NEW ZEALAND
BANKERS ASSOCIATION

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Law Commission

By email: cpp@lawcom.govt.nz

Dear Susan

NZLC IP30: Civil Pecuniary Penalties

The New Zealand Bankers' Association (**NZBA**) is grateful for the opportunity to comment on the Issues Paper on Civil Pecuniary Penalties.

In general, NZBA has no objection to the use of civil pecuniary penalties. On a fundamental level, however, we believe before they are included as part of a regulatory regime consideration needs to be given as to the appropriateness of their inclusion in the specific circumstances. We do not believe it is appropriate for them to be included as a matter of course. We believe that consistency across regulatory regimes must be maintained, and as such the approach, frequency of inclusions and the quantum of pecuniary penalties must not be significantly different across statutes that are regulating the same market or industry.

Furthermore, where pecuniary penalties are included, sufficient controls need to be put in place to assure that they are used appropriately.

Another area that caused considerable dialogue within our membership is the purpose of civil pecuniary penalties. The general position has been that these penalties are intended to serve as a 'stick', a mechanism for punishing bad behaviour and as such a way to deter behaviour which has been deemed to be undesirable. Increasingly, however, these penalty mechanisms have been used as a way of compensating victims, particularly in cases where no compensation mechanism exists in the regime. NZBA believes that further debate as to the purpose of these penalties is required. Furthermore, once a position has been determined, civil pecuniary penalties must be consistently applied.

The abovementioned point is relevant because the difference fundamentally changes the question a court asks when considering these proceedings. If the former position is retained, the court's focus will be on imposing a remedy that is proportionate to the quantum of the wrongdoing. If, however, the question revolves around compensation, the court will be considering what level of harm the victims should be compensated for. This could lead to

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considerably different outcomes. For companies, this also means that it creates greater uncertainty in cases where they are unsure which standard a court would apply.

A further matter which NZBA believes needs to be considered is the interplay between civil pecuniary penalties and criminal penalties. In many regimes both options are available and often civil and criminal proceedings are initiated simultaneously. NZBA strongly believes, however, due to the costs in both time and resources involved in dealing with such actions, that both sets of proceedings should not be conducted simultaneously. As such, if criminal proceedings (the more severe of the two) are initiated, civil proceedings should be halted.

Finally, NZBA believes that thought needs to be given at to the standard that courts should use when deciding whether these penalties should be applied or not. While a standard balance of probabilities test does give greater certainty, it does fail to recognise the large variety of different legislation, covering acts of differing severity. Ultimately, a more flexible approach may well be appropriate.

Thank you for allowing us to make these general comments. If you would like to discuss any of these points further please feel free to get in touch with me.

Yours sincerely

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