Response to *Civil Pecuniary Penalties* (NZLS IP33)

February 2013

MEREDITH | CONNELL

BARRISTERS AND SOLICITORS

1 Introduction

1.1 Meredith Connell is pleased to comment on the issues raised by the Law Commission in Issues Paper 33, *Civil Pecuniary Penalties* (NZLS IP33) (**Issues Paper**).

1.2 Meredith Connell is the office of the Crown Solicitor for Auckland, Simon Moore QC, who is responsible for the prosecution of indictable crime in the greater Auckland region. In addition, the firm represents a number of public bodies and government agencies with statutory powers to seek pecuniary penalties, including the Commerce Commission, the Financial Markets Authority, and the Department of Internal Affairs.

1.3 As a result, Meredith Connell has considerable experience representing public bodies in proceedings seeking civil pecuniary penalties, as well as prosecuting indictable crime and regulatory offences.

1.4 Our submission focuses on the practical operation of civil pecuniary penalty regimes, in the context of the broader array of governmental responses to law breaking.

1.5 This paper has been primarily prepared by Ben Hamlin and Kim Francis, with assistance from John Dixon, Nick Williams and Fionnghuala Cuncannon. Please do not hesitate to contact Mr Hamlin or Mr Francis with any queries.

1.6 Our answers to the specific questions raised in the Issues Paper are set out in the appendix to this document.

1.7 Before addressing the specific questions, we comment generally on the operation of the civil pecuniary penalty regimes, and the place of civil pecuniary penalties within the broader context of sanctions for breach of regulatory regimes.

2 Practical observations on civil pecuniary penalty proceedings

2.1 The Issues Paper notes several criticisms of civil pecuniary penalties regimes from a philosophical perspective.

2.2 We have acted in a significant number of proceedings seeking civil pecuniary penalties. It may assist to set out our general observations on these proceedings from a practical perspective.

2.3 First, civil pecuniary penalties are primarily pursued against large bodies corporate.[1] As a result, proceedings for civil pecuniary penalties tend to have a markedly different character to ordinary criminal proceedings. In practical terms, the inequality of power sometimes said to be present in criminal proceedings is absent. Defendants are very well-resourced (often more so than the regulator) and well-advised. In this type of litigation, the "level playing field" of civil litigation is entirely appropriate, and proceedings resemble ordinary civil litigation. Regulators can in theory pursue individuals who are at a significant disadvantage, but in the last 10 years such cases have been rare.

2.4 Second, the Issues Paper records some concerns with the maximum available level of civil pecuniary penalties, particularly in comparison to the maximum level of fines. We caution

[1] While there have been instances where regulators have also pursued individuals, these have tended to be either well-resourced owners and directors of corporate defendants, or current or former executives of corporate defendants who have defended proceedings with the full support of those parties. There have been very few recent cases where pecuniary penalties have ultimately been imposed on individuals for breach of the Commerce Act or securities legislation.

against equating the maximum possible pecuniary penalty with the actual level of penalties that tend to be imposed by the courts. For example, penalties for global corporations engaging in serious price-fixing conduct are generally in the low millions.[2] While these are large penalties, they are far from prohibitive when imposed on multi-national corporates. When imposing or approving a penalty, the Court will take into account the defendant's financial resources and ability to pay. Courts are concerned to avoid imposing financial penalties that are crushing or have a disproportionate financial impact.[3]

2.5 Third, the regulators who enforce civil pecuniary penalty provisions tend to be guided by appropriate enforcement guidelines, model litigant policies and/or by analogy with the *Prosecution Guidelines*. In our experience, regulators – quite properly – hold themselves to a higher standard of conducting civil litigation. The approach taken by regulators significantly reduces the potential for abuse or oppression in civil pecuniary penalty proceedings.

2.6 Accordingly, regulators and the courts have in practise largely avoided the potential and theoretical risks associated with civil pecuniary penalties. As a result, the pecuniary penalty regimes have been enforced effectively and appropriately. They are working well.

2.7 In the circumstances, we do not consider that the arguments noted in the Issues Paper justify any radical changes to the civil pecuniary penalties regimes currently in place. Moreover, we consider that existing penalty regimes – especially the Commerce Act – provide an invaluable template for future legislation providing for civil pecuniary penalties.

3 Civil pecuniary penalties are a valuable regulatory tool

3.1 Modern regulatory enforcement is focused primarily on prevention rather than punishment. General deterrence and education are arguably more important than specific punishment (although such punishment can assist deterrence). Obtaining compensation for affected parties will also be a relevant factor in some cases.

