporting entity” to implement and monitor a compliance programme. Failure to establish such a programme is a “civil liability act” that gives rise to a pecuniary penalty.³⁴⁹ Although this example applies to a reporting entity, there is no reason why such an approach could not

³⁴⁸ See also Welsh and Anderson, above n 324, at 316–317.

³⁴⁹ Anti-Money Laundering and Countering Financing of Terrorism Act 2009, s 78(f).

be applied to specific corporate officers such as directors, particularly as directors are already subject to a number of duties under Part 8 of the Companies Act 1993.³⁵⁰

- 14.71 The advantages of this approach are similar to those for deeming provisions. They are an efficient method of providing for corporate officer liability, and they provide certainty as to who is responsible for certain actions. Additionally, they provide certainty to corporate officers as to what they need to do to avoid liability. There is a clear link between the corporate officer's responsibility and the acts/omissions that make them liable.
- 14.72 The shortfall of this approach may relate to its effectiveness. Such a provision could allow a corporate officer to put in place a process and then absolve themselves from any further responsibility for ensuring it is being followed or is effective. However, careful drafting could ameliorate this risk.

Conclusion

- 14.73 The imposition of duties on corporate officers provides a more nuanced alternative to the deemed liability approach. This could be appropriate where it is necessary for corporations to have appropriate processes and procedures in place in order to comply with a regulatory regime. The provision will need to be carefully crafted to ensure it is effective, with consideration of an ongoing monitoring obligation on the corporate officer.

GUIDELINES

G13 Careful consideration should be given to the attribution of individual and corporate liability for pecuniary penalties

Statutes should be clear as to who is liable and how they are liable. Relevant questions include:

- What type of conduct (corporate or personal) is the pecuniary penalty seeking to moderate?
- Is the conduct usually carried out by individuals or corporations?
- Is the activity one in which the costs of paying the pecuniary penalty could easily be passed onto others (for example, consumers or shareholders)?

If corporations are liable, the following should also be considered:

- Are the normal rules of agency sufficient to attribute the actions of individuals to the corporation or should there be a specific attribution provision?
- Should individuals also be liable for the corporate misconduct? Relevant considerations include: whether corporate liability alone is sufficient to promote compliance; and whether an individual would be subject to other disciplinary proceedings in the event of corporate non-compliance.

350 See also Corporations Act 2001 (Cth), s 1317E (table includes duty provisions as civil penalty provisions); Commonwealth Authorities and Companies Act 1997 (Cth), sch 2.

G14 If there is to be individual liability, generally “concurrent principal liability” or “accessory liability” provisions should be used

There are a number of forms of individual liability. Whichever form is chosen, legislative drafting should be clear as to who is liable, what they are liable for, and what they can do to avoid liability.

Concurrent principal liability and accessory liability both attach to individuals only where they have participated, in some way, in the relevant contravention. Deemed liability, and to an extent, the imposition of duties, do not require such participation and can therefore give rise to fairness issues.

What type of individual liability is appropriate will depend on the regime. Questions to consider include:

- Does the activity being regulated present a high risk to public safety? Put another way, how serious is the harm that the provision is seeking to avoid?
- What level of involvement in the physical acts should give rise to personal liability?
- What degree of knowledge should give rise to personal liability?
- Might the option expose people to an overly high risk of litigation?
- Might the option deter quality candidates from taking on roles?
- Might the provision have an undesirable impact on decision-making and foster overly cautious behaviour?
- Should liability attach to particular positions within the organisation, or those who perform a particular function?

An alternative to deemed liability is to impose a positive duty on specified corporate officers, with failure to comply exposing those officers to a pecuniary penalty. This approach requires careful drafting to ensure effectiveness.

ANCILLARY LIABILITY

- 14.74 Ancillary or secondary liability refers to the liability of those who assist or encourage a contravention (accessories); those who organise the contravention of a provision by others (conspiracy); and those who try to contravene a provision but fail (attempts).
- 14.75 As identified by the Ministry of Business, Innovation and Employment, accessory liability extends liability to individuals, but only to those who knowingly and intentionally assist in the corporate misconduct; innocent or even negligent participation is not enough to establish accessory or liability.³⁵¹ It may be wider than principal liability as it does not require an individual to have committed all the relevant elements of the contravention, but is narrower than a deeming provision³⁵² as it requires a deliberate act.
- 14.76 We highlighted drafting and interpretation issues in the Issues Paper about how pecuniary penalty regimes impose ancillary liability.

³⁵¹ Submission of the Ministry of Business, Innovation and Employment at [15].

³⁵² See above at [14.50]–[14.70].

Extent of coverage

- 14.77 In the criminal law context, the Crimes Act 1961 addresses how and when ancillary liability arises for attempts, accessories and conspiracy.³⁵³ In particular, section 66 provides that:

66 Parties to offences

- (1) Every one is a party to and guilty of an offence who:
 - (a) actually commits the offence; or
 - (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.
- (2) Where 2 or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of the common purpose if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose.

This provision applies to all offences (as defined in section 2 of the Crimes Act) unless clearly excluded.³⁵⁴

- 14.78 However, a broader formulation is used in pecuniary penalty statutes.³⁵⁵ The provisions vary in whether they cover ancillary liability such as attempts and conspiracy, although they all have in common the concepts of aiding, abetting, counselling and procuring. Each also extends accessorial liability to a person who is “in any way, directly or indirectly, knowingly concerned in, or party to,” the contravention.

- 14.79 In the context of the Fair Trading Act 1986 (which uses the same formulation for a criminal offence) Tipping J commented on the breadth of this provision:³⁵⁶

I think it would be wrong in principle if a mere junior employee could be held strictly liable for helping to draft some publicity material which turned out to be misleading without any knowledge that this was so. Another case might be an advertising agent who in good faith assists in the production of material which contains a false representation.

- 14.80 We wondered in the Issues Paper whether the broader formulation is necessarily appropriate in the pecuniary penalty context.³⁵⁷ However, the Ministry of Business, Innovation and Employment thought that the framing of the provision is correctly pitched at those who “intentionally and knowingly facilitate misconduct”:³⁵⁸

We believe that the [accessory liability] concept appropriately targets those who are engaged in wrongful misconduct – those who cross the line to intentionally and knowingly facilitate misconduct. We consider that this is the appropriate standard for accessory liability in all civil proceedings in the relevant statutes, including those that may result in pecuniary penalties.

- 14.81 In the Ministry’s experience, such accessory provisions have never led to an adviser or employee, for instance, being found liable for innocent or even negligent participation in a primary contravention. In particular, the Ministry noted that accessory liability is not novel in

353 Crimes Act 1961, ss 66, 72, 310 and 311.

354 J Bruce Robertson (ed) *Adams on Criminal Law* (online looseleaf ed, Brookers) at [CA66.03].

355 The Commerce Act 1986, s 83; the Unsolicited Electronic Messages Act 2007, s 15; and the Financial Markets Conduct Act 2013, s 533, all use this formulation.

356 *Megavitamin Laboratories (NZ) Ltd v Commerce Commission* and *Commerce Commission v Stewart*, above n 333, at 31.

357 We asked whether this formulation is overly broad and ambiguous for pecuniary penalties, which are imposed on a lower standard of proof. This point was also made by PCO’s Commercial Team in its submission.

358 Submission of the Ministry of Business, Innovation and Employment.

a civil context, being used in the Fair Trading Act 1986, the Commerce Act 1986, the Securities Markets Act 1988 and in Australian statutes.³⁵⁹

- 14.82 The debate about the approach to ancillary liability proposed in the Financial Markets Conduct Bill 2011 is instructive.³⁶⁰ As introduced, the Bill defined “contravention” as including attempts, aiding, abetting, inducing, conspiring or procuring a contravention of a pecuniary penalty provision, or “being in any way, directly or indirectly, knowingly concerned in, or a party to, the contravention by any other person of the provision”.³⁶¹ Submissions to the Select Committee pointed out that the traditional criminal law accessory concepts may be too broad for a commercial context, which seeks to regulate socially useful activities (where a breach may be established after the fact), as opposed to manifestly criminal activity.³⁶²
- 14.83 A number of submitters on that Bill argued that it would inappropriately extend potential liability to professional advisers, employees and others who may have incidental roles, and that it could provide a disincentive for corporate officers and external advisers to fully engage in the relevant processes, to the detriment of regulated activity, and could also conflict with professional responsibilities.³⁶³ The Select Committee recommended amendment of the provision. As enacted, the Financial Markets Conduct Act 2013 uses “contravene” only in connection with the primary contravention. It has introduced the concept of “involvement in the contravention” (that includes being knowingly concerned in or party to a contravention) for those who are liable as accessories.³⁶⁴
- 14.84 The PCO submitted to this review of pecuniary penalties that it is very difficult for statute users to know what is required by the element that a person is “knowingly concerned in” a contravention, and particularly whether that requires knowledge of the purpose of the actions of the primary offender or only knowledge of the risk of an offence. We agree.
- 14.85 We think specific drafting is needed on the question of ancillary liability, in the interests of certainty and to ensure that people are not caught who are not necessarily intended to be. Where appropriate, the particular statute might include a provision stating that certain people or classes of people (such as employees or advisers) are expressly excluded, or the statute might include specific defences (such as a good faith exception).³⁶⁵ As noted by the New Zealand Law Society, this approach ensures people within coverage are made aware of their potential liability.³⁶⁶ Greater awareness of and certainty in relation to liability also supports the underlying deterrent function and purposes of pecuniary penalty regimes.
- 14.86 In summary, pecuniary penalty statutes should be express as to the extent of coverage of ancillary liability, and as narrowly targeted as possible in the circumstances of the particular regime. Policymakers should carefully consider who, other than the primary contravener,

359 It is also notable that the current precedent for accessory liability is very similar in terms to those used in the Australian Competition and Consumer Act 2010 (Cth), s 76(1)(c). Clause 92 of the Regulatory Powers (Standard Provisions) Bill 2014 (Cth) also contains an ancillary liability provision using the same terms and format.

360 Financial Markets Conduct Bill 2011 (342-1). Now the Financial Markets Conduct Act 2013.

361 Clause 447. Ministry of Business, Innovation and Employment *Financial Markets Conduct Bill – Officials’ Report Part A: Main Issues* (24 July 2012) at [22]–[23]:

Perhaps the strongest submissions on the Bill relate to the meaning of “contravene” in clause 447 ... the concept includes not only the primary person who contravenes the law in question, but also accessories to the contravention, such as aiders and abettors. This translates accessory liability concepts from criminal law into a civil law context.

362 Bank of New Zealand “Submission to Commerce Committee on the Financial Markets Conduct Bill” at [10.14]; and Chapman Tripp “Submission to Commerce Committee on the Financial Markets Conduct Bill” at [118]–[120].

363 Bank of New Zealand, above n 362, at [10.16]–[10.18] and [10.28]–[10.31]; and Bell Gully, Chapman Tripp, Russell McVeagh and Simpson Grierson “Joint submission on the Financial Markets Conduct Bill” at [8]–[10].

364 Section 533. See also ss 484, 486, 489 and 490. The Act does not include attempts to contravene.

365 See for example Financial Markets Conduct Act 2013, s 503.

366 See also the submission of Federated Farmers.

should be liable for their role in the contravention and how their liability is established, with regard to their state of mind or their extent of knowledge of the contravention.

Level of intent or knowledge

- 14.87 In the Issues Paper, we asked whether pecuniary penalty statutes should be more explicit about the degree and nature of knowledge required to establish ancillary liability.³⁶⁷
- 14.88 The courts have dealt with concerns about wide accessorial liability under the criminal law by restricting liability to intentional and knowing conduct.³⁶⁸ Under the criminal law (including strict liability offences), the accessory must know of the essential facts that make up the contravention and knowingly participate in it.³⁶⁹
- 14.89 However, the level of accessorial knowledge required is not always clear in a pecuniary penalty context. In the Commerce Act case *New Zealand Bus Ltd v Commerce Commission*,³⁷⁰ the wide-ranging nature of the evidence presented difficulties in determining exactly what constituted the “essential facts” for the purpose of accessory liability. The contravention in issue was the acquisition of shares in a company which had “the effect of substantially lessening competition in a market” in breach of section 47. The High Court followed relevant Australian authorities and held that an accessory is liable under section 83 of the Commerce Act only if its participation was intentionally aimed at the commission of the acts that form the principal’s contravention, and only if it had actual knowledge of the essential facts that amounted to the contravention.³⁷¹
- 14.90 On appeal, the Court of Appeal recognised that while the orthodox criminal law approach is taken to accessory liability for restrictive trade practices under the Commerce Act, the traditional approach might not be appropriate in other areas such as business acquisitions. This is because the “essential facts” were difficult to assess. Arnold J noted that whether there had been a substantial lessening of competition in breach of the Act required an “evaluative assessment on the part of the court”.³⁷² The Court heard evidence from market participants, experts and other industry participants to assist this analysis.
- 14.91 Recognising the limits of the traditional approach, members of the Court of Appeal proposed alternative options for assessing the element of intent necessary to establish accessory liability under the Commerce Act. The options proposed were:
- dishonest participation in the contravention;³⁷³ or
 - knowledge of a real risk of contravention.³⁷⁴

If a person understands that there is a real risk that a merger or acquisition will be found to breach s 47 but, with that knowledge, facilitates the merger or acquisition, the imposition of accessory liability

367 Issues Paper, above n 295, at Q23.

368 This means that the mens rea element for primary and secondary liability can differ: Tipping J in *Megavitamin Laboratories (NZ) Ltd v Commerce Commission* and *Commerce Commission v Stewart*, above n 333, at 245 noted that “it might seem rather strange at first blush that a secondary party must have knowledge of falsity when that is not necessary for the principal”. However, at 250, he concluded that “even if the offence in question is one of strict liability, a secondary party must have mens rea”.

369 See *Adams on Criminal Law*, above n 354, at [CA66.19]. See *Yorke v Lucas* [1985] HCA 65; *Megavitamin Laboratories (NZ) Ltd v Commerce Commission* and *Commerce Commission v Stewart*, above n 333; *van Nieuwkoop v Registrar of Companies* [2005] 1 NZLR 796 (HC); and *New Zealand Bus Ltd v Commerce Commission* [2007] NZCA 502, [2008] 3 NZLR 433.

370 Above n 369.

371 *Commerce Commission v New Zealand Bus Ltd* (2006) 11 TCLR 679 (HC) at [224]–[239].

372 *New Zealand Bus Ltd v Commerce Commission*, above n 369 at [261].

373 At [156].

374 At [267].

seems an appropriate response. It may provide an incentive for such persons to refuse to facilitate a merger or acquisition in the absence of a clearance or authorisation.

- 14.92 Ultimately, the Court of Appeal determined that the defendants should not have been found liable as accessories, whichever of the tests was used. But the case illustrates that the criminal law test may not always be appropriate for pecuniary penalties, depending on the nature of the contravention and the particular regime.
- 14.93 Meredith Connell submitted that it would be useful to clarify the knowledge requirement for accessory liability in light of the conflicting judicial dicta. Other submitters also agreed that greater certainty is needed in this area.³⁷⁵ The Bar Association inclined towards the “knowledge of a real risk of contravention” test, submitting that some clarity in the correct test for accessorial liability for penalties is needed.
- 14.94 In our view, the criminal law approach to accessorial liability (namely, intentional participation in the contravention with knowledge of the essential elements) will be appropriate where the essential elements of the contravention are relatively straightforward. That approach can be applied to pecuniary penalties by virtue of the current precedent provision with the use of terms such as aid, abet, counsel and procure,³⁷⁶ subject to our conclusion above that there is a case for specific drafting as to the coverage of the provision.
- 14.95 Where a different approach to accessorial intent is appropriate for the particular regulatory regime, or where the essential facts are unclear, the accessory liability provision should specify the degree of knowledge required for liability to accrue. Any prescribed mental element should be as specific as possible about what is captured.
- 14.96 We are attracted to “knowledge of a real risk of contravention,” as proposed in the *New Zealand Bus* case, as an appropriate objective test in such cases. An explicit statement about the mental element for accessory liability will provide clarity to individuals about the scope of accessory liability. If a provision departs from the traditional criminal law mens rea approach, it should be clear that this does not alter the accessory mens rea element for any parallel criminal offences: section 66 of the Crimes Act 1961 would continue to apply.
- 14.97 Detailed thought should be given to what, if any, defences should be available to accessories. It should not be assumed that the defences available to the primary contravener (which in many cases may be a body corporate) will be equally appropriate for accessories. Specific defences may need to be tailored for each.
- 14.98 In line with our recommendation that the Ministry of Justice should be consulted on the policy development of pecuniary penalty regimes, we suggest that accessorial liability provisions should be one the elements specifically reviewed by the Ministry of Justice as part of that consultation process.³⁷⁷

375 New Zealand Law Society, Ministry for Primary Industries, Financial Markets Authority, Parliamentary Counsel Office (Commercial Team), Federated Farmers and Air New Zealand.

376 Above at n 355.

377 See Recommendation R1.

GUIDELINE

G15 Pecuniary penalty statutes should state clearly how ancillary liability will arise

Ancillary liability provisions should be no wider than necessary to achieve the purposes of the regime.

Policymakers need to consider:

- who, other than the primary contravener, should be liable for their role in the contravention;
- how their liability is to be established, with regard to their state of mind or the extent of their knowledge of the contravention;
- which defences should be available.

Usually, (that is, unless it is unworkable or inappropriate) the traditional criminal law approach should be adopted, which requires knowledge of the essential facts that constitute the contravention, and an intention to participate in the contravention.

Chapter 15

Insurance and indemnity

- 15.1 An additional issue to those raised in the Issues Paper is the availability of insurance and indemnification to a defendant to meet the costs of defending pecuniary penalty proceedings, and any penalty imposed. A number of legislative design questions arise, including:
- whether indemnities and insurance should be available from a public policy perspective;
 - how their availability might influence the behaviour of those operating in environments regulated by pecuniary penalty statutes;
 - whether such measures support the regulatory objectives of a particular regime (through the imposition of market disciplines); or
 - whether they potentially undermine them (by diluting the penalty's punitive effect).³⁷⁸
- 15.2 Statutory liability insurance policies cover breaches of statutes such as the Building Act 2004, the Resource Management Act 1991 and the Health and Safety in Employment Act 1992, subject to any policy exclusions for intentional conduct³⁷⁹ and any statutory restrictions.³⁸⁰ The terms of these policies may also extend to liability incurred under pecuniary penalty statutes, depending on policy wording and construction.
- 15.3 The rationale for providing such insurance is to manage individual risk of personal liability:³⁸¹
- In its absence, capable and talented individuals may be unwilling to join boards of directors, particularly as non-executive directors, or may become excessively risk averse on boards, to the detriment of the individual company and the broader commercial community. D & O [Directors and Officers] insurance also recognises that company officers may become personally liable in circumstances where they have scant moral responsibility ... On the other hand however, there is a legitimate public policy concern that, in certain circumstances, the availability of D & O insurance can negate the very reasons why personal liability rather than merely corporate liability is imposed.
- 15.4 The absence of specific provisions in the pecuniary penalty statute confirming whether a penalty may be insured or indemnified against creates uncertainties for regulators and market participants, as the existing law concerning insurance or indemnities for criminal liability is not necessarily fit for purpose in the context of pecuniary penalties. Reserving the issue for analysis by the courts where the issue arises in a particular case does not provide sufficient regulatory certainty.
- 15.5 This chapter examines the policy issues concerning indemnities and insurance for pecuniary penalties. We conclude that, for greater regulatory certainty, pecuniary penalty statutes should expressly provide that there is no bar on insurance or indemnification for pecuniary penalty

378 In relation to defendants who are officers or employees of the Crown, or a State sector defendant: see the discussion of public sector immunities at [19.60]–[19.65].

379 For example, the exclusion of deliberate breaches of legislation from the coverage of a policy.

380 For example, Health and Safety in Employment Act 1992, s 5(h), s 56I and s 50(1)(b); Health and Safety Reform Bill 2014 (192-1), cl 178. See also Commerce Act 1986, ss 80A and 80B.

381 T F Bathurst (Chief Justice of the Supreme Court of New South Wales) “Insurance law – A view from the bench” (speech to Australian Insurance Lawyers Association National Conference, 19 September 2013) at [7]–[8].

liability, unless it is necessary to specify any prohibition or limitation in the context of the particular pecuniary penalty regime. Policymakers should consider whether there is any case to restrict the availability of insurance or indemnities, based on the underlying objectives of the particular regime.

CONTRARY TO PUBLIC POLICY?

- 15.6 Both common law and statute recognise that in certain circumstances indemnification against liability is unenforceable on grounds of public policy. *Fire and All Risks Insurance Co Ltd v Powell*³⁸² is cited as providing the general principle that:³⁸³
- ... where the act amounting to the offence is sufficiently serious or of such an anti-social character as to justify a refusal to allow an indemnity in the interests of the public, public policy should be invoked to deny cover to the assured.
- 15.7 In that case, the legislative provision in breach was found to be a “mere” regulatory provision, rather than a crime in the sense that it would shock the conscience of reasonable people or cause to them to regard the defendant as a criminal. In reaching this finding, the Court applied a range of criteria such as the gravity of the conduct, goals of deterrence and the interests of the victims, and concluded that the indemnity survived. The penalty imposed was sufficient for the protection of the public, and it was not going to help deter future offenders for the Court to refuse to allow the indemnity.³⁸⁴
- 15.8 Generally, the availability of indemnities and insurance for employees and directors of New Zealand companies is governed by the Companies Act 1993.³⁸⁵ The Act provides that a director or employee can be indemnified for any liability but criminal liability, breaches of fiduciary duty or breaches of section 131 (duty to act in good faith and in the interests of the company) of the Companies Act.³⁸⁶ A director or employee may be insured by the company against any liability save criminal liability, so long as it is permitted by the company’s constitution and is fair to the company.³⁸⁷
- 15.9 In relation to corporate liability, the Companies Act does not place any restrictions on a company seeking to insure its statutory liabilities. Companies are able to seek cover for liability to fines and penalties, subject to the policy being challengeable in court as void on public policy grounds.³⁸⁸ Similarly, individuals may insure themselves against liability without procedural restrictions, subject to the same limitation.
- 15.10 The increasing use of pecuniary penalties to regulate behaviour in Australia has given rise to questions about the applicability of the conventional doctrine that insurance against the imposition of penalties is contrary to public policy.³⁸⁹ Conceptual differences between conventional criminal offending and pecuniary penalties (and strict liability offences) have led

382 *Fire and All Risks Insurance Co Ltd v Powell* [1966] VR 513 (VSC).

383 Kenneth Sutton *Insurance Law in Australia* (3rd ed, LBC, Sydney, 1999) at 1033.

384 See Chris Jurgeleit “Insurance Against Liability to Pay Statutory Fines and Penalties” (1996) 26 VUWLJ 735 at 741.

385 Companies Act 1993, s 162. For members, office holders and employees of Crown entities, see ss 122 and 123 of the Crown Entities Act 2004.

386 Companies Act 1993, s 162(4).

387 Companies Act 1993, s 162(5) and (6).

388 The basis for the limitation on indemnification and insurance in the criminal sphere is the principle that no action can be founded on illegal or immoral conduct (*ex turpi causa oritur non actio*): see *Burrows v Rhodes* [1899] 1 QB 816 at 828:

It has, I think, long been settled law that if an act is manifestly unlawful, or the doer of it knows it to be unlawful, as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom. An express promise of indemnity to him for the commission of such an act is void.

See Bathurst, above n 381, at [17]; Jurgeleit, above n 384, at 736.

389 D K Derrington and R S Ashton *The Law of Liability Insurance* (3rd ed, LexisNexis, Sydney, 2013) at 249.

to the gradual retreat from the position that the creation of a statutory contravention punishable by a monetary penalty is always a reason to invalidate an indemnity.

- 15.11 A judicial address to the 2013 Australian Insurance Lawyers Association on liability insurance for directors and officers, acknowledged that in most cases issues of public policy will not arise because the relevant insurance contract will exclude liability in circumstances that might offend public policy.³⁹⁰ However, where a policy squarely purports to indemnify directors and officers against statutory liability, Justice Bathurst pointed to a significant lack of clarity about when it would be against public policy for directors and officers to access liability insurance where a pecuniary penalty is imposed. Canvassing the arguments for and against permitting cover for pecuniary penalty liability, he noted:³⁹¹

It is obviously within the policy of the law for people to [i]nsure themselves against liability incurred through negligence, and I do not believe anyone has suggested that this circumstance is altered because the duty is also subject to a civil penalty provision, which is intended to have a deterrent effect.

