

14 September, 2000

## **MINISTER OF LABOUR**

### **REVIEW OF THE HEALTH AND SAFETY IN EMPLOYMENT ACT 1992: INFRINGEMENT FEES**

#### **Purpose**

1. The purpose of this paper is to make recommendations regarding the imposition of infringement fees to all persons with duties under the Health and Safety in Employment 1992(HSE Act)<sup>1</sup> in order to gain better health and safety outcomes.

#### **Problem definition**

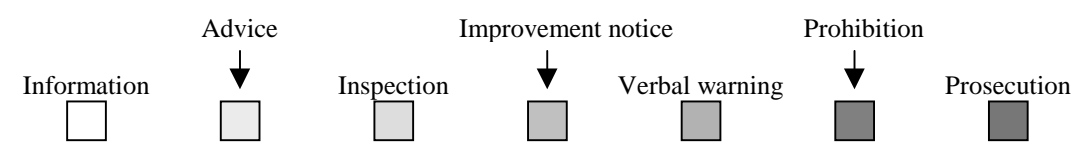
2. The HSE Act is a performance-based framework placing responsibility for managing workplace risks on employers and employees. Amongst other things it creates incentives for managing workplace hazards through its enforcement provisions.
3. Health and Safety Inspectors taking action under the HSE Act currently have the following tools available.
  - Provision of information and advice to assist employers to comply.
  - Verbal warning accompanied where appropriate by information and advice.
  - Issue of an improvement notice, requiring non-compliance with the Act to be corrected within a specified period.
  - Issue of a prohibition notice, requiring the use of plant, a process or a workplace to be suspended until non-compliance with the Act is corrected.
  - Prosecution under the Act.

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<sup>1</sup> It should be noted that Occupational Safety and Health Service (OSH) inspectors are authorised to issue infringement notices under the Hazardous Substances and New Organisms (HSNO) Act 1996.

4. The following diagram illustrates the hierarchy of the existing range of tools.

### Spectrum of tools to encourage compliance with the HSE Act 1992



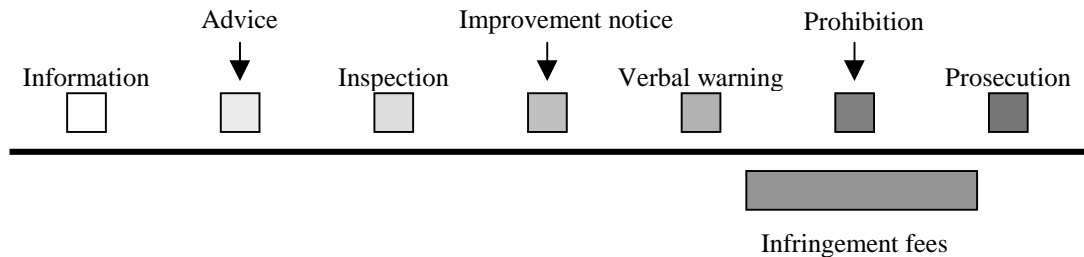
5. While there are costs imposed on employers through the use of improvement and prohibition notices currently the only monetary penalty imposed follows from a successful prosecution. Prosecution is a serious measure reserved for major breaches of the Act that had the potential to cause or actually caused serious harm, or for persistent and/or wilful non-compliance with the Act. The primary aim of prosecution is to encourage compliance by deterring breaches of the law with the threat of prosecution. However, prosecution is seen as a severe means of ensuring compliance. For both parties, prosecution is expensive in staff time and legal costs and is subject to court scheduling delays
6. Both severity and certainty of punishment strongly influence injury rates, although certainty has a perceptibly stronger effect. Compliant behaviour by employers and employees is generally a response to the certainty of being caught.<sup>2</sup> Compliance is more probable when the risk of a workplace being visited by an inspector and a subsequent infringement fee being levied is too high to ignore. For minor offences, however persistent or wilful (for example, repeat minor offences such as missing safety rails on a construction site), prosecution is too severe a penalty and therefore not undertaken.
7. At the current level of staffing and activities a workplace has approximately:
- 1 in 8 possibility of a visit by an HSE inspector during the year.
  - 1 in 25 possibility of receiving an improvement notice.
  - 1 in 333 possibility of receiving a prohibition notice.
  - 1 in 1000 possibility of being prosecuted.
8. In terms of the certainty of receiving a penalty for a breach of the HSE Act the current rate of use and mix of enforcement tools provide weak and uneven incentives. Even if the numbers of HSE inspectors were to increase and more prosecutions were to be pursued an enforcement gap would exist. This is because minor breaches of the HSE Act, that create risk but do not cause actual harm, do not often warrant a prosecution approach. Taking more prosecutions for minor offences could increase certainty but this would be a poor use of resources. Adding infringement fees to the enforcement tools able to be utilised by HSE inspectors would increase the certainty of being penalised for non-compliance

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<sup>2</sup> R. Brown, *Administrative and Criminal Penalties in the Enforcement of Occupational Health and Safety Legislation* (1992) 30 Osgoode Hall Law Journal 693.

with the HSE Act and be a better means of applying penalties to specified minor offences. Infringement fees are therefore advocated.

