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10 December 2012

Susan Hall
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Submissions on the Commission’s Issues Paper, Civil Pecuniary Penalties

Introduction

The following submissions are made from my background as Professor of Law at Victoria University of Wellington, a Queen’s Counsel in general practice in Wellington, and my experience as Special Counsel to the Parliamentary Counsel Office, in which capacity I have advised and serviced the Rules Committee for some 7 years. These submissions are, however, made in my personal capacity and do not reflect the views of any other person or body.

Question 3

This asks whether there is any conduct for which civil pecuniary penalties are not suited. Civil pecuniary penalties are not suited to conduct which must be responded to by ordinary criminal process. That, of course, begs the question, unless the conduct which must be so responded to is identified, at least in general categories. At least the following categories can be identified:

- conduct involving dishonesty/fraud;
- conduct causing physical harm;
- conduct involving questions about sexual morality and the like;
- conduct involving secret commissions, bribery and corruption;
- conduct where the question of liability is entirely or almost entirely dependent upon the memory and reliability of witnesses giving oral evidence;
- conduct where there is obviously a need for “criminal discovery”;
- conduct which is appropriate for trial by jury having regard to the arguments for trial by jury in criminal cases which are currently accepted, ie, penalty proceedings are always inappropriate when trial by jury is appropriate as penalty proceedings must, in principle, be heard by a Judge alone.
Procedure and evidential rules

My answer to question 4 is “yes” but the word “usual” should be deleted. I can see no basis for alteration of the ordinary rule about the standard of proof in civil proceedings. If criminal conduct is alleged in civil proceedings for a penalty the question of the standard of proof to be applied is well settled by existing case law and does not need to be revisited by any statutory provision. In my opinion, however, the “broad instruction” referred to in the Commission’s question 4 should, as a matter of standard practice when a penalty provision is included, contain express provisions about (a) the admissibility of the findings of the High Court in subsequent proceedings involving the same conduct and very possibly involving different parties eg, claimants for compensation, and (b) the effect of the court’s formal decision as an ordinary decision of the High Court, “in all respects including the doctrines of estoppel and abuse of process”. It is highly arguable whether the rules governing estoppels are “rules of evidence”. The policy should be to reduce the uncertainty about the effect of the High Court’s decision on still further litigation to the very minimum.

Question 5

This asks whether civil pecuniary penalty statutes should contain a uniform standard of proof provision, and if so what it should contain. Uniformity should not be insisted upon. On the other hand there should be no unjustifiable inconsistency. Policy-makers should be instructed to pay careful attention to what should go into a particular statute creating penalty procedure. With respect, the Commission’s discussion at paragraph 6.15-6.36 is too abstract. The precise standard of proof must depend upon the particular subject matter. The policy should be that an unduly high standard of proof should never be imposed on the plaintiff when the existence of the offending behaviour is primarily within the knowledge of the defendant, and it depends on inferences to be drawn from that conduct, in the absence of admissions. Thus, whether a cartel existed is often merely a probable inference from overt action in the market. That action is probably explicable in some cases only because of a prior agreement between companies X and Y. The criminal standard of proof would be likely to result in such defendants being exonerated.

I refer to paragraph 6.34. I do not favour stating that the civil pecuniary penalties in a particular area should be subject to “a strict and inflexible application of the civil standard of proof”. The flexibility is already there in the standards, and in any event I know of no statutory provision which instructs the court to make an “inflexible application” of a standard of proof. I have not closely examined the Australian courts’ decisions, but if Comino is right and the standard of proof effectively implemented in the Australian courts closely resembles “beyond reasonable doubt” I deplore that development. But until there is evidence of a parallel development in New Zealand. I think that regulatory effectiveness is adequately protected by mandating a civil standard of proof simpliciter.

Question 6

I agree that all civil pecuniary penalty provisions should be drafted to maximise certainty over the allocation of the burden of proof. Unnecessary appeals will be the result of an absence of clarity. Each statute should in my view refer to the “legal burden of proof”, not simply to “burden of proof”.
I think this is very important when the plaintiff in penalty proceedings has to prove the defendant’s “purpose” or “intention”. The burden of proving that it did not have an objectionable purpose or intent must lie on the defendant in such cases. The distinction between “legal burden of proof” and “evidential burden” (which it is clear is not a burden of proof) is sufficiently established by the authorities as a clear distinction which can be built on accordingly by Parliament.

**Question 7**

**Privilege and non-criminal penalties**

I strongly agree with the concerns summarised in the Commission’s paragraph 6.85. Civil pecuniary penalty statutes should not recognise a privilege against self-exposure to a non-criminal penalty. To do so would in all probability defeat the practical application of the particular Act. The important thing to remember is the effect that such a privilege would have upon the agency’s pre-trial investigations. Imagine the position of a Commerce Commission investigator, if such a privilege in any form existed. Simple investigations would be radically hobbled. The investigator interviews the company secretary of a company under suspicion of unlawful price fixing. To the simple question “was there a meeting of the directors on 1 June”? the legitimate answer would be “I assert privilege”. To the question “you say that there was no discussion between your company and the company Z before prices were simultaneously raised. Were there any written communications between the 2 companies?” the legitimate answer would be the same. The Commission’s investigation will either be frustrated, or will have to be conducted through different, quite probably more costly, channels.

**Questions 8 to 14**

These are a series of questions posed by the Commission relating to proceedings subsequent to the primary penalty proceeding. Rather than answer them individually, I advocate the adoption of a single principle which renders the Commission’s complex questions otiose. That principle is that “parallel criminal offences” should never be provided in statutes. In every case Parliament should elect between imposing a penalty for conduct, and prosecuting that very same conduct by the very same person as a criminal offence. In my view double jeopardy by statute is intolerable. The choice between penalty and criminal prosecution is of course difficult but it must be made in the case of each category of conduct by Parliament. I emphasise that my principle would never preclude proceeding against a company for civil penalty, and against the company’s managing director for a criminal offence, relying in each case on the same conduct. That may be perfectly appropriate, depending on the circumstances. Further, if the conduct is not the same, eg, if the civil penalty provision requires no proof of dishonest intention or purpose, and a criminal prosecution would so require, that would not infringe the principle. It is the very same conduct, including mental elements, that must not form the basis of 2 distinct processes against the same person or body corporate.

**Questions 21 and 22**

I need not repeat any of the Commission’s discussion and answer “Yes” to both questions.
Paragraph 6.158

It is, with respect, incorrect to say that inducing breach of contract is an “ancillary liability”. It is a primary tortious liability.

Questions 24 and 25 - Apportionment of liability

I answer question 24 “No”. Basically, practical guidance cannot be provided. There is too huge a variety of factual situations to be covered. If any guidance were provided, it could additionally lead to interpretative problems, generating unprofitable legal argument, and would almost certainly leave significant lacunae for which there was no guidance. I certainly agree that both a body corporate and its offices should be susceptible to being made to pay penalties, but surely the justifiability of a particular apportionment depends upon the precise functions entrusted to the officer and the precise relationship with others including the board of directors in the particular case. These should be a matter for evidence and finding in the penalty proceedings, and the Judge will in practice form a clear view, probably, about whether a particular managing director tended to manipulate his board, or whether a company officer never took any important action without a specific instruction from the Board. It will be fallacious, in my opinion to assume, or to make it the basis of a legislative direction, that the distinction between superintendence of policy and operational decisions was clear-cut in the case of all New Zealand corporations.

Questions 26 – Terminology

When a penalty is imposed the word “penalty” must always be used. However, I see nothing wrong with simply using “civil penalty”. I do not think that the word “pecuniary” is necessary or always appropriate. The general category should be “civil penalty”. This would embrace the great majority of cases where the penalties are wholly pecuniary, but would also be apt to cover cases where the Judge is authorised to impose a management ban or any kind of suspension from trading or any other non-pecuniary sanction.

Question 7 – Non-judicial bodies

I agree that the imposition of variable monetary penalties by non-judicial bodies should be discouraged. They should be imposed directly and solely by the High Court. In the present commercial environment I believe that settlements of the amount of a penalty between the Commission and the defendant, following High Court approval, should be published either on the agency’s website, or in the media, with sufficient detail to enable the public to identify the conduct which has been made the subject of the penalty, and the agency’s characterisation of that conduct in terms of seriousness and harm. There would be no need to enter into any detail.

Question 30 – Policy towards negotiations

My answer to question 30 is “No”. Making public the agency’s policy for approaching settlement negotiations would have dangers. It would probably lead to interpretative difficulties because of the general language used in the policy, and it would open the door for arguments like “you cannot do
that because it is departing from the agency’s advertised policy”. In other words an additional layer of complexity should not be imposed by general formulae upon what is probably a complex factual situation in the first place.

**Question 31 – Individuals**

Individuals should never be able to commence civil pecuniary penalty proceedings. This is vexatious and a wasteful use of the court’s time dealing with such proceedings, which would almost always be dismissed. Individuals simply do not have the necessary statutory powers to investigate unlawful corporate behaviour successfully.

**Question 32 – Declarations of contravention**

All regimes should provide for a declaration of contravention. I have reflected on whether such declarations will usually be of practical assistance to anybody. In my view, when a particular regime provides for a declaration of contravention, it should also provide that along with it the court has the discretion to declare its formal conclusions, eg, “the actions of the defendants A, B, and C in 2012 show that they were parties to an unlawful price-fixing agreement in relation to the prices of [products named]”. Compensation will not always be available simply because there has been a breach of, for example, the HOSNI Act. Compensation would not be available unless the particular statute provided for it, or the tort of breach of statutory duty is available (often the court will hold that it is not available). The general conclusions reached by the High Court in finding that there is a contravention will likely be of appreciably greater benefit to subsequent claimants than a bare declaration of contravention.

**Question 36 – Threshold of seriousness**

Providing a threshold of seriousness as in the Takeovers Act 1993 may be appropriate in that case or in some other cases. The question is too context-dependent to permit a general answer.

**Questions 35, 37, 38, and 39**

Civil pecuniary penalty statutes should include guidance for the courts as to the setting of the level of a penalty. There should not be 2 questions, each with a list of factors stipulated, ie, whether and what? There should be a simple list of factors answering both questions. There should be a penalty every time the necessary conditions are proved. In my view there are some very obvious questions which will lead the courts to flounder if they are not expressly dealt with. For example, previous breaches should usually be expressly stated as being able to be taken into account. In every case it would seem appropriate to include paragraphs (a), (c), and (d) of s. 90(4) of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009. To that should no doubt be added “any other matters the court considers relevant”.

**Question 39 – Criminal sentencing practice**

The courts should draw on criminal sentencing practice when determining the quantum of a civil penalty only if dissatisfied that the different purposes of the 2 systems does not make that practice irrelevant or a dangerous tutor. I think that general guidance should provide that the court “should
draw on criminal sentencing practice only when satisfied that the different purposes of criminal prosecution and proceedings for a civil penalty do not render criminal sentencing practice irrelevant”.

**Question – Limitation**

I strongly agree with the contents of the Commission’s paragraph 7.103. In answer to question 41, I agree that civil pecuniary penalty statutes should deal expressly with the issue of limitation. This should be done on a regime-by-regime basis. In answer to question 42 I agree that guidance should be provided to policy-makers on the matters influencing the choice of periods but in general terms only, eg, the first sentence in the Commission’s paragraph 7.105.

**Form**

This is dealt with in paragraph 8.7 of the Commission’s Issues Paper. I agree that the LAC Guidelines are an ideal vehicle for the guidance. I am not surprised that the Commonwealth government has not formerly responded to the ALRC’s recommendation of a regulatory contravention statute. No such similar statute should be recommended in New Zealand. Such a statute would constitute yet another set of standards which had to be adverted to by policy-makers and drafters, and many of them would have to be negative or varied in particular cases. Apart from that, it would open up scope for technical arguments, especially by meritless defendants, on the *vires* of particular provisions, and even more probably on whether uniquely tailored provisions were intended to vary the general provisions of the statute.

I answer your question 43 “Yes”. As to question 44(a), legislation should be recommended to amend existing civil pecuniary penalty regimes to ensure that they are principled and consistent only if the contrariness to sound principle is marked and serious. The emphasis should be on the greater attention to the issues in the Commission’s valuable paper when enacting statutes in the future that contain civil penalty provisions.

In answer to question 44(b) I answer: “very definitely, no”. In particular, no such set of standard pecuniary statutory provisions should appear in the High Court Rules. It is not the function of the High Court Rules to lay down “standard provisions” which are open to be altered by specific statutes. It is the task of specific statutes to indicate, if this is desired, in what respects, if any, the ordinary High Court Rules should be altered or dispensed with to facilitate court enforcement of legal obligations imposed by the particular statute.
12 February 2013

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Law relating to civil penalties

Thank you for the opportunity to comment on the Law Commission’s Civil Pecuniary Penalties issues paper. This submission has been prepared with the assistance of the New Zealand Law Society’s Civil Litigation and Tribunals Committee.

General comments

The Law Society is concerned that civil penalty regimes could be used in order to make it easier to impose sanctions on persons by removing criminal law protections. It is important to bear in mind that what is involved remains a penalty (the person is being punished for contravention of a particular statute). Punishment can only be justified where an offence has clearly been committed, and that must be the yardstick in any civil penalty regime.

CHAPTER 4 - WHAT CIRCUMSTANCES MIGHT JUSTIFY THE USE OF CIVIL PECUNIARY PENALTIES?

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

The Law Society considers that civil penalty regimes might be appropriate where a regulator is required to bring a civil case in order to establish liability.

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?

The Law Society considers that there are dangers in treating traditional criminal offences as civil matters. Criminal law protections available to defendants should not be lightly removed.

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

The question is not one of particular conduct, but the processes followed by the law. The Law Society considers that civil penalties are likely to be useful only in limited circumstances, and should not become a default regime.
CHAPTER 6 - THE CRITICAL ISSUES

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”?

No. The penalty aspect must not be obscured. A civil penalty should not be imposed on a balance of probabilities, and the protections available to criminal defendants ought to be available.

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

Yes. Statutes should provide that no civil penalty may be imposed unless the relevant requirements have been established beyond reasonable doubt.

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

Yes. It is of the utmost importance that the burden of proof be clearly stated.

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

Yes. Privilege against exposure to any penalty should be available to the person in jeopardy. The Evidence Act 2006 should also be amended to reflect a general privilege of this nature.

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

No. Civil penalty proceedings should be seen as attracting the same double jeopardy regime as criminal proceedings. The regulator should be required to elect which course to pursue rather than keeping its options open to the prejudice of the person in jeopardy.

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

Assuming that it is possible for both proceedings to be commenced (which the Law Society considers to be wrong in principle) then there ought to be a provision for mandatory stay.

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

The Law Society does not agree that it should be permissible to bring both types of proceedings. If this option is to be pursued, then the evidence should not be admissible.

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

If criminal proceedings have failed, that should be the end of the matter. If they have been withdrawn (for example because of a lack of evidence), the matter should be regarded in the same way as bringing a fresh prosecution.
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?

No. The two proceedings should be regarded as equivalent for the purposes of double jeopardy rules.

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?

Yes. See question 12.

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?

No. There can be no situation justifying a duplication of penalties through separate criminal and civil processes. A regulator is properly placed to assess the most appropriate course of action to follow (criminal or civil) having regard to the nature of the alleged breach.

Where a criminal prosecution is pursued and a sanction has been imposed, no civil sanction should follow. Even where the civil pecuniary penalty serves some auxiliary, non-punitive purpose (such as compensation or rectification of damage) this does not of itself justify a duplication of penalty, particularly as the criminal process is able to address compensatory and/or restitutionary remedies.

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?

Yes. While there is no reason to restrict the ability of a regulator to pursue multiple proceedings based on particular conduct, where the act or course of conduct might lead to findings of multiple breaches, it is important that there be clear guidelines as to the consequences of a finding of multiple breaches arising out of the same conduct.

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?

Yes. Where a regime provides for the making of multiple orders, it is important that the overall cumulative effect of those orders remains proportionate to the alleged breach; that is a totality approach to multiple penalties for the same breach. This is particularly important where protective measures such as a management ban have a punitive (usually financial) consequence and, when combined with further financially punitive sanctions, might otherwise lead to a disproportionately harsh penalty.

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

While recognising the desirability of clear drafting of penalty provisions, it is difficult to see the scope for drafting greater clarity in relation to “the same conduct” provisions. The determination of “the same conduct” offending will depend on the particular evidence and entire factual matrix of each case.

It is desirable, however, that statutes recognise that multiple breaches may arise out of “the same conduct” and that the court be empowered to mitigate the imposition of multiple penalties that might otherwise follow. Where there is a dispute over “the same conduct”, an important issue is who bears
the onus of proving “the same conduct”, and this ought to be a matter expressly dealt with by the relevant statute.

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?

Where there is sufficient similarity of conduct, it should be dealt with through a statutory bar.

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

Yes. The relationship between criminal and civil sanctions, combined with the apparent discretion on the part of the regulator (subject to the current Solicitor-General’s Prosecution Guidelines) to pursue either criminal or civil sanctions where available, makes it highly desirable that there be a consistent and transparent policy guiding such elections.

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?

Yes. The hybrid nature of such penalties means that it is inevitable there will be an overlap between civil pecuniary penalties and criminal sanction. Accordingly, there is no reason why a civil pecuniary penalty could not be imposed for a contravention where some moral blameworthiness is inherent. Ultimately, if a civil 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.

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

Yes. The difficulties that have arisen in the absence of these express provisions are well known. This situation need not be repeated. 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.

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?

Guidelines should be in place for policy makers about such decisions. Absolute liability should only be contemplated in very rare circumstances. Those circumstances are appropriately summed up in (a) and (b) above.

This approach also underlines the deterrent nature of civil pecuniary penalties, so that it is very rare that such penalties are imposed on an absolute liability basis. Indeed, in such instances only
a relatively small monetary penalty would be appropriate, given the absence of fault. If a significant penalty is considered desirable, it is likely that liability would be fault-based.

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

Yes. It is very important that there be a consistent approach in this area. In the civil jurisdiction, while there are statements of principle, the application is not always straightforward. There remains a degree of dissatisfaction with directors or other individuals carrying personal liability, absent fraud and reckless trading.

With civil pecuniary penalties it is important that individuals are aware of potential personal liability and the circumstances where that can arise. The law has developed to the extent that it should be possible to clearly set out when ancillary liability is to be imposed. The purpose of civil pecuniary penalties is to provide a deterrent as to future conduct. The penalties are essentially punitive or exemplary in their nature. They have the potential to harm reputation. An explicit provision in itself puts persons who could be the subject of such ancillary liability on notice, and also ensures that such persons are not able to claim a lack of awareness of their potential liability.

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?

Yes. Consideration should be given to the principles in the Sentencing Act 2002. There are difficult issues when this situation arises including proportionality and overall quantum. Essentially the one organisation that has undertaken the conduct is subject to the quantum of the penalty. The guidelines would be just that, leaving the court with the ability to deal with the particular circumstances as it deems appropriate.

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?

Yes. Such guidelines are clearly desirable for consistency and certainty.

CHAPTER 7 - OTHER ELEMENTS OF LEGISLATIVE DESIGN

26. Do you agree that any penalty:

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

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

Yes. Consistent use of this term for this type of penalty across different legislation would be helpful. However, the Law Society does not consider that punishment should be imposed on the balance of probabilities.
27. **Do you agree that the imposition of variable monetary penalties by non-judicial bodies should be discouraged?**

Yes. Such penalties should only be imposed where there is a robust justification, for example based on the technical expertise of the relevant body and/or a particular need for a fast and efficient enforcement system.

We also agree that a statutory requirement for at least one member of the body to have legal expertise could be considered as a potentially desirable option, but it may not be appropriate in all cases (for example, if this would detract from the specialist/technical nature of the relevant body). In such cases the same objective could be fulfilled by ensuring the panel members have adequate training and/or access to legal advice before making determinations. The maximum size of the penalty should also be limited in most cases, and rights of appeal and/or review should be provided.

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

Yes. The ability to settle saves time and money by encouraging engagement between the parties at an early stage and avoiding what, in many cases, would be extremely lengthy trials. It is one of the main benefits of having civil pecuniary penalties.

We note that “settlements” need to involve an admission of liability. That seems implicit in the Commission’s paper but is perhaps best made explicit. We would think it problematic if defendants can deny liability (likely for public relations purposes) while paying money to settle, on the pretence that they are doing so only to save money in defending.

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?**

Yes, settlements should be published to provide transparency, ensure accountability of the regulators, as well as to ensure consistency, and to provide guidance as to likely future enforcement (which also assists with deterrence).

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

Yes, publication of enforcement policies also assists with transparency, accountability, consistency, and deterrence, although any such policies are inevitably in very general terms to allow flexibility to suit individual cases.

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

As a general rule, this would not be appropriate as it would entail individuals taking on the punishment and deterrence role that properly belongs to the state/regulator. There is a risk that some corporations or individuals would abuse an ability to commence civil pecuniary penalty actions and would conduct such proceedings in an unreasonable or anti-competitive way or to pursue individual goals or grudges. Claims by corporates and individuals should therefore be restricted to civil proceedings to recover loss, where applicable.
32. Should all civil pecuniary penalty regimes provide for a declaration of contravention to be made?

It would be useful to have a consistent approach and for provision to be made for declarations of contravention in regimes where there is the potential for separate damages claims to be made by individuals, as well as civil pecuniary penalty or other proceedings. However, it is doubtful whether this is the case for all civil pecuniary penalty regimes. The issue is probably best considered on a case-by-case basis rather than being a required feature of all civil pecuniary penalty regimes.

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

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

Yes. The Law Society agrees with these principles as general guidelines.

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?

No. It is difficult to see any justification for this, particularly where there is no possible penalty of imprisonment for criminal behaviour (for example, where the defendant is a company).

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

There is no evidence that the courts have had any difficulty in determining when a civil pecuniary penalty is appropriate, but including statutory guidance would probably assist and would potentially make the outcomes more consistent and predictable. Some factors are likely to be common to all civil pecuniary penalty regimes, such as the nature and extent of the contravention and of the loss or damage caused, whereas others may be specific to the particular context.

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

It is difficult to see what such a threshold adds if the courts have discretion in any case whether or not to impose a pecuniary penalty.

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

Yes, such guidance would be helpful to promote consistency of approach, transparency, and predictability of outcomes, which in turn is likely to assist in the negotiation of early settlements.

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 factors set out in paragraph 7.51 of the Issues Paper are likely to be relevant in virtually all cases, with other factors depending on the particular statutory context, such as the purpose of the Act. Any
such list that is included in legislation should be non-exclusive so that the courts are able to take into account any other factors that may not be foreseen or that may be specific to an individual case.

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

There should be overall consistency between criminal sentencing practice and the manner in which the quantum of civil pecuniary penalties is determined, as both involve the imposition of punishment and the same considerations are therefore relevant (for example, the gravity of the conduct, the culpability of the defendant, the maximum penalty, the desirability of consistency, and personal circumstances). However, in the case of pecuniary penalties, regard also needs to be had to the specific goals of the relevant statutory regime, which may give rise to different or additional considerations in some cases.

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?

Yes. The standard provisions of the Limitation Act 2012 are not suitable for most civil pecuniary penalty cases. The limitation period for money claims of six years plus a late knowledge extension of three years is too long for most such cases, having regard to:

- the need for market certainty about whether certain commercial conduct is lawful or not;
- the routine destruction of business records, replacement of IT systems and turnover of staff, all of which place evidence out of reach over the passage of time; and
- the very high level of some civil pecuniary penalties and the impact on businesses and individuals of having such potential liabilities unresolved for long periods of time.

The issue of how limitation periods apply to different potential litigants also needs to be explicitly addressed, for example whether discovery of loss by a regulator affects individual claimants and vice versa.

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

Yes, this would be helpful to ensure that a sensible and balanced approach is taken.

CHAPTER 8 - WHAT FORM SHOULD OUR RECOMMENDATIONS TAKE?

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, an additional chapter in the Legislation Advisory Committee Guidelines would be helpful.

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?
It is not clear that this is necessary, unless specific failings are identified which need to be amended in specific Acts. Otherwise, the focus should be on developing general principles as a guide to future legislation.

The Law Society hopes that the above comments are of assistance to the Law Commission. If you wish to discuss any matters raised in this letter please contact the Civil Litigation and Tribunals Committee convenor, Andrew Beck, through the Committee secretary, Rhyn Visser (phone (04) 463 2962 or email rhyn.visser@lawsociety.org.nz).

Yours sincerely

Jonathan Temm
President
Civil Pecuniary Damages are a topic of particular contention for all companies and individuals in New Zealand. Any change in this area has the potential to affect many people greatly. In this submission I will focus on the types of Civil Pecuniary Penalties awarded in Commercial cases.

The following is a general commentary about the state of the law currently, rather than a direct answer to any of the questions in the Law Commission Review. This is because I felt that in such a wide area of law, it is impossible to state a strong opinion about the concept when your ideas are constrained by narrow questions to answer.

There is no doubt that the legal world is moving towards acceptance and increased use of the civil/criminal hybrid that is the Civil Pecuniary Penalty (CPP). There are grave implications for this future if we do not take definitive steps to strengthen the foundations upon which the future is built. The core principles of the law stipulate that the law be consistent, reliable, well know and safeguarded with robust procedural requirements.

At this point in time, CPPs meet none of these core principle requirements. This is a hallmark of reactionary law which is not suitable to build further upon.

It is my opinion that the New Zealand Government needs to seriously think about the basis on which CPPs are built and that there needs to be dialogue to create a robust policy based on commercial and social considerations, and a definitive structure about when to award CPPs.

There are three main points which should be recognised in this consultation process;

1. An acknowledgement of the strength of punishment caused by civil pecuniary penalties
2. A definitive establishment of the standard of proof needed to award civil pecuniary damages.
3. An appreciation of the necessity of the imposition of regulation and strict structure surrounding the awarding of civil pecuniary penalties

The Strength of Civil Pecuniary Penalties.

CPPs can be detrimental in business and personal spheres, and can be seen to be on par, if not more destructive in the long term, than criminal sanctions. There is no parole for the financial hardship CPPs impose on individuals and companies. There is harm caused to business relationships. There is damage to reputation, and in an industry where deals are based on solid reputation, there is no way to repair the stigma that is caused by CPPs. There are few safeguards involved in CCPs. It can be seen that this is because there is little recognition of the severity, and therefore the belief that there is not a need for safeguards. This is untrue.
The Privilege Against Self Incrimination.