At the other end of the spectrum, it seems equally clear that a director or officer cannot be indemnified for loss incurred through wilful criminal acts ... Between the two extremes of intentional criminal conduct and civil negligence, things are much less clear.

- 15.12 Another significant issue is that a particular contract of indemnity may not be in issue in legal proceedings and so may fall outside a court's powers of determination. In an Australian decision, *Hillman v Ferro Con (SA) Pty Ltd (in liq)*,³⁹² the Industrial Magistrate expressed great frustration that the defendant, whose actions had caused a workplace fatality, was insured, finding that the defendant's:³⁹³

... actions have also undermined the Court's sentencing powers by negating the principles of both specific and general deterrence. The message his actions send to employers ... is that with insurance cover for criminal penalties for [Occupational Health and Safety] offences there is little need to fear the consequences of very serious offending...

- 15.13 It also seems that there are market incentives to provide liability insurance even if, were the policy to be tested before the courts, it might be found void for reasons of public policy.³⁹⁴ This issue has been addressed in certain statutes by penalising the indemnification of contraventions, and is discussed further below.

STATUTORY LIMITS

- 15.14 Generally, a company must not indemnify or insure its directors or employees against liability in connection with their role, or defending or settling claims arising out of that liability,³⁹⁵ unless it is expressly authorised by the company's constitution. In that case:
- a director or employee may be indemnified for costs related to proceedings in his or her favour, or in which he or she is acquitted;³⁹⁶

390 Bathurst, above n 381.

391 At [16]–[19].

392 *Hillman v Ferro Con (SA) Pty Ltd (in liq)* [2013] SAIRC 22.

393 At [80]. The position is different in New Zealand as health and safety legislation criminalises insurance against fines: see Health and Safety in Employment Act 1992, s 56I.

394 Sutton, above n 383, at 1033; and Michael Tooma "Is statutory liability insurance damaging?" (11 June 2013) CCH Law Chat < www.lawchat.com.au > . See also Jurgeleit, above n 384, at 737–738.

395 Companies Act 1993, s 162(1).

396 Section 162(3).

- a director or employee may be indemnified for liability to parties other than the company, but not for criminal liability or for breach of a fiduciary duty to the company or section 131 of the Companies Act;³⁹⁷ and
 - a director or employee may be insured for: (i) liability in connection with their role; or (ii) costs incurred in proceedings related to that liability, or (iii) costs incurred in criminal proceedings where the person is acquitted.³⁹⁸ The directors must certify that the insurance is fair to the company.³⁹⁹
- 15.15 The Financial Markets Conduct Act extends the rules concerning indemnities and insurance established by the Companies Act to entities that are not New Zealand companies.⁴⁰⁰ It also prohibits a “specified person” from providing an indemnity or insurance to an auditor except where a judgment is in favour of the auditor or the proceedings are discontinued.⁴⁰¹
- 15.16 Under section 162(2) of the Companies Act, any indemnity given in breach of the Companies Act procedure is void. The indemnification procedure is reinforced by the directors’ duty in section 134 of the Companies Act to comply with the provisions of the Act and the company’s constitution. Nevertheless, any failure to comply with section 162, for example by granting a broader indemnity than envisaged by section 162, is not specifically an offence.⁴⁰²
- 15.17 The consequences are described by Jurgeleit, in the context of breaches of the Resource Management Act 1991:⁴⁰³
- Technically, the contract will be unenforceable against the insurer. Directors who have entered into such contracts on behalf of their company or who have caused their company to grant indemnities or effect insurance in breach of the Companies legislation could face claims from shareholders or from the company. Directors may have to pay the costs of the insurance personally. Otherwise there appear to be no sanctions against companies or directors who might take insurance of this sort.
- It is probably unlikely, except perhaps in the event of a change in company shareholding or upon liquidation of a company, that there would be any *internal* company dispute over the enforceability of an indemnity or the effecting of directors’ and officers’ insurance. Similarly, except where an insurance company changes hands or goes into liquidation, it is improbable that an insurer would refuse to honour a fines policy, because of the damage that would do to its commercial reputation.
- 15.18 The prohibition on indemnification in the health and safety legislation is strengthened by inclusion of an offence provision for policies or contracts of indemnity that purport to indemnify a person against their liability to pay a fine or infringement fee under that legislation.⁴⁰⁴
- 15.19 A similar approach has been taken in relation to price fixing under the Commerce Act 1986. Section 80A prohibits a body corporate from indemnifying a director, servant or agent against liability for pecuniary penalties imposed for price fixing, or for costs incurred in penalty

397 Section 162(4).

398 Section 162(5).

399 Section 162(6).

400 Financial Markets Conduct Act 2013, ss 526–528.

401 Section 529.

402 Companies Act 1993, s 373.

403 Jurgeleit, above n 384, at 749 (footnotes omitted).

404 Health and Safety in Employment Act 1992, s 50(1)(b) and s 56I; Health and Safety Reform Bill 2014 (192-1), cl 178.

proceedings.⁴⁰⁵ A breach of that provision in turn gives rise to a pecuniary penalty that may be imposed on the company.⁴⁰⁶

- 15.20 The clause in the Commerce Amendment Bill 1999, as introduced, applied to all contraventions of the Commerce Act. Following outcry that such a clause was harsh and unworkable, it was amended so that it only applied to price fixing arrangements under section 30. The rationale for this amendment was that individuals engaged in such behaviour were likely to be aware that it was illegal.⁴⁰⁷

IMPLICATIONS FOR PECUNIARY PENALTY REGIMES

Express clarification

- 15.21 We have considered whether it is desirable, in the interests of regulatory certainty, for pecuniary penalty regimes to pre-empt arguments about whether the availability of insurance and indemnification is potentially void for public policy considerations. Statutes could do this by expressly authorising or confirming the extent to which such measures are available.
- 15.22 Justice Bathurst has expressed particular concerns about the uncertainty inherent in applying the rule of public policy to avoid contracts of liability insurance or indemnity:⁴⁰⁸

What I do think is undesirable however is the lack of clarity around these issues. At the moment, the market's best guess seems to be that insurance for criminal penalties is likely to be deemed illegal or unenforceable by the courts, and that it is not clear if a similar situation applies in relation to civil penalties.

I have spoken on previous occasions about the need for certainty in the legal rules applicable to commercial activity. That need is acute in this context. Directors and officers need to know whether their policies are enforceable and will protect them against the risk of personal liability and possible bankruptcy. Insurers need to be able to properly assess variables in order to accurately price risk. ASIC [the Australian Securities and Investments Commission] needs to assess how insurance may affect its corporate regulation strategy. At present, it is questionable whether sufficient clarity exists to enable those assessments to be made satisfactorily.

- 15.23 The advantages of express statutory confirmation include greater certainty for directors and officers, as identified by Justice Bathurst. It would also confirm that the impacts of indemnification on the regulatory regime have been addressed by policymakers in designing the regime, thus ensuring a robust regime and providing a clearer indication to the public of how issues of liability may be dealt with.
- 15.24 On this basis we conclude that pecuniary penalty statutes should expressly confirm whether contracts that indemnify or insure against liability to a pecuniary penalty are legal, or whether they are subject to any particular prohibition or limitation.

Limiting indemnification?

- 15.25 A further question for policymakers designing pecuniary penalty regimes is whether to squarely prohibit or limit the availability of indemnification in any respect, as in the case of price fixing

⁴⁰⁵ Commerce Act 1986, s 80A.

⁴⁰⁶ Commerce Act 1986, s 80B: the maximum penalty may not exceed two times the value of the indemnity given. See also Health and Safety Reform Bill 2014 (192-1), cl 178(3).

⁴⁰⁷ Commerce Amendment Bill 1999 (296-2) (select committee report) at 26. See also Jill Mallon and Jenny Stevens "Commerce Act Penalties for Individuals" [2001] NZLJ 339.

⁴⁰⁸ Bathurst, above n 381, at [49]–[50].

under the Commerce Act. Whether any such measure is necessary will depend on the nature of the pecuniary penalty regime and its underlying objectives.

- 15.26 The arguments for and against permitting cover for pecuniary penalty liability were summarised by Justice Bathurst in his address to Australian insurance lawyers:⁴⁰⁹

The question of whether indemnity should be available for civil penalties, or for the personal financial consequences of breaching a civil penalty provision is a difficult one.

On the one hand allowing insurance in such circumstances tends to negate, or at least significantly undermine the deterrent and punitive goals that underlie the imposition of such penalties ... Nonetheless ... [to] my mind, excluding indemnity for civil penalty provisions would be at odds with the general acceptance that insurance is available for the civil consequences of negligent behaviour. Breaches amounting to civil penalty provisions may often be the result of honest but careless behaviour... it does not seem unreasonable to me that directors should be able to protect themselves from liability for civil penalties ...

- 15.27 In *Auckland Regional Council v Gubbs Motors Ltd*, concerning breaches of the Resource Management Act, Judge Moore also observed that the law is unclear on the extent to which certain penalties are insurable:⁴¹⁰

Traditionally, a person could not insure themselves against the consequences of deliberate criminal acts and, in particular, to purchase indemnity for a fine or other punishment imposed for the commission of a crime. But where the law was broken by an act or omission which was negligent, different considerations intruded and the consequential case law is byzantine, in part because of particular statutory provisions or policy considerations in particular areas of human activity. As a matter of commercial reality much will depend upon the type of cover that insurers are prepared to provide rather than the limits of what the law permits.

- 15.28 His Honour noted the effectiveness of insurance in deterring risk and the policy advantages in permitting insurer participation:⁴¹¹

Theirs is the business of evaluating risk likelihood and likely levels of loss when loss occurs. They are entitled as a matter of law, and compelled by practical reality, to make careful inquiry of those seeking cover. Those who want cover need to be truthful and complete in their responses or risk being denied indemnity. When a claim is made, the nature and extent of it may result in future cover being available (if at all) only at the cost of increased premiums. Above all insurance companies can and frequently do affect the future conduct of insured persons by requiring of the taking of precautions against loss. Where the criminal law merely hopes to deter by threat or example an insurance company has much more effective tools at its disposal, particularly in the context of commercial activities. Insurers can require safety precautions and distribute financial burdens according to risk far more effectively than any warranted inspector.

... as a matter of policy, when considering areas of human activity in which there is a required process of taking precautions against foreseeable risk the policy advantages of permitting insurer participation seem compelling. Insurance against the consequences of unintentional breaches of public or environmental welfare laws, far from undermining those laws, adds in a factor tending to promote their adherence. There is a vast difference between profiting from a deliberately unlawful act, or at least taking prior steps to reduce the impact of its consequences, and insuring, that is paying in advance for at least some protection against, the consequences of prosecutions flowing from unintentional shortcomings of a type which many people would characterise as part of the human condition – one which can be reduced though probably never eliminated.

409 At [42]–[43], [46] and [48].

410 *Auckland Regional Council v Gubbs Motors Ltd* DC Auckland CRN 08084500006, 20 March 2009 at [20].

411 At [22]–[23].

15.29 Another consideration is whether the availability of indemnification would significantly dilute the deterrent effect or the punitive impact of a pecuniary penalty on an individual, as they do not personally pay the penalty imposed on them for the contravention. However, adverse publicity, reputational impacts and any other applicable consequences may provide adequate deterrent and punishment.

15.30 The effects on rational behaviours and potential moral hazard also need to be assessed. This is highlighted in regimes such as health and safety, but may potentially arise in other contexts:⁴¹²

Knowing that they are “insured” for the criminal and civil liability of industrial accidents, some firms will find it harder to economically justify the large investment in systems designed to prevent such accidents from taking place. Economists call this moral hazard. Leaving aside ethical considerations, if a company will not face the consequences of deficiencies in its systems, it is less likely to maintain such systems. The vigilance around safety may be lost ...

15.31 We expect that the availability of indemnification and insurance may have a disciplinary effect that contributes to the deterrence objectives of pecuniary penalty regimes. However, in some specific instances it may be necessary to reinforce the impact of a pecuniary penalty by expressly penalising indemnification against statutory liability. Jurgeleit suggests that such instances will need to be carefully justified, given the consequences for the personal liability of directors and managers.⁴¹³

15.32 The following factors may offer guidance to policymakers on this issue:⁴¹⁴

- (a) The nature and gravity of the illegal conduct. Would the conduct shock the conscience of reasonable people, or cause them to regard the contravener as a “criminal”, or as so anti-social that courts should decline to enforce the contract of insurance in order to protect the public?
- (b) The extent to which allowing the indemnity will hinder any deterrent effect the law was intended to have. If the provision was enacted purely or primarily for its deterrent effect, would it actually deter the contravener or future contraveners if imposed in the particular circumstances? Was the breach purely inadvertent? If so, does it nevertheless have morally or socially reprehensible outcomes?
- (c) The potential for encouraging similar future acts if the indemnity is allowed. Will those insured under these policies prefer to allow the breach and recover under their insurance policies rather than to avoid the breach altogether? Will other sanctions make the contravener prefer to avoid the breach – for example, loss of customer satisfaction or poor corporate image?
- (d) The purpose of the statutory provision that was breached. Was it enacted purely or primarily for deterrent purposes, or does it have some other objective?
- (e) The contravener’s knowledge of facts or law that make the conduct unlawful. In subjective terms, was the conduct morally reprehensible, so that it warrants a punishment that will be borne personally? This requires an assessment of whether the conduct subject to a proposed penalty is likely to be advertent, or includes an express element of intent or fault.
- (f) Whether enforcement of the indemnity would promote or be detrimental to the interests of innocent third parties. For example, does the penalty go to a fund to compensate for loss

⁴¹² Tooma, above n 394.

⁴¹³ See Jurgeleit, above n 384, on the risk that if statutory penalties are not insurable, businesses will become excessively risk-averse, the risk of stifling enterprise and the threat to the certainty necessary for efficient business management.

⁴¹⁴ Derived from Jurgeleit’s summary of the *Powell* factors, above n 384, at 743.

caused by the event insured against, to a general fund to promote the Act's purposes generally, or to fund education to prevent future breaches? If so, will the contravener be able to pay the penalty if the indemnity is not allowed?

- 15.33 Other relevant considerations are the potential impact on penalty imposition by the courts, the potential impact on prosecution strategies, and the impact on the personal liability of directors and managers.⁴¹⁵
- 15.34 Where it is necessary to impose statutory limits on insurance and indemnification in a pecuniary penalty regime, policymakers should consider penalising the provision of insurance or indemnification in breach of that restriction.⁴¹⁶

GUIDELINE

G16 Pecuniary penalty statutes should deal expressly with the question of insurance or indemnification in relation to pecuniary penalty liability

Policy makers should consider whether there should be no bar on insurance or indemnification in respect to pecuniary penalty liability under the proposed regime, or whether policy reasons justify a particular prohibition or limitation. In either case, an express statutory statement confirming or restricting the legality of contracts to indemnify or insure is desirable.

Factors to be considered include:

The nature and gravity of the illegal conduct. Are there public policy reasons why indemnification or insurance in respect of the conduct / breach should be barred? For example, was the conduct so morally reprehensible that punishment should be borne personally?

The deterrent effect of the penalty. Would the availability of indemnification significantly dilute the deterrent effect of a pecuniary penalty provision? Or does the disciplinary effect of indemnification and insurance contribute to the deterrence objectives of the pecuniary penalty regime? Similarly, would those insured prefer to allow the breach and recover under their insurance policies rather than to avoid the breach altogether?

Interests of innocent third parties. Will the penalty be diverted for reparative purposes or to fund education to prevent future breaches? If so, will the contravener be able to pay the penalty if the indemnity is not allowed?

Other relevant considerations are the potential impact of insurance and indemnification on penalty imposition by the courts, the potential impact on prosecution strategies, and the impact on the personal liability of directors and managers.

Where it is necessary to impose statutory restrictions on insurance and indemnification in a pecuniary penalty regime, policymakers should consider penalising the provision of insurance or indemnification in breach of those restrictions.

⁴¹⁵ See Tooma, above n 394.

⁴¹⁶ As, for example, the case of price fixing under the Commerce Act 1986, ss 30, 80A and 80B.

Chapter 16

Fixing penalties

16.1 In this chapter, we deal with two issues:

- how maximum pecuniary penalties are set in statutes; and
- how courts determine the level of pecuniary penalty to be imposed in individual cases.

MAXIMUM PECUNIARY PENALTIES

- 16.2 In our Issues Paper, we stated our intention to provide guidance about how maximum pecuniary penalties should be set in statutes. This issue has raised a number of questions, including: how much guidance can be taken from how maximum penalties are set for criminal offences; whether different or additional principles and factors are relevant to setting maximum pecuniary penalties and, if so, what they are; and what approach should be taken where statutes contain both criminal offences and pecuniary penalties for the same or similar conduct.
- 16.3 We have considered these questions and have developed some Guidelines about how maximum pecuniary penalties should be set. However, there is a case for further, wider review of this area. At present, the way in which both maximum criminal and maximum pecuniary penalties are set is unsatisfactory.
- 16.4 In the criminal sphere, maximum penalties have been set fairly unsystematically. One accepted principle is that the maximum penalty should reflect the most serious of cases of that form of offending.⁴¹⁷ However, there is no agreed methodology or approach for determining the relative seriousness of an offence. And, while relativity between the maximum penalties for similar offences tends to be considered, criminal penalties have not been updated systematically over time, so this is not a reliable guide.⁴¹⁸
- 16.5 Similarly, there is no agreed methodology or approach for assessing how maximum pecuniary penalties should be set, both in individual cases and relative to each other. To illustrate, considerable work has been documented on how maximum pecuniary penalties in the Commerce Act 1986 should be set, based on economic theory about how to optimally deter breaches of competition law.⁴¹⁹ It is standard for economic theory on competition law penalties to take into account factors including: the need to focus on deterring breaches because of the low chance of detection; the fact that offenders can make substantial gains quickly, before detection is risked; the rational and detailed financial assessment that potential offenders are likely to undertake before they engage in such practices; the size of the market concerned; and the cost of the resulting detriment to the market and economy as a whole. Those factors are quite specific to the deterrence of anti-competitive practices. Yet, the same maximum penalties for bodies corporate have been repeated in:

⁴¹⁷ This is now reinforced in s 8(2) of the Sentencing Act 2002.

⁴¹⁸ See generally Law Commission *Maximum Penalties for Criminal Offences* (NZLC SP21, 2013).

⁴¹⁹ See for example Ministry of Commerce *Penalties, Remedies and Court Processes under the Commerce Act 1986* (Discussion Document, 1998) at [2.4].

- the Biosecurity Act 1993, for breaches of a variety of regulatory requirements under that Act;
 - the Dairy Industry Restructuring Act 2001, in relation to Fonterra's obligations under the Act; and
 - the Hazardous Substances and New Organisms Act 1996, in relation to breaches relating to the development, testing, importing, releasing, possessing or disposing of "new organisms" under that Act, and failing to comply with other regulatory controls.
- 16.6 It may be that those maximum penalties are the most appropriate ones in each of those regimes too. But it is also possible that an unscientific transplanting of maximum pecuniary penalties is taking place.
- 16.7 One consistent feature of pecuniary penalties is their very high maxima. In general, standard maximum pecuniary penalties are higher than standard criminal fines. However, there are also inconsistent approaches across the existing statutes. This is especially the case where statutes contain both criminal offences and pecuniary penalties for the same or similar conduct, or for different breaches of the regime.
- Under the Anti-Money Laundering and Countering the Financing of Terrorism Act 2009, criminal offences have a higher penalty than pecuniary penalties. The maximum criminal penalties, which are reserved for knowing or reckless breaches of the Act, are two years' imprisonment or a \$300,000 fine for an individual or a \$5 million fine for a body corporate. All other breaches of the Act are punishable by a pecuniary penalty of up to \$200,000 for an individual or \$2 million for a body corporate.
 - Under the Commerce Act 1986, breach of a price-quality requirement or order, or of an information disclosure requirement or order, is an offence if done intentionally and can also be punished by pecuniary penalty. Here the pecuniary penalties are higher than the criminal penalties. The maximum pecuniary penalty is \$500,000 for an individual or \$5 million for a body corporate. The maximum criminal penalty is \$200,000 for an individual or \$1 million for a body corporate.
 - In some cases, the maximum monetary penalties are the same for both pecuniary penalty and criminal breaches, although of course for the latter, conviction results and there may also be provision for a term of imprisonment. The Commerce (Cartels and Other Matters) Amendment Bill 2011⁴²⁰ will introduce a criminal offence for bodies corporate that engage in cartel conduct. The maximum fine is identical to that of the parallel pecuniary penalty – the greater of either \$10 million, three times the value of commercial gain if readily ascertainable, or 10 per cent of the turnover of the person in breach.
- 16.8 The issue for pecuniary penalties is whether their statutory maxima can be set in a principled, consistent, and (where possible) evidence-based way. This question cannot be covered in full here and we propose no strict methodology for policymakers who are setting penalties in legislation. What we do provide, however, is guidance on some of the relevant considerations. As stated above, we propose that a dedicated review should take place, which is able to identify and assess all the relevant legal principles; relevant deterrence, economic and other theories; and evidence and factors that may be relevant to the setting of a range of forms of penalty, including criminal incarceration penalties, criminal fines; and pecuniary penalties. Such a review would benefit from the input of a range of expertise. It could be carried out by way

420 Commerce (Cartels and Other Matters) Amendment Bill 2011 (341-2).

of an officials' review or as a request for advice from a body such as the Law Commission or Legislation Advisory Committee.

- 16.9 In the meantime, there is clearly a need for a central agency to have oversight of the development of maximum penalties for pecuniary penalty provisions. It is well-established practice that the Ministry of Justice plays this role when criminal penalties are set. In Chapter 2 of this Report, we recommend that the Ministry should be consulted on proposals for pecuniary penalties, in the same manner as for criminal offences.⁴²¹ Such an oversight role will be absolutely central to the principled and robust setting of pecuniary penalties in the future.

SOME RELEVANT PRINCIPLES

- 16.10 In our Issues Paper, we suggested the following principles might be relevant to the setting of maximum pecuniary penalties:

- Maximum penalties should reflect the worst class of case in each particular category.
- Maximum penalties 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.
- Maximum penalties should balance the promotion of compliant behaviour with ensuring that people remain willing to enter the market and take sensible commercial risks.

- 16.11 Seven submitters agreed that these were appropriate guiding principles.⁴²² We remain of the view that these principles provide appropriate guidance for setting maximum penalties. We elaborate further on them below. We have also identified additional matters that we consider should guide policymakers when setting maximum pecuniary penalties. These relate to:

- the very high maxima that, at present, tend to accompany pecuniary penalties;
- the need to treat like conduct alike;
- the setting of maximum penalties for pecuniary penalty provisions that have parallel criminal offences;
- the use of commercial gain and turnover as a measure of a penalty; and
- continuing penalties.

- 16.12 We address all of these issues below.

Reliance on very high maximum penalties

- 16.13 As noted above, pecuniary penalties tend to be accompanied by very high maxima. In general, they are considerably higher than the financial penalties that accompany most criminal offences. Rather than indicating that the breaches are more serious or more culpable than common criminal offending, this usually reflects the context in which they sit. Turning again to the Commerce Act penalties, they tend to be directed at contraventions by large corporations with high market share (and therefore commercial power) and deep pockets. Given that companies can stand to save or gain millions of dollars through the breach of competition law, it is important to set a maximum penalty that provides an effective disincentive. The largest pecuniary penalty in New Zealand, \$12 million imposed on Telecom for breach of

⁴²¹ See [2.15] above. Also see Recommendation 1.

⁴²² Ministry for Primary Industries, New Zealand Bar Association, New Zealand Law Society, Meredith Connell, Takeovers Panel, Parliamentary Counsel Office (Commercial Team), and an individual submitter.

section 36 of the Commerce Act 1986, should be viewed in the context of the maximum penalty that could have been imposed (10 per cent of Telecom's annual turnover), namely \$279.2 million.⁴²³ Similarly, in *Chief Executive of the Department of Internal Affairs v Atkinson*, penalties of \$100,000 and \$50,000 were imposed, but they should be viewed in the light of the commission payments thought to be gained as a result of the contravention of the Unsolicited Electronic Messages Act 2007.⁴²⁴

- 16.14 However, policymakers should resist transplanting existing formulas for maximum pecuniary penalties from one regime to another. It should not be assumed that pecuniary penalties can inevitably be set very high, and they should not be chosen by policymakers as an enforcement mechanism merely because of a perceived view that they allow higher maxima than criminal offences. In any policy development process, the penalty should be assessed with the specific type of contravention, conduct and/or actor in mind, and should be able to be defended on this basis.⁴²⁵

Maximum penalties that reflect the worst type of case

- 16.15 In the criminal sphere, there is a principle that the maximum penalty should be set with the worst type of case in mind. This is confirmed by section 8 of the Sentencing Act 2002, which provides that:

8 Principles of sentencing or otherwise dealing with offenders

In sentencing or otherwise dealing with an offender the court—

...

