



## Consumer Law Reform Additional Paper – February 2011

### Enforcement of the Fair Trading Act

#### Introduction

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- 1 The paper *Consumer Law Reform: A Discussion Paper* released by the Ministry of Consumer Affairs in June 2010 included a review of the effectiveness and enforcement of consumer legislation with the goal of providing for law that is effective and enforceable (page 110 onwards). The Ministry of Consumer Affairs also released a discussion paper in 2006 reviewing enforcement and redress provisions in the Fair Trading Act.<sup>1</sup>
- 2 The 2010 paper concluded that most consumer laws are effectively enforced. However, it recommended that court enforceable undertakings and banning order provisions be included in the Fair Trading Act as additional enforcement tools for the Commerce Commission, the Government agency responsible for enforcement of the Fair Trading Act, to use. Submissions on the 2010 Discussion Paper and the 2006 paper suggested a number of other enforcement tools that could be included in the Fair Trading Act. This paper analyses the advantages and disadvantages of including, in the Fair Trading Act, provisions for:
  - court enforceable undertakings;
  - banning orders;
  - infringement offences and notices;
  - trans-Tasman enforcement;
  - compulsory interview powers; and
  - civil pecuniary penalties.
- 3 It also considers possible increases to the maximum criminal penalties in the Act.

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<sup>1</sup> *Review of the Redress and Enforcement Provisions of Consumer Protection Law: International Comparison Discussion Paper*, Ministry of Consumer Affairs, May 2006 (<http://www.consumeraffairs.govt.nz/legislation-policy/policy-reports-and-papers/discussion-papers/international-comparison-discussion-paper>).

## Court Enforceable Undertakings

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- 4 A settlement agreement is an agreement between a regulator and a party who admits some contravention of the law. The agreement will usually provide for the party to remedy the breach and change their behaviour and in return the regulator will agree not to take any further enforcement action.<sup>2</sup>
- 5 The Commerce Commission uses informal settlement agreements when a person in trade voluntarily admits that it may have breached the Fair Trading Act and gives an undertaking to alter its behaviour. Settlement agreements provide an alternative to litigation and have a number of benefits for businesses in that they are more efficient and avoid the expense of court proceedings. They can also significantly speed up the process of obtaining compensation for the victims of the breach.
- 6 The Commerce Commission has entered into 19 Fair Trading Act settlement agreements since the beginning of 2007. The Commission has increasingly used settlement agreements as an enforcement tool for the Fair Trading Act and other laws, following the example of other enforcement agencies in New Zealand and overseas. The Commission has never encountered a party to an agreement failing to adhere to the terms of the agreement but is concerned that it may face difficulty getting redress if it were ever to encounter such a problem.
- 7 To enforce a settlement agreement in the courts, the Commission would have to establish that the settlement agreement is an enforceable contract and that it has been breached. This may be problematic if the Commission threatened prosecution as the alternative to the agreement, and if that was viewed by the court as duress. If the Commission was able to prove that the agreement is an enforceable contract that has been breached, then several contractual remedies may be available. Compensation for damage is the usual remedy for breach of contract, but an award of damages would depend on the Commission proving that it had suffered damage because of the breach of the settlement agreement. Under contract law the Commission would not be able to claim compensation for damage caused to third parties, such as consumers, because they would not be parties to the contract. An injunction preventing the party from continuing to breach the settlement agreement may also be an option. An alternative remedy would be specific performance, where the court can require a party to fulfil its obligations under a contract. Specific performance of the terms of the settlement agreement may be available at the discretion of the court, but specific performance can be a difficult remedy to achieve, especially if the agreement has been cancelled by the breach, and it may not always be an appropriate remedy where the party's behaviour has already caused detriment to consumers.
- 8 The underlying issue is that it is artificial for the Commerce Commission to be required to go to court to access contractual remedies for breaches of the Fair Trading Act that have been admitted. The Commission could commence prosecution proceedings for the original breach of the Fair Trading Act if a settlement agreement has been breached and cancelled, but the three year

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<sup>2</sup> This is to be contrasted with out-of-court settlements where proceedings are initiated in court and the parties will agree to settle before they get to the hearing. These are usually approved by a Judge and are enforceable in court.

limitation period could prevent the Commerce Commission from prosecuting for the original offence if a business breaches a settlement agreement some time after it was entered into.

- 9 Prosecution through the courts is extremely resource intensive and expensive. Settlement agreements provide the Commerce Commission with a more efficient and potentially creative enforcement alternative, and their use should be encouraged.
- 10 Increasingly laws have been enacted to allow enforcement agencies to use settlement agreements as a formal enforcement tool, called court enforceable undertakings. The Securities Act 1978 gives the Securities Commission the power to accept and enforce undertakings in relation to breaches of the Securities Act. The Australian Consumer Law has a very similar provision.
- 11 The Australian Competition and Consumer Commission (ACCC) has found that court enforceable undertakings are a vital aspect of its enforcement programme, stating that of the 50 court enforceable undertakings accepted during the 2005-2006 period for fair trading, 13 involved outcomes, primarily refunds, that would not have been achieved through other means. In 2009-2010, the ACCC entered into 45 court enforceable undertakings. It regularly carries out successful enforcement action in relation to breaches of undertakings.
- 12 Providing for court enforceable undertakings as a formal enforcement tool of the Fair Trading Act was included in the May 2006 *Review of the Redress and Enforcement Provisions of Consumer Protection Law* (page 47) and in *Consumer Law Reform: A Discussion Paper* (page 111).

#### *Views in submissions*

- 13 Most of the 32 submissions on the Discussion Paper that commented on this proposal supported providing for the use of court enforceable undertakings in the Fair Trading Act. The general view is that legislative endorsement of the tool would allow undertakings to be enforced through an appropriate method and encourage their use as a low-cost enforcement option. It would make the settlement process more transparent and allow the Commerce Commission to enter into more creative solutions than are available under the current law. According to the Commission, the use of undertakings under other Acts and in Australia has been positive, reducing the number of criminal prosecutions and costs of enforcement.
- 14 Some of the five submissions that opposed the proposal questioned the Discussion Paper's conclusion that the Commission cannot enforce a settlement as it is not an affected party. As noted above, the Commission has not yet had to enforce a settlement agreement, but it would be artificial for the Commission as a regulator to have to rely on contract law to take action against a party which has breached the Fair Trading Act.
- 15 Other submissions also considered that the power to enforce court enforceable undertakings was an unnecessary addition to the Commerce Commission's already wide-ranging powers. The Legislation Design Committee does not suggest amending legislation unless it is necessary.