Defendants cannot rely on the Evidence Act\(^1\) to enforce the privilege against self incrimination. It is my strong belief that the privilege against self incrimination should exist during the investigation of civil pecuniary penalty proceedings and during the proceedings themselves in order to preserve the robust structure of the legal system and to uphold the defendant’s basic legal rights. This is necessary as the statutes which impart CPPs do not have sufficient safeguards in them and all have a very inconsistent approach. The privilege against self incrimination exists in criminal cases because of the imbalance of power, and even though it can be argued that there is less of an imbalance of power in civil cases, this is far from the truth. There is nothing to stop an individual from being sentenced to severe civil sanctions, and the fact that the defendant is a company does not mean that they are powerful and able to protect themselves against the state. It is clear that regardless of the fact that many defendants in civil cases are companies it is still necessary to have safeguards for the defendants. When the privilege against self incrimination was removed from civil courts there was not the issue of the severe penalties imposed by CPP, and as the law moves forward, so must the safeguards to protect the citizens. It can be seen that NZBORA does not sufficiently step into the gap left by the privilege against self incrimination and therefore support its reimplementation in cases involving civil pecuniary penalties. Overseas law follows the preservation of this privilege, and if we are so intent on following our neighbouring common law jurisdictions’ lead then this is a further support for the argument that this privilege need to be protected.

Double Jeopardy.

The right to not be tried twice for the same crime is one of the very fundamental rights outlined in NZ BORA. I also strongly support the notion that when there are civil proceedings there should be no scope for criminal proceedings surrounding the same issue and vice versa. CPPs are serious enough on their own, and because of this severity I strongly reject any proposal of the possibility that there be any sort of double jeopardy occurring. There is also the possibility of exemplary damages coming from the criminal courts, and this really throws into relief why there should not be parallel proceedings in the Civil Court, as there is the danger of double monetary penalties.

One response to the problem of double jeopardy in civil and criminal courts is to not criminalise behaviours already covered by civil sanctions. This can be seen in the recent bill to criminalise cartel behaviours. Were this bill to pass and criminalise cartel and other anti-competitive behaviours, the New Zealand court system would face a great challenge in regards to which court would try the behaviour. It is arguable that it would be more advantageous to the Commerce Commission to try anti-competitive behaviour under civil law, as they would get much greater damages out of it, but this then raises the question of why bother criminalising the behaviour in the first place. At present our prisons are already over full and incarcerating an individual costs around $90,936\(^2\) per year, more than twice the average income for a New Zealander. This could strengthen the decision by the Commerce Commission to try people under the civil law in the hopes of getting CPPs to offset costs.

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\(^1\) Evidence Act 2006.

The possibility of double jeopardy highlights the importance of increasing the certainty surrounding the burden of proof standard and the structure surrounding awarding CPPs. CPPs must not be seen as an ‘easy option’ to punish people in the place of criminal sanctions, just because they do not have the same safeguards that criminal proceedings do. If there were to be a proper structure and robust safeguards and procedure surrounding the awarding of CPPs then arguably there would be less likelihood of double jeopardy because civil prosecution would be less attractive if CPPs were harder to award.

The courts must be very clear about what they want to gain out of prosecution. Criminal sanctions punish liberty. Civil sanctions compensate and punish financially. It is my belief that there should be no chance of double jeopardy, and if a case is tried in one court then it should never have the chance to be retried in the other court. The procedure surrounding the decision in which court to prosecute should also have strict guidelines around it, but I do not suggest a definite solution here. Our preferred solution is that if one set of proceedings has been started, the other be stayed, regardless of the outcome of the proceedings.

In conclusion; criminal penalties are still considered the worst sentence that can be awarded, but CPPs are increasing in severity, and accordingly the treatment, structure and burden of proof in imposing civil pecuniary damages should be considered in this light. There needs to be clear recognition that parties to civil proceedings are not always equal, and that regardless of the fact that it is usually larger companies being taken to court, virtue of size alone does not constitute a level playing field. There needs to be the privilege against self incrimination, and a rule against double jeopardy, both of which should be upheld vigorously, in order for justice and equality to be served by the courts.

The need for regulation surrounding the imposition of Civil Pecuniary Damages.

“Where law ends, there tyranny begins.” William Pitt, the Elder
At the moment the imposition of CPPs is arbitrary, at the discretion of the judges, and without proper prescription. There are variances between statutes and between court decisions. There needs to be clear law surrounding the awarding of CPPs and an appreciation of the necessity of the imposition of regulation and strict structure surrounding the awarding of civil pecuniary penalties. Not only does this law need to achieve consistency, it also needs to achieve certainty.

Non Judicial Imposition.

There is no requirement of legal training to impose a CPP. Under the Electricity Act 2010, CPPs of up to $200, 000 may be imposed by a panel of experts with no legal knowledge. I see this as unacceptable, and so variable as to be untenable.

I suggest that CPPs be awarded by judges of the High Court only, and that the High Court must follow a robust procedure when applying them.
In no case should CPPs of any kind be imposed by a regulator. Variable monetary penalties are open to many abuses and lack of procedures, and depending on who imposes them, can open an industry up to allegations of corruption or insider trading. If an industry or the government sees a need to impose a fine for certain behaviour, then the fine should either be a set amount, or it should be a civil court case settled in the High Court and punished by the judiciary with CPPs. The protections inherent in the legal system need to exist in the imposition of a variable fine to protect the vulnerable, and prevent abuses. Also, without public scrutiny there will be no guarantee of justice or consistency of the penalties, again opening the event up to allegations of corruption.

**Maximum Penalty Consistency.**

I also suggest that the current method for setting maximum penalties is weak, and that a process for determining maximum penalties should be determined. This process should be structured to cover all industries, but take into account all factors of the industry the CPPs are dealing with. The maximum penalties should reflect the damage that can be done by breaching the laws in that particular industry. Penalties need to achieve a harmony between the promotion of good behaviour and not being overly prescriptive as to stifle good business decisions. There is the great danger that increasing or changing current laws will result in businesses being too afraid of penalties to take proper commercial risks, and have a deterrent effect on business. This is not desirable at all, and the penalties arrived at have to reflect this. The point of the law is to facilitate business, not stifle it, and this is a very important goal that lawmakers should always remember when broaching any sort of proposed change or consultation.

It is clearly necessary that in today’s business world the bar for CPP should be set quite high, to recognise the damage that business cheating can do, however I recommend that these penalties be set in a consistent way, that they reflect a common policy goal across the board, and that they are set with a thought to the industry standards and the business needs of the area that they are aimed at.

**Methodology of when to apply CPPs.**

There should be guidance contained in any statute with a provision for CPPs as to where to award them, and what factors to take into account when doing so. Again, this method should be consistent across all statutes. As a guide to what issues should be considered when determining whether a CPP is appropriate, the *Securities Trustees and Statutory Supervisors Act 2001* is very useful. Because I support the idea that there should never be double jeopardy, there should be no need to check to see if there have been other penalties imposed on the same conduct.

Presently most CPP statutes list factors that should be taken into account when deciding on the penalty, however I believe that a general standardised code should be created to apply across the board.
The issue surrounding the Civil or Criminal Standard of Proof.

"Better that ten guilty persons escape than that one innocent suffer." Sir William Blackstone. 1765.

One of the major issues clearly visible concerns the commercial standard of proof in civil pecuniary damages.

Because of the strong consequences of a criminal case, the standard of proof is the high standard of ‘beyond reasonable doubt’. However, as demonstrated above, sometimes civil pecuniary penalties can cause as much, if not more, long term damage than criminal sanctions. Therefore it does not seem consistent to award civil pecuniary damages on the ‘balance of probabilities’.

In commercial cases it is often difficult to come up with a strong enough case to successfully convict upon the standard of proof of ‘beyond reasonable doubt’. The very nature of the types of commercial offences which attract civil pecuniary penalties means that the gathering of proof is very difficult and proving any illegal behavior is even more challenging. Commercial crimes usually directly impact a wider group of people than do criminal, and therefore the ease of culpability should reflect the suffering that the crimes cause. This means that in order to convict, it can be argued that it is necessary to have the civil standard of proof.

The counter argument is that civil pecuniary penalties affect the very livelihood of the person or company affected, and their effects arguably last longer than those of criminal sanctions, as once a company’s reputation is gone, it is difficult to overcome this commercially. In today’s world, commercial sanctions can be as destructive, if not more destructive than criminal ones. When applying such a strong punishment, therefore, surely the criminal standard of proof is necessary.

The question; Is it worse to sentence an innocent man than it is to fail to sentence a guilty man? Legal principles and morality tell us that it is better to let the guilty go free than convict the innocent. Therefore the Civil courts, when awarding CPPs, need to conform to the criminal standard of proof.

We need a system where business is nurtured, where a trustful environment is fomented and where business people feel safe in their transactions. In an environment where business people feel like they could be witch hunted and facing civil pecuniary penalties on the balance of probabilities standard is not conducive to business at all. New Zealand is the easiest country to do business in as decided in the Forbes Best Countries For Business List 2012. This is a highly respected and sought after recommendation, and the New Zealand Government should be doing all they can to maintain this. It is fair to say that the lack of cohesion and consistency around the civil pecuniary damages may damage New Zealand here. If foreign businesses try to do business in New Zealand and are faced with an inconsistent system involving huge fines, they will not be as willing to invest in New Zealand, and indeed this may prevent future investment.

There are very few benefits to criminalisation surrounding commercial crimes, and indeed I suggest the opposite. It is an easy trap to fall into; the government is determined to promote fair consumerism for its citizens, and is so vigilant in doing so that it creates a chilling effect on good and competitive businesses. And further to this, there is the danger that the government fall into the mentality of imposing huge fines on companies, similar to revenue gathering, further fuelling the chilling effect on business. To prevent citizens against this, it is overwhelmingly clear that the criminal standard of beyond reasonable doubt needs to be the standard of proof in civil cases.

**Ignorantia juris non excusat.**
While ignorance of the law is no defence, it must be acknowledged that commercial offences that civil pecuniary penalties can be applied to can be complex, and not immediately identifiable as an offence. This is where the standard of proof comes in; if the standard were to be the civil, on the balance of probabilities, standard, in a situation where it was not clear to the defendant that their actions were illegal they would nevertheless likely be held guilty. However if the standard of proof were to be the criminal standard of beyond reasonable doubt, then it would be a lot more difficult to convict. This seems to be the most just option.

**Conclusion.**
The current state of the law is dangerous to individuals, to companies, to international business and to the economy. It is unquestionable that CPPs have a place in our legal system, however there needs to be safeguards, structure and certainty surrounding them.

We must not make a scarecrow of the law,
Setting it up to fear the birds of prey,
And let it keep one shape, till custom make it.
Their perch and not their terror

*William Shakespeare*
*Measure for Measure.*

*Written By:*
*Nicole Buxeda.*
*20/12/2012*
CIVIL PECUNIARY PENALTIES
Comment from BusinessNZ

There must be some concern about the increasing use of civil pecuniary penalties since, as the paper notes, such penalties blur the line between criminal and civil law. That there is often little difference between the two is evidenced by the fact that it was found necessary, in 1978, to change the terminology in the then Industrial Relations Act, moving from a regime which referred to ‘fines’ and ‘offences’ to one that confined itself to the word ‘penalties. The criminal stigma was removed (a not insubstantial change) but otherwise there was no change of purpose. What the 1978 amendment tends to indicate is the sometimes arbitrary nature of restrictions imposed, further exemplified by the repeal of section 14 of the Health and Safety in Employment Act, a section in respect to which non-compliance previously constituted an offence (repealed section 52).

Precisely what acts or omissions should attract the punitive response of a civil pecuniary penalty is often a far from straightforward matter. Unfortunately there can be a danger that penalties of this kind will be imposed without any clear consideration of their likely or wider consequences. The apparent acceptance by some that it may be reasonable that some companies that have engaged in price-fixing should close as a result of the penalty imposed takes no regard at all of the effect this will have on employees, their dependents, subcontractors and so on.

While it is acknowledged that the Employment Relations Act is outside the focus of the review, it is not unaffected by the increasing use of civil pecuniary penalties. For example, while industrial relations legislation has, as the paper states, for many years been subject to civil penalties, section 234 of the Employment Relations Act represents a significant departure, lifting the corporate veil in regard to money payable by way of minimum wages and holiday pay. Imposing personal liability on a company’s directors, officers or agents is a form of civil pecuniary penalty which can act as a disincentive both to employing and to risk taking, although it is also likely to be an imposition of which many small business owners are unaware. Further, there is more than an element of pre-judging the matter in providing for the Employment Relations Authority to authorise an action for recovery against an individual if a Labour Inspector is satisfied on the balance of probabilities that the amount claimed is unlikely to be paid in full. There is an argument to be made that balance of probabilities decisions should be left to the courts.

The urge to regulate appears to be increasing in intensity but can have its own perverse effects. The law will be respected only to the extent that it has general societal acceptance and to that end individuals need to be better informed about new and existing regulations that may affect them. As noted, greater thought needs to be given to the likely effects of planned regulatory changes and the extent to which regulation is required. Here, regulatory responsibility legislation could play a welcome part. It is by no means certain, as the paper seems to think it is, that ‘corporations can easily shift the burden
of a fine’, although the paper subsequently contradicts itself by allowing that ‘a large monetary penalty may also force a corporation into liquidation’. It should always be possible to balance the imposition of a penalty against consequences for others. Punishment for punishment’s sake achieves little, while regulating an activity does not mean the regulation is necessarily reasonable.

In relation to the appropriate standard of proof, the paper appears to accept that where civil proceedings involve particularly grave matters the court may require stronger evidence before it is satisfied that the civil standard has been reached. But for the person or persons concerned, even less grave matters may have comparatively serious effects; they should not therefore be ‘provable’ on lesser evidence. The balance of probabilities should continue to mean ‘more probable than not’. The degree of seriousness of whatever is proved to the balance of probabilities standard should reflect in the penalty imposed.

The question of standard of proof under the Employment Relations Act (cited in the paper) currently appears to be unresolved. The paper states that ‘proof beyond reasonable doubt’ is also the standard on which pecuniary penalties are imposed for contractual and statutory breaches’ under the Act but in Xu v McIntosh 2004 2 ERNZ 448 Goddard CJ said: ‘In all instances, that is in both the personal grievance and the penalty action, the standard of proof required to be attained to discharge the relevant burden of proof is the standard applying in all civil cases: proof on a balance of probabilities’. Goddard CJ went on to say: ‘I am aware of judicial expression to the contrary but I have several times reserved my position on the subject and believe it is time for this Court to make the position plain, even if in practice it may make little difference’. MBIE’s website similarly states that ‘The person asking for the imposition of a penalty must prove the penalty action on the balance of probabilities’. Clarification appears to be required.

The option of using the criminal standard of proof where severe pecuniary penalties may be imposed has some merit but could cause a degree of confusion, particularly as there would need to be a cut-off point which would inevitably be somewhat arbitrary. Possibly there should be a rethink of the desirability of imposing severe pecuniary penalties for misdemeanours of statutory origin.

With the burden of proof there must be concern that shifting the onus – as under the Employment Relations Act – is increasingly undermining the concept of innocent until proved guilty. However grave an alleged offence, it should not be for the person accused to disprove their actions while, as well, the imposition of strict liability, but with statutory defences, should be contemplated only where the consequences of an act or omission would be particularly severe.

The greater the growth in civil pecuniary penalty regimes and their punitive nature, the more protection for the individual will be required. This includes the retention of the privilege against self-incrimination, the reintroduction (if it
does not already apply to civil proceedings) of the penalty privilege and the retention of the rule against double jeopardy. There may sometimes be good reason to adopt a punitive approach but in general, the retributive impulse should be resisted. Retribution’s flow-on effects are likely to cause more harm than the mischief addressed, the more so where differences of opinion are possible. Education and the provision of clear information are likely to achieve a better result. Ignorance of the law may be no excuse but it will often be a factor in legislative compliance failure. In the absence of knowledge, the punitive approach has no hope of acting as a deterrent.

It is not desirable for statutes to provide guidance for courts in determining the quantum of any penalty imposed since fact situations are rarely identical and those who hear the facts in the best position to know what is appropriate. Judicial discretion can then accordingly, be exercised (with thereafter a right of appeal). Any requirement to adhere to written guidelines can lead to injustice (as from an employers’ point of view the recent Employment Relations Act dismissal procedure clearly, at times, has) since the language used, even if not unduly prescriptive, allows for less flexibility or can be subject to prescriptive interpretation.

The right of appeal should always be available where pecuniary penalties have been imposed and this includes the right to appeal from the decisions of quasi-legal tribunals. Limitation periods (a period of six years is reasonable) should apply to provide a degree of certainty and to avoid belated copy-cat claims.

Given that the varying circumstances in which they can be imposed and that they can be imposed other than in High Court, it is to be doubted that it would be possible to mandate an approach to civil pecuniary penalties that was truly consistent and effective. Greater effort should instead be put into considering likely consequences and whether there is a real need to promulgate the regulations to which the penalties will apply and whether, even with penalty provision, the regulations will achieve their intended purpose.

14 February 2013
SUBMISSION ON THE LAW COMMISSION’S REVIEW OF CIVIL PECUNIARY PENALTIES IN LEGISLATION

1. The Takeovers Panel (the “Panel”) wishes to make a submission on specific aspects of the Law Commission’s review on Civil Pecuniary Penalties (the “Review”).

2. The Panel is the market regulator for changes in control of certain companies in New Zealand. It achieves this through the administration of the Takeovers Code (the “Code”) under the Takeovers Act 1993 (the “Act”). It carries out a judicial function when exercising its enforcement powers under the Act.

Civil Pecuniary Penalties under the Takeovers Act 1993

3. Civil pecuniary penalty orders and declarations of contravention are contained in sections 33M to 33R of the Act.

4. The Panel must first apply for a pecuniary penalty order against a person under the Act in accordance with section 35. The court must then determine whether the Code has been breached, make declarations of contravention and determine the level of the pecuniary penalty.

5. The maximum of pecuniary penalty under the Act is $500,000 for an individual and $5,000,000 for a body corporate for each contravention.

6. The Act was amended in 2006 to include civil pecuniary penalties by inserting into the Act sections 33M to 33R. Since that amendment in 2006, the Panel has not made an application to the court under section 35. As a result, the court has not had to make a civil pecuniary penalty order. Because of its limited practical experience, this submission addresses only those questions in the Review on which we believe we are in a position to comment.
Question 1: What circumstances favour the inclusion of civil pecuniary penalties in legislation?

7. In order for the Panel to regulate takeovers in New Zealand effectively and ensure an efficient market for investment, the Panel needs to have the power to seek sanctions against parties that refuse to comply with, or have intentionally breached, the Code.

8. The threat of sanction more effectively allows the Panel to enforce compliance with the Act and the Code. Anecdotal evidence suggests that civil remedies, such an injunction to enforce or prohibit certain actions in respect of a Code company, may not always be effective. Anecdotal evidence also suggests that in considering actions in respect of a Code-regulated transaction, the potential to incur pecuniary penalties is considered very seriously by company directors involved in the transaction.

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

9. The Panel develops guidelines and policies on compliance with the Code and publishes those guidelines and policies on its website. These publications enable the Panel to inform market participants quickly and efficiently on developing policy.

10. The Panel has not at this stage published guidelines in respect of pecuniary penalties. Guidelines on pecuniary penalties have not been a priority for the Panel because of the infrequency with which the Panel seeks to apply for pecuniary penalties. In addition, the threshold guidelines set out in section 33M of the Act and the guidelines for the setting of appropriate penalties in section 33Q of the Act (see below) provide a level of guidance to the market and the Panel.

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

Maximum penalties:

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

11. The maximum amount of pecuniary penalty under the Act is $500,000 per individual and $5,000,000 for a body corporate for each contravention of the Code (section 33P). The court must consider all relevant matters, including factors listed in section 33Q in determining the level of penalty:

(a) the principles contained in the takeovers code; and
(b) the nature and extent of the contravention; and
(c) the likelihood, nature, and extent of any damage to the integrity or reputation of any of New Zealand’s securities market because of the contravention; and

(d) the nature and extent of any loss or damage suffered by a person referred to in section 33M(c)(i) because of the contravention; and

(e) whether or not the person in contravention has previously been found by the court in proceedings under this Act to have engaged in any similar conduct.

12. The Panel supports the principles guiding the setting of penalties stated in question 33. Section 33Q of the Act reflects these principles, and provides guidance to the court when it considers the appropriate determination of pecuniary penalties.

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

13. We refer again to section 33M of the Act. We support the approach in the Act in which a threshold must be met before a penalty can be imposed. We believe an appropriate balance has been achieved where the court’s discretion to impose a penalty is restricted to serious breaches of the Code as reflected in section 33M(c).

**Question 36: Are there difficulties in providing for a “threshold” of seriousness as in the Takeovers Act 1993**

14. In our view, the threshold of seriousness in section 33M of the Act is appropriate. However, because the application of the threshold remains untested, we cannot comment about whether this threshold will create difficulties when applied to the specific circumstances of a particular case.

15. We understand that the Law Commission intends to table a report before Parliament on its findings in this review. We are happy to further assist if we are able to.

Yours faithfully,

[Signature]

Ashiq Hamid
Lawyer

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15 February 2013

Susan Hall,
Senior Legal and Policy Adviser
New Zealand Law Commission
cpp@lawcom.govt.nz

Dear Susan

Re: Civil Pecuniary Penalties Issues Paper

I wish to make a submission on one aspect only of the Issues Paper. My submission regards Q.7, specifically, should civil pecuniary penalty statutes recognise a privilege against self-exposure to a non-criminal penalty?

My focus is on securities markets regulation and therefore my comments are limited to civil penalty provisions within this area. In this context I have read the series of articles by Prof P Spender, Prof V Comino and T Middleton that coherently and cogently argue that ASIC’s powers in recent years have been undermined by a series of judicial decisions that have treated civil penalties as quasi-criminal offences. I note these articles are referred to in the Issues Paper and accordingly my intention in this submission is simply to record that I do not support privilege against self-exposure being extended to a non-criminal penalty.

More generally, the recent High Court of Australia’s decision in *Fortescue Metals*¹ illustrates the difficulties that ASIC now face when seeking to enforce the Corporations Act 2001² as a result of the courts affording defendants with heightened procedural protections in civil penalty cases. In this case, the High Court found that ASIC had failed in its pleadings to clearly identify the case which it was seeking to make against the defendants (Fortescue Metal and its chairman and former CEO, Andrew Forrest) and thereby undermined their rights to a fair trial.

Alternatively, and in recognition of the potentially significant monetary penalties that may be awarded in civil penalty cases, consideration may need to be given to some form of modified procedure or “paradigm shift”³ for such proceedings.

Yours sincerely,

Trish Keeper
Senior Lecturer in Commercial Law
School of Accounting and Commercial Law
Victoria University of Wellington

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¹ *Forrest v Australian Securities and Investment Commission: Fortescue Metals Group Ltd* [20120 HCA 39 (2 October 2012)
² Corporations Act 2001, s 1041H (dealing with misleading and deceptive conduct), s 674 (continuous disclosure requirements and s 180(1) specifically with respect with Mr Forrest had breached his duties as a director.
Bell Gully submission to Law Commission – Issues Paper on Civil Pecuniary Penalties

1. Bell Gully is a leading New Zealand law firm, advising major New Zealand and overseas clients on all aspects of commercial law (including securities, competition and regulatory law). We frequently advise both corporate and individual clients in relation to pecuniary penalties.

2. We are grateful for this opportunity to submit on the Law Commission’s first principles review of the law relating to pecuniary penalties. In this submission, we comment briefly on the following matters:

   (a) the nature of pecuniary penalties;
   (b) proper protections;
   (c) the relationship between criminal, quasi-criminal and civil proceedings;
   (d) penalty-setting; and
   (e) settlement.

3. We would be happy to discuss our views further with the Law Commission. Please contact:

   Jenny Stevens
   Partner
   04 915 6849

   Andy Glenie
   Senior Associate
   09 916 8811

The nature of pecuniary penalties

4. In our view, the key to understanding pecuniary penalties is to begin by identifying the purposes which they serve.

5. Pecuniary penalties are not designed to compensate the victims of wrong-doing (like an award of damages). Nor are they designed to compel a wrong-doer to disgorge ill-gotten gains (like a restitutionary remedy). They are designed to protect the public as a whole, by deterring citizens from breaching the law and punishing those who do. In other words, their functions closely match those of truly criminal sanctions.

6. Given that their principal purposes are deterrence and punishment, it is a misnomer to refer to such measures as “civil pecuniary penalties”. The use of the first epithet might lead future policy-makers to assume that the more accommodating rules of the civil law must apply, when in truth those rules only apply as a matter of policy choice. In this submission, we adopt the terminology presently used in regulatory legislation and refer throughout to “pecuniary penalties”.

7. We do not suggest that pecuniary penalties are truly criminal in nature. They do not attract the same stigma as a criminal conviction, or carry with them the risk of imprisonment. Nevertheless, they involve the imposition by the State on private citizens of financial and reputational costs which can be – and frequently are – very substantial. For instance, the Biosecurity Act 1993, Commerce Act 1986, Dairy Industry Restructuring Act 2001 and Hazardous Substances and New Organisms Act 1996 all contemplate the imposition of
pecuniary penalties of up to “10 per cent of turnover”: in Commerce Commission v Telecom, Rodney Hansen J noted that under section 80(2B)(b)(ii)(B) of the Commerce Act, that „10 per cent of turnover” rule meant that the maximum penalty the court could impose on Telecom was $279.2 million (it ultimately settled on a penalty of $12 million). In our view, Fisher J was quite right to describe these sanctions as “quasi-criminal”.1

8. We hold some concerns about the proliferation of pecuniary penalties in regulatory statutes which has occurred in recent years. However, we recognise that pecuniary penalties can be an important addition to a regulator’s enforcement toolkit (along with prosecution, management bans, licence revocations, cease and desist notice, leniency policies, warning letters, and educational initiatives). In some cases, they offer an appropriate, efficient and effective alternative to the pursuit of more serious criminal sanctions.

9. However, in our view quasi-criminal measures must be subject to quasi-criminal procedures and protections. If civil rules are unthinkingly applied, policy-makers and regulators may begin to perceive pecuniary penalties as an easy way to achieve the objectives of punishment and deterrence whilst neatly sidestepping the strict rules and protections of the criminal law. Those rules and protections have developed over centuries to prevent the State from abusing its power over private citizens. In twenty-first century New Zealand, their importance can hardly be questioned (especially as regulation and the investigatory powers of regulators have increased). Their abrogation in relation to pecuniary penalties would lead to substantive unfairness, regulatory over-enforcement (and hence a chilling effect on legitimate business), and a loss of confidence in government administration.

10. For those reasons, we consider that there are dangers in adopting the definition of a “civil pecuniary penalty” put forward by the Law Commission.2 We suggest instead that any order that may be made by a court:

(a) on the application of a regulator or enforcement agency;

(b) in respect of a breach of legislation by a private party;

(c) requiring that party to pay a substantial financial amount to the Crown;

(d) without entering any criminal conviction against that party,

should be referred to as a “pecuniary penalty”.

