Departmental Disclosure Statement

Insolvency Practitioners Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material
- some of the key quality assurance products and processes used to develop and test the content of the Bill
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

Background

This disclosure statement relates to a supplementary order paper (SOP) to the Insolvency Practitioners Bill (the Bill). There was no original disclosure statement for the Bill because the requirement for disclosure statements did not exist when it was introduced in 2010. The Bill had a second reading on 7 November 2013 but has since been on hold. This disclosure statement has been prepared because:

- the SOP largely rewrites the Bill
- the Bill will be referred to a select committee for detailed consideration.

Comment on the General Policy Statement

The high level policy objectives stated in the Bill's General Policy Statement (GPS) remain accurate. However, the GPS described how the Bill intended to achieve the objective, by way of a negative licensing regime. The SOP proposes positive licensing. Thus, the GPS is outdated and would be misleading if included in this disclosure statement. For this reason, the GPS section of this disclosure statement reflects the means of achieving the policy of the Bill under the SOP.

This disclosure statement was prepared by the Ministry of Business, Innovation and Employment.

The Ministry of Business, Innovation and Employment certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

June 2018

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Part One: General Policy Statement

The goals of insolvency law

Corporate insolvency arises when a company is unable to pay its debts when they fall due and/or has liabilities that exceed its assets. The main goal of corporate insolvency law is to provide incentives for any remaining assets of the company to be allocated to their most efficient use. A business should be rehabilitated if it is viable. If not, the company should be liquidated, and the assets realised and distributed to creditors with a minimum of delay and expense.

Insolvency practitioners play an essential role in determining whether these outcomes are achieved. Insolvency practitioners need to have a very good understanding of the principles and practices of corporate insolvency law, and have other skills, knowledge and experience. Insolvency practitioners must also act honesty and with integrity because they have broad statutory powers to manage, protect, realise and distribute money and other assets on behalf of the company's creditors and shareholders.

The policy of the Bill

The main purpose of the Insolvency Practitioners Bill is to promote better outcomes under the corporate insolvency system by strengthening the regulation of insolvency practitioners.

The Bill, as introduced in 2010, sought to achieve this goal in two ways. First, it proposed the introduction of a negative licensing system which would have given the Registrar of Companies the power to restrict or prohibit individuals from providing corporate insolvency services. Secondly it proposed strengthening existing statutory measures in relation to the automatic disqualification of insolvency practitioners.

The negative licensing regime was replaced with a registration regime under a supplementary order paper at the second reading of the Bill in 2013 ("the 2013 SOP"). Under the registration regime, a person would need to be on a public register in order to practise. However, registration would not convey any suggestion of honesty, competence or quality of service.

The attached Supplementary Order Paper ("the 2018 SOP") replaces the registration regime contained in the 2013 SOP with a coregulatory licensing system. The 2018 SOP also expands on the list of grounds on which an insolvency practitioner may be disqualified, clarifies practitioners' responsibilities, roles and duties, increases transparency in relation to the appointments of practitioners and improves practitioners' reporting requirements.

The main features of the coregulatory licensing regime

Under the 2018 SOP:

- the Registrar of Companies will:
  - consider applications from professional bodies to be accredited to regulate insolvency practitioners
  - monitor and report on the adequacy and effectiveness of each accredited body's regulatory systems and processes
  - investigate and, where appropriate, prosecute possible contraventions of the law.

- accredited professional bodies will be responsible for the frontline regulation of insolvency practitioners including:

- issuing licences to practise
- regulating ongoing requirements to retain a licence
- promulgating and monitoring compliance with codes of conduct and professional and ethical standards
- receiving and investigating complaints and taking disciplinary action where appropriate.

The reasons for replacing registration with licensing

There are two main problems with the registration regime contained in the Bill as modified by SOP No. 1.

First, it will not adequately address competence and integrity issues because the disqualification criteria are minimal, and there are no skill, experience and good character requirements.

Secondly, it may mislead inexperienced users of insolvency services. Those users cannot be expected to understand the difference between "registration" and "licensing" when used in their technical senses. It is reasonable for the public to expect that if a person's name appears on a government register, then a regulator will have verified that they have met certain minimum standards of honesty and competence.

The main goals of the licensing regime contained within SOP No. 2 are:

- to introduce a robust regime that will include rigorous competence, honesty and integrity criteria in relation to obtaining and retaining a licence
- to provide effective ways for holding practitioners to account.

The scope of insolvency practice covered by SOP No. 2

The licensing regime will apply to the following insolvency processes:

- **Insolvent liquidations** – upon appointment, the liquidator takes possession of the company's assets and distributes the assets or the proceeds from realising the assets to the company's creditors in accordance with the rules in the Companies Act 1993. The liquidator then applies to the Registrar of Companies to remove the company from the register of companies.

- **Voluntary administrations** – placing a company in voluntary administration freezes the company's financial position while an administrator and the creditors determine the company's future. The administrator reports to creditors on whether the business of the company should be rehabilitated in whole or in part, or whether the company should be liquidated. If the administrator recommends a 'deed of company arrangement' and the creditors agree, it is given effect to by a deed administrator.

- **Receiverships** – a receivership is usually initiated when a company fails to pay its debts to a creditor that has security over the assets of a company. The receiver manages the assets over which the debt was secured in order to repay the debt owed to the secured creditor and pay amounts owed to preferential creditors.

- **Trustees** of an insolvent person's proposal – The Insolvency Act 2006 provides for an insolvent person to make a proposal to creditors for the payment or satisfaction of their debts. A trustee will be appointed if creditors accept the proposal and the High Court approves it. The trustee takes control of the property that is subject to the proposal and generally gives effect to the proposal.

Solvent liquidations will be regulated, but not through the licensing regime

Solvent liquidations generally arise because a business has been sold, closed down or reorