COMPLIANCE AND ENFORCEMENT

Chapter 22 Ways to achieve compliance and enforce legislation

Compliance with legislation is often addressed by setting out offences for breaches (that is, criminal liability). However, a range of options exist that help regulate behaviour and address non-compliance in different ways. The options include education initiatives, warnings, self-regulation, relying on or modifying existing civil remedies, pecuniary penalties, infringement offences, management bans, enforceable undertakings, and other civil orders.

Creating a fully developed compliance model that is effective in dealing with the many forms of non-compliance often requires a combination of options. The combination of options should form an effective system, and each option should be proportionate to the form of non-compliance it is intended to address. Officials should also consider who will monitor compliance with, and enforce, the legislation. In many circumstances, the role of achieving compliance and enforcement is given to an expert regulator. A regulator can take many forms.

This chapter, when read with Chapters 24 - 26, will help identify which of the most common regulatory options for achieving compliance are available and in which circumstances they may be appropriately used. Chapter 20 provides advice on the options for the form of the regulator.

Legal advisers and the Ministry of Justice should be consulted early in the development process if there is an intention to amend or create a new civil remedy or order, criminal offence, infringement offence, or pecuniary penalty.

Guidelines

22.1 How will the legislation be enforced?

The Government should not generally become involved in enforcing rules or otherwise regulating in an area where the rules can be reliably enforced by those who are subject to them.

Every Act has an administering department or ministry; however, consideration must be given to what role the Government will have in enforcing the legislation and whether regulation of the issues and conduct can be left to the individuals or groups concerned.

The Government's role will vary depending on what the Act sets out to do. An Act may grant legal rights or make use of existing rights that are left to the parties to a dispute to resolve (by the courts or otherwise) (*see* Chapter 23). At the other end of the spectrum is the criminal law, where the full weight of the government's powers are brought to bear on an individual through the investigation and prosecution of crime and the administration of sentences (*see* Chapter 24).

Legislation often provides for registration and discipline of professions, but the Government has little or no ongoing involvement in administering the Act—that is left to registration bodies and the profession concerned.

In general, the Government should have little involvement in areas where the reliance on private enforcement of legal rights and obligations is sufficient to address harm caused by non-compliance and provide sufficient deterrents (for example, where the legislation modifies common law rights within the existing framework, such as a sale of goods between commercial traders).

However, in many contexts, the private enforcement of legal rights and obligations will be insufficient. For example, the damages from a civil action may be an insufficient deterrent. 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 (eg, because of the costs of bring private actions or insufficient private benefit in doing so), or both. If the law will not reliably be enforced, then this can cause the regime to fail, which is worse than having no regulation at all.

In addition, if the context is complex, a wider range of compliance methods and more proactive approach may be needed. For example, a regime may involve education, guidance, licensing, authorisation, or approval functions. In this case, consideration should be given to the regulatory options needed for compliance and also to the role of a regulator, which could be the administering department or a specific entity (often a Crown entity—*see* Chapter 20).

22.2 If government enforcement is required, what are the most appropriate regulatory tools?

Regulatory options should be effective and efficient, workable in the circumstances that they are required to operate in, and appropriate in light of the nature of the conduct and potential harm they are intended to address.

All regulatory options included in legislation must be consistent with the purpose of that legislation. Some Acts are intended to prevent, deter, or punish certain behaviour. Other statutes are intended to protect the public or compensate those who have suffered loss. In some cases, legislation may be designed to provide a mechanism by which individuals can resolve their own disputes by granting civil rights of action or by providing for a scheme of self-regulation. In other cases, the legislation will be empowering (such as authorising local government to operate, and utilities to enter and acquire rights over private land).