Proper protections

11. As noted above, we consider that quasi-criminal measures must be subject to quasi-criminal procedures and protections. A potential defendant to damaging, costly pecuniary penalty proceedings is entitled to expect greater safeguards than those offered to civil litigants. We comment here on some of those safeguards.

Privilege

12. The privilege against self-incrimination (PASI) is one of the key safeguards upon which the integrity of the criminal law depends. It recognises the importance of individual autonomy, of constraining State power, and the seriousness of criminal conviction and severity of criminal punishments. In our view, if a party may in the future face criminal proceedings brought

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1 (2011) 13 TCLR 270 at [47]. This judgment dealt with penalty issues in connection with the data tails litigation.
2 Commerce Commission v Roche Products (New Zealand) Ltd [2003] 2 NZLR 519 at [57].
3 Issues Paper at [7.1].
under a regulatory statute then he should be entitled to invoke the PASI and maintain his silence.

13. Equally, we consider that if a party may at some point in the future face quasi-criminal proceedings under a regulatory statute then he should be entitled to invoke the privilege against self-exposure to penalty (PASEP). The omission of the PASEP from the Evidence Act 2006 was perhaps not fully thought through and should be revisited. As noted above, the main purposes of pecuniary penalties are punishment and deterrence – the same aims which motivate criminal sanctions. Reinstating the PASEP in the Evidence Act would recognise the rights and dignity of private parties, support our system of accusatorial justice, preserve a fair balance between State and individual, and accord with section 25(d) of the New Zealand Bill of Rights Act 1990. There is no risk that the revitalisation of the PASEP would compromise the administration of civil remedies, as it would only be available in respect of proceedings which could result in the imposition of a penalty (and, indeed, could be limited to cases involving pecuniary penalties).

14. If Parliament were concerned that the operation of the PASEP would neuter the effectiveness of a particular pecuniary penalty regime, then it could give consideration to disapplying the PASEP whilst simultaneously declaring that answers given by a potential defendant could not be used in proceedings against him (similar to the approach taken in sections 27 and 28 of the Serious Fraud Office Act 1990). The point here is that Parliament should have that debate in connection with each regulatory regime, rather than simply assume that the PASEP can never apply.

**Standard of proof**

15. We recognise that the effectiveness of pecuniary penalties as a regulatory tool would be diminished were the courts to demand proof beyond reasonable doubt in all cases. Nevertheless, we have emphasised that pecuniary penalties are a grave sanction, serving the same ends as criminal sentences. It follows that the courts should not impose pecuniary penalties without a high degree of confidence that the defendant has indeed committed the conduct of which he has been accused.

16. Weighing these factors, we consider that it may be worth exploring in a policy-making context the possibility raised by the Law Commission that the regulator should be asked to prove the necessary elements to an intermediate standard of proof (falling between the civil ‘balance of probabilities’ and the criminal ‘beyond reasonable doubt’). The precise definition of the standard would merit further consideration, but we see some attraction in the ‘clear and convincing evidence’ standard applied in the US. Such a standard may 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.

**Fault**

17. The fact that many pecuniary penalty provisions do not presently require the prosecutor to prove fault may lead to a misconception that it is appropriate for policy-makers to impose strict or absolute liability. In our view, the significance and severity of pecuniary penalties demonstrates that serious consideration should always be given to requiring some degree of intention or knowledge as a pre-requisite to liability. It is not sufficient that fault be taken into account only at the penalty-setting stage.

18. Equally, we consider that some degree of fault should be required before the courts can impose accessoriel liability or attribute the conduct of an individual to a corporate (or vice versa). We cannot see any basis for deeming a party to be automatically liable for the conduct of another party in a quasi-criminal context. That places too great a compliance burden on both individuals and organisations.

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4 Issues Paper at [6.27].
Defences

19. Although we do not see any great benefit in exhaustively setting out defences in legislation, limitation is one form of defence which should perhaps be set out in the particular regulatory statute. Relying on the general rules of the Limitation Act 2010 risks confusion. In particular, where the statute provides for both civil and quasi-criminal liability in respect of the same conduct, the limitation period should be the same in each case (for instance, pecuniary penalty proceedings under section 80 and actions for damages under section 82 of the Commerce Act are subject to similar three year / ten year limitation periods). The same should be true where the statute provides for both quasi-criminal and criminal liability. The contravening conduct in each case is the same.

The relationship between criminal, quasi-criminal and civil proceedings

20. A particular set of issues is presented by the overlay of criminal, quasi-criminal and civil liability in the context of regulatory legislation. Careful thought needs to be given to the interaction of such heads of liability to avoid unfairness to potential defendants.

Double jeopardy

21. Enforcement proceedings of any nature are incredibly taxing for citizens, and often follow lengthy and similarly taxing regulatory investigations. They are subjected to substantial expense, reputational harm, distraction and anxiety (even before the court makes its decision). Equally, the possibility of bringing multiple proceedings against a defendant offers the prosecutor or regulator two bites at the cherry and hence the ability to wear down a defendant and exhaust his resources, pressuring him into settlement.

22. The rule against double jeopardy is designed to prevent such unfairness. For that reason, we consider that it protects against the bringing of multiple proceedings just as much as it protects against the imposition of multiple penalties. In other words, the rule should apply even before the first proceedings have been withdrawn or concluded. In our view, in this context the rule against double jeopardy should be stated in these terms: 5

(a) once criminal proceedings have been commenced, no pecuniary penalty proceedings may be commenced; and

(b) once pecuniary penalty proceedings have been commenced, no criminal proceedings may be commenced.

23. Unless the defendant itself consents, we cannot see any reason why a regulator should be able to commence criminal proceedings against a defendant and then ‘downgrade’ to pecuniary penalty proceedings if its case turns out to be weaker than expected; similarly, it should not be able to ‘upgrade’ its case by commencing criminal proceedings once it has had the benefit of watching its pecuniary penalty proceedings unfold. There is no hardship in this – it simply represents a fair, principled and consistent restraint on the exercise of State power against the individual.

24. The interface with exemplary damages should be treated in a similar way. As exemplary damages serve a punitive function, they have more in common with pecuniary penalties and criminal sanctions than they do with compensatory damages. For reasons that are not perfectly clear, some regulatory statutes allow the court to impose both pecuniary penalties

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5 Some statutes provide for different regulators to take enforcement action in respect of the same conduct ie there is overlapping jurisdiction. To state the obvious, the rule should apply no matter which regulator takes the initial action.
and exemplary damages in private proceedings in respect of the same conduct (eg see section 82A of the Commerce Act). In our view, that also violates the rule against double jeopardy as both mechanisms are intended to punish rather than compensate.

Use of evidence

25. If the regulator is not to be put to an election of the type described above, clear rules must be put in place in relation to the use of evidence acquired by the regulator. Otherwise, there is an obvious risk that the regulator will be able to take advantage in criminal proceedings of information acquired in pecuniary penalty proceedings. That risk would be even more pronounced if the relevant pecuniary penalty proceedings are subject to usual civil procedural rules (such as discovery, or interrogatories). Any conviction obtained in the criminal proceedings would be tainted by unfairness.

26. In our view, if a regulator is to be free to commence both criminal or pecuniary penalty proceedings at any time then:

(a) the regulator should not be permitted to use in criminal proceedings evidence it acquired by reason only of having previously commenced pecuniary penalty proceedings;

(b) the regulator should not be permitted to use in criminal proceedings evidence which another regulator acquired by reason of having previously commenced pecuniary penalty proceedings (ie where there is overlapping jurisdiction).

Privilege

27. The unfairness associated with the kind of 'cross-pollination' just described may extend beyond evidence. For instance, the defendant to a pecuniary penalty proceeding may be required to make its defence plain in pleadings or evidence – that could be of great advantage to the regulator in subsequent criminal proceedings, and would be a significant erosion of the right to silence in criminal matters.

28. As noted above, we consider that the PASI should be available in connection with all criminal proceedings and the PASEP in connection with all quasi-criminal proceedings. The possibility that a regulator pursuing a pecuniary penalty may later seek a criminal conviction weighs in favour of the scope of the PASEP matching that of the PASI. Otherwise, a defendant could be compelled to provide information to a regulator in connection with pecuniary penalty proceedings only to find that information being used against it in connection with criminal proceedings.

Penalty-setting

29. The process by which the court determines the applicable pecuniary penalty is often overlooked in favour of questions of liability. However, the level at which the relevant penalty is set is obviously capable of making a very great difference to the defendant.

Maximum penalties

30. Statutory maximum penalties have considerable symbolic value, guiding courts as to the sanctions that should be imposed in the very worst cases. As we have already noted, some maximum pecuniary penalties are presently capable of being inordinately large: regulatory statutes provide that a court may impose a pecuniary penalty of $10 million (or more). There is a danger that the perception that 'corporates can afford large penalties' will lead to policy-makers introducing higher and higher maximum penalties, and so to courts feeling compelled
to impose higher and higher penalties. In our view, in a small economy like New Zealand a sense of perspective must be preserved.

31. We consider also that careful thought should be given to the place of pecuniary penalties in an enforcement toolkit. We have emphasised that pecuniary penalties should be seen as more serious than ordinary civil remedies, but less serious than truly criminal sanctions. For that reason, we consider that it would be very rarely appropriate for a maximum pecuniary penalty to be set at or above the maximum (criminal) fine that could be imposed for that conduct. To do so would give regulators a perverse incentive to take pecuniary penalty proceedings rather than pursue more demanding criminal proceedings. The proper approach must surely be to set maximum pecuniary penalties at a level materially lower than the maximum fine for criminal conduct of that nature.

**Relevant factors for court in setting penalty**

32. As the Law Commission has pointed out, there are a number of factors which can be relevant to the court's determination as to an appropriate penalty. Not all of those factors apply with equal strength in all regulatory regimes. Indeed, not all of those factors apply with equal strength even in cases brought under a particular regulatory regime. Some will be entirely irrelevant in some cases. In our view, careful consideration should be given to whether it is necessary for each regulatory statute to set out an exhaustive list of relevant factors (or even a core list of relevant factors). The better approach may be to allow the parties and the courts to identify the factors relevant in a particular case.

33. It goes without saying that we see no basis for legislation to direct a court that it must impose a pecuniary penalty (as in section 80(2) of the Commerce Act, which states that the court must impose a penalty on an individual in certain circumstances). Such rules could just lead to a court imposing a nominal penalty, or being compelled to impose an arbitrary statutory minimum. In our view, the court should consider the same range of factors in determining whether to impose a penalty at all as in determining what magnitude of penalty to impose.

**Pecuniary penalties and compensation**

34. We have emphasised in this submission that pecuniary penalties are punitive and deterrent rather than compensatory. Indeed, the imposition of pecuniary penalties may be quite contrary to the interests of other affected parties (especially if the defendant nears insolvency). In our view, it may be worth considering further whether a pecuniary penalty should be imposed if to do so would unfairly disadvantage the victims of wrong-doing.

35. Pecuniary penalties in the securities law context provide a useful illustration. An order requiring a director to pay a penalty to the Crown will deplete and may even exhaust the pool of resources available to compensate parties who have suffered actual loss (such as the company, its shareholders and security-holders). In that situation, a pecuniary penalty may only end up “punishing” creditors.

**Settlement**

36. It is both common and appropriate for pecuniary penalty proceedings to be settled by agreement between the regulator and the defendant. Such settlements allow the parties to avoid unnecessary expense and litigation risk.

37. In our view, there may be limited benefit in requiring the court to further scrutinise penalties agreed between regulators and defendants. In nearly all cases, the regulator is an experienced and well-resourced public body charged with acting in the public interest — it is

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6 Issues Paper at [7.51], [7.56] and [7.58].
unlikely that such a body would agree to accept payment by the defendant of a particular sum without good reason. We consider that further thought should be given to providing a statutory basis for regulators to agree penalties with defendants, and enforce compliance as required.

Concluding comments

38. We are conscious that pecuniary penalty provisions have been developed by a range of policy-makers within Government over a lengthy period. We consider that a single flexible expression of principles should now be developed to guide policy-makers in the future, so as to ensure consistency and coherency across regulatory regimes. As the Law Commission has suggested, the best approach may be to insert a chapter in the LAC Guidelines to deal with the use of pecuniary penalties.

39. We wish to express our appreciation for the Law Commission’s carefully researched and presented Issues Paper. We look forward to considering its recommendations.

Bell Gully
February 2013
To: THE LAW COMMISSION

On: CIVIL PECUNIARY PENALTIES

Date: 15 February 2013

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SUBMISSION TO THE LAW COMMISSION

ON: CIVIL PECUNIARY PENALTIES

KEY SUBMISSIONS

- Federated Farmers acknowledges the work the Commission has put into reviewing civil pecuniary penalties.

- Federated Farmers generally considers that the civil pecuniary penalties should be extended so as to cover offences under the Resource Management Act.

SUMMARY OF RECOMMENDATIONS

Federated Farmers recommends that:

The Law Commission receive and take account of the Federated Farmers submission.

EXECUTIVE SUMMARY

Federated Farmers acknowledges the work the Commission has put into the review of civil pecuniary penalties. In general terms, Federated Farmers considers that the civil pecuniary penalties regime is working satisfactorily, but that it should be extended to cover the majority of offences under the Resource Management Act.

The submission also responds to a number of the questions posed by the Commission in the Paper.

DISCUSSION

Introduction

Federated Farmers of New Zealand ("Federated Farmers" or "the Federation") welcomes the opportunity to make a submission to the Law Commission on its paper "Civil Pecuniary Penalties" ("the Paper").

The issues discussed in the Paper are important to Federated Farmers because they consider the sort of regime that the Federation considers should administer many of the minor offences for which farmers (and others) can be prosecuted under the Resource Management Act.

In general terms, it is Federated Farmers’ view that the civil pecuniary penalties regime is working satisfactorily, but agrees that it should be set onto a more principled basis. It is also considered that the regime should be extended so as to include many of the offences for which persons can be prosecuted under the Resource Management Act.
The Key Issues

Federated Farmers has identified, in broad terms, several key issues in the Paper. These are:

- That the civil pecuniary penalties regime is generally working satisfactorily;
- That the civil pecuniary penalties regime should be set onto a more principled basis;
- That the civil pecuniary penalties regime should be extended so as to include many of the offences for which persons can be prosecuted under the Resource Management Act.

These issues are discussed in greater detail below.

The regime is generally working satisfactorily

Federated Farmers agrees with the proposition put in para 1.26 of the Paper, that civil pecuniary penalties have a role to play in the justice system. Federated Farmers also agrees that with the proposition that, while the sanctions available through the civil pecuniary penalties regimes have a valuable role to play, they should also be subject to robust justification.

It is considered that this justification should work in two ways. Firstly, that they provide the appropriate sanction in a given set of circumstances, and secondly, that if those same circumstances apply elsewhere, then that should be justification for applying the civil pecuniary penalties regime.

As the Paper notes in para 1.12, there is a lack of consistency in when civil pecuniary penalties have and have not been included in legislation. Federated Farmers considers that civil pecuniary penalties should play a much greater role in resource management legislation, an aspect of the legislative scheme from which they are totally absent at the moment. Yet, as the paper notes, civil pecuniary penalties feature heavily in other aspects of environmental legislation.

Accordingly, Federated farmers agrees that a first principles review is needed, as is proposed in para 1.13.

Nevertheless, Federated Farmers considers that the civil pecuniary penalties regime, such as exists at present, is working satisfactorily. No issues are identified in the Paper regarding existing legislation utilising the regime that is relevant to the Federation’s interests, such as the Hazardous Substances and New Organisms Act, the Biosecurity Act and the Dairy Industry Restructuring Act. Federated Farmers itself is unaware of any issues with the regime in those contexts.

Thus Federated Farmers is of the view that, in the legislation in which it is used, and the extent to which it is used, the civil pecuniary penalties regime is generally working satisfactorily.

The regime should be established on a more principled basis

Federated Farmers agrees with the propositions put in para 1.11 of the Paper, that inconsistencies, and matters such as procedural rules, guidance about penalty levels and when a penalty should be imposed, privilege and double punishment are dealt with in a variety of ways, and that this results in confusion,
does not assist in promoting the integrity of the law and suggests that insufficient consideration has been given to good legal principle.

Federated Farmers considers that, if the civil pecuniary penalties regime was to be set onto a more principled footing, then it would be relatively straightforward to determine the sorts of situations where the regime should apply.

It follows that Federated Farmers disagrees with the proposition put in para 3.2, that civil pecuniary penalties wrongly prioritise the need for efficiency in regulation over legal principle. If, as should be the case, the regime is founded on a principled basis, that should leave no room for arguments to be made out that such a regime has the wrong priorities.

In general terms, Federated Farmers agrees that the guiding principles should be that a civil pecuniary penalties regime should be fair, effective and certain.

The Regime should be extended so that it applies to Resource Management Act offences

Federated Farmers considers that the way in which the penalties regime in the Resource Management Act has come to operate is very unfair on those who are prosecuted under the regime, and in particular on those who come to be penalised under the regime.

Offences under the Resource Management Act are set out in s 338:

338 Offences against this Act
(1) Every person commits an offence against this Act who contravenes, or permits a contravention of, any of the following:
(a) sections 9, 11, 12, 13, 14, and 15 (which impose duties and restrictions in relation to land, subdivision, the coastal marine area, the beds of certain rivers and lakes, water, and discharges of contaminants):

...  

...  

The offences with which Federated Farmers is concerned are offences prosecuted under s 338(1) of the Act.

The penalties regime is provided in s 339 of the Act:

339 Penalties
(1) Every person who commits an offence against section 338(1), (1A), or (1B) is liable on conviction,—
(a) in the case of a natural person, to imprisonment for a term not exceeding 2 years or a fine not exceeding $300,000:
(b) in the case of a person other than a natural person, to a fine not exceeding $600,000.
(1A) Every person who commits an offence against section 338(1), (1A), or (1B) is also liable on conviction, if the offence is a continuing one, to a fine not exceeding $10,000 for every day or part of a day during which the offence continues.
Thus, offences under the Resource Management Act are indictable criminal offences. In terms of the new Criminal Procedure Act 2011, offences under the Act are Category 3 offences.

The offences are strict liability offences (Resource Management Act s 341). The threshold of proof is very low, indeed all that the prosecuting authority is required to demonstrate is that certain things “might” occur. In the case Hawkes Bay Regional Council v Hawkes Bay Dairies (2002) Limited, Judge C J Thompson said:

Section 15(1) [of the Resource Management Act] does not prohibit discharges which will result in contaminants entering water, or even those that are likely to have that result. The operative word is may. The Concise Oxford Dictionary defines may as …expressing possibility… and comments that may and might in current use are generally interchangeable. Similarly, the Oxford New Zealand and Collins Concise both define may as indicating or expressing possibility, and that …might is an accepted acronym.

So, I should understand s 15(1)(b) as prohibiting discharges of contaminants onto land where there is a possibility of that contaminant entering water. That is a very low threshold, demonstrating the value legislation places on maintaining high standards of purity in natural water of whatever form.

Thus the combination of strict liability offence and a “very low threshold” of proof has come to mean that even very minor offences under the Resource Management Act are indefensible. Small spills of dairy shed effluent have resulted in criminal convictions and large fines for the offenders. At this time it seems that the law does not distinguish between minor accidental spills, and major, more deliberate, spills.

I note at this point that the Resource Management Act provides for a stepped regime of enforcement, whereby enforcement agencies, normally local authorities, have options including issuing warnings, issuing infringement offence notices, issuing abatement notices and issuing enforcement orders. While most councils see prosecution as a last resort, Federated Farmers has been made aware of a number of cases where vindictiveness appears to have been the motive behind the bringing of a prosecution.

The Resource Management Act provides, at s 332, a power for enforcement officers to go onto property to inspect and determine whether or not the Act, any regulations, rules of a plan, or resource consents are being complied with. The High Court has determined that if, during the course of the inspection, evidence of an offence under the Act is obtained, then such evidence would prima facie be admissible in any subsequent prosecution.

The Sentencing Act 2002 provides discounts for such things as early guilty pleas, expressions of remorse, and measures taken to make amends. It seems that, because of the large sums of money involved, many of the farmers who are prosecuted under the Resource Management Act make a pragmatic decision to

1 DC Napier CRI-2007-041-1348.
3 Re Waikato Regional Council [2003] NZRMA 481, at [54].
plead guilty so as to take advantage of the discount provisions of the Sentencing Act. Very few cases actually come to trial, and the writer is aware of only the one case where a farmer, who was being prosecuted for a discharge offence, elected trial by jury. That case is the only case the writer is aware of where the alleged offender was found not guilty.

Finally, it is worth commenting on one aspect of how the enforcement regime works, at least regarding dairy farm inspections. When an inspection is carried out and the enforcement officer finds what he or she considers to be evidence of a breach, the alleged offender is often asked some days later to provide an explanation in writing. That ‘explanation’ is sometimes then used as evidence against the alleged offender, mostly during sentencing following a guilty plea.

The explanation above is set out in some detail to illustrate the disparity of protection between alleged offenders against Resource Management Act offences, and alleged offenders against more mainstream criminal offences. The penalties for committing offences against the Resource Management Act are serious penalties, yet the balances offered by the mainstream criminal prosecution system and the protections offered by the New Zealand Bill of Rights Act are generally not available to those alleged offenders.

Further, Federated Farmers has been told of cases where prosecutions have been brought, where it is alleged that sabotage is the cause behind the alleged offence having taken place. Farmers are particularly vulnerable to disgruntled employees in this situation, but that is not the only type of situation in which such events are alleged to take place.

A further point is that in some cases the stigma and effect of a criminal conviction far outweighs the sort of penalty that could reasonably be expected to apply in the circumstances. Federated Farmers is aware of people who would otherwise be considered pillars of society, and some of whom are leaders in their field, whose prosecution and subsequent conviction has seriously blighted the careers of people who are otherwise major contributors to the success of New Zealand society as a whole. The Paper itself notes at para 1.15, that prosecution can result in imprisonment and a criminal conviction, an enduring form of sanction which can have life-long implications for employment prospects, freedom to travel and other opportunities.

Federated Farmers considers that all of this has resulted in an extremely unjust situation, and it considers that the situation could be addressed if some of the lesser offences, particularly those where no deliberateness is involved, were to be brought into a civil pecuniary penalties regime. It is considered that the criminal regime should be reserved for those offences where deliberateness on behalf of the offender can be proven.

Much of the discussion in the Paper appears to support such a proposal.

Firstly, as to the discussion regarding so-called ‘Stealth sanctions’ at paras 1.14 – 1.18 of the Paper, as already noted, the regime as it applies to Resource Management Act offences contains few if any of the safeguards of criminal procedure, despite it not being a ‘civil debt’. The strict liability regime and the low threshold of proof means they are easier to investigate and impose than more mainstream criminal penalties. The statement in the Paper (para 1.15) that, ‘because criminal conviction results in our legal system’s gravest implications
for the defendant, criminal procedural rules provide the greatest protections available”, simply does not hold true in the case of offences under the Resource Management Act.

In para 2.7, it is stated that, in civil pecuniary penalty proceedings, the enforcement agency must prove, on the balance of probabilities, that the defendant carried out the contravention, and that in most regimes there is no express requirement for any element of knowledge or intent. However, in the case of offences under the Resource Management Act, while the standard of proof is “beyond reasonable doubt”, there is no need for the enforcement agency to demonstrate that the defendant carried out the contravention, all that need to be demonstrated is that the contravention took place and that the defendant had some connection with that offence taking place. For example, directors of farming companies who have been overseas at the time of a contravention on land they are responsible for have faced prosecution for a contravention taking place on that land.

Federated Farmers considers that the discussion in paras 3.14 – 3.19 concerning the nature of civil pecuniary penalties fits comfortably with what society is seeking to achieve in all but the most deliberate offences under the Resource Management Act. The primary object of the penalties regime is to punish and deter, even though in many case the offences involved are not ‘acts which have a particularly harmful effect on the public and do more than interfere with merely private rights”.

Federated Farmers agrees with the discussion in para 3.35, that the justice system needs to respond in more sophisticated ways, and with the proposition in para 3.37, that proportionality has a role to play in the gradations of sanctions. As discussed earlier, Federated Farmers considers that the civil pecuniary penalties regime has a role to play in the more “accidental” types of Resource Management Act offences, with the criminal sanction being reserved for the most serious, deliberate offences. However, there is no evidence to support the proposition that if a regulator can access criminal sanctions it may be less likely to take prosecutions as frequently, in the case of Resource Management Act offences. In most cases the Court directs that a large proportion of the fines that are incurred be paid to the council involved, and, anecdotally at least, the feeling is that some councils are finding the results of successful prosecutions provides a useful source of income.

As regards Chapter 4, Federated Farmers considers that the proposition put in para 4.2 fit well with low-level offences under the Resource Management Act. Most of the offences that are prosecuted can be considered “corporate” offences, as they take place in a business setting. Indeed, in many cases the fines imposed are actually paid for by insurance companies, under corporate public liability insurance.

The civil pecuniary penalties regime is also a fit as regards the discussion of “harm”. As noted earlier, the low threshold for an offence to occur under the Resource Management Act means prosecutions can be brought where little if any harm actually takes place.

Federated Farmers agrees with the proposition in para 5.5, that fairness be central to the design of civil pecuniary penalties. It is considered that providing for a civil pecuniary penalties regime for many Resource Management Act offences
would be a much fairer way of enforcing the Act and the planning instruments prepared under the Act.

Federated Farmers agrees with the proposition in para 7.32, that civil pecuniary penalties need to be set at a level which does not deter legitimate commercial endeavour or sensible risk-taking.

In summary, then, the nature of civil pecuniary penalties regimes is such that it is Federated Farmers’ view that the regime should be extended so as to include many of the offences for which persons can be prosecuted under the Resource Management Act.

The Questions

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

Federated Farmers considers that civil pecuniary penalty regimes are appropriate where they can be introduced in a manner that is fair, effective and certain.

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

Federated Farmers considers that many of the offences under the Resource Management Act could be brought within the civil pecuniary penalties regime.

The rationale for this is discussed extensively above.

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

Confining the response to the offences regime within the Resource Management Act, Federated Farmers considers that the most serious, deliberate Resource Management Act offences should remain liable to criminal prosecution.

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

Yes. Federated Farmers considers that, at least as far as offences under the Resource Management Act are concerned, the standard of proof should be the balance of probabilities. In effect under the regime that operates in the case of Resource Management Act offences at the moment, there is little difference between that standard and the beyond reasonable doubt standard.

Q6 Do you agree that civil pecuniary penalty provisions should be drafted to maximise certainty over the allocation of the burden of proof?
Yes. Federated Farmers considers it important that the burden of proof be clearly stated.

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

Yes, privilege against exposure to any penalty should be available to a person in facing prosecution for an offence.

