# Chapter 26 Pecuniary penalties

Pecuniary penalties are non-criminal monetary penalties imposed by a court in civil proceedings that apply the civil standard of proof ("the balance of probabilities"). They are one of a range of enforcement tools available to those designing legislation.

Although pecuniary penalties are not criminal sanctions, they can have serious reputational and financial effects on a person or entity. Pecuniary penalties are civil remedies imposed by the courts, so it cannot be assumed that the protections of the criminal law will apply. The lack of automatic protection needs to be thought through and, if necessary, specifically provided for in the empowering legislation.

This chapter will help to identify the issues that should be considered when designing a pecuniary penalty regime. In addition, other chapters of these Guidelines provide guidance on other aspects of a pecuniary penalty regime:

- Chapter 22—in relation to selecting the appropriate regulatory tool for enforcement;
- Chapter 24—particularly, in relation to setting the maximum penalty;
- Chapter 11—in relation to determining whether the Crown should be subject to the pecuniary penalty (*see* the section on making the Crown subject to criminal liability, which may be relevant by analogy); and
- Chapter 27—in relation to the relevant limitation period for a pecuniary penalty.

Legal advisers and the Ministry of Justice should be consulted early in the policy development process if new pecuniary penalties are proposed or an existing provision is to be altered in some way (including an increase in the penalty).

In 2014, the Law Commission published a report on pecuniary penalties that thoroughly canvassed issues in the design of pecuniary penalties.[55] That report discussed whether pecuniary penalty provisions should include a privilege against compelled self-exposure to the pecuniary penalty. That issue is not covered in this chapter because, at the time of writing, the Government's policy work to determine its position on that issue remains ongoing. Instead, that issue is covered in supplementary material.

## Guidelines

### 26.1 Should the conduct be subject to a pecuniary penalty?

*Pecuniary penalties are not appropriate to address truly criminal conduct.*

Pecuniary penalties may be an appropriate alternative to criminal offences when a monetary penalty would deter breaches of a regulatory regime and the nature of the offending conduct does not warrant the denunciatory and stigmatising effects of a criminal conviction or imprisonment. To date, pecuniary penalties have usually been imposed as part of regulatory

[55] Law Commission *Pecuniary Penalties: Guidance for Legislative Design* (2014) NZLC R133.

regimes targeting commercial behaviour in a particular industry. They may be an alternative to a strict liability criminal offence in cases where civil enforcement is more appropriate than criminal enforcement.

Pecuniary penalties are not appropriate for the type of conduct sometimes described as "truly criminal", such as violence, emotional harm, or significant harm to property, the economy, the environment, or the administration of law and justice. Officials should consider whether the contravention should include an element of fault or moral blameworthiness. To date, most pecuniary penalty provisions do not contain a mens rea element.[56] If fault or moral blameworthiness is an element of the conduct, it may be more appropriate for the contravention to be addressed by a criminal offence, rather than in civil proceedings.[57]

Pecuniary penalties may also be inappropriate if there is an imbalance of power between the enforcement agency and defendants, which would require the procedural protections of the criminal law.

There must be an adequately resourced enforcement body or agent to implement pecuniary penalties. Usually, this is a statutory body with investigatory and prosecutorial responsibility for the particular regime, but a department or ministry (or its chief executive) may also be appropriate.

Finally, pecuniary penalties are enforced as civil debts. The same tools for enforcement of criminal fines (such as the seizure of property and compulsory deductions from income or bank accounts) are available for pecuniary penalties, but enforcement must be initiated by the enforcement body. Officials should think about the practicalities of enforcing civil debts as part of determining whether pecuniary penalties are the appropriate enforcement mechanism.

### 26.2 Who should impose pecuniary penalties?

*Pecuniary penalties should be imposed by a court.*

Generally, decisions about liability for pecuniary penalties and the amount of the penalty should be made by a court, and not the enforcement agency. Judicial imposition of the penalty provides open and transparent consideration of liability and any aggravating or mitigating circumstances, and the avoidance of allegations of a conflict of interest by the enforcement agency (if the enforcement agency is both the complainant and the judge).

In very limited circumstances, penalties could be imposed by an independent non-judicial body. Current examples are the quasi-judicial Rulings Panels established under the Gas Act 1992 and the Electricity Industry Act 2010. This model may be appropriate if specialist knowledge is absolutely essential to the decision on liability and penalty or if there is a particular need for a fast and efficient enforcement system. Such models should have a process for appeal and review. Consideration should also be given to requiring the chair or

[56] An exception is section 33M(c) of the Takeovers Act 1993, which includes a requirement that "the person knew or ought to have known of the conduct that constituted the contravention".
[57] The Law Commission discussed the inclusion of mens rea in pecuniary penalty provisions. *See* Law Commission Pecuniary Penalties: Guidance for Legislative Design (2014) NZLC R133, Chapter 11.

other members of the body to have legal expertise.

### 26.3 What limitation period should apply to pecuniary penalties?

*The limitation periods in the Limitation Act 2010 should apply to pecuniary penalties unless there are good reasons for different periods.*

If a pecuniary penalty statute does not deal specifically with limitation periods, the normal rules for civil proceedings in the Limitation Act 2010 apply. Officials should consider whether there are good reasons to deviate from that default position, for example, if the penalties are being retrofitted into a regime with its own limitation provisions. There may also be a concern that the long-stop extension in the Limitation Act 2010, which allows periods to be extended if the damage is not discoverable, will extend the period of potential liability for 15 years from the date of the actions.