## *Comment*

- 16 The need for legislative recognition of court enforceable undertakings is evidenced by a settlement the Commerce Commission entered into with ANZ National Bank Limited and ING (NZ) Limited in 2009 in relation to alleged breaches of the Fair Trading Act. It was decided that the best possible outcome for the affected investors was to enter into a negotiated settlement, rather than commence lengthy and uncertain litigation. Under the agreement, the parties acknowledged that some of their conduct may have breached the Fair Trading Act. The result was the largest financial settlement the Commission had ever entered into, with millions of dollars being refunded to consumers. However, the Commerce Commission was unable to formalise the settlement agreement under the Fair Trading Act. The parties to the settlement agreement have fulfilled their obligations under the agreement, but the Commission has expressed reservations about its ability to enforce the agreement and gain redress for consumers if it had been necessary because of the reasons given above.
- 17 The Securities Commission also welcomed the settlement, and accepted its own enforceable undertaking from ANZ National and ING in respect of the conduct investigated by the Commerce Commission, under section 69J of the Securities Act. This gives the Securities Commission the ability to enforce the undertaking under the legislation rather than contract law. Remedies that may be available to the Securities Commission include requiring the parties to fulfil their obligations under the agreement and the ability to gain compensation for the Crown and third parties to a maximum of the amount of money gained as a result of the breach.
- 18 To avoid current difficulties the Commerce Commission experiences with informal settlement agreements, it is recommended that the Fair Trading Act be amended to give the Commerce Commission the power to accept written undertakings in connection to matters related to the enforcement of Parts 1 and 2, and regulations made under Parts 3 and 4 of the Fair Trading Act. If the Commerce Commission considers that an undertaking has been breached it is recommended that it may apply to the court for an order requiring a party to the undertaking to comply with a term of the undertaking, pay money to the Crown (not exceeding the financial gain the person obtained by breaching the undertaking), and/or compensate others for loss or damage caused by the breach. The provision would be modelled on sections 69J and 69K of the Securities Act (which also closely reflect section 218 of the Australian Consumer Law).
- 19 The Securities Commission and the ACCC publish the court enforceable undertakings made under the authority of these provisions, although the legislation does not expressly provide for the undertakings to be disclosed publicly. It is important for the purposes of transparency that the undertakings should be notified publicly, but this can presumably be achieved without an express publication or disclosure provision being included in the relevant legislation. Safeguards to ensure that the power to accept undertakings is used properly are:
  - a The Commerce Commission's discretion to enter into an undertaking only if it considers that it meets its enforcement criteria. In cases of serious misconduct the Commission would be expected to take a prosecution instead of accepting an undertaking.

- b The ability for a person to refuse to enter into an undertaking with the Commission.
  - c Inclusion of the ability for the other party, with the consent of the Commission, to withdraw or vary the undertaking at any time.
- 20 The provisions would only apply to new enforceable undertakings entered into after enactment, not existing settlements.
- 21 If a party were to subsequently breach a court order requiring it to comply with an undertaking, that party would be guilty of contempt of court, which is a criminal offence.<sup>3</sup>

## Recommendations

- a Amend the Fair Trading Act to allow the Commerce Commission to accept written court enforceable undertakings in connection to matters related to the enforcement of Parts 1 and 2, and regulations made under Parts 3 and 4 of the Fair Trading Act, similar to sections 69J and 69K of the Securities Act.
- b If the Commerce Commission considers that an undertaking has been breached, recommend that it may apply to the court for an order requiring a party to the undertaking to comply with a term, pay money to the Crown (not exceeding the financial gain the person obtained by breaching the undertaking), and/or compensate others for loss or damage caused by the breach.
- c Provide for the ability for a person to alter or withdraw an undertaking with the permission of the Commerce Commission.

## Banning Orders

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- 22 Banning orders are a tool available to the courts under some legislation to ban individuals from certain activities for specified lengths of time. Sometimes the person can get permission from the court to participate in the banned activities despite the ban. A person who breaches a ban can face serious consequences. In most cases a breach of a ban will be a criminal offence.
- 23 The purpose of banning orders is to prevent the public from suffering detriment due to the ongoing misconduct of a deliberate wrongdoer or incompetent individual who continues to act unlawfully or unfairly even after they have been convicted and fined.<sup>4</sup> Banning orders are used as an enforcement tool against a recidivist offender who can cause the public significant damage from his or her repeat offending or serious incompetence. They are particularly appropriate where the benefits of committing the offences are considered by the wrongdoer to outweigh the possible penalties under the law. They are intended as a protection mechanism for the

<sup>3</sup> District Courts Act 1947, section 112 and Crimes Act 1961, section 401. The maximum penalty is a fine of \$1,000 or 3 months imprisonment.

<sup>4</sup> Section 383 of the Companies Act allows a person to be banned for persistently failing to comply with the legislation or for incompetence. A conviction is not necessary.

public rather than a deterrent for would-be offenders, although they are penal in nature.

- 24 There are numerous examples in New Zealand law where a criminal conviction, including for dishonest behaviour such as fraud or theft, or being declared bankrupt, will disqualify persons from holding various positions of responsibility. Most are industry specific although some relate to the removal of the right to direct a company or hold a management position. These are administrative consequences of a conviction or bankruptcy, but they are not express banning orders.
- 25 Express banning orders that may be made by the courts are also available to confront serious dishonesty or misconduct not expected from a person in a position of responsibility. These bans can only be issued by a judge. Bans of this type can be found in the Companies Act 1993, Securities Act 1978, Motor Vehicle Sales Act 2003, and Credit Contracts and Consumer Finance Act 2003 (CCCFA). The ban will usually prevent the person from managing or directing a company, or in the case of the Motor Vehicle Sales Act and the CCCFA, prevent them from participating in the motor vehicle or credit trades. Any person affected by the offender's wrongdoing can apply for a longer ban if the offender demonstrates additional undesirable characteristics such as persistent contravention of the law or incompetence. The court is given wide discretion to determine who is subject to a ban and what the conditions of the ban will be.
- 26 The Commerce Commission has identified some individuals who deliberately and repeatedly offend under the Fair Trading Act. Once convicted an individual can continue to trade (and potentially re-offend) under new branding or a new company. The most common examples are scams and pro-forma invoicing. The penalty for a conviction under the Fair Trading Act is a fine of up to \$60,000 for an individual or \$200,000 for a company, but scammers' profits from unlawful activities at the expense of their victims can exceed those amounts. Some scammers consider the fine as a "cost of business". Although the number of repeat offenders is small, the consumer detriment and harm to consumer confidence is destructive. Businesses also benefit from banning orders in that they are able to operate in a market without being undercut or losing market share to persons previously convicted under the Fair Trading Act.
- 27 The Australian Consumer Law includes a power for the court to disqualify a person from managing companies if that person contravenes specific provisions of the Australian equivalent of the Fair Trading Act, and the court is satisfied that a disqualification is justified. A breach of the ban can be penalised by civil or criminal sanctions. The Australian law-makers intended banning orders to be a strong deterrent by penalising the individuals that control companies who break the law, unlike a monetary penalty, which may be considered a cost to the company not the individual.
- 28 The May 2006 *Review of the Redress and Enforcement Provisions of Consumer Protection Law* (page 52) and the *Consumer Law Reform: A Discussion Paper* (page 111) proposed giving the court the ability to ban recidivist offenders under the Fair Trading Act in order to protect consumers and businesses from repeat

unfair behaviour by individuals who are not deterred by the penalties available under the Act.