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

No, this would be double jeopardy. The regulating authority should be required to commit to a particular course before commencing any prosecution proceedings.

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

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

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

See the response to Q8. The regulating authority should be required to commit to a particular course before commencing any prosecution proceedings.

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

No. again, the regulating authority should be required to commit to a particular course before commencing any prosecution proceedings.

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

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

No. See questions 8 & 12.
Q15 If the same conduct can contravene multiple civil pecuniary penalty provisions, should the statute provide that proceedings may be brought in respect of any one or more of the contraventions, but that a person cannot be liable for more than one civil pecuniary penalty for the same conduct?

Yes, there seems no good reason to preclude this, although guidelines as to what should apply in the situation might be useful.

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

Yes, again, there seems no good reason to preclude this, although guidelines as to what should apply in the situation might be useful.

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

Yes. It is inevitable there will be an overlap between civil pecuniary penalties and criminal sanctions because of the hybrid nature of civil pecuniary penalties.

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

Yes. The law should be made as clear as possible as the time it is enacted.

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

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

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

Federated Farmers considers that the circumstances of the offences regime under the Resource Management Act as it is at present has the effect of operating as an absolute liability regime. Such a situation is undesirable.

It is considered that it should be only in rare and exceptional circumstances that penalties would be imposed on an absolute liability basis.

Q23 Should civil pecuniary penalty provisions be more explicit as to the degree and nature of knowledge required to establish ancillary liability?
Federated Farmers considers it important that it is important that individuals be made aware of their potential personal liability and the circumstances under which that liability can arise.

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

Yes, the principles in the Sentencing Act should apply.

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

Yes. Such guidelines are desirable to give consistency and certainty.

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

Yes, this would saves time and money and encouraging the parties to engage and seek the resolution of the matter that gave rise to the proposed prosecution in the first place.

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

Yes, settlements should be published in the same way as the outcomes of successful prosecutions are published.

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

Yes, this would assist public confidence in the process through increased transparency, accountability and consistency.

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

No, at least as far as offences under the Resource Management Act is concerned, this is public law matter.

Q34 Where parallel criminal and civil pecuniary penalties target the same conduct or breach, is it ever appropriate for maximum civil pecuniary penalties to be higher than the equivalent maximum monetary criminal penalty?
There may be justification for this in some circumstances, but at least as far as offences under the Resource Management Act is concerned, Federated Farmers envisages that the monetary penalties would be the same in both regimes, if the regimes are to operate in parallel.

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

Yes, this would assist public confidence in the process through increased transparency, accountability and consistency.

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

Yes, this would be helpful.

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

As regards (b), a set of standard civil pecuniary penalty statutory provisions would be helpful.

CONCLUSION

Federated Farmers generally considers that the civil pecuniary penalties regime is working satisfactorily, but agrees that it should be set onto a more principled basis. It is also considered that the regime should be extended so as to include many of the offences for which persons can be prosecuted under the Resource Management Act.

Federated Farmers recommends that the Law Commission receive and take account of the points advanced in Federated Farmers' submission.

THE ORGANISATION

Federated Farmers of New Zealand is a primary sector organisation that represents farming and other rural businesses. Federated Farmers has a long and proud history of representing the needs and interests of New Zealand farmers.

The Federation aims to add value to its members' farming business. Our key strategic outcomes include the need for New Zealand to provide an economic and social environment within which:

- Our members may operate their business in a fair and flexible commercial environment;
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- Our members' families and their staff have access to services essential to the needs of the rural community; and

- Our members adopt responsible management and environmental practices.

Federated Farmers would welcome the opportunity to discuss this submission in greater detail with the Commission.

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Submission to the Law Commission

CIVIL PECUNIARY PENALTIES

Issue Paper 33

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Introduction

This submission addresses the release of the Law Commission’s Issue Paper on Civil Pecuniary Penalties (2012). Some of the suggestions that have been provided in this submission are of a policy nature. I further recommend that certain changes to the existing regime of civil pecuniary penalties occur.

If any of the responses require further explanation please contact Dr Marina Nehme at the University of Western Sydney, School of Law at M.Nehme@uws.edu.au.

Academic involved in producing this response

NEHME; Marina is a Senior Lecturer at the University of Western Sydney in the Parramatta Campus. She has a doctoral research on enforceable undertakings. Her research is primarily in corporate law, regulation, indigenous corporate governance and financial services laws.

General Observations

Sanctions are the cornerstone of any regulatory system. They can act as a catalyst to ensure that laws are complied with because they enable law enforcers to promote desired behaviour and punish undesirable acts.\(^1\) The threat of a sanction may be an incentive towards improved outcomes and compliance with the rules.\(^2\) However, people may find themselves surrounded by laws and sanctions that are supposed to protect them when, in reality, those sanctions may not operate effectively. Accordingly, the review of the use of civil pecuniary penalties by the Law Commission is welcomed as it may enhance the way this sanction is relied on in the future.

The observations made in this submission can be summarised in the following manner:

- The inclusion of civil pecuniary penalties in a statute has a number of benefits. However, this sanction should not be viewed as a replacement to criminal or administrative monetary penalties;
- It is crucial that a decriminalisation of the system does not occur as criminal sanctions have different aims then civil pecuniary penalties;
- Including 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” will clarify any confusion that may arise about the classification of the proceedings;
- The civil pecuniary penalty proceedings should be stayed if criminal proceedings are initiated for the same conduct. Civil pecuniary penalties should not be imposed when a criminal action has been taken and was successful. However, the regulator should be

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able to commence civil pecuniary penalty proceedings if criminal proceedings have failed or been withdrawn. This should be clearly stated in the statutes;

- If a conduct has breached a number of provisions in a statute and each provision incurs a civil penalty, more than one civil pecuniary penalty may be applied to the offender;
- Guidance regarding the use of civil pecuniary penalties should be created by the regulatory agency and the courts. The statute should not provide specific guidance regarding this matter;
- Civil pecuniary penalties should not apply to contraventions which entail some degree of moral blameworthiness. This will lead to a further erosion of the criminal and civil distinction;
- The term of an enforceable undertaking should not include pecuniary penalties because an enforceable undertaking’s aim is not to punish offenders; and
- Private parties should not be able to commence civil pecuniary penalty proceedings.

Consideration Issue in Chapter 4

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

As noted in the issue paper, a number of regulators have civil pecuniary penalties at their disposal. A civil pecuniary penalty can be described as an amount imposed for a contravention of the law. The sanction, in fact, relies on the coercive power of the state to penalise unlawful conducts.

There are a number of circumstances that favour the inclusion of civil pecuniary penalties. Firstly, Braithwaite proposed that the more sanctions there are, the better, since if there are a multitude of sanctions dealing with one act, at least one of those sanctions may be able to be used to deal with the offending behaviour. Accordingly, pecuniary penalties will be a positive addition to the arsenal of any regulator. Further, with the addition of civil pecuniary penalties, the regulators will have a middle ground when dealing with a contravention of the law. This middle ground is between criminal penalties and civil remedies/administrative sanctions. For example, if a breach of the law has occurred, action needs to be taken against the offender. However, the contravention may not warrant the imposition of an administrative sanction such as infringement notices or a fixed administrative penalty due to the seriousness of the breach. Additionally, criminal action may not be appropriate to deal with the scenario because the conduct may not be serious enough to lead to the imposition of criminal sanctions. In such an instance, without the availability of civil pecuniary penalties, the offender may escape any liability. Consequently, the regulator may rely on civil pecuniary penalties to deal with the offence. This will highlight that the conduct will not be tolerated and therefore general deterrence may be achieved.

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Additionally, civil pecuniary penalties differ from fixed administrative penalties. For example, they will attract more negative publicity than fixed administrative penalties. Fixed administrative penalties also apply for less serious breaches of the law. Therefore, administrative penalties cannot be viewed as a replacement for civil pecuniary penalties. Civil pecuniary penalties will apply to serious breaches (that do not warrant criminal actions) and they will have a better deterrence effect than administrative penalties.

Further, one of the advantages of civil pecuniary penalty is that the regulator can seek the imposition of this sanction with other sanctions. For example, in the same proceedings, the regulatory agency can also apply for consumer redress and an order to stop the breach. This will mean that such civil proceedings may achieve a number of aims: protection of the public by stopping the breach, corrective action as a result of the compensation and deterrence by issuing a pecuniary penalty.

Lastly, civil pecuniary penalties are part of civil proceedings. Accordingly they are easier to prove than criminal proceedings. This sanction, therefore, offers an alternative way to deal with a breach of the law, a way that may be cost effective when compared to criminal proceedings. The sanction will also provide a way to deter others from breaching the law without communicating blame or censure.

**Q 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?**

There is not one answer to this question. Before broadening the use of civil pecuniary penalties to more traditional criminal offences, it is important to assess the aim of the relevant statute: would the introduction of civil pecuniary penalties into a particular statute achieve the intended aim of the statute? If the sanction does not achieve these aims then the introduction of the sanction would be inappropriate. After all, civil pecuniary penalties do not attract the same social stigma as criminal sanction.

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

Civil pecuniary penalties should not be viewed as a replacement to criminal sanctions. It is crucial that a decriminalisation of the system does not occur as criminal sanctions have different aims then civil pecuniary penalties.

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7 Yeung, above n 1, 67.
Consideration Issue in Chapter 6

Q 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”?

Civil pecuniary penalties are closer to criminal fines than to private law civil damages.\(^8\) While civil damages are ordered to compensate a person for the harm caused to him/her, civil pecuniary penalties are payable whether or not a harm is caused. As a consequence, they are intended to serve as punishment.

Accordingly, including 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” will clarify any confusion that may arise about the classification of the proceedings. This may stop the courts from treating civil proceedings for a pecuniary penalty order as a criminal proceeding.

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

No Comment.

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

Yes, I agree with this statement. It is important to maximise certainty in this area to ensure that the sanction is used efficiently in the future. In case of uncertainty, the regulator will hesitate to rely on pecuniary penalty which in turn may defeat the purpose behind the introduction of this sanction.

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

No comment.

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

No. The civil pecuniary penalty proceedings should be stayed until the criminal proceedings are completed. Civil pecuniary penalties should not be imposed when a criminal action has been taken and was successful. In such instances, the criminal action will achieve the required punishment and deterrence. Civil pecuniary penalties will not achieve any other objective and would be unnecessary.

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

Yes, civil pecuniary penalties proceedings should be stayed for the reason outlined in the answer to Q 8.

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

No comment.

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

Yes, the regulator should be able to commence civil pecuniary penalty proceedings if criminal proceedings have failed or been withdrawn. In such instances, civil pecuniary penalty proceedings may achieve the required deterrence effect to stop other people from contravening the law.

Q 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?

No. Initiating criminal proceedings is inappropriate if a breach of the statute has already been penalised through the issue of a pecuniary penalty.

Q 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?

Yes, this will create consistency between statutes and will provide clarification on the use of civil pecuniary penalties and criminal sanctions.

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

No there are no circumstances under which a regulator should be able to commence civil pecuniary penalties proceedings if a criminal sanction has already been imposed for the reasons outlined in Q 8.

Q 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?

If a conduct has breached a number of provisions in a statute and each provision incurs a civil penalty, more than one civil pecuniary penalty may be applied to the offender. This will ensure that general deterrence is achieved. Every breach of the law needs to be penalised even if it is the result of one conduct.
Q 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?

It should be left up to the court to determine if it is appropriate to take into account whether the imposition of management ban or other civil remedies may impact on the imposition of civil pecuniary penalties. Each scenario may vary from the next and the aims that may need to be achieved to deal with the contravention may not be the same. As a result in certain cases, it may be suitable to impose civil pecuniary penalties with other sanctions while in other instances this may not be the appropriate.

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

No comment.

Q 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?

No comment.

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

Yes, enforcement bodies should develop and publish enforcement guidelines or policies regarding the use of civil pecuniary penalties. This will ensure consistency and enhance transparency of the regulatory system.

Q 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?

Civil pecuniary penalties should not apply to contraventions which entail some degree of moral blameworthiness. This will lead to a further erosion of criminal and civil distinction.

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

No comment.

Q 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:

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

No comment.
Q 23. Should civil pecuniary penalty provisions be more explicit as to the degree and nature of knowledge required to establish ancillary liability?

No comment.

Q 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?

No, the statute should not provide the court with guidance regarding this matter. This will make the law too prescriptive. The court should create its own guidelines and it should determine the penalty quantum based on each scenario.

Q 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?

No comment.

**Consideration Issue in Chapter 7**

Q 26. Do you agree that any penalty:
   - that involves substantial maximum financial penalties;
   - that is imposed by the High Court after a civil trial, according to the rules of civil procedure and evidence;
   - where liability is established on the civil standard of proof;
   - where payment of the penalty is enforced in the civil courts, as a debt due to the Crown; and
   - where neither imprisonment nor criminal conviction can result; should be referred to in legislation as a "civil pecuniary penalty"?

Yes they should. This will provide consistency across all legislations.

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

Civil pecuniary penalties should not be imposed by non-judicial bodies as one of the aims of this sanction is punishment. However, civil pecuniary penalties should not be confused with administrative monetary penalties. Administrative monetary penalties should still be available to regulators as the sanction provides the enforcement agency with an extra tool to their arsenal.

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

Yes, enforcement agencies should be able to settle a matter with the parties involved. They should not be obliged to go to court to impose a civil pecuniary penalties when they believe that this sanction is inappropriate. Civil pecuniary penalties and settlements such as enforceable undertakings have different objectives.
An enforceable undertakings aims to achieve the following goals:

- protection of the public;
- prevention of similar breaches in the future by changing the compliance culture of an organisation, for example, through the implementation of compliance programs; and
- corrective measures, such as compensation or corrective advertisement.

The aim of an enforceable undertaking is not and should not be to punish. This is the case because an enforceable undertaking is an administrative sanction. Accordingly, the term of an enforceable undertaking should not include pecuniary penalties.

Further, allowing the regulator to issue pecuniary penalties via settlements may be viewed as a breach of the doctrine of separation of powers. Therefore, the introduction of provisions such as s 46A in the legislation is not desirable.

Q 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?

As noted in Q 28, a settlement should not include a pecuniary penalty component. However, if a settlement is entered into, its term should be available to the public. This will ensure transparency of the system and consistency in the use of the sanction by the regulator.

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

Yes, this is very important for the reasons outline in Q 29. It will additionally give the perspective from the point of view of the offender that the regulator is ensuring that procedural fairness has taken place.

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

No, individuals should not be able to commence civil pecuniary penalty proceedings. One of the aims of pecuniary penalties is punishment. As such, regulators and not individuals should be the ones taking action against offenders. Applying for punishment should not be within the scope of private parties which may include corporations and individuals.

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

No comment.

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10 Yeung, above n 1, 115
Q 33. Should the setting of maximum civil pecuniary penalties in legislation be guided by the following principles?

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

Yes.

Q 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?

No comment.

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

No, the statute should not provide the court with guidance regarding this matter. This will make the law too prescriptive. The court should create its own guidelines and it should determine when it is appropriate to impose civil pecuniary penalties.

Q 36. Are there difficulties in providing for a “threshold” of seriousness as in the Takeovers Act 1993?

No comment.

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

No, for the reasons stated in Q 24.

Q 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?

No.

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

No comment.

Q 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?
No comment.

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

No comment.

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

No comment.

**Consideration Issue in Chapter 8**

No comments regarding Q 43 and 44.

**Conclusion**

A civil pecuniary penalty is a hybrid sanction. It erodes the traditional distinction between the civil and criminal paradigms. However, it is a useful sanction as it provides the regulator with a new tool to deal with contraventions of the law. The review conducted by the Law Commission on this sanction is welcomed as it will ensure that the civil pecuniary penalty regime will become more effective. However, in enhancing the regime, it is always important to remember that civil pecuniary penalties cannot and should not be viewed as a replacement to criminal or administrative penalties. Each of these sanction has different aims and goals that are taken into account by the regulator when the agency is considering which sanction to apply for.

Marina Nehme

15/02/2013
19 February 2013

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CIVIL PECUNIARY PENALTIES CONSULTATION DOCUMENT
SUBMISSION OF THE INSTITUTE OF DIRECTORS

About the Institute of Directors
The Institute of Directors in New Zealand (IoD) is a membership organisation which promotes excellence in corporate governance, represents directors’ interests and facilitates their professional development through education and training. Its membership of around 5,500 individuals represents the spectrum of New Zealand enterprise, from small family owned businesses to large NZX listed companies.

The IoD offers a wide range of courses to enable committed directors to develop their skills as well as a wide range of services aimed at raising corporate governance standards of practice in New Zealand. All these services reflect the IoD’s commitment to promoting governance best practice. For more information please visit www.iiod.org.nz

Introduction
The IoD has long supported the need for a clear demarcation between civil and criminal liability. Civil pecuniary penalties in their current form do not provide this. It is important that individuals are able to understand the distinction and the consequences of a breach of duty.

The IoD firmly believes that directors should be accountable for their actions. The IoD supports the review of the civil pecuniary penalty (CPP) regime and the general belief by the Law Commission that there is a place for CPP in today’s world. Notwithstanding this, we believe that clearer regulations that distinguish various CPP as allegations of negligence or mens rea (a guilty mind) will better enable individuals to understand the consequences if they breach their duties.

The IoD’s submission will focus on the effects (both actual and potential) of the current regime. We believe that there are ways in which it can be improved to better support the principles of natural justice in accordance with Section 27 of the New Zealand Bill of Rights Act 1990 (NZBORA) as well as the Rule of Law.
IoD Comments on the Document

Increasing Regulation of Director's Duties

With the introduction of the Financial Markets Conduct Bill (FMCB) and the Companies and Limited Partnerships Amendment Bill (CLPAB) regulation on directors is not only increasing, but also is becoming increasingly complicated for non-legally educated directors to navigate. At present regulation spans several pieces of legislation and carries inconsistent penalties for various forms of civil and/or criminal conduct. One of the fundamental principles of the Rule of Law is that those following the law must be able to understand it, and the consequences of their conduct. We believe that the inconsistencies in the CPP regime and, in particular the blurring of the distinction between civil and criminal conduct and liability are, at variance with this principle.

The demarcation between civil and criminal liability is becoming increasingly blurred with the introduction of new CPP. In the FMCB new CPP have been introduced, some of which contain a requirement of “knowing”. The penalties for individuals under the civil regime are also high (up to $1m) which is just as high as the maximum criminal financial penalty for an individual in the same Bill. However, it does not provide the rights available in a criminal case, such as proof beyond reasonable doubt.

For the purpose of this submission, we will mirror the term “criminal protections” used by the Law Commission in the consultation document when referring to the rights afforded to those in criminal investigations and prosecutions that are not available in civil investigations and proceedings. These include the criminal standard of proof and rules of evidence.

While the CPP may not carry a conviction, a declaration of contravention is made, which is likely to have career impact. This declaration and the CPP (along with a compensatory order) are all determined in the civil court and are required to meet the civil standard of proof i.e. on a balance of probabilities. This is in contrast to the higher “beyond reasonable doubt” burden of proof placed on the prosecution in criminal cases. Also, the issue of discovery in civil cases provides less protection than the process of documentation searches via a search warrant for criminal cases.

CPP are a small part of a much larger enforcement regime which has increased in complexity and severity with the introduction of the FMCB and CLPAB. These pieces of legislation mean directors now face new criminal offences and a possible penalty of a lifetime ban. However, there appears to be an “ad hoc” rather than consistent approach to developing this new wider regulatory regime. We believe that this is not in the best interests of business.

Inconsistencies and lack of clarity

In recent years, civil and criminal proceedings against company directors have been very public affairs. Public proceedings of this nature are very stressful not only on those accused, but families and friends. This stress is often magnified with back-to-back proceedings.

The “double jeopardy” rule which applies to some criminal offences means the accused does not face a second prosecution for the same allegation of a wrongful act. However, this does not apply where the second proceeding is a civil case brought by the regulator. For the purposes of this
submission we are not referring to any subsequent civil proceeding brought by a party other than
the crown. This is a fundamental right to seek redress that we do not seek to have removed.

On numerous occasions, regulators have filed both civil and criminal proceedings for the same case.
The civil proceedings are stayed until the criminal proceedings have been concluded. If the accused
is found to be “not guilty”, they must face a second set of proceedings, where the criminal
protections available in the first proceeding have been removed. Given the amount of time and
resource expended on the criminal proceeding, we believe that once the second proceeding begins,
the individual is already likely to be physically and financially worn down and this places the crown at
an advantage. We believe this is inconsistent with Section 27(3) of the New Zealand Bill of Rights Act
1990, which indicates that the crown should not have any advantage over the individual in civil
proceedings. We also believe that removal of basic protections such as the right to be proven guilty
beyond a reasonable doubt are in breach of Section 27(1) of the New Zealand Bill of Rights Act 1990.

If criminal protections were available to individuals who faced large civil penalties, regulatory
authorities would likely find it less viable and have less reason to bring separate proceedings. This
would indirectly provide the same fairness to those who are at risk of facing criminal and subsequent
state sanctioned civil proceedings for the same wrongful act.

IoD’s submissions
We do not believe the purpose of CPP is to enable regulators to take a second bite at the cherry if a
prosecution fails. We believe the ultimate intention was to provide regulators with a range of
options and the ability to use whichever method was most appropriate given the individual
circumstances. As a result of the lack of clarity within the law itself, we submit that regulators should
only be able to select one avenue to pursue individuals accused of wrongdoings.

We submit that CPP that require an element of “knowing” or culpability that could label the conduct
as “criminal”, be automatically subject to criminal protections to provide directors with the best
opportunity to protect their reputations and careers in the event they are not guilty of such
behaviour.

We also submit that CPP which carry large penalties should be automatically subject to criminal
protections to enable directors the best opportunity to defend themselves. In addition, allowing
criminal protections in the circumstances outlined above will serve to provide clearer demarcation
between civil and criminal conduct and subsequent consequences of such conduct.

Clarity should be provided within the law as to the purpose of CPP and when proceedings may and
may not be brought. This ensures that individuals, when accused of criminal conduct, have some
certainty and are able to move forward in the appropriate manner once the criminal case has ended.

Conclusion
Directors need to be able to see the ‘big picture’. The inconsistent and arbitrary use of CPP among
the regulatory regime for directors has clouded the vernissage.
We wish to see a clearer and more simplified regime by creating a better demarcation between criminal and civil liability. This can be achieved by allowing for criminal protections to apply in certain circumstances where regulators issue civil proceedings, and ensuring that once that state has made its case once, the double jeopardy rule can be applied. We believe these actions would effectively alter the regulatory regime to better support the principles of natural justice in accordance with the New Zealand Bill of Rights Act 1990 and the principles of the Rule of Law.

We are happy to meet with you to discuss further.

Yours sincerely

Ralph Chivers
Chief Executive Officer
Institute of Directors in New Zealand (Inc)
Submission in response to issues paper on Civil Pecuniary Penalties

1. Thank you for the opportunity to comment on the Issues Paper on Civil Pecuniary Penalties (Issues Paper). This letter sets out the Commission's response.

2. As the agency responsible for New Zealand's competition and consumer protection laws, we deal daily with civil pecuniary penalty regimes and with the criminal law.

3. Under the consumer statutes that we enforce we have gained experience in selecting between civil and criminal enforcement, in the instances where it is possible to prosecute an offence under both civil and criminal regimes.

4. Our response to the paper reflects our practical experiences of these systems. We do not at this stage attempt to respond to all of the many questions posed in the paper, but rather to offer our perspective on what we perceive to be some of the underlying questions and assumptions associated with pecuniary penalty regimes.

5. In particular, we respond to what we see as two related and recurring themes favoured by critics of pecuniary penalties, that:

   5.1 the same procedural protections do not exist as for criminal proceedings, despite the potential for pecuniary penalties to be very significant; and that

   5.2 it is 'too easy' for an enforcement agency to secure pecuniary penalties from defendants.

Civil pecuniary penalties are a useful and important enforcement tool

6. At the outset we record that we are a strong supporter of civil pecuniary penalties. We believe that they are an appropriate and efficient method for dealing with commercial wrongdoing. ²

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² We have submitted to Select Committee on the Consumer Law Reform Bill (March 2012) that, subject to the Law Commission's civil penalties recommendations, we would favour the enactment of a civil penalties regime within the Fair Trading Act for those currently strict liability offences.
7. With respect, Hammond J’s comments in the Court of Appeal in the *New Zealand Bus*\(^3\) merger case pithily describe why pecuniary penalties are apt for situations where an enactment is designed to protect from economic harm:

> Generally, the law should only resort to criminal law principles where the particular acts complained of are always harmful to society. But the harm caused by “illegal” acts in competition law terms can be much more ambiguous; and parties can “accidently” breach the statute.\(^4\)

8. While stated in terms of competition law, we believe the same can be said of many other areas where the concern is commercial wrongdoing and the profit or harm is financial.\(^5\)

9. In our view in the competition and consumer context, pecuniary penalties provide an efficient means to remedy and deter wrong-doing by enabling the stripping away of the profits from such conduct. To achieve this, penalties must be at a level where they are not just seen as a cost of doing business.

10. This critical dynamic was noted by the Select Committee when reporting back on the 2001 amendments to increase cartel penalties:

> The purpose of penalty and [remedial] provisions in competition law is to penalise today’s offender with sufficient severity to discourage others from committing similar acts.\(^6\)

11. Matt Sumpter in his leading competition law textbook notes, similarly, that the imposition of financial penalties is “the principal mechanism for incentivising compliance with the Commerce Act.”\(^7\)

12. The Commission has accordingly invested significantly in trying to increase penalties so that they are not regarded simply as a cost of doing business (although recognising the need for the penalty to reflect culpability).\(^8\) We have had good success.\(^9\) It follows that the resulting increase in penalties does not (and should not be taken to) indicate that there is any problem with pecuniary penalties per se, or as

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\(^3\) *New Zealand Bus Ltd v Commerce Commission* [2007] NZCA 502.

\(^4\) *New Zealand Bus* at (131).

\(^5\) As above at n2, we also believe that pecuniary penalties are more appropriate than criminal penalties for strict liability consumer law offences.

\(^6\) Commerce Amendment Bill 2001 (Select Committee report) at 23.

\(^7\) Sumpter *New Zealand Competition Law and Policy* CHH 2010 at ¶1701, also ¶1704 “The penalty regime is about deterrence.”

\(^8\) Deterrence can come not only from a monetary penalty but also from the publicity associated with a finding of liability. Our experience is that the extent of such publicity deterrence is for companies, especially, not a function of whether a person is found liable under a civil standard with a penalty imposed, or guilty of a crime with a fine imposed. The reason is that the general public do not readily identify a penalty and a fine as being materially different. We note as a caveat, however, that individuals much prefer the imposition of a civil penalty rather than a criminal fine, for the reasons the Issues Paper supplies at [1.15] and [3.20], such as the employment and travel consequences of being convicted of criminal offending.

some indication that they are too ‘easy’ to achieve; rather, it simply reflects a realignment of penalty awards to achieve their deterrent effect.

13. The deterrent role for pecuniary penalties is particularly important where those affected by the conduct are unlikely to have the resources to be able to privately ‘enforce’ the law. This is invariably the case in consumer protection cases. However, at least in New Zealand, it is also often the situation in cases involving harm to large and sophisticated parties. There is a particular paucity of private competition litigation.\(^\text{10}\)

14. In some larger jurisdictions, such as the United States, ‘enforcement’ of economic laws such as competition laws is left primarily to commercial plaintiffs’ taking damages claims (often having an automatic ‘treble-damages’ entitlement, which reflects an exemplary or punitive component to the damages award). However New Zealand’s size (and more particularly the size of our companies), together with our lack of a class actions regime, means that there is very little private ‘enforcement’ by way of third party damages claims.

15. As a result pecuniary penalties provide a mechanism which resembles what private damages actions can achieve (albeit that penalties are paid to the Crown rather than to affected parties).

16. An important advantage of pecuniary penalties (and civil actions more generally) is that they provide enforcement agencies and defendants with a greater ability and incentive to settle. Most importantly, there is no requirement that a defendant admit to a criminal act to settle civil proceedings.

17. The Courts have routinely indicated that that there is a significant public benefit when corporations acknowledge wrongdoing, thereby avoiding time-consuming and costly investigation and litigation.\(^\text{11}\)

18. It is also a welcome feature that where the civil penalties regime has enabled the Commission to conclude a settlement, so too have private parties commonly achieved settlement of their follow on damages action.\(^\text{12}\) The benefits of the Commission’s ability to secure early resolution and admissions has in many cases rebounded to the benefit of private parties also. This can only be to the good of the overall justice system.

19. Finally, despite what theoretical arguments might be made for and against civil pecuniary penalties the reality is that companies and individuals appear to have a preference for them at least in some cases. The most contemporary illustration of

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\(^{10}\) Sumpter at ¶1712: “Interestingly, there do not seem to have been any private party damages awarded in 24 years of Commerce Act jurisprudence.... While damages have been sought in a small number of cases, those cases have either failed or settled.”

\(^{11}\) See, for example, *Commerce Commission v Alstom Holdings* [2009] NZCCLR 22 at [18]; *ACCC v ABB Transmission and Distribution Ltd* [2001] FCA 383 at [27].

\(^{12}\) Recent examples include the settlement of TimTech’s affected-competitor claim in the Koppers-Osmose wood chemicals cartel, following the Commission’s success in securing admissions and penalties; see also the private retailer settlement of the Interchange credit card merchant service fee litigation.
this is the strong lobbying against the introduction of criminal sanctions for cartel conduct. If there was a general concern with civil penalties, or that they closely resemble criminal proceedings, the cartel criminalisation debate would have looked quite different. The focus of many submitters, rather, was to note the severity of civil penalties and to resist the enactment of a criminal regime.

**Procedural rights and protections**

20. While there are many benefits to pecuniary penalties, we acknowledge that there is a need to ensure that individuals subject to state action are given adequate safeguards and protections.

21. Critics suggest that pecuniary penalties water down such safeguards and protections to the cost of individuals. However, our experience is that the courts are quick to recognise that pecuniary penalties actions are quasi-criminal and to incorporate criminal law concepts into penalty proceedings, or to take other steps to ensure that defendants are adequately protected.

22. That is, courts are actively seeking to minimise whatever ‘costs’ one might perceive to be associated with a civil regime.

23. Perhaps the best example of this is the way in which the courts have ‘flexibly applied’ the balance of probabilities standard to reflect the seriousness of the conduct in question. As the Issues Paper notes, this approach has been endorsed by the Supreme Court, which stated that while the ‘standard’ remains the same:

   "...the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.

24. While this approach in itself illustrates that the courts are alive to ensure that there are adequate protections in place consistent with the seriousness of the offence, it is far from the only example.

24.1 In terms of assessing penalties, courts have drawn analogies to the criminal sentencing principles and explicitly to the jurisprudence associated with those guidelines in determining appropriate penalties.

24.2 Moreover, the Bill of Rights Act applies to the Commerce Commission and our experience is that the courts hold regulators to high standards of behaviour both during investigations and during proceedings. For example, in one

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13 Z v Dental Complaints Assessment Committee [2008] NZSC 55 at [112]

14 See, for example, New Zealand Bus Ltd v Commerce Commission [2008] 3 NZLR 433 (CA) at [197]. See also Williams J in Commerce Commission v Koppers Arch Wood (NZ) Ltd (2006) 11 TCLR 581 at [44]: “Although, of course, Commerce Act proceedings alleging anti-competitive behaviour substantially differ from criminal proceedings, it is the Court’s view that a rough-hewn comparability exists in the principles to be applied”. In Commerce Commission v Telecom Corporation of New Zealand Ltd (‘DataTails’) (2011) 13 TCLR 270 at [6] R Hansen J noted that there are limits to the direct transfer of principles from criminal sentencing to civil penalty cases.
judicial review\textsuperscript{15} the High Court carefully balanced public interest factors in ruling illegal and ultra vires a confidentiality order\textsuperscript{16} imposed and maintained on a party once litigation had been issued by the Commission; this was held to contravene the freedom of expression guaranteed under the New Zealand Bill of Rights. On appeal, the Commission succeeded in overturning that decision, but the Court emphasised that the Commission needed to maintain an ongoing watch on whether such restrictions on individual rights remained justified once litigation was in progress.\textsuperscript{17}

24.3 Courts are diligent when endorsing agreed penalties mutually recommended by the Commission and defendants following settlements. Courts have indicated a need to be satisfied as to the appropriateness of the penalty,\textsuperscript{18} which reflects an underlying desire to ensure that individuals are protected from capricious state action. An illustration of this is Williams J’s statement in Koppers that:\textsuperscript{19}

\begin{quote}
It is essential [courts] retain an independent approach to the imposition of penalties, particularly those of the magnitude customarily imposed for anti-competitive behaviour and they are entitled to the full assistance of counsel and the parties in that regard when approval of penalty recommendations is sought.
\end{quote}

25. There is no reason to believe that the courts will refrain from actively managing any perceived ‘costs’ or disadvantages associated with a civil regime.

**In practice, civil standard of proof approaches criminal standard**

26. As with procedural and process safeguards, we believe that the ease of obtaining civil penalties is significantly overstated.\textsuperscript{20}

27. It is certainly not the case that we inevitably succeed in our civil proceedings. While we prioritise cases where we consider there is illegal conduct and harm to New Zealand consumers, there are recent examples where we have been unable to prove our case on the balance of probabilities standard.\textsuperscript{21}

\begin{flushleft}\textsuperscript{15} Commerce Commission v Air New Zealand Ltd & Ors CIV 2008-404-008352, 21 October 2009. \textsuperscript{16} Section 100 Commerce Act 1986. \textsuperscript{17} Commerce Commission v Air New Zealand Ltd & Ors [2011] 2 NZLR 194 at [77], [109]. \textsuperscript{18} See Borrowdale “Sufficient Severity” at 34-36. \textsuperscript{19} Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd (2006) 11 TCLR 581 at [38]. Note also the reference at [36] to the Court having sought “additional assistance” from the parties (supplementary submissions) to allay “concerns” as to the penalty being recommended. \textsuperscript{20} We note especially your Issues Paper at [3.12] which refers to commentators’ suggestion that “enforcement bodies have found a way of punishing people while avoiding the procedural protections that accompany criminal proceedings” and that the “true attraction [of civil penalty proceedings] lies in the ease with which they can be imposed.” We note also your [6.31]: “Imposition of the criminal standard, however, would remove what must, admittedly, be considered to be the attraction of civil pecuniary penalties for enforcement bodies: that is that they are easier to impose.” \textsuperscript{21} The Commission was recently unsuccessful in two competition cases. First, in Commerce Commission v Siemens AG (2010) 13 TCLR 40, where Woodhouse J at [33] noted and applied the higher than balance of probabilities ‘flexible’ threshold to the Commission’s penalty case: “... it is to be applied ‘flexibly’; with
28. Some lack of success in complex litigation is inevitable. But part of the reason for this is, as already explained, 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.

29. Our overall impression is that the complexity and age of the case are the primary determinants of outcome; a commercial conspiracy entered into a decade ago is, whatever the standard, difficult to establish using primarily circumstantial evidence and witness recollection.

**Agency guidance is best practice**

30. We agree with the Issues Paper that it is highly desirable for enforcement agencies to provide guidance on how they will exercise their enforcement functions, and we have taken steps to provide such guidance.

31. For example, late last year the Commission published Enforcement Response Guidelines which explain what enforcement responses are available to us, and what criteria and considerations we take into account when deciding which response to use.\(^\text{22}\) We have also published a model litigant policy to which we are committed.\(^\text{23}\) Both have generated much interest from other agencies eager to adopt similar statements, so we see a real enforcer interest in providing such guidance.

**Further comments**

32. My staff would be happy to meet with you to discuss any of the matters outlined in this submission. Please contact our General Counsel, Competition, Mary-Anne Borrowdale if you would find that useful.

Yours faithfully

[Signature]

Dr Mark Berry  
Chairman

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Submission by PCO’s Commercial Team on Law Commission’s Issues Paper on Civil Pecuniary Penalties

We agree with the Law Commission that the use of civil pecuniary penalties in legislation so far has been ad hoc. There are a number of core issues that need to be resolved each time they are included in legislation. Currently those issues are not always fully addressed and are often resolved slightly differently, depending in part on the precedent used. Dealing with these issues on a more informed, principled, and consistent basis will promote coherence of the statute book (both as between civil pecuniary penalty regimes and as between civil and criminal enforcement mechanisms).

Although PCO does not have policy views on many of the issues raised by the Issues Paper, the views set out below arise from the Commercial Team’s experience of drafting civil pecuniary penalty regimes and also take account of PCO’s interest in the statute book as a whole. These views are set out as talking points, on which we are happy to engage with the Law Commission further, rather than a full written submission.

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

- We suggest that the core justification for use of civil pecuniary penalties should be similar to the justification for using criminal law sanctions: ie, the state has a demonstrable justification in enforcement, rather than relying on the private law. The state’s role can be justified if damages under a compensation claim would not be a sufficient deterrent to prevent the relevant conduct. This may be because loss is not an adequate measure of the harm caused by the conduct (eg, because the harm done is diffused) or because civil suits are not a realistic likelihood, or both.

- Once it is established that state enforcement is appropriate, the guidance should focus on the characteristics of civil pecuniary penalties and of criminal sanctions that make them appropriate or inappropriate for different contexts. (We are concerned that if guidance only deals with civil pecuniary penalties in isolation, we risk ignoring the problems with the alternative instruments for enforcement. Eg, the problems of proliferation of overlapping criminal offences and with strict liability offences.)

- Any guidance to assist with this choice should not form a series of boxes all of which must be ticked for civil pecuniary penalties to be used. As always, the benefits and the costs of the alternative sanctions should be weighed. We suggest that the weighing should take into account the nature of the conduct being penalised, the enforcement objectives, the potential for unfairness to individuals in particular, and the regulatory scheme as a whole.

- On this basis, civil pecuniary penalties may be an appropriate and effective sanction for breaches if (1) the breaches are of a kind for which a criminal conviction is a disproportionate response and the procedural protections of criminal law are not as relevant, (2) having a civil sanction will give regulators more tools and more flexibility and/or criminal law will undermine the efficacy of the regulatory regime, and (3) potential unfairness or costs are not high (eg, because penalties are confined to particular regulatory regimes). We expand below:
(1) The criminal law is the best means of dealing with conduct where issues of intention or moral blameworthiness are important. Civil pecuniary penalties do not (and should not) provide a societal condemnation to the same extent as a criminal conviction. They provide only one remedy (a monetary penalty) as compared to all the sentencing options available for offences. They will not alone therefore address societal needs for retribution, compensation, or rehabilitation, and will not be a sufficient sanction if the behaviour being punished is one that is morally repugnant (ie, truly “criminal”).

However, a criminal conviction may be a disproportionate response to breaches of law where intention or moral responsibility are not the issue and the only question is whether the duty set was met. In this context a no fault defence may still be relevant to ensure there is no gross injustice. However, the focus of the law is on whether you did everything that could be done to ensure the duty was complied with and not on the degree of intention with which you acted.

The criminal law alternative for penalising this standard of conduct is the strict liability offence. However, strict liability offences may criminalise conduct for which no societal condemnation is needed or desired. In addition, a proliferation of overlapping criminal offences undermines the coherence of the statute book and may dilute the impact of criminalisation. Lastly, criminal procedures and protections may have less relevance when the standard of conduct set by the legislation does not generally require moral culpability.

For these types of breaches, where the primary enforcement objective is deterrence, civil sanctions may provide a more proportionate response. As long as a monetary penalty provides sufficient deterrence, civil pecuniary penalties may also be an effective response.

(2) We agree that civil pecuniary penalties provide regulatory benefits if they are used as one of a hierarchy of sanctions in the regulatory toolkit. A hierarchy of sanctions enables regulators to respond differently to levels of seriousness and different types of enforcement situations.

Conversely using criminal law sanctions may have costs for a regulatory regime, particularly for conduct where the degree of intention is not generally relevant. If the standards of conduct being imposed would require strict liability offences, there will be no distinction between the intentional and the merely negligent wrongdoer, which diminishes the range of tools for a regulator. If criminal offences result in lengthy criminal prosecutions, the deterrent effect of the sanction may be weakened.

In addition, the threat of criminal sanctions at all may result in a less co-operative industry response to regulators, less self-reporting, and so a less proactive regulatory environment. The impact of the alternative sanctions on the regulatory regime as a whole need to be considered. This includes any need for consistency with overseas regimes (particularly where there are mutual enforcement regimes).
To the extent civil pecuniary penalties are confined to particular regulatory regimes, particularly where the main actors are corporates, the potential for unfairness is diminished. We do not think a definitive definition of “regulatory regime” is needed, but rather that it should be considered who and in what context civil pecuniary penalties will apply. If they apply only in defined or particular spheres of activity in which largely bodies corporate consciously choose to participate, knowing that there are “rules for the game” and that they have duties under those rules, then we suggest that unfairness is less of a concern. On the other hand, civil pecuniary penalties may be less fair to the extent they are used to penalise standards of conduct applying generally, particularly to individuals. However, it is inevitably a question of degree.

On the analysis above, a distinction between criminal law and civil pecuniary penalties is justified and should in fact be protected. Criminal law should be reserved for truly criminal conduct as much as possible. The corollary of this is that civil pecuniary penalties should be seen as a lesser punishment and a more appropriately focussed punishment for the conduct involved. In any case, the role of civil pecuniary penalties vis-à-vis any criminal liability for the same or similar conduct and how a regulator will likely choose between and use different sanctions needs to be considered before using civil pecuniary penalties.

Alternative approaches to civil pecuniary penalties that might be considered before choosing to use civil pecuniary penalties are-

- criminal offences with different levels of penalty according to the different levels of moral fault, using sentencing guidelines to ensure that self-reporting and cooperative responses result in a benefit in sentencing, and ensuring that regulators publish clear enforcement policies.
- facilitating private actions through (eg) class actions or regulator’s being able to take derivative actions.

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

See comments above, particularly as to the risks of unfairness increasing as the sphere to which civil pecuniary penalties applies is less defined. Civil pecuniary penalties may also be less effective for traditional criminal offending because they deliver only one sanction (a monetary penalty) and that sanction may not be effective in all contexts.

In addition, we note that the infringement notice regime already exists to deal in the traditional criminal offending context with absolute or strict liability offending that do not require mens rea, have no sentence of imprisonment, and involve straightforward matters of fact (although this last requirement is an important limitation on the matters for which the infringement notice regime could apply).

Q3 Is there any conduct for which civil pecuniary penalties are not suited?
• See comments on question 2. In addition, we think legislation should avoid imposing civil pecuniary penalties if criminal sanctions are also available for the same conduct, unless there is a clear policy direction in the legislation as to when the different enforcement methods should be used (e.g., as to mens rea or degree of fault).

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

• Some general instruction of this kind is needed by which Parliament can clearly determine that the penalties are intended to be “civil” and have the civil standard of proof. We consider that this general instruction should be consistent across the civil pecuniary penalty statutes.

• We are mindful of the LC’s concern as to the vagueness of the current formulation and the potential ambiguity as to what are the “usual” rules of court etc. However, the purpose of the provision is to establish that the criminal procedures do not generally apply to these sanctions, and we think that this purpose is reasonably clear.

• We would have no concern with more specific directions being given on particular procedural issues that are unclear. However, we would be very concerned with a proliferation of procedural rules that had to be covered in each individual statute. The best way of setting particular civil procedure rules if need be may be through the rules of court and/or the Evidence Act.

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

• We agree that civil pecuniary penalty statutes should use consistent wording for the standard of proof.

• In terms of what the standard of proof provision should contain, we favour a general statement that the standard of proof in civil proceedings applies. Although this does not result in complete certainty, the ability of the courts to apply a standard of proof flexibly is not unique to civil pecuniary penalties. We do not think the court’s ability to be flexible should be prevented, as long as this “flexible” application is used for particular cases, rather than across a whole “remedy type”. We would be loath to see legislation try to prevent the court from responding to the interests of justice in particular cases.

• However, our view would alter if a different standard of proof was actually being applied by the courts in substance and generally to all civil pecuniary penalties (merely because they are a possible consequence). This would undermine the legislative instruction that the standard is the civil standard.

• In the case of the FMC Bill, for example, the proceeding will involve both a declaration of contravention and an order for a pecuniary penalty. If a different standard of proof is applied (in substance) to all pecuniary penalties, then this will affect the declaration of contravention and limit its usefulness as a tool for facilitating claims for compensation.
In this case, one option to consider (rather than trying to define what may be considered under the balance of probabilities) would be including a provision that states that the standard of proof applying is the balance of probabilities and that the court, in determining whether or not it is satisfied to that standard, must not take into account the mere fact that the order sought is a pecuniary penalty.

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

- We agree that drafting should maximise certainty as to the burden of proof, particularly for defences (as with any liability provision).

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

We do not express a view on whether or not penalty privilege should apply (or its limitations be justified) for civil pecuniary proceedings generally.

- We note however that the privilege against self-incrimination as formulated in s60 of the Evidence Act does not apply to bodies corporate and so, if a penalty privilege was devised along similar lines, the privilege would not be relevant to many circumstances where civil pecuniary penalties are applied. It would still be relevant of course to proceedings against, eg, directors or staff if those persons were individually liable for penalties under the relevant regime (eg, whether primarily or as accessories)).

- In addition, there is a view that providing too many criminal-type protections may result in fewer costs for the use of civil sanctions and their increased use in traditional criminal law areas.

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

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

- On both questions 8 and 9: We don’t think that a statutory bar on the commencement of criminal proceedings is needed as we can see circumstances where a regulator would wish to overtake civil proceedings with criminal.

- We are not convinced that the statute needs to provide that, if criminal proceedings are commenced, the civil proceedings must be stayed. As the LC states, the High Court can already stay civil proceedings under its inherent jurisdiction in these circumstances. We think it is best left to the courts to determine whether there is a danger of injustice in the particular case, rather than having a blanket legislative rule.

- It is important not to create statutory rules that are broader than the mischief at which they are directed, unless there is a clear reason for doing so. Rules about procedure risk doing this.
• The need for rules on stays may also be removed to the extent that the policy problems with overlapping cases are addressed. Eg, if the problem is one of double penalty, that may be addressed by prohibition on a fine and pecuniary penalty. If the problem is self-incrimination, that may be addressed by a rule preventing use of information gained from civil proceedings in criminal proceedings.

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

- Provisions of this kind are not uncommon in the statute book. However, in general we prefer that these rules not be dealt with by statute if they can be dealt with adequately by either the rules of the court or the discretion of the court in dealing with abuse of process.

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

- If there is a legislative distinction between the criminal breach and the civil breach (eg, as to the degree of intention), then we do not think a regulator should be prevented from bringing subsequent civil pecuniary penalty proceedings. Even for the same conduct, there are arguments for allowing subsequent civil proceedings on the basis that the standard of proof is different and while there may not be sufficient proof to impose the ultimate penalty of a conviction, it is nonetheless appropriate to apply a civil sanction if there was sufficient proof on the civil standard.

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

- The arguments for allowing subsequent criminal proceedings (and so limiting the principle of finality) are-
  
  - if there is a level of moral culpability that the civil proceedings have not addressed, you need to allow a regulator an ability to still bring criminal proceedings. This argument only applies if there is a clear distinction (as there should be) between the elements of the civil and criminal liability provisions:
  
  - if you do not allow this, civil proceedings will not be brought by a regulator first or at all (this was the experience in Australia). Rather they will bring criminal proceedings as a first preference and, only if they fail, bring civil proceedings. This approach will defer quick preventative actions and compensation:
  
  - the civil penalty would presumably be taken into account by a court in subsequent sentencing.

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

- No – as the LC states in paras 6.112 and 6.113 a person should not be ordered to pay a criminal fine and a pecuniary penalty for the same conduct, however we do not think the
legislation should preclude other any criminal sanctions being imposed (which may have, eg, a protective purpose) if a pecuniary penalty has been imposed.

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

- We cannot think of any in relation to civil pecuniary penalty proceedings. However, a criminal sanction being imposed should not of course prevent the regulator bringing other civil proceedings (eg, for a declaration of contravention, which may form the basis of claims for compensation).

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

- PCO supports a provision of this kind, but note that it should not prevent other types of civil liability orders from being imposed (ie, these might be imposed for very different reasons, eg banning orders have a protective purpose).

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

- Not necessarily. The purpose of the civil remedies/sanctions is likely to be quite different. Eg, a management ban is primarily a protective remedy. The ability of a person to pay might be a relevant matter for the court to consider in imposing a pecuniary penalty and this may be affected by whether or not they can continue to act as a manager/director, but the fact of the management ban’s imposition itself is not the relevant consideration here

- However, neither should a court be prevented from having regard to other civil remedy orders (eg, forfeiture orders) to ensure there is not a double penalty being imposed.

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

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

- On both questions 17 and 18: It is difficult to see how what constitutes “the same conduct” could be specified in more detail by legislation.

- In any case, this is not a question that should be considered in isolation from determining the particular double jeopardy rule to be adopted. If the rule adopted is a requirement for the court to “have regard” to various matters in setting a pecuniary penalty, the wording as to which offences/sanctions to consider can be more flexible and can refer to the court’s opinion as per para 6.125. If the rule is more absolute (eg, prohibiting the commencement of
criminal proceedings if civil proceedings have already been started for the “same conduct”), then the “same conduct” rule needs to be more narrow and certain.

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

- This is best regulator practice and setting guidelines for best enforcement practice for regulators is a potential concept that should perhaps be used and developed as an alternative to legislative duties (in the same way as the Crown is a “model litigant” in criminal prosecutions).

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

- Yes. For example, even if a strict standard is applied to the principal actor, usually accessories will only be civilly liable if they participate with a degree of intention. This is appropriate to avoid unfairness and does not undermine the reason for imposing a strict standard on the principal actor.

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

- Provisions should be drafted to expressly require fault or, by setting out “no fault” defences, exclude fault.

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

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

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

- We think that policy-makers should in this area ensure that the legislation is absolutely clear as to what ‘total absence of fault’ defences should apply, if any. That is, the legislation should set the requisite standard of conduct, whether it is set by the liability provision itself or by the available defences.

- We would expect that total absence of fault should usually be a defence, and that there should be a clear reason for precluding that defence. However, given that there is no “conviction” in the case of a pecuniary penalty, it may be sufficient to have the degree of fault listed in the factors the court must have regard to in determining whether to impose, and the quantum of, a pecuniary penalty.

**Q23 Should civil pecuniary penalty provisions be more explicit as to the degree and nature of knowledge required to establish ancillary liability?**
• Yes, we consider that the current precedent for accessory liability in civil proceedings may be problematic in some cases because-
  o it bundles together primary liability and accessory liability – it is only when these two forms of liability are “unbundled” that it becomes clear that defences need to work differently in each case, and both forms of liability may not be relevant in each case.
  o there are already “parties” provisions in the Crimes Act. The extended form of accessory liability in civil proceedings differs from the Crimes Act “parties” provisions of the Crimes Act. This is not problematic in itself, but if the statute imposes parallel regimes of criminal and civil liability, it needs to be clear that the civil version of accessory liability applies only to civil proceedings.
  o it is very unclear to users of statutes 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 a risk of offence. This is an issue with the current precedent that is difficult to address on a statute-by-statute basis however.

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

• We are unsure what this guidance would consist of as the justice of the case could widely differ according to the nature of the company and the role of the individual concerned. Eg, if it is an owner-operator company then clearly primary liability on both the director/owner and the company would be a form of double penalty. However, in many other cases the liability may be different, the defences may differ, and the penalty is, in effect as well as in law, imposed on different persons.

• This is also an issue that the regulator’s enforcement policy could usefully address – eg, when they are likely to pursue individuals involved vs the body corporate.

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

• We would support the formulation of policy guidance for when a regime should attach liability to officers personally vs to the body corporate and the other consequential issues to consider in this context (including attribution of liability provisions, defences, and accessory liability).

• However, these are difficult questions and involve significant trade-offs, including for the economy (eg, the problems of making directors automatically liable too frequently). Any policy guidance would need to set out these trade-offs in our view, but need not mandate a particular position for all situations.
• Any guidance here would be just as relevant to criminal liability and when a regime should attach personal criminal liability to officers of a body corporate, and so should not be confined to a civil pecuniary penalty regime.

**Q26 Do you agree that any penalty:**

• *that involves substantial maximum financial penalties;*

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

• *where liability is established on the civil standard of proof;*

• *where payment of the penalty is enforced in the civil courts, as a debt due to the Crown; and*

• *where neither imprisonment nor criminal conviction can result;*

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

• We agree the consistent terminology would be useful.

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

• We are not convinced that it is necessarily inappropriate for non-judicial bodies to impose variable monetary penalties. However, the cautions as to the value of legal experience and an adequate appeal and review process are useful.

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

• We consider that there are likely to be many reasons why settlement is the best option for both parties and provides the quickest and most effective remedy for an enforcement situation. Regulators do not have unlimited resources. Settlement is cost-effective. Little public good is achieved by forcing every action to be litigated at expense to both parties and delay for all concerned.

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

• Yes. However, there may need to be some ability to hold back particular details for commercial sensitivity reasons or perhaps other reasons. It would be good to discuss this point further with, eg, the FMA and Commerce Commission.

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

• Yes, as a matter of good regulator practice.
Q31 Are there any circumstances when individuals should be able to commence civil pecuniary penalty proceedings?

