BUSINESS NEW ZEALAND SUBMISSION ON THE MINISTRY OF JUSTICE/LAW COMMISSION DISCUSSION PAPER: Review of the Infringement System – Options for Reform

1. Introduction

1.1 This submission from Business New Zealand is directed specifically to those aspects of the infringement system that impinge on business activities, particularly infringement fees contained in the Health and Safety in Employment Act and proposals for recovering unpaid fees and fines that would place greater responsibilities on employers than already exist. Business New Zealand has chosen to concentrate on these aspects of concern rather than to respond to detailed questions that have no immediate consequences for employers and business generally.

2. Health and Safety in Employment Act

2.1 Business New Zealand notes the footnote reference in paragraph 10 under the heading 'Why is a Review Required?" to the infringement fee provisions of the above Act and the range of fees that can be imposed, including the higher range fees for what the Commission acknowledges is the necessarily subjective assessment of employer hazard management. While the intention driving such provisions can be well understood – safety at work is obviously a desirable aim – it is arguable that the adoption of an educative approach is likely to achieve more than a penalty regime can hope to achieve. This is particularly so given that many hazards will not be readily identifiable – accidents, for example, are often the consequence of behaviour that was entirely unanticipated, of events that, despite the Act's strict liability regime, were simply not foreseeable.

2.2 If the above is true of convictions under the Act per se, it is also the case that infringement fees under the Act place liability on the individual employer for an offence for which, as the later part of the Review document recognises, he or she has not yet been found guilty. Challenging an infringement fee is possible, but is a time-consuming process in which many will be reluctant to engage. Moreover, the stick approach should seldom be the preferred option. Better results are invariably achieved though the giving of appropriate advice and through persuasion.

2.3 However, it is Business New Zealand's view that notwithstanding the growth in number of infringement fees they should not be removed to a separate Act but remain as part of their individual statutes. The amount of legislation affecting employers and business is considerable and it is important that offences for which penalties of this kind are to be imposed should be readily identifiable in the legislation to which they apply.

2.4 What *is* required is better supervision of the overall legislative process. The fact that minor offences for which a court appearance is required under the Summary Proceedings Act may well be penalised far less than many offences attracting an infringement fee, is a confirmation of an ad hoc approach to law making which can only enhance the impression (noted by the Review document) that the infringement fee process is a revenue gathering exercise.

3. Access to information/ warrants to seize

3.1 Business New Zealand is concerned at the proposals for information recovery in Options 9.5 and 9.6 under the heading 'Strengthening existing enforcement options'. The attachment order process already asks employers to devote productive time to policing court imposed fines at the expense of their own businesses. If, as footnote 39 notes, the process is rarely used because of the additional compliance costs involved, there would seem to be little purpose in extending it, since to do so would, as the Review document recognises, simply add to those costs. An extension of the attachment order system should not be contemplated.

3.2 By the same token, employers should not be made responsible for infringement fines when those incurred by employees have reached unaffordable levels. Many employees are required to travel in the course of their employment and it follows that there is unlikely to be any element of supervision involved. It is, therefore, quite untenable to make a third party who has not offended, (the employer) jointly liable for an employee's infringement offences. An employer's vehicle should not be subject to seizure and sale where infringement fines are unpaid, nor should an employer, in such circumstances, essentially be forced to pay the unpaid fine to retain the vehicle (or, as paragraph 223 puts it, to be given 'the opportunity to pay the fines in order to prevent the vehicle's seizure and sale'). Registered vehicle owner liability is already significant. Current provisions should not be further extended to create even greater problems for employers.

3.3 The same applies to the proposal to hold directors or managers of companies personally liable for infringement offences committed by the corporate body. From an enforcer's point of view, imposing liability on directors must seem to offer a simple solution (in the same way as must imposing liability on the employer for the employee's infringement). It is, however, difficult to see how doing so would 'provide a strong incentive for those responsible for the company's operation to ensure that infringement offences are not committed' (paragraph 268). Supervision is an even less tenable possibility than in the employer/manager situation. Given existing director liabilities imposing a further liability such could only have its own unintended deterrent effect.

4. General comments

4.1 The perception that the imposition of infringement fees is merely a revenue gathering exercise is something to which the Review documents makes several references. However, by contrast, it gives as the system's intended purpose deterrence, accountability and education. On this point it is important to remember that infringement fees are imposed for offences created by statute and not for universally recognised crimes such as burglary and theft. "Offences" of this sort do not necessarily have general public acceptance and, consequently, an instant infringement fee may serve no really useful purpose, being instead a cause of resentment and doing little to deter future offending *(*to illustrate this see the extent of infringement recidivism).

4.2 Probably it is resentment such as this that exacerbates infringement fee recovery difficulties and, together with the inability of many offenders to pay, largely accounts for the considerable backlog of unpaid fees. Rather than thinking of new ways to pursue those who have failed to pay, it would be better to consider introducing a warning system along with a discretion to overlook minor infringements, depending on circumstances.

4.3 Were a warning system to be used, Infringement fees would be imposed only after a set number of warnings had been given thus reducing their number but strengthening the case for fee recovery. As it is, the belief that infringement fees are a revenue gathering exercise is undoubtedly reinforced by the inhibiting effect they have on defendants' ability to put their side of the story.

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