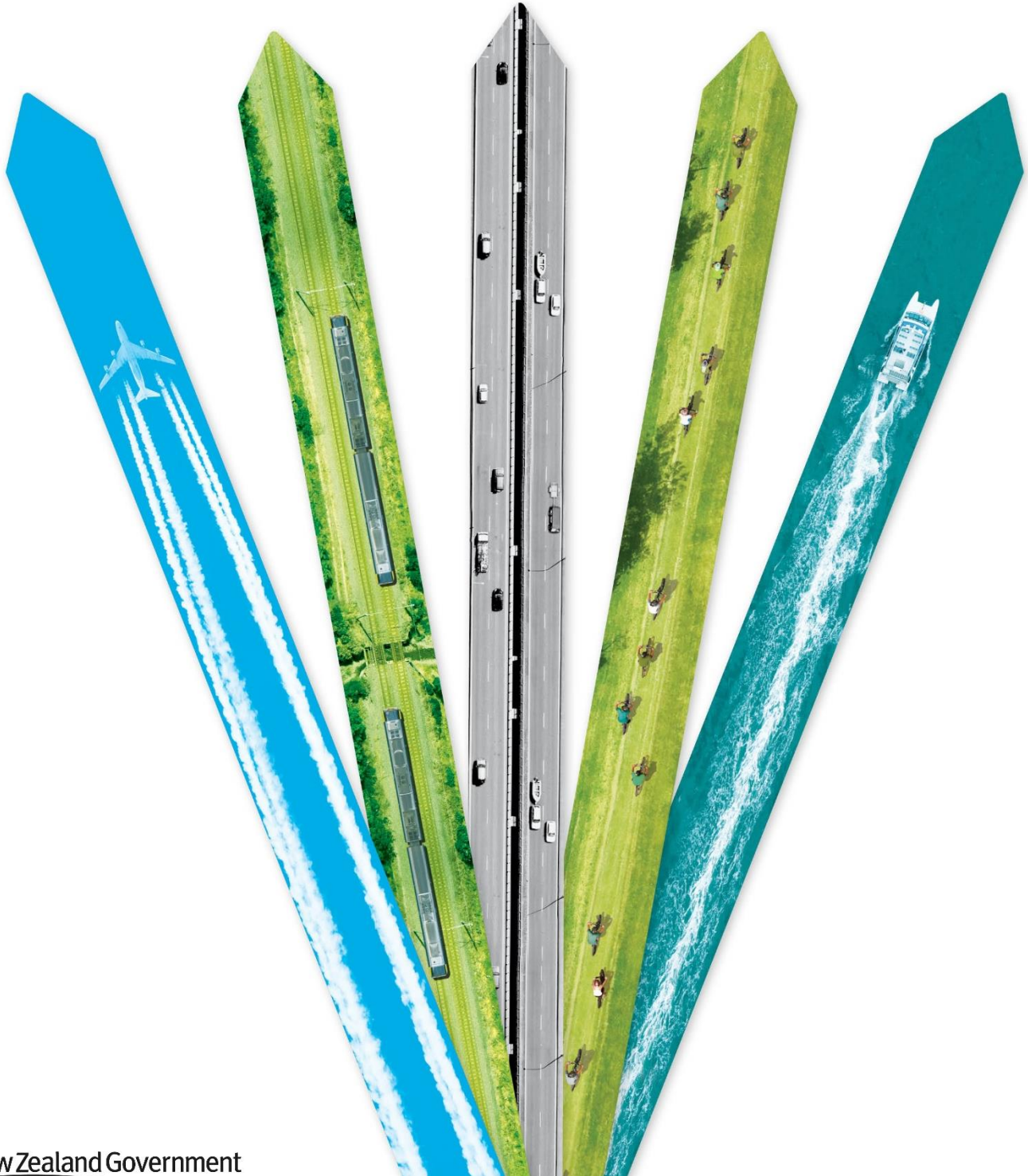


# Effective Transport Financial Penalties Policy Framework

Version 1 – 24 August 2021



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## Purpose of this document

1. The Ministry of Transport (the Ministry), in collaboration with the transport regulatory agencies, is a steward of the transport system. This means we take a whole-of-system and proactive approach to maintain our regulatory framework, including responsibility for ensuring transport legislation is current and works effectively. The work discussed in this document forms part of our ongoing regulatory stewardship programme.
2. We have identified an opportunity to improve the way we develop and maintain transport financial penalties<sup>1,2</sup> to help us ensure they are fit-for-purpose. To achieve this we have developed this Effective Transport-Related Financial Penalties Policy Framework (the Framework), and an Effective Transport Financial Penalties Categorisation Tool, which includes a penalty categorisation and decision-making process, to implement the Framework. We have based the Framework on five key principles to help determine financial penalty levels.
3. By developing and applying a cross-transport mode approach to setting financial penalty levels for infringement fees and fines, over time we expect these to become more coherent and better aligned to risk, as well as more effective and fairer. We expect this approach will also support us to provide more consistent, reliable advice to ministers when reviewing and setting financial penalties in the future.
4. Eventually, as opportunities arise, we intend to apply the Framework across all transport-related financial penalty levels. We note that any change to financial penalties requires amending the relevant Act or regulations following the usual process of public consultation, proposals to government, and, for changes to primary legislation, consideration by Parliament.

### Existing government guidance on offences and penalty levels

5. This Framework is a guidance resource for transport regulatory agencies in setting financial penalty levels. However, it does not override existing government guidance on offences and penalties in general, including the overall design of penalty frameworks. The Legislation Design and Advisory Committee Guidelines<sup>3</sup> are a key source of guidance for all government agencies – see particularly Compliance and Enforcement, chapters 22-27. These guidelines should therefore be followed in policy development and drafting of offences and penalties.
6. The Ministry of Justice (MoJ) also has a key role in assessing offences and penalties and is an important source of advice. The Cabinet Manual (section 7.34) requires that MoJ must also be consulted on all proposals to create new criminal offences or penalties or alter existing ones, to ensure that such provisions are consistent and appropriate. MoJ is available to provide advice throughout any offence and penalty-related policy development stage (contact: [offenceandpenaltyvet@justice.govt.nz](mailto:offenceandpenaltyvet@justice.govt.nz)). This includes advice on setting financial penalty levels, which is the specific focus of this Framework. The MoJ's Policy Framework for New Infringement Schemes<sup>4</sup> is also available for reference.

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<sup>1</sup> The Sentencing Act 2002 refers to financial penalties as 'monetary' penalties.

<sup>2</sup> These are financial penalties that transport legislation empowers either the relevant enforcing officer, for infringement fees, or the court, for fines, to apply to those committing offences.

<sup>3</sup> <http://www.ldac.org.nz/guidelines/legislation-guidelines-2018-edition/>

<sup>4</sup> <https://www.justice.govt.nz/assets/Documents/Publications/infringement-governance-guidelines.pdf>

## Caveat on focus of Framework

This Framework focusses narrowly on an approach to setting financial penalty levels in transport legislation. Demerit points and other types of penalties such as imprisonment, or the loss or suspension of a licence to operate, and any potential alternative resolutions (while important in the broad context of considering penalties) are out of scope of this work. Further, the Framework does not attempt, for example, to cover wider contextual circumstances and issues such as the option for increased penalty levels to respond to committing multiple parallel offences (which might exacerbate harm), addressing penalty levels in relation to reoffending, or options for how offenders might pay any financial penalties (for example, partial payments).

While important to the broad context of financial penalties, these types of issues can be addressed by various means such as the design of offences, the court's discretion in relation to levels of fines and regulatory agencies' enforcement approach and options. The Ministry and transport regulatory agencies have the ability to design what duties, requirements and associated offences and penalties (of which financial penalties are only one option) are included in transport legislation, and propose these to government. The transport regulatory agencies, New Zealand Police (NZ Police), and other enforcement agencies can also decide on and apply their own enforcement policy and practices within the scope of the law.

## The New Zealand transport system and the role of penalties

Our transport system facilitates travel and movement of goods and includes duties and requirements for its safe and effective operation – penalties support these

7. Transport is a critical part of daily life for all New Zealanders. We use transport for access to services, freight, travel to work, education, health, and visiting family and friends. Transport networks allow businesses, regions, and urban areas to be well connected and productive. Transport can be a powerful enabler for new housing opportunities, liveable cities, and sustainable economic development in regional New Zealand.
8. We have a legislative framework designed to facilitate a safe, easily accessible and efficient transport system. This includes requirements to have the appropriate licence, to have a safe vessel, vehicle or aircraft, and to follow duties and requirements about how we should behave. By not following the system's requirements, an individual or business can increase the risk of harm to other users and the wider community. Transport offences and penalties aim to discourage this negative behaviour in the transport system, address its associated risks and respond to any harm it may cause.

### The transport legislative framework in action

9. The transport system includes three main modes of transport: land, aviation and maritime. Each mode is governed by a series of Acts, rules, regulations and bylaws (the legislative framework). The legislative framework sets out the responsibilities, rights, and powers of the regulators, enforcement agencies, and other organisations or people that operate in and use the transport system. Appendix 1 lists key transport legislation.
10. Each of the transport modes has a Crown entity that acts as the main regulator for that mode:
  - Land – Waka Kotahi NZ Transport Agency (Waka Kotahi).

- Maritime – Maritime New Zealand (Maritime NZ).
- Aviation – the Civil Aviation Authority (CAA).

11. Other agencies also enforce the legislation and/or support these government regulators. These include the NZ Police, WorkSafe New Zealand, MoJ, territorial and regional authorities (councils) and the Transport Accident Investigation Commission (TAIC). These agencies and the Ministry work together to maintain the transport system, also in collaboration with industry stakeholders and delegated agents.

### The role of compliance in the system

12. Various powers and strategies are available to regulators and enforcers to influence transport system participants to comply with requirements, as part of a risk-based, responsive and flexible regulatory system. These powers and strategies can be seen as existing on a continuum from broadest reaching in application and least severe in impact on people, to most targeted and severe.

13. Transport regulators (and NZ Police as the land transport enforcement agency) use approaches and tools ranging from:

- educational campaigns and warnings to encourage positive behaviour
- infringement fees, demerit points, and powers to suspend and revoke licences for minor to moderate transgressions
- prosecutions (that can result in court imposed fines and/or imprisonment) for more serious offences.

14. This Framework focuses narrowly on an approach for setting financial penalty levels for offences in legislation, which sit around the mid and upper parts on the compliance continuum as regards targeting and impact. However, financial penalties are just one type of compliance tool available as part of a balanced regulatory approach. Consequently, financial penalties need to be considered in the context of the broader approach and what is appropriate for the particular outcomes sought.

15. To support compliance, an effective transport system also needs the support of a legislative framework under which:

- duties and requirements are practical and logical
- people know what these are
- appropriate penalties are issued if these are broken
- penalties are appropriate and proportionate the system has flexibility to respond to events in different contexts.

16. For society to view the transport legislative framework as legitimate, duties and requirements need to be practical and logical, so people understand why they are in place and are more likely to follow them. People must also know what these are and be able to find them readily. Further, it should be straightforward for a user to determine the consequences of not following duties and requirements.

17. Duties and requirements should be developed so they are fit-for-purpose and can be applied as evenly and consistently as possible in comparable situations, to support fairness. Further, people and businesses that are following these also want to know that others are doing the same. Society

expects that enforcement agencies will hold those who break legitimately set duties and requirements to account. Aspects of a 'fair' financial penalty include considering:

- the severity of the offence
- the circumstances of the offending and the broad type of offender (for example 'regular' individual or corporate entity)
- how the proposed penalty aligns with those for other comparable offences.

18. Penalties should be proportionate to the nature and potential consequences of an offence and applied logically. If a penalty is too lenient in relation to the harm risked to arise from an offence, it will not be seen as providing justice. Conversely, a penalty that is too harsh or applied arbitrarily can undermine confidence in the system and have unintended negative consequences. Certainty and swiftness of penalties are also important factors in their effectiveness and may influence the type of penalty chosen.

19. The circumstances under which an offence is committed and the type of offender or entity committing the offence also vary widely. The legislative framework therefore needs to contain sufficient flexibility to respond to ensure the penalty is effective and appropriate.

## Financial penalties: infringement fees, fines and pecuniary penalties

Fees, fines and pecuniary penalties are the three forms of financial penalty available to regulators

20. Financial penalties are a useful tool to motivate compliance and support enforcement, in their own right or as an alternative to, or in conjunction with, other penalties.

21. The two forms of financial penalty in our system most relevant to this Framework are infringement fees (fees) and maximum fines before a court (fines).

### Infringement Fees

22. The purpose of infringement offences and associated infringement fees is to address minor breaches of the law, in cases where it is more efficient and effective to impose an immediate sanction. Consequently, infringement fees are at the lower end of the financial penalty scale. When an individual is issued an infringement notice (such as a speeding ticket), the associated monetary penalty recorded is called an infringement fee or fee.

23. Infringement offences should apply only to strict or absolute liability offences, where culpability is easily proven (for example, speed camera photo evidence of speeding infringements). Strict liability offences are those where the prosecution must only prove that the offender committed the act of the offence (physical element/*actus reus*). Whether the offender intended to offend or was negligent (mental element/*mens rea*), is not relevant to the offender being liable.

24. For strict liability offences, where the offender wishes to challenge their culpability, the burden of proof is on the offender to prove that they did not commit the offence or, for some reason, were not at fault – this is the offenders' defence. For absolute liability offences, the option of proving a defence or absence of fault is not open to the defendant. Consequently, offences resulting in infringement fees are suited to less serious offences, due to the lowered burden of proof.

25. Examples of offences which may be penalised by fees (together with other penalties) are:
- speeding in, illegally parking, or not registering a car
  - a light rail vehicle driver not taking due care to enable drivers of other vehicles to move safely from the path of the light rail vehicle
  - using a recreational boat without life jackets for everyone on board
  - an aircraft operator not keeping accurate daily flight records.
26. In certain situations, fees can also become fines (outlined further below). Firstly, if an individual does not pay a fee by the due date (for example, they simply ignore any notices), the fee may be referred to the court for enforcement as if it were a fine. In this case, the court is deemed to have made an order that the individual pay a fine equal to the amount of the infringement fee, together with costs (see section 21(3), (5) of the Summary Proceedings Act 1957).
27. Secondly, fees can become fines if a regulatory authority decides to prosecute, and as a result a fine-level penalty may be imposed for the offence (for example, for serious offending). Alternatively, an individual may request a hearing regarding an infringement notice (for example, because they dispute the offence or want to admit the offence and make submissions as to penalty). In these cases the infringement fee no longer applies and the court can impose a fine not exceeding the maximum set for the offence in question (see section 21(7) – (9) Summary Proceedings Act 1957).
28. Consequently, where fees are provided for as financial penalties for offences in legislation, they must also be accompanied by associated fines in case the offence is dealt with in court. MoJ guidance on infringement schemes indicates that fees should generally be considerably less than the maximum fine available to the court following a successful prosecution. This difference aligns with various aspects of the nature of infringement schemes including:
- an infringement scheme provides an administratively efficient method of encouraging compliance with the law by imposing a set financial penalty for relatively minor breaches
  - an infringement offence notice is a proportionate response to offending, which avoids the formality of court proceedings and does not impose a full criminal penalty
  - the justice system needs not devote judicial and court resources to determining whether each offence has occurred.
29. This Framework provides for a ratio of 1:5 between fee and associated fine financial penalty levels. This ratio fits the nature of the transport legislation penalty framework, with its high number of fees (particularly in relation to traffic offences) and this Framework, with its' comparatively higher fees and associated fines relating to penalties targeted at special regulated individuals and businesses or undertakings.
30. In this context, the ratio also accounts for the courts' usual discounting process when applying fines for first offenders. The Ministry's experience is that the courts will usually take around 25 percent of the maximum fine as a starting point. Assuming that there are no particular mitigating or aggravating factors, there is likely to be a further 20 percent discount for a plea of guilty at the earliest opportunity.
31. Accounting for the nature of the transport penalty framework, this Framework, and court process therefore, the 1:5 fee/fine ratio generally meets the objectives that:
- an individual is not perversely incentivised to challenge infringements if the levels are too low;

but also

- there is not a 'chilling' effect on the defendant if the fine is too high, which may stop them challenging the infringement if they have good grounds to do so.