If it is decided that the Government needs to monitor and enforce the legislation, the choice between enforcement options (for example criminal law, infringement offences, pecuniary penalties, injunctions, or management bans) must be based on a robust and transparent assessment of how appropriate the option is in relation to the purpose of the legislation and the particular circumstances and regulatory system in which it will operate. The relevant factors include:

- **The harm caused and the nature of the conduct involved**—The option must be appropriate in light of the conduct it relates to. For example, it will generally be inappropriate to use the criminal law to address matters relating to a simple breach of a commercial contract or a failure to pay a private debt. By contrast, conduct that involves deliberate and significant physical harm to a person should generally be subject to the criminal law.

- **Enforcement objective**—Will the option achieve the desired enforcement objective? For example, if deterrence is the primary objective, issuing a $1,000 infringement notice to a large corporation may have little deterrent effect. If the objective is to compensate someone for loss or damage, criminal remedies will generally not be sufficient.

- **Practical considerations**—Is the option workable having regard to the circumstances in which it is intended to operate? For example, it would be impractical and not provide effective deterrence to require local authorities to pursue every instance of illegal parking through a criminal prosecution or a civil debt recovery processes. It's important here to consider the characteristics of the regulated group, what are the range of reasons for non-compliance and the incentives affecting behaviour, and design enforcement options accordingly.

- **Fairness considerations**—What are the characteristics of the regulated group—how homogenous are they? What is their ability to challenge unfair decisions? These considerations affect both what enforcement tools, or combination of tools, are likely to be appropriate (as well as effective) and the nature of the procedures and protections that are needed to ensure appropriate safeguarding of rights and interests (for example, the need for low-cost internal review processes—*see* Chapter 28).

22.3 If a regulator is required, what roles should it have?

The role, functions, and powers of a regulator should be linked to the purpose of the regime in which it operates.

Regulators are usually required to play different roles in complex regulatory regimes that use a number of regulatory options and require many actors.

Legislation establishing the role of a regulator should set out the regulator's functions, powers and, sometimes, objectives and how it is expected to perform them. These provisions should expressly link the roles of the regulator to the purpose of the regime it operates within.

If multiple regulators operate within a regime, the legislation needs to be designed with the relationship between the regulators in mind. This includes considering what might be required in legislation to ensure that the relationship operates effectively and to determine what can be left to non-legislative mechanisms or administrative co-operation.

A regulator may need a range of powers and tools to fulfil its role within the regime it operates within. Consideration should be given to the following matters and to the extent to which the legislation needs to provide for them:

- **Monitoring**—A regulator needs to understand the system that it operates within. This may mean it needs the ability to gather information, monitor trends and advise on changes that might be required. *See* Chapter 21 on issues relating to monitoring regimes.

- **Compliance and enforcement**—A regulator should have available to it, and effectively deploy, a range of tools for achieving compliance in a range of situations. *See* the rest of the guidance in this chapter about designing enforcement systems, and Chapters 23 to 26 for guidance on specific enforcement options.

- **Guidance**—A regulator may need to issue guidance to those regulated by the regime. Although this can often be done without a legislative basis, there may be reasons to make it clearly part of the regulator's role. The nature and status of guidance should be appropriate to achieve the policy objective (for example, consideration should be given to whether it is legislative or administrative, and the consequences of reliance on, or failing to comply with, guidance).

- **Licensing, authorisations, or approval**—It may be appropriate for a regime to include an ability for the regulator to grant licences, authorisations, or approvals. *See* Chapter 18 for guidance on statutory powers and decision making. Consideration should also be given to the practical, operational, and resourcing requirements of administering a licensing or approval scheme.

- **Transparency**—A regulator should carry out its role transparently (for example, by publishing its compliance strategy) and with regard to the costs as well as benefits of regulatory action.

- **Accountability**—There should be mechanisms to hold a regulator to account. A well-designed regulatory system will ensure that a regulator has the tools and powers it requires to fulfil its role and is accountable without disproportionately restricting the regulator in legislation. Consideration should be given to whether non-legislative or existing accountability mechanisms (for example, those in the Crown Entities Act 2004) can be relied on.