- 29 The 2010 Discussion Paper suggested that a court should be given the power to ban an individual from any activities necessary to prevent the individual from continuing to trade unfairly and break the law. On further reflection, the Ministry of Consumer Affairs considers that a general ban under the Fair Trading Act could have serious consequences for the livelihood of the banned person and their dependants. A court may find it difficult to specify the conduct that should be the target of the banning order, given that the intention is to prevent the person from being in a position to continue to trade unfairly. Such a power may result in unnecessarily wide bans. Banning someone from trade altogether could leave them without a way to earn a living. No other banning power in New Zealand, or the power under the Australian Consumer Law, gives the court the ability to ban someone from trade altogether. It is important to ensure that individuals are only banned from doing the minimum necessary to protect the public from ongoing offending to minimise the impact on individual rights and freedoms. For these reasons the law should only allow a court to ban an individual from being a director or promoter of a company, or being involved in the management of an incorporated company or other types of businesses engaged in trade.
- 30 A ban from management is appropriate and will be effective, so long as it is enforced. Repeat offenders cause the most detriment when they establish businesses to front their offending and conceal their identities, and incorporate a company to limit their liability. Consumers, shareholders and employees are all susceptible to the actions of unscrupulous company directors or managers. A management ban will enable the individual to continue to earn a living while prohibiting them from causing detriment to susceptible consumers behind the veil of an incorporated company. Only individuals should be subject to bans so as to not penalise employees (and shareholders) of the businesses controlled by repeat offenders.
- 31 The majority of the 31 submissions on the enforcement issues in the 2010 Discussion Paper support such a provision being added to the Fair Trading Act. Most submitters were eager for applications for banning orders to be subject to proper court processes. Some suggested increasing the level of penalties applicable for Fair Trading Act offences as an alternative to improve deterrence. However, the purpose of disqualification orders is to protect consumers from repeat behaviour by dishonest traders, not as a penalty for wrongdoing. For some offenders no penalty short of imprisonment will outweigh the gain from unfair practices.
- 32 Those submitters that did not support the provision questioned the need for an additional punitive power on top of the ability of a court under section 41 of the Fair Trading Act to grant permanent injunctions to prevent future unlawful behaviour. However, permanent injunctions are not suitable to prevent an individual from causing consumer detriment by repeat breaches of the Fair Trading Act. Injunctions are used in civil disputes to put a stop to current conduct causing damage to others. They are not intended, and are not used as, a behavioural control to protect the public from recidivist offenders. A permanent injunction may specifically prohibit conduct that will breach the Fair Trading Act and courts have used this power to

prohibit traders from undertaking activities that are unlawful under the Fair Trading Act. It would serve to make the consequences of the conduct more serious by making it a breach of the Fair Trading Act and contempt of a court order. A court is unlikely to use an application for a permanent injunction to act as a pseudo-regulator by preventing someone from doing something lawful, such as managing a business, to remove the risk that they might re-offend, especially because the likelihood of ongoing offending will probably be uncertain.

- 33 A court asked to grant an injunction will consider whether the “balance of convenience” favours granting the injunction. This test asks whether the inconvenience to the trader from the injunction will outweigh consumers’ inconvenience caused by the particular behaviour which may not of itself be a breach of the Fair Trading Act. Despite the express instruction to do so in section 41(4) of the Fair Trading Act, courts in New Zealand seem hesitant to put much weight on possible future conduct. If a trader is likely to be prevented from continuing in business, a judge is unlikely to grant the injunction where the conduct being prevented is not actually a breach of the Fair Trading Act that would cause consumer detriment. Banning orders, in comparison, allow the court to ban a person from lawful behaviour where that person is not deterred from the penalties available under the Fair Trading Act and is likely to re-offend.

#### *How a banning order would work*

- 34 The following paragraphs detail the form a banning order provision could take. It is important to ensure that individuals who unintentionally breach the Fair Trading Act are not subject to banning orders. This is difficult because a trader’s intention is not relevant to the offences under the Fair Trading Act.
- 35 An application for a ban should only be allowed when an individual has been convicted, or was involved in the management of a company that has been convicted, of two or more offences under the Fair Trading Act within a 10 year period. The likelihood of two or more unintentional breaches is small, and may represent an extent of serious incompetence on behalf of the trader that justifies a ban. Several breaches of the Fair Trading Act also show that the offender does not consider the penalties and stigma of a conviction enough to deter them from future offending.
- 36 Only the Commerce Commission should have the ability to apply for a banning order to remove the risk that banning orders are used for anti-competitive purposes. Whether to apply for a ban will be determined by the Commerce Commission on the basis of its enforcement criteria.
- 37 Proper safeguards should be established to ensure the power is only used when it is absolutely essential. Any ban should have a time limit of less than 10 years as determined by the court. The court should also have the ability to set other conditions on the ban as necessary to ensure that it meets its purpose. In case circumstances change, the banned individual should have the ability to apply to the court for permission to carry out a banned activity or have the ban altered or removed.



- 38 In addition to meeting the criteria above, the court should only be allowed to order a ban where it is satisfied that the ban is justified in that particular case (similar to the Australian provision) and only to the extent necessary to protect the public from being harmed by the individual's likely re-offending. It is likely that banning orders will only prevent the individual from managing companies that trade in particular goods or services that are associated with their previous offending.
- 39 Appeals against a court's decision should be allowed to go to the court above. When deciding whether to ban an individual the court should be allowed to hear evidence from the Commerce Commission, the defendant and other people who are connected with the proceedings (for example, other enforcement entities or people affected by the individual's offending).
- 40 The Commerce Commission is likely to want to make an application for a ban at the same time as a second or subsequent prosecution. However, a banning order is a civil remedy so should be required to be heard separately from a criminal prosecution. Some submissions noted that, while banning orders impose serious restrictions on an individual, they are a civil remedy so the lower civil standard of proof applies. However, an application for a banning order, as noted, should be contingent on two or more criminal convictions, where a person has been found guilty under the higher criminal standard of proof. It would be unworkable if the court was required to be satisfied beyond reasonable doubt that a convicted person will re-offend. Also, the courts have accepted that where a penalty is more severe a higher standard of proof is necessary, although it will not be as high as the criminal standard.
- 41 Banned individuals would not be allowed to be employed in management positions and would be added to the list of banned directors administered by the Companies Office. A copy of each banning order would be published and sent to the Registrar of Companies to allow the Companies Office to assist the Commerce Commission to enforce the ban.
- 42 Individuals who breach a banning order should be guilty of an offence under the Fair Trading Act. The maximum penalty should include imprisonment and a fine to ensure that the individual can be punished effectively (say, if they are insolvent). The penalty should be in line with other similar offences in the Companies Act and the CCCFA.

## **Recommendations**

Amend the Fair Trading Act to provide for the ability for the court to grant banning orders along the following lines, similar to section 248 of the Australian Consumer Law:

- a Allow the court to ban an individual from being a director or promoter of a company engaged in trade, or being involved in the management of a business engaged in trade, for up to 10 years, subject to conditions as necessary.
- b Application can only be made when an individual has been convicted, or was involved in the management of a company that has been convicted,

of two or more offences under the Fair Trading Act within a 10 year period.

- c The court can order a ban where it is satisfied that the ban is justified in that particular case and only to the extent necessary to protect the public from being harmed by more of the individual's offending.
- d Applications for banning orders can be made to the District Court by the Commerce Commission.
- e When deciding whether to ban an individual the District Court can hear evidence from the Commerce Commission, the defendant and other people that are connected with the proceedings (for example, other enforcement entities or people affected by the individual's offending).
- f Banned individuals will have the ability to apply to the Court for leave to participate in activities prohibited by the ban.
- g An offence will be created for breaches of a banning order, the maximum penalty of which will include imprisonment and a fine in line with similar offences in the Companies Act 1993 and the Credit Contracts and Consumer Finance Act 2003.

## **Infringement Offences and Notices**

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- 43 Several enforcement agencies in New Zealand issue infringement notices and impose a fine on people who they have reasonable cause to believe have committed an offence identified as an infringement offence. Infringement notices are a quick and efficient enforcement tool used to penalise people for clear-cut, minor breaches of their statutory obligations. Infringement offences and notices are currently used to enforce over 20 pieces of legislation in New Zealand, including the Motor Vehicle Sales Act 2003 and the Weights and Measures Act 1987. Most infringement regimes allow the enforcement agency to choose between an infringement notice and prosecuting the person for a summary conviction for the same offence.
- 44 Infringement offences and notices allow enforcement agencies to carry out enforcement action for misconduct that is deemed not to be serious enough to be prosecuted in a court, or that needs to be acted against quickly, but which is still detrimental to the public good. The benefit of infringement offences is that they allow enforcement agencies to react expeditiously and efficiently to misconduct which is minor but that cannot be ignored. The Commerce Commission has identified a class of offending that it considers breaches the Fair Trading Act, but that it does not prosecute on a regular basis because the benefit of doing so would not outweigh the cost.
- 45 Because infringement notices remove the right for a person to be tried and heard in a court before being fined, it is important that the process is fair and includes protections for defendants. New Zealand has a standardised process for

infringement offences and notices set out in the Summary Proceedings Act 1957.<sup>5</sup> It includes a standard process for the collection of infringement fines and minimum protections for defendants.

- 46 As an example, non-compliance with a Consumer Information Standard is an offence under the Fair Trading Act and is relatively common compared to other Fair Trading Act offences, with traders neglecting to display the notices, or displaying incorrect information. The Commission reports that the average cost of enforcing a Consumer Information Standard through the courts is \$15,000 and the average fine imposed for minor offending is \$3,550. In these situations the Commerce Commission will use informal enforcement tools, such as warnings, compliance letters, or settlements to encourage the offender to comply with the law. These are soft tools that do not always result in improved compliance.
- 47 The alleged offending is usually minor and does not cause major consumer detriment, but if left unaddressed it could lead to more serious and repeated offending. The cumulative effect of minor offending may impact on consumers' confidence over time and will erode the public's confidence in the Fair Trading Act. One of the objectives of the Consumer Law Reform project is to ensure New Zealand's consumer laws are effective and enforceable.
- 48 If the Commission, as the entity responsible for the enforcement of the Fair Trading Act, had the ability to issue a relatively small fine for these offences it would encourage compliance with the Fair Trading Act and ensure it retains the public's confidence.
- 49 The use of infringement notices would probably replace some of the warning and compliance letters and other informal enforcement measures that the Commission uses. Evidence from the use of infringement notices under the Weights and Measures Act shows that enforcement agencies continue to prefer assisting businesses to comply with the law as a first resort, rather than using infringement notices (out of approximately 400 Weights and Measures Act offences detected per year, about 10% were followed up by an infringement notice).
- 50 Infringement offences are suitable for minor offences that do not involve any mental elements, such as an offender's intention. The individual offence should be easy to establish and generally of little concern to the public. The misconduct should involve clear-cut issues of fact. Infringement offences are usually committed in large numbers and require quick, efficient responses. The Law Commission considers that infringement offences are suitable for less morally reprehensible behaviour than is the subject of other offences.
- 51 Not all offences in the Fair Trading Act are suited to infringement enforcement. Some offences, such as the obligation to not engage in misleading or deceptive conduct in relation to goods, require a careful analysis of the facts, and there may be conflicting evidence. However, there are some offences where it can quickly be determined whether the law has been complied with, such as the display of correct Consumer Information Notices in accordance with the regulations. In addition it is

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<sup>5</sup> The Criminal Procedure (Reform and Modernisation) Bill will retain this Act largely unaltered, but will rename it the Enforcement of Infringement Offences and Fines Act.

relatively easy to avoid these more minor offences, and so a low fine is all that is necessary to make the cost of non-compliance outweigh the benefit.