32. Infringement schemes involve both benefits and trade-offs for the prosecuting agency, the defendant and the justice system:

- The prosecuting agency benefits from not having the cost of bringing court proceedings or of proving the elements of the offence.
- Penalty levels imposed are, however, reduced and, through being unable to obtain a criminal conviction, the potential deterrent effect and other possible impacts such as moral condemnation are lowered.
- Due to no criminal conviction, there is no criminal history relating to the offence – this poses challenges regarding future offending where agencies may wish to consider a person's criminal history to apply the 'public interest' test for prosecution, and for the court to take into account for sentencing.
- The defendant benefits from:
  - a discounted penalty (as a 'rule of thumb' slightly less than a first offender pleading guilty at the first opportunity would, in practice, be fined by the court)
  - no possibility of conviction
  - the time and cost involved in a court hearing being avoided,<sup>5</sup> despite the downgrading of a legal right.

33. While offences which include fee-based penalties which go to court still cannot incur convictions (see section 375 of the Criminal Procedure Act 2011); the individual does become subject to the same court action that can be taken to recover unpaid fines including:

- taking money from a bank account
- clamping a car
- stopping the offender travelling overseas
- suspending a driver's licence.

## Fines

34. Fines are used to address more serious offences, have higher maximum financial penalties than fee-based offences, and (except where the offence can also be dealt with as an infringement offence) are imposed following a conviction. There are three situations under which fines may be imposed:

- where an infringement offence is dealt with by a court (as described above)
- non-infringement offences where a fine is the only penalty available
- non-infringement offences where a fine is imposed instead of, or together with, another penalty such as an imprisonment.

35. Examples of offences where the court may sentence the person to pay a fine (and for some, other penalties such as imprisonment) are:

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<sup>5</sup> This benefit comes at the cost of needing to disprove culpability if challenging an infringement fee.



- dangerous driving causing death or injury while under the influence of alcohol or other drugs
- engaging in dangerous activity involving an aircraft or ship or failing to comply with rail safety duties
- obstructing a dangerous goods enforcement officer
- carrying out rail activities without a required licence.

## **Pecuniary penalties**

36. Pecuniary penalties are non-criminal monetary penalties (civil remedies) imposed by a court. They are far less common than fees and fines in transport legislation, but can result in significant financial impacts on offenders. Two similar examples in transport legislation are section 47 of the Civil Aviation Act 1990 (CA Act) and section 409 of the Maritime Transport Act 1994 (MTA). These both provide that an additional penalty can be imposed by the court, linked to the amount of commercial gain received on being convicted of committing certain other offences in the Acts. So, these pecuniary penalties are also linked to criminal sanctions including fines.
37. However, issues around setting pecuniary penalties are outside this Framework's scope. Due to their more technical nature, if pecuniary penalties are being considered for review or development, we recommend that MoJ be consulted. The Law Commission has also produced a report, Pecuniary Penalties: Guidance for Legislative Design<sup>6</sup> (2014) providing guidance.

## **Fees and fines have sometimes developed arbitrarily – they are not always consistent or relative to actual levels of risk and harm**

38. The exact number of financial penalties in transport legislation is difficult to quantify, but we estimate that there are about 6,000 offences in transport legislation (Acts and regulations), excluding local bylaws.
39. In the past, we have tended to make decisions about penalty levels for individual offences in a particular transport mode, or suites of these enforcing a particular transport rule. This has occurred without considering wider comparable offences and penalties within the modal legislation being considered, across transport legislation, or in other comparable legislation. The resulting penalty levels may then be inconsistent with fees and fines across the whole transport system or related wider legislative frameworks, especially as these individual decisions accumulate.
40. We also need to regularly review penalties so they keep in line with inflation, penalties for other comparable offences, and changes in society's expectations of behaviour or understanding of the effect of penalties over time. It is also important that a financial penalty is a meaningful deterrent that holds an offender to account and sends a proportionate message of denunciation for the behaviour.<sup>7</sup>
41. The government recognises the need to review legislation to ensure it is up-to-date and fit for purpose. The 2017 Government Expectations for Good Regulatory Practice<sup>8</sup> set regulatory stewardship expectations for departments with responsibility for developing and administering regulation including:

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<sup>6</sup> Pecuniary Penalties: Guidance for Legislative Design (2014) <http://r133.publications.lawcom.govt.nz/>.

<sup>7</sup> See section 7, Sentencing Act 2002

<sup>8</sup> <https://www.treasury.govt.nz/sites/default/files/2015-09/good-reg-practice.pdf>

- monitoring, review and reporting on regulatory systems
  - robust analysis and implementation support for changes to regulatory systems
  - good regulatory practice.
42. Some of the penalties in the transport system, particularly for more serious offences, were set as long ago as 1990 and have not have been reviewed since. Consequently, the maximum penalties in the transport system are out of touch with comparable modern legislation.
43. The maximum financial penalty across the three transport modes is \$500,000<sup>9</sup> and some very serious offences only have a maximum penalty of \$20,000<sup>10</sup>. This problem is exacerbated by the effects of inflation on the original deterrent value of outdated maximum penalties. In comparison, the maximum financial penalty under the Health and Safety at Work Act 2015 (HSWA) is \$3,000,000.
44. The MTA contains penalties for hazardous substance-related marine protection offences including fines of up to \$200,000 for a single offence. That MTA penalty was set for consistency with the penalty for the corresponding offence under the Resource Management Act 1991 (RMA). However, since then the RMA maximum penalty has been raised to \$600,000. Therefore, even the highest maximum penalty in a transport Act is significantly out of step with the corresponding RMA provision.
45. Despite the above, it is also necessary to bear in mind that different legislative regimes function differently and their offences and penalties target particular behaviour in a particular context. Consequently, caution needs to be exercised in making comparisons between penalties in different regimes.
46. While this Framework only concerns setting appropriate financial penalty levels, we must also be mindful of the wider context of the regulatory stewardship approach in which this needs to occur. We need to continuously improve the entire compliance and enforcement framework underlying regulatory systems to ensure that:
- risk is appropriately managed
  - the balance of incentives on regulated parties is correct
  - regulators have flexibility to respond to breaches of legislation in a variety of ways
  - new types of regulatory intervention are incorporated when appropriate.
47. Offences and penalties need to be viewed in this holistic context. This is not only to ensure penalties are up-to-date, appropriate and comparable across legislation, but also to avoid placing undue weight on offences and penalties as a dominant means of achieving compliance outcomes.

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<sup>9</sup> Further, this \$500,000 penalty relates to just two offences (s61, s61) in the Railways Act. The highest financial penalty, excluding pecuniary penalties, in maritime and civil aviation legislation is \$200,000.

<sup>10</sup> For example, under the MTA a body corporate that applies for or obtains a maritime document while disqualified only faces a maximum \$20,000 fine. This means, for example, that a company with significant financial resources that has already offended, would face a low penalty for attempting to fraudulently re-establish its' business.

## Issues with the current transport fee and fine framework

48. Some of the issues with the current transport fee and fine framework include:

- *Inappropriate penalty levels regarding offences' severity:* Financial penalties are not always set at levels that acts as an effective deterrent, denunciation and response, regarding the level of risk and potential harm to people, the environment or property. For example, there is a \$150 infringement fee for impeding progress of a light rail vehicle, including by turning across a track or safety zone – a low penalty for action that could lead to serious injury to multiple people. The maximum financial penalty for an aviation document<sup>11</sup> holder (for example, an aircraft pilot) for causing unnecessary danger to any other person or property (section 43 CA Act) is \$10,000 for an individual (although a maximum 12 month prison term is also available) and \$100,000 for a body corporate.
  - These amounts appear low for conduct that might result in the loss of multiple lives. This is especially the case, for example, when after the Framework's harm assessment, the penalty is applied to a body corporate, which may be a large commercial enterprise with significant financial resources. This can lead to offenders factoring in the penalty as a cost of doing business.
  - A particular issue is that there are also examples of infringement fees existing for serious offences. This is a concern as section 375 of the Criminal Procedure Act 2011 states that a conviction cannot be recorded for an offence including an infringement fee. The principle behind this is that an infringement offence, normally applied to less serious offences, should not result in a conviction, which may have disproportionate consequences for the offender.
  - However, there are instances in transport where offences appear unsuitable for infringement fees. For example, the Civil Aviation (Offences) Regulations set the fines for not complying with aviation rule requirements for coding and notifying details of emergency beacons at the maximum possible under the regulations (\$50,000 for a corporate or \$10,000 for an individual). This suggests a very serious offence. However, the regulations also specify an infringement offence for the same rule breach. This means that even if the fine option is chosen (and the individual appears before a court), a conviction cannot be recorded.
- *Inconsistency across transport legislation:* Financial penalties are not always consistent across the different transport modes in relation to the severity of harm that may be expected to arise. For example, there is a \$150 fee for running a red light on a road but a \$500 fee for flying a drone over private property without permission. Running a red light could easily result in serious injury or even death. However, this serious physical harm to people is arguably much less likely in the drone-related offence, where harm from breaching people's privacy is more likely. There are also maximum \$100,000 fines in the MTA (s65) and CA Act (s44) for offences that involve a body corporate causing unnecessary danger, but a much higher \$500,000 fine in the Railways Act (s61) for a body corporate for the comparable offence of failing to comply with safety duties.
- *Inconsistency with comparable legislation:* There are large differences between transport fine levels and those in HSWA, for similarly serious offending. In contrast to the above MTA, CA Act and Railways Act offences, section 48 of HSWA prescribes an offence for a person who fails to comply with a duty that exposes an individual to risk of death, serious injury or serious