Chapter 23 Creating new, or relying on existing, civil remedies

A number of civil remedies (sometimes called "private law remedies") exist in the common law and some are supplemented by legislation. Most forms of civil remedy concern private disputes between individuals, bodies corporate and, in some cases, the Government over contracts, debt, or wrongs, such as negligence. In private civil actions, the Government may sue and be sued as if it were a private individual unless legislation has a specific provision to the contrary.

The primary purposes of civil actions are to repair the harm done by one party to another and to prevent the harm from happening again. Different mechanisms (referred to as "remedies") are available to the parties. These include:

- the payment of damages from one party to another;
- court-ordered requirements to perform contractual or legal obligations; and
- a variety of other orders that prevent or restrict the conduct of a party (or, in rare cases, a third party) to the proceedings.

In many cases, private disputes are settled through the use of alternative dispute resolution (ADR) and it is unnecessary to involve the courts.

Civil remedies are determined in the courts, applying the rules of civil procedure. Matters are decided on the civil standard of proof—the "balance of probabilities"—meaning that it is more likely than not that a particular thing occurred or exists. The civil standard of proof is a less stringent test than the criminal standard of "beyond reasonable doubt".

Guidelines

23.1. Should existing civil remedies be relied on?

Existing civil remedies should be relied on if they are adequate and appropriate for the purposes of enforcement.

Existing civil remedies should be used if they can apply to the circumstances of the new legislation and are efficient and effective mechanisms for the purposes of enforcement. If there is uncertainty as to whether an existing civil remedy will apply, or if it is necessary to modify it in some way to better suit the purposes of the legislation (such as making a new or different kind of remedy available), this must be made explicit in the legislation. Legal advisers will be able to identify existing civil actions and whether they are adequate.

23.2 Should a new civil remedy be created?

New civil remedies should be created only if there is a clear need, if it is necessary to achieve the purpose of the legislation, and no existing civil remedy is appropriate.

New civil remedies should not generally be created unless there is a clear need. This need may arise due to a gap in the current range of remedies or because there are difficulties in

modifying existing remedies. In other cases, a new process or institution may be a more effective and efficient way of addressing an issue.

Broad consultation should take place before creating a new civil action, in particular with agencies that administer similar legislation. The Ministry of Justice, the Crown Law Office, and the Parliamentary Counsel Office should also be consulted.

Chapter 24 Creating criminal offences

One purpose of the law is, by creating offences, to punish, deter, and publicly denounce conduct that society considers to be blameworthy and harmful. Criminal offences carrying conviction can have a serious impact on individuals, and new criminal offences can have a significant resource impact on the criminal justice system. They should be included in legislation only if they are necessary to achieve a significant policy objective (which is likely to be the avoidance of harm to society generally or to particular classes of people).

Offences are one of a variety of alternative mechanisms for achieving compliance with legislation and should not be seen as the default response to breaches of legislation. Before settling on enforcement by criminal offence, officials must conduct an analysis as to whether the policy objective can be achieved effectively:

- without state intervention, for example, where it can be achieved by self-regulation by the applicable industry, or through civil claims or civil complaints investigation processes;
- by non-criminal state measures, such as education campaigns, informal warnings, or other methods of persuasion, such as codes of practice or national standards; or
- by other forms of State enforcement, such as civil remedies (including pecuniary penalties or taking action under a licensing regime).

Chapters 22, 23, 25, and 26 provide more detailed guidance on alternatives.

In addition to determining that a criminal offence is necessary, a number of other matters should be thoroughly assessed before a criminal offence is included in legislation:

- What conduct should be prohibited? (the “physical element”, or actus reus).
- When should the person be held responsible? What is the required culpability? (the “mental element”).
- What defences, if any, should be available?
- On whom should the burden of proof lie?
- Who should be punished (for example, an individual or a company)?
- What maximum penalty should apply?

Legal advisers should be consulted early in the policy development process if new criminal offences are proposed. The Ministry of Justice should also be consulted whenever a new criminal offence is created or an existing criminal offence is altered in some way (including an increase in the penalty).