- 52 Infringement notices become controversial where the defendant's natural justice rights are taken into account, including the right to be presumed innocent until proven guilty, and the right to be heard. Infringement offences are only appropriate when the necessity for an efficient and expedient process along with the minor penalty is considered to outweigh the alleged offender's right to the protections of a full court process. In response to the growing number of infringement offences in New Zealand, the Summary Proceedings Act established a number of default protections for offenders, in particular:
- a The right for the defendant to elect to have a full court hearing if they choose (section 21); and
  - b That a criminal conviction cannot result from the issue of an infringement notice and payment should not be taken as admission of fault (section 78A).
- 53 The Summary Proceedings Act also allows for 28 day reminder notices, and time-to-pay arrangements. These streamline the fine recovery process and use the administrative resources of the Ministry of Justice rather than the courts. Any money collected by an enforcement agency is transferred to the general Crown account, in the same way as penalties imposed by a court.
- 54 As an additional safeguard, the defendant will always have the right to bring to the attention of the enforcement agency any matter relating to the alleged offence. Any enforcement agency, including the Commerce Commission, should consider matters brought to its attention and use its discretion to waive or vary a fine if it is appropriate. This allows a defendant's financial means and individual circumstances to be taken into account in accordance with natural justice and the purposes of the Sentencing Act 2002. While the Law Commission encourages enforcement agencies to allow defendants to enter into time-to-pay arrangements, these arrangements are less likely to be necessary for fair trading offences where the defendants are likely to be in trade and are normally businesses.
- 55 The use of infringement notices as an enforcement tool for a small number of offences under the Fair Trading Act has not been subject to public consultation. The Australian Consumer Law includes the ability for the Australian Competition and Consumer Commission (ACCC) to issue infringement notices for the majority of the offences in the new law. The Commerce Commission is in favour of infringement offences for a limited number of Fair Trading Act offences. Given their efficiency and minor impact on traders due to the small fines, it is recommended that infringement notices and fines are included in the Fair Trading Act as an enforcement tool for a limited number of clear-cut offences to improve compliance with the law. It is timely to include them now, given the opportunity for amendment and the inclusion of several new offences in the Fair Trading Act.
- 56 Using the criteria noted in paragraphs 50 and 51 above, it is recommended that the breaches of the Fair Trading Act suited to be enforced as infringement offences are:

- a Failure to comply with consumer information standards (section 28);
- b Failure to comply with product safety standards (section 30);
- c Failure to comply with an unsafe goods notice (section 31);
- d Failure to comply with a compulsory recall notice (section 32); and
- e Obstructing a person with a search warrant (section 47F).

57 In addition, a number of new conduct requirements are being included in the Fair Trading Act that may not be suitable for enforcement by court action alone. These will be enforced by the Commerce Commission and are particularly suited to infringement offences because of their clear-cut nature and the low cost of compliance. While these offences are yet to be drafted by the Parliamentary Counsel Office, it is likely that they will include provisions related to the registration of auctioneers, regulation of layby sales and unsolicited direct selling, and some minor product safety provisions.

58 The Commerce Commission will continue to have the option of progressing with a court prosecution instead of issuing an infringement notice if the offending is sufficiently serious. The Commission should not be required to issue an infringement notice for any misconduct. The Commission will not be able to progress with infringement notices *and* a civil remedy or criminal prosecution. The ACCC maintains a public register of infringement notices that it issues to ensure it remains accountable to the public and to its enforcement criteria. A similar public register maintained by the Commerce Commission is recommended.

59 When an employee of the Commerce Commission believes, on reasonable grounds, that someone has committed an offence under one of these provisions it is recommended that they have the ability to issue an infringement notice and a small fine. The form of notice should be specified by regulation and will include:

- a Details of the time, place and nature of the alleged offence;
- b The infringement fee;
- c How the infringement fee must be paid (to the Commission in the first instance, and then to the Crown);
- d When the infringement fee must be paid (the usual timeframe of 28 days should apply, in line with other infringement offences and the Summary Proceedings Act);
- e A summary of the defendant's rights under the Summary Proceedings Act; and
- f A statement of what will happen if the person neither pays the fine nor requests a hearing.

60 The level of the fine will be in accordance with other regimes and offences of a similar nature. The Law Commission, the Legislation Advisory Committee

Guidelines and the Ministry of Justice publication *Policy Frameworks for New Infringement Schemes* suggest a number of factors to be considered when determining the amount of an infringement penalty:

- a Suggestions of maximum fines range between \$500 and \$1,000, but other regimes, such as the Fisheries Act 1996 and Building Act 2004 have maximum fines of \$3,000 and \$50,000 respectively.
- b The fine needs to outweigh the possible benefits of non-compliance.
- c The fine should bear some proportion to the average likely penalty imposed by a court when a defendant is found guilty of the same offence (approximately \$3,500 for recent minor Fair Trading Act convictions).
- d The fine should be discounted to take into account the fact that a defendant is admitting some degree of guilt by paying the fine. The usual discount applied by the court for a guilty plea is one-third.
- e Regard should be had to the level of risk or harm posed by the misconduct. While safety violations pose a greater risk to than, say, failure to show an auctioneer's licence, the availability of a fine for each event of misconduct will allow the Commission discretion to impose more or less of a fine as is reasonable taking into account the trader's circumstances.
- f The fine should bear some proportion to the maximum penalty for conviction of the standard offence. Offences (a) to (d) listed in paragraph 56 above have a maximum penalty when convicted in a court of \$60,000 for an individual or \$200,000 for a body corporate. Offence (e) has maximum penalties of \$10,000/\$30,000. The penalties for the new offences are yet to be determined.

61 In March 2008, Cabinet approved a set of guidelines for the development of new infringement schemes to ensure cross-government consistency (Ministry of Justice publication *Policy Frameworks for New Infringement Schemes*). These guidelines also recommend how the infringement regimes are structured in the legislation and operated. If the Government agrees to include infringement offences in the Consumer Law Reform Bill, the final infringement regime should be determined by the Minister of Consumer Affairs in consultation with the Minister of Justice after the new offences have been drafted.

62 As mentioned above, the Summary Proceedings Act contains a number of general safeguards and process requirements that apply to all the infringement offences in New Zealand. These will also apply to any infringement offences under the Fair Trading Act.

## **Recommendations**

- a Include in the Fair Trading Act a small number of clear-cut offences as infringement offences, enforceable by infringement notices issued by employees of the Commerce Commission.

- b Invite the Minister of Consumer Affairs, in consultation with the Minister of Justice, to determine the final infringement offences and penalties in accordance with the criteria suggested by the Law Commission, the Legislation Advisory Committee Guidelines and the Ministry of Justice publication *Policy Frameworks for New Infringement Schemes*.
- c Note that infringement offences and notices will be subject to the standard processes and safeguards contained in the Summary Proceedings Act.