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<sup>11</sup> 'Aviation document' means any licence, permit, certificate, or other document issued under the CA Act to or in respect of any person, aircraft, aerodrome, aeronautical procedure, aeronautical product, or aviation related service. These documents effectively permit participants to operate in the civil aviation system.

illness. This HSWA offence has a maximum penalty of \$1,500,000 for a body corporate. These differences are striking particularly because the CAA and Maritime NZ, as designated HSWA agencies, can elect to prosecute under either the transport or HSWA regimes for the same event.

- *Lack of differentiation for offender types:* Some financial penalties have not taken into consideration the appropriateness of penalty levels for ‘individuals’ versus ‘businesses or undertakings’.<sup>12</sup> Businesses or undertakings, which include commercial or corporate entities, are subject to higher public expectations, have more extensive responsibilities (for example to their staff, customers and the public) and may have significant financial resources. For example, there is a \$600 fee for an unsecured item on a vehicle, whether it is merely a car with trailer or a large commercial truck transporting goods. A higher penalty would likely be necessary to deter a large commercial operator from merely factoring the cost of penalties into its business model. There is consequently often a sound policy basis for having separate offences with higher penalties for businesses.
  - Financial penalties also do not currently recognise a group we have identified as ‘special regulated individuals’, whose obligations fall somewhere in between ‘regular’ individuals and businesses or undertakings. Such individuals may include, for example, a taxi driver, pilot, ship’s master or freight driver. We outline the concept of special regulated individuals further on pages 19-20.
  - There are higher penalties for entities defined as ‘body corporates’ for some offences in transport legislation. However, we consider the term ‘businesses or undertakings’ is more appropriate as it can include commercial or corporate entities and not-for-profit ‘undertakings’ like local government bodies. The new concept of using the term ‘businesses or undertakings’ is outlined in more detail on pages 20-22.
- *Ratios between fees and fines:* The ratios between progression from fees to fines is not always consistent. For example, if an individual does not display a current Transport Service Licence card (land)<sup>13</sup>, the fine is five times the level of the fee. However, for not producing a document of compliance (maritime), the fine is 2.5 times the level of the fee. This difference does not appear justified given the similarity of transgression in these offences, and that they both involve not displaying necessary documentation on vehicles or craft. Irrespective of this, there seems no logical reason that fee to fine ratios should differ between any offences.

## Responding to identified issues with a principles-based framework

### Using a framework to review our current fees and fines and ensure a consistent approach for the future

49. In response to the issues discussed above, we have developed a systematic, principles-based framework to use as a guide to set financial penalty levels in both primary and secondary transport legislation.

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<sup>12</sup> The term used here as ‘businesses or undertakings’ is adapted to an extent from HSWA, but does not match HSWA’s ‘Person Conducting a Business or Undertaking’. In the Frameworks’ context the term includes a broader range of entities including bodies corporate. Undertakings refers to non-commercial organisations such as councils or charities.

<sup>13</sup> Drivers and operators of freight, vehicle recovery and passenger transport services industries are required to comply with a range of rules and regulations. In most cases this includes holding an appropriate Transport Service Licence.

50. We expect that establishing a principles-based financial penalties framework will:
- reduce inconsistencies across transport legislation over time
  - contribute to fairer and more effective penalties
  - improve administrative efficiency through a more logical framework to enable review
  - reduce the consequences of ad hoc decision making in the future.
51. Having more consistent fees and fines across the transport modes, in relation to expected harm from offences, is a key objective of the Framework. However, we recognise that the regulatory contexts across the modes, including types of participants, risk levels and their management, social acceptance of risk and enforcement approaches, differ.
52. The Framework recognises this in that these different contexts can be accounted for when proposing appropriate financial penalty levels, due to differing modal context. Similar actions in different transport modes will not necessarily lead to similar penalty levels. However, to support consistency, actions expected to result in similar levels of harm, irrespective of transport mode, should have similar penalty levels.
53. The Sentencing Act 2002 lists several purposes and principles of sentencing that are also relevant to developing or reviewing financial penalties. These include, among others:

### **Purposes**

- Holding an offender accountable for harm.
- Promoting responsibility in the offender.
- Denouncing unacceptable conduct.
- Deterring offenders and others from committing similar offences.
- Protecting the community from the offender.

### **Principles**

- The gravity of the offending and culpability.
  - The seriousness of the offence in comparison to other types of offences.
54. The Framework principles listed below acknowledge the purposes and principles that the court will take into account, together with additional factors that we consider make for fair and effective financial penalties. The following narrative details each principle in turn. These principles can be used to consider future financial penalty levels in the transport system, or review current penalties.

**Four principles to consider in reviewing or establishing financial penalty levels:**

1. Respond to offences' severity.
2. Act as a deterrent.
3. Be proportionate.
4. Consider the responsibilities and financial capacity of the individual or entity.

## Principle 1: Respond to the offence's severity

55. When considering the severity of an offence, it helps to consider the type or types of harm, likelihood that harm will occur if the offence occurs, and how severe the negative consequence is or may be should the harm occur.
56. This Framework breaks harm down into three types: system; safety; environmental and property. Note that any of these harms may occur from the same behaviour.

### System harm

57. System harm relates to harm from breaching transport system requirements in and of themselves. This involves effectively committing an offence by breaking any duty or requirement in transport legislation. These system requirements comprise the duties and requirements considered necessary for a safe, secure, effective and efficient transport system. These include such duties and requirements as needing to show driving competence by passing a driving test and obtaining a drivers licence to drive on a road. Not having required transport documents across transport legislation would be common system harms.
58. System harm itself is not tangibly, directly, or immediately harmful to people, property or the environment. However, it breaches system requirements put in place to safeguard these things. Not meeting these requirements can undermine the system and lead to negative outcomes, including the safety and environmental and property harms outlined further below.
59. For example, it is an offence and minor system harm, while not in itself dangerous or risky, if a driver forgets to take their driver licence with them and cannot produce it when asked by a police officer. Greater system harms are driving without holding a driver licence at all, or driving while disqualified, as these offences are more strongly linked to negative outcomes. Failing to keep accurate maintenance records, particularly for rail vehicles, ships and aircraft, for example, could be seen as a relatively serious system harm, due to the potential for serious consequences from the failure of components.
60. Ongoing or widespread disregard for the requirements in the system can be very serious, even when the breach of a requirement occurs without incident. This is because the offender is technically showing a lack of regard for the system requirements and the consequences of not following them, which are in place to guard against harm occurring. We do acknowledge that offenders will not always consciously disregard system requirements in offending. Other variables can also influence behaviour, such as socio-economic circumstances (for example in not maintaining an up-to-date warrant of fitness), or not being fully aware of the risk which may result from a particular system offence.
61. There are significant potential harms inherent in breaches of system requirements, particularly, for example, in the aviation, rail and maritime transport systems. Requirements impose accountability, competency and probity obligations on certain participants, such as ship, train and aircraft operators, pilots and ships' masters, designed to protect life, property and public welfare.
62. Such requirements might include the need to ensure that proper maintenance records are kept, safe operational procedures are documented, accidents and incidents are reported, or that individuals are medically fit to operate craft. Breaches in these areas compromise the system's capacity to detect and respond to risks that if undetected can lead to catastrophic consequences.
63. Breaching system requirements could also result in significant economic loss to parties through 'downstream' negative consequences. Further, it could cause reduced integrity of the transport system, reducing the public confidence that it is safe and effective. The Framework holds that all

offences involve some level of system harm because in offending, an individual or entity is breaking a transport system requirement.

### **Safety harm**

64. Safety harm refers to behavioural actions that constitute a risk of, or actual, tangible harm to people. This involves situations where it is evident that the behaviour is inherently dangerous. The degree of risk and the likelihood of actual harm vary according to the behaviour in question. Failing to indicate when turning, for example, generally carries less inherent risk than not stopping for a red light, operating a vehicle in a dangerous or reckless manner, or driving under the influence of alcohol or other drugs. However, all these actions reflect safety harm.
65. There is increased safety risk where an individual in charge of an aircraft, rail vehicle or ship carrying passengers, for example, does not meet the standard of conduct expected of someone in their position. This is because this situation may put hundreds of lives at risk of death or injury. Safety is a priority for the transport system, as unsafe behaviours can harm the individual themselves, workers, passengers and the public.

### **Environmental and property harm**

66. Environmental and property harm is a similar concept to safety harm, but refers to behavioural actions that constitute a risk of, or actual, tangible harm to the environment, property or infrastructure. For example, in transport legislation rules contain provisions designed to protect the environment from pollution from discharge of hazardous substances, exhaust emissions, rubbish and oil.<sup>14</sup>
67. There are also offences in transport regulations about the improper use of, harm or damage to public and private property such as parking offences, offences relating to toll payment, or destruction of property. Further, where there is safety harm to people there will also normally be a component of environmental and/or property harm, even if minor, given safety harm will often involve at least damage to a vehicle or craft.

### **Overall harm**

68. When considering financial penalty levels, policy and regulatory agencies need to consider all three types of harm to respond to the severity of the offence appropriately. In the case of shipping, for example, environmental and property harm can often be a direct consequence of conduct that constitutes a safety harm, such as operating a vessel dangerously. The more severe the potential harm or likelihood that harm will occur if an offence occurs, the higher the penalty level should be.
69. System, safety, and environmental and property harms can occur in the same offence. For example, where the master of a ship carrying oil operates the ship in a dangerous manner, and runs aground causing the oil to spill into the sea. There is a safety hazard as this action endangers the ships' crew. The oil is also toxic to the marine environment, thereby causing environmental harm and a risk to human and animal health. Finally, as does all offending, this conduct breaks a system requirement designed to keep the transport system safe and therefore involves system harm.

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<sup>14</sup> This document is only concerned with environmental matters covered under transport legislation. For more information about other requirements relating to pollution and water or air quality see Ministry for the Environment <https://www.mfe.govt.nz/>.

70. When determining how serious an offence is, the overall seriousness is a product of all of the types of harm involved and their individual levels of severity. Offences that are more serious often include a significant system harm (for example lack of a relevant licence), alongside a heightened or realised risk of harm to people, property or the environment.

### **Risk or actual harm**

71. Transport offences can also be categorised based on behaviour that has:

- a known risk of safety or environmental and property harm (for example, not properly maintaining a vehicle, vessel or aircraft ); or
- actually caused safety or environmental and property harm (for example, dangerous driving causing death, oil pollution damage).

72. Many offences targeting risky behaviour aim to reduce the chance of these risks or harms materialising. Preventing harm is better than reacting to a situation where loss of life, injury, damage or pollution has already occurred. A high likelihood of harm from an offence should have a higher penalty level to influence people's behaviour, encourage compliance, and reduce the level of risk of something undesirable happening.

73. This reflects that the difference between dangerous behaviour, and dangerous behaviour *causing harm*, depends on chance and circumstance, rather than any difference in the nature or culpability of the offending conduct. However, we acknowledge that financial penalty levels are merely one factor able to reduce offending risk, others including such things as awareness, education, and withdrawal of privileges to operate in the transport system. These factors can operate together to reduce risk.

74. There are many types of inherently risky behaviour, which in certain circumstances could lead to serious consequences. For example, consider a pilot operating a commercial aircraft, or a passenger train driver, while under the influence of alcohol or other drugs. Depending on the level of impairment, the increase in risk may range from minor to very large, but the potential consequences if the risk is realised are catastrophic and could include the loss of multiple lives.

#### ***Interaction with Crimes Act 1961:***

Our transport legislation includes a graduated series of offences. These range from infringement offences to more serious offences, where a finding or an admission of guilt will result in a conviction and penalties including substantial fines and even imprisonment. These more serious offences usually relate to inherently risky, careless, intentional or more dangerous behaviour, but are specific to the transport mode (land, air or sea) being regulated.

Offences in the Crimes Act may also be available where behaviour is sufficiently serious to merit the higher penalties in that more general legislation. For example, the offence of 'Endangering transport' under section 270 of the Crimes Act carries a maximum penalty of 14 years imprisonment. This is far greater than the maximum 12 months imprisonment for offences such as 'Endangerment caused by holder of aviation document' (section 43 CA Act 1990) and 'Dangerous activity involving ships or maritime products' (section 65 MTA). However, these offences do also carry financial penalties.



## Principle 2: Act as a deterrent to undesirable behaviour

75. Aiming to deter offending is an important purpose of financial penalties.<sup>15</sup> However, caution is required as evidence of the deterrent effect of penalties is inconsistent. There is no linear relationship between the penalty amount and the level of deterrence, which will be different for different people or entities, in different circumstances.

76. Deterrence will depend on factors such as:

- whether the individual is aware of the penalty level
- their financial circumstances
- their willingness and ability to comply (which may be due to not understanding the risk or their obligations)
- their level of comfort with carrying out the risky behaviour
- whether they deem the benefits of offending to outweigh the costs
- their perception of the potential consequences.

77. The deterrent effect of financial penalties works best when people are aware the penalties exist and the threat of detection is sufficient. The certainty and swiftness of application of the penalty are also important deterrent factors, which is an advantage of fee-based penalties.

78. Accessibility and clarity of the law regarding offences also appears to play an important role in reducing offending. Offences are often committed by those with little understanding of the law and did not realise that their acts or omissions were offences with associated penalties. Research suggests that knowledge of the existence of an offence can therefore deter offending.

79. While acknowledging the above factors, financial penalty levels are important deterrence tools in the transport sector. This is particularly regarding addressing behaviour associated with financial loss or gain for a commercial operator, or at an individual level. Setting an appropriate level expected to deter commercially-based negative behaviour is illustrated by the following example.

### **Poor Knights and Three Kings islands – deterring negative commercial activity**

In 2005 the Ministry needed to address a problem with ships regularly routing near the Poor Knights and Three Kings islands – an environmentally sensitive area. This activity breached new requirements in Marine Protection Rule Part 190, Mandatory Ships Routeing, which gave effect to “areas to be avoided” by certain ships in this area. At the time there were no offences and penalties associated with these breaches, arguably signalling that these breaches were not important.

In considering an infringement fee level for breaching Rule part 190, the Ministry determined that a fee below \$2000 would not provide a realistic deterrent regarding the potential financial benefit to be gained from the breaches. This was given that savings regarding time, fuel and ship hire (charter rate), from the breaches were calculated to be around \$2000. Current penalties for these breaches consist of infringement fees of \$2000 for individuals and \$12,000 for persons other than individuals (for example, body corporates), and fines of \$5000 for individuals and \$30,000 for persons other than individuals.

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<sup>15</sup> Section 7(f) of the Sentencing Act 2002 states that one of the purposes of penalties is “to deter the offender or other persons from committing the same or a similar offence.”