If an offence is the preferred approach, thought needs to be given to the type of offence. Offences generally fall into one of three categories:[48]

- **Offences requiring mens rea**—Mens rea (the mental element) is an ingredient of the offence and the prosecution is required to prove it (along with the physical element, the actus reus, of the offence).[49] It requires the prosecution to prove that not only did a defendant engage in a prohibited act, but that the defendant did so with the specified intent: the defendant's state of mind is important in assessing culpability. Offences requiring mens rea are still the most common offences, and the mental element is particularly important for serious offences.

- **Offences of strict liability**—The prosecution is not required to prove mens rea, but the defendant can escape liability if he or she can show the existence of a defence or an absence of fault. Strict liability offences are used to enforce requirements of regulatory regimes, such as regulating an occupation or commercial activity.

- **Offences of absolute liability**—Liability is established once the prosecution proves the act beyond reasonable doubt because the option of proving a defence or absence of fault is not open to the defendant. These offences are almost never used: it is rarely justifiable to create an offence for which there is no defence. The starting point is always to consider what defences should be open to the defendant.

Guidelines

24.1 Should the conduct be subject to the criminal law?

Compelling reasons must exist to justify applying the criminal law to conduct.

The authors of *Principles of Criminal Law* make the following point:[50]

> […] even though a prima facie case can be made in favour of criminalising an activity, for example because it is harmful to others, it does not follow that criminal legislation is the best response. Other forms of intervention need to be considered; sometimes, it may be best not to legislate at all. The criminal law is a powerful, expensive, and invasive tool. It should not be used lightly.

Imposing criminal sanctions is a serious matter that has significant consequences. For example, making an action subject to the criminal law may authorise the Police or other enforcement agencies to search and arrest an individual and to search and seize their property for the purpose of investigating or preventing the commission of a crime. Depending on the seriousness of the misconduct, a person subject to a criminal conviction may experience a loss of liberty (imprisonment or home detention), a loss of property (confiscation, fines, or reparation), or both. A person who is convicted acquires the stigma of a criminal conviction,

[48] Simon France (ed) *Adams on Criminal Law—Offences and Defences* (online looseleaf ed, Thomson Reuters) at CA 20.12.

[49] Mens rea is the latin phrase used in the criminal law to refer to the element of an offence that encapsulates the fault or moral blameworthiness of the defendant, typically that the defendant intended to do the prohibited act or had knowledge of it.

[50] AP Simester, WJ Brookbanks *Principles of Criminal Law* (4th ed, Thomson Reuters, 2012) at 21.7.2.

which may affect future employment or overseas travel.

Because of the possible consequences, criminal offences should be created with care, and with convictions being possible only if imposed by a court where the offence is proved by the prosecution to the standard of "beyond reasonable doubt" following a fair process (including the minimum standards of criminal procedure set out in the New Zealand Bill of Rights Act 1990).

The following factors, not all of which must be present, may be relevant in determining whether conduct should be criminalised:

- the conduct involves physical or emotional harm;
- the conduct involves serious harm to the environment, threats to law and order, fraud, bribery or corruption, or substantial damage to property rights or the economy;
- the conduct, if continued unchecked, would cause significant harm to individual or public interests such that public opinion would support the use of the criminal law;
- the conduct is morally blameworthy, having regard to the required intent and the harm that may result; or
- the harm to public or private interests that would result from the conduct is foreseeable and avoidable by the offender (for example, it involves an element of intent, premeditation, dishonesty, or recklessness in the knowledge that the harms above may eventuate).

It is undesirable to further criminalise conduct that is already addressed by the criminal or civil law unless doing so would serve a goal that is not currently served by the law.

24.2 What conduct is to be prohibited?

Legislation must precisely define the prohibited conduct.

Criminal law marks the legal boundary of individual liberty. Offences must be defined clearly so that people know what is and what is not prohibited. Therefore, it is necessary to consider exactly what conduct (called the *actus reus*) is prohibited by a criminal offence.[51] The description of the conduct should be precise and rationally connected with the harm targeted by the policy objective.

An imprecise statement of the prohibited conduct may lead to inconsistent enforcement of the law, uncertain application of the law, unintended changes in behaviour, or failure to preclude conduct that it was intended to prohibit.

General provisions (such as "every breach of this Act is an offence") are not acceptable as they

[51] Actus reus is the latin phrase used in the criminal law to refer generally to the conduct that is prohibited by an offence (and which may encompass behaviour, consequences, or circumstances).

may capture a range of conduct that is too wide and not intended to be subject to the criminal law.

Any proposal to apply the criminal law to conduct occurring outside New Zealand (extraterritorial conduct) should be discussed with the Ministry of Justice early in the policy development process because this is relatively unusual and subject to unique considerations.

24.3 When should the person be held responsible?

Legislation should state the mental element (mens rea) required for an offence to be committed.

It important to consider why, and in what circumstances, a person who has committed the physical act should be considered culpable and deserving of punishment for having committed that act. As a general rule, a person should be liable for a criminal offence only if he or she is at fault for the prohibited conduct. This concept of moral responsibility for the conduct is reflected in the mental element of the offence (the mens rea). That mental element can be framed in many different ways (for example, the defendant "intentionally", "recklessly", or "knowingly" performed the prohibited conduct). Each of these formulations has subtle differences as explained in judicial decisions.

A criminal offence should include a mental element unless there are compelling policy reasons to relieve the prosecution from the burden of proving a mental element and require the defendant to prove some essential element to avoid liability. In such a case, an offence may be framed as a strict liability offence, meaning the prosecution must prove only the physical element of the offence.

Policy reasons for strict liability offences may exist in the regulatory context if:

- the offence involves the protection of the public, or a group such as employees, from those who voluntarily undertake risk-creating activities;
- there is a need to provide an incentive for people who undertake those activities to adopt appropriate precautions to prevent breaches; or
- the defendant is best placed to establish absence of fault because of matters primarily within their knowledge.

In those cases, officials should be able to provide reasons why strict liability offences are justified in the particular regulatory context. They should also consider what defences would be appropriate.

If legislation is silent as to the mental element or the defences available, the courts will generally infer a mental element, but that can create uncertainty. This is undesirable because a person is entitled to know *before* engaging in conduct whether it is prohibited and, if so, in what circumstances.

24.4 What defences, if any, should be available?

Legislation should identify any specific defences that are available.

It is important to consider whether any factors that exonerate the defendant from criminal liability should be specified in legislation. Certain general defences, such as self-defence, will exist without needing to be specified or cross-referenced.

However, particularly when strict liability offences are justified, it is necessary to specify any defences that a defendant is entitled to raise in the relevant statutory context that, if accepted, would result in acquittal.

24.5 On whom should the burden of proof lie?

The burden of proving both the actus reus and the mens rea should remain on the prosecution.

The default position is that the prosecution must prove beyond reasonable doubt both the existence of the prohibited conduct (actus reus) and the requisite mental element (mens rea). This is described as a *legal burden* of proof. There is no obligation on the defendant to negate those elements of the offence.

If the legislation specifies a justification or excuse (for example, lawful authority or reasonable excuse) for certain conduct, but does not require the defendant to prove its existence, the defendant must raise credible evidence to bring the matter into issue before the court. This is described as an *evidential burden*—it is not a burden of proof. If the defence satisfies the evidential burden, the prosecution must then disprove the existence of the defence beyond reasonable doubt (the legal burden).

There may sometimes be good policy reasons for placing a legal burden of proof on the defendant. An example is where a strict liability offence is justified (as described in 24.3). In that case, the prosecution must prove only the physical element of the offence and, to avoid liability, the defendant must prove the existence of a statutory defence or total absence of fault on the lesser standard of the balance of probabilities. However, shifting the burden in this way will constitute a limitation on the presumption of innocence (*see* section 25(c) of the New Zealand Bill of Rights Act 1990) so there must be compelling justification for departing from the default position and consideration must be given to what defences should be available to the defendant.