- (b) must take into account the seriousness of the type of offence in comparison with other types of offences, as indicated by the maximum penalties prescribed for the offences; and
 - (c) must impose the maximum penalty prescribed for the offence if the offending is within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and
 - (d) must impose a penalty near to the maximum prescribed for the offence if the offending is near to the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and
 - (e) must take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances.
- 16.16 As the Law Commission has previously observed, most law-breaking does not fall within the bracket of the "worst class of case".⁴²⁶ Both criminal offences and many breaches that can lead to pecuniary penalties tend to be broadly defined, with widely varying degrees of seriousness encapsulated within one form of breach. Certainly in the criminal field, the result is that 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, and provide a poor guide as to what the sentences for those offences ought to be. There is, therefore, only an indirect and sometimes marginal relationship between the maximum penalty for an offence and the bulk of

423 *Commerce Commission v Telecom Corporation of New Zealand Ltd* (2011) 13 TCLR 270 (HC).

424 *Chief Executive Department of Internal Affairs v Atkinson* HC Christchurch CIV-2008-409-2391, 19 December 2008 and 27 October 2009. Pecuniary penalties of \$100,000 were imposed on each of two brothers involved in the operation, and a penalty of \$50,000 on a third defendant who provided administrative support. Commission received was in the order of \$1.6 million.

425 For instance, in Australia similar penalties can be used against childcare centres for technical breaches of a regulatory regime. The maximum penalty is comparatively low, which is appropriate given the size and type of the actor and type of breach involved. See *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth), Part 8C.

426 Law Commission *Maximum Penalties for Criminal Offences*, above n 418, at [2.4].

sentences imposed for that offence. The extent of the relationship will also vary from offence to offence, depending on the breadth of the offence definition and the consequent spread of offending relative to the worst class of case.

- 16.17 It seems reasonable to expect the same for pecuniary penalties. It may, therefore, never eventuate that a pecuniary penalty imposed on a body corporate in a particular case is in fact set at the greater of \$10 million, three times the commercial gain or 10 per cent of the turnover of the body corporate involved. Instead, it seems to us that the key principle is that the maximum penalty in legislation should not *exceed* that which would be imposed for the “worst class of case”.

Deterrence

- 16.18 The second principle noted at [16.10] relates to deterrence. The emphasis that is placed on the deterrent and denunciatory aims of penalties varies according to the type of conduct and actors involved, and the aims and nature of the statutory regime as a whole. One of the aims of the criminal law is deterrence, but its dominant purpose is to denunciate and to set conduct apart as deserving serious moral condemnation. Pecuniary penalties have been adopted in circumstances where the emphasis has been more squarely on deterrence. This is reflected in the policy material that has supported pecuniary penalty regimes. Cases under the Commerce Act and the Unsolicited Electronic Messages Act have also emphasised deterrence as the principal purpose of the pecuniary penalties contained within those Acts.⁴²⁷
- 16.19 In our view, neither criminal penalties nor pecuniary penalties can be said to be exclusively denunciatory or exclusively deterrent. Pecuniary penalties deter by the imposition of a penalty that exceeds mere profit stripping or compensatory measures, and they can be imposed whether or not there has been any gain or harm. It is clear to us that they have a denunciatory impact. This fact contributes to us identifying pecuniary penalties as punitive and so requiring special consideration as to which procedural rules and safeguards should result. However, where a penalty’s emphasis is more squarely on deterrence, this has a legitimate influence on the level at which the maximum penalty should be set.
- 16.20 A penalty that is likely to deter an owner-operator may not be sufficient to deter a large multi-national. Our reference to “the classes and sizes of participants in that regulatory field” highlights the importance of tailoring a maximum penalty to the actors it targets.
- 16.21 Where a regulatory system will target participants who are broadly similar in nature with similar resources, this is a more straightforward exercise. In fields with a wide variety of participants, this is more difficult, as a maximum penalty set at a level to deter well-resourced participants may be so large that it discourages smaller operators from entering the regulatory field and may even cause smaller players to leave it.

Minimal deterrence of beneficial behaviour

- 16.22 The third principle raised in our Issues Paper recognises the delicate balancing process required in setting maximum penalties. Set too high, pecuniary penalties may have an over-deterrent effect, which could deter people from engaging in socially beneficial activities (for example,

⁴²⁷ See, for example, *Telecom Corporation of New Zealand Ltd v Commerce Commission* [2012] NZCA 344 at [28], in which the Court of Appeal said that the “primary consideration is deterrence and penalties must be set at a level that achieves both specific and general deterrence”. See also *Phillipson v Maritime New Zealand* HC Nelson CRI 2010-442-29, 5 July 2011 at [17], commenting on a penalty that uses a similar formulation in the criminal law and noting that this reflects an economic approach to deterrence (footnote omitted):

Deterrence is normally achieved when the gains resulting from the offending activity are eliminated, but if prospects of detection and enforcement are low the offender may find it profitable to continue so long as it must disgorge gains only on those occasions when it is caught and punished. In such circumstances the optimal penalty is the gain from the offence multiplied by the probability of detection and enforcement.

providing goods and services to the public or participating in financial markets), or to do so in a risk-averse manner to the detriment of society or industry.

- 16.23 This was illustrated by concerns raised about proposed amendments of the Electricity Industry Act in 2010. The Electricity Industry Bill 2009,⁴²⁸ as introduced, would have increased the maximum pecuniary penalty the Rulings Panel could impose from \$20,000 to \$2 million. Following submissions that the increase “may discourage market participants from providing certain services and encourage undue risk aversion” the Ministry of Economic Development recommended in its departmental report that the maximum penalty be reduced to \$200,000.⁴²⁹

Treating like conduct alike

- 16.24 Both the Legislation Advisory Committee Guidelines (LAC Guidelines) and the Sentencing Act 2002 emphasise the importance of sentence parity for similar criminal offences or offences of comparable culpability. The LAC Guidelines state that policymakers should consider “the level of maximum penalties provided across the statute book for similar offences of similar severity”.⁴³⁰ They contain the caveat, however, that the ad hoc development of criminal offences has resulted in disparate maximum penalties for behaviour of similar seriousness on the statute book, so absolute consistency will not be possible. Notwithstanding this, there is a clear expectation that like offences will be treated alike and historical inconsistency does not obviate the desirability of enhanced consistency now. The Ministry of Justice’s vetting role is performed partly with this aim in mind.
- 16.25 The same approach should be taken with pecuniary penalties. Relative to each other, the penalties should reflect appropriately the differing levels of culpability.

Parallel offences and pecuniary penalties

- 16.26 An area of particular difficulty is where there are “parallel” pecuniary penalty provisions and criminal offences – that is, penalty provisions and offences in a single regulatory regime that target the same conduct, except that the criminal offence requires proof of intention or recklessness. While one would expect to find some consistency in the way the various statutes use parallel pecuniary penalties and offence, the examples at [16.7] illustrate this is not the case.
- 16.27 A question arises as to whether there are principles that should dictate the approach to be taken where there are parallel penalty and criminal offence maxima. Should there be a consistent approach, and if not, what factors justify such a range of practices?
- 16.28 One might argue that a criminal fine should be set lower, because regulating conduct through criminal law can have additional punitive effects, at least for natural persons, which do not attach to pecuniary penalties. Higher maxima for pecuniary penalties may reflect the fact that the imposition of such a penalty is not attended by a criminal conviction. Likewise, criminal offences can also lead to imprisonment. For example, the maximum monetary (criminal) fine for a person who takes an action contrary to the Health and Safety in Employment Act 1992, knowing that it is reasonably likely to cause serious harm to any person, is \$500,000. This must be regarded as a high culpability offence, yet the monetary penalty is lower than many pecuniary penalties. However, a sentence of up to two years’ imprisonment can be imposed as an alternative to, or in addition to, the monetary fine. Finally, whereas in the pecuniary penalty

428 Electricity Industry Bill 2009 (111-1).

429 Ministry of Economic Development “Electricity Industry Bill: Officials’ report on submissions to the Finance and Expenditure Committee” (16 April 2010) at 47.

430 Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (2001) [LAC Guidelines] at [12.6.3].

context increasing deterrence is usually achieved by increasing the maximum penalty,⁴³¹ the criminal law presents the option of escalating to a higher *form* of penalty, namely imprisonment.

- 16.29 On the other hand, the parallel criminal offences must be committed with some degree of intent or recklessness. It follows that they carry a higher level of moral blameworthiness. One could argue that this means they should carry a higher maximum fine than their parallel pecuniary penalties.
- 16.30 In the Issues Paper, we concluded that where there are parallel criminal offences and pecuniary penalties, the criminal offence should be reserved for the more egregious, morally blameworthy conduct and on that basis it should carry a higher maximum fine than its parallel penalty provision. Therefore we preferred the approach of the Anti-Money Laundering and Countering Financing of Terrorism Act, which clearly adopts a “pyramid” approach to enforcement, with pecuniary penalties lower on the pyramid than criminal offences, and therefore carrying a lower statutory maximum.⁴³² We were also concerned that setting pecuniary penalties higher than parallel criminal offence fines might create perverse incentives for regulators to seek a pecuniary penalty where criminal proceedings would actually be more appropriate.
- 16.31 We also note the approach used in some Australian statutes. In some cases, the pecuniary penalty *must not* exceed the maximum that could have been imposed if the defendant had been convicted for the parallel criminal offence.⁴³³ This reflects the view that pecuniary penalty provisions are lower on the “enforcement pyramid” in that regime, and the regime seeks to ensure that criminal offences are treated as the more egregious.
- 16.32 We received mixed responses to this question in submissions. Some submitters favoured a flexible approach that allowed a higher penalty to be set in the pecuniary penalty context.⁴³⁴ Two did not think that doing so would create the perverse incentive referred to above.⁴³⁵ In contrast, other submitters agreed that criminal prosecutions should be reserved for graver conduct and that the respective penalties should reflect this approach.⁴³⁶
- 16.33 We recognise that a criminal conviction has a punitive effect on its own. But this effect is impossible to quantify. People place different weight on a criminal conviction depending on their circumstances and priorities, and the stigma attaching to a conviction differs for the type of conduct in question.⁴³⁷ For instance, breach of Easter Sunday trading laws will not necessarily attract a high amount of public opprobrium, even though that is a criminal offence. We also recognise that since a criminal conviction will often be a serious punishment, the circumstances where it is appropriate for a maximum pecuniary penalty to exceed the monetary value of an equivalent criminal fine may be limited. One situation where this may well be appropriate is where the criminal offence also carries an alternative penalty of imprisonment.
- 16.34 We have not reached a conclusion on this point. In our view, the points above could be used both to suggest that pecuniary penalties should be higher than criminal penalties, and vice versa. It is not clear to us how much weight ought to be given to factors such as the differing forms of penalty, the type of conduct involved and the type of actor involved. This is a question that

431 Clause 6 of the Commerce Amendment Bill 1999 (296-2) raised the maximum pecuniary penalties from \$5 million to \$10 million. The majority of Select Committee members wished to “send an unequivocal signal to the courts that Parliament, and indeed the public, expect offenders engaged in anti-competitive behaviour to the disadvantage of consumers be severely penalised as a deterrence to others”: Commerce Amendment Bill 1990 (296-2) (select committee report) at 25.

432 Law Commission *Civil Pecuniary Penalties* (NZLC IP33, 2012) [Issues Paper] at [7.38].

433 See for example the Broadcasting Services Act 1992 (Cth), s 205F.

434 Ministry for Primary Industries, Parliamentary Counsel Office (Commercial Team) and Meredith Connell.

435 Parliamentary Counsel Office (Commercial Team) and Meredith Connell.

436 New Zealand Criminal Bar Association, New Zealand Law Society, Bell Gully, Air New Zealand and Federated Farmers.

437 See the discussion at [4.23]–[4.26].

demands, in our view, consideration by experts in economic and deterrence theory as well as in legal principle.

Use of commercial gain and turnover as a measure of a penalty

- 16.35 A number of Acts use a multiple of the commercial gain from the breach and/or 10 per cent of turnover of the body corporate (and all associated bodies corporate), as measures of the maximum penalty.⁴³⁸ The paucity of case law on these penalties makes it difficult to determine whether the courts find such formulations easy to administer. Although there are a number of penalty judgments under the Commerce Act regime, most of these adopt penalties that have been jointly recommended by the parties, which limits the analysis of how such penalties are reached.⁴³⁹ Likewise, many judgments appear more concerned about horizontal consistency; that is, that companies with similar levels of involvement (and therefore culpability) in a contravention should be subject to comparable penalties. This applies between cases, as well as between different parties in the same case.⁴⁴⁰
- 16.36 We consider that linking a maximum penalty to three times the commercial gain resulting from the breach can be a useful formulation, particularly where deterrence of breach for financial benefit is sought. The approach is accepted as an effective deterrent against those who would make a rational decision to breach with the intention of making a profit or avoiding a loss. It has been designed with a specific purpose and with specific offenders in mind. In addition, arguably there can be little objection to this approach on the grounds of uncertainty about the potential penalty – the persons targeted are likely to be in a position to calculate their maximum possible liability.
- 16.37 Penalties linked to the turnover of a body discriminate between defendants according to their capacity to pay. Statutes indicate that they have been devised as an alternative maximum where there may be difficulty in assessing the commercial gain from a breach. Again, arguably there is no inherent uncertainty about the potential penalty in those cases since a potential offender should be in a position to assess 10 per cent of the turnover of their organisation. Such a penalty also accords with deterrence objectives, because the maximum potential penalty would be likely to account for the potential gain from the offending as well as compensate for any low chance of detection.
- 16.38 However, we do have reservations about this formulation. Guidelines issued by the Australian Attorney-General's Department recommend such penalties should “generally be avoided because of a lack of connection between an organisation's total turnover and the contravening conduct”.⁴⁴¹ Arguably, they are also in conflict with the principle set out above that the maximum penalty in legislation should not *exceed* that which would be imposed for the “worst class of case”. We find it hard to believe that a New Zealand court would ever impose a penalty of \$279.2 million.⁴⁴² We consider that such a formulation should be used rarely, but we also suggest it is a question that would benefit from a multi-disciplinary review of how maximum penalties are set.

438 See for example Biosecurity Act 1993, s 154J; Commerce Act 1986, s 80; Dairy Industry Restructuring Act 2001, s 141; Hazardous Substances and New Organisms Act 1996, s 124C; Overseas Investment Act 2005, s 48; and Securities Markets Act 1988, s 42W.

439 See generally Tom Pasley “Regulators’ penalties and court approval” (2013) NZLJ 136.

440 See for example *Giltrap City Ltd v Commerce Commission* [2004] 1 NZLR 608 (CA) at [59] in which the Court referred to the “constraining effect of the penalty imposed on the other participants”; and *Chief Executive, Department of Internal Affairs v Atkinson* HC Christchurch CIV 2008-409-002391, 27 October 2009 at [21], where French J refers to “the need to maintain parity” between the contraveners. Also see generally Mary-Anne Borrowdale “‘Sufficient Severity’: A New Era of Commerce Act Penalties” (speech to the Competition Law and Policy Institute of New Zealand, 6 August 2011).

441 Attorney-General's Department “A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers” (September 2011) at [3.1.5].

442 See [16.13] above.

Continuing penalties

- 16.39 Telecommunications (Interception Capability and Security) Act 2013 contains a daily penalty for continuing contraventions. A 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).⁴⁴³ There are no guiding factors for when that is appropriate.
- 16.40 The LAC Guidelines state the following in relation to continuing criminal offences:⁴⁴⁴
- 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.
- 16.41 These kinds of provisions introduce uncertainty in the size of penalty that can be imposed. We agree with the LAC Guidelines that they are not generally desirable. At present a provision of this kind appears in only one pecuniary penalty regime and against a limited class of possible defendants under that regime (telecommunications network operators).
- 16.42 Rather than creating continuing penalties, it is preferable that the length and severity of the breach should be taken into account by courts at the penalty imposition stage. If the intention is to bring an ongoing breach to an end, policymakers should consider other means of achieving it. A discontinuance order or an early warning system may be alternative options.

RECOMMENDATION

- R7 The Government should instigate a review of how maximum criminal and pecuniary penalties should be set in legislation.

GUIDELINE

G17 Maximum pecuniary penalties should be set with the specific contravention, conduct and actor in mind

Pecuniary penalties should not be chosen as an enforcement mechanism merely because of a view that they allow higher maximum penalties than criminal offences. Also, the maximum penalties in existing pecuniary penalty statutes should not merely be transplanted to new regimes. In any statute, they should be set with the specific contravention, conduct and actor in mind.

Penalties that rely on a multiple of commercial gain or percentage of turnover might be considered where deterrence of breach for financial benefit is sought. However, since turnover penalties discriminate between defendants according to their capacity to pay, and lack connection to the actual contravening conduct, they should be used sparingly.

The following principles should be applied:

- Maximum pecuniary penalties should:
 - (i) reflect the worst class of case in each particular category;

⁴⁴³ Telecommunications (Interception Capability and Security) Act 2013, s 98(2).

⁴⁴⁴ LAC Guidelines, above n 430, at [12.6.2].

- (ii) 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; and
 - (iii) balance the promotion of compliant behaviour with ensuring that people remain willing to enter the market and/or take sensible commercial risks.
- Like conduct should be treated alike.

COURT IMPOSITION OF PENALTIES

- 16.43 In individual cases, it is for the court to determine where the conduct falls within the range stipulated by Parliament and what size penalty is appropriate. Some existing pecuniary penalty statutes provide guidance for the courts as to:
- whether to impose a penalty; and
 - how to assess the size of the penalty in the individual case.
- 16.44 In the Issues Paper, we asked whether statutes should continue to adopt an approach of providing guidance to courts, and whether there was a core list of factors that might be relevant to a judge's assessment of the appropriate penalty. We also noted that some have argued that in addition to a statutory list of factors, courts should draw on criminal sentencing practice.⁴⁴⁵
- 16.45 The High Court has already implicitly and explicitly adopted aspects of criminal sentencing in its penalty judgments under the Commerce Act,⁴⁴⁶ and use of a framework broadly based on the criminal law sentencing approach has been praised as being more transparent and predictable than that of previous cases, where the Court tended to list the factors relevant to the exercise of its discretion and then arrive at a global penalty figure.⁴⁴⁷ However, in *Commerce Commission v EGL Inc*, the Court warned against taking the analogy too far, as the objectives of criminal sentencing may differ markedly from those served by pecuniary penalties.⁴⁴⁸ Several submitters supported the courts being able to draw on sentencing practice in the criminal law, but also emphasised that analogies should be made critically. We agree with the need for a transparent and predictable approach to imposing pecuniary penalties, and support the direction taken by the courts.
- 16.46 Submitters generally supported legislation providing guidance to courts on when to impose pecuniary penalties, as it could lead to more consistent and transparent outcomes. In terms of what the court should consider, the New Zealand Law Society suggested factors such as “the nature and extent of the contravention” and “the nature and the extent of any loss or damage”. Bell Gully, the New Zealand Bar Association and Donald Mathieson QC expressly stated that a single set of factors should be used. This is, perhaps, unsurprising, as courts' discretion as to the level of penalty also encompasses the decision to impose a penalty of \$0 (that is, no penalty) or a nominal penalty.⁴⁴⁹ We agree that a single list of factors should be relevant to both issues (that is, whether a penalty should be imposed and what level that penalty should be).

⁴⁴⁵ B Hamlin and M Sumpter “Fixing the price of Commerce Act breaches” [2011] NZLJ 230 at 233–234.

⁴⁴⁶ *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) at [14].

⁴⁴⁷ Hamlin and Sumpter, above n 445, at 231.

⁴⁴⁸ *Commerce Commission v EGL Inc* HC Auckland CIV 404-2010-5474, 16 December 2010 at [13]–[14].

⁴⁴⁹ Such as in *Commerce Commission v Otago and Southland Vegetable and Produce Growers' Association (Inc)* (1990) 4 TCLR 14 (HC), in which Holland J imposed nominal penalties of \$5 on the defendants.

- 16.47 We identified the following “core” factors that were contained in a number of pecuniary penalty provisions to guide courts as to the level of penalty:
- 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;
 - the level of pecuniary penalties that have been imposed in previous similar situations; and
 - the circumstances in which the breach took place.
- 16.48 We asked submitters whether these were appropriate factors to be set out in legislation to provide guidance to courts in determining quantum. We also asked whether any other factors were relevant. Submitters identified the following:
- whether the respondent has committed previous breaches;⁴⁵⁰
 - whether other particular orders (for example, exemplary damages) have been made in respect of the breach;⁴⁵¹
 - the attitude of the offender;⁴⁵²
 - whether professional advice was obtained about the breach before it occurred;⁴⁵³
 - the financial circumstances of the defendant;⁴⁵⁴ and
 - for bodies corporate:⁴⁵⁵
 - the level of the company at which offending took place; and
 - whether the corporation exercised due diligence and whether it had a corporate culture conducive to compliance.
- 16.49 The Parliamentary Counsel Office (Commercial Team), Bell Gully and Meredith Connell emphasised that what factors will be relevant is highly context dependent. Accordingly, any list should be non-mandatory and non-exhaustive. We agree, particularly given our expectation that the use of pecuniary penalties will continue to grow. The lack of consensus among submitters as to which factors are relevant also confirms our view.
- 16.50 However, we think that the relative novelty of pecuniary penalties means some guidance to courts will often be desirable. It would be useful for policymakers to consider whether a pecuniary penalty provision should include the core factors listed at [16.47] when designing a pecuniary penalty provision. These factors are contained in several pecuniary penalty regimes and were also identified by the New Zealand Law Society, the Parliamentary Counsel Office (Commercial Team) and the New Zealand Bar Association as likely to be relevant in most cases. In addition, the factors listed at [16.48] above, and at [7.56] and [7.58] of the Issues Paper, may also be relevant to specific regimes. Which factors will be relevant will depend on the features of the specific legislative regime and what it is seeking to achieve.

450 Ministry for Primary Industries, the New Zealand Bar Association and Donald Mathieson QC.

451 Ministry for Primary Industries and the New Zealand Bar Association.

452 Air New Zealand and the New Zealand Bar Association.

453 Air New Zealand and the New Zealand Bar Association.

454 New Zealand Bar Association.

455 Air New Zealand and the New Zealand Bar Association.

- 16.51 Finally, we have also considered whether, in regimes where more than one civil order can be imposed on a person for the same conduct, the court should take into account whether any other such orders have been imposed and their effect.⁴⁵⁶ Section 48 of the Unsolicited Electronic Messages Act 2008 defines orders for pecuniary penalties, compensation and damages as “civil liability remedies”. When imposing a civil liability remedy, the court must have regard to whether any other civil liability remedy has been imposed for the same civil liability event and, if so, the amount and effect of the first civil liability remedy.⁴⁵⁷
- 16.52 This led us to consider, in the Issues Paper, whether the possibility of multiple orders of a different nature, being imposed for the same conduct, raises double punishment concerns. We recognised that different orders serve different functions; for example, management bans also serve a protective function and compensation orders obviously are intended to compensate victims of the conduct.⁴⁵⁸ But we asked (at question 16 of the Issues Paper) whether the potentially punitive effect of those other orders should be taken into account by a court imposing a pecuniary penalty. Management bans, for example, can have serious financial consequences for individuals, and it may be that the court should take that into account when determining the quantum of a pecuniary penalty for the same conduct.⁴⁵⁹
- 16.53 Several submitters agreed.⁴⁶⁰ The Law Society noted that the totality approach should apply, so that where a regime provides for the making of multiple orders, the overall cumulative effect of those orders must remain proportionate to the alleged breach. Submitters noted that the financial consequences of a management ban combined with further financially punitive penalties could be disproportionately harsh, so mechanisms are required to enable the courts to take this into account.
- 16.54 However, some disagreed. Meredith Connell noted that, in their experience, courts are already conscious of other sanctions imposed on a particular defendant in relation to contravening conduct. Including this as a specific factor might therefore be unnecessary. They emphasised that each order serves a different purpose. This point was also emphasised by the Parliamentary Counsel Office (Commercial Team) (PCO). Since the purpose of the civil remedy or management ban is likely to be quite different, the court should not necessarily give any weight to the fact that one has been imposed. Its only relevance, if at all, should be whether it negates the person’s ability to pay the penalty. However, nor did PCO think the court should be prevented from having regard to other civil remedy orders (including forfeiture orders) that had been imposed.
- 16.55 We recommend, in Chapter 10 of this Report, that there be a statutory bar against a pecuniary penalty and a criminal penalty being imposed for the same conduct, and against several pecuniary penalties being imposed for the same conduct. We do not propose a bar against the possibility of a pecuniary penalty and a form of civil order such as a management ban, or a pecuniary penalty and a forfeiture order, or a pecuniary penalty and an order for compensation.