80. An example of a situation where the deterrent effect has seemed limited due to penalty levels is parking infringements in urban areas. In 2019, infringements for overstaying in a public parking space started at \$12. This did not offer significant deterrence when compared with parking rates in Auckland and Wellington particularly. A 2019 survey found city parking rates were commonly between \$4 and \$8 and up to \$15 per hour.<sup>16</sup> So, in some circumstances some people may have thought it was worth risking the chance of getting a parking ticket.
81. Levels of financial penalties also provide a societal 'signal' of how seriously an offence is considered. This potentially supports society's level of condemnation of the behaviour and may influence behaviour over time.
82. Aside from penalty levels, there are several other factors that may contribute to the deterrent effect of fines in particular. These include the negative reputational effect of having a court appearance and conviction in relation to an offence, inconvenience of the process, and potential effects on employment and travel.
83. Regarding offending by businesses involved in commercial transport activity, it is important that maximum penalty levels available for the most serious offending are high enough for courts to impose appropriate penalties. These are penalties that fully reflect the level of harm and culpability associated with the offence. For very large businesses, this also means penalties that serve as a genuine deterrent rather than just a cost of doing business.
84. A financial penalty, in the form of a fee or fine, may also be imposed alongside another type of penalty, such as licence/document removal by the regulator, demerit points or, for an individual, imprisonment. Depending on the circumstances of an individual's offending, a non-financial penalty may be a greater deterrent to future negative behaviour, or the combined effect of financial and non-financial penalties used together may be most effective.

### Principle 3: Be proportionate

85. The financial penalty assigned needs to be proportionate to the level of harm it is addressing. Further, offences should be consistently proportionate to other offences linked to similar levels of harm across the transport system and in wider legislation. Offences with a similar harm severity level and likelihood of harm if the offence occurred, should have similar penalties. Being proportionate and consistent across regulatory frameworks are key aspects of fair, effective, penalty regimes.
86. This is true within and across the transport modes, and more widely across comparable government compliance situations, such as health and safety requirements at work. For example, Maritime NZ and CAA are both designated regulators under HSWA, but HSWA has higher maximum fine levels than those in transport legislation. This can lead to significantly different penalty levels between these two regulatory frameworks, for offending of similar severity. This may imply that offending in one framework is somehow more harmful, which is not justified. There are two aspects to this.
87. Firstly, in many situations an individual's actions can be an offence under HSWA and the MTA or CA Act. However, because the maximum HSWA penalties are much higher, prosecution under HSWA is likely to result in a heavier penalty. Secondly, in situations where there is no offence under HSWA (for example, involving a foreign operated ship) the CA Act or MTA must be used.

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<sup>16</sup> Informal survey conducted by the Ministry, May 2019.

This may result in potentially lower penalties for conduct that would have attracted higher penalties had it been prosecuted under HSWA.

88. This means that differences in the context of an incident could change whether charges are laid under the transport regime or HSWA, with a corresponding different penalty amount.
89. To provide the right context for proportionality, financial penalties for offences that are more serious should be imposed by a court. Conversely, low risk, low harm offences may be more suitable for lower fee-based penalties and can be imposed by a regulator. However, all transport-related offences that are suitable for fees must also have an associated fine. This is to enable the court to consider issuing fines when circumstances warrant this, such as when a regulator wishes to charge and fine serious or persistent offender instead of issuing another infringement fee.
90. When transport offences are reviewed against the Framework, it may be that some penalties need to increase and some decrease so they are proportionate and fair.

#### Principle 4: Consider the responsibilities and financial capacity of the individual or entity

91. The transport system is broad reaching, covering the movement of people and goods locally, regionally, across the country and internationally. Almost all New Zealanders use the transport system daily and consequently we all have a part to play to ensure the safe running of the system. However, we place a higher level of trust on some people operating in the transport system.
92. Therefore, penalty levels should also consider the responsibility associated with specific roles in the transport system and the extra expectations we have of the people undertaking them. Parts of the system, such as commercial aviation, rail and shipping and public transport, are more closely regulated because we have higher expectations of good training, appropriate operating procedures and attention to safety.
93. People undertaking high trust roles in these parts of the system are required to be 'fit and proper' persons (that is, competent and of strong integrity). Businesses that operate transport services must demonstrate that they have systems and processes in place to mitigate risk. The Framework recognises three categories of potential offenders that penalties may apply to.

#### Individuals

94. The majority of people participating in the transport system can be described as 'regular' individuals. These include people such as passengers on public transport or those with licences to drive domestic motor vehicles. These individuals do have responsibilities to obey relevant transport requirements. However, they do not have professional responsibilities in the system and are not responsible, for example, for operating large vehicles or craft associated with a duty of care to large numbers of people.

#### Special regulated individuals

95. We recognise that there are some situations where there are higher expectations of, and obligations on, individuals due to their roles in the system and that penalties should reflect this. This framework categorises these individuals as 'special regulated individuals' - people who, for example, are responsible for the lives of paying passengers, are trusted with transporting dangerous goods, or who operate larger or specialised vehicles that are more hazardous.
96. Such individuals will typically be undertaking duties in a professional capacity such as aircraft pilots, seafarers or commercial drivers. These individuals may have specialised transport

documents relating to their duties such as aviation, maritime or land transport documents, or dangerous goods endorsements.

97. Penalties for special regulated individuals should be higher to reflect the trust and expectations placed upon them by the transport system. Under this Framework, we recommend that special regulated individuals should be subject to higher fines<sup>17</sup> than 'regular' individuals in the transport system, who are subject to less regulation. However, current transport legislation does not designate special regulated individuals as a category of persons distinct penalty levels could apply, to – only 'individuals' are designated.
98. Some parts of the transport system do already reflect situations where people have a clear position of responsibility, through offences being directed only at that class of people. For example, this would include aviation offences that only apply to the pilot in command of the airplane. In these cases, it is straightforward to apply a penalty matching the expectations we have of the individual in the role (that is, apply the special regulated individual-level penalty).
99. Note that these positions do not need to be distinguished as 'special regulated' or other particular classes or persons in the legislation, or be identified by having particular documents (as may be the case for example for some types of rail workers). The penalty level in the Framework associated with special regulated persons can simply be used for particular offences that can only be committed by individuals in these positions of responsibility.
100. Aside from issues relating to appropriate financial penalty levels for special regulated individuals, offending may make these individuals subject to deregistration or revocation of their operating certificates. This can cause loss of their income – often considered the harshest compliance tool. This would be taken into account by a court when sentencing and so may impact the overall compliance objective.

### **Business or undertaking**

101. A further category that this Framework recognises as requiring consideration regarding penalty levels are businesses or undertakings. In the context of this Framework, a business or undertaking may be an organisation (for example, a business entity such as a company or entity such as a body corporate) or an individual, such as a sole trader.
102. We take the terms 'business' and 'undertaking' to mean:
  - 'Business' – an activity carried out with the intention of making a profit or gain.
  - 'Undertaking' – an activity that is non-commercial/not-for-profit in nature (for example, certain activities of a local authority, charities and other non-governmental organisations).
103. A business entity would usually warrant a greater level of penalty than does an individual. This is because, generally, business entities have access to more financial resources and, unlike for individuals, the penalty of imprisonment is not available. Undertakings, such as councils or charities for example, may also warrant higher financial penalties, given their high level of interaction with the public and associated responsibility.

The current transport penalty system reflects this by having individual versus body corporate splits in fees and fines. For example, in aviation offences regulations, the fine for the offence of a pilot-

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<sup>17</sup> Maximum infringement fee of \$3,000 and maximum fine of \$180,000.

in-command or operator involved in accident not providing occurrence details within the prescribed time, differs between an individual (\$4,000) and body corporate (\$25,000).<sup>18</sup> The Framework's penalty levels for businesses and undertakings can therefore currently only be applied to body corporates, unless legislative change were made reflecting businesses and undertakings in transport legislation.

104. While the current transport penalty regime only covers commercial entities categorised as body corporates, we consider the categorisation of 'business or undertaking' as more complete. This is because its scope more clearly includes a wider range of business types like sole traders, and 'undertakings' which the term 'corporate body' does not cover.
105. There are several considerations for setting penalties at levels that will appropriately cover a business or undertaking. These include:

#### *Considerations for fees*

- Infringement fee offences generally apply to individuals, but can also be the responsibility of a company (for example, a Warrant of Fitness breach for a company vehicle).

#### *Considerations for fines*

- The maximum fine available should be high enough to appropriately respond to potential harm done by a large corporation, considering the nature of the offence.
- A higher fine may be justified because there are limited penalty options available for a business or undertaking (for example, there may be no option of imprisonment).
- Businesses or undertakings often have larger financial resources, so a fine will need to be high enough to influence behaviour change.<sup>19</sup>
- Pecuniary penalties can also be applied to account for the commercial gain received in the course of offending, which are recoverable in the same way as fines. Section 47 of the CA Act and section 409 of the MTA empower a court to order an offender to pay an amount not exceeding three times the value of any commercial gain resulting from committing certain offences. To apply this penalty the court must be satisfied that the offence was committed in the course of producing a commercial gain.