Legislation must be very clear if it is intended to place a legal burden of proof on the defendant. If the legislation is not clear, the court may interpret the provision as placing only an evidential burden on the defendant.

24.6 Who should be punished?

Legislation must identify who will be liable to criminal conviction and in what circumstances they will be liable.

Legislation should be very clear about which people are potentially liable for the criminal

offence—that is, whether "any person" is potentially liable or only a particular subset of people.

Criminal liability may be imposed on an individual or a body corporate. The meaning of "person" includes, by default, a corporation sole, a body corporate, and an unincorporated body, unless specific case law or legislation states differently.[52]

In relation to corporate liability, unless the legislation specifies otherwise, the general rule is that a director or member of a corporation (for example, a shareholder of a company) is not vicariously liable for the acts of the corporation (but could be liable as a secondary party if he or she knew of the offending and encouraged or assisted it). However, a corporation may be vicariously liable for the acts of its employees or agents. A corporation can also be directly liable if the acts of an employee or agent can be attributed to it.

24.7 What is maximum penalty that will apply?

Legislation must state the maximum fine and/or term of imprisonment.

Once legislation comes into force, the decision as to precisely what penalty will be imposed in a particular case rests solely with the courts. When imposing a sentence, the courts have regard to the maximum penalty available, the particular facts of the case, and the guidance and principles set out in the Sentencing Act 2002. The courts also have regard to any additional sentencing guidance provided by the legislation and higher courts.

The maximum penalty should not be disproportionately severe, but should reflect the worst case of possible offending. Legislation that sets minimum penalties is undesirable because it limits the courts' ability to impose a sentence appropriate to the particular case. It may also be seen as contrary to the principle of the separation of power and judicial independence.

The maximum penalty affects the procedure that the courts adopt, including whether the High Court can hear the case and whether the defendant has the right to elect trial by jury. Section 6 of the Criminal Procedure Act 2011 provides more detail as to how the maximum penalty will affect the procedure that is adopted.

If offending is in a commercial context, it may be appropriate to provide for a variable fine, such as a fine linked to the commercial benefit derived from the offending. Proposals for such penalties should be discussed with the Ministry of Justice and the Ministry of Business, Innovation and Employment (MBIE) at an early stage. Since those types of fines can result in very large, indeterminate penalties being imposed in a criminal context, there should be compelling justification for a commercial gain penalty.

References to precedents and similar offences must be made with care. Subtle differences may exist as to the elements of the offence, such as the required mental element, justifying a higher penalty in one context but not in another. This can be the case even if the same general subject is covered by both the existing offence and the proposed offence, or the harm to be addressed is similar. However, penalties for some offences may be unduly low simply because

[52] Interpretation Act 1999, section 29.

of the age of the Act.

Basing proposed offences on overseas legislation can be particularly problematic. The whole statutory context, common law (particular legal terms may be interpreted differently in different countries), and sentencing framework need to be considered before taking an offence from another jurisdiction and proposing it for inclusion in New Zealand law.

Chapter 25 Creating infringement offences

Infringement offences are a subset of criminal offences that do not result in criminal convictions. They usually involve low-level infringement fees (less than $1,000) and are often imposed by the issuing of an infringement notice (such as the Police issuing a fine for an unwarranted motor vehicle or issuing a speed camera fine). The purpose of infringement offences is to deter conduct that is of relatively low seriousness and that does not justify the full imposition of the criminal law. Infringement offences prevent the courts from being overburdened with a high volume of relatively straightforward and low-level offences. Without them, the law may otherwise not be enforced because it is unlikely a prosecution would be in the public interest. The criminal courts will generally become involved only if the infringement fee is not paid or if the recipient of the infringement notice challenges it.