### Spectrum of tools with infringement fees added



#### *Australian experience with infringement fees*

9. Infringement fees currently operate in four Australian States. The National Occupational Health and Safety Commission commissioned a report<sup>3</sup> at the end of 1997 to:

"... provide a "snapshot" of the experience of using on-the-spot fines [infringement fees] in the context of occupational health and safety (OHS). In particular, the Commission was interested in garnering the views of recipients of such fines, and the subsequent impact of the fines on preventative OHS behaviour."

10. The report identified that different industries had different responses to infringement fees. In general industry's response was that infringement fees were:

- an effective means of preventing injury and occupational disease in the workplace
- an indicator of performance for management
- able to get the "safety message" across
- able to provide a significant financial deterrent in some cases
- able to provide a "ripple effect" by an infringement fee levied on one firm impacting on the activity of another firm through word of mouth

11. The shortcomings of infringement fees were identified as: the preventative effect was likely to be short term in nature, lack of consistency in application on the part of the inspectorate, and the need for infringement fees to be used as part of a range of preventative tools.

12. Large and small businesses also differed in their response to infringement fees. The level of fee did not in itself generate a deterrent for large business but did provide an indication of performance and a blot on their record. This provided motivation for a greater emphasis on injury prevention. The report suggested that

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<sup>3</sup> "Evaluation OHS Enforcement Strategies - Efficacy of On-The-Spot Fines" A National Solutions Project 1997/1998, Professor Neil Gunningham. At the time of this report only two States operated infringement fees, they were NSW and Northern Territories.

for maximum benefit to be levered from an infringement fee it is necessary for senior management to be aware of the infringement.

13. Small business however found the fees to be a financial deterrent, and receiving a fee was a personal stigma. They were likely to take prompt corrective action.
14. The conclusion the report reached was that infringement fees have considerable potential to prevent workplace injury and disease, by improving occupational health and safety attitudes and performance in industry. This conclusion was consistent with the international literature search undertaken as part of the report, which indicated that such penalties provide credible deterrence at a very modest administrative and legal cost.

### **New Zealand Legislation**

15. Comparable infringement fees are found in the Resource Management Act 1991, the Land Transport Act 1993 and the Hazardous Substances and New Organisms Act 1996.

#### *Resource Management Act 1991*

16. Section 338 of the Resource Management Act allows for a range of infringement fees to be levied for offences against the use of natural resources. Infringement fees range from \$300 for failure to provide information to \$1000 for the discharge of contaminants into the environment from industrial or trade premises.

#### *Land Transport Act 1993*

17. Under the Land Transport Act 1993 infringement fees for speeding progressively increase for speeds in excess of 10 km/h over the limit, with a maximum fee of \$630 for speeds up to 50 km/h over the limit. Infringement fees for parking offences have a maximum of \$60 for specific offences and \$57 for exceeding time limits. Other infringement fees such as not wearing a safety belt are set at \$150.

#### *Hazardous Substances and New Organisms Act 1996*

18. Section 97(a) of the HSNO Act provides that the Department of Labour shall ensure that the provisions of this Act are enforced in any place of work. Failure to control a hazardous substance is an offence under section 6 of the HSE Act and section 109(e) – (i) of the HSNO Act. Section 140 (j) of the HSNO Act enables regulations to be made prescribing “infringement fees (not exceeding \$1000) for each infringement offence...”.
19. When the hazardous substance provisions of the HSNO Act are fully implemented, HSE inspectors will be able to issue an “infringement fee” under the HSNO Act where a hazardous substance is not controlled in a place of work.

### **Schedule to the HSE Act or Regulations**

20. The HSE Act will have to be amended to include provision for issuing infringement notices. It is proposed that the general applicability of infringement fees is limited in practice so that they apply to minor offences. A clear definition of these offences and the corresponding fee payable will have to be specified in

either a schedule to the HSE Act [preferred] or in regulations. Regulations will also be required to prescribe the form of the notice.

### **Operation of infringement fees**

21. In determining whether to issue an infringement notice, a decision tree or a point system could be used to assist this decision, similar to that used now to determine whether a prosecution should proceed. A prosecution decision requires the balancing of a broad range of factors, according to how each factor relates to the particular case. The presence or absence of a particular factor does not necessarily mean that a prosecution should or should not proceed. It is all the relevant factors taken together that will determine, on balance, whether it is in the public interest to proceed with a prosecution. In prosecutions, judges prefer an established set of criteria on which to base the penalty. In an operating policy of this type, every time an infringement notice is considered, a combination of facts and circumstances would be considered.