456 We originally discussed this in the double jeopardy section of our Issues Paper, above n 432, at Q16 and associated paragraphs.

457 Section 48. See also Commerce Act 1986, s 82A: the court must take into account whether a pecuniary penalty has been imposed when deciding whether to make an order for exemplary damages for a breach of Part 2 of the Act. Other relevant provisions include the 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; and the Securities Trustees and Statutory Supervisors Act 2011, where contravention of a licensee obligation could occur under that Act as well as a number of other Acts containing these obligations (s 4, definition of “licensee obligation”).

458 See for example Securities Act 1978, s 57B; Securities Markets Act 1988, s 42ZG; and Takeovers Act 1993, s 43. See also Australian Law Reform Commission *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC R95, 2003) at [27.50] and [27.53].

459 Issues Paper, above n 432, at [30.62].

460 New Zealand Law Society, Ministry for Primary Industries, New Zealand Bar Association and Air New Zealand.

- 16.56 However, we agree with the view that the totality principle should be applied by courts when imposing pecuniary penalties and other orders. We do not consider there is a need for statutory direction about this matter.

Takeovers Act 1993, section 33M(c)

- 16.57 In the Issues Paper, we asked whether providing a “threshold” of seriousness, such as that contained in section 33M(c) of the Takeovers Act, creates any difficulties. That provision states that a 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.

- 16.58 The Takeovers Panel considered that restricting the court’s discretion to impose a penalty only for serious breaches of the Takeovers Code would be appropriate. However, it noted that the threshold remains untested, so it is unclear if its application to a particular case will cause problems.

- 16.59 It is not clear to us what a threshold of “seriousness” for imposing penalties achieves. It means that an enforcement agency has to jump over two hurdles to successfully obtain a pecuniary penalty: proving that the contravention occurred, and then proving that it is serious enough to merit a penalty. The term is also somewhat vague and uncertain. It is not clear whether “serious” relates to the consequences of the contravention, the intention of the person behind the contravention (for example, was it deliberate), or both. These uncertainties could act as a disincentive to pursue a pecuniary penalty. The Parliamentary Counsel Office (Commercial Team), in its submission, also noted that a seriousness threshold seems inconsistent with the hierarchy of enforcement options as between civil and criminal options.

- 16.60 If there is a legitimate reason for only serious contraventions to be punished, then it seems best for this to be incorporated into the elements of the breach, rather than the question of whether a penalty should be imposed at all. Alternatively, regulators’ enforcement guidelines could set out relevant factors to consider when exercising their prosecutorial discretion, in much the same way that the Solicitor-General’s Prosecution Guidelines provide that the predominant public interest consideration relevant to the decision whether to prosecute is the “seriousness of the offence”.⁴⁶¹

- 16.61 Our view is that it will often be most relevant and appropriate for any “seriousness” to be considered at the time a court is determining the level of penalty. This accords with submissions by the Financial Markets Authority, New Zealand Law Society and New Zealand Bar Association.

⁴⁶¹ Crown Law Office *Solicitor-General’s Prosecution Guidelines* (2013) at [5.8.1].

GUIDELINE

G18 Pecuniary penalty statutes should provide guidance to courts about the circumstances when a penalty should be imposed and the amount of the penalty

Pecuniary penalties are a relatively novel form of penalty and there is a limited amount of case law to guide courts when determining penalties. Policymakers should consider what factors should be considered by the court under the particular regime. As a minimum, pecuniary penalty statutes should usually include the following guidance:

- the nature and extent of the breach;
- any loss or damage caused by the breach;
- any financial gain made, or loss avoided, from the breach;
- whether the breach was intentional, inadvertent or negligent;
- the level of penalties imposed in previous similar situations; and
- the circumstances in which the breach took place.

Chapter 17

Appeals

APPEALS OF PENALTIES IMPOSED BY THE HIGH COURT

- 17.1 At present, all pecuniary penalties, bar one, are imposed by the High Court.⁴⁶² The Issues Paper asked whether appeals of pecuniary penalties should continue to be brought before the Court of Appeal under the broadly framed right in section 66 of the Judicature Act 1908.⁴⁶³ Section 66 provides that the Court of Appeal has appellate jurisdiction over “any judgment, decree, or order” of the High Court.⁴⁶⁴ An appeal under section 66 is brought as of right on questions of both fact and law, and is undertaken by way of rehearing.⁴⁶⁵ It is available both to defendants and the enforcement body taking the proceedings. Section 66 also deals with appeals on interlocutory decisions or orders made in the High Court.⁴⁶⁶
- 17.2 A further appeal to the Supreme Court may be granted by way of leave under the Supreme Court Act 2003.⁴⁶⁷
- 17.3 An alternative approach to appeal rights would be for each statute to specify the appeal route for pecuniary penalty proceedings. Currently, none do; however, that might be desirable if there was a need to restrict appeals for reasons of cost, delay, the significance of the subject matter, the specialist competence and expertise of the first-instance decision maker, or the need for finality.⁴⁶⁸
- 17.4 All submitters who answered this question agreed with our view that it is appropriate for those pecuniary penalties imposed by the High Court to be subject to the broad right of appeal in section 66, for the reasons given in the Issues Paper. They are a comparatively novel form of action that involves the imposition of sizeable monetary penalties. As such, it may be likely

462 Section 37 of the Unsolicited Electronic Messages Act 2007 confers jurisdiction on the District Court to hear applications for a pecuniary penalty under that Act.

463 Issues with s 66 of the Judicature Act were recently noted by the Law Commission in *Review of the Judicature Act: Towards a Consolidated Courts Act* (NZLC IP29, 2012) at [11.1]. The section has given rise to substantial difficulties over the years as to what appeals come within its purview: Andrew Beck “When is a judgment not a judgment?” [2007] NZLJ 381. The provision will be reformed by clause 57 of the Judicature Modernisation Bill 2013 (178-2) which, at the time of publication, is awaiting its second reading before Parliament.

464 See also *New Zealand Bus Ltd v Commerce Commission* [2007] NZCA 502, [2008] 3 NZLR 433 at [65]. In full, 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.

465 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.

466 See *Siemer v Heron* [2011] NZSC 133, [2012] 1 NZLR 309 and *Waterhouse v Contractors Bonding Ltd* [2013] NZCA 151. Clause 57 of the Judicature Modernisation Bill, as it is reported back from the Select Committee, provides that leave of the High Court will be required for appeals against interlocutory orders or decisions of the High Court in respect of any civil proceeding, except those that (a) strike out or dismiss the whole or part of a proceeding, claim, or defence; or (b) grant summary judgment.

467 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 Maritime Transport Act 1994, s 428(3)), although no pecuniary penalty regimes contain such provisions.

468 Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (2001) at [13.1.1] [LAC Guidelines].

that challenges will be brought relating both to procedural matters and penalty quantum. This warrants full supervisory oversight by the Court of Appeal. It has been noted that:⁴⁶⁹

... even in civil cases, litigants who find themselves tilting against the overwhelming might of the state, in a forum set up and operated by the state, should have the right to a sober second look.

- 17.5 A general appeal on fact and law ensures 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.⁴⁷⁰ A cautious approach should be taken to limiting appeals on pecuniary penalties to questions of law, because of the difficulties that may arise in trying to distinguish between matters of fact and law.⁴⁷¹ Generally, only second-tier appeals should be limited to matters of law.⁴⁷²
- 17.6 Narrowing the right of appeal for pecuniary penalties may 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 pecuniary penalties.⁴⁷³ Any argument to restrict pecuniary penalty appeal rights because of 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.
- 17.7 As currently drafted, section 66 ensures broad appellate court oversight of pecuniary penalties. This may be contrasted with the closely prescribed criminal appeal rights set out in Part 6 of the Criminal Procedure Act 2011. Criminal appeal rights are more closely prescribed, in part, because of the need to afford deference to initial determinations of fact in criminal trials.⁴⁷⁴ For the reasons given in this section, we recommend that the general right of appeal in section 66 should apply to all pecuniary penalties imposed by the High Court.

APPEALS OF PENALTIES IMPOSED BY THE DISTRICT COURT

- 17.8 Section 37 of the Unsolicited Electronic Messages Act 2007 confers jurisdiction on the District Court to hear applications for a pecuniary penalty under that Act. We state in this Report that we have no objection to pecuniary penalties being imposed by the District Court within its jurisdictional limit.⁴⁷⁵
- 17.9 The District Court appeal rights are set out in sections 72, 75, and 76 of the District Courts Act 1947. They will apply to penalties imposed by the District Court unless the penalty statute provides otherwise. Section 72 provides a right of appeal on both fact and law to the High Court against the whole or any part of the decision, and section 75 provides that all appeals must be by way of rehearing. Section 76 sets out the powers of the High Court on appeal, which include making any decision it thinks should have been made or directing the District Court to rehear the proceedings.
- 17.10 For the same reasons set out above, we see no reason why this standard appeal route would not be appropriate for pecuniary penalties imposed by the District Court.

469 HL Dalton “Taking the Right to Appeal (More or Less) Seriously” (1985) 95 Yale LJ 62 at 103–104. Dalton considers whether appeals are required to address the risk that the government’s disproportionate power distorts trial outcomes.

470 See Law Commission *Tribunal Reform* (NZLC SP 20, 2008) at [8.8].

471 At [8.10]. These difficulties are discussed in T Endicott “Questions of Law” (1998) 114 LQR 292.

472 At [8.9]. See also LAC Guidelines, above n 468, at [13.3.2].

473 Financial Markets Conduct Act 2013, s 487; and Takeovers Act 1993, s 33N. Also a series of discrete orders made in the High Court may be appealed as a general appeal: see for example *New Zealand Bus Ltd v Commerce Commission*, above n 464, at [65].

474 See Law Commission *Civil Pecuniary Penalties* (NZLC IP33, 2012) [Issues Paper] at [7.67]–[7.68] and R Nobles and D Schiff “The Right to Appeal and Workable Systems of Justice” (2002) 65 MLR 676 at 689 onwards.

475 At [13.11].

GUIDELINE

G19 Standard appeal routes should be used for pecuniary penalties

As they are a subset of civil proceedings, the standard appeals routes under the Judicature Act 1908 and the District Courts Act 1947 are the most appropriate for pecuniary penalties.

Chapter 18

Limitation periods

INTRODUCTION

- 18.1 In the Issues Paper, we noted a range of approaches to the limitation period for bringing pecuniary penalty proceedings.⁴⁷⁶ We asked two questions about limitation periods:
- should pecuniary penalty statutes deal expressly with the issue of limitation;⁴⁷⁷ and
 - should guidance be provided to policymakers on the matters influencing the choice of limitation periods.⁴⁷⁸

Preliminary views

- 18.2 The Law Commission's preliminary view was that wholesale reliance on the Limitation Act 2010 is not necessarily desirable, since some pecuniary penalty statutes cover a range of conduct of varying seriousness, with some regimes requiring separate limitation periods for different penalties. We also noted that some non-monetary orders such as management bans are not covered by the Limitation Act.
- 18.3 Our preliminary conclusion, therefore, was that the setting of limitation periods for pecuniary penalties should be a conscious policy decision that takes into account the range of penalties that may be sought under the particular regime. We suggested that policymakers 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, and that they will need to specify clearly the extent to which a statute's internal limitation rules displace or exist alongside the Limitation Act.⁴⁷⁹

Our conclusions

- 18.4 In this Report, based on the submissions we received, and further analysis and research, we confirm the preliminary conclusion reached in the Issues Paper that pecuniary penalty statutes should deal expressly with the limitation issue. It would be desirable, in our view, for greater consistency in this aspect of pecuniary penalty design. Therefore, we propose a model approach.
- 18.5 In general, the Commission continues to support the standardisation of limitation periods in relation to civil claims under the Limitation Act, and in relation to criminal offences under the Criminal Procedure Act 2011. However, as pecuniary penalties are a hybrid form of proceeding, sharing features of both civil and criminal proceedings, we conclude that the standard approaches in those statutes are not always apt for pecuniary penalties. Instead, there is a need for a tailored model limitation period that is designed to best balance the relevant policy factors engaged.

⁴⁷⁶ Law Commission *Civil Pecuniary Penalties* (NZLC IP33, 2012) [Issues Paper] at ch 7, 155–167.

⁴⁷⁷ Issues Paper, above n 476, at Q41.

⁴⁷⁸ Issues Paper, above n 476, at Q42.

⁴⁷⁹ Issues Paper, above n 476, at [7.103].

- 18.6 In this chapter, we propose a model form of limitation period as the default approach for pecuniary penalty statutes. We have considered the following options:
- (a) the approach taken in section 508 of the Financial Markets Conduct Act 2013 (express adoption of the Limitation Act multi-factored limitation period); or
 - (b) the Commerce Act 1986 discoverability model (three years from reasonable discoverability with a 10-year longstop), supplemented by the addition of the Limitation Act fraud exception to the longstop.
- 18.7 We conclude that the model approach should be one structured on “reasonable discoverability” (option (b)); however, the standard Limitation Act approach (option (a)), should be an alternative option when there is a specific policy justification for applying that model.
- 18.8 The substance of this model is not significantly different to the operation of the three-year late knowledge period in the Limitation Act 2010, the key difference being that the limitation will bite three years after reasonable discoverability, regardless of the standard six-year limitation period that usually applies to civil claims. This essentially shifts the late knowledge period in the Limitation Act to the primary limitation period. Our view is that this model is justified in the context of pecuniary penalties to achieve the appropriate balance between certainty, efficiency and encouraging regulatory responsiveness. We note that this model is largely consistent with the limitation periods in sections 74D, 80 and 80B of the Commerce Act 1986.

CURRENT APPROACHES TO LIMITATION PERIODS

- 18.9 We have identified five distinct approaches in pecuniary penalty statutes currently in force:
- no express limitation period, thereby invoking the default limitation periods in the Limitation Act 2010;
 - express application of the finite six-year primary period in the Limitation Act 2010;
 - adoption of a shorter finite primary period;
 - adoption of a primary period based on “reasonable discoverability”; and
 - a variety of primary periods for different contraventions within a pecuniary penalty statute.

No express limitation period

- 18.10 Some pecuniary penalty statutes are silent on the question of limitation periods and are therefore subject to the Limitation Acts 2010 and 1950.⁴⁸⁰ “Civil penalties” are included as “money claims” under the 2010 Act,⁴⁸¹ with the result that the structure of the limitation period includes:
- a six-year primary period (after the date of the act or omission on which the claim is based);
 - a three-year late knowledge period;⁴⁸² and

480 Biosecurity Act 1993; Hazardous Substances and New Organisms Act; Overseas Investment Act 2005; and Securities Trustees and Statutory Supervisors Act 2011.

481 Limitation Act 2010, s 12. “Civil penalty” is defined in s 4 as:

[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.

482 The late knowledge date is defined in s 14: “the date (after the close of the start date of the claim’s primary period) on which the claimant gained knowledge” (or earlier if the claimant ought reasonably to have gained knowledge) of particular facts. To utilise the late knowledge extension, the claimant must prove that at the start of the six year primary period, the claimant had no knowledge of the contravention (s 14(2)).

- a 15-year longstop period.⁴⁸³ The longstop period does not apply in the case of fraud.⁴⁸⁴
- 18.11 The interaction of these various periods means that a limitation period can be between three and six years from the acquisition of knowledge of the contravention or reasonable discoverability of that knowledge. This is because the six-year primary period applies regardless of the point at which the contravention is discovered. This means that the acquisition of knowledge or reasonable discoverability occurring within the first half of the primary period is subject to the full length of the remaining primary period, whereas a contravention discovered near the end of the primary period is subject to a three-year late knowledge period.
- 18.12 By contrast, the Limitation Act 1950⁴⁸⁵ provided a two-year limitation period (from the date on which the cause of action accrued)⁴⁸⁶ for actions to recover a penalty⁴⁸⁷ that could be extended where the cause of action has been concealed by fraud.⁴⁸⁸ The 1950 Act also has a longstop period of 15 years, introduced by the Limitation Act 2010.
- 18.13 The decision to include pecuniary penalties as “money claims” for purposes of the Limitation Act 2010, and therefore make penalties subject to a six-year primary period, was a simplification decision by the Commission reference group convened in 2007–2008, in response to submissions that the draft Limitation Bill was overly complex in categorising different claims.⁴⁸⁹

Limitation periods based on the Limitation Act 2010

- 18.14 Section 72 of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 expressly adopts the six-year limitation period (from the date the conduct occurs) but does not specify any additional late notice period.⁴⁹⁰ It would be a matter of statutory interpretation whether section 72 provides a finite limitation period, or whether it is extendable through the Limitation Act’s late knowledge provision.⁴⁹¹ Another interpretation issue is whether the Limitation Act’s fraud exception applies to potentially lengthen the limitation period.
- 18.15 In contrast, section 508 of the Financial Markets Conduct Act 2013 generically applies all aspects of the money claim defence from the Limitation Act:
- (1) The Limitation Act 2010 prescribes a defence to a money claim that is a claim for monetary relief under this subpart (for example, a pecuniary penalty order or a compensatory order).

483 Limitation Act 2010, s 11.

484 Limitation Act 2010, s 48.

485 This provision applies to acts or omissions before 1 January 2011, and, as more than two years has passed since that date, will not generally apply to pecuniary penalty proceedings any longer, except that the postponement for fraud provision may still apply in particular circumstances (Limitation Act 1950, s 23B).

486 Most of the Australian jurisdictions adopt a two-year limitation period for penalty proceedings, although the Limitation Act 2005 (WA) adopts a six-year general limitation period.

487 Limitation Act 1950, s 4(5).

488 Limitation Act 1950, s 28. In that case, the limitation period does not start to run until the fraud or mistake that concealed the cause of action was discovered or was reasonably discoverable.

489 The reference group was established to progress reform of the Limitation Act 1950 following two Law Commission Reports: *Limitation Defences in Civil Proceedings* (NZLC R6, 1988) and *Tidying the Limitation Act* (NZLC R61, 2000), and a report by barrister Chris Corry *Limitation Defences in Civil Claims: Update Report for the Law Commission* (2007). A note of a meeting of the reference group records that it was agreed to treat claims in relation to civil penalties the same as other monetary claims, noting that overriding statutes can impose different limits: Minutes of meeting of Law Commission Limitation Reference Group (25 August 2008).

490 See also Therapeutic Products and Medicines Bill 2006 (103-1), cl 251.

491 See Limitation Act 2010, s 40. Other enactments may displace or affect defences.

- 18.16 The provision also expressly applies the Limitation Act periods to non-monetary orders as if they were “money claims” within the Limitation Act definition:
- (2) Subsections (3) to (5) apply to a claim for relief (other than any form of monetary relief or declaratory relief) under this subpart.
 - (3) It is a defence to the claim if the defendant proves that the date on which the claim is filed is at least 6 years after the date of the act or omission on which the claim is based.
 - (4) The claim has both a late knowledge period and a longstop period, and sections 11(3)(a) and (b) and 14 of the Limitation Act 2010 apply to it—
 - (a) as if it were a money claim; and
 - (b) as if the period in subsection (3) were its primary period.

Shorter finite primary limitation period

- 18.17 Some pecuniary penalty statutes use shorter finite primary limitation periods. For example:⁴⁹²
- three years after the matter giving rise to the contravention arose: section 144(4) of the Dairy Industry Restructuring Act 2001;
 - three years after the contravention occurred: section 137K(5) of the Financial Advisers Act 2008; and section 79A(5) of the Financial Service Providers (Registration and Dispute Resolution) Act 2008.
- 18.18 This formulation does not indicate whether the late knowledge period, longstop period and fraud exceptions from the Limitation Act are intended to apply, in addition to the primary limitation period expressed in the pecuniary penalty statute.

Primary limitation period based on reasonable discoverability

- 18.19 Other pecuniary penalty statutes use a primary limitation period based on reasonable discoverability of the contravention. For example:⁴⁹³
- three years after the matter giving rise to the contravention was discovered or ought reasonably to have been discovered;⁴⁹⁴ or
 - two years after the date on which the matter giving rise to the contravention was discovered or ought reasonably to have been discovered.⁴⁹⁵
- 18.20 On its face, it may appear shorter than the six-year primary period in the Limitation Act, but because it may start at a later point in time (from reasonable discoverability of the contravention, rather than from the date of the contravention itself), the period may not in fact be shorter than a standard limitation period. If the contravention is immediately or fairly quickly discoverable, however, the limitation period will be shorter than under the Limitation Act.
- 18.21 The model used in these statutes raises similar interpretation issues as to whether the Limitation Act would fill any gaps, as there is no indication whether any longstop period

⁴⁹² See also Commerce Act 1986, below at [18.24].

⁴⁹³ Although not involving pecuniary penalties, s 43A of the Fair Trading Act 1986 also uses this approach to limitation periods. See also Commerce Act 1986, below at [18.25].

⁴⁹⁴ Electricity Industry Act 2010, s 52; Securities Act 1978, s 57E; Securities Markets Act 1988, s 42ZJ; Telecommunications Act 2001, s156L(5); and Telecommunications (Interception Capability and Security) Act 2013, s 97(3).

⁴⁹⁵ Takeovers Act 1993, s 43C; and Unsolicited Electronic Messages Act 2007, s 50.

or fraud exception applies.⁴⁹⁶ Use of the reasonable discoverability model also gives rise to consideration of the state of knowledge required for discoverability to be achieved.⁴⁹⁷

18.22 We note the formulation used in section 52 of the Electricity Industry Act 2010, in particular subsection (2), which negates the operation of the limitation provision:

- (1) The [Electricity] Authority may not exercise its powers in relation to a breach or possible breach of the Code if the breach—
 - (a) was discovered, or ought reasonably to have been discovered, more than 3 years before the exercise of the power; or
 - (b) occurred more than 10 years before the exercise of the power.
- (2) However, once the [Electricity] Authority has exercised a power in relation to the breach or possible breach, the limitations in subsection (1) do not apply.

18.23 The intent, presumably, is that once the Electricity Authority has exercised any power in relation to a breach, it is not precluded from then exercising a different power with respect to same breach, in cases where an escalated regulatory response may be required. The Commission's view, however, is that any pecuniary penalty proceedings should be initiated within the specified limitation period, and we are not persuaded that the exception in subsection (2) is desirable. We do not recommend its wider adoption.

Dual approach

18.24 The Commerce Act 1986 has adopted two different limitation models depending on the type of contravention.⁴⁹⁸ First, a primary period of three years from the date of contravention is used for proceedings for contraventions relating to business acquisitions,⁴⁹⁹ information disclosure requirements⁵⁰⁰ and price quality requirements.⁵⁰¹ This matches the limitation period applying to damages actions for breach of business acquisition restrictions.⁵⁰² It is not specified whether the three-year primary period is potentially extendable by virtue of the Limitation Act late knowledge period.

18.25 Secondly, a primary period of three years from the date of reasonable discoverability applies to proceedings for contraventions relating to cease and desist orders,⁵⁰³ restrictive trade practices⁵⁰⁴ and the indemnification prohibition,⁵⁰⁵ with a 10-year longstop from the date of contravention. This matches the limitation period applying to damages actions for restrictive trade practices.⁵⁰⁶ However, there is no express provision for a fraud exception to the longstop period, as would apply under the Limitation Act.

496 A longstop period of 10 years is specified in s 52 of the Electricity Industry Act 2010.

497 See s 14 of the Limitation Act 2010.

498 See also the 12 month time limit for applying for a penalty for breach of an undertaking in s 85A(7) of the Commerce Act 1986.

499 Section 83.

500 Section 86.

501 Section 87.

502 Section 84A.

503 Section 74D(5).

504 Section 80(5).

505 Section 80B(5).

506 Section 82(2).

SUBMISSIONS

- 18.26 While most submitters supported the need for guidance,⁵⁰⁷ responses to the question about whether pecuniary penalty statutes should expressly deal with the limitation issue⁵⁰⁸ fell into two categories.
- 18.27 One group generally favoured the Limitation Act 2010 approach of a six-year primary limitation period.⁵⁰⁹ Reasons included:
- the reformed Limitation Act simplifies and clarifies the law; and
 - ad hoc limitation periods are undesirable unless clear policy-based distinctions are justified.
- 18.28 Meredith Connell's view is that pecuniary penalties are appropriately assimilated into money claims under the Limitation Act 2010, and the firm does not favour varying limitation periods unless this is necessary. The submission noted that "importantly, the new provisions incorporate a 'late knowledge period' in a manner that reflects the 2001 amendments to the Commerce Act".⁵¹⁰
- 18.29 The second group of submitters favoured a case-by-case approach, suggesting the six-year primary limitation period is not an appropriate default.⁵¹¹ Reasons included:
- the need for market certainty about whether certain commercial conduct is lawful or not;
 - loss of evidence over time through records management (periodic destruction of records), replacement of IT systems and staff turnover;
 - fairness and the impact on business of ongoing exposure to potentially large liability for a long period;
 - relying on the Limitation Act risks confusion;
 - a desire to match the limitation period to that applying to criminal liability for the same conduct; and
 - the fact that the Limitation Act does not cover non-money liability orders.
- 18.30 The Law Society submitted that the standard Limitation Act provisions are not suitable for most pecuniary penalty cases, and the limitation period for money claims of six years plus a late knowledge extension of three years is too long for most cases. The New Zealand Bar Association submitted that limitation periods should include a long-stop provision that is appropriate to the circumstances, and favoured a maximum longstop of 10 years, with a shorter longstop period of five years for some breaches, such as those under the Unsolicited Electronic Messages Act 2007.

507 Issues Paper, above n 476, at Q42.

508 Issues Paper, above n 476, at Q41.

509 Submissions of Meredith Connell, Financial Markets Authority, Air New Zealand, Business NZ and the Ministry for Primary Industries.

510 Note, however, that the late knowledge period in the Limitation Act runs in parallel with, but is subject to, the six-year primary limitation period, while in the Commerce Act, the late knowledge period is the primary period for those proceedings to which that model applies. This means the limitation period may be shorter under the Commerce Act 1986, depending on when the contravention is reasonably discoverable.

511 Submissions of the New Zealand Law Society, Bell Gully, Donald Mathieson QC, New Zealand Bar Association and the Parliamentary Counsel Office (Commercial Team).

ISSUES ARISING

18.31 In this section we consider the following issues arising from our consideration of the submissions:

- (a) Are the Limitation Act 2010 periods generally appropriate for pecuniary penalties?⁵¹²
- (b) Should the primary limitation period for pecuniary penalties run from the date of the contravention, or the date of its discoverability?
- (c) Do limitation periods for pecuniary penalties need to be consistent with the limitation periods applying to other forms of enforcement (such as compensation orders or criminal offences) available for the same conduct?
- (d) Would a different limitation period for pecuniary penalties undermine the law reform objective of civil and criminal limitation period standardisation?
- (e) Is it possible or desirable to identify a preferred default limitation period for pecuniary penalties, or should the limitation periods be set on a case-by-case basis, depending on the particular nature of the specific pecuniary penalty provision and the conduct it addresses?
- (f) Is it advisable to have an express provision in each pecuniary penalty statute for clarity and completeness?⁵¹³

Are the Limitation Act periods generally appropriate for pecuniary penalties?

18.32 Limitation periods for pecuniary penalties more often vary from the Limitation Act defaults than apply them. This may be because many pre-date the passing of the Limitation Act 2010. However, no amendments to pecuniary penalty limitation periods have been promoted to expressly adopt aspects of the Limitation Act model – indicating that its standard periods may not necessarily be suitable in the penalty context.⁵¹⁴

18.33 Selecting a limitation period is clearly a balancing exercise:⁵¹⁵

Statutes of limitations reflect a delicate balance among the plaintiff's, defendant's, and society's interests. They are designed to create predictability, uniformity and fairness by preventing litigation of stale claims. Limitations periods must be long enough to protect the plaintiff's and society's interests in having the claim prosecuted. On the other hand, they must be short enough to protect the defendant, the court, and society from wasting time and resources litigating old claims. ... To choose an appropriate limitations period, the legislature must evaluate the nature of the underlying cause of action, its policies, and society's interests in having the right asserted. Then the legislature must select a reasonable time in which the plaintiff can discover, investigate, and assert his or her claim. The legislature must also estimate how long the evidence and witnesses will be available and reliable. The time period chosen is the period after which the need for repose and avoiding stale claims outweighs the interests in enforcing the claim.

18.34 The Court of Appeal noted that limitation provisions in the Fair Trading Act 1986:⁵¹⁶

...indicate an intention on the part of Parliament to shorten and confine the limitation period. That approach appears to have been a counterweight against the potential width and reach of the Act for

⁵¹² As noted above, the Act's limitation periods include a six-year primary limitation period (plus a further three-year late knowledge period), subject to a 15-year longstop (extendable in the case of fraud).

⁵¹³ See for example the Financial Markets Conduct Act 2013, s 508.

⁵¹⁴ We note, however, that the limitation periods in the Financial Markets Conduct Act 2013, s 508, may represent a return to the standard Limitation Act 2010 approach.

⁵¹⁵ Katherine F Nelson "The 1990 Federal Fallback Statute of Limitations: Limitations by Default" [1993] Neb L Rev 454 at 462–464.

⁵¹⁶ *Murray v Eliza Jane Holdings Ltd* (1993) 6 PRNZ 251 (CA) at 258–259. As enacted, the standard six-year civil limitation period was reduced to three years, but has since been amended in 2001, by the Business Law Reform Bill 1999 (319-3H), to a three-year discoverability period.

the purpose of giving those engaged in trade some reasonable certainty as to when their potential liability under the Act will come to an end. Although the Act is consumer oriented Parliament has endeavoured to strike a balance between the concepts of protecting and compensating consumers and long exposure of traders to the risk of litigation.

- 18.35 We have explored a number of policy issues to assess the desirability of modifying the Limitation Act approach for pecuniary penalties. First, the rationale for the Limitation Act model that applies to ordinary litigants is not necessarily the same in the context of regulatory enforcement.
- 18.36 The policy factors relating to *plaintiffs* are somewhat different in the pecuniary penalty context. A key rationale for the six-year limitation period for civil claims is to allow plaintiffs sufficient time to bring legitimate claims before the courts. This includes making sufficient allowance for plaintiffs who may have capacity and disability issues, and allowing for latent issues to be uncovered. Enforcement bodies or regulators are in a different position to ordinary litigants, as these bodies are generally charged with oversight of a statutory regime, have regulatory monitoring powers and have State resources available to initiate proceedings. Responsive regulation, regulatory efficiency and market certainty may require a more nuanced approach – a standard six-year period, regardless of the date of discoverability, appears somewhat arbitrary in the regulatory context.
- 18.37 While the same factors underlying the Limitation Act relevant to *defendants* do apply to pecuniary penalty limitation periods (such as fairness to intended defendants, certainty and not being disadvantaged by an overly long limitation period), it could be argued that they have greater strength in an enforcement context with the potential for punitive measures to be imposed.
- 18.38 Secondly, there may be an issue of regulator discretion about which contraventions to prioritise in terms of enforcement action, taking account of the likelihood of success and the efficient allocation of regulatory resources. In some pecuniary penalty regimes, it might also be necessary to allow sufficient time for the regulator to work through the range of regulatory tools available in the enforcement hierarchy before resorting to penalty proceedings. Therefore, a longer limitation period might be attractive in terms of regulator flexibility.
- 18.39 However, we note that the choice of enacting a pecuniary penalty provision may create a public or market expectation that proceedings will be initiated fairly promptly upon discovery (in the same way that there is a public assumption that a crime will be prosecuted promptly where there is sufficient evidence to proceed). The enactment of sizeable maximum pecuniary penalties in legislation, for sufficiently serious contraventions, is likely to give rise to a consequential enforcement expectation.
- 18.40 Thirdly, while it can be argued that effective and responsive regulation requires enforcement action to be brought in a timely manner, contraventions may be particularly difficult to detect in some regimes (especially where they are actively hidden), and the enforcement body may need an adequate window of opportunity to discover the contravention. A discoverability approach would provide flexibility to deal with this issue, as well as the Limitation Act's fraud exception to the longstop period.
- 18.41 Fourthly, there is an argument that the Limitation Act's late knowledge discoverability period adds little in the pecuniary penalty context, except where there is fraud or the regulated entity actively avoids detection, in which case section 48 could be used to extend the limitation period. In the absence of those circumstances, it may be difficult for an enforcement body to successfully argue for an extension of the six-year primary Limitation Act period. This

is because the test for reasonable discoverability may be more strictly construed against an enforcement body, given its functions and resources, compared to an ordinary litigant. This suggests that the structure of the Limitation Act (primary period plus late knowledge extension) may not be optimal for pecuniary penalties.

- 18.42 Other factors may also favour shorter limitation periods from the perspective of market participants. For regulated entities and markets, there will be an interest in certainty and finality that could favour a shorter limitation period. In some cases, it will clearly be appropriate for penalty proceedings to be initiated promptly, depending on the context and seriousness of the contravention. Insurance implications may arise for defendants if standard insurance clauses covering a range of breaches are predicated on a shorter limitation period. In the Issues Paper, we also noted the judgment of the High Court in *Re Network Agencies International Limited*,⁵¹⁷ suggesting that the choice between short and long limitation periods will turn on whether the predominant purpose is to punish or to compensate.⁵¹⁸
- 18.43 On balance, our conclusion is that the overall structure of the Limitation Act could result in limitation periods that are overly long for particular pecuniary penalty regimes. The Limitation Act is, arguably, not optimally suited to the context of regulatory enforcement, in which certainty, efficiency and regulatory responsiveness are key drivers. We prefer the development of a bespoke model limitation period for pecuniary penalty statutes. The model provision should be a streamlined version of the Limitation Act model, as we discuss further below. However, there may be particular cases where the full Limitation Act model can be justified.

Should the limitation period run from the date of the breach or from the date of its discoverability?

- 18.44 As noted above, a primary limitation period can be structured either as a period that starts to run from the date of the contravening behaviour (as per the Limitation Act six-year primary period), or from the date of its reasonable discoverability.⁵¹⁹ Where discoverability is used, the actual length of the limitation period will depend on the nature of the contravention and length of time that is considered reasonable for discoverability in the circumstances. Discoverability is used in a number of New Zealand statutes (besides the pecuniary penalty statutes mentioned at [18.19] above) as the basis for limitation periods.⁵²⁰
- 18.45 The Limitation Act 2010 has not adopted discoverability for the primary limitation period (although the late knowledge period is based on discoverability). However, other jurisdictions have used discoverability as the basis for the primary period.⁵²¹ Canada's Uniform Limitations Act 2005 has been adopted in at least five provinces, establishing a limitation of two years from discovery (with a 15 year longstop, subject to wilful concealment or wilful misleading of claimant). The Law Commission of England and Wales has recommended a three year civil limitation period from the date of discoverability,⁵²² and the Irish Law Reform Commission

517 *Re Network Agencies International Limited* [1992] 3 NZLR 325 (HC) at 328–329.

518 Issues Paper, above n 476, at [7.96].

519 The Law Commission has previously suggested that the reasonable discovery rule is an extension of a strategy in equity (doctrine of laches): Law Commission *Limitation of Civil Actions* (NZLC PP39, 2000) at [41]–[46]. See Bryan Garner (ed) *Black's Law Dictionary* (8th ed, West Group, Boston, 2004) “laches”: “[t]he equitable doctrine by which a court denies relief to a claimant who has unreasonably delayed in asserting the claim, when that delay has prejudiced the party against whom relief is sought”; and “discovery rule”: “[t]he rule that a limitations period does not begin to run until the plaintiff discovers (or reasonably should have discovered) the injury giving rise to the claim ... [U]sually applies to injuries that are inherently difficult to detect”.

520 Examples include: the Fair Trading Act 1986, s 43(5); Retirement Villages Act 2003, s 84; Major Event Management Act 2007, s 50; and Credit Contracts and Financial Services Law Reform Bill 2013 (104-2), cl 48 and 52 (amending ss 90 and 95 of the Credit Contracts and Consumer Finance Act 2003).

521 See also the International Institute for the Unification of Private Law (UNIDROIT) *UNIDROIT Principles of International Commercial Contracts 2010* (Rome), art 10.2, which adopt a general limitation period of three years from the date of knowledge, with a 10-year longstop.

522 Law Commission of England and Wales *Limitation of Actions* (LAW COM No 270, 2001).

has recommended a two year civil limitation period from the date of actual or constructive knowledge with a 15-year longstop.⁵²³

- 18.46 Reasons to consider adopting a primary limitation period structured around discoverability include the following:
- greater responsiveness to and a better reflection of how limitation periods operate in the regulatory enforcement context;
 - a more flexible approach;
 - provision of appropriate incentives for enforcement bodies to ensure adequate oversight so as not to lose the benefit of the discoverability limitation period, and, once discoverable, not to delay enforcement action;⁵²⁴ and
 - provision of greater market certainty and less delay for regulated entities.
- 18.47 Arguments against adopting discoverability as the basis for the primary limitation period include the following:
- it departs from Limitation Act generic defaults for civil proceedings for money claims (this aspect is discussed further below);
 - what is reasonably discoverable by the regulator and what is not may be complex; and
 - it may introduce potential uncertainty as to when the limitation period is triggered and becomes operative, and when it ends.
- 18.48 A primary period based on the discoverability concept could bring its own complexities about when an enforcement body might reasonably be expected to have discovered a contravention, potentially giving rise to interlocutory arguments, although this could be addressed in the drafting of the limitation provision. It might not actually be any shorter in some cases than a limitation period based on when a contravention occurs, although it might mean that some proceedings are brought more quickly when a contravention is discovered.
- 18.49 The Commission has previously noted that the disadvantage of the discoverability approach is uncertainty: “it has caused considerable confusion and unfairness because there is no clear cut-off point”.⁵²⁵ This can be addressed through the inclusion of a longstop period to provide a definitive end point. Concerns about the lack of certainty also carry less force in a pecuniary penalty context as what amounts to reasonable discoverability is likely to be more strictly construed against enforcement bodies than ordinary plaintiffs.
- 18.50 On balance, our conclusion is that the advantages to using discoverability as the basis for the primary limitation period in the pecuniary penalty context outweigh the disadvantages, and that the disadvantages can be properly addressed.

523 Irish Law Reform Commission *Limitation of Actions* (R104, 2011). The recommendation is for a core limitation regime for commonly litigated common law actions, not including pecuniary penalties.

524 See Law Commission *Limitation of Civil Actions*, above n 489, at [42]: the orthodox approach “acts against defendants because in many cases a claimant is promptly aware that a claim should be brought but can keep the matter hanging for up to six years”.

525 Law Commission *Limitation of Civil Actions*, above n 489, at [44]–[45]. See also Law Commission *Tidying the Limitation Act*, above n 489, at [10]: “a reasonable discoverability test is favourable to the plaintiff, [but] its open-endedness puts a defendant at a considerable disadvantage unless [there is a longstop]”. An insider trading decision pre-dating the Limitation Act 2010 noted the risk of uncertainty in importing a reasonable discoverability criterion into Securities Markets Act claims, with the Judge considering certainty to be most desirable for a quasi-criminal remedy such as a pecuniary penalty: *Securities Commission v Midavia Rail Investments BVBA* [2006] 2 NZLR 207 (HC).

Do limitation periods for pecuniary penalties need to be consistent with other regulatory tools available for the same conduct?

- 18.51 This was an issue raised in some of the submissions, suggesting that different limitation periods for pecuniary penalty orders and other civil orders such as compensation orders would be problematic. Statutes that contain both criminal offences and pecuniary penalties for the same type of conduct may also have different limitation periods.
- 18.52 However, the different policy rationales for the different types of orders may, in our view, justify different limitation periods. In relation to compensation orders, the enforcement body is representing those who have suffered loss. This is more analogous to ordinary civil litigation between a plaintiff and a defendant.
- 18.53 Another point of comparison is the limitation periods under the Criminal Procedure Act 2011.⁵²⁶ As quasi-criminal punitive measures, pecuniary penalties have some commonality with criminal offences. If they were criminal offences, pecuniary penalties would be “category 1” offences, attracting a five-year limitation period under section 25(3)(c) of that Act, assuming the maximum penalty exceeds \$20,000.⁵²⁷ However, the Criminal Procedure Act period is a default, which can be altered by a specific statute. The Health and Safety Reform Bill 2014, for example, proposes:⁵²⁸
- (1) Despite section 25 of the Criminal Procedure Act 2011, proceedings for an offence against this Act may be brought within the latest of the following periods to occur:
 - (a) within 2 years after the offence first comes to the notice of the regulator;
 - (b) within 1 year after the date on which a coroner completes and signs a certificate of findings under section 94 of the Coroners Act ...
 - (c) if an enforceable undertaking has been given in relation to the offence, within 6 months after—
 - (i) the enforceable undertaking is contravened; or
 - (ii) it comes to the notice of the regulator that the enforceable undertaking has been contravened; or
 - (iii) the regulator has agreed under section 149 to the withdrawal of the enforceable undertaking.
 - (2) A proceeding for an offence against section 42 [offence of reckless conduct in respect of health and safety duty] may be brought after the end of the applicable limitation period in subsection (1) if fresh evidence relevant to the offence is discovered and the court is satisfied that the evidence could not reasonably have been discovered within the relevant limitation period.
- 18.54 It could be argued that the pecuniary penalty primary limitation period should generally be no longer than five years (from the date of the conduct). This is consistent with the criminal limitation period for offences attracting larger fines and, being less than the six-year limitation period for ordinary civil claims, might reflect the different underlying policy factors in setting a limitation period for proceedings brought by enforcement bodies rather than ordinary litigants. It would provide consistency of limitation periods where offences and pecuniary penalties are created for the same conduct. The difficulty, however, is that the standard criminal limitation

⁵²⁶ See Issues Paper, above n 476, at [7.85]–[7.90] for discussion of limitation of criminal proceedings.

⁵²⁷ For smaller maximum fines, there are limitation periods of six or 12 months. The only pecuniary penalty that does not exceed \$20,000 is the penalty stated in reg 32 of the Overseas Investment Regulations 2005 (\$20,000). All other maximum pecuniary penalties are at least \$100,000 for an individual.

⁵²⁸ Health and Safety Reform Bill 2014 (192-1), cl 167. See also Charities Act 2005, ss 38 and 52; and Credit Contracts and Financial Services Law Reform Bill 2013 (104-2), cl 105 (replacing Credit Contracts and Consumer Finance Act 2003, s 105).

periods do not allow for situations where the breach is not uncovered for some time. As discussed above, we think the flexibility of the discoverability approach is desirable in a regulatory context to deal with these situations.

- 18.55 On balance, our conclusion is that there is no compelling reason in principle for pecuniary penalty limitation periods to be strictly consistent with limitation periods that apply to different regulatory tools such as compensation orders or criminal offences. Although aligned limitation periods would allow maximum flexibility to enforcement bodies in selecting the type of proceedings to be initiated in response to the conduct in question, the requirements of regulatory efficiency and responsiveness require a more disciplined approach. Our view is that the limitation period should properly fit the particular method of enforcement. Differences can be justified by the different role and policy rationale for each form of regulatory response in the enforcement hierarchy.
- 18.56 A discoverability approach for pecuniary penalties could mean that the limitation period might be shorter or longer than the five-year limitation period for criminal offences for the same conduct. This could, on occasion, influence a regulatory enforcement response – where a particular limitation period has expired the enforcement options available to the regulator may be reduced; however, the availability of alternative forms of proceedings provides a measure of flexibility that allows some form of enforcement to proceed.

Would a different limitation period for pecuniary penalties undermine limitation period standardisation?

- 18.57 As noted above, the Criminal Procedure Act 2011 has introduced a measure of standardisation to the limitation periods for criminal offences. Similarly, the Limitation Act 2010 has consolidated the approach to limitation periods in civil proceedings. One policy consideration is whether departing from these established approaches is undesirable.
- 18.58 The Limitation Act, in particular, was the result of a significant simplification project to remove numerous, distinct limitation periods for different causes of action and to develop a standard approach (although a number of differences still remain). This might be seen as a factor in favour of adopting the standard limitation provisions for pecuniary penalties. However, in moving from the two-year limitation period for penalties in the Limitation Act 1950, to the six-year money claims limitation period, the Law Commission reference group contemplated that specific pecuniary penalty statutes would depart from the Limitation Act as appropriate.⁵²⁹
- 18.59 It is also clear that statutes besides pecuniary penalty statutes depart from the Limitation Act in particular circumstances (for example, the Building Act 2004 and the Fair Trading Act 1986).⁵³⁰ A number of other statutory regimes depart from the Limitation Act; for example, regimes relating to carriage of goods, maritime transport, employment personal grievances and accidental deaths.⁵³¹
- 18.60 The fact that many pecuniary penalty statutes depart from the Limitation Act (in a variety of ways) indicates that a default limitation period for pecuniary penalties needs to be considered. The policy factors discussed above suggest that the Limitation Act provisions may not be optimal in a regulatory enforcement context.
- 18.61 On balance, our conclusion is that a default limitation provision for pecuniary penalties is not precluded by the law reform objectives of limitation law. The reasonable discoverability

⁵²⁹ See above n 489.

⁵³⁰ Above n 520.

⁵³¹ Carriage of Goods Act 1979, s 19; Maritime Transport Act 1994, ss 97 and 411; Employment Relations Act 2000, s 114; Deaths by Accident Compensation Act 1952, s 10.

approach is present in the Limitation Act, such that a default provision based on discoverability could be viewed as a streamlining adjustment, rather than representing a substantive shift.

A default limitation period or a case-by-case approach?

- 18.62 The variety of limitation provisions in current pecuniary penalty statutes suggests that a new default provision may bring greater standardisation and uniformity than the status quo. It is difficult to justify the existing variety of approaches to pecuniary penalty limitation provisions, and there is a strong argument, in our view, in favour of a model provision that appropriately reflects the underlying policy considerations, rather than taking a case-by-case approach.
- 18.63 The model approach preferred is one based on reasonable discoverability; however, the Limitation Act approach should also be available as a secondary option in circumstances where there may be a specific policy justification for applying that model.

Is an express limitation provision required in every pecuniary penalty statute?

- 18.64 A desirable practice, in our view, would be for pecuniary penalty statutes to include express and comprehensive limitation periods. Developing a model provision would be useful to reflect the default approach proposed to pecuniary penalty limitation periods (three years after reasonable discoverability of the contravention, subject to a 10-year longstop, plus fraud exception). This model provision should also take account of ancillary issues, such as how the limitation period will operate in circumstances where there is a continuing contravention or a series of related contraventions, and how to adapt section 14 of the Limitation Act 2010 to the pecuniary penalty context (as to when an enforcement body ought reasonably to have gained knowledge of the contravention).
- 18.65 Where the full Limitation Act approach can be justified, the limitation provision in a pecuniary penalty statute should address the primary limitation period, the late knowledge period, the longstop period and the fraud exception. This would help to clarify issues of interpretation between the pecuniary penalty statute and the Limitation Act that might otherwise arise. A drafting option would be to reference the Limitation Act 2010 defence generally, rather than the six-year primary limitation period specifically, as illustrated by the approach taken in the Financial Markets Conduct Act 2013.⁵³²

GUIDELINE

G20 Pecuniary penalty statutes should generally provide for a primary limitation period of three years after reasonable discoverability of the contravention, with a 10-year longstop (subject to a fraud exception)

Pecuniary penalty statutes should deal expressly with periods of limitation.

A model approach to limitation periods in pecuniary penalty statutes is a primary limitation period of three years after reasonable discoverability of the contravention, with a 10-year longstop (subject to a fraud exception).

The Limitation Act 2010 defence to money claims (a six-year primary limitation period plus a three-year late notice period and a 15-year longstop) is an alternative limitation period for pecuniary penalties, in circumstances where there is a specific policy justification for applying that model.

⁵³² Financial Markets Act 2013, s 508(1). See also the Financial Markets Conduct Act 2013, s 508(2)–(5) extending the Limitation Act 2010 defence to non-monetary orders.