New Zealand law contains a number of infringement provisions that impose penalties in excess of $1,000. These provisions are exceptions to the general principles in this chapter and should not operate as precedents for new infringement offence regimes.

Guidelines

25.1 Is it appropriate to deal with the prohibited conduct as an infringement offence?

Infringement offences should be reserved for the prohibition of conduct that is of concern to the community, but which does not justify the imposition of a criminal conviction, significant fine, or imprisonment.

The Ministry of Justice has produced guidelines, approved by Cabinet, on the development of infringement schemes, which departments should adhere to.[53]

Infringement penalties may be appropriate if:

- the conduct represents a minor contravention of the law;
- large numbers of strict or absolute liability offences are committed in high volumes on a regular basis;
- the conduct involves straightforward issues of fact that can be easily identified by an enforcement officer;
- a fixed penalty can achieve a proportionate deterrent effect because contraventions of the particular prohibition are reasonably uniform in nature (if individual culpability can vary widely, the conduct is unlikely to be suitable to be dealt with by infringement offence); or
- identifying actual offenders is not practicable (for instance, in relation to parking, speed cameras, or toll road offences), but liability may be attributed to the person who has prima facie responsibility for the item used in the offending (such

[53] Ministry of Justice *Policy framework for new infringement schemes.*

as the owner of the vehicle that is found speeding or illegally parked).[54]

Infringement penalties are generally not appropriate for mens rea offences, cases that involve complex factual situations, or conduct that may warrant more serious consequences (for example, more than a $1,000 fee or a non-monetary penalty).

Any aspect of an offence that provides an incentive to a person issued with an infringement notice to challenge the matter in court (for example, a high fee or the potential to prove some matter to escape liability) defeats the purpose of the infringement regime to keep minor infringements of the criminal law out of court and therefore should be avoided.

It is generally undesirable to have identical conduct specified to be both an infringement offence and a separate criminal offence. Wherever possible, some differentiation as to mens rea or the specific type of conduct should exist between infringement offences and other offences in the same legislation. If a low-level fixed fee is considered insufficient to punish or deter the prohibited conduct, the conduct is likely to be too serious to be dealt with as an infringement offence.

25.2 Is there authority for the infringement regime?

Infringement offences must be in or authorised by an Act.

An infringement offence must either be specified in the Act or be clearly authorised by the Act. Secondary legislation may address some matters, but the Act must contain an appropriate empowering provision (*see* Chapter 14).

At a minimum, the Act must:

- establish the infringement offence scheme;
- establish the maximum penalty provisions;
- establish who can issue infringement notices; and
- identify the entitlements to revenue that prosecuting agencies receive from infringement fees.

The Act must specify whether the fee will be paid to the enforcement body or to the Crown Bank Account. Generally, infringement fees collected by central government agencies should be paid to the Crown Bank Account, but territorial and local authorities may be entitled to retain all or some of the revenue. If the fee is to be split, that must be provided for in the Act. Treasury advice should be sought on these matters.

It is standard practice for the Act to authorise details of the specific infringement regime to be provided for in secondary legislation, including:

[54] This is subject to the person issued with the infringement notice being able to raise his or her lack of involvement in the offending with the issuer and to challenge it in court.

- the specific act or omission constituting an infringement offence;
- the specific penalty levels for each infringement offence; and
- the form of the infringement notice and reminder notice to be issued.

In general, infringement fees should not exceed $1,000, although, in cases with significant financial incentives for non-compliance, a higher fee may be justified to achieve the deterrent effect. If fees are to be set by secondary legislation, the empowering provision should specify the upper limit for the fees. Fees of more than $1,000 should be stated in the Act. In some cases, the Act will need to specify a maximum fine for an infringement offence, as well as an infringement fee. This should be discussed with the Ministry of Justice if infringement offences are proposed.

25.3 What procedures apply to new infringement penalties?

Section 21 of the Summary Proceedings Act 1957 should apply to all new infringement offences.