3.2 It is important that regulators are empowered to seek to deter and punish contraventions of the law in a manner that is proportionate and appropriate to the circumstances of each breach. There may be wide differences between the culpability and consequences involved in breaches of different regulatory regimes.

3.3 Parliament has recognised this, and has provided regulators with an array of different remedies, albeit that not every remedy is available to every regulator. The tools that may be available to a modern regulator include:

(a) Education campaigns;

(b) Compliance advice (eg written advice to specific firms about their conduct);

(c) Warnings (formal and informal, and including pre-charge warnings);

(d) Diversion;

(e) Out of court settlements (for example, an agreement to change behaviour and compensate an affected party);

(f) Court enforceable undertakings;

[2] These are summarised in Hamlin & Sumpter [2011] NZLJ 230, 232.

[3] Financial concerns may also be addressed by deferred payment of a pecuniary penalty: see *Commerce Commission v Cargolux Airlines International SA* HC Auckland CIV 2008-404-8355, 5 April 2011 at [56].

(g) Civil infringement notices;

(h) Civil proceedings seeking injunctions or banning orders;

(i) Civil proceedings seeking compensation, or the disgorgement of gain;

(j) Civil proceedings seeking pecuniary penalties;

(k) Summary criminal prosecutions; and

(l) Indictable criminal prosecutions.

3.4 We endorse the suggestion that civil pecuniary penalties are an efficient regulatory option, and may be a more appropriate option than laying criminal charges in respect of the same conduct:

(a) Not all regulatory contraventions should necessarily trigger the "blunt instrument" of criminal sanctions. Civil pecuniary penalties serve a valuable intermediate role within the hierarchy of sanctions.

(a) Some conduct should be strongly discouraged due to the detrimental effect on society, without necessarily requiring the condemnation of criminal sanctions.

(b) The parties have significantly more flexibility when resolving a civil proceeding than when resolving a criminal one. This encourages the early and principled resolution of proceedings, with considerable savings to the parties and the Court system.

(c) Documents held by overseas defendants may be made available to a regulator under ordinary civil discovery rules, whereas these documents may not otherwise be obtainable under a regulator's compulsory powers.

(d) Although reparation is available in criminal proceedings, and in the absence of effective class action or representative plaintiff procedures, affected parties are generally better served through civil proceedings. These enable a regulator to seek compensation orders on behalf of injured parties, or can be case managed with parallel claims for compensation by private litigants.

(e) The complex, often document-intensive and lengthy nature of disputes arising from regulatory offending means that they are ill-suited to summary criminal procedures. As a result, regulatory criminal proceedings can create a disproportionate burden on the criminal justice system.

3.5 Accordingly, in our view civil pecuniary penalties remain a useful tool to keep in the regulatory arsenal, both for regulators who already have them, and when Parliament is considering the design or amendment of regulatory frameworks.

4 Criminal sanctions and civil pecuniary penalties perform different roles

4.1 Based on our experience, we endorse the Issues Paper's articulation of the two fundamental differences between criminal sanctions and civil pecuniary penalties:[4]

(a) First, civil pecuniary penalties do not result in a criminal conviction. The stigma and consequences of conviction[5] significantly exceed the stigma and consequences of

[4] Issues Paper, 3.20.

other contraventions of the law. This is apparent from the frequency of applications for discharges without conviction,[6] where defendants argue that the consequences of the mere fact of conviction are out of proportion to the gravity of the offending.

(b) Second, civil pecuniary penalties do not imperil the liberty of the defendant. Based on our experience, and the reaction of the commercial community to the proposal to criminalise cartel conduct, the potential for imprisonment is a significantly greater deterrent to commercial wrongdoing.

4.2 The justifications underlying the procedural protections in the criminal law, such as the onus and standard of proof, are that the liberty of citizens are imperilled, and the stigma associated with criminal conviction.

4.3 Some commentators suggest that there is little functional difference between civil pecuniary penalties and criminal sanctions such as fines. While there is some overlap between the two regimes at the margins, in our view this does not detract from the very significant differences between them. Deterrent remedies do not necessarily require the wholesale adoption of criminal procedural rules, which are designed for, and most appropriate for, proceedings involving the risk of more serious criminal sanctions.

5 There is no strict demarcation between criminal and civil sanctions

5.1 We have set out above the fundamental differences between civil pecuniary penalties and criminal sanctions. On a practical level, we therefore disagree with arguments that civil pecuniary penalties should necessarily be assimilated to, and treated identically with, traditional criminal sanctions.

5.2 The wide range of regulatory enforcement options that are available (as set out in paragraph 3.3 above) mean that there is no clear divide between criminal and civil remedies. Civil pecuniary penalties are simply one point on a spectrum of enforcement options that enable regulators to take a proportionate and appropriate response to the circumstances of each case. Most modern regulatory regimes, such as the Financial Markets Conduct Bill, contain carefully considered gradations of civil and criminal sanctions for contraventions of varying levels of culpability and seriousness.

5.3 The increasingly problematic nature of the distinction between civil and criminal remedies was noted by Finkelstein J in *ASIC v Petsas*:[7]

> For some time, however, the reasonably clear line between the civil and criminal law has been collapsing. So great is the collapse that in 2003 Hayne J was able to say that the distinction between civil and criminal proceedings "is, at best, unstable": *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Limited* [2003] HCA 49; (2003) 216 CLR 161, 200. There are several reasons for the disappearance of the line between criminal and civil proceedings. First, civil remedies are now available to supplement criminal sanctions. Second, civil remedies are being chosen as alternatives to the criminal law, especially in the area of so called "white collar" crime. Third, and this case provides an example, civil remedies may be chosen by the enforcing authority as an express alternative to a criminal prosecution.

[5] We refer to the consequences of the conviction itself, without reference to any additional sentence or fine imposed by the Court.
[6] See Sentencing Act 2002, ss 106 and 107.
[7] *Australian Securities and Investments Commission v Petsas* [2005] FCA 88 at [1].

5.4 In addition to the points referred to by Finkelstein J, we note that private parties may seek remedies such as exemplary or statutory damages that reflect deterrence and denunciation,[8] rather than simply compensation for loss or disgorgement of gain.

5.5 The Issues Paper notes the comments of some "purist" commentators, who suggest that civil pecuniary penalties should be treated in an identical manner to criminal proceedings simply because they involve an element of "punishment", and are enforced by the state.

5.6 While we accept that there is an analogy between civil pecuniary penalties and criminal sanctions, their separate places on the spectrum of enforcement options arise from fundamental differences. Accordingly, we do not agree that the current statutory treatment of civil pecuniary penalties should be changed due to the existence of some parallels with criminal sanctions.

6 Existing authorities provide valuable guidance in penalty proceedings

6.1 The Issues Paper notes the concern of some commentators with the lack of certainty concerning some aspects of civil pecuniary penalties.

6.2 At a practical level, the law concerning civil pecuniary penalties in many areas – especially the Commerce Act – appears well developed and workably clear. There have been a number of significant Commerce Act proceedings for civil pecuniary penalties, including complex multi-party litigation such as the "Interchange",[9] "Air cargo",[10] "Freight Forwarding"[11] and "GIS" proceedings.[12] The civil pecuniary penalty aspects of these cases do not appear to have raised any particular issues, and they have required no more interlocutory intervention than would be expected in comparable civil proceedings.

6.3 In our view, uncertainty is potentially introduced through the suggestion that the 'quasi criminal' nature of the proceedings requires some additional steps or different approach to that found in ordinary civil proceedings. Bespoke additions, whether judicially crafted or found in specialist rules, are particularly likely to create uncertainty. One recent example was the suggestion in *Morley v Australian Securities and Investments Commission*[13] that a "duty of fairness" applied in such a civil prosecution. On appeal the High Court of Australia rejected this,[14] but in the interim there was significant uncertainty as to what practical obligations such a duty would impose in any given case.

6.4 We agree that, for clarity, legislation could confirm the civil nature of the proceedings, the rules of procedure which apply, the standard of proof, and who bears the burden of proof. Where an Act is silent on one of these issues, we consider it unlikely that Parliament intended to depart from the well established norms in this area that:

(a) pecuniary penalties are civil proceedings, governed by the rules that apply in civil proceedings;

---

[8] Partly penal orders to forfeit dividends or shares may also be made on the application of a private litigant under ss 42ZE and 42ZF of the Securities Markets Act 1988. These powers may be exercised on a standard of proof that is lower than the ordinary civil standard (the Court must be "satisfied on reasonable grounds" of a contravention). Relevant considerations to penal orders are noted in *Mercury Energy Ltd v Utilicorp NZ Ltd* [1997] 1 NZLR 492 (HC) at 505-512; *Ithaca (Custodians) Ltd v Perry Corp* [2003] 2 NZLR 216 (HC) at [260]-[268].

[9] *Commerce Commission v Cards NZ Ltd*.

[10] *Commerce Commission v Air New Zealand Ltd & Ors*.

[11] *Commerce Commission v Kuehne + Nagel International AG*.

[12] *Commerce Commission v Siemens AG*.