Chapter 19

Crown and State sector defendants

INTRODUCTION

- 19.1 An additional issue we have considered in the course of preparing this Report is the need for guidance about whether and how a pecuniary penalty statute should apply to the Crown and State sector defendants. The State sector is made up of a diverse range of public entities.⁵³³ The nature of these entities, and of the Crown itself, gives rise to special considerations that may need to be factored into the design of a pecuniary penalty regime where these entities engage in conduct or behaviour that falls within the scope of the regime.
- 19.2 The issue is pertinent to both existing and future pecuniary penalty regimes. All the current pecuniary penalty statutes purport to bind the Crown. They potentially extend, therefore, to the Crown and public entities where they participate in the activity that is regulated by the statute.⁵³⁴ However, variation in the specificity of legislative drafting gives rise to a degree of uncertainty as to whether the Crown would in fact be liable for a pecuniary penalty under current provisions. If public entities are liable, the penalty to which they would potentially be exposed is of course substantial. We have recommended that, as each existing pecuniary penalty statute is periodically reviewed or amended, the opportunity should be taken to assess the statute against the guidance in this Report.⁵³⁵ That would also be an opportunity to assess whether there is sufficient certainty and clarity about the liability of the Crown or State sector defendants, and whether any statutory clarifications may be desirable.
- 19.3 If pecuniary penalties are applied in future to new forms of regulated conduct, the extent to which those regimes would impact on the Crown and other public bodies will need to be considered. Our view is that it would be desirable to improve the level of guidance for policymakers, in light of contemporary government, whose activities:⁵³⁶
- ... reach into almost all aspects of commercial, industrial and developmental endeavour and where it is commonplace for governmental commercial, industrial and developmental instrumentalities ... to compete and have commercial dealings on the same basis as private enterprise
- 19.4 In approaching these issues, it is important to be clear about whether and when we are talking about “the Crown”, and public entities outside the core Crown. It is also necessary to consider the forms of penalty available to policymakers, and which will be the most effective and appropriate for Crown and State sector defendants.

533 Public entities include both statutory and non-statutory entities, and incorporated companies such as State-owned enterprises and Crown entity subsidiaries. See State Services Commission “A Guide to New Zealand’s central government agencies” (1 September 2011). There are also local authority bodies and council controlled organisations (CCOs) that we do not specifically address, but which may raise their own particular issues.

534 See in particular Biosecurity Act 1993; Commerce Act 1986; Hazardous Substances and New Organisms Act 1996; Financial Markets Conduct Act 2013; and Unsolicited Electronic Messages Act 2007.

535 Recommendation 6.

536 *Bropho v State of Western Australia* (1990) 171 CLR 1 (HCA) at 19.

- 19.5 In this chapter we discuss the following considerations that policymakers should take into account in the design of pecuniary penalty regimes:
- (a) identifying whether the Crown and any parts of the State sector should be included or excluded;
 - (b) legislative drafting and presumptions – making it “abundantly clear” whether the Crown is to be subject to liability;
 - (c) considering what form of penalty should apply – either a pecuniary penalty or a different form of penalty;
 - (d) considering alternatives to pecuniary penalties – such as the declaratory order, adverse publicity orders, external investigation or inquiry, enforceable undertakings, injunctive orders, compensation orders and costs orders;
 - (e) potential issues with imposing pecuniary penalties on the Crown and State sector:
 - limited ability to “fine” under the Crown Organisations (Criminal Liability) Act 2002;
 - the “folly” of the Crown paying itself;
 - budgetary impacts; and
 - (f) procedural issues – invoking relevant procedural provisions of the Crown Proceedings Act 1950 and the Crown Organisations (Criminal Liability) Act 2002, and factoring in statutory immunities.

COVERAGE

Are there impediments to imposing liability for pecuniary penalties on the Crown and State sector?

- 19.6 The Law Commission has considered issues of Crown liability in a number of reports and papers over the years. As we note in our recent Issues Paper *A New Crown Civil Proceedings Act for New Zealand*, the Crown Proceedings Act 1950 went a considerable distance towards abolishing the privileged position that the Crown previously enjoyed at common law in civil litigation, by allowing private citizens to sue the Crown in the courts.⁵³⁷
- 19.7 On the question of criminal liability, the position at common law was that the Crown could not be subject to criminal prosecution, on the basis of the maxim “the King could do no wrong”.⁵³⁸ However, legislative measures and judicial determinations have clarified that the Crown may be subject to criminal liability if the statute expressly so provides. The Commission has previously concluded that no constitutional law changes are required to impose criminal liability on the Crown,⁵³⁹ but that certain issues need to be addressed to effectively do so (such as defining what is meant by “the Crown,” in the particular context, and which acts and omissions are to be treated as acts of the Crown). It also concluded that it would be sensible to address various issues relating to procedure and penalties that are likely to arise.⁵⁴⁰

537 Law Commission *A New Crown Civil Proceedings Act for New Zealand* (NZLC IP35, 2014) at [1.4]. The liability of the Crown, public bodies and their servants for breaches of the New Zealand Bill of Rights Act 1990 was considered in our 1997 report: Law Commission *Crown Liability and Judicial Immunity – a response to Baigent’s case and Harvey v Derrick* (NZLC R37, 1997).

538 See Maurice Sunkin “Crown Immunity from Criminal Liability in English Law” [2003] Public Law 716; and Anthony Gray “Options for the Doctrine of Crown Immunity in 21st century Australia” (2009) 16 AJ Admin L 200.

539 Law Commission *A New Interpretation Act: to Avoid “Prolixity and Tautology”* (NZLC R17, 1990) at ch 4; Law Commission *To Bind their Kings in Chains – an advisory report to the Ministry of Justice* (NZLC SP6, 2000), at 10–12.

540 Law Commission *To Bind their Kings in Chains – an advisory report to the Ministry of Justice*, above n 539, at [21]. See also at [22] the suggestion that a pecuniary penalty may be a better approach than the imposition of criminal liability on the Crown.

- 19.8 The Crown Organisations (Criminal Liability) Act 2002⁵⁴¹ was a further significant development, removing the Crown's exemption from prosecution for offences under the Building Act 1991 and the Health and Safety in Employment Act 1992. According to the Ministry of Justice, this marked a significant change in the long-standing principle that the Crown is indivisible and immune from criminal prosecution, and establishes a precedent for criminal liability.⁵⁴² Amendments to the Crown Organisations (Criminal Liability) Act are currently being considered by Parliament in relation to the Health and Safety Reform Bill.⁵⁴³
- 19.9 Another development of note, following a Commission recommendation⁵⁴⁴ endorsed by the Ministry of Justice,⁵⁴⁵ was the introduction of a Cabinet mandated process to require departmental analysis of the impact of new Bills on the criminal liability of the Crown.⁵⁴⁶ At the end of this chapter, we recommend that consideration be given to supplementing this procedure to include the potential impacts of pecuniary penalty statutes on Crown liability.

Should the Crown and State sector be liable under the regulatory scheme?

- 19.10 The initial policy question is the necessity of including the Crown and State sector bodies within the coverage of a particular pecuniary penalty regime. The Federal Court of Australia has explained the inclusion of the Crown in the coverage of pecuniary penalty regimes in the following terms:⁵⁴⁷
- A wide range of statutory schemes exist in Australia which are designed to protect public welfare across a range of subject matters from occupational health and safety to the protection of the environment to fair trade and competition. It is commonly the case that these schemes bind the Crown in relation at least to their commercial, industrial and developmental endeavours. It is commonly the case that civil sanctions are utilised to enforce compliance. That Parliament would seek to impose effective statutory sanctions to deter wrongdoing and thereby prevent further wrongdoing by all persons whose activities are regulated, is unsurprising. That motivation suggests an intent that the Crown be treated the same as any other person who is the subject of the regulation. Such an intent is supported by the principle of equality before the law.
- 19.11 A sampling of the Australian pecuniary penalty regimes indicates a case-by-case approach to the issue of Crown liability for pecuniary penalties. While there is coverage in the sense that each statute expressly binds the Crown, the liability implications vary. We have identified examples of each of the following approaches:

⁵⁴¹ The Act implemented the recommendations of Judge Noble's report into the Cave Creek tragedy: *Report of the Commission of Inquiry into the Collapse of a Viewing Platform at Cave Creek near Punakaiki* (Department of Internal Affairs, 1995).

⁵⁴² Ministry of Justice *Report Required by section 28 of the Interpretation Act 1999* (Report presented to the Minister of Justice, 2001) at [24].

⁵⁴³ See also Vulnerable Children Bill 2014 (150-2).

⁵⁴⁴ Law Commission *To Bind their Kings in Chains – an advisory report to the Ministry of Justice*, above n 539, at 9.

⁵⁴⁵ Ministry of Justice, above n 542, at [46].

⁵⁴⁶ Cabinet Office Circular "Acts binding the Crown: Procedures for Cabinet Decision" (13 March 2002) CO 02/4. The Circular requires an assessment of relevant factors before imposing criminal liability on the Crown and that Cabinet papers address matters such as: who is the Crown for the purposes of the prosecution; who should defend and prosecute the Crown; what procedures should apply; and what penalties should be imposed upon conviction and whether these need to differ from generally applicable penalties.

⁵⁴⁷ *Construction, Forestry, Mining and Energy Union v Victoria (No 2)* [2013] FCA 1034 at [38].

- (a) express exclusion of Crown liability for pecuniary penalties and offences;⁵⁴⁸
 - (b) general exclusion of Crown liability but with express exceptions for certain statutory Crown authorities;⁵⁴⁹
 - (c) exclusion of Crown liability for offences, but no express exclusion of liability for pecuniary penalties;⁵⁵⁰
 - (d) express provision for Crown liability for pecuniary penalties (but not offences);⁵⁵¹ and
 - (e) express provision for Crown liability for both pecuniary penalties and offences.⁵⁵²
- 19.12 The Commission's view is that a case-by-case approach to the question of Crown liability for pecuniary penalties is also the desirable approach in New Zealand. However, where the Crown or the State sector participates in a market or activity that is to be regulated by way of a pecuniary penalty regime, the presumption should be that those public bodies are included within the regime's scope (subject to what we say below about whether or not pecuniary penalties themselves are the most appropriate form of penalty).⁵⁵³ Not including market participants on the basis of their Crown or public status effectively grants a form of exemption from regulation that may undermine the objectives of the regime.
- 19.13 Whether or not the presumption should apply will require a policy exercise in each case to analyse the requirements of the particular regime and assess the competing considerations. Policymakers will need to consider relevant aspects of the Legislation Advisory Committee Guidelines, including the fundamental common law principles such as the rule of law.⁵⁵⁴ Generic factors such as transparency, accountability and equality will be relevant considerations, as will be specific consideration of the regulatory objectives of the particular regime.
- 19.14 Excluding particular participants from the coverage of a regime may have an impact on both regulatory integrity and market performance, as there may be a risk of market distortions if different participants are subject to different rules or penalty consequences. It may affect the extent to which regulation provides a level playing field in the particular market and raise fairness issues among market participants.⁵⁵⁵
- A level playing field or "competitive neutrality" requires that private enterprises have the same benefits and be subject to the same restrictions as other sectors. It is in this area that the privilege afforded to the Crown, and particularly its instrumentalities, is least defensible.
- 19.15 Where the Crown or State sector bodies play a very minor role in the regulated sector, that impact might be negligible. Nevertheless, where it is foreseeable or conceivable that public bodies will play a greater role in future, it may be desirable to establish a regime on a prospective basis by including the Crown or State sector bodies within coverage, reducing the need for future legislative amendments.

548 Resale Royalty Right for Visual Artists Act 2009 (Cth), s 4; and Personally Controlled Electronic Health Records Act 2012 (Cth), s 11. The Explanatory Note to the Bill resulting in the latter statute notes that while the Crown cannot be liable to be prosecuted for an offence, or liable for a pecuniary penalty, this does not mean that all action against the Crown is precluded. For example, the Crown may be subject to a declaration or injunction, investigated by the Information Commissioner under the Privacy Act, investigated by the Ombudsman, subject to Parliamentary scrutiny or subject to claims for breach of statutory duty.

549 Spam Act 2003 (Cth), s 12.

550 Fair Work Act 2009 (Cth), ss 37 and 549; Privacy Act 1988 (Cth) as amended by the Privacy Amendment (Enhancing Privacy Protection) Act 2012 (Cth), ss 4 and 80ZC.

551 Greenhouse and Energy Minimum Standards Act 2012 (Cth), s 7.

552 Work Health and Safety Act 2011 (NSW), ss 10 and 246.

553 See, for example, the Commerce Act 1986, ss 5 and 6.

554 Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (Wellington, 2001) [LAC Guidelines] at ch 2.

555 Ray Steinwall "The Liability of the Crown and its instrumentalities under the Trade Practices Act 1974 (Cth)" (1994) 17 UNSWLJ 314 at 316. See also Gray, above n 538.

LEGISLATIVE DRAFTING

Legislative presumptions

- 19.16 The common law approach was that the Crown is only bound by statute if expressly named, unless the necessary implication of the statute was that the Crown is bound by it:⁵⁵⁶

If it can be affirmed that, at the time when the statute was passed and received the royal sanction, it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown were bound, then it may be inferred that the Crown has agreed to be bound.

- 19.17 This rule of construction, as subsequently codified in interpretation statutes, has been strictly construed to require an express legislative statement:⁵⁵⁷

No enactment binds the Crown unless the enactment expressly provides that the Crown is bound by the enactment.

- 19.18 The common law response has been to develop a presumption against Crown liability unless it is “abundantly clear” from the statute that the legislature intended Crown liability:⁵⁵⁸

There is, I think, the strongest presumption against attaching to a statutory provision a meaning which would amount to an attempt to impose upon the Crown a liability of a criminal nature. It is opposed to all our conceptions, constitutional, legal and historical. Conceptions of this nature are, of course, not immutable and we should beware of giving effect to the strong presumption in their favour in the face of some clear expression of a valid intention to infringe upon them. But we should at least look for quite certain indications that the legislature had adverted to the matter and had advisedly resolved upon so important and serious a course.

- 19.19 The New Zealand authority is *Southland Acclimatisation Society v Anderson and the Mines Department*:⁵⁵⁹

The increasing trend of government participation in what may be generally described as areas of social welfare legislation would suggest that the inclusion of the Crown within the scope of general criminal liability must be increasingly accepted. I do not as yet, however, see any tendency to recede from the proposition that the Crown is only to become liable, either criminally or civilly, where it is abundantly clear that the legislature has intended such a result.

- 19.20 In contrast, the High Court of Australia decision in *Bropho v State of Western Australia* established a purposive approach to the interpretation exercise, enabling the question of parliamentary intention to be considered in the round, and not rigidly or exclusively from the express provisions of the statute.⁵⁶⁰ A more recent Australian case suggests that the presumption may not be as strict in relation to the imposition of liability for pecuniary penalties, in finding that the presumption informs rather than controls the assessment of whether the Crown has liability under a particular enactment.⁵⁶¹

556 *Province of Bombay v Municipal Corporation of Bombay* [1947] AC 58 (PC) at 63. See Steven Price “Crown Immunity on Trial – the Desirability and Practicability of enforcing statute law against the Crown” (1990) 20 VUWLR 213 at 214 and 217.

557 Interpretation Act 1999, s 27.

558 *Cain v Doyle* (1946) 72 CLR 409 (HCA) at 424.

559 *Southland Acclimatisation Society v Anderson and the Mines Department* [1978] 1 NZLR 838 (SC) at 842.

560 *Bropho v State of Western Australia*, above n 536, finding the provisions of the Aboriginal Heritage Act 1972 (WA) to apply to Crown land, and s 17 (prohibiting any person from damaging or destroying an Aboriginal site or object) to apply to employees and agents of the Crown. See also Andrew Beatty “Prosecuting The Crown For Environmental Offences” (paper presented to Conference on Environmental Crime, Hobart 1–3 September 1993) at 2: “In order for the Crown to be bound it is not necessary that the intention should be ‘manifest’ from the terms of the statute or that its purpose would be wholly frustrated if the Crown were not bound”. Also see Steinwall, above n 555.

561 *Construction, Forestry, Mining and Energy Union v Victoria (No 2)*, above n 547, considering the liability of the Crown under the Fair Work Act 2009 (Vic).

- 19.21 However, *Southland Acclimatisation Society* remains the current authority in New Zealand. This suggests the desirability of an express statutory statement, either positive or negative, on the issue of Crown liability under a pecuniary penalty regime, to put the matter of parliamentary intent beyond doubt.

Crown and agents of the Crown

- 19.22 Of the current pecuniary penalty statutes, the Commerce Act 1986 arguably meets the “abundantly clear” standard that would make the Crown potentially liable to pecuniary penalties (to the extent that any Crown agent engages in trade), although even this statute could go further and include a positive statement that the Crown is liable to pay pecuniary penalties other than under section 80, to balance the statement that the Crown is not liable to pay a pecuniary penalty under section 80.
- 19.23 The Unsolicited Electronic Messages Act 2005 also contains statutory indicators of Crown liability: a “person” is defined to include an individual and an organisation; “organisation” expressly includes a government body; “government body” includes a department as listed in Schedule 1 of the Ombudsmen Act and a Crown entity under the Crown Entities Act 2004. Under section 45, if the perpetrator of a civil liability event is an “organisation”, the court may apply the higher maximum penalty level (\$500,000). Nevertheless, there is potential for argument as to whether this is “abundantly clear”. Express legislative statement may be desirable if the intent was to impose liability on the Crown for a civil liability event.
- 19.24 Other statutes, such as the Biosecurity Act 1993 and the Hazardous Substances and New Organisms Act 1996, purport to bind the Crown and include the Crown in the definition of a “person”, suggesting that the Crown is covered by the pecuniary penalty provisions. However, given the strength of the statutory presumption, even this interpretation may be insufficiently clear. Therefore, when reviewing existing pecuniary penalty statutes, the opportunity should be taken to assess whether there is sufficient clarity and certainty about the liability of Crown organisations, and whether any statutory clarification may be desirable.
- 19.25 The closer the relationship between a public body and the Crown, the more likely that express statutory advertence would be needed to impose liability for breach of a pecuniary penalty statute. The application of the Interpretation Act presumption to Crown agents was considered in a case before the Supreme Court of Canada. The governing statutes of the defendants were found by the majority to confer Crown agent status such that each had the benefit of Crown immunity from cartel legislation that did not specifically bind the Crown.⁵⁶²

At common law the question whether a person is an agent or servant of the Crown depends on the degree of control which the Crown, through its ministers, can exercise over the performance of his or its duties. The greater the control, the more likely it is that the person will be recognized as a Crown agent. Where a person, human or corporate, exercises substantial discretion, independent of ministerial control, the common law denies Crown agency status. The question is not how much independence the person has in fact, but how much he can assert by reason of the terms of appointment and nature of the office.

- 19.26 However, it is unlikely in New Zealand that Crown agents established as Crown entities would be found to be subject to the level of ministerial control that might confer the presumptive benefit of section 24 of the Interpretation Act (NZ). Although obliged to give effect to

⁵⁶² *R v Eldorado Nuclear Ltd; R v Uranium Canada* (1983) 4 DLR (4th) 193 (SCC) at [42]. See also *Construction, Forestry, Mining and Energy Union v Victoria (No 2)*, above n 547, at [85]; and *Steinwall*, above n 555, at 322–324.

government policy as directed by the responsible Minister, these Crown agents have a measure of discretion as to how they carry out their statutory functions.⁵⁶³

Public bodies at a remove from the Crown

19.27 The general wording of pecuniary penalty statutes will extend to public entities that are incorporated or established by statutory instrument, and are at some degree of remove from the Crown (for example, Crown entities, local authorities and tertiary education institutions), without express advertence to coverage or liability in the specific statute.⁵⁶⁴

19.28 One example of express advertence is section 6 of the Commerce Act:

- (1) This Act applies to every body corporate that is an instrument of the Crown in respect of the Government of New Zealand engaged in trade.
- (2) Notwithstanding any enactment or rule of law, proceedings [including pecuniary penalty proceedings] under Part 6 may be brought against a body corporate referred to in subsection (1).

19.29 In the interests of certainty, clarity and transparency, pecuniary statutes should be as explicit as possible about whether public entities are included in, or excluded from, the regime, such as the approach taken in the Commerce Act.⁵⁶⁵

Conclusion

19.30 It is desirable for pecuniary penalty statutes to be as specific as possible about their application to the Crown and the resulting consequences: simply stating “this Act binds the Crown” is not sufficient.

19.31 Each pecuniary penalty statute should state clearly and expressly:

- whether it binds the Crown;
- which Crown and State sector agencies are covered;⁵⁶⁶
- whether, and in what capacity they are liable for breaches under the statute;
- what forms of penalty are available to the court to impose; and
- where a pecuniary penalty is available, state what maximum pecuniary penalty is available in relation to the Crown and State sector.

19.32 In relation to coverage, it may be desirable or appropriate to expressly target the application of the pecuniary penalty regime to certain agencies by reference to the nature of their activities. For example, the Commerce Act applies to the Crown and instruments of the Crown where the particular entity is engaged in trade.⁵⁶⁷

19.33 In relation to setting maximum penalty levels, the “percentage of turnover” formulation will not be appropriate in relation to the Crown and State sector defendants.

⁵⁶³ On the issue of control, see *Bank Voor Handel en Scheepvaart NV v Administrator of Hungarian Property* [1954] AC 584 (HL); *Tamlin v Hannaford* (1950) 1 KB 18 (CA); and *NT Power Generation Pty Ltd v Power & Water Authority* (2001) ATPR 41-814.

⁵⁶⁴ See Interpretation Act 1999 definition of a “person” as including a corporation sole as well as any body of persons whether incorporated or unincorporated. See also s 7(a) of the Crown Entities Act 2004 noting that Crown entities are bodies corporate established under statute.

⁵⁶⁵ See Unsolicited Electronic Messages Act 2007.

⁵⁶⁶ For example, see definition of the “Crown” in Public Finance Act 1989 as including all Ministers of the Crown and all departments (including Police, the Defence Force, the Security Intelligence Service, Parliamentary Counsel Office, Office of the Clerk and the Parliamentary Service) but not a Crown Entity, a state-owned enterprise, an Office of Parliament, or a body corporate or other legal entity with the power to contract.

⁵⁶⁷ Commerce Act 1986, ss 5 and 6(1).

POLICY DECISIONS AS TO TYPE OF PENALTY

Selecting the appropriate form of penalty

- 19.34 Following policy decisions as to coverage, analysis of the implications and consequences of coverage for Crown and State sector defendants is required. The critical issue at this stage is consideration of the different incentives and deterrents that operate in the public sector. While pecuniary penalties may be an effective primary lever for deterrence and accountability in the private sector, that lever may be less appropriate or effective for public sector defendants. A range of options is available.
- 19.35 Selection of the appropriate penalty type requires a regulatory theory assessment of the objectives of the pecuniary penalty regime. For instance, is the primary goal retribution for morally blameworthy contraventions,⁵⁶⁸ or is it promoting regulatory compliance through the provision of sufficient deterrents? It is then necessary to consider how to effectively deter public sector participants from contravening the regime. In short, pecuniary penalties are monetary penalties. There is a question whether those types of penalties are the most effective and appropriate deterrent for the Crown and other public bodies.
- 19.36 The starting point in this aspect of the policy process is the declaratory order and assessing whether that is sufficient for regulatory purposes, or whether additional consequences are necessary to meet the objectives of the pecuniary penalty regime. Non-financial penalties should then be considered. The range of possible options includes adverse publicity orders,⁵⁶⁹ external investigation or inquiry, improvement or training orders, stop notices, enforceable undertakings, injunctive orders, compensation orders, and costs orders.⁵⁷⁰
- 19.37 If it is necessary to provide for a financial penalty, policymakers need to select an appropriate maximum penalty for the Crown and State sector defendants, depending on the requirements of the particular regulatory regime. Options include categorising these entities as “bodies corporate” or “organisations” for the higher maximum penalty, or including them in the maximum penalty specified for individuals. Another option is to include a middle maximum penalty level specifically for public bodies that is set at a level high enough to act as an effective deterrent.

Public sector liability for pecuniary penalties

- 19.38 Imposing a pecuniary penalty is arguably analogous to imposing a criminal fine and may therefore be subject to the presumption against imposing fines on the Crown. While the Crown Organisations (Criminal Liability) Act provides for criminal liability of Crown organisations under certain statutes (such as the Building Act, the Health and Safety in Employment Act and the Resource Management Act 1991), it bars the imposition of fines.⁵⁷¹
- 19.39 However, we note that two recent Bills depart from the position that fines cannot be imposed on Crown organisations.⁵⁷²

568 A case from the Federal Court of Australia suggests that retributive punishment is unlikely to be imposed upon the Crown except in extraordinary circumstances, and that it will rarely be necessary to provide redress for the moral outrage of the community in relation to the conduct of the Crown: *Construction, Forestry, Mining and Energy Union v Victoria (No 2)*, above n 547, at [68].