- If there is a right to bring proceedings for compensation, and there is a regulator who is able and funded to act to enforce matters in the public good, it is difficult to justify an individual right to bring civil pecuniary penalty proceedings for the public good.

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

- We consider that this will depend on each regulatory regime and the mixture of objectives that it services. Declarations of contravention are only a useful tool if they enable compensation proceedings to be brought more easily. We are not aware of any cases where they have been tested in NZ courts as yet.

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

Maximum penalties:

- should reflect the worst class of case in each particular category;
- should be designed to encourage compliance with the regulatory system at hand and so be set at a level to deter the classes and sizes of participants in that regulatory field;
- should balance the promotion of compliant behaviour with ensuring that business remains willing to enter the market and/or take sensible commercial risks.
- We agree with these principles for maximum penalties. In setting maximum penalties, consideration also needs to be given to their relationship to any criminal sanctions under the statute and to their relationship to civil pecuniary penalties of a similar type under other statutes.

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

- We consider that an argument can feasibly be made that civil pecuniary penalties need in some circumstances to be set at the level required to ensure that the deterrent aim is met. In some cases we think this may be higher than the maximum criminal penalty. We do not consider that there will be a perverse incentive to bring civil pecuniary penalty proceedings rather than criminal proceedings where the fine is lower, at least if imprisonment is an option. If imprisonment is a possible sentence and, to a lesser extent, even where it is not, the stigma attaching to a criminal conviction is more significant.

Q35 In what circumstances should Acts contain guidance as to when to impose a civil pecuniary penalty, and what should that guidance be?
Q36 Are there difficulties in providing for a “threshold” of seriousness as in the Takeovers Act 1993?

- A threshold of “seriousness” is problematic, particularly when there is no threshold for bringing a criminal prosecution. It greatly diminishes the likelihood that the civil pecuniary penalties will be used both because it creates a test that the regulatory agency must meet which is a very vague test (and increases the risk of the enforcement method) and because it makes no sense in terms of a “hierarchy” of civil vs criminal tools in a responsive regulatory toolkit.

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

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

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

- On questions 35 to 39: statutes usually list some factors for courts to take into account in determining the level of a pecuniary penalty. In some cases, this list must also be taken into account in determining whether to impose a pecuniary penalty at all. We understand that in those areas where civil pecuniary penalties have been in use for some time, regulators and the courts are developing practices and expectations around penalty levels.

- It would be useful for guidance on civil pecuniary penalties to address the core list of factors and other possibilities. However, we agree that a standard list should not be mandated and incorporated into every pecuniary penalty regime. The needs and the demands of each regulatory regime should be considered and subject to deliberate policy decisions in light of guidance.

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

- We agree that s66 of the Judicature Act 1908 is the appropriate provision to govern appeals.

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

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

- On questions 41 and 42: We agree that there should be clear and deliberate policy decisions on limitation defences (including limitation periods) for claims for civil pecuniary penalty orders. Guidance for policy-makers would be useful on the effect of the default position under the Limitation Act 2010 for money claims and the factors that support tailored special provisions (longer or shorter periods or other modifications). In addition, the Limitation Act 2010 does not cover all forms of relief in civil proceedings (eg, limitation periods need to be
provided for non-money civil liability orders such as civil forfeiture orders) and applies only to a claim made in a specified court or tribunal or in arbitration. It may be useful for statutory provisions to expressly address the application of the 2010 Act, particularly if it is only partial.

- In particular, a critical issue may be the combinations of relief likely to be sought by the regulator or plaintiff under the regulatory regime. Policy makers should try to avoid different limitation provisions applying without good reasons to different kinds of relief arising from the same conduct. For example, under the Financial Markets Conduct Bill, the FMA may seek compensation and a civil pecuniary penalty order. Having different limitation periods for the civil pecuniary penalty orders would be problematic.

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

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

- We consider that a LAC chapter on civil pecuniary penalties vs other sanctions, and on other choices to be made in applying a civil pecuniary penalty regime, would be a useful tool.

- We also consider that model provisions could usefully be developed within PCO with guidelines attaching to each.

- We are very doubtful as to the benefit of going further and enacting a standard set of provisions and/or amending existing regimes. Exercises of this kind that set a new generic standard are very difficult to implement in practice, particularly if existing regimes are modified. That said, if particular drafting problems are identified with the efficacy of current provisions, it would be worth considering targeted amendments to existing regimes across the statute book.
21 February 2013

The Law Commission
171 Featherstone Street
WELLINGTON 6160

Attention: Susan Hall, Senior Legal and Policy Adviser

CIVIL PECUNIARY PENALTIES ISSUES PAPER

Overview

1. This submission is made in response to the Civil Pecuniary Penalties Issues Paper (Number 33) (the "the Paper"). The New Zealand Bar Association (the Association) agrees that civil pecuniary penalties (penalties) are a useful addition to the regulatory ‘toolkit’ and believes they have worked well to date.

2. Although the civil nature of penalty provisions means that respondents lose the protections that would be available to them if the relevant conduct was the subject of a criminal prosecution, that is the quid pro quo for not facing a criminal conviction or potential for imprisonment.

3. The Association considers it would be useful to introduce consistency as much as possible to issues such as procedural rules, when a penalty should be imposed and quantum of penalty. That needs to be balanced against the fact that the courts face a myriad of circumstances and do need to retain some discretion in order to do justice in the particular circumstances before them.

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

4. Penalties are useful primarily for the following reasons:

   (a) Allowing different enforcement options enables regulators to take a more proportionate response to offences rather than always being required to take criminal proceedings (para 3.37 of the Paper).
(b) Penalties can be more appropriate than criminal convictions for regulatory or "public welfare" offences, often in a commercial context. (para 3.34 of the Paper).

(c) Penalties are useful as a means of providing sufficient deterrence of offences where defendants know civil damages claims are unlikely (para 4.33 of the Paper).

(d) Allowing for penalties rather than criminal punishment can make proceedings more efficient and less costly by allowing regulators to 'settle' more readily with defendants by agreeing on recommended penalties, which is not an option for criminal proceedings (para 4.44 of the Paper).

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?

5. If the nature of the offending falls within the circumstances set out at paragraph 4 above, penalties may be an appropriate response. However the Association is not generally in favour of replacing traditionally criminal offences with penalty provisions and is concerned this may cause the removal or reduction of protections that existed for defendants when the offending was dealt with by criminal prosecution.

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

6. Yes.

7. Penalties will often not be suitable for conduct that is currently the subject of criminal offending. Penalties are best suited to regulatory or commercial offences to which the reasons set out at paragraph 4 above apply.

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"?

8. Yes.

9. The Association's view is that the Courts have dealt well with penalty proceedings as civil proceedings to date and there is no reason to change this. It is also in favour of providing for some consistency where it is thought appropriate to use penalty proceedings in legislation.

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

10. Yes.

11. There is a benefit in having a burden of proof that is consistent across all legislation. However the Association also agrees with the Law Commission that there is an interest
in leaving areas of discretion to enforcement bodies and the courts so that the court’s approach can be tailored to the circumstances of a particular case (para 5.38 of the Paper).

12. The application of the civil standard of proof, applied flexibly with due regard to the gravity of what is alleged, has worked well in penalty proceedings. The Association favours maintaining this standard of proof.

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

13. Yes.

14. The Association agrees that it is desirable for penalty provisions to make it clear on whom the burden of proof falls for elements of a contravention or for defences.

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

15. No.

16. The lack of criminal conviction and potential for imprisonment does distinguish penalties enough from criminal offences to warrant treating them differently when it comes to the protections that would available to defendants facing criminal prosecutions.

17. Some of the conduct that forms the subject of penalty provisions is by nature hidden; often in documents in the defendant’s possession. The Association does not favour the recognition of a privilege against self-exposure to a penalty. However it is appropriate for removal of the privilege to also be accompanied by restrictions on the use of information obtained. Answers to questions and/or information supplied should not be admitted into evidence against that person in subsequent criminal proceedings.

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

18. Yes, in certain circumstances.

19. A regulator should only be able to commence criminal proceedings if the civil proceedings are stayed.

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

20. Yes.
21. Statutes should specify that if criminal proceedings are commenced, then the penalty proceedings must be stayed.

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

22. Yes.

23. Evidence adduced in the civil proceedings by a person should not be able to be tendered in criminal proceedings against that person if the proceedings relate to the same or substantially the same conduct.

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

24. No.

25. The rule against double jeopardy should apply. A defendant who has successfully defended a matter should be entitled to finality.

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


27. The Association does not agree with allowing criminal proceedings to be commenced after penalty proceedings have concluded and a penalty imposed. This infringes the sound policy behind the rule against double jeopardy.

28. It is recognised that a consequence of this is that it creates a potential incentive for respondents to mislead regulators about the nature of conduct so that civil proceedings are brought when criminal proceedings may have been valid. This could be addressed by having provisions imposing significant fines for concealing evidence or misleading the regulator.

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?

29. Yes.

30. Penalties and criminal sanctions have the same purpose, to punish conduct in breach of the legislation. It is not appropriate to punish a defendant twice for the same, or substantially the same, conduct.
Are there any circumstances in which a regulator should be able to commence civil pecuniary penalties proceedings if a criminal sanction (whether a fine or imprisonment) has already been imposed?

31. No.

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 the person cannot be liable for more than one civil pecuniary penalty for the same conduct?

32. Yes.

33. The Association agrees with the view expressed in paras 6.117 to 6.118 of the Paper.

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?

34. Yes.

35. The Association agrees there is no reason why both a management ban and civil penalty should not be imposed for the same conduct. Management bans serve a different protective function.

36. However, as the Paper notes at para 6.119, management bans can also have serious financial consequences for a defendant. Those financial consequences should be taken into account by a court in assessing the quantum of penalty to be imposed for the same conduct subject to a management ban.

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

37. It would be helpful for penalty legislation to clarify whether a series of related acts constitutes “the same conduct”. Thought should be given to whether a series of related acts constitutes “the same conduct” in a particular regime and how this may be expressed in the legislation.

38. However, the Association also recognises that a variety of fact situations are placed before the courts and some flexibility is necessary to allow the courts to deal with each individual case. Judges are experienced at applying the policies and principles to come to the right answer eg. Commerce Commission v Accent Footwear (in para 6.123 of the Paper).
Where there is a sufficient similarity of conduct, should this be dealt with through a statutory bar or through guidance for the courts in penalty setting?

39. No matter what wording is used in penalty provisions, there will inevitably be arguments about how specific fact situations are to be dealt with according to that wording. Therefore, the better course is to provide guidance for the courts in penalty setting similar to s214 of the Australian Consumer Law under the Competition and Consumer Act 2010 (Cth).

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

40. Yes.

41. Transparency and appropriate regulatory enforcement practice is enhanced by the publication of enforcement guidelines.

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

42. Yes.

43. Penalties are useful for the reasons set out in paragraph 4 above. If those reasons apply, there is no reason why penalties should not be used for offences that involve some degree of moral turpitude or blameworthiness.

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

44. There is merit in the suggestion (at para 6.155 of the Paper) that it would be desirable to clarify in each civil penalty provision whether some element of mens rea or fault is required or not. The Association supports a default position that mens rea or fault should be required unless there is good reason to the contrary.

45. It would also be desirable for any available defences to be set out in the penalty statute.

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

The Association's position, that mens rea or fault should be required unless there is good reason to the contrary, has already been set out. If there is good reason to allow either strict or absolute liability it is agreed that absolute liability 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.

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

Yes.

Different statutory formulations for accessorial liability for penalties causes uncertainty. Therefore some clarity in the correct test for accessorial liability for penalties is needed.

The Association is inclined to the view that the test proposed by Justice Arnold New Zealand Bus v Commerce Commission (discussed at para 6.168 of the Paper) is appropriate i.e. there should not be accessorial liability in the absence of knowledge by the defendant of a real risk of contravention.

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?

No.

The issue of guidance that could be included in penalty statutes in relation to quantum of penalty generally is discussed below. The 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. Further guidance on this specific issue is not regarded as necessary.

However, civil penalty statutes should treat this issue consistently. All statutes should either provide similar guidance or be silent.

Further, the common practice of splitting a penalty between both an individual and company, where both are principally liable, is questionable. In a criminal proceeding, where a number of perpetrators are held responsible for the same crime each usually
receives a punishment independently as a principal, rather than receiving a 'share' of an overall punishment.

54. By comparison, in civil proceedings where a number of perpetrators have caused the same loss or damage, the defendants are usually held responsible for a share of the total damage although on a joint and several liability basis.

55. The Association agrees that the function of civil penalties is more analogous to punishment or deterrence than compensation. This makes it appropriate for the courts to take an approach more analogous to that taken in criminal proceedings than that taken in civil proceedings.

56. Where there is a real risk of double punishment (eg. where a 'one-man' company and the 'one man' individual are involved) sharing a penalty may be appropriate.¹ However, in other circumstances (eg. a large corporation and specific personnel) it seems more appropriate for penalties to be imposed individually.

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?

57. Yes.

58. It would be useful for policy makers to have guidance about the methods of attributing or ascribing liability between a body corporate and its officers in a penalty regime. For example, the Association does not support deemed liability under which individual directors of a company may become liable to a penalty even though they were not themselves involved in the breach. Either the perpetrators or the corporation should be subject to liability in this case rather than directors. A consistent approach should be taken to the issues of accessory and deemed liability across all statutes.

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

59. Yes.

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

¹ See for example Commerce Commission v Wrightson NMA Ltd (1994) 6 TCLR 279
60. Yes.

61. The Association agrees that the imposition of variable monetary penalties by non-judicial bodies, without any judicial oversight, should be discouraged.

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

62. No.

63. For the reasons set out in paras 7.14 to 7.16 of the Paper enforcement agencies should not be able to “settle” with parties upon whom they would otherwise seek to have civil penalties imposed unless there is court approval.

64. Transparency of settlements is important to ensure public confidence that the regulator is exercising its powers responsibly and fairly and in the public interest. Requiring judicial oversight ensures individual defendants are not treated either too leniently or too harshly and different defendants are being treated in a consistent and even-handed way. Judicial oversight assists the development of precedents on penalty setting.

65. Accordingly, the Association is opposed to the proposed new section 46A of the Financial Markets Authority Act 2011 (to be introduced by the Financial Markets Conduct Bill, and as set out in para 7.11 of the Paper).

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?

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

66. If, contrary to the Association’s view, enforcement agencies are given the ability to “settle” with parties without court approval these safeguards should be imposed.

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

67. No.

68. For the reasons set out at paragraphs 7.21 and 7.22 of the Paper individuals should not be able to commence civil penalty proceedings.

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

70. It would be useful for all civil penalty regimes to provide that a declaration of contravention may be made.

Should the setting of maximum civil pecuniary penalties in legislation be guided by the following principles?
Maximum penalties:
- should reflect the worst class of case in each particular category;
- should be designed to encourage compliance with the regulatory system at hand and so be set at a level to deter the classes and sizes of participants in that regulatory field;
- should balance the promotion of compliant behaviour with ensuring that business remains willing to enter the market and/or take sensible commercial risks.

71. Yes.

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?

72. No.

73. It is difficult to identify circumstances in which it would be appropriate for maximum penalties to be higher than an equivalent maximum monetary criminal penalty. It is accepted that where parallel criminal and civil penalties exist the possibility of a criminal prosecution should be reserved for graver conduct. The respective penalties should reflect this.

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

74. In order to introduce consistency across legislation, as far as possible, civil penalty statutes should be consistent as to the factors considered relevant to the imposition of a penalty. The matters which the Law Commission has identified as relevant to the quantum of penalty in a number of civil penalty statutes are matters that could also be common to the determination as to whether or not to impose penalty. The considerations are (para 7.51 of the Paper):

(a) The nature and extent of the breach;

(b) The nature and extent of any loss or damage caused by the breach;

(c) The nature and extent of any financial gain made from the breach;
(d) Whether the breach was intentional, inadvertent or negligent;

(e) The circumstances in which the breach took place;

(f) Any other matters the Court considers relevant.

75. A further general relevant matter is whether the respondent has committed previous breaches. Other factors will be specific to the particular regime involved.

76. The Securities Trustees and Statutory Supervisors Act 2011 also requires the court to consider the public benefit in encouraging prompt and honest self reporting of breaches (or possible breaches) of the Act. The Association’s view is that this is a matter that is more relevant to the quantum of penalty imposed rather than the decision whether to impose any penalty at all.

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

77. Yes.

78. Provisions which provide for a “threshold” of seriousness as in the Takeovers Act 1993 are not favoured. It is preferable to have the nature and extent of the contravention of the Act as a factor to be taken into account in deciding whether to impose a penalty and if so, the quantum.

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

79. Yes.

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?

80. Yes.

81. While some factors relevant to determining the level of penalty will be relevant only to the particular regime which has been breached, many factors will be relevant to all regimes. The Association believes there is a core list of factors that could be set out in legislation for courts to take into account.

82. The Association believes the factors (a) – (e) listed at para 35.1 above are relevant to determining quantum of penalty. In addition the following factors are relevant:
(a) The level of penalties that have been imposed in previous similar situations;

(b) The attitude of the defendant;

(c) Whether the defendant has committed previous breaches;

(d) The financial circumstances of the defendant;

(e) Whether other particular orders have already been made in respect of the breach (for example an order of exemplary damages or a management ban, both of which also have financial consequences fo the defendant);

(f) Whether professional advice had been obtained about the contravention prior to the breach.

83. And where the defendant is a body corporate:

(a) The level in the organisation at which the contravening conduct occurred;

(b) Whether the corporation exercises due diligence and whether it has a corporate culture conducive to compliance.

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

84. It is appropriate for a court to draw on criminal sentencing practice when determining penalties. Having either a core set of factors, or factors particular to the regime to be considered by the court in determining the level of penalty, is analogous to the first two steps in the modern approach to criminal sentencing (as described in paragraph 7.60 of the Paper).

85. A Court should also discount a penalty to take account of the entry of an early admission of liability (equivalent to an early guilty plea) and any assistance or cooperation provided to the authorities (including for example the provision of evidence against other defendants). These matters are currently commonly considered by the courts in determining the level of civil penalties and should continue to be relevant.

Do you agree that appeals from civil pecuniary penalties should continue to be brought under the broadly framed right in s66 of the Judicature Act 1908?

86. Yes.

87. For the reasons set out in paras 7.63 – 7.69 of the Paper the Association agrees that appeals from penalties should continue to be brought under the broadly framed right in s66 of the Judicature Act 1908.
Do you agree that civil pecuniary penalty statutes should deal expressly with the issue of limitation?

88. Yes. It would be useful for individual statutes to provide limitation periods appropriate to the particular regime with which they deal.

89. Limitation provisions should include a long-stop provision appropriate to the circumstances. The Association favours a maximum long stop period of ten years. For certain breaches a shorter time period, such as five years, is likely to be more appropriate. For example in relation to the sending of unsolicited electronic messages a long stop period of any more than five years seems unnecessary.

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

90. Yes, guidance should be provided to policy makers on the matters influencing the choice of limitation periods. In particular, it would be useful for such guidance to address when time begins to run and whether or not provision for continuing breaches should be made.

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?

91. Yes.

92. It would be useful for the Law Commission to recommend the addition to the Legislation Advisory Committee Guidelines of a chapter relating to civil penalties. The Association is not aware of any other guidance that could be helpful.

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?

93. There is likely to be a need for legislation to amend existing penalty regimes to ensure they are principled and consistent eg. amending the Financial Markets Conduct Bill to remove the ability of the FMA to settle directly with parties. It will be necessary for the guidelines to be finalised before determining what statutes may require amendment.

94. The Association does not favour having one Act containing a set of penalty provisions that would then be mandatory across all penalty statutes. Prescription to this level across all regimes is not necessary.
95. By including standard provisions in the LAC Guidelines Civil penalty regimes should be consistent going forward. Allowing individual statutes to contain their own procedural provisions would still allow flexibility for a particular regime where required.

Yours faithfully

Stephen Mills QC
President | New Zealand Bar Association
22 February 2013

Susan Hall
Senior Legal and Policy Adviser
Law Commission

By email: cpp@lawcom.govt.nz

Dear Susan

NZLC IP30: Civil Pecuniary Penalties

The New Zealand Bankers’ Association (NZBA) is grateful for the opportunity to comment on the Issues Paper on Civil Pecuniary Penalties.

In general, NZBA has no objection to the use of civil pecuniary penalties. On a fundamental level, however, we believe before they are included as part of a regulatory regime consideration needs to be given as to the appropriateness of their inclusion in the specific circumstances. We do not believe it is appropriate for them to be included as a matter of course. We believe that consistency across regulatory regimes must be maintained, and as such the approach, frequency of inclusions and the quantum of pecuniary penalties must not be significantly different across statutes that are regulating the same market or industry.

Furthermore, where pecuniary penalties are included, sufficient controls need to be put in place to assure that they are used appropriately.

Another area that caused considerable dialogue within our membership is the purpose of civil pecuniary penalties. The general position has been that these penalties are intended to serve as a ‘stick’, a mechanism for punishing bad behaviour and as such a way to deter behaviour which has been deemed to be undesirable. Increasingly, however, these penalty mechanisms have been used as a way of compensating victims, particularly in cases where no compensation mechanism exists in the regime. NZBA believes that further debate as to the purpose of these penalties is required. Furthermore, once a position has been determined, civil pecuniary penalties must be consistently applied.

The abovementioned point is relevant because the difference fundamentally changes the question a court asks when considering these proceedings. If the former position is retained, the court’s focus will be on imposing a remedy that is proportionate to the quantum of the wrongdoing. If, however, the question revolves around compensation, the court will be considering what level of harm the victims should be compensated for. This could lead to
considerably different outcomes. For companies, this also means that it creates greater uncertainty in cases where they are unsure which standard a court would apply.

A further matter which NZBA believes needs to be considered is the interplay between civil pecuniary penalties and criminal penalties. In many regimes both options are available and often civil and criminal proceedings are initiated simultaneously. NZBA strongly believes, however, due to the costs in both time and resources involved in dealing with such actions, that both sets of proceedings should not be conducted simultaneously. As such, if criminal proceedings (the more severe of the two) are initiated, civil proceedings should be halted.

Finally, NZBA believes that thought needs to be given at to the standard that courts should use when deciding whether these penalties should be applied or not. While a standard balance of probabilities test does give greater certainty, it does fail to recognise the large variety of different legislation, covering acts of differing severity. Ultimately, a more flexible approach may well be appropriate.

Thank you for allowing us to make these general comments. If you would like to discuss any of these points further please feel free to get in touch with me.

Yours sincerely

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Associate Director

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26 February 2013

The Law Commission
PO Box 2590
WELLINGTON

Attn: Susan Hall, Senior Legal and Policy Adviser

CIVIL PECUNIARY PENALTIES

1. Thank you for the opportunity to make a submission on the Law Commission’s review of civil pecuniary penalties.

Civil penalties and financial markets legislation

2. The Financial Markets Authority (FMA) is an independent Crown entity, established on 1 May 2011. Its purpose is to promote and facilitate the development of fair, efficient, and transparent financial markets in New Zealand. FMA’s statutory functions include to monitor compliance with, investigate conduct that constitutes or may constitute a contravention of, and enforce the financial markets legislation set out in Schedule 1 of the Financial Markets Authority Act 2011. Some of these pieces of legislation, including the Securities Act 1978 and the Securities Markets Act 1988, utilise civil pecuniary penalties as important parts of the framework designed to protect investors and the integrity of the market and to deter misconduct by market participants. The Financial Markets Conduct Bill, currently before Parliament, gives even more prominence to civil penalties.

3. In FMA’s submission civil penalties are an important part of the hierarchy of sanctions available for financial markets regulation. In keeping with the strategic theory of regulation FMA applies a range of interventions that recognise that the majority of market participants will seek to comply with regulatory requirements if given appropriate guidance and incentives. For FMA to apply a risk-based and proportionate approach to regulation it is essential that we have a range of compliance and enforcement options to provide the right level of incentive, sanction, and deterrence to differing levels of market misconduct. We agree with the conclusion in Chapter 4 of the issues paper that the theory of responsive regulation should guide our approach to the design of regulatory enforcement regimes in New Zealand.

4. FMA agrees that a general assertion that civil penalties are appropriate in relation to “regulatory” law may be overly broad, given the breadth of regulation in modern society. In our submission, however, financial markets are an area in which arguments of voluntary accession to regulation through active participation have genuine validity. This is especially
true given the small number of regulated actors whose conduct can have significant consequences on investors throughout New Zealand and on the economy, and the growing extent to which market participants are required to be registered, licensed or authorised in order to provide financial services, especially to members of the public. A significant part of FMA’s regulatory activity and a core aspect of FMA’s mandate is devoted to providing guidance to ensure that those who choose to participate in the markets are aware of the standards required of them. This includes promoting an understanding of the consequences that will follow if willing compliance is not achieved.

5. It also part of FMA’s mandate to encourage the development of New Zealand’s markets. In part this is achieved by ensuring that a flexible and proportionate range of enforcement remedies available, so that misconduct is punished but responsible market players are not discouraged from entering the market for fear of unduly onerous enforcement action for less serious infractions. The availability of civil pecuniary penalties allows regulators such as FMA to strike a balance between the protection of investors, sending a message to the market and encouraging market participation. This is more desirable than an inflexible, binary approach to enforcement action.

6. In these circumstances we believe it is reasonable to contend that participants in this regulated sphere have a high awareness that illegal conduct is subject to administrative, civil pecuniary, and criminal sanctions. Feedback from directors, commentators and others in the markets strongly suggests that civil penalty proceedings taken by FMA provide a strong incentive to compliance among market participants. FMA agrees with the view expressed in chapter 4, that civil pecuniary penalties fill a gap where the threat of private civil action fails to supply a deterrent. Our assessment of submissions received by the Commerce Select Committee in its consideration of the Financial Markets Conduct Bill is that submitters clearly differentiated between civil penalty and criminal enforcement provisions, and while treating both as serious, clearly did attach additional significance to the jeopardy of criminal conviction. In our submission these factors favour the continued inclusion of civil penalties in financial markets legislation.

**Critical issues**

7. In FMA’s submission the approach to the civil standard of proof confirmed by the Supreme Court in Z v Dental Complaints Assessment Committee remains appropriate for civil pecuniary penalties. In the context of financial markets regulation this allows a Court to assess the seriousness of the matters to be proved in light of the statutory context and the jeopardy faced by the defendant, whilst allowing more effective enforcement of regulatory provisions. We think the reference in securities legislation to the “usual” civil standard of proof supports this, and is a sufficient indicator to the Courts in this regard.

8. In our submission the usual civil approach is appropriate in terms of the burden of proof for defences. However we agree it is desirable for civil penalty provisions to be clear as to the allocation of the burden of proof for affirmative defences, particularly in any cases where it is intended that only an evidentiary burden will lie on the defendant.