[13] *Morley v Australian Securities and Investments Commission* [2010] NSWCA 331.

[14] *ASIC v Hellicar* [2012] HCA 17, see the judgment of Heydon J in particular.

(b) the enforcement agency seeking a pecuniary penalty bears the burden of establishing the contravention, and must do so on the balance of probabilities; and

(c) defendants have the burden of establishing any affirmative defences relied on.

7 Civil pecuniary penalties are consistent with trans-Tasman harmonisation

7.1 As a result of the significant steps towards trans-Tasman regulatory harmonisation that have taken place in the past decade, it would now be unusual for a regulatory framework to be imposed without regard to equivalent processes, standards, and remedies used in Australia. Many changes have been made with the explicit goal of ensuring that conduct receives similar treatment in either jurisdiction, with the goal of achieving a single common market.[15]

7.2 Any discussion of civil pecuniary penalties must therefore be tempered by that reality. Any alterations to the New Zealand civil pecuniary penalty regime should not impose a significantly higher or lower burden on the regulator or regulated party than the comparable Australian regime. Divergence of regulatory remedies could have unintended consequences that distort investment decisions by regulated firms.

[15] The Commerce (Cartels and Other Matters) Amendment Bill is a recent example.

ANSWERS TO SPECIFIC QUESTIONS:

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

Civil pecuniary penalties are particularly appropriate for commercial or corporate offending, especially where contraventions have some or all of the following features:

(a) The conduct is financially motivated, so that it:

(i) is generally carried out to increase profit (or to avoid cost or loss); or

(ii) arises from insufficient investment in compliance or safety programmes;[16]

(b) The conduct is generally carried out by firms or individuals carrying on business;

(c) The conduct is either:

(i) not sufficiently culpable to justify the imposition of criminal liability; or

(ii) is culpable on some occasions or in some circumstances, but not others, such that flexibility is appropriate;

(d) The conduct is likely to cause economic harm to markets or communities as a whole that is not adequately deterred by civil damages claims, usually because:

(i) this harm may not be readily attributable to one individual; and/or

(ii) the harm to individuals or firms is likely to be difficult to quantify; and/or

(iii) the total level of harm to any individual or firm is below the significant costs involved in bringing a civil proceeding.

Where these features are present, pecuniary penalties are likely to be more apt than criminal sanctions to punish and deter.

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

Civil penalties can appropriately be used for regulatory offences where there is currently a risk that an economically rational actor could conclude that the risk of criminal sanction is outweighed by the financial gain from offending, whether that gain is a direct financial benefit or arises from reduced investment in appropriate compliance programmes.

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

Civil pecuniary penalties are more apt to deal with commercial or corporate offending. Offending without the features set out in response to question 1 above is likely to be less suitable for punishment by civil pecuniary penalties.

[16] This factor may be of particular relevance where pecuniary penalties arise from contraventions comparable to strict liability, such as under anti-money laundering legislation (s 78, Anti-Money Laundering and Countering Financing of Terrorism Act 2009) or environmental and biosecurity regulation (ss 53 and 154H, Biosecurity Act 1993; s 124B Hazardous Substances and New Organisms Act 1996).

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

Yes. We agree that, for clarity, statutory provisions could usefully make clear the civil nature of proceedings seeking civil pecuniary penalties, including the standard and burden of proof.

If similar provisions are being inserted into an existing framework, we consider that it would be useful for the statutory provision to make clear that the clarification is for the avoidance of doubt. This would avoid any confusion, or any suggestion that it is intended to represent a change to the current procedural treatment of claims for civil pecuniary penalties.[17] This comment is of general application, and applies equally to question 5, and other issues for which a statutory restatement is under consideration.

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

Yes. The appropriate standard of proof for civil pecuniary penalties is the conventional civil standard of the balance of probabilities. This reflects the civil nature of the penalties and the underlying proceedings. In practical terms, the civil standard is also appropriate to reflect the standard applied to compensation orders or ancillary relief sought in the same proceeding by the regulator or injured parties.[18]

In our experience, the courts are accustomed to adapting the civil standard of proof as appropriate in the circumstances, including where claims concern serious allegations such as fraud. In *Amaltal v Maruha*,[19] for example, Hammond J for the Court of Appeal explained the application of the civil standard to a claim based on the tort of deceit. We therefore question the need for statutory provisions containing a list of mandatory (rather than permissible) relevant considerations as is contained in s 140 of the Evidence Act 1995 (Cth).

Civil pecuniary penalties do not give rise to the core concerns of criminal procedure: the risk of deprivation of liberty and the stigma of criminal conviction. Accordingly, the criminal standard is inappropriate. In our view, a higher standard of proof would largely remove the "civil" nature of the penalty.