### *Evidence requirements*

22. It is proposed that to issue an infringement notice the inspector:
  - must be present in the workplace and
  - observe that a breach of the legislation has occurred or is still occurring.
23. Inspectors would be required to keep a copy of the evidence collected, in case the offence is denied and there are subsequent court proceedings. It is proposed that, if possible, they photograph the site and record the details of a witness who can confirm the reason for issuing the infringement notice. The person who is alleged to have committed the infringement offence would then be issued an infringement notice (setting out a statement of rights and the appropriate infringement fee) at the work site or advised that the notice will be posted.

### *Process*

24. The infringement notice process would be required to conform to the process set out in the Summary Proceedings Act 1957. This would generally involve:
  - an infringement notice being issued by an HSE inspector;
  - once issued with an infringement notice the person to whom it has been issued can request a Court hearing;
  - if after a set period a hearing had not been requested and the fee had not been paid, a reminder notice would be issued;
  - a further period to request a hearing or to pay the fee would be allowed;
  - if at the end of that period the fee had not been paid nor had a request for a hearing received, the processing agency would file notice in court to have the court treat the fee as an order to pay a fine.
25. Experience in Australia is that that most challenges to infringement notices are rejected. In the majority of cases, the only involvement the inspector will have will be at the time of issuing the infringement notice.

## **Industries and workplaces to which infringement fees would be applicable**

26. Infringement fees have the potential to be applied across all the industries that the HSE Act covers. However, compliance with the HSE Act varies from industry to industry. Contributing reasons for this variance between industries include insufficient knowledge of how to comply, financial constraints and poor attitudes. OSH needs to be aware of industry and individual client circumstances and develop appropriate strategies to improve compliance through the use of an infringement notice regime.

### *Pre-conditions*

27. There are several preconditions that will need to be met if the introduction of infringement fees is to be successful. The most significant of these is the need for appropriate training and upskilling of inspectors; particularly in conflict resolution skills as people can be angered by the receipt of an infringement fee. OSH would need to develop an operating policy with the following features:

- Infringement fees would be applied only for specified minor/non serious offences.
- Infringement fees would need to be applied to all levels in industry - principals, sub contractors, employers and employees.
- Prior to issuing infringement notices, OSH would need to be proactive in informing and educating employers and employees.

28. Regular training, monitoring and evaluation would accompany implementation.

### **Amount of infringement fees**

29. A financial penalty that achieves a balance between an affordable option and financial deterrence is required. It is proposed that the maximum infringement fee be in the order of \$1000 to be comparable with infringement fees set under the RMA and HSNO Acts.

30. Should you agree in principle to an infringement fee regime, it is suggested that further work be undertaken to recommend an appropriate fee table.

### **Financial Implications**

31. Non-compliant workplaces will incur additional costs but may be less likely to bear the costs of a prosecution. By creating a timely and credible deterrent against non-compliance with the HSE Act, infringement fees may reduce the need for prosecution action for more serious incidents.

32. For those issued notices, infringement fees will be a cheaper alternative to the significant costs of litigation. In the administration of the HSE Act time savings made by inspectors in issuing a fee would in many cases make infringement fees preferable to mounting a prosecution.

33. The Department will not be required to establish a system to process fees. Infringement fees can be processed by the New Zealand Police Fines Processing Bureau and other alternatives exist.

34. The major costs to Government would be in:

- design and implementation of a national publicity campaign; and
- training of OSH field staff.

### **Implementing infringement fees**

35. This would require:

- the development of national guidelines and protocols for the consistent application of notices;
- a national education / publicity programme to apprise industry of this addition to the enforcement regime;
- a training programme for OSH field staff; and
- ideally, some form of trialing in a targeted high-risk work environment.

### **Summary**

36. Compliance with legislative duties is known to partly depend on the probability of being penalised and partly on the size of penalties imposed. Both the perceived severity and perceived certainty of punishment influence injury rates, although certainty has a substantially stronger effect than severity. Introducing infringement fees is recommended as a means of increasing the certainty of being penalised for non-compliance with the HSE Act.

37. Infringement fees will require careful administration with implementation through well-developed strategies in well-informed sectors. Used strategically, infringement fees will be a useful tool in increasing the certainty of an enforcement action occurring, particularly in those non-harm cases where there is a clear non-compliance with the HSE Act.

38. It is recommended that fees be imposed on all persons with duties under the HSE Act and that the sum be comparable with fees levied in the RMA and HSNO Act. The maximum fee would therefore be in the order of \$1000.

39. Should you accept these proposals it is suggested that further work be undertaken to recommend an appropriate fee table.

## **Recommendations**

I recommend that you:

- a) **note** that compliance with legislative duties is known to partly depend on the probability of being penalised and the size of penalties imposed.
- b) **note** that infringement fees would enhance the probability of being penalised.
- c) **agree** that infringement fees in the order to those imposed under the RMA and HSNO be imposed on persons with duties where there is clear non-compliance with duties imposed by the Health and Safety in Employment Act 1992.

RJM Hill

For Secretary of Labour