9. As observed above, the Courts oversee the application of evidential and procedural safeguards that ought to apply in a civil pecuniary penalty proceeding. We agree that civil pecuniary penalty proceedings are civil proceedings and the usual rules of court, evidence and procedure for civil proceedings should apply.
10. Our preferred approach to matters of procedure and evidence is consistent with our viewing civil penalty proceedings as quite distinct from criminal prosecutions. This distinction, which is not always apparent in existing legislation, will be made clearer if the Financial Markets Conduct Bill is enacted in broadly its current form. That legislation will reserve serious criminal liability for conduct that occurs with the requisite mens rea, while providing incentives, in the form of civil penalty provisions, for market participants to maintain systems and standards of compliance.

11. In the context of New Zealand securities law, civil penalties have evolved from “treble damages” provisions for insider trading that were introduced in the Securities Act 1988. The use of treble damages in securities law, anti-trust law, and related areas developed in the United States as a means to more effectively deter illegal activity, accepting that optimal deterrence involves a calculation of the probability and severity of any punishment. Treble damages claims for insider trading were originally available in New Zealand only to private litigants and not to the regulator. More recent reforms to our securities trading laws have reversed this, such that civil penalties can now be imposed only at the suit of the regulator, and are paid to the Crown rather than to the company the shares of which were the object of the trading. The broadening of civil penalty provisions has been accompanied by a more general shift to public enforcement of our financial markets legislation, including the introduction of a role for the FMA in taking private law actions for damages or other remedies, either by its own standing (such as under section 55G of the Securities Act) or on behalf of an aggrieved person, as is possible in a wide range of circumstances under section 34 of the Financial Markets Authority Act 2011. In a growing number of cases these compensatory actions, procedurally, sit alongside the regulator’s ability to take proceedings seeking civil pecuniary penalties.

12. It is FMA’s submission that where Parliament has decided to increase public enforcement in terms of both remedial and punitive proceedings less weight can be placed on the distinction between private and public actions when comparing civil penalties to other civil proceedings. The combination of compensation actions (or actions for declarations of contravention that can be relied upon by other aggrieved persons seeking compensation) and penalty proceedings allows more efficient compensation and avoids multiple Court proceedings, reducing costs for all parties, notably vulnerable investors. Any introduction of specific rules of procedure and evidence that applied only to civil penalty proceedings would materially reduce these efficiencies, and reduce the effective enforcement of the law. There is a risk that the integrity of the market and interests of investors would be less protected by such a change.

13. For the same reason we think that application of the rule against self-incrimination to civil penalty proceedings is problematic. We believe the privilege as formerly applied in New Zealand, both to testimony and pre-existing documents, was overly broad. 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.

14. FMA agrees that further examination of the application of notions of double jeopardy to civil penalty proceedings would be useful. The existing position in securities legislation takes a narrow view that a person cannot be ordered to pay a civil penalty and be liable for a fine for the same conduct. This does not provide any guidance on when proceedings can be taken,
or the extent to which precedence should be given to criminal over civil proceedings. It is against the interests of victims of misconduct that proceedings intended to provide them with compensation for the harm they have suffered are routinely stayed, often for considerable periods of time, while criminal proceedings and appeals take their course. We should be interested to discuss further with the Commission the practical difficulties in this area, with a view to finding pragmatic protections that could allow civil compensation cases to move speedily to resolution notwithstanding the existence of criminal charges.

15. FMA’s enforcement policy, which is available on our website, sets out our approach to civil and criminal proceedings. It says that in general we will take criminal proceedings where we see misconduct that is intentional, reckless, or otherwise serious. This approach recognises that civil penalty proceedings can be appropriate whenever expected standards of conduct are breached, while conduct that is particularly egregious is appropriately a matter for criminal prosecution. It follows that we do not believe that any mens rea requirement should, as a general rule, be required for liability for civil penalties. In the context of a regulated market we see the particular advantage of civil penalties is that they provide an appropriate level of incentive to regulated participants to have sufficient systems and processes to ensure that they comply with the expected standards and do not cause harm to investors. This level of incentive would be lost if penalties were reserved only for deliberate acts. Conversely we think it would be difficult in practice to apply a rule that said civil penalties could never be used in cases that involve a degree of moral blameworthiness, as this is ultimately a subjective assessment.

16. We would also welcome further clarity in relation to the approach to ancillary liability. We note that the approach taken in Australia in relation to civil penalty provisions is essentially the same as required for party liability under criminal law. We think there are potential shortfalls in this approach, which are those highlighted by Justice Hammond and Justice Arnold in Commerce Commission v NZ Bus Ltd. We believe an approach to ancillary liability that is based on “dishonest participation” or, as suggested by Justice Arnold, knowledge of a real risk of contravention, would provide a basis for liability that is more consistent with the positioning of civil penalties as an incentive to encourage compliance with known standards in a regulated market.

17. Whether civil penalty provisions in statute should distinguish between individual and corporate offenders depends, in our submission, on the circumstances. We would observe that in the financial markets liable individuals are, for the most part, covered by corporate insurance policies. 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.

Legislative design

18. We do not have extensive comments on this section of the issues paper, save to note that we think consistency in drafting is desirable wherever possible, to reduce the chance that differences merely of terminology are interpreted as differences of substance.

19. We note that FMA has advised MBIE officials on the proposal in the FMC Bill to allow settlement of pecuniary penalty proceedings. We should be happy to discuss this proposal further with the Commission.
20. We think it is useful for individual statutes to include guidance for judges in assessing the 
level of civil penalties, tied to the purpose of the legislation. We think it is less helpful to 
have a prescribed statutory threshold for the application of penalties that is additional to 
proof of the elements of the requisite liability provision. The matters addressed in such 
provisions currently (such as section 55C(c) of the Securities Act 1978) could, in our 
submission, adequately be addressed as matters relevant to the quantum of any penalty.

21. As we have already noted, the increased use of civil penalties in financial markets legislation 
has been part of a broader emphasis on public enforcement of investors’ rights under this 
legislation. Given this intent we do not think it would be desirable to reintroduce different 
limitation periods for civil penalty proceedings as opposed to other civil proceedings. In our 
submission the approach in the Limitation Act 2010, including the concept of reasonable 
disclosability, remains appropriate in the context of financial markets legislation, where the 
breaches and resulting loss often remain hidden from investors view for some time.

Form of recommendations

22. Given the broad range of circumstances in which these penalties might be considered we 
think it would be desirable for the LAC Guidelines to include guidance as suggested in the 
issues paper.

23. We appreciate that the use of these penalties is becoming more common in other, less 
regulated, environments. While we express no view on this, it seems to us that a single 
legislative approach to civil penalties could be a blunt way of addressing the varied situations 
in which civil penalty provisions employed. We consider that the operation of civil pecuniary 
penalties should reflect the factors relevant to the particular market in which they are to be 
applied. In respect of financial markets, we have noted that civil penalties in the relevant 
legislation are increasing along with a move to greater public enforcement of private rights. 
The introduction of specific procedural and evidential rules for penalty proceedings would, 
in our view, materially reduce the efficiencies that can be found by combining compensation 
and penalty proceedings, and could negatively impact outcomes for investors if 
compensation proceedings had to be stayed awaiting the end of a civil penalties case. We 
think that guidelines for the use and design of civil penalties would assist policy makers to 
ensure that new penalty provisions are fit for their specific purpose and provide clarity both 
to regulators and to participants.

24. As we noted at the outset, FMA sees civil penalties as an important element in the 
regulatory toolkit available for financial markets regulation. Within that context we would 
welcome the opportunity to discuss the matters raised in this submission and in the issues 
paper more generally.

Yours faithfully,

[Signature]

Liam Mason
Head of Legal and Board Secretary

1258038
26 February 2013

Law Commission
PO Box 2590
Wellington
By email: cpp@lawcom.govt.nz

Attention: Susan Hall- Senior Legal and Policy Adviser

Air New Zealand Legal Counsel Law Submission on Civil Pecuniary Penalties

In response to the Law Commission’s request for submissions and comments on the Issues Paper on Civil Pecuniary Penalties, enclosed with this letter is our submission.

Our submission focuses on the questions outlined in the Issues Paper and considers the types of procedural protections that should be in place in the form of policy guidance and imposition of a legislative framework.

We welcome the Law Commission’s initiative in raising the review of the role of Civil Pecuniary Penalties within the New Zealand legal system.

Yours faithfully

John Blair
Air New Zealand
General Counsel & Company Secretary
CIVIL PECUNIARY PENALTIES IN THE NEW ZEALAND LEGAL SYSTEM- LAW COMMISSION SUBMISSION

INTRODUCTION
Civil pecuniary penalties (CPPs) are imposed by the courts under the authority of statutes for a breach of the relevant legislation. CPPs are in the nature of fines and can impose severe financial penalties by enforcement agencies to punish corporate entities and individuals for breaches of the law. Despite being a civil action they are not to compensate for any actual loss suffered and are paid to Government. They encourage compliance with a regulatory regime with the aim of deterring breaches.

CPPs affect a variety of sectors and activities. Financial penalties can be particularly severe for individuals and even more so for corporate entities. There are circumstances where CPPs are considered appropriate in a regulatory regime. They occur in areas of low level breach in commercial and corporate transactions, securities and the financial sector as well as regimes for environmental protection.

This submission will consider the types of procedural protections that should be in place in the form of policy guidance and a legislative framework as has been recommended in Australia with their CPP regime. New Zealand has lacked strategic consideration of CPPs merits and design and we welcome the Law Commission’s initiative in raising this issue. This submission advocates maintaining the traditional distinctions between the civil and criminal law;

a) Minor infringements should be dealt with by CPPs and more severe infringements should be dealt with by the criminal law.

b) Traditional evidential and procedural rules for civil matters should apply to CPPs being predominately a civil matter and criminal evidential and procedural rules should be kept for criminal matters alone.

c) The traditional burden of proof for civil matters should be maintained for CPPs on the balance of probabilities, beyond reasonable doubt should be kept for criminal matters.

d) CPP provisions should be drafted to maximise certainty in their application over the allocation of the burden of proof.

f) To reflect CPPs quasi-criminal nature, CPP statutes should recognise a privilege against self incrimination.

g) Parallel proceedings for civil pecuniary and criminal matters should be discouraged due to double jeopardy concerns.

h) Evidence adduced from civil proceedings should not be used in criminal proceedings; evidence adduced from criminal proceedings should generally not be used in civil proceedings to reflect the different underlying bases of the civil and criminal systems.

i) There should be a prohibition on CPPs for offences which require some degree of moral culpability; criminal intent is better reflected in the criminal system.

j) Generally only enforcement bodies should instigate CPP proceedings.
k) More guidance is recommended on imposing how monetary penalties are to be determined. Maximum penalties should not exceed criminal maximum penalties. Appeals should continue to be brought and limitation periods should be encouraged.

These propositions will be considered in more detail in the submission as follows;

1) ROLE & SCOPE OF CIVIL PECUNIARY PENALTIES
   Q1. What circumstances favour the inclusion of civil pecuniary penalties in legislation?

Enforcement bodies find financial penalties attractive. They are easier to obtain than criminal convictions due to being civil rather than criminal. A criminal trial is not required, CPP’s require a lower standard of proof and more relaxed rules of evidence and procedure. CPPs offer benefits to offenders who can avoid the stigma of criminal conviction. There is not a chance of imprisonment, only a fine. Furthermore there is less risk to a person’s travel and work opportunities. Clarification of the role of CPPs in our legal system will bring us into alignment with international trends, including Australia which has reviewed its CPP provisions. Alignment would mean our two regimes are more compatible and could potentially be enforced from either side of the Tasman promoting co-operation.

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

CPPs are considered to play a valuable role in our regulatory system. CPPs should be confined to traditional civil offending and promote deterrence and compliance rather than being purely punitive. The criminal law adequately deals with traditional criminal offending for low levels of harm and more serious criminal matters. CPPs should be kept for civil infringements so distinctions between the criminal and civil systems can be maintained. These systems have different theoretical underpinnings, civil being more compensatory rather than punitive.

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

CPPs are not suited to severe infringements. Severe infringements are better dealt with under the criminal system as they are more likely to require a degree of moral culpability, a characteristic of the criminal law. More severe infringements that require severe punishments do not seem suited to CPPs as they are civil in nature and intended to be more compensatory. CPPs should be thought of as a type of quasi-criminal penalty, intending to act as more of a deterrent to breaches of regulations rather than focusing on punitive penalties. Severe infringements can be better dealt with by the criminal system.

2) EVIDENTIAL/PROCEDURAL RULES APPLICABLE TO CIVIL PECUNIARY PENALTIES
Q4: Should civil pecuniary penalty statutes contain a broad instruction to the effect that “civil pecuniary penalty proceedings are civil proceedings and the usual rules of court and rules of evidence and procedure for civil proceedings apply? 

There should be broad instruction that the usual rules of evidence and procedure for civil proceedings should apply to CPPs. CPPs are a civil tool and the evidential and procedural distinction between civil and criminal matters should be maintained. The theoretical reasons for the distinction in terms of fairness and possible outcomes carry great weight. Criminal evidential rules are stricter, we are dealing with proving moral culpability and the action is brought by the state so requires more protections. Civil proceedings evidential rules are more relaxed. Parties are more evenly matched as the action generally involves private individuals and protects private interests so requires fewer protections.

3) BURDEN OF PROOF FOR CIVIL PECUNIARY PENALTIES

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

CPP statutes should contain a uniform standard of proof provision as this will encourage certainty and clarity for the courts to apply and also provide a definite and clear indication for defendants who could be fined under CPPs. The uniform standard of proof should contain the usual civil standard of the balance of probabilities. Creating a new burden of proof would be an over complication and create uncertainty.

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

CPP provisions should be drafted to maximise certainty in their application over the allocation of the burden of proof. Certainty in the law is imperative. There should be a different scale of penalty for strict liability CPP offences compared to other general CPP offences.

4) PRIVILEGE AGAINST SELF-INCRIMINATION FOR CIVIL PECUNIARY PENALTIES

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

Recognition of the privilege against self-incrimination in criminal matters reflects the severity of criminal penalties, the imbalance of power between the state and the individual in criminal proceedings and our desire not to penalise the innocent. Australian case law and overseas practice has also recognised a common law privilege against self exposure to penalties designed to punish or discipline or be protective in nature, in civil penalty matters but not to compensatory awards.

CPPs do not result in criminal conviction, although they have a punitive effect and are considered quasi-criminal. They should recognise a privilege against self incrimination despite the traditional lower protections of civil penalties to recognise
their quasi-criminal nature. CPPs could be treated differently to the criminal law privilege and perhaps apply at the CPP proceedings stage only and not during investigations for CPP proceedings. Once it is at the proceedings stage the penalty would act more punitively, so the privilege should apply equally across the board to all CPPs to encourage consistency. Currently most CPP regulatory regimes are silent as to the privilege unless specifically mentioned that they apply.

5) DOUBLE JEOPARDY ISSUES, PROCEEDINGS AND EVIDENCE

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

There is a concern of double jeopardy; the right not to be tried twice for the same crime is a fundamental right in the NZBORA. If there are civil proceedings then parallel criminal proceedings should not be commenced and vice versa, there could end up being parallel monetary penalties. However, it should be noted that commencement of a criminal claim or a CPP claim should not preclude a private damages claim being commenced.

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

CPP statutes should require if criminal proceedings are commenced, CPP proceedings should be stayed to avoid the risk of double jeopardy. Regulators would put more consideration into whether they wish to commence criminal or CPP proceedings. The Courts could apply a statutory bar on taking one set of proceedings after another has been commenced or completed unless an act specifies when the courts discretion to not stay proceedings can occur which would be exceptional circumstances.

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

There should be a statutory restriction on the use in criminal proceedings of evidence adduced in CPP proceedings. There are traditionally significant differences in evidential rules for criminal and civil matters, criminal evidential rules being stricter.

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

If criminal proceedings fail a regulator should not be able to commence CPP proceedings based on the common law peremptory plea; a special reason for which a trial cannot go ahead, 'autrescois acquit'. The defendant has been previously acquitted of the same offence and cannot be tried for it again. If criminal proceedings have only been withdrawn CPP proceedings could go ahead as the defendant has not yet been properly tried.
Q12. Are there any circumstances in which a regulator should be able to commence criminal proceedings if a civil pecuniary penalty has already been imposed?

Currently under some CPP statutes it is possible for regulators to commence criminal proceedings even if a CPP has already been imposed for the same conduct if it is stated in the relevant statute. Other acts contain specific provisions about one penalty only. Double jeopardy is of major concern. There is a peremptory plea ‘autrefois convict’; if a defendant is previously convicted of an offence the trial for the same offence cannot go ahead, which will avoid issues of double jeopardy. Criminal proceedings should not be commenced if a CPP has already been imposed.

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

There should be a clear rule in all statutes containing criminal offences and CPPs that no person may be liable for a CPP and a criminal sanction. This will avoid double jeopardy issues and allow greater certainty.

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

A regulator should not be able to commence CPP Proceedings if a criminal sanction has already been imposed. There are the usual concerns of double jeopardy.

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

A person should not be liable for more than one CPP for the same conduct to avoid double jeopardy issues. Especially when it is the same conduct, the person is being charged twice for the same offence which should be avoided. Statutes will have to be clear as to what constitutes same conduct. Also there could be a limit to the penalty a court may impose where a person is convicted of more than one offence when the offences had some sort of similarity (but was not considered the same conduct). There could be exceptions for exceptional circumstances if clearly stated and reasoned as discussed above.

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

If there are management bans or other civil remedies for the same conduct, then the courts should be required to take those into account when imposing penalties to avoid double jeopardy. The courts should be required to minimise double jeopardy effects
of any penalty wherever possible, so the offender is not penalised twice for the same offence.

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

Yes, as this would allow certainty. The scheme would be clearer and easier for courts to apply too. People may try to avoid a fine by claiming it was the same conduct and there would be double jeopardy issues, so it is appropriate to have some guidelines to ensure clarity.

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

There should be guidance for the courts in penalty setting. A stringent code is not desirable as flexibility is important. Guidelines (factors to be taken into account) are a way of achieving this and providing certainty of application to ensure consistency and transparency when an enforcement decision is to be made.

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

Enforcement bodies should develop and publish enforcement guidelines or policies. For the reasons discussed above, it is important for the public to be educated about policies and guidelines. Clarity in their policies and guidelines is fundamental to allow people the opportunity to comply and further principles of natural justice.

6) INTENTION AND DEFENCES

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

There should be a prohibition on CPPs being used for contraventions which entail some degree of criminal intent. Known or intentional breaches define criminal behaviour, proof of mens rea is the threshold for criminal liability. Stigma accompanies criminal conviction and it is considered fair to impose criminal sanctions on persons whose subjective mental states and conduct is blameworthy. The civil system is not characterised by moral culpability. CPPs are imposed through civil proceedings on the balance of probabilities, a lower standard than the criminal burden of proof (criminal law has a tougher burden to meet reflecting the requirement for moral culpability). Contraventions which entail a degree of criminal intent should not be dealt with by CPPs. These types of contraventions are better dealt with under the criminal system.

Q21. Should civil pecuniary penalty provisions be drafted to expressly require or exclude fault and to set out all the available defences?
CPP provisions should expressly exclude fault being a civil matter and not characterised by moral culpability. Available defences should be set out.

**Q22. What guidance should be in place for policy makers about the decision to opt for mens rea, strict or absolute liability civil pecuniary penalties?**

Specifically, should there be guidance that absolute 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**

Absolute CPPs should only be contemplated in rare circumstances such as when there is an overwhelming national interest as is the case with criminal absolute liability provisions to take into account CPPs quasi-criminal nature.

b) **There is a cogent reason in the particular circumstance s for precluding a defence of total absence of fault.**

There should be guidance for CPPs to be contemplated only in rare circumstances when there is a good reason for not allowing a defence of total absence of fault.

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

CPPs should be more explicit as to the degree and nature of knowledge required to establish ancillary liability as penalties can be very severe and on a par with criminal penalties. Some CPPs expressly refer to ancillary liability possibilities. The criminal system is explicit in the nature of knowledge required to reflect the severity of its penalties. CPPs being quasi-criminal should also be explicit for similar reasons, particularly when CPPs are very high.

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

CPPs should provide guidance to courts in determining penalty quantum in cases where both a company and an individual are principally liable for the same contravention. It would promote certainty. Companies seem to be liable to receive more severe penalties than individuals so a clear framework for basing quantum decisions on would provide a more principled approach. Currently no CPP regime statutes give guidance on how penalties should be imposed in relation to companies and individuals.

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

It is currently possible under some CPP regimes for both an individual and a body corporate to be principally liable for a breach. There should be more guidance as to
how corporate and individual liability should be attributed and ascribed as double jeopardy issues are relevant, putting liability on the company and its officers could be considered imposing a penalty twice.

7) LEGISLATIVE DESIGN ELEMENTS

Q26. Do you agree that any penalty:

- That involves substantial maximum financial penalties;
- That is imposed by the High Court after a civil trial, according to the rules of civil procedure and evidence;
- Where liability is established on the civil standard of proof;
- Where payment of the penalty is enforced in the civil courts, as a debt due to the Crown; and
- Where neither imprisonment nor criminal conviction can result.

Should be referred to in legislation as a “civil pecuniary penalty”?

When the penalties cover the listed elements, they should be referred to as a CPP. They should be imposed after a civil trial and according to the rules of civil procedure and evidence.

8) IMPOSITION

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

Variable monetary penalties by non-judicial bodies’ should be discouraged; the regulators would be both complainant and judge which creates problems with fairness, especially when there are variable monetary penalties involved. Judicial bodies should be imposing penalties and non-judicial bodies should be discouraged.

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

When a party is happy to admit a breach has occurred, or has settled on an agreed penalty with the enforcement body, it seems unnecessary to involve the court. This also avoids time delays and costs of the court process (CPPs currently must be imposed by the High Court). Obvious concerns are of CPP settlements becoming undercover and there being a lack of transparency; innocent parties may feel bullied into accepting a settlement to avoid a possible court action. These criticisms could be ameliorated by public disclosure of settlements, guidelines in statutes to approach settlement negotiations to promote more control over the settlement process and court approval of settlements.

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

Publicising details of the breach (the agreed circumstances and nature of the breach and the quantum of the agreed penalty) would discourage an undercover market of
settlements behind closed doors and encourage transparency. Enforcement bodies and offenders who have breached regulations would still be held accountable for their breach.

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

Policy for approaching settlement negotiations should be made public. This would allow for more transparency and public understanding so there is an even playing field and the alleged offender is not in a more vulnerable position than the enforcers.

9) INSTIGATION OF PROCEEDINGS
Q31. Are there any circumstances when individuals should be able to commence civil pecuniary penalties?

Only relevant enforcement bodies or agencies should be able to instigate CPP proceedings. Individuals should not be able to instigate CPP proceedings. CPPs generally arise in the regulatory context and should be confined to regulatory bodies.

Q32. Should all civil pecuniary penalties regimes provide for declaration of contravention to be made?

Declarations should be extended to all CPP regimes if courts find a breach, encouraging more accountability, public understanding and openness, especially when some of the CPPs are severe and can be significant monetary sums. It could be compulsory for CPPs over a certain amount. Currently only some statutes provide for declarations to be made in the penalty proceedings if it is satisfied a breach has occurred.

10) PENALTIES; MAXIMUM PENALTIES; GUIDANCE AS TO IMPOSITION; GUIDANCE AS TO LEVEL OF PENALTY
Q33. Should the setting of maximum civil pecuniary penalties in legislation be guided by the following principles?

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

Maximum penalties should be applied in a systematic manner. The above principles and some level of guidance seem appropriate. It is important consistency is achieved, particularly when penalties can be severe. Encouraging deterrence of non-compliance by offenders is a goal of CPPs as opposed to criminal aims of retribution, rehabilitation and deterrence, characterised by the criminal system. Maximum
penalties following the above principles should persuade potential offenders to comply with the regulations rather than punish. Fixed amounts may not be appropriate but a consistent approach in the form of guidelines to encourage compliance would assist.

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

Where parallel criminal penalties and CPPs target the same conduct or breach, it is not appropriate for maximum CPPs to be higher than the equivalent maximum monetary criminal penalty. The criminal system punishes defendants with sanctions to penalise the most egregious social crimes, maximum criminal penalties should reflect this by being higher than equivalent maximum CPPs.

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

Currently the High Court may impose a CPP on a person in breach at their discretion to make an order for a CPP. Most Acts don’t give guidance of when discretion is applied, while others do. A more consistent approach must be taken. A list of standard factors should be considered across the board to encourage consistency in imposing CPPs in a more systematic manner. General guidance is appropriate with scope for additional factors to be considered for particular regimes that may require them.

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

Difficulties with this include inconsistency among different regimes; there is uncertainty for those who may receive enforcement action under a particular regime if each regime has a different threshold of seriousness. Some particular circumstances make it is appropriate for thresholds of seriousness to be incorporated in regimes for guidance for CPPs to be imposed. This can account for differences in standards that need to be considered in different regimes. It can act to raise the bar slightly to impose a CPP when the breach is considered more serious, encourages deterrence for breach.

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

Best practice would be to set out guidance in the statute or have general factors that can be applied to all statutes, rather than leaving it to the absolute discretion of the court. This would encourage awareness and transparency in the courts setting of penalties. Currently some CPP regimes do set out factors whereas others do not.

Q38. Is there a core list of factors that could be set out in legislation for courts to take into account when determining the quantum of a penalty and if so, what should it include? What other additional factors are or are not relevant?
A core list of factors for the courts to consider would be helpful. Factors should be non-exhaustive and apply generally to all CPP statutes. Thresholds of seriousness could be included in regimes which require additional guidance. The factors to be included generally should include:

- The nature and extent of breach;
- The nature and extent of any loss or damage caused by breach;
- The nature and extent of any financial gain made by the breach;
- Whether the breach was intentional, inadvertent or negligent;
- The level of CPPs that have been imposed in previous similar situations;
- The circumstances in which the breach took place;
- The attitude of the offender;
- For bodies corporate, the level of the company at which offending took place and whether there is a company culture of compliance;
- Whether professional advice was obtained about the breach before it occurred;

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

If the type of regulatory offending leans more towards traditional serious criminal offending, it should be open for the courts to consider practices in criminal sentencing; however generally in determining the quantum of CPPs the courts should focus on civil approaches to determining quantum as it is a civil matter. Civil system goals are focused on deterring breach and consequences should be more compensatory, rather than criminal goals of retribution and punishment for breaches of the law.

11) APPEALS

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

Generally appellate bodies have tended to exercise wider powers in the civil jurisdiction. The appeals from CPPs should continue to be brought under the broadly framed right in s66. The argument for it to be narrowed is due to it being essentially a penalty which is more criminal in nature. However, as it is a civil matter, the appeal right should be framed broadly. The distinction between civil and criminal should be retained.

