

23. Creating new pecuniary penalties

Pecuniary penalties are a relatively new form of monetary penalty imposed by a court in civil proceedings applying the civil standard of proof (“the balance of probabilities”). They are widely, but inconsistently, used in New Zealand law.

Pecuniary penalties are punitive in nature, not compensatory, and can severely impact a person’s or entity’s solvency, property interests, reputation and opportunities. In some cases they can be imposed as an alternative to criminal penalties, and are particularly suited to regulating conduct in contexts where the intervention of the State is justified but the financial consequences serve more of a deterrent effect than criminal penalties.

Pecuniary penalties should not be included in legislation because they may be perceived as easier to obtain or allow higher maximum penalties. Every decision to include a pecuniary penalty should be justified having regard to the particular policy objective and purpose of the legislation.

In 2014 the Law Commission published a comprehensive report on the use of pecuniary penalties in New Zealand.¹⁴¹ The Government has yet to respond to the recommendations in that report. The LAC will produce further advice and guidelines once the Government’s response is published.

The courts are yet to rule on whether pecuniary penalties amount to an “offence” for the purposes of s 25 NZBORA and therefore attract the protections typically afforded to criminal procedures. In the interim, the PCO and the Ministry of Justice should be consulted before Cabinet approval is sought to create a new pecuniary penalty.

¹⁴¹ <http://www.lawcom.govt.nz/default/files/publications/2012/11/nzlc-ip33-civilpen-web.pdf>