569 See the Health and Safety Reform Bill 2014 (192-1), cl 171.

570 See the Health and Safety Reform Bill 2014 (192-1), cl 170.

571 Crown Organisations (Criminal Liability) Act 2002, s 8(4). “Crown organisation” is defined as a Crown entity, government department (as named in sch 1 of the State Sector Act 1988) or a government-related organisation (including the Police, the Defence Force and the Offices of Parliament) (Crown Organisations (Criminal Liability) Act 2002, s 4).

572 See the Vulnerable Children Bill 2014 (150-2) which dis-applies s 8(4) Crown Organisations (Criminal Liability) Act; and the Health and Safety Reform Bill 2014 (192-1), sch 3, which also proposes to remove the limitation on fines for health and safety breaches.

- 19.40 Under the criminal law, it might be argued that the prosecution is a sufficient punitive sanction against public bodies without the further imposition of a fine. However, the strength of that sanction is not as strong in the pecuniary penalty context, raising the question of what is an appropriate penalty to be imposed on public sector organisations.
- 19.41 In some cases, a declaratory order will be sufficient and an effective deterrent, given the public and political scrutiny that would result from a declaration of breach. But, in others, it may be regarded as ineffective or a low priority to initiate a penalty proceeding against a Crown organisation with no further tangible consequences. If the available sanctions are not regarded as effective or worth pursuing, this may detract from the integrity and effectiveness of the pecuniary penalty regime overall.
- 19.42 Therefore, it is important to ensure that Crown organisations are subject to appropriate penalties that meet the objectives of the particular regime. Financial penalties should not be ruled out but it will be context-specific as to whether financial penalties are appropriate.

The “folly” of the Crown paying itself

- 19.43 There is a potential circularity in a public body paying a financial penalty back to the Crown: “what is the point, it might be asked, of one part of the Government paying money to another part of the Government?”⁵⁷³ This objection was influential in removing fines as a penalty from the Crown Organisations (Criminal Liability) Bill, as introduced.⁵⁷⁴
- 19.44 A response to this conceptual difficulty, however, is that a financial penalty can provide the appropriate compliance incentives:⁵⁷⁵
- There is nothing shocking in the suggestion that the Crown – whether it acts through a government department or through a separate corporation – should be subject to [regulatory offences] ... the liability of the Crown and other public authorities to fines must be seen, not as a means of making them suffer financially, but as a means of ensuring a standard of public conduct at least equal to that which the Crown demands of its subjects.
- 19.45 Steven Price suggests that the mere fact that a particular body happens to be a government agency does not automatically render fines an inappropriate form of enforcement,⁵⁷⁶ noting the argument that fines are not simply returned to the infringing government body and, in fact, make public accounts more accurate in that they better reflect the costs incurred by the different branches of government.⁵⁷⁷ Moreover, the imposition of a fine or penalty may provide incentives for agencies, having limited budgets, to prevent the recurrence of the infringement or contravention.
- 19.46 The issue was considered by a House of Commons Select Committee looking at whether Crown bodies should be liable for fines under health and safety legislation.⁵⁷⁸ Some submissions to the Committee agreed with the argument that fining a Crown body serves little practical purpose and is simply recycling public money through the Treasury and back to the relevant body to continue to provide services. However, the majority thought that fines should apply to Crown bodies for reasons such as justice being seen to be done, sending a powerful public message of

573 Law Commission *A New Interpretation Act – to Avoid “Prolivity and Tautology”*, above n 539, at [187]. See also Price, above n 556, at 236, citing *Cain v Doyle*, above n 558, at 418: “There is no reason in a provision that the Commonwealth should pay a fine to itself.”

574 (8 October 2002) 603 NZPD 1260.

575 W Friedmann *Law and Social Change in Contemporary Britain* (Stevens & Sons, London, 1951) at 107–108, as cited by Sunkin, above n 538, at 718.

576 Price, above n 556, at 236.

577 Peter Hogg *Liability of the Crown* (2nd ed, Carswell, Toronto, 1989), cited by Price, above n 556, at 236.

578 Select Committee on Home Affairs, Work and Pensions Committee (UK) *First Report* (12 December 2005).

culpability, strengthening accountability, and that without fines, Crown bodies might not learn from their failures.

- 19.47 As the Commission has earlier noted, departments have legally separate appropriations with public finance legislation and practices emphasising the responsibility of individual departments and facilitating interdepartmental payments.⁵⁷⁹ This is reflected in the Public Finance Act 1989, which provides that the Crown is not liable for the debts of Crown entities, or other agencies or bodies controlled by the Crown. A financial penalty can help formalise the condemnation of the agency for its breach of the law and helps promote future compliance with the law by others as well as by the Crown.
- 19.48 Potentially penalties could be applied in particular ways that reduce the circularity conundrum, such as being paid to those affected by the contravention⁵⁸⁰ or diverted to regulatory efforts.⁵⁸¹ There is also potential for alternative orders to be made that require a public organisation to invest in future compliance.⁵⁸²

Budgetary impacts

- 19.49 The development of significant maximum pecuniary penalties as an enforcement tool for regulatory breaches has clearly been designed and implemented with private sector participants in mind. Some public bodies simply may not be able to pay a large penalty out of current budgets, and if they could, their ability to provide future services may be significantly affected.
- 19.50 A potential budgetary impact resulting from a breach could operate as a compliance incentive. The breaches for which significant penalties are liable to be imposed can be presumed to be sufficiently serious that compliance is clearly in the public interest. The imposition of a penalty can act as a red flag that the agency is failing to comply with fundamental statutory obligations, directing attention not only to agency compliance but also to agency resourcing.
- 19.51 Nevertheless, a large pecuniary penalty may be too blunt an instrument for public sector organisations where its imposition creates significant risk to public service provision. Alternative orders and/or a tailored maximum penalty level that effectively addresses a public sector contravention may be in the public interest.

PROCEDURE

Relationship with Crown Proceedings Act 1950

- 19.52 A further question to consider is the potential application of the Crown Proceedings Act 1950 to pecuniary penalty proceedings against the Crown.
- 19.53 “Civil proceedings” are defined in the Crown Proceedings Act as “any proceedings in any court other than criminal proceedings” except for certain proceedings including judicial review, habeas corpus and mandamus. Section 3 provides for the types of claim that may be brought by or against the Crown under the Act. Section 3(2)(c) is of closest application to pecuniary penalty proceedings:

⁵⁷⁹ Law Commission *A New Interpretation Act – to Avoid “Prolixity and Tautology”*, above n 539, at [187].

⁵⁸⁰ For example, the Unsolicited Electronic Messages Act 2007, s 45(1) allows court discretion as to who the penalty is paid to.

⁵⁸¹ For example, Biosecurity Act 1993, s 160(9).

⁵⁸² For example, see Health and Safety Reform Bill 2014 (192-1) providing for the court to make training orders (cl 176), general improvement orders (cl 173) and court-ordered enforceable undertakings that may include special conditions (cl 174).

any cause of action, in respect of which a claim or demand may be made against the Crown under this Act or under any other Act which is binding on the Crown, and for which there is not another equally convenient remedy against the Crown.

- 19.54 The Commission is assessing the coverage provision in its current review of the Crown Proceedings Act.⁵⁸³ Ideally, there would be legislative clarification of whether pecuniary penalty proceedings are “civil proceedings” for purposes of the Crown Proceedings Act.
- 19.55 It may also be useful for penalty proceedings to expressly apply certain aspects of the Crown Proceedings Act relating to procedure, especially if it is modernised following the separate current Commission review of that Act. These could be aspects such as:
- (a) section 12 – manner of proceedings;
 - (b) section 14 – method of making the Crown a party to proceedings;
 - (c) section 16 – service of documents and time for filing defence;
 - (d) section 17 – nature of relief;
 - (e) section 18 – appeals;
 - (f) section 24 – satisfaction of orders against the Crown;
 - (g) section 27 – discovery; and
 - (h) section 30 – rules of court.
- 19.56 It would be desirable to develop model clauses for pecuniary penalty statutes to declare penalty proceedings to be subject to the Crown Proceedings Act, or aspects of it. Using such clauses would help to overcome any current ambiguities in the Crown Proceedings Act relating to pecuniary penalties.

Relationship with Crown Organisations (Criminal Liability) Act 2002

- 19.57 The other potential source of procedural provisions that might be relevant to pecuniary penalty proceedings against the Crown is the Crown Organisations (Criminal Liability) Act 2002. Again, it would be desirable to develop model clauses to adopt or modify procedural aspects of that Act that might usefully be applied to penalty proceedings by analogy, such as:
- (a) section 7 – legal status of certain Crown organisations;
 - (b) section 8 – conduct of proceedings;
 - (c) section 9 – rights and privileges of Crown organisations;
 - (d) section 10 – restrictions on the privilege of self-incrimination (penalty privilege);
 - (e) section 11 – derivative Crown immunity;⁵⁸⁴ and
 - (f) section 12 – appropriation.
- 19.58 The Crown Organisations (Criminal Liability) Act also provides a useful model of a procedural statute dealing with aspects of Crown liability. The following features may be useful in a pecuniary penalty context:
- (a) definition of “Crown organisation”;

⁵⁸³ Law Commission *A New Crown Civil Proceedings Act for New Zealand*, above n 537.

⁵⁸⁴ *ACCC v Baxter Healthcare* (2007) 232 CLR 1 (HCA); R Wright “The future of Derivative Crown Immunity – with a Competition Law Perspective” (2007) 14 Competition and Consumer Law Journal 240.

(b) confirming which statutes give rise to liability; and

(c) confirming procedural matters.

19.59 Should the number of pecuniary penalty statutes continue to increase in future, it may be desirable to consider enacting legislation to confirm the pecuniary penalty statutes under which Crown organisations are liable to pecuniary penalties, and the applicable procedures. This could be done either as an amendment to the Crown Organisations (Criminal Liability) Act 2002 or as a stand-alone statute along similar lines. A procedural statute could provide a useful clarification of Crown liability, and provide a vehicle for confirming or negating Crown liability under any future pecuniary penalty regime.

Public sector immunities

19.60 A consideration in any pecuniary penalty statute will be whether:

- the regime needs to address and deter individual conduct;
- the consequences of a contravention should fall on the organisation rather than on individual employees when acting in the course of their employment; or
- there are areas of overlap where liability should fall on both the organisation and the individual.

In Chapter 14, we discuss issues relating to attributing liability between a body corporate and its officers under a pecuniary penalty regime. Where that regime extends to the Crown and State sector defendants, similar consideration will need to be given to liability attribution and the circumstances in which an agency and individuals may each be liable as principals.

19.61 Individuals employed by public bodies are not generally immunised against criminal liability except in specific circumstances.⁵⁸⁵ However, statutory immunities from civil proceedings for individuals employed by public bodies could extend to pecuniary penalties, unless the pecuniary penalty statute provides otherwise. Any proceedings against a member or employee of a public body would need to take account of:

- (a) section 86 of the State Sector Act 1988 (public service chief executives and employees are immune from liability in civil proceedings for good faith actions or omissions in pursuance or intended pursuance of their duties, functions or powers);
- (b) section 121 of the Crown Entities Act 2004 (no civil liability for a member's or employee's act or omission in good faith in the performance or intended performance of the entity's functions);
- (c) section 43 of the Local Government Act 2002 (members indemnified for any civil liability if acting in good faith and in pursuance or intended pursuance of the responsibilities or powers of the local authority); and/or
- (d) specific immunities under any statute.⁵⁸⁶

585 For example, Crimes Act 1961, s 216N: immunising certain persons from liability in relation to intimate visual recordings when carrying out law enforcement or judicial process functions. Compare with Crown Organisations (Criminal Liability) Act 2002, s 11: Crown immunity not to apply in relation to offences; and Health and Safety in Employment Act 1992, s 56(2):

If a Crown organisation fails to comply with a provision of this Act, any of its officers, directors, agents, or employees concerned in the management of the organisation who directed, authorised, assented to, acquiesced in, or participated in the failure is a party to, and guilty of, the failure and is liable on conviction to the punishment provided for the offence, whether or not the Crown organisation has been prosecuted or convicted.

586 For example, see Law Commission *Crown Liability and Judicial Immunity – a response to Baigent's case and Harvey v Derrick*, above n 537, Table 4, at 98–170.

- 19.62 It is unclear whether these provisions were drafted in contemplation of liability to a pecuniary penalty. An initial question is whether these provisions would extend to such liability. It can be fairly strongly argued that section 86 of the State Sector Act, in dealing with immunity from liability in “civil proceedings”, would cover pecuniary penalty liability. Other formulations based on “civil liability” may be less certain. It is therefore desirable for a pecuniary penalty statute to confirm whether the statute is subject to or overrides the public sector indemnities and immunities in any respect.
- 19.63 The accountability of the Crown and its employees, including the immunity under section 86 of the State Sector Act and whether it is the most appropriate way of protecting Crown employees, is being considered in the Commission’s review of the Crown Proceedings Act.⁵⁸⁷ The underlying principles include protecting Crown employees from personal liability where they have acted in good faith in the course of their employment, the interest in allowing employees to carry out their roles objectively and not defensively, and not deterring people from entering the public service by incurring potential personal liability. These provisions reflect the public policy tradition that public servants are, in some respects, in a different position to private sector employees.
- 19.64 In Chapter 15, we discuss the role of indemnification and insurance of pecuniary penalty liability in the private sector. It might be argued that statutory immunities perform a similar role in the public sector, although private sector insurance imposes its own market discipline on the insured that may not be present for public sector immunities and indemnities.
- 19.65 However, we expect that in most cases the public sector immunities and indemnities, primarily designed to neutralise the tort liability of individuals (but not their public sector employers), would not unduly interfere with the regulatory objectives of a pecuniary penalty regime. Consideration should be given to confirming the limits of the coverage of the public sector immunities and indemnities; for example, whether to expressly clarify that coverage does not extend to intentional breaches.

CABINET DECISION PROCESS – PECUNIARY PENALTIES CREATING CROWN LIABILITY

- 19.66 As noted above, a Cabinet circular mandates a process that requires departmental analysis of the impact of new Bills on the criminal liability of the Crown.⁵⁸⁸ As is evident from this chapter, pecuniary penalties raise specific considerations in relation to Crown liability. Given the potential for pecuniary penalties to impose liability of a quasi-criminal nature on public sector defendants, and expose the Crown to substantial financial burden, we recommend that consideration be given to supplementing the Cabinet circular procedure to also require disclosure to Cabinet of the impact of new Bills on the liability of the Crown to pecuniary penalties.

⁵⁸⁷ See Law Commission *A New Crown Civil Proceedings Act for New Zealand*, above n 537, at ch 6.

⁵⁸⁸ Cabinet Office Circular “Acts binding the Crown: Procedures for Cabinet Decision”, above n 546. The Circular requires an assessment of relevant factors before imposing criminal liability on the Crown and that Cabinet papers address matters such as: who is the Crown for the purposes of the prosecution; who should defend and prosecute the Crown; what procedures should apply; and what penalties should be imposed upon conviction and whether these need to differ from generally applicable penalties.

RECOMMENDATION

- R8 Cabinet should consider supplementing the current requirements in Cabinet Office Circular CO (02) 4 (“Acts binding the Crown: procedures for cabinet decisions”) to require departmental analysis of the impact on the liability of the Crown of legislative proposals to introduce pecuniary penalty regimes.

GUIDELINE

G21 Policymakers should consider whether the Crown and the State sector or parts of the State sector should be subject to a pecuniary penalty regime

To the extent that they participate in the activity regulated by the pecuniary penalty statute, the Crown, State sector or parts of the State sector should generally be subject to the statute; however this aspect of pecuniary penalty design should be considered on a case-by-case basis. Policymakers should consider the appropriateness of this form of penalty as an enforcement tool in the particular context and whether its application to the Crown and the State sector would be in the public interest.

The statute should state clearly whether it binds the Crown. It should also address the following matters:

- What is meant by the Crown for the purposes of the statute?
- Should the whole State sector or only parts of the State sector be subject to the regime?
- How will liability be attributed?
- Should public sector indemnities and immunities apply?
- What procedures should apply?
- What forms of penalty should be available?

A pecuniary penalty may not be the most appropriate form of penalty for public sector contraventions. In particular, a declaratory order will often be appropriate, without further penalty, given the consequences of an adverse finding of liability, such as public censure. Whether or not a pecuniary penalty should be able to be imposed must be considered on a case-by-case basis.

A range of further penalty options is available for the Crown and State sector bodies, including adverse publicity orders; external investigation and report; enforceable undertakings; and injunctive orders such as compliance orders, improvement or training orders, or stop notices.

Where a pecuniary penalty is to apply, policymakers should consider whether the maximum penalty should differ for Crown and State sector defendants. The “percentage of turnover” maximum penalty formulation is not appropriate for non-trading public defendants.

Chapter 20

Publication of enforcement policies

- 20.1 We have made reference in this Report to the need for enforcement bodies to provide guidance on how they will enforce their regimes. The following enforcement agencies (or agents) can commence pecuniary penalty proceedings:
- Commerce Commission;⁵⁸⁹
 - Department of Internal Affairs;⁵⁹⁰
 - Electricity Authority;⁵⁹¹
 - Financial Markets Authority;⁵⁹²
 - Government Communications Security Bureau;⁵⁹³
 - Ministry for Primary Industries (Chief Executive);⁵⁹⁴
 - New Zealand Police;⁵⁹⁵
 - New Zealand Security Intelligence Service;⁵⁹⁶
 - Overseas Investment Office;⁵⁹⁷
 - Reserve Bank of New Zealand;⁵⁹⁸ and
 - Takeovers Panel.⁵⁹⁹
- 20.2 In some cases, these bodies have been established specifically for the purpose of overseeing one or more statutory regimes. They have broad functions relating to the promotion of confidence in their regimes, providing information and promoting understanding of the relevant law, monitoring compliance, investigating conduct and conducting inquiries. In other cases, the enforcement role has been given to a more generally tasked body and is one of a very wide range of matters with which they are tasked. They all have a range of investigatory powers at their disposal.
- 20.3 In all cases these agencies need to make decisions about whether and when to commence proceedings, which enforcement route to take (where they have options) and how to approach settlement negotiations.

589 Commerce Act 1986; Dairy Industry Restructuring Act 2001 and Dairy Industry Restructuring (Raw Milk) Regulations 2001; and Telecommunications Act 2001.

590 Anti-Money Laundering and Countering Financing of Terrorism Act 2009; and Unsolicited Electronic Messages Act 2007.

591 Electricity Industry Act 2010.

592 Anti-Money Laundering and Countering Financing of Terrorism Act 2009; Financial Markets Conduct Act 2013; Financial Advisors Act 2008; Financial Service Providers (Registration and Dispute Resolution) Act 2008; Securities Act 1978, Securities Markets Act 1988; and Securities Trustees and Statutory Supervisors Act 2011.

593 Telecommunications (Interception Capability and Security) Act 2013.

594 Biosecurity Act 2003; and Hazardous Substances and New Organisms Act 1996.

595 Telecommunications (Interception Capability and Security) Act 2013.

596 Telecommunications (Interception Capability and Security) Act 2013.

597 Delegated from Chief Executive of Land Information New Zealand. Overseas Investment Act 2005.

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

599 Takeovers Act 1993.

- 20.4 Public and industry confidence in the agencies will be helped by transparent, consistent and responsible use of their broad powers. A number of these agencies already operate under and publish their own enforcement guidelines and policies to ensure consistency and transparency on the factors that will be taken into account when an enforcement decision is made.
- 20.5 We recommend that enforcement agencies armed with a range of sanctions and remedies, such as pecuniary penalties, should devise and publish such guidelines and policies. 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.⁶⁰⁰
- 20.6 In the criminal context, a decision to prosecute a Crown agency will be guided by the test for prosecution in the Solicitor-General's *Prosecution Guidelines*.⁶⁰¹ It is our understanding that pecuniary penalties were not contemplated in the drafting of the *Prosecution Guidelines*. As a result, one concern is that the terms of those Guidelines might tend to encourage the use of measures such as pecuniary penalties instead of criminal offences. In particular, Guideline 6.9.13 states that the availability of any proper alternatives to prosecution should weigh against a decision to prosecute.
- 20.7 It is preferable, then, that enforcement agencies devise their own guidance, specific to the statutory regime they oversee. This has been achieved by the Commerce Commission in its *Enforcement Response Guidelines* and *Criminal Prosecution Guidelines* and the Financial Markets Authority's *Enforcement Policy* and *Prosecution Policy*.⁶⁰²
- 20.8 We recommend, then, that other enforcement agencies should follow suit. As a minimum, their policies should deal with how the agency will decide whether or not to commence court proceedings; where it has the choice, how it will determine whether to commence civil or criminal proceedings; and how it will decide to enter into negotiations for settlement and what process it will follow. Where relevant, agencies may wish to consider whether their guidance should vary depending on whether an individual, body corporate or Crown defendant will be involved. To illustrate, where pecuniary penalties arise in areas of Crown activity that require weighing factors such as broad ministerial discretion with the public good, a decision to take enforcement action will be much more complex.

RECOMMENDATION

- R9 Enforcement agencies with the power to commence pecuniary penalty proceedings should develop and publish enforcement policies.

600 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.

601 Crown Law Office *Solicitor-General's Prosecution Guidelines* (2013).

602 See Commerce Commission "Enforcement Response Guidelines" and "Criminal Prosecution Guidelines" (October 2013) < www.comcom.govt.nz > and Financial Markets Authority "Enforcement Policy" and "Prosecution Policy" < www.fma.govt.nz > .

Appendix A

Guidelines for the legislative design of pecuniary penalties

The Guidelines in this Appendix are intended as a guide and starting point to the matters policymakers need to take into account when considering the inclusion of pecuniary penalties in a statute. The Guidelines are based on the discussion and conclusions in this Report. The main text of the Report expands on the points made in the Guidelines. We recommend that, if you are considering a matter raised in this Appendix, you also refer to the text in the associated chapter.

CHAPTER 4: NATURE OF PECUNIARY PENALTIES

G1 The term “pecuniary penalty” should be used consistently to describe non-criminal monetary penalties that are imposed by a court in civil proceedings

Consistent terminology should be used in statutes for novel forms of penalty or order. Use of consistent terminology makes the statute book clearer and more accessible. It helps the public understand the nature of their liabilities and removes the need for enforcement bodies and the court to assess how to employ novel tools and impose them fairly.

G2 Pecuniary penalty regimes must be designed with their punitive nature in mind

Although their primary purpose may be deterrence, pecuniary penalties are punitive in nature. They can have a potentially severe impact on a person or entity’s solvency, property interests, reputation and opportunities. Pecuniary penalty regimes must be designed with this in mind.

CHAPTER 5: ROLE OF PECUNIARY PENALTIES

G3 There should be robust reasons for employing pecuniary penalties in any regime

Pecuniary penalties are one of a range of penalties that policymakers can include in legislative regimes, along with criminal offences and infringement offences. Any decision to employ one or more of those penalties in a statute should be based on a robust and transparent assessment of its appropriateness in responding to the particular contravention.

The assessment should take into account the following:

- (i) effectiveness and efficiency;
- (ii) practical considerations; and
- (iii) the nature of the harm caused or the conduct involved.

CHAPTER 7: STANDARD OF PROOF

G4 Pecuniary penalties should be imposed on the civil standard of proof

Pecuniary penalties should continue to be imposed on the civil standard of proof, or in other words, on the balance of probabilities, rather than the criminal standard of proof.

CHAPTER 8: BURDEN OF PROOF

G5 The burden of proving all the elements of a contravention that results in a pecuniary penalty should usually be on the enforcement agency bringing proceedings

A pecuniary penalty provision should only place the burden of proving a matter in issue on a defendant where doing so is reasonable and can be demonstrably justified. This might include where:

- the person bringing proceedings would face serious difficulty in proving the matter, and the defendant has peculiar knowledge of the relevant facts; or
- it would be extremely difficult or expensive to require the person bringing proceedings to provide proof, and that proof could be provided readily by the defendant; or
- a policy decision has been made that it is appropriate, in the particular circumstances, for the regulated community to be encouraged to comply with certain standards or take certain precautions, having regard to wider considerations of justice and fairness.

Where it is justifiable to impose a burden of proof on a defendant, this should generally be an evidential rather than legal burden. A legal burden should only be imposed on a defendant if it is clear that the desired regulatory outcome cannot be achieved by imposing only an evidential burden.