## **Trans-Tasman Enforcement**

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- 63 In its submission on the Consumer Law Reform, the Commerce Commission suggested that an anomaly exists between its and the Australian Competition and Consumer Commission's (ACCC) ability to enforce consumer fair trading laws on the other side of the Tasman.
- 64 Section 5 of the Australian Competition and Consumer Act 2010 extends the application of the Australian Consumer Law provisions to Australian citizens or bodies incorporated in Australia, but trading outside Australia. This allows the ACCC to enforce Australian consumer law against Australian companies regardless of where they are trading. The Commerce Commission gives two examples of the ACCC using this power; one to prevent the promotion of a pyramid scheme in New Zealand, and the other to gain compensation in an Australian court for New Zealand consumers because of the misconduct by Australian companies and individuals that took place in New Zealand.
- 65 Section 3 of the Fair Trading Act has a similar provision, providing for the New Zealand Fair Trading Act to apply to conduct by New Zealand companies and citizens acting outside New Zealand, but it also has a proviso. It is limited to conduct that relates to the supply of goods or services in New Zealand only. The Australian Act does not have such a proviso, and so the ACCC's powers of cross-border enforcement are wider. A limited exception allows sections 10 and 13 (misleading and deceptive conduct, and false representations) to be applied to New Zealand companies exporting to China under a particular bilateral agreement.
- 66 Trans-Tasman investigation and enforcement of competition and consumer law has been endorsed by governments on both sides of the Tasman through the Single Economic Market (SEM) agenda and the Closer Economic Relations work programme.
- 67 Australia enacted legislation in 2007 to allow the ACCC and the Commerce Commission to share information and collaborate on investigations. The New Zealand Government is considering similar legislation with the Commerce Commission (International Cooperation, and Fees) Bill currently progressing through Parliament. If enacted, this will go some of the way to removing the barriers to cross-border enforcement by making it easier for the Commerce Commission to assist, and be assisted by, the ACCC. However, it will not allow the Commerce Commission to enforce the Fair Trading Act directly against New Zealand companies operating overseas where the conduct does not affect the market in New Zealand.

- 68 The Commerce Commission has suggested that section 3 of the Fair Trading Act be amended to remove the proviso that the misconduct must affect the New Zealand market. The change would allow the Commerce Commission to enforce the New Zealand law against New Zealand companies operating in Australia and further its relationship with the ACCC under the SEM agenda. It will ensure that New Zealand companies and citizens have an obligation to operate fairly wherever they are based. However, the number of New Zealand companies breaching the Fair Trading Act overseas, where the breach does not affect New Zealand, is probably very small and investigations are likely to be a low priority for the Commerce Commission.
- 69 There is a principle in international law that there are only limited circumstances in which it is appropriate for any country to make laws about conduct which occurs outside that country and which does not have an adverse effect on the country. On balance, the case to depart from this principle of international law has not been made out.
- 70 The current Fair Trading Act allows the law to be enforced when New Zealand consumers are harmed. The Trans-Tasman Proceedings Act 2010 also ensures that if the ACCC takes action in Australia for the benefit of Australian consumers, the orders made can be enforced in New Zealand against the New Zealand resident.

### **Compulsory Interview Powers**

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- 71 Compulsory interview powers enable an enforcement agency to compel a person to attend an interview with a view to explaining documents or events during an investigation of an offence. The Commerce Commission already has a number of information gathering powers under the Fair Trading Act. Under section 47G the Commerce Commission can require a person to supply information or documents where it considers it necessary or desirable for the purposes of carrying out its functions under the Fair Trading Act. The Commerce Commission also has the ability, under section 47, to obtain a search warrant and search and seize property to aid investigations. However, the Commerce Commission does not have the power to require compulsory interviews under the Fair Trading Act. The Commerce Act 1986 allows the Commerce Commission to require a person to appear and give evidence by notice. These provisions also apply to the Commission's enforcement of the Credit Contracts and Consumer Finance Act 2003 (CCCFA).
- 72 In the 2006 Discussion Paper *Review of the Redress and Enforcement Provisions of Consumer Protection Law* the Ministry of Consumer Affairs proposed amending the Fair Trading Act so that a person can be required to appear before the Commerce Commission and give evidence, with appropriate protections.
- 73 The Commerce Commission supports the introduction of compulsory interview powers in the Fair Trading Act. It considers that its current interview powers under the Commerce Act and the CCCFA have been of considerable value, and have enabled it to obtain important information. The Commission considers that investigations and commercial transactions are becoming increasingly complex. It considers that it is vital that they are able to question company representatives



regarding matters under investigation to obtain the required information within a reasonable time period.

- 74 In response to the 2006 Discussion Paper submitters provided mixed feedback. A clear theme of submissions was that, if this proposal were to be implemented, a number of safeguards would need to be put in place to ensure that compulsory interview powers were used appropriately, and in a way that ensured minimal disruption to businesses, and protections for interviewees. Some concerns were raised that the power could be misused, and that it would become the primary way for the Commerce Commission to obtain information. Some submitters also said that the need for this power was not made out. Some of the key concerns are listed here in brief.
- a Section 25(d) of the New Zealand Bill of Rights Act 1990 legislates for the right for an individual or body corporate not to be compelled to be a witness or confess guilt. Compulsory interview powers appear to be at odds with this right. The Ministry of Justice suggests that departments consider this right when they are contemplating policies to allow enforcement agencies to question any person in connection with an investigation.
  - b There is a common law right of privilege against self-incrimination in criminal proceedings. In *Taylor v New Zealand Poultry Board* it was held that the privilege against self-incrimination can apply outside court proceedings where there is a statutory obligation to answer questions or produce documentation. It appears that compulsory interview powers are also at odds with this right.
  - c The Legislation Design Committee has expressed concerns that compulsory interview powers under the Fair Trading Act would not be proportionate to offences under the Fair Trading Act, which do not involve elements of moral wrongdoing (they are strict liability) and sometimes may not cause any actual harm. Compulsory interview powers may be more suitable, for example, in investigations of Crimes Act offences, but the Police do not have this power.
  - d A related issue is the potential for compulsory interview powers to be misused. The Legislation Design Committee, along with submitters on the 2006 Discussion Paper, raised concerns that compulsory interview powers could be used for the purposes of intimidation. Furthermore, given their controversial nature, compulsory interview powers should not be the Commerce Commission's primary way to obtain information.
  - e There are employment law issues where employees can be compelled to answer questions about their employer. The information produced by an employee can be used against the employer. This could potentially constitute a breach of their employment agreement which could result in repercussions against them, although employees may be protected by the Protected Disclosures Act 2000.

- f If compulsory interview powers were to be adopted, safeguards would need to be put in place to ensure procedural rights of witnesses, such as the right to legal advice and the right to a fair trial, were not affected. At a minimum, interviewees would need to be afforded the same privileges as witnesses in a court.
- 75 The Commission has submitted to the 2010 Consumer Law Reform review that compulsory interview powers are necessary because of the complexity of present day investigations, and their inability to get the information they need in a timely way. It has noted that the Financial Markets (Regulators and KiwiSaver) Bill will give the Financial Markets Authority a similar power for this reason, although it will have a stronger protection against self-incrimination than currently in the Commerce Act (and the CCCFA).
- 76 The Commission argues that, used in conjunction with informal enforcement tools, the ability to require that an alleged offender, or a colleague, business associate or customer of an alleged offender, is available for face-to-face interviews would allow it to draw out the relevant facts of a case more quickly, and would encourage traders to agree to an early settlement, reducing the cost and time of an investigation and greatly improving the efficiency of the Commission's investigations. The Commission has the power to request information in writing but the ability to talk to specified individuals, it argues, would allow the Commission to look behind the documents and determine where responsibility for an alleged offence lies.
- 77 It further argues that with complicated commercial cases involving multiple entities the ability to require an interview with a person may prevent dead-end investigations or prosecutions. The Commission has examples where it considers that if it had been able to complete an interview with a person this would have allowed facts of a case to come to light at the investigation stage. In one example, the Commission was only able to question several people as part of the criminal prosecution proceedings. At that point, information was obtained that showed that the defendants were being wrongly prosecuted for offences they were not involved in.
- 78 Despite this information from the Commission, it is not clear how much the Commission *needs* compulsory interview powers to complete complex investigations and operate more efficiently. Because of the controversy surrounding compulsory interview powers, the Ministry considers that to justify their inclusion in the Fair Trading Act the need for compulsory interview powers should go beyond making investigations "easier" for the Commission.
- 79 As noted, some submitters in 2005 consider that the Commission's information-gathering powers are already extensive. In addition, compulsory interview powers are controversial in nature; possible pitfalls include their incompatibility with the right not to be compelled to be a witness and the privilege against self-incrimination, their disproportionateness to the Fair Trading Act's strict liability offences and the risk of misuse. It is recommended that compulsory interview powers are not included in the Fair Trading Act at this stage.

## Civil Pecuniary Penalties

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- 80 The Fair Trading Act sets out several expectations of traders' conduct. Traders can be required to comply with their Fair Trading Act obligations through the courts with the use of civil or criminal remedies.
- 81 Civil remedies are usually intended to undo harm caused by unlawful conduct. They usually require the trader to compensate victims, remedy wrongs or stop the unlawful conduct. Criminal remedies focus on retribution or punishment and reflect society's condemnation of the offender for their wrongdoing. Both can serve as deterrents from offending, although criminal convictions more so because of the large fines available to the courts.
- 82 When a person has done something unlawful under the Fair Trading Act civil remedies allow the courts to:
- a Grant an injunction to prevent or require a person to do something to prevent them from breaching their obligations;
  - b Cancel, void or vary a contract; or
  - c Order a person to disclose information or publish an advertisement, provide goods or services, or pay money to another person as a refund or compensation for damage and loss.
- 83 In addition, this paper recommends that the courts have the ability to ban an individual from being involved in the management of a company if they have had several Fair Trading Act convictions.
- 84 Civil remedies are usually used by enforcement agencies for less serious contraventions of the law and can also be used by traders or consumers against other traders (some civil remedies, such as banning orders, can only be used by enforcement agencies). Traders who accidentally break the law may still be the subject of civil remedies (there are very limited defences available and the Fair Trading Act's provisions are strict liability). However, a party asking for a civil remedy will need to prove that the trader breaking the law caused them (or someone else, if the application is by the Commerce Commission) damage in doing so.
- 85 Criminal sanctions are for more serious offending. The Commerce Commission is responsible for enforcing the criminal offences in the Fair Trading Act. If a person is convicted of a criminal offence under the Fair Trading Act the court can impose a fine up to a maximum amount of \$60,000 for an individual and \$200,000 for a body corporate. Along with large fines, the stigma of a criminal conviction is viewed by most traders as a serious penalty and so strict safeguards and a high standard of proof apply to criminal prosecutions. When a trader commits an offence because of a reasonable mistake they will not be convicted of an offence.
- 86 Criminal and civil cases cannot be heard by a court at the same time because different standards of proof and rules of evidence apply. The standard of proof in civil proceedings is usually the lower standard of *the balance of probabilities* but

courts will require a higher standard if a more severe penalty is sought (although it will not be as high as the criminal standard). The other key difference between civil and criminal proceedings is that less persuasive debt collection procedures apply in civil proceedings if the court requires money to change hands. Under the criminal collection procedures failure to pay a fine can result in imprisonment.

- 87 The range of criminal and civil punishments allows the Commission to choose a remedy that is proportionate to the offending in particular situations. However, the Commission's practice for all types of offending, after first trying informal enforcement methods such as warning or compliance letters and settlement negotiations, is to prosecute offenders rather than to use the civil remedies. The civil remedies under the Fair Trading Act are more commonly used by traders who have suffered damage from other traders breaching the Fair Trading Act.
- 88 Gaps and deficiencies have been identified with similar ranges of civil and criminal remedies in other legislation in New Zealand and overseas. The additional civil remedy of pecuniary penalties has sometimes been included to fill these gaps. Pecuniary penalties are fines that can be imposed by the court when a person has contravened the legislation but has not been convicted of a criminal offence.
- 89 In New Zealand, the Securities Act (currently being reviewed) allows pecuniary penalties of up to \$500,000 for an individual and \$5 million for a body corporate for serious contraventions of that Act. The Australian Consumer Law and the New Zealand Commerce Act also allow for substantial pecuniary penalties for contraventions of those Acts.<sup>6</sup>
- 90 The Commerce Commission has submitted that the Fair Trading Act should be amended to give the Commission the ability to apply for pecuniary penalties under the Fair Trading Act along with the other remedies available. This section looks at the reasons for including pecuniary penalties in other legislation and considers whether they apply to the Fair Trading Act.
- 91 One of the major problems with the range of civil and criminal remedies in Acts similar to the Fair Trading Act is that they cannot be used to compensate consumers and penalise offenders at the same time. Usually, criminal and civil remedies must be sought in separate proceedings. Civil orders can compensate consumers, among other things, but are usually not large enough to penalise and deter an offender. Enforcement agencies should not have to choose between these two objectives and so it is useful to be able to apply for a penalty and compensation for consumers in the same proceeding. In other legislation, pecuniary penalties have been used as a way to enhance regulatory efficiency and allow enforcement agencies to apply for both a penalty and compensation in a single civil proceeding.
- 92 However, New Zealand courts hearing criminal cases under the Fair Trading Act have agreed to the Commerce Commission's requests to grant civil orders under section 43 of the Fair Trading Act that require offenders to pay compensation to consumers. This allows the Commission to get a conviction, a fine and

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<sup>6</sup> The Credit Contracts and Consumer Finance Act allows for statutory damages which are a form of civil penalty. The maximum amounts are set as a percentage of the damage caused, and so they do not apply in situations where damage cannot be proven. For this reason, they are slightly different to pecuniary penalties.

compensation and other orders, all in one proceeding. Therefore, this justification for pecuniary penalties does not apply to the Fair Trading Act.