(a) It would impose significantly greater costs in both investigating and prosecuting prohibited conduct. It would mean the Court could not then deal with penalties at the same time as other civil remedies such as applications for an injunction, declaration or damages.

(b) A criminal standard would put New Zealand at odds with comparable Australian regulatory regimes.

(c) If a criminal standard were imposed, it is difficult to see what role such "civil" pecuniary penalties would play in the regulatory environment.

(d) Those enforcing regulatory frameworks would be more likely to use other regulatory tools, which could see both under deterrence (if lesser options were preferred) or over deterrence (if more criminal proceedings resulted).

[17] These issues are alluded to in the Issues Paper, paragraph 6.5.

[18] One example of private compensation claims and a regulator's claims for civil pecuniary penalties being case managed together is *Commerce Commission v Cards NZ Ltd (No 2)* (2009) 19 PRNZ 748 (HC) at [1].

[19] See *Amaltal Corp Ltd v Maruha Corp* [2007] 1 NZLR 608 (CA) at [69]-[71].

(e) Those designing regulatory frameworks would be likely to revert to the use of criminal offence provisions, including strict liability offences and increased levels of fines, creating a wider sphere of criminal liability than would otherwise be required.

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

Yes, although this may not be necessary. The allocation of the burden of proof is sufficiently clear in existing civil pecuniary penalty provisions.

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

No. Privilege is an exception to the general admissibility rules, and should not be expanded unnecessarily. As noted above, civil pecuniary penalties do not give rise to the same jeopardy as criminal proceedings (imprisonment; stigma of conviction). They do not therefore warrant additional protections.

The reintroduction of "penalty privilege" would also be likely to cause significant practical difficulties. The recent trend is to introduce civil pecuniary penalty provisions alongside provisions enabling compensation for loss in relation to the same breach,[20] and are often enacted precisely because private actions for compensation are uneconomic or impractical. The reintroduction of "penalty privilege" would be likely to further impair the ability of private plaintiffs to pursue actions for private compensation. Where parallel provisions exist, a substantial proportion of the evidence relevant to a civil claim would be equally relevant to civil pecuniary penalties, and would potentially be protected by "penalty privilege".

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

Under the courts' current case management powers, we would typically expect that civil proceedings would be stayed pending the resolution of overlapping criminal proceedings, although this is not always the case, particularly as s 405 of the Crimes Act provides:

> No civil remedy for any act or omission shall be suspended by reason that such act or omission amounts to an offence.

In some situations, a stay of civil proceedings might not be appropriate. For example, in a number of the recent finance company prosecutions commenced by the FMA, civil pecuniary penalty proceedings were agreed to be stayed pending the outcome of simultaneously commenced criminal proceedings. However, the High Court declined an application by the Nathans Finance directors to stay civil proceedings brought against them by the receivers pending the outcome of the criminal prosecution.[21]

It would therefore be appropriate for the courts to retain some discretion. For example, there may be grounds to stay a criminal rather than civil proceeding, or only part of a civil proceeding, where:

(a) there is limited overlap between the criminal and civil proceedings, for example where: (i) only one of many civil defendants is facing criminal charges, or (ii) where the alleged criminal conduct is a small part of the civil proceeding;

[20] See for example ss 80 and 82, Commerce Act 1986; s 56, Securities Act 1978.

[21] *Nathans Finance Ltd (in Rec) v Doolan* HC Auckland CIV-2010-404-2360, 15 October 2010. This was not a pecuniary penalty proceeding.

(b) the civil proceedings are significantly more advanced;

(c) the civil proceedings seek additional relief in the public interest, such as compensation orders or banning orders; and/or

(d) civil proceedings brought by the regulator are being case managed together with actions by private plaintiffs.

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

No. See answer to question 8 above.

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

We understand this question to relate to evidence adduced *by the defendant* in civil proceedings. Evidence adduced by the regulator in civil proceedings is likely to be equally admissible in a criminal prosecution.

The existing evidential rules in criminal proceedings, which limit the use of evidence obtained in other proceedings, are likely to provide sufficient protections.

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

Yes, subject to the present scope of protection against double jeopardy.[22] Restrictions on subsequent proceedings would only be appropriate where prior proceedings concerning the same matters have been determined in favour of the defendant on the merits. Fewer if any restrictions are appropriate where charges have been voluntarily withdrawn, or determined on a procedural or technical basis.