12) LIMITATION PERIODS

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

CPPs should deal expressly with the issue of limitation. CPPs are civil actions and it would be appropriate the usual 6 year time limit under the Limitation Act 2010 applies with the possibility of some flexibility in specified circumstances to take account of CPPs being quasi-criminal but clear guidelines are required. There is a difference in operation of limitation periods in the criminal and civil systems. Within the regulatory sphere delay should not be of great concern, CPP actions for known breaches should be taken swiftly to encourage finality in the matter and deter further
breaches. There could be exceptions to express limitations for situations when evidence is unlikely to be discovered for some time.

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

Guidance should be provided to policy makers on the matters influencing the choice of limitation periods. CPPs are punitive in nature with consequences which can be severe. Shorter periods would be appropriate as it is clear when a regulation has been breached and evidence of breach will not become stale.

**13) WHAT FORM SHOULD RECOMMENDATIONS TAKE-GUIDANCE FOR POLICY MAKERS**
**Q43. Should we recommend the addition to the Legislation Advisory Committee Guidelines of a chapter relating to civil pecuniary penalties? Are there any other forms of guidance that would assist?**

A chapter relating to guidelines for CPPs would greatly assist certainty of CPPs as it is a controversial area being a hybrid of civil and criminal characteristics. A chapter in relation to CPPs would be highly beneficial. Guidance to the High Court on their application in the form of additions to the High Court rules seems appropriate as they currently have discretion as to when the order for CPPs enforcement can be made.

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

It is imperative that the legislature amend existing CPP regimes for a more consistent and principled approach. Setting standard CPP provisions appears to be the best way to achieve this. As discussed in this submission, there are important considerations of when general provisions should be departed from and various regimes should provide specifically in some cases after careful consideration by policy makers.
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. 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

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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;

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\(^2\) 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

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\(^4\) Issues Paper, 3.20.
other contraventions of the law. This is apparent from the frequency of applications for discharges without conviction, 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:

   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.

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5 We refer to the consequences of the conviction itself, without reference to any additional sentence or fine imposed by the Court.
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, 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;

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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.


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. 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.

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, 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].
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, 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.

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;

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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.


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.

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. 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. The Supreme Court declined the Commission’s application for leave to appeal.

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.


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.

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\(^{30}\) *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 sentencing34 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].
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.
31 October 2014

Susan Hall
Senior Legal & Policy Advisor
Law Commission

Dear Ms. Hall

Submission by the Ministry for Primary Industries on Law Commission Issues Paper 33- Civil Pecuniary Penalties

Introduction
Thank you for the opportunity to comment on the above paper. Civil pecuniary penalties are relevant to the Ministry for Primary Industries (MPI) in the following ways:

a) The Hazardous Substances and New Organisms Act 1996 (HSNO) contains pecuniary penalty provisions in sections 124A to 124F. While MPI does not administer this Act, it is the enforcement agency for new organisms and can accordingly apply to the High Court for a pecuniary penalty order. To date, no pecuniary penalty orders have been sought.

b) Provisions (sections 154H to 154L) largely modelled on the HSNO provisions were recently introduced in the Biosecurity Act 1993 by the Biosecurity Law Reform Act 2012. These amendments came into force on 18 September 2012.

There are currently no proposals to include pecuniary penalty regimes in any other legislation administered by the MPI.

This submission focuses on the pecuniary penalty provisions in the Biosecurity Act 1993.

General Comments
MPI agrees with the Commission’s view that civil pecuniary penalties are not objectionable per se, but that they should be approached in a consistent and principled manner. The right balance needs to be achieved between certainty, flexibility, regulatory efficacy and fairness to defendants.
In MPI's view, having a criminal standard of proof and a privilege against exposure to a civil penalty would seriously undermine the efficacy of civil pecuniary penalties as a regulatory tool. However, MPI supports other protections available to criminal defendants, such as the rule against double jeopardy, being available to persons in pecuniary penalty proceedings.

MPI only favours the use of pecuniary penalties in circumstances where a significant financial sanction is necessary to ensure compliance or a person's non-compliance may cause substantial loss to others.

MPI welcomes guidance from the LAC on the use of statutory pecuniary penalty provisions.
RESPONSES TO SPECIFIC QUESTIONS

CHAPTER 4 - WHAT CIRCUMSTANCES MIGHT JUSTIFY THE USE OF CIVIL PECUNIARY PENALTIES

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

Where a significant financial sanction is necessary to counter economic incentives for non-compliance or a person's non-compliance may cause significant loss to others. This was the rationale for the recent introduction of the civil pecuniary penalty regime in the Biosecurity Act 1993 (as stated in the paper to Cabinet seeking policy approval for the civil pecuniary penalty regime).

Biosecurity is critical to New Zealand’s prosperity and way of life. More than any other developed country, New Zealand depends on the success of its primary industries and the biosecurity system that underpins them. Approximately half of New Zealand’s exports relate to primary produce. The biosecurity system also protects native plants and animals (many of which are unique to New Zealand), and other resources that are taonga of significance to Maori, and precious to all New Zealanders.

Pests and diseases from overseas can cause significant loss to New Zealand’s primary industries and the New Zealand economy for e.g. the PSA virus has caused losses of millions of dollars to the Kiwifruit industry. Persons and organisations need to be disincentivised from undertaking actions that may benefit them personally at the expense of others or the well-being of New Zealand or its resources as a whole for e.g. an organisation may wish to illegally import exotic animals for sale in the black market in the knowledge that persons are willing to pay a high price for them. The pets may pose a serious threat to native animals because of pests and diseases that they could carry. An appropriate financial sanction is necessary to deter and/or punish such conduct.

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

MPI is of the view that civil pecuniary penalties should not be used to target offending where there is a comparatively low level of harm. This is consistent with the VADE (Voluntary, Assisted, Directed, Enforced) model of compliance and
enforcement followed by MPI. Under the VADE model, in deciding which regulatory intervention to apply, MPI considers both the culpability of the person involved and the seriousness of the breach. The least regulatory response needed is used to gain compliance and interventions are escalated as required. E.g. a person may, in the first instance, be provided with information on their legal obligations. This may be escalated to a warning letter and then a direction to comply. Further interventions may be considered if the direction to comply is not complied with.

While criminal prosecution is an available option for less serious breaches of the law, regulatory agencies would, in accordance with the Attorney-General’s prosecution guidelines, not prosecute for every breach. In MPI’s view there are other regulatory and non-regulatory interventions, besides civil pecuniary penalties, available to agencies which can be more effectively used to gain compliance. Moreover, as civil pecuniary penalties involve action in the High Court, the cost and delays involved are not justified for “low level” breaches.

MPI’s view is that civil pecuniary penalties should only be available for serious and/or on-going non-compliance. However, we do not favour this restriction being written into legislative provisions as it would give room for debate as to what constitutes “serious” or “on-going” non-compliance (Departmental Report on Biosecurity Law Reform Bill 2012)

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

Civil pecuniary penalties are not suited to certain conduct where significant losses do not occur or it is difficult to link a loss with a breach e.g. assaulting or obstructing enforcement officers, impersonating persons exercising statutory powers, purporting to operate a transitional facility when not an approved person and knowingly providing false information. These involve serious allegations which can affect a person’s employment prospects and reputation and should be proven in criminal proceedings where the standard of proof is beyond a reasonable doubt.

Some breaches of the law can be more effectively addressed by other regulatory interventions e.g. infringement notices. An example is persons who fail to declare or incorrectly declare goods when they arrive in New Zealand. It is simply not practical to take these persons to court (some of them may only be in New Zealand for a short period, the number of breaches also means this is not cost-effective) and an instant infringement fine has more impact than a long-drawn out court proceeding with an uncertain outcome.
MPI agrees with the Commission’s view that it is not feasible or appropriate to use gradations of harm to justify the introduction of civil pecuniary penalties. Agencies need to examine on a case by case basis whether civil pecuniary penalties are justified and if so for what type of breaches. They would need to take into account the type of regulatory tools already available to them and the nature and circumstances of the breaches.

CHAPTER 6-THE CRITICAL ISSUES

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

MPI favours a broad instruction along the lines of the statement in the Commonwealth Authorities and Companies Act 1997 (referred to on page 80 of the issues paper): ‘The Court must apply the rules of evidence and procedure for civil matters when hearing proceedings for a pecuniary penalty order’. We think that the use of the word ‘usual’ should be avoided so that there are no disputes as to what is ‘usual’. The ability to adapt procedure in the case of pecuniary penalties to ensure fairness, in our view, supports the case for a broad formulation.

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

Yes, MPI favours the use of the formulation in section 140 of the Evidence Act 1995 (Cth) (pg 82-83 of the issues paper), that is, the statement that the balance of probabilities standard applies, as well as the factors a court may take into account in deciding if the standard has been met.

MPI’s view is that such a formulation gives legislative authority to the practice of the courts in applying the standard flexibly and makes for greater transparency. MPI does not favour legislating for an intermediate standard of proof – the civil standard is well understood and introducing another standard would create confusion.

In MPI’s opinion, the civil standard will not detract from the right of defendants. There is only likely to be a small percentage of non-compliance that actually causes significant economic loss to others. The majority of persons will comply with their
legal duties and of the small percentage that do not comply, only a small proportion of them will actually cause losses.

Further, in the case of the Biosecurity Act pecuniary penalty provisions, MPI would have the burden of establishing that a particular person has breached a legal duty and would also need to assess and quantify any harm caused. These tasks present challenges and would ensure that civil pecuniary penalty proceedings are not undertaken lightly.

Having a criminal standard of proof would seriously undermine the efficacy of civil pecuniary penalties as a regulatory tool. Given the sheer volume of transactions occurring at the border, and the fact that it is not practical to inspect all incoming goods, it would not always be possible to establish breach of a legal duty beyond a reasonable doubt.

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

Yes, these provisions should clearly indicate which party carries the burden of proof to minimise litigation and increase transparency.

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

No, this will result in inconsistency in the law. There is no privilege for other civil sanctions e.g. exemplary damages, or in the biosecurity context, seizure and destruction of goods. Some consignments can be worth thousands of dollars. It would be anomalous if a person could have a privilege against exposure to a pecuniary penalty but not against the seizure or destruction of their goods, the financial consequences of which may be equally, if not more adverse.

The privilege against self-exposure to a civil penalty has long been recognised by courts (but is no longer a recognised privilege under the Evidence Act 2006). However, this was at a time when state power was almost absolute and persons had no or minimal redress against oppressive state action. MPI’s view is that in the 21st century, there are sufficient other checks and balances to ensure regulatory agencies are accountable for their actions e.g. media and parliamentary scrutiny, Office of the Ombudsmen and judicial review. Nevertheless, to preserve the privilege against self-incrimination in relation to criminal penalties, statements or evidence
provided by the subject should not be allowed to be used in subsequent criminal proceedings.

In MPI’s view, a privilege against self-exposure to a civil penalty would undermine the efficacy of civil pecuniary penalties as a regulatory tool. Further, MPI considers that the interests of defendants would be served by the absence of such a privilege as it would incentivise co-operation with regulatory agencies e.g. if a person has failed to comply with a direction under section 122 of the Biosecurity Act and the person provides a genuine reason why they have failed to do so, MPI could work with that person to ensure compliance rather than having to pursue regulatory interventions.

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

Yes, because in the course of the civil proceedings, evidence may emerge that supports the case for criminal proceedings e.g. a breach of the law was intentional rather than negligent. However, the pecuniary penalty proceedings should then be stayed (refer question 9).

Q9 Should civil pecuniary penalty statutes require that, if criminal proceedings are commenced, the civil pecuniary penalty proceedings must be stayed? Yes, a person should not be subject to two proceedings where the object of both the proceedings is punitive. This is reflected in section 154L(3) of the Biosecurity Act.

Q10 Should there be a statutory restriction on the use in criminal proceedings of evidence adduced in civil pecuniary penalty proceedings? The only restriction should be on using statements or evidence provided by the party subject to the proceedings. This is to preserve the privilege against self-incrimination that the person would have had in relation to criminal offences. MPI supports the inclusion of a provision such as section 75 of the Anti Money Laundering Act. MPI understands that such a provision would not preclude the admission of evidence not provided by the person who is the subject of the proceedings.

Q11 Should a regulator be able to commence civil pecuniary penalty proceedings if criminal proceedings have failed or been withdrawn? Yes, given the variety of reasons for why a criminal proceeding may fail or be withdrawn, not all of which are under the control of the regulatory agency, MPI is of the view that there
should not be a statutory bar on such commencement. A court may, as part of its inherent jurisdiction, stay any proceedings which are regarded as an abuse of process (e.g. where the regulator did not initially investigate matters properly and wants to have a ‘second bite at the cherry’. MPI regards this as a sufficient safeguard against oppressive or unfair state action.

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

No, MPI is of the view that criminal proceedings should not be able to be commenced if a pecuniary penalty has been imposed and it is not overturned on appeal. This is reflected in section 154L(4) of the Biosecurity Act. While the rule against double jeopardy in section 26(2) in the New Zealand Bill of Rights Act 1990 does not apply to civil proceedings, fairness would require that a person is not subject to two penalties in respect of the same conduct.

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

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

MPI considers that a person should not be subject to a civil pecuniary penalty if a criminal sanction has already been imposed. However, under section 154K of the Biosecurity Act, a court may instead of making a pecuniary penalty order, order the person to mitigate or remedy any adverse effects on persons or a natural and physical resource that are caused by or on behalf of that person or order that the person pay the costs of mitigating/remedying the same. These orders are not by nature punitive but remedial/cost recovery measures. MPI’s view is that such orders should be able to be imposed notwithstanding that a criminal sanction has already been imposed.

Q15 If the same conduct can contravene multiple civil pecuniary penalty provisions, should the statute provide that proceedings may be brought in respect of any one or more of the contraventions, but that a person cannot be liable for more than one civil pecuniary penalty for the same conduct? Yes
Q16 When imposing penalties, should courts be required to take into account whether a management ban or other civil remedy has been imposed for the same conduct? Yes

Q17 Should statutes specify in more detail what constitutes “the same conduct” for the purposes of multiple civil pecuniary penalties and criminal sanctions? Yes, MPI would support a provision along the lines of section 214 of the Australian consumer law which limits the penalty a court can impose in respect of conduct which appears to the court to be ‘of the same or substantially similar nature and to have occurred on or about the same time’.

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

In the interests of certainty, this should be dealt with through a statutory bar.

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

Yes

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

Yes, given civil pecuniary penalties are punitive, this is consistent with some degree of culpability- e.g. commercial gain. Most of the breaches subject to the civil pecuniary penalty regime in the Biosecurity Act do not require proof of intent or knowledge. However, some breaches e.g. contravention of section 52 require proof of a ‘knowingly element’.

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

Yes

Q22 What guidance should be in place for policy makers about the decision to opt for mens rea, strict or absolute liability civil pecuniary penalties? Specifically, should there be guidance that absolute liability civil pecuniary penalties should be contemplated only in rare circumstances when:
(a) there is an overwhelming national interest in using them as an incentive to prevent certain behaviour occurring, regardless of fault; and (b) there is a cogent reason in the particular circumstances for precluding a defence of total absence of fault?

Guidance on what type of breaches are suitable for a civil pecuniary penalty and what degree of intent or knowledge (if any) should be required to found liability for a civil pecuniary penalty would be useful.

Yes, MPI agrees that the above guidance should be given in relation to absolute liability civil pecuniary penalties.

Q23 Should civil pecuniary penalty provisions be more explicit as to the degree and nature of knowledge required to establish ancillary liability? The Biosecurity Act does not allow for pecuniary penalty orders to be made against ancillary actors but MPI agrees that if there were such provisions, they should be explicit about the degree of knowledge required to establish ancillary liability.

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

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

Q26 Do you agree that any penalty:
- that involves substantial maximum financial penalties;
- that is imposed by the High Court after a civil trial, according to the rules of civil procedure and evidence;
- where liability is established on the civil standard of proof;
- where payment of the penalty is enforced in the civil courts, as a debt due to the Crown; and
- where neither imprisonment nor criminal conviction can result;

should be referred to in legislation as a “civil pecuniary penalty”? Yes, this will ensure that there is consistency in legislation.
Q27 Do you agree that the imposition of variable monetary penalties by non-judicial bodies should be discouraged?

Yes, non-judicial bodies should only be able to impose penalties where these are a fixed amount authorised by statute or where statute stipulates a formula for determining the amount.

CHAPTER 7-OTHER ELEMENTS OF LEGISLATIVE DESIGN

Q28 Should enforcement agencies be able to “settle” with parties that they would otherwise seek to have civil pecuniary penalties imposed upon? Yes, High Court proceedings can be lengthy and expensive for both agencies and the parties involved. Settlements can ensure that biosecurity breaches are remedied with less delay, which can mitigate the effects of breaches.

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

Yes, in the interests of transparency, this should be carried out to avoid the public perception that “deals” have been done.

Q30 Should enforcement bodies with such a power make public their policy for approaching settlement negotiations? A policy in general terms could be made available.

Q31 Are there any circumstances when individuals should be able to commence civil pecuniary penalty proceedings? No, MPI agrees with the Commission’s views set out in paragraph 7.21 that no strong arguments for allowing individuals to commence pecuniary penalty proceedings exist. Individuals are able to bring civil claims for damages and in a pecuniary penalty proceeding brought by an enforcement agency, a court is able to order that adverse effects on any person (or their land) are remedied or mitigated (refer section 154K). MPI considers that these provide sufficient redress for individuals. Further, MPI considers that the role of punishment/deterrence should not be taken on by individuals.

Q32 Should all civil pecuniary penalty regimes provide for a declaration of contravention to be made? This may be useful where there is a potential for separate damages claims to be made. Given the ability for a court to order the
remedying or mitigation of adverse effects under the Biosecurity Act, it remains to be seen how often damages claims would be undertaken by individuals. In MPI’s view, this issue is best determined on a case by case basis.

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

Maximum penalties:

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

Yes

Q34 Where parallel criminal and civil pecuniary penalties target the same conduct or breach, is it ever appropriate for maximum civil pecuniary penalties to be higher than the equivalent maximum monetary criminal penalty? Yes, as stated by the Commission at paragraph 7.34, the dominant imperative of pecuniary penalty orders is in creating incentives for compliance and disincentives for non-compliances. With the increase in trade and travel over the last decade, it is not possible for MPI to physically inspect all goods coming across New Zealand’s borders. Hence, it may not possible to detect all breaches of biosecurity law. High maximum penalties are therefore appropriate to deter non-compliance.

Q35 In what circumstances should Acts contain guidance as to when to impose a civil pecuniary penalty, and what should that guidance be? If the imposition of the pecuniary penalty is at the discretion of the court, there should be statutory guidance. MPI agrees that as minimum, the factors set out in paragraph 7.51 should be included. The purpose(s) of the statutory regime will also be relevant. The inclusion of ‘any other matters the court thinks fits’ will enable the court to take into account other relevant matters.

Q36 Are there difficulties in providing for a “threshold” of seriousness as in the Takeovers Act 1993? Yes, this leave room for debate as to what constitutes “serious”
Q37 Do you agree that civil pecuniary penalty statutes should include guidance for courts as to the setting of the level of a penalty? Yes

Q38 Is there a core list of factors that could be set out in legislation for courts to take into account when determining the quantum of a penalty and if so, what should it include? What other additional factors are or are not relevant? Yes, in MPI’s view a non-exhaustive list set out in statute would be helpful. The factors mentioned in section 7.51 would be relevant. Other relevant factors are: whether or not the person has committed previous breaches, the steps (if any) taken by the person to bring the contravention to the attention of the appropriate authority, the steps (if any) taken by the person to avoid, remedy or mitigate the effects of the breach and whether other particular orders have been made in respect of the breach.

Q39 To what extent should courts draw on criminal sentencing practice when determining the quantum of a penalty? MPI considers that the large body of jurisprudence in criminal sentencing practice would be an aid to courts in dealing with quantum, given the paucity of case law in New Zealand related to civil pecuniary penalties. Given that the object of both criminal and civil proceedings is punitive, such an approach would also ensure consistency. However, additional considerations may also be relevant to pecuniary penalties, bearing in mind the purposes of the relevant statutory regime.

Q40 Do you agree that appeals from civil pecuniary penalties should continue to be brought under the broadly framed right in s 66 of the Judicature Act 1908? Yes, MPI agrees with the view of the Commission expressed in paragraph 7.65. The alternative approach of each statute specifying appeal rights could lead to inconsistencies in appeal rights.

Q41 Do you agree that civil pecuniary penalty statutes should deal expressly with the issue of limitation? MPI’s view is that this should be decided on a regime by regime basis taking into account fairness, the need for finality and availability/reliability of evidence over the passage of time.

Q42 Do you agree that guidance should be provided to policy makers on the matters influencing the choice of limitation periods? Yes, this will aid policy
makers to decide if they want to insert a specific limitation period in their statutory regime or fall back on the Limitation Act provisions.

CHAPTER 8-WHAT FORM SHOULD OUR RECOMMENDATIONS TAKE?

Q43 Should we recommend the addition to the Legislation Advisory Committee Guidelines of a chapter relating to civil pecuniary penalties? Are there any other forms of guidance that would assist? Yes. Examples of civil pecuniary penalty provisions from legislation in other jurisdictions would be helpful for an agency proposing to enact a pecuniary penalty regime.

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

No, MPI favours guidance as this lends to more flexibility. A ‘one size fits all’ approach may not work. A core set of guiding principles that agencies can work through would provide greater flexibility to deal with the wide variety of conduct that is regulated by various agencies.

We hope the above comments are of assistance to the Commission. This submission has been approved by Mark Patchett, Chief Legal Advisor, MPI.

Please contact the writer if you wish to discuss this submission further:

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BUSINESS & EMPLOYMENT

March 2013

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LAW COMMISSION ISSUES PAPER ON CIVIL PECUNIARY PENALTIES

1. The Ministry of Business, Innovation and Employment wishes to comment on the Law Commission’s issues paper Civil Pecuniary Penalties. We are responsible for much of the policy-making in the commercial area and have been involved in the development of civil pecuniary penalty provisions in a number of regulatory settings, most recently in the Financial Markets Conduct Bill.

2. We welcome the Commission’s work on pecuniary penalties. We particularly welcome the proposal in Chapter 8 to include material in the LAC guidelines to assist those designing legislation on the appropriate use of pecuniary penalties. We consider that this will be of considerable practical benefit to our work.

3. The issues paper canvasses the issues that pecuniary penalties raise thoroughly. We limit our comments to aspects of the paper that we wish to raise particular issues on.

Penalty privilege

4. The issues paper comprehensively examines the issue of penalty privilege. We consider that the arguments put forward against the privilege in paragraphs 6.76 and 6.77 have considerable strength.

5. It is common for civil liability provisions to be structured on the notion of a contravention of obligations. Once a contravention has been proved, a number of civil remedies might result, including compensation, pecuniary penalties and other orders such as injunctions.

6. This means that regulators investigate contraventions of obligations, and not pecuniary penalty actions. We agree with the statement in the issues paper that the existence of a penalty privilege would, therefore, seriously impede the ability of regulators to make out their case in a wide range of civil proceedings. This would hinder regulators in monitoring compliance and punishing breaches of the law. In our view, this would be a negative development.
Limitation
7. We consider that the limitation period for pecuniary penalties should align with the standard period for civil proceedings. Again, we note that regulators investigate and bring proceedings in respect of a contravention. Adding a different limitation period for pecuniary penalties will add considerable complexity and uncertainty to investigations and civil proceedings, which we consider would be a poor outcome.

Double jeopardy
8. The issues paper examines the different situations where civil pecuniary penalty claims may overlap with criminal proceedings in considerable depth. The paper identifies a number of possible solutions to this overlap, including statutory bars to proceedings in some circumstances.

9. The first issue that we wish to comment on concerns the substantive double jeopardy issue of whether a defendant may receive be convicted of a criminal offence and receive a penalty in respect of the same conduct. We note that it is common for statutes to provide that a person may not be ordered to pay a pecuniary penalty and be liable for a fine for the same conduct. In our view, this is an appropriate policy response to this issue.

10. A related procedural issue is the question of the timing of overlapping civil and criminal claims. We note that at present this issue is generally dealt with by the High Court in the exercise of its inherent jurisdiction. This provides considerable flexibility for the Court to assess the particular facts of an individual case to arrive at a conclusion that is in the best interests of justice in that situation. We are not aware of any problems with this approach.

11. We acknowledge that an alternative approach may be for legislation to require an automatic stay of civil proceedings where a criminal proceeding has been initiated. There are already precedents for this approach in New Zealand.

12. A key reason having a stay in these circumstances is to prevent the prosecuting regulator from gaining additional information under the rules of civil procedure that would not be accessible in a criminal proceeding. This is, in essence, a self-incrimination problem. We note that another way to deal with this issue is to include provisions that restrict the use of evidence obtained from civil proceedings in criminal proceedings.

Ancillary liability
13. The issues paper examines the issue of ancillary liability for civil proceedings in paras 6.163 to 6.169, including the interpretation of common civil accessory provisions. This is an issue that we examined closely during the development of the Financial Markets Conduct Bill, and we do not consider that it presents concerns for the application of pecuniary penalties.

15. The issues paper notes the possible deterrent effect of these provisions on professional advisors. The case law in New Zealand and Australia demonstrates that intentional participation in the primary contravention and knowledge of all the facts essential to the contravention is required for accessory liability; innocent or even negligent participation is not sufficient for liability to be found.

16. We have not been able to identify a real-life instance in Australia or New Zealand where the civil accessory concept has led to an advisor being found liable for performing their normal professional role or an employee being found liable in carrying out their normal duties. We believe that the 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.

**Settlement**

17. The issues paper examines the issue of enforceable undertakings and settlements in paras 7.11-7.17, noting in particular the provisions of the Financial Markets Conduct Bill. The paper describes concerns with potential private settlements of pecuniary penalty proceedings between the regulator and the defendant.

18. We recognise the Law Commission’s concerns in this area. However, we consider that it important that regulators be able to settle proceedings in the financial markets context. This provides an effective and efficient means for both parties to resolve a pecuniary penalty proceeding. Settling these claims may also lead to better outcomes for investors who are seeking compensation.

19. We agree with the view expressed in the issues paper that transparency around these settlements is important. As the paper notes, transparency helps to uphold public confidence in the administration of justice. Publication of settlements is particularly important from a deterrence perspective.

**Contact details**

20. Thank you for the opportunity to make a submission on this issue. If you have questions on our submission, please contact in the first instance James Hartley, Senior Policy Advisor, Investment Law.
Yours sincerely

Matthew Andrews
Acting Chief Legal Advisor