Pecuniary penalty provisions should be drafted to minimise any ambiguity as to:

- who has the burden of proving all matters in issue, including the elements of the breach, defences, and matters relating to penalty quantum; and
- whether a burden is an evidential or legal one.

CHAPTER 9: PENALTY PRIVILEGE

G6 People investigated or proceeded against for a pecuniary penalty should have the benefit of a privilege against compelled self-exposure to a pecuniary penalty

A statute may limit or remove the privilege against self-exposure to a pecuniary penalty if the limit is reasonable and can be demonstrably justified. Individual rights will be best protected by the adoption of the approach in section 5 of the New Zealand Bill of Rights Act 1990.

Where a case can be made to limit the privilege, the form of the limitation should be context specific. It should balance appropriately the particular needs of the regime at hand with fairness to the individual.

CHAPTER 10: DOUBLE JEOPARDY

G7 Policymakers must consider how the pecuniary penalty statute will deal with “double jeopardy”

Given their punitive nature, pecuniary penalties can raise double jeopardy concerns.

Pecuniary penalty statutes should usually:

- (i) prohibit a person being punished by the imposition of both a pecuniary penalty and criminal penalty, or by more than one pecuniary penalty, for the “same conduct”; and
- (ii) provide that once criminal proceedings have been determined (whether successfully or otherwise) there should be no pecuniary penalty proceedings based on the same conduct, and vice versa.

Consideration will need to be given to how a statute deals with double jeopardy where:

- (i) The regime will allow for a range of orders to follow from a finding of civil liability or “declaration of contravention”. In such regimes it may be appropriate for questions of double jeopardy to be left to the court to determine.
- (ii) A case can be made that the statute may allow for the imposition of both a pecuniary penalty and a sentence of imprisonment for the same conduct. The potential for such double punishment should be possible only in relation to specific breaches under the statute that can genuinely capture a broad range of conduct, from inadvertent conduct that results in minimal harm, to intentional conduct carried out in the knowledge that substantial harm might result. The statute should provide expressly for this.

Where possible, drafters should employ consistent terminology in dealing with the question of the “same conduct”.

CHAPTER 11: INTENTION AND STRICT LIABILITY

G8 Pecuniary penalty provisions should state clearly:

- (i) whether mens rea is an element of the penalty provision; or**
- (ii) whether the penalty is to be imposed on the basis of strict liability**

Consideration should be given to whether intention or fault should be an element of the contravention for which a pecuniary penalty may be imposed.

In assessing whether to include intention or fault as an element of the contravention, it is necessary to weigh up the features of the penalty and regime, such as the nature of the conduct, potential defendants and size of the penalty involved, to ensure that the particular provision achieves the right balance between fairness and regulatory effectiveness.

Strict liability pecuniary penalties may be appropriate where a case can be made that:

- Strict liability provides persons with an incentive to adopt compliance processes and procedures to protect against contraventions, and these precautions may not otherwise be taken; and

- The standards imposed are clear and well-known to the regulated persons, who participate voluntarily in the activity; and
- The defendant is in the best position to establish a defence. This might include where:
 - the person bringing proceedings would face serious difficulty in proving the matter, and the defendant has peculiar knowledge of the relevant facts; or
 - it would be extremely difficult or expensive to require the person bringing proceedings to provide proof, and that proof could be provided readily by the defendant.

It is not clear that the presumptions that exist about strict liability criminal offences apply equally to pecuniary penalties. Strict liability pecuniary penalty provisions should therefore clearly set out any defences, even if it is anticipated that only the defence of absence of fault should be available.

Absolute liability pecuniary penalties should be used very rarely.

CHAPTER 12: RULES OF PROCEDURE

G9 Civil rules of court procedure and evidence should apply to pecuniary penalty proceedings

Pecuniary penalty proceedings take place in the civil courts, where the civil rules of procedure and evidence apply.

Nevertheless, policymakers should always consider potential problems with applying standard civil rules to proposed new punitive or coercive orders. Consideration should be given to whether tailored rules are required to balance principles of fairness, regulatory efficiency and certainty.

CHAPTER 13: IMPOSITION

G10 Pecuniary penalties should be imposed by a court

Pecuniary penalties should not be imposed directly by an enforcement agent. This approach should only be departed from in rare cases:

- Where decisions on fact and liability genuinely require assessment by industry experts. In those circumstances there may be a case for imposition of a pecuniary penalty by an industry tribunal or “panel”. There should be a statutory requirement that the chair of the body has legal expertise.
- Where a case can be made that the statute should allow the enforcement agency and defendant to settle the penalty out of court. This should only be provided for in exceptional circumstances, where, within the field regulated, there is no chance of oppression or abuse of the procedure. This may be because all the actors in the field are well-resourced, such that there is no significant imbalance of power.

If such a provision is to be included in a regime, the statute should require that the details of the settlement be publicised, including (a) the circumstances and nature of the breach and (b) the quantum of the agreed penalty.

G11 Pecuniary penalty proceedings should only be commenced by an enforcement body or agent acting under a statutory power

There should be no scope for private persons to seek and obtain pecuniary penalties.

G12 “Declaration of contravention” provisions should be considered where other civil orders can be sought by third parties or where several orders can be sought by an enforcement agency

Provision for a declaration of contravention should be considered where other civil orders can be sought by third parties or where several orders can be sought by an enforcement agency, and where such an approach might result in cost savings.

However, the wording of a declaration of contravention provision should clarify that it is only conclusive evidence of the matters stated in it for the purpose of later proceedings against the same entity or individual against whom the declaration was made. There should be no risk of such declarations being used as a means of attributing liability to others.

CHAPTER 14: INDIVIDUAL AND CORPORATE LIABILITY

G13 Careful consideration should be given to the attribution of individual and corporate liability for pecuniary penalties

Statutes should be clear as to who is liable and how they are liable. Relevant questions include:

- What type of conduct (corporate or personal) is the pecuniary penalty seeking to moderate?
- Is the conduct usually carried out by individuals or corporations?
- Is the activity one in which the costs of paying the pecuniary penalty could easily be passed onto others (for example, consumers or shareholders)?

If corporations are liable, the following should also be considered:

- Are the normal rules of agency sufficient to attribute the actions of individuals to the corporation or should there be a specific attribution provision?
- Should individuals also be liable for the corporate misconduct? Relevant considerations include: whether corporate liability alone is sufficient to promote compliance; and whether an individual would be subject to other disciplinary proceedings in the event of corporate non-compliance.

G14 If there is to be individual liability, generally “concurrent principal liability” or “accessory liability” provisions should be used

There are a number of forms of individual liability. Whichever form is chosen, legislative drafting should be clear as to who is liable, what they are liable for, and what they can do to avoid liability.

Concurrent principal liability and accessory liability both attach to individuals only where they have participated, in some way, in the relevant contravention. Deemed liability, and to an

extent, the imposition of duties, do not require such participation and can therefore give rise to fairness issues.

What type of individual liability is appropriate will depend on the regime. Questions to consider include:

- Does the activity being regulated present a high risk to public safety? Put another way, how serious is the harm that the provision is seeking to avoid?
- What level of involvement in the physical acts should give rise to personal liability?
- What degree of knowledge should give rise to personal liability?
- Might the option expose people to an overly high risk of litigation?
- Might the option deter quality candidates from taking on roles?
- Might the provision have an undesirable impact on decision-making and foster overly cautious behaviour?
- Should liability attach to particular positions within the organisation, or those who perform a particular function?

An alternative to deemed liability is to impose a positive duty on specified corporate officers, with failure to comply exposing those officers to a pecuniary penalty. This approach requires careful drafting to ensure effectiveness.

G15 Pecuniary penalty statutes should state clearly how ancillary liability will arise

Ancillary liability provisions should be no wider than necessary to achieve the purposes of the regime.

Policymakers need to consider:

- who, other than the primary contravener, should be liable for their role in the contravention;
- how their liability is to be established, with regard to their state of mind or the extent of their knowledge of the contravention;
- which defences should be available.

Usually, (that is, unless it is unworkable or inappropriate) the traditional criminal law approach should be adopted, which requires knowledge of the essential facts that constitute the contravention, and an intention to participate in the contravention.

CHAPTER 15: INSURANCE AND INDEMNITY

G16 Pecuniary penalty statutes should deal expressly with the question of insurance or indemnification in relation to pecuniary penalty liability

Policy makers should consider whether there should be no bar on insurance or indemnification in respect to pecuniary penalty liability under the proposed regime, or whether policy reasons justify a particular prohibition or limitation. In either case, an express statutory statement confirming or restricting the legality of contracts to indemnify or insure is desirable.

Factors to be considered include:

The nature and gravity of the illegal conduct. Are there public policy reasons why indemnification or insurance in respect of the conduct / breach should be barred? For example, was the conduct so morally reprehensible that punishment should be borne personally?

The deterrent effect of the penalty. Would the availability of indemnification significantly dilute the deterrent effect of a pecuniary penalty provision? Or does the disciplinary effect of indemnification and insurance contribute to the deterrence objectives of the pecuniary penalty regime? Similarly, would those insured prefer to allow the breach and recover under their insurance policies rather than to avoid the breach altogether?

Interests of innocent third parties. Will the penalty be diverted for reparative purposes or to fund education to prevent future breaches? If so, will the contravener be able to pay the penalty if the indemnity is not allowed?

Other relevant considerations are the potential impact of insurance and indemnification on penalty imposition by the courts, the potential impact on prosecution strategies, and the impact on the personal liability of directors and managers.

Where it is necessary to impose statutory restrictions on insurance and indemnification in a pecuniary penalty regime, policymakers should consider penalising the provision of insurance or indemnification in breach of those restrictions.

CHAPTER 16: FIXING PENALTIES

G17 Maximum pecuniary penalties should be set with the specific contravention, conduct and actor in mind

Pecuniary penalties should not be chosen as an enforcement mechanism merely because of a view that they allow higher maximum penalties than criminal offences. Also, the maximum penalties in existing pecuniary penalty statutes should not merely be transplanted to new regimes. In any statute, they should be set with the specific contravention, conduct and actor in mind.

Penalties that rely on a multiple of commercial gain or percentage of turnover might be considered where deterrence of breach for financial benefit is sought. However, since turnover penalties discriminate between defendants according to their capacity to pay, and lack connection to the actual contravening conduct, they should be used sparingly.

The following principles should be applied:

- Maximum pecuniary penalties should:
 - (i) reflect the worst class of case in each particular category;
 - (ii) 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; and
 - (iii) balance the promotion of compliant behaviour with ensuring that people remain willing to enter the market and/or take sensible commercial risks.
- Like conduct should be treated alike.

G18 Pecuniary penalty statutes should provide guidance to courts about the circumstances when a penalty should be imposed and the amount of the penalty

Pecuniary penalties are a relatively novel form of penalty and there is a limited amount of case law to guide courts when determining penalties. Policymakers should consider what factors should be considered by the court under the particular regime. As a minimum, pecuniary penalty statutes should usually include the following guidance:

- the nature and extent of the breach;
- any loss or damage caused by the breach;
- any financial gain made, or loss avoided, from the breach;
- whether the breach was intentional, inadvertent or negligent;
- the level of penalties imposed in previous similar situations; and
- the circumstances in which the breach took place.

CHAPTER 17: APPEALS

G19 Standard appeal routes should be used for pecuniary penalties

As they are a subset of civil proceedings, the standard appeals routes under the Judicature Act 1908 and the District Courts Act 1947 are the most appropriate for pecuniary penalties.

CHAPTER 18: LIMITATION PERIODS

G20 Pecuniary penalty statutes should generally provide for a primary limitation period of three years after reasonable discoverability of the contravention, with a 10-year longstop (subject to a fraud exception)

Pecuniary penalty statutes should deal expressly with periods of limitation.

A model approach to limitation periods in pecuniary penalty statutes is a primary limitation period of three years after reasonable discoverability of the contravention, with a 10-year longstop (subject to a fraud exception).

The Limitation Act 2010 defence to money claims (a six-year primary limitation period plus a three-year late notice period and a 15-year longstop) is an alternative limitation period for pecuniary penalties, in circumstances where there is a specific policy justification for applying that model.

CHAPTER 19: CROWN AND STATE SECTOR DEFENDANTS

G21 Policymakers should consider whether the Crown and the State sector or parts of the State sector should be subject to a pecuniary penalty regime

To the extent that they participate in the activity regulated by the pecuniary penalty statute, the Crown, State sector or parts of the State sector should generally be subject to the statute; however this aspect of pecuniary penalty design should be considered on a case-by-case basis. Policymakers should consider the appropriateness of this form of penalty as an enforcement tool in the particular context and whether its application to the Crown and the State sector would be in the public interest.

The statute should state clearly whether it binds the Crown. It should also address the following matters:

- What is meant by the Crown for the purposes of the statute?
- Should the whole State sector or only parts of the State sector be subject to the regime?
- How will liability be attributed?
- Should public sector indemnities and immunities apply?
- What procedures should apply?
- What forms of penalty should be available?

A pecuniary penalty may not be the most appropriate form of penalty for public sector contraventions. In particular, a declaratory order will often be appropriate, without further penalty, given the consequences of an adverse finding of liability, such as public censure. Whether or not a pecuniary penalty should be able to be imposed must be considered on a case-by-case basis.

A range of further penalty options is available for the Crown and State sector bodies, including adverse publicity orders; external investigation and report; enforceable undertakings; and injunctive orders such as compliance orders, improvement or training orders, or stop notices.

Where a pecuniary penalty is to apply, policymakers should consider whether the maximum penalty should differ for Crown and State sector defendants. The “percentage of turnover” maximum penalty formulation is not appropriate for non-trading public defendants.

Appendix B

Table of pecuniary penalty provisions

ACT	REGULATORY BODY	PECUNIARY PENALTY PROVISION(S)	MAXIMUM PENALTY AMOUNT
Anti-Money Laundering and Countering Financing of Terrorism Act 2009	<p>One of three “supervisors”, depending on the reporting entity:</p> <p>Reserve Bank (for banks, life insurers, non-bank deposit takers);</p> <p>Financial Markets Authority (for issuers of securities, trustee companies, futures dealers, collective investment schemes, brokers, financial advisers);</p> <p>Department of Internal Affairs (for casinos, non- deposit taking lenders, money changers, and other reporting entities).</p>	<p>Section 78: failure by a reporting entity (financial institution or casino) 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>Section 90: for a breach of s 78(b), (c) (d) or (g)–</p> <p>\$100,000 (individual)</p> <p>\$1m (body corp)</p> <p>and for a breach of s 78(a), (e) or (f)–</p> <p>\$200,000 (individual)</p> <p>\$2m (body corp).</p>
Biosecurity Act 1993	Chief executive of the Ministry for Primary Industries.	<p>Section 154H: failure to comply with–</p> <p>ss 16A, 16B, 16C (importers’ duties);</p> <p>ss 18(1)(b), 24D(1)(a), 25(1), (2), (8), (9), 27A, 29(1), 29(2) (clearance of risk goods);</p> <p>s 40(6) (duties of operators of transitional/containment facilities);</p> <p>ss 52, 53 (handling of pests/ unwanted organisms);</p> <p>s 122 (inspectors’ directions);</p> <p>ss 130(3), 134(1) (restrictions on risk areas);</p> <p>regulations made under s 150 (biosecurity emergencies);</p> <p>directions or requirements under Part 7 (exigency actions);</p> <p>requirements in rules or regulations declared to give rise to civil liability.</p>	<p>Section 154J: \$500,000 (individual)</p> <p>For a body corporate, the greater of \$10m; 3x commercial gain (if gain readily ascertainable); or 10 per cent of turnover (if gain not readily ascertainable).</p>

ACT	REGULATORY BODY	PECUNIARY PENALTY PROVISION(S)	MAXIMUM PENALTY AMOUNT
Commerce Act 1986	Commerce Commission.	Section 74D: breaching a cease and desist order.	Section 74D(2): \$500,000 (against "a person").
		Section 80: breaching provisions relating to restrictive trade practices (and for attempting, aiding, abetting, inducing, being knowingly concerned in, or conspiring to).	Section 80(2B): \$500,000 (individual); For a body corporate, the greater of \$10m; 3x commercial gain (if gain readily ascertainable); or 10 per cent of turnover (if gain not readily ascertainable).
		Section 80B: breaching s 80A (no indemnity against certain pecuniary penalties).	Section 80B(2): 2x value of indemnity given.
		Section 83: breaching provisions relating to business acquisitions likely to have effect of substantially lessening competition in market (and for attempting, aiding, abetting, inducing, being knowingly concerned in, or conspiring to).	Section 83(1): \$500,000 (individual) or \$5m (body corporate), for each act or omission.
		Section 85A: breach of an undertaking given to Commission re business acquisitions (and for attempting, aiding, abetting, inducing, being knowingly concerned in, or conspiring to).	Section 85A(3): \$500,000 for each act or omission (against "a person").
		Section 86: contravening information disclosure requirement for regulated goods or services (including disclosing false or misleading information) (and for attempting, aiding, abetting, inducing, being knowingly concerned in, or conspiring to).	Section 86(3): \$500,000 (individual) or \$5m (body corporate).
		Section 87: contravening price-quality requirement for regulated goods and services (including refusing to comply with quality standards) (and for attempting, aiding, abetting, inducing, being knowingly concerned in, or conspiring to).	Section 87(3): \$500,000 (individual) or \$5m (body corporate).
Dairy Industry Restructuring Act 2001 / Dairy Industry Restructuring (Raw Milk) Regulations 2001	Commerce Commission.	Section 141: conduct breaching subpart 5, "Regulation of dairy markets and obligations of new co-op" (Fonterra). Section 141: breach of regulations made under s 115 (regulations relating to raw milk).	Section 141(2): \$500,000 (individual); For a body corporate, the greater of \$10m or 3x commercial gain or 10 per cent turnover.
Electricity Industry Act 2010	Electricity Authority.	Section 80: breaching a provision of Part 3 of the Act, "Separation of distribution from certain generation and retailing".	Section 80(2): \$500,000 (individual); For a body corporate, the greater of \$10m or 3x commercial gain or 10 per cent turnover.
Financial Advisers Act 2008	Financial Markets Authority.	Section 137K: contravening a wholesale certification requirement under s 5E.	Section 137K(2): \$100,000 (individual) or \$300,000 (for an "entity": an incorporated or unincorporated body and sole trustees).
Financial Markets Conduct Act 2013 ⁶⁰³	Financial Markets Authority.		

ACT	REGULATORY BODY	PECUNIARY PENALTY PROVISION(S)	MAXIMUM PENALTY AMOUNT
Financial Service Providers (Registration and Dispute Resolution) Act 2008	Financial Markets Authority.	Section 79AK: contravening a wholesale certification requirement under s 49B.	Section 137K(2): \$100,000 (individual) or \$300,000 (for an "entity": an incorporated or unincorporated body and sole trustees).
Hazardous Substances and New Organisms Act 1996	Chief executive of the Ministry for Primary Industries.	Section 124B: breaches relating to new organisms (developing, field testing, importing, releasing, possessing, disposing of, failing to comply with regulatory controls).	Section 124C: \$500,000 (individual) For a body corporate, the greater of \$10m; 3x commercial gain (if gain readily ascertainable); or 10 per cent of turnover (if gain not readily ascertainable).
Overseas Investment Act 2005 / Overseas Investment Regulations 2005	Chief executive of the "regulating department" (Land Information New Zealand, delegated to the Overseas Investment Office).	Section 48(1): (a) contravening the Act; (b) committing an offence under the Act; (c) failing to comply with a notice to provide information or a statutory declaration under ss 38–40; (d) failing to comply with condition of consent or exemption.	Section 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").
		Section 53: "administrative penalty" for retrospective consent.	Regulation 32: \$20,000 (against "an applicant").
Securities Act 1978 / Securities Act (Contributory Mortgages) Regulations 1988 ⁶⁰⁴	Financial Markets Authority.	Section 55C: • engaging in a "civil liability event" that materially prejudices subscribers; is likely to materially damage NZ securities markets; or is otherwise serious. A "civil liability event" is • distributing an advertisement or prospectus including an untrue statement; or • breaching the contributory mortgage regulations.	Section 55F(1): \$500,000 (individual) or \$5m (body corporate), for each civil liability event.

603 The pecuniary penalty provisions come into force on 1 April 2017 or earlier as provided by Order in Council.

604 Act to be repealed by Financial Markets (Repeals and Amendments) Act 2013 as from 1 April 2017, or earlier as provided by Order in Council. Regulations revoked by Financial Markets (Repeals and Amendments) Act 2013.

ACT	REGULATORY BODY	PECUNIARY PENALTY PROVISION(S)	MAXIMUM PENALTY AMOUNT
Securities Markets Act 1988 ⁶⁰⁵	Financial Markets Authority.	<p>Section 42T:</p> <ul style="list-style-type: none"> contravening a "civil remedy provision" that materially prejudices third parties' interests, is likely to materially damage NZ securities markets, or is otherwise serious. <p>A "civil remedy provision" means:</p> <ul style="list-style-type: none"> insider conduct or market manipulation; breaches relating to continuous and substantial holdings disclosures; or breaches relating to unsolicited offers. 	<p>Section 42W(1): the greater of: the consideration for transaction; 3x 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>Section 42W(2): \$1m for a breach of any other civil remedy provision (against "a person").</p>
Securities Trustees and Statutory Supervisors Act 2011	Financial Markets Authority.	<p>Section 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 Reserve Bank of NZ Act 1989; Retirement Villages Act 2003; Securities Act 1978; Unit Trusts Act 1960. 	<p>Section 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").</p>
Takeovers Act 1993	Takeovers Panel.	Section 33M(c): prejudicial, damaging or otherwise serious breaches of the takeovers code.	Section 33P: \$500,000 (individual) or \$5 m (body corporate), for each contravention.
Telecommunications Act 2001	Commerce Commission.	<p>Section 156L(1):</p> <p>(a) breaching an undertaking given under Part 2A (structural separation of Telecom).</p> <p>(ab) breaching an undertaking given under Part 4AA (providers under Ultra-fast Broadband and Rural Broadband Initiative).</p>	Section 156L(3): \$10m (against "a person").
		Section 156L(1)(c): breaching a provision contained in s 156A.	Section 156L(3): between \$300,000 and \$10m depending on the provision breached.
		Section 156Q: breach of an enforceable matter filed in the High Court under s 156P(1).	Section 156R: the amount of commercial gain less any compensatory damages.

605 To be repealed by Financial Markets (Repeals and Amendments) Act 2013 as from 1 April 2017, or earlier as provided by Order in Council.

ACT	REGULATORY BODY	PECUNIARY PENALTY PROVISION(S)	MAXIMUM PENALTY AMOUNT
Telecommunications (Interception Capability and Security) Act 2013.	<p>New Zealand Police</p> <p>New Zealand Security Intelligence Service</p> <p>Government Communications Security Bureau</p> <p>Any specified law enforcement agency within the meaning of section 50 of the Search and Surveillance Act 2012 that is approved by an Order in Council under that section to use interception devices (currently the Department of Internal Affairs or the New Zealand Customs Service).</p>	Section 97: a serious non-compliance with any of the duties under the Act or contravening a compliance order.	Section 98: \$500,000 plus \$50,000 per day for continuing contraventions (against "a person").
Unsolicited Electronic Messages Act 2007	Department of Internal Affairs.	<p>Section 45: committing a "civil liability event":</p> <ul style="list-style-type: none"> • sending unsolicited commercial electronic messages; • sending commercial electronic messages without sender information or unsubscribe facilities; or • committing a breach related to address-harvesting software and harvested-address lists. 	<p>Section 45(3): \$200,000 (individual).</p> <p>Section 45(4): \$500,000 (organisation).</p>

Appendix C

List of submitters and consultees

Air New Zealand

Bell Gully

Business New Zealand

Commerce Commission

Department of Internal Affairs, Anti-Spam Enforcement Unit

Donald Mathieson QC, Special Counsel to the Parliamentary Counsel Office

Federated Farmers

Financial Markets Authority

Grace Haden

Institute of Directors

Dr Marina Nehme, Senior Lecturer, University of Western Sydney

Meredith Connell

Ministry for the Environment

Ministry of Business, Innovation and Employment

Ministry of Justice

Ministry for Primary Industries

Nicole Buxeda

New Zealand Bankers' Association

New Zealand Bar Association

New Zealand Law Society

Overseas Investment Office

Parliamentary Counsel Office (Commercial Team)

Productivity Commission

Takeovers Panel

Treasury

Trish Keeper, Senior Lecturer in Commercial Law, School of Accounting and Commercial Law, Victoria University of Wellington