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

Yes. As the Issues Paper notes, criminal sanctions may differ markedly from civil pecuniary penalties. In addition, civil pecuniary penalties may incorporate a discount for promised co-operation that does not eventuate, so that additional punishment may be appropriate. The present powers of the courts to prevent oppression or abuse of process are sufficient to prevent unfairness.

The prevention of double punishment raises a particular practical issue in the context of competition law. Anti-competitive agreements contrary to s 27 of the Commerce Act 1986 often operate at several levels. An "overarching agreement" to fix prices may be implemented via a number of specific separate agreements concerning the prices to be applied at particular times, or to particular sub-markets.[23] It would be undesirable to permit a criminal or civil sanction for one of these specific agreements to prevent criminal proceedings for more culpable "overarching" conduct.

[22] *Daniels v Thompson* [1998] 3 NZLR 22 (CA). Affirmed *W v W* [1999] 2 NZLR 1 (PC).

[23] Separate overarching and specific agreements have been alleged in *Visy*, *Koppers Arch*, and the "Air Cargo" litigation.

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

We agree with the content of this statement, but question whether it needs to be expressly reiterated in legislation in view of the existing protections against double jeopardy.[24]

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

There may be exceptional circumstances where subsequent pecuniary penalty proceedings may be appropriate. This is adequately dealt with by the existing protections against double jeopardy.

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

This is likely to be unnecessary.[25] The existing authorities on civil pecuniary penalties already emphasise the importance of the totality principle in setting penalties.[26] It is also currently provided for in some statutes, for example s 57C of the Securities Act 1978.

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

Our experience is that the courts are already conscious of other sanctions imposed on a particular defendant in relation to contravening conduct. Some caution is appropriate, however, where the different sanctions serve different objectives. For example, compensation orders may be limited to loss suffered, rather than punishment. Similarly, management bans will be focused on the protection of the public rather than punishment per se. Where the different sanctions arise from successive proceedings brought under different regulations, these are best dealt with through the rules on double jeopardy, abuse of process and the totality principle.

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

The principles relating to the same conduct are already well understood in both the civil sphere (res judicata; abuse of process due to collateral attack) and criminal sphere (double jeopardy; the totality principle). These existing principles are likely to provide sufficient guidance.

---

[24] *Daniels v Thompson* [1998] 3 NZLR 22 (CA). See also s 65F of the Securities Act 1978, which prevents the imposition of both a fine and a pecuniary penalty for the same conduct

[25] For completeness, we note that this issue does not arise in relation to the current versions of ss 27 and 30 of the Commerce Act, as suggested in the Issues Paper (paragraph 6.117). Section 30 is a deeming provision, which deems particular elements of s 27 (the SLC) satisfied in particular circumstances (a price-fixing agreement). Section 30 is not an operative provision, so that cartels are prosecuted under s 27 "via s 30". This is likely to change on enactment of the Commerce (Cartels and Other Matters) Amendment Bill.

[26] *Commerce Commission v Singapore Airlines Cargo Pty Ltd* [2012] NZHC 3583 at [50]; *Commerce Commission v Deutsche Bahn AG* HC Auckland CIV-2010-404-5479, 13 June 2011 at [39].

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

In practice similarity of conduct is already adequately dealt with by the courts through the application of the totality principle.

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

Yes. In our view it is generally desirable for regulators to produce guidance on the exercise of their powers as it improves business certainty for relatively little cost. An example of best practice is provided by the Commerce Commission's *Enforcement Response Guidelines*. Where criminal sanctions are used, the *Prosecution Guidelines* will of course apply.

Ultimately, however, the decisions made by enforcement bodies on what enforcement option to use in a specific case amount to the exercise of prosecutorial discretion. We would be concerned with any suggestion that this discretion should be fettered by reference to such guidelines.

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

We agree. Civil pecuniary penalties may be used in a wide variety of different regulatory regimes where different considerations are appropriate.

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

The elements of most civil pecuniary penalties are already sufficiently clear. However, a non-exhaustive list of permissible considerations might be useful in new pecuniary penalty regimes.

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

(a) there is an overwhelming national interest in using them as an incentive to prevent certain behaviour occurring, regardless of fault; and

(b) there is a cogent reason in the particular circumstances for precluding a defence of total absence of fault?

Yes. We agree that such guidance would be useful and appropriate.

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

The law is currently less clear than it could be in relation to the required mental state for accessory liability under s 83 of the Commerce Act (and, by extension, s 80).