- 93 Australia has recently included pecuniary penalties as an enforcement tool for the Australian Competition and Consumer Act 2010 because of the pitfalls of other civil remedies. The experience in Australia has been that the Australian Competition and Consumer Commission (ACCC) rarely uses the criminal sanctions available to it, instead relying on civil remedies to enforce their legislation, due to procedural and other difficulties with taking criminal prosecutions at the Commonwealth level. Prosecutions on behalf of the Commonwealth of Australia can only be taken by the Department of Public Prosecutions (DPP). When the ACCC considers that particular misconduct should be penalised with a criminal conviction, it will refer the matter to the DPP. The DPP will then decide whether the misconduct justifies a prosecution on the basis of its own criteria, which may or may not align with the ACCC's enforcement criteria. The DPP are responsible for all prosecutions nationwide so must weigh up which prosecution to take. They may not always assign the desired priority to consumer protection breaches.
- 94 Also, the ACCC is unable to impose large penalties on traders in civil proceedings because a court will only grant enough of the remedy to put right the damage. Pecuniary penalties are easier to obtain than other civil remedies because they allow enforcement agencies to apply for large penalties without having to prove that the penalty corresponds to the loss or damage caused, in the same way as criminal fines are not required to correspond to the loss or damage.
- 95 The Commerce Commission does not have this difficulty – it is not required to seek approval to take criminal prosecutions. In fact, the Commission took 14 prosecutions under the Fair Trading Act in 2009/2010. The availability of large criminal fines under the Fair Trading Act means that the problem of limiting the penalty to the damage caused does not apply to the Fair Trading Act.
- 96 In consultation on the Australian Consumer Law, the Australian Law Reform Commission argued that pecuniary penalties play a crucial part in the ACCC's "enforcement pyramid" (the hierarchy of enforcement tools for more to less serious misconduct) because they allow punishment without the stigma of conviction. The inability of the ACCC to ask for pecuniary penalties meant that enforcement outcomes may have been disproportionate to the misconduct in some situations. The Commerce Commission and other commentators have not raised this issue with the Ministry in relation to the Fair Trading Act, except in the context of minor, clear-cut offences, in response to which it is recommended that the Fair Trading Act include a number of infringement offences.
- 97 A criminal conviction and a fine represent condemnation by society for particular conduct. Because of the seriousness of a conviction several safeguards have been incorporated into the criminal process to protect defendants' rights, such as the right to remain innocent until proven guilty. The safeguards include:
  - a The high standard of proof, being *beyond reasonable doubt*;
  - b The protections against self-incrimination; and

- c The unavailability of discovery (where one party can get all the information related to the case held by the other party).
- 98 Under the Fair Trading Act it is a defence if the trader made a reasonable mistake. This defence applies to criminal cases but not civil. (The defence must be proven by the trader, not the prosecution.)
- 99 These safeguards sometimes make it harder for enforcement agencies to obtain a criminal conviction and a fine than to get civil remedies in a civil court. This has been put forward as an argument to allow the court to impose civil pecuniary penalties in the absence of a criminal conviction.
- 100 The Legislation Advisory Committee has expressed concern that where civil penalties are used as a deterrent their effect is the same as that of a fine, except that the protections of the criminal law do not apply. The safeguards that apply to criminal proceedings serve an important purpose and are cornerstones of our legal system. The strict nature of Fair Trading Act offences, combined with the onus of proof for the defence being on the defendant, means that standard criminal protections are already diluted for Fair Trading Act prosecutions. These protections should not be further diluted to make it easier for a court to impose penalties in non-criminal situations.
- 101 In addition to the lack of protections for defendants, there are other risks associated with pecuniary penalties. Those were brought to light by the Australian Consumer Law consultation process and are, briefly:
- a The penalty is considered “just a cost of business” and so does not act as a deterrent as intended.
  - b The burden of the penalty is borne by shareholders, not the individual wrongdoers.
  - c Pecuniary penalties convey the impression that contravening the Fair Trading Act is purchasable for a price.
  - d Financial penalties may force a company into liquidation.
  - e Financial penalties are prone to avoidance techniques such as asset stripping.
- 102 Given the downsides, and the lack of a demonstrable need, it is recommended that civil pecuniary penalties are not added to the remedies available to the Commerce Commission under the Fair Trading Act at this time. If pecuniary penalties were to be added to the Fair Trading Act in the future, a number of detailed issues not covered by this paper would need to be carefully considered. The Law Commission began a review of civil pecuniary penalties as directed by the Minister of Justice in July 2010. It is recommended that the addition of pecuniary penalties in the Fair Trading Act is reconsidered in light of this review once it is completed.

## **Possible Increases to Maximum Criminal Penalties**

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- 103 The maximum penalties a court can give for committing an offence under the Fair Trading Act are currently \$60,000 for an individual and \$200,000 for a body corporate. (The separate offence of failing to comply with a search warrant has maximum penalties of \$10,000 for an individual and \$30,000 for bodies corporate.) These penalties were last updated in 2003, and before that had not been updated since the Act was passed in 1986. (In 1986, the fines were \$30,000 for an individual and \$100,000 for a body corporate.)
- 104 With the inclusion of unsolicited goods and services, unsolicited direct sales, layby sales, substantiation and auction regulation in the Fair Trading Act under the Consumer Law Reform Bill, a number of new offences and maximum penalties will need to be established. Accordingly, it is timely to review the entire range of penalties to ensure they are proportionate to the offences. The Fair Trading Act penalties should also be measured against penalties in other comparable legislation, such as regulation of financial advisors and resource management legislation.
- 105 It is recommended that the Ministry of Consumer Affairs continue to work with the Ministry of Justice to review the Fair Trading Act maximum penalty levels for the new and current offences and determine new maximum penalty levels if necessary.