Section 21 of the Summary Proceedings Act 1957 sets out a generic process by which a person may challenge an infringement notice. It also provides a process by which an agency may issue reminder notices, enter into instalment arrangements, and, if necessary, bring a person before the court and have an unpaid infringement penalty converted to a fine plus the associated court costs.

New infringement penalties should use this existing system to ensure consistency with the infringement regime systems and to reduce complexity in the law. Cogent reasons are required to justify any departure from the Summary Proceedings Act procedure.

For section 21 of the Summary Proceedings Act 1957 to apply, legislation should contain an express provision to the effect that the new offence is an infringement offence for the purposes of section 21 of the Summary Proceedings Act 1957. Ideally, the infringement regime should also be included in the list of regimes in section 2 of the Summary Proceedings Act 1957 under the definition of “infringement notice”.

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.

Chapter 27 Imposing time limits for enforcement

Imposing time limits on enforcement action for breaches of legislation involves balancing two strong public interests:

- the prompt enforcement of legislative sanctions or disposal of civil claims; and
- ensuring that someone who has committed a serious unlawful act does not escape punishment because their actions remained undetected for many years.

The passage of time may mean that a person finds it hard to defend him or herself against a civil claim, a criminal charge, an infringement notice, or a pecuniary penalty. Key witnesses may be dead, documents lost, or witnesses' memories faded. Also, key forensic evidence may have been destroyed.

In such cases, any delay in bringing proceedings may mean that the defendant finds it hard to present a full defence or otherwise respond to allegations. This may compromise the person's right to a fair hearing. In the commercial context, there are also financial implications for businesses or people if they are subject to the open-ended possibility of civil claims.

Limitation periods balance an individual's right to a fair hearing, the need for legal certainty in business and private life, entitlements to compensation, and the public interest in seeing unlawful or otherwise wrongful conduct addressed.

Guidelines

27.1 Are new or amended criminal offences subject to a limitation period?

The limitation periods in the Criminal Procedure Act 2011 should apply to all new criminal offences.

Section 25 of the Criminal Procedure Act 2011 provides a standard set of time limits by which a criminal prosecution must be brought after an offence is committed. The limitation periods differ subject to the category of offence and the maximum penalty that can be imposed. The most serious offences (category 4) have no limitation period.

Strong policy reasons that are particular to the circumstances of the legislation must be present to justify a departure from the rules in the Criminal Procedure Act 2011 and legal advice should be sought.

The time within which an agency may issue an enforcement notice for an infringement offence is limited in practice by the requirements of section 21 of the Summary Proceedings Act 1957 (which should apply to all new infringement offences). Under section 21(5), if the agency wishes to enforce an unpaid infringement notice through the court, it must provide particulars of the reminder notice to the court within 6 months from the date on which the infringement offence is alleged to have been committed.

27.2 Are new civil proceedings subject to a limitation period?

The limitation periods in the Limitation Act 2010 should apply to all new civil proceedings.

The Limitation Act 2010 provides a generic set of time limits (and exceptions to those limits) that apply to civil claims. The Limitation Act sets limitation periods in respect of a variety of civil claims (such as money claims, land claims, and claims relating to wills or judgments of awards). Legal advisers should be consulted to establish whether or not the particular civil proceeding relied on falls within the Limitation Act.

The limitation periods in the Limitation Act apply to those claims it covers unless another enactment expressly provides for another limitation period or otherwise sets a deadline by which a claim must be made. Good policy reasons that are particular to the circumstances of the legislation must be present to justify a departure from the Limitation Act.

27.3 Are new pecuniary penalties subject to a limitation period?

The limitation period for pecuniary penalties (non-criminal monetary penalties imposed by a court in civil proceedings) will be the limitation period in the Limitation Act unless the legislation provides otherwise. In every case, officials should consider whether that period is appropriate. Further guidance for the setting of a limitation period for pecuniary penalties can be found in Chapter 26.