#### *Certain catastrophic offences should have a stronger financial penalty for a business or undertaking*

106. It is also important to consider whether the current maximum penalty (for bodies corporate in the current transport legislation) appropriately reflects the offence's severity and credible worst case risk scenarios. For example, it needs to be high enough, particularly where the offence could have led to multiple loss of life, or a very severe or catastrophic environmental impact.
107. As noted above, there is no option of imprisonment for bodies corporate for very severe offences and therefore a higher financial penalty may be justified. Further, as previously indicated, HSWA overlaps with transport legislation as many ships, aircraft and vehicles are places of work or used in in the course of work. Maritime NZ and the CAA are both designated regulators under HSWA, which has maximum fines of up to \$3,000,000 for organisations.

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<sup>18</sup> Civil Aviation Rule 12.53 - Pilot-in-command or operator involved in accident must provide occurrence details within prescribed time.

<sup>19</sup> The fee and fine should be 10 times higher than for individuals.

108. Therefore, under HSWA, the consequences for an offender can be much more severe than under similar circumstances where transport legislation applies. Increasing the penalties for similar events in transport legislation would address such anomalies. The following scenarios illustrate these differences.

**Penalty difference scenarios – HSWA and MTA, CA Act, Railways Act**

Scenario	Max fine under HSWA s48	Max fine under transport Act
A seafarer is seriously injured when a domestically owned commercial ship’s faulty railing gives way, and the seafarer falls onto the wharf below.	\$1,500,000	MTA s65 \$100,000
A person travelling on a helicopter for work is seriously injured when the aircraft crashes due to overloading by the operator of the helicopter.	\$1,500,000	CA Act s44 \$100,000
A track maintenance vehicle is struck by a train as the result of a network control failure, resulting in serious injury to a worker in the vehicle.	\$1,500,000	Railways Act s61 \$500,000

**Reference to types of offender in offences and penalties in legislation**

109. As outlined above, this Framework proposes that financial penalties be set at levels that increase in turn for three separate groups – individuals, special regulated individuals, businesses or undertakings. However, given that special regulated individuals and business or undertakings are not currently reflected in transport legislation, we do not propose that legislation needs to be changed to reflect these groups to implement the Framework. Such changes may be a longer-term consideration if an offence and penalty regime is being re-designed.
110. The Framework recognises that, while beneficial, it may not be appropriate, feasible, or necessary to design offences that specifically identify these groups and assign specific penalties. The process of penalty setting needs to work within the constraints of the design of the particular legislation and offender types already identified or considered appropriate. The offender categories are a guide only to set appropriate penalty levels.
111. Regarding strict and absolute liability infringement offences, there is obvious benefit in designating fees specifically associated with particular offender groups, given there is no flexibility available in fee levels. Regarding fines, which can be applied up to a maximum level, the court has the ability to account for a wide range of factors in setting appropriate penalties, such as the gravity of the offending and financial capacity of the offender. This discretion could account for differences in offender types.
112. Nonetheless, setting fines for particular offender groups, where possible (for example where an offence can only be committed by a special regulated individual like an aircraft pilot), makes a clear distinction between the penalty ranges considered appropriate for those groups. It also gives the court guidance, while still leaving the court discretion to apply penalties within those ranges.

113. Overall, the important factor is that penalty levels have scope to cover the expected offender types. The Tool, associated with the Framework, provides more advice on how penalty levels for offender types might be reflected in current legislation, which only differentiates penalty levels for individuals and body corporates.

### Public policy contextual factors review

114. Applying the Framework's principles, as outlined above, supports an objective approach to set consistent, proportionate and fit-for-purpose financial penalties. However, it is also relevant to consider proposed penalty levels for particular offences in their wider public policy context. This is to determine whether there are factors relating to applying particular penalties at the Framework's proposed levels that may lead to perverse outcomes, such as in relation to vulnerable population groups.<sup>20</sup>
115. For example, the report by Te Uepū Hāpai i te Ora (the Safe and Effective Justice Advisory Group)<sup>21</sup> noted that for some youth, in particular Māori youth and those in rural areas, costs related to driver licensing can be prohibitive. The report further notes that offending that starts in connection with drivers licensing can be an entry to the criminal justice system, with lifelong consequences for the offender and their whānau. For 31 percent of under 25 year olds convicted for a driver licence-related offence in 2018, it was their first offence.
116. Consequently, we recommend that in addition to applying the Framework's principles as a fundamental approach, users also undertake a public policy contextual review. This is to determine whether any factors, including wider societal considerations not previously covered, may mean some adjustment of a penalty level (either up or down depending on context) may be warranted.
117. However, it is important to note that financial penalty levels set in legislation cannot directly account for the financial circumstances of different offenders. This is particularly the case for infringement fees, which are not open to adjustment by the court according to offenders' circumstances. This is addressed to an extent in that fees will be set at relatively low levels given that they represent 'instant fines' for uncomplicated offending. However, what is considered a 'low' level will be relative to different offenders' financial capacity.
118. Therefore, the enforcement approaches of regulators and enforcement agencies will arguably have more influence to account for offenders' ability to pay or other circumstances than penalty levels. This is because of their ability to use discretion in whether and how to apply financial penalties, or substitute alternative penalties. Also important are the design of offences to target the right behaviour and offender types, to avoid perverse outcomes as far as possible.
119. Regarding fines, which are set up to a maximum, the court process allows judges discretion in setting penalties to account for financial circumstances, among other matters. Therefore, the level at which fines are set in legislation is relevant in this context only as it will determine the range of the penalty that the court will work within.

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<sup>20</sup> For example, where financial penalties are excessive, not paying them can lead to further penalties such as car or property seizure and inhibiting ability to access credit due to poor credit scores. These outcomes may then damage employment opportunities. This will disproportionately affect those on low incomes.

<sup>21</sup> He Waka Roimata,

[https://www.safeandeffectivejustice.govt.nz/assets/Uploads/7efb12cccb/teuepureport\\_hewakaroimata2.pdf](https://www.safeandeffectivejustice.govt.nz/assets/Uploads/7efb12cccb/teuepureport_hewakaroimata2.pdf)

## Process for deciding on penalty levels

120. Drawing on the principles detailed above, the Framework provides a decision-making process that can be applied consistently in setting proposed financial penalty levels for transport-related offences. This process is designed to be applied when reviewing penalty levels for existing offences, or after new offences have been designed and financial penalties are proposed. However, it does not replace the broader process that considers the whole appropriate regulatory 'toolbox' available and range of different penalty types that might be applied (in addition to financial), when designing a compliance approach.
121. This decision-making process is covered in detail in the Framework's associated Financial Penalties Categorisation Tool (the Tool), which serves as a guide to implementing the Framework by applying the process. The six-steps of the financial penalty setting decision making process in the Tool are:

### **Six-step penalty level decision-making process**

Step 1: Consider the offence's design, use, and associated data

Step 2: Assess the offence's severity

Step 3: Identify the type of offender the penalty would apply to

Step 4: Use the Categorisation Tool to assign an initial penalty level

Step 5: Check the penalty against the three remaining Framework principles

Step 6: Refine the financial penalty

### Using the Financial Penalties Categorisation Tool to generate penalty levels

122. Applying the Tool (as per Step 4 above) will generate initial financial penalties. To use the Tool, the user will allocate points provided in the Tool to the offence, based on the severity of each of the three harm categories (system, safety, environmental and property) and likelihood of occurrence of the safety and environmental and property harms should the offence occur.
123. Table 1 on page 25 broadly shows how we might allocate the points in the Tool, according to the level of risk of harm occurring for the safety harm type, applying to harm to people. Note that the severity descriptors in the table are merely a guide or proxy, giving examples of a level of harm to gauge the grade of harm that might be appropriate for an offence.
124. For many offences, it will not be possible, for example, to determine whether an offence has the potential to result in 'Death or significant injury to one-ten people' or 'Death or significant injury to more than ten people'. However, the objective is to form a general view, regarding the severity of the offence, in which severity grade the potential consequence of the offence best fits.