An analysis of limitation periods should take into account the following factors:

- the time period within which breaches of the regulatory regime ought to be discoverable;
- the time period within which enforcement agencies ought to be able to make decisions to bring proceedings;
- fairness to potential defendants in relation to knowing whether or not proceedings will be commenced (it is possible that the larger the potential pecuniary penalty, the greater the need for certainty); and
- the public or market expectations of prompt prosecutorial action.

### 26.4 What defences should be specified?

*The legislation should describe any defences that are available.*

Officials should consider what circumstances may provide a defence. Examples include:

- the contravention was necessary (for example, to save or protect life or health, or prevent serious damage to property);
- the contravention was beyond the person's control and could not reasonably have been foreseen, and the person could not reasonably have taken steps to prevent it occurring;
- the person did not know, and could not reasonably have known, of the contravention;
- the contravention was a mistake or occurred without the person's knowledge;
- the contravention was due to reasonable reliance on information supplied by another person; and

- the contravention was due to the default of another person, which was beyond the first person's control, and that first person took precautions to avoid the contravention.

### 26.5 On whom should the burden of proof fall?

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

Generally, the party initiating proceedings, usually the enforcement agency in the case of pecuniary penalties, should have the legal burden to prove the elements of the case, because that party seeks the penalty from the court.

Sometimes, there may be good reasons for placing a burden of proof on a defendant in relation to a defence. These might include cases where the party initiating proceedings would face serious difficulty in proving the matter or would incur significant expense to do so, but the matter is likely to be within the particular knowledge of the defendant or can be proved by the defendant cheaply and easily.

The Ministry of Justice should be consulted as to whether a burden of proof on the defendant is appropriate and, if so, whether it should be a legal burden to prove the matter or an evidential burden to raise credible evidence to make the matter relevant.

### 26.6 How should the court determine the penalty to be imposed?

*Legislation should provide guidance to the court about how to determine the amount of the penalty.*

Legislation should state the maximum penalty that could be imposed by the court. That maximum penalty should reflect the worst class of case in each particular category. More assistance for determining the maximum penalty can be found, by analogy with criminal offences, in Chapter 24.

Acts should also provide guidance to the court about how to determine the amount of a penalty in specific cases. Although the list of factors to consider should be tailored to the circumstances of the regime, the following factors should be considered:

- the nature and extent of the breach;
- any loss or damage caused by the breach;
- any financial gain made, or loss avoided, from the breach;
- the level of calculation involved in the breach; and
- the circumstances in which the breach took place.

### 26.7 Is there a risk of double jeopardy that should be addressed in the statute?

*Legislation should specifically protect against the risk of double jeopardy.*

The criminal law has long provided protection against people being punished twice for the same conduct (section 26(2) of the New Zealand Bill of Rights Act 1990; section 10(4) of the Crimes Act 1961). There are two aspects to the double jeopardy rule—a prohibition on being subjected to more than one penalty for the same conduct, and a prohibition on requiring a person to defend themselves against simultaneous or multiple penalty actions for the same conduct.

Although those rules apply only to criminal proceedings, the underlying rationale of the rules usually applies equally to pecuniary penalties. Therefore, on the basis of fairness, similar prohibitions should be specifically included in legislation so that a person is not subject to both criminal proceedings and civil proceedings that seek a pecuniary penalty for the same conduct. If the legislation is silent on this matter, it will be left to the court to use its existing power to stay or strike out the second proceedings if it considers there is an abuse of process.

### 26.8 Should insurance or other indemnity be able to cover a pecuniary penalty liability?

*Legislation should prohibit indemnity or insurance for a pecuniary penalty only if that would be consistent with the underlying policy objectives.*

The effect of insurance and indemnification on the deterrent effect of pecuniary penalties is not necessarily clear. On the one hand, insurance mitigates the financial risk so it may undermine deterrent and punitive goals of the legislation. On the other hand, insurance companies can motivate their clients to minimise their risk of non-compliant behaviour through the threat of increased premiums.

There are some statutory restrictions on indemnities and insurance against criminal liability. For example, section 162 of the Companies Act 1993 prohibits a company from indemnifying or effecting insurance for a director or employee of the company for criminal liability. This tricky issue should be considered by officials, but a prohibition on indemnity or insurance is justified only if it is necessary to achieve the underlying policy objective. The following factors may be relevant:

- **The nature and gravity of the illegal conduct**—Are there public policy reasons why indemnification or insurance in respect of the breach should be barred? For example, is the conduct so morally reprehensible that punishment should be borne personally?

- **The deterrent effect of the penalty**—Would the availability of indemnification significantly dilute the deterrent effect of a pecuniary penalty provision? Or does the disciplinary effect of indemnification and insurance contribute to the deterrence objectives of the pecuniary penalty regime? Similarly, would those insured prefer to allow the breach and recover their loss under their insurance policies rather than avoid the breach altogether?

- **Interests of innocent third parties**—Will the penalty be diverted for reparative purposes or to fund education to prevent future breaches? If so, will the contravener be able to pay the penalty if the indemnity is not allowed?

Other relevant considerations are the potential impact of insurance and indemnification on penalty imposition by the courts and the impact on the personal liability of directors and managers.