In the *NZ Bus* case, the High Court followed relevant Australian authorities, and held that an accessory is liable only if its participation was intentionally aimed at the commission of the acts that form the principal's contravention, and had actual knowledge of the essential facts

that amount to a contravention.[27] On appeal, the Court of Appeal allowed an appeal by the Waddell defendants, but was divided as to its reasons. Hammond J suggested a "dishonest participation" test, whereas Arnold J suggested "knowledge of a real risk of contravention" was sufficient.[28] The Supreme Court declined the Commission's application for leave to appeal.[29]

In view of the conflicting dicta in *NZ Bus*, the knowledge requirement for accessory liability could usefully be clarified.

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

While such guidance may be useful, we are not aware of any difficulties arising in this area. At present, there does not appear to be a pressing need for additional guidance.

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

While such guidance may be useful, we are not aware of any difficulties arising in this area. At present, there does not appear to be a pressing need for additional guidance.

26 Do you agree that any penalty:

(a) that involves substantial maximum financial penalties;

(b) that is imposed by the High Court after a civil trial, according to the rules of civil procedure and evidence;

(c) where liability is established on the civil standard of proof;

(d) where payment of the penalty is enforced in the civil courts, as a debt due to the Crown; and

(e) where neither imprisonment nor criminal conviction can result;

should be referred to in legislation as a "civil pecuniary penalty"?

Yes. We agree with the definition proposed in the Issues Paper. However, the qualification "substantial" (in relation to maximum penalties) is imprecise, and may fail to capture any future civil penalties for less culpable criminal conduct. The phrase "substantial maximum financial penalties" should be clarified.

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

We agree that caution is appropriate.

[27] *Commerce Commission v New Zealand Bus Ltd* (2006) 11 TCLR 679 (HC) at [224] – [239].
[28] *New Zealand Bus Ltd v Commerce Commission* [2007] NZCA 502, [2008] 3 NZLR 433 at [110] – [161] per Hammond J; [259] – [267] per Arnold J. Wilson J agreed with both judgments.
[29] *Commerce Commission v Infratil Ltd* [2008] NZSC 73.

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

Yes. The principled early resolution of civil pecuniary penalty proceedings saves the time and resources of private litigants, regulators and the justice system. We respectfully agree with the comments of Rodney Hansen J in *Commerce Commission v Alstom* that there is "significant public benefit" when corporates acknowledge wrongdoing, thereby avoiding time-consuming and costly investigation and litigation.[30] These comments are at least as relevant to settlements prior to filing.

We agree that regulators should be able to reach an agreed resolution with contravening parties prior to commencement of proceedings. Where pecuniary penalties are agreed, court consent will still be necessary. Where the settlement involves the payment of compensation to injured parties, court approval is unlikely to be necessary. We agree that it will often be appropriate for a regulator to be empowered to accept enforceable undertakings. The key concern is that settlements take place on a transparent and principled basis.[31]

In the case of settlements of existing proceedings, this will be a matter for the Court to determine in the circumstances of each case. In practice, agreed submissions in relation to civil pecuniary penalties involve the disclosure of these matters. Generally the Court will require the agreed (or contested) circumstances to be put before the Court so that it can confirm the penalty is one that it could have imposed. We consider this to be appropriate.

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

See answer to question 28 above.

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

The availability of guidelines may be helpful. Significant guidance is in any case provided by model litigant obligations, and by analogy with the *Prosecution Guidelines*.

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

Several statutory regimes currently permit individuals to seek orders with a penal element, such as exemplary damages under the Commerce Act 1986 (s 80A), statutory damages under the Credit Contracts and Consumer Finance Act 2003 (ss 88 and 89) and orders to forfeit dividends or shares under the Securities Markets Act 1988 (ss 42ZE and 42ZF). In the circumstances, there is likely to be limited need for individuals to seek pecuniary penalties.

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

Yes. In our view a declaration of contravention may be most useful where that declaration can be used by a third party to obtain relief from the Court. This reduces the risk of the Court being asked to rule on the same matters twice, and arriving at potentially different results.

---

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

[31] The Issues Paper refers to chapter 16 of the *Prosecution Guidelines*. We understand that this chapter is currently under review.

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

(a) should reflect the worst class of case in each particular category;

(b) 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;

(c) should balance the promotion of compliant behaviour with ensuring that business remains willing to enter the market and/or take sensible commercial risks.

We agree with these principles generally. Lists of relevant factors may provide useful albeit non-exhaustive guidance to the courts. Additional factors may be relevant depending on the nature of the statutory regime and the conduct in question. Additional factors have been considered in the context of civil pecuniary penalties under s 80 of the Commerce Act.[32]

In addition, maximum penalties must be set sufficiently high to ensure that penalties more than disgorge any potential gain caused by the conduct, irrespective of the size or class of the participants. The level of penalties should be sufficient to ensure that it is never an economically rational decision to deliberately contravene the relevant law.

