TAKEOVERS PANEL

POLICY ON USE OF PENCUNIARY PENALTIES

Introduction

1. Pecuniary penalties are monetary penalties that are imposed by a court after a trial conducted under the rules of civil procedure, as opposed to fines, which may be levied upon conviction of a criminal offence.[1]

2. Pecuniary penalties are not intended or designed to compensate people affected by a breach of law, but to punish the contravention and deter future contraventions. However, they are imposed on a lower standard of proof of guilt than for criminal offences, and under proceedings that lack many of the procedural protections offered by the criminal law.

3. The Law Commission recommended that agencies devise and publish enforcement guidelines and policies, which set out the factors governing their enforcement decisions. This is the Panel's policy on its use of the pecuniary penalties regime in the Takeovers Act 1993.

Enforcement remedies in the Takeovers Act 1993

4. The Panel has a range of enforcement remedies available when a person breaches the Code. If the Panel determines at a formal enforcement hearing convened by the Panel under section 32 of the Takeovers Act ("section 32 meeting") that a person has contravened the Code, then in addition to the power to impose temporary restraining orders and permanent compliance orders, the Panel may seek from the High Court:

   (a) an injunction;

   (b) a civil remedy order;

   (c) a compensatory order;

   (d) a pecuniary penalty.[2]

5. In addition, under section 44 of the Act, certain behaviour may amount to an offence, on conviction for which a person may be subject to fines or imprisonment.

6. Broadly, injunctions and civil remedy orders are intended or designed to provide a remedy for a breach of the Code.

7. Compensatory orders are granted when the court is satisfied that there has been a breach of the Code, and a person has suffered loss or damage from that breach. The order is intended to compensate that person for the loss or damage suffered, or prevent that loss or damage.

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[1] In the Law Commission's Report 133 - *Pecuniary Penalties – Guidance for Legislative Design*, August 2014, the Law Commission defines pecuniary penalties as monetary penalties that are imposed by a court after a trial conducted under the rules of civil procedure and evidence, in which:

- liability is established on the civil standard of proof;
- the monetary penalty can be very substantial;
- neither imprisonment nor criminal conviction can result; and
- the penalty is paid to the Crown, rather than any victim.

[2] Section 33E of the Act

8. The aim of pecuniary penalties is to punish the contravention of the Code and to deter future contraventions. Pecuniary penalties do not compensate for loss or harm as a result of the breach of the Code.

Pecuniary penalties

9. Pecuniary penalty provisions are set out in sections 33M and 33P – 33R of the Act.

10. Section 33M of the Act provides:

If the Panel applies for a pecuniary penalty order against a person under this Act in accordance with section 35, the court—

(a) must determine whether the person has contravened the takeovers code; and

*(b) must make a declaration of contravention (*see *sections 33N and 33O) if satisfied that the person has contravened the takeovers code; and*

*(c) may order the person to pay a pecuniary penalty that the court considers appropriate to the Crown (*see *sections 33P and 33Q) if satisfied that the person has contravened the takeovers code, that the person knew or ought to have known of the conduct that constituted the contravention, and that the contravention—*

(i) materially prejudices the interests of offerees, the code company, the offeror or acquirer, competing offerors, or any other person involved in or affected by a transaction or event that is or will be regulated by the takeovers code, or that is incidental or preliminary to a transaction or event of that kind; or

(ii) is likely to materially damage the integrity or reputation of any of New Zealand's financial markets; or

(iii) is otherwise serious.

11. In brief, if the Panel determines at a section 32 meeting that a person has contravened the Code, then the Panel may decide to seek a pecuniary penalty. If so, the Panel will need to satisfy the court that:

(a) the person has contravened the Code; **and**

(b) the person knew or ought to have known of the conduct that constituted the contravention; **and**

(c) the contravention:

(i) materially prejudices the interests of any person involved in or affected by the relevant Code transaction; **or**

(ii) is likely to materially damage the integrity or reputation of any of New Zealand's financial markets; **or**

(iii) is otherwise serious.

12. If the court is satisfied of these requirements, then the court may, but is not required to, make an order that the person pays a pecuniary penalty. If the court decides to order that a pecuniary penalty be paid, then section 33P provides that the maximum amount of a pecuniary penalty is $500,000 for an individual and $5,000,000 for a body corporate, for each contravention.

The Panel will consider all remedies available

13. When the Panel determines at a section 32 meeting that a person has breached the Code, then the Panel will consider whether to apply to the court for any of the enforcement orders or remedies described above.

14. The Panel will apply the principles of fairness and proportionality to any decision on whether to pursue an enforcement order or remedy.

15. If, weighing up the fairness of pursuing a pecuniary penalty, and the proportionality of such a punishment as a response to the breach, the Panel considers that it may be appropriate to apply for a pecuniary penalty order, the Panel will apply a similar test to that which the court must apply in proceedings for a pecuniary penalty order, as set out in section 33M of the Act. The test has three limbs:

    (a) Has the person contravened the Code? This test is met for the Panel when the Panel makes such a determination at a section 32 meeting.

    (b) Did the person know, or ought they to have known, of the conduct that constituted the contravention? If the breach was intentional, or if the person ought to have known that their conduct would breach the Code, then this limb of the test is met. If the breach was caused by a genuine error in judgment or genuine mistake, then the Panel may elect not to seek a pecuniary penalty order.

    (c) Does the breach meet one or more of the following tests? -

        (i) Did the breach materially prejudice the interests of any person involved in or affected by the Code transaction? This involves a consideration of the loss or harm caused to any such person or persons as a result of the breach of the Code.

        or

        (ii) Is the breach likely to materially damage the integrity or reputation of any of New Zealand's financial markets? This involves a consideration the loss or harm caused to any of New Zealand’s financial markets as a result of the breach of the Code.

        or

        (iii) Was the breach otherwise serious? For example, was the breach part of a history of recurring conduct or has the person been involved in previous breaches?

16. If all three limbs of the test set out above are met, then the Panel’s aim in seeking pecuniary penalties will be to punish misconduct, reduce the chances of further misconduct and to raise public awareness.

Criminal action

17. The Panel may consider taking criminal action where there is evidence of intentional, reckless, or other serious unlawful conduct, but will not seek a pecuniary penalty and take a criminal action in respect of the same act or omission comprising a breach of the Code.

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