**Table 1: Safety harm severity and risk matrix**


Severity		Likelihood of harm occurrence			
Grade	Descriptor	Low	Medium	High	Extreme
None	No risk of, or actual, safety-related harm	Green	Green	Green	Green
Low	Minor offence which may cause, or caused, minor injury	Green	Green	Yellow	Yellow
Med	Moderate offence which may cause, or caused, moderate injury	Green	Yellow	Orange	Orange
High	Serious offence which may cause, or caused, death or significant injury to between one and 10 people	Yellow	Orange	Red	Red
Very High	Extremely serious offence which may cause, or caused, death or significant injury to more than 10 people	Orange	Orange	Red	Red

**Harm severity key:**

Low	Medium	High	Extreme
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125. Adding up the points across all three harm types will assign a 1-10 overall harm category, representing minor (1) to catastrophic (10) harm. Table 2 below illustrates this process:

**Table 2: Overall offence harm category and points scale**

Harm category	Points
1	X (minimum)
2	
3	
4	
5	
6	
7	
8	
9	
10	

126. Once harm points are assigned, The Tool generates an initial financial penalty according to the overall harm category level chosen (1-10) and whether the offender is an individual, a special regulated individual, or a business or undertaking. The Tool provides a table of proposed penalty levels according to the overall harm category and type of offender. Table 3 on page 26 shows how the overall harm categories and initial financial penalties should look in relation to each other.

**Table 3: Offence categories and penalties by type of offender**

Severity Scale:	Category Level:	Infringement Fees			Fines before a Court		
		Individual	Special Regulated Individual	Business or undertaking	Individual	Special Regulated Individual	Business or undertaking
Minor	1	\$	\$\$	\$\$\$	\$\$	\$\$\$	\$\$\$\$
	2						
Moderate	3						
	4						
Serious	5	\$\$	\$\$\$	\$\$\$\$			
	6						
Very Serious	7						
	8						
Catastrophic	9						
	10				\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$\$

127. Once an initial financial penalty is generated, the user continues through the step-by-step process (from step five) to establish a final financial penalty for potential implementation. The categorisation process and Tool are designed to be flexible enough so that they can be used for all transport-related financial penalties set by national legislation and local bylaws.

**There will be some exceptions in process for some offences**

128. Some offences, such as those using a graduated approach, will require some further work to determine the penalty level. A graduated approach means that the penalty level associated with the offence increases as the severity of the offence and risk of harm escalates. Such offences include speeding, overloading and parking infringements. Table 4 on page 27 illustrates the graduated approach to the penalty levels for speeding.

**Table 4: Infringement fees for speeding offences** (as at September 2020)

<b>Km/h<sup>22</sup> above speed limit</b>	<b>Infringement fee</b>
10 km/h or less	\$30
11 - 15 km/h	\$80
16 – 20 km/h	\$120
21 – 25 km/h	\$170
26 – 30 km/h	\$230
31 – 35km/h	\$300
36 – 40 km/h	\$400
41 – 45 km/h	\$510
46 – 50 km/h	\$630

129. We propose that the process to be followed for reviewing graduated penalties is to use the Framework to identify what should be the high and low ends of the offence's range.
130. Overall, to categorise offences, some rationalisation may be required. Further, there may be specific offences that form exceptions to the Framework, and we may need to consider these outside the proposed categories to maintain their effectiveness.

## Where to from here

131. We intend to progressively implement the Framework throughout transport legislation (Acts and regulations that set penalties for breaches of rules), in collaboration with the transport regulatory agencies. This will include via regulatory impact analysis, when we develop new offences, and review and revise current offences and penalties.
132. Applying this framework across all transport related offences is a multi-step process. It will take time to implement, given the number of offences in the system. Eventually, we intend to apply the Framework to all transport-related offences and their related financial penalties. However, this will occur as regulatory agency capacity allows and opportunities present themselves, as various pieces of legislation are being reviewed.
133. The Framework's purpose is not to change all financial penalties. However, individual fees and fines may increase or decrease as they are aligned to the Framework. Any proposed changes will go through the appropriate legislative change process, including public consultation and, for changes to primary legislation, consideration by Parliament.
134. This is a significant piece of regulatory stewardship work. We expect that introducing the Framework, reviewing existing financial penalties and developing new offences and penalties in line with the Framework, will lead to more consistent fees and fines that better reflect likely harm, are fairer and more effective.

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<sup>22</sup> Kilometres per hour.

## APPENDIX 1

### Key Acts, rules and regulations

1. Each transport mode has a series of parent Acts, ordinary and emergency rules made under those Acts, and regulations that set out the offences and penalties associated with the Acts and rules.
2. Below is a list of the key Acts and regulations with links to the associated documents, for each transport mode.

#### Land (Road)

- [Land Transport Act 1998](#)
- [Land Transport \(Offences and Penalties\) Regulations 1999](#)
- [Land Transport \(Motor Vehicle Registration and Licensing\) Regulations 2011](#) – covers the offences and penalties and demerits relating to vehicle licensing and registration
- [Land Transport Rules](#)
- [Land Transport Management Act 2003](#) – covers the offences relating to tolls and regional charges
- [Traffic Regulations 1976](#)
- [Government Roding Powers Act 1989](#)
- [Transport \(Vehicular Traffic Road Closure\) Regulations 1965](#)
- [Heavy Motor Vehicle Regulations 1974](#)
- [Road User Charges Act 2012](#)
- [Road User Charges \(Infringement Offences\) Regulations 2012](#)

#### Land (Rail)

- [Railways Act 2005](#)
- [Railways Regulations 2019](#)

#### Maritime

- [Maritime Transport Act 1994](#)
- [Maritime \(Offences\) Regulations 1998](#)
- [Marine Protection \(Offences\) Regulations 1998](#)
- [Maritime Security Act 2004](#)
- [Maritime Security Regulations 2004](#)
- [Maritime and Marine Protection Rules](#)
- [Ship Registration Act 1992](#)

#### Aviation

- [Civil Aviation Act 1990](#)
- [Civil Aviation \(Offences\) Regulations 2006](#)
- [Civil Aviation Rules](#)
- [Aviation Crimes Act 1972](#)
- [Airport Authorities Act 1966](#)

## APPENDIX 2

### The process used to develop the Framework

1. In developing this document, we have considered a range of academic research focused on compliance and enforcement models, and the effect of fees and fines.<sup>23</sup> Much of the research focuses on deterrence or on how to stop people from reoffending, as well as theories about ‘just deserts’ or what appropriate punishment looks like.
2. A key factor we have noted is that people are less likely to offend if they see a regime is ‘fair’, but fairness can be situational. How people from different positions view the regime is important. This includes people who are compliant and people who are, or could be, victims of offending. People who rely on the safety of the system need confidence that it encourages and enforces compliance, and compliant people risk becoming resentful if there appears to be no cost to non-compliance. Research also shows that it is important for compliance that people understand the law and consequently accessibility is another important key factor.
3. We have considered guidance on this topic for New Zealand regulators, including from the Legislation Design and Advisory Committee and MoJ, which have provided guidance around offence and penalty regimes and specifically for setting infringement fees. We have also considered the Sentencing Act 2002, which outlines the purposes of penalties to:
  - hold the offender accountable for harm done to the victim and the community by the offending
  - promote in the offender a sense of responsibility for, and an acknowledgment of, that harm
  - denounce the conduct in which the offender was involved
  - deter the offender or other persons from committing the same or a similar offence
  - protect the community from the offender.
4. We have also reviewed the various approaches taken to fees and fines in other similar legislation in New Zealand, including the Health and Safety at Work Act 2015, the Food Act 2014, the Conservation (Infringement System) Act 2018 and the Electricity (Safety) Regulations 2010. These pieces of legislation take different approaches to how fees and fines should be set.
5. We have also considered some approaches taken to transport-related fees and fines internationally, for example in Finland, the United Kingdom and Australia.

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<sup>23</sup> Uri Gneezy and Aldo Rustichini, "A Fine Is a Price," *The Journal of Legal Studies* 29, no. 1 (January 2000): 1-17; Karen Yeung "Securing Compliance: A Principled Approach", 2004 Hart Publishing 59-101; Steve Moffatt and Suzanne Poynton "The deterrent effect of higher fines on recidivism: Driving offences" March 2007, NSW Bureau of Crime Statistics and Research.