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

Possibly. Maximum civil pecuniary penalties may be higher than maximum fines to reflect the additional stigma inherent in a fine and criminal conviction. We are not aware of the operation of any "perverse incentive" to prefer civil pecuniary penalty proceedings. On the contrary, in our experience regulators approach enforcement alternatives in a principled and appropriate manner.

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

The appropriate threshold for imposing penalties will depend on a variety of matters, including whether fault is required to commit a contravention and whether penalties are imposed on individuals and/or accessories in addition to principal contraveners.

Guidance is only likely to be necessary where a statutory regime contemplates a different test for civil pecuniary penalties than simply a breach of a substantive provision.

36 Are there difficulties in providing for a "threshold" of seriousness as in the Takeovers Act 1993?

We make no comment on the operation of the Takeovers Act, but a materiality threshold could be difficult to apply under other statutory regimes.

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

Guidance is currently available from existing penalty decisions under regimes such as the Commerce Act, as well as analogous principles under the Sentencing Act 2002. Additional

[32] *Telecom Corp of NZ Ltd v Commerce Commission* [2012] NZCA 344 at [13]; *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) at [19].

guidance in the form of non-exhaustive lists of permissible considerations may in some cases be helpful.

Our experience is that the courts have generally given careful consideration to an appropriate range of relevant factors. Where existing penalty regimes have an established body of relevant authorities, caution may be appropriate before legislative amendment that may give rise to new uncertainties.

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

The relevance of different factors may depend on the particular context. In *Data Tails*, the Court of Appeal noted a number of factors relevant to the assessment of civil pecuniary penalties under s 80 of the Commerce Act.[33]

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

Criminal sentencing practice may provide a useful analogy, but should not be applied uncritically. While some of the purposes and principles of sentencing[34] may also have weight in civil pecuniary penalty orders (eg, deterrence), others are less likely to be relevant (eg, rehabilitation) or applicable only by analogy (eg, remorse).

For example, in Commerce Act cases some substantial discounts have been conferred for early admissions of responsibility and ongoing co-operation. The courts have noted the analogous sentencing decision in *Hessell v R*,[35] but explained that the analogy can not be taken too far.[36] We agree.

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

Yes.

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

No, except where a penalty is subject to a distinct limitation period, or where it is necessary to clarify that the Limitation Act 2010 applies.

The Limitation Act is intended to simplify and clarify the law on limitation.[37] The provisions applicable to money claims are simple and clear. Civil pecuniary penalties are appropriately assimilated to other money claims. Importantly, the new provisions incorporate a "late knowledge period" in a manner that reflects the 2001 amendments to the Commerce Act.

We disagree with the enactment of different limitation provisions unless they are necessary. Different limitation provisions will not be necessary unless there are clear policy-based distinctions justified by a particular statutory regime. Unnecessary ad hoc limitation

[33] *Telecom Corp of NZ Ltd v Commerce Commission* [2012] NZCA 344 at [13]. See also *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) at [18].
[34] See Sentencing Act 2002, ss 7 and 8.
[35] *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.
[36] See for example *Commerce Commission v Qantas Airways Ltd* HC Auckland CIV-2008-404-8366, 11 May 2011 at [61] to [62].
[37] As was made clear in the explanatory note to the Limitation Bill.

provisions risk creating complexity, confusion, inconsistency and anomalies, even within statutes.[38]

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

Yes. Guidance should be available on the circumstances that might justify a separate ad hoc statutory limitation regime, as opposed to the clearer general limitation provisions.

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

Yes. Any additional publication by the Law Commission in this area will itself provide invaluable guidance.

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

We consider that it would provide greater certainty in the long run if all civil pecuniary penalties operated from a similar statutory framework. This will increase legal certainty across all areas.

However, as reflected in our comments above, we consider the certainty benefits must be balanced against the very real risk that statutory reform might undermine the existing body of precedent in New Zealand cases. Further, such reform might introduce inconsistencies between the law of New Zealand and the law of Australia, eliminating another useful source of precedent.

On balance we consider that:

(a) There should not be significant amendments to the Commerce Act, which represents 'best practice' in this area, and has the greatest volume of precedent cases.

(b) In the medium term, certainty could be achieved by amendment of statutory frameworks to align them with the Commerce Act.

(c) In the long term, certainty will be obtained by ensuring the LAC Guidelines provide useful guidance for future policy work and drafting.

[38] There are 17 separate limitation provisions in the Commerce Act alone, as listed in M Sumpter *New Zealand Competition Law and Policy* (2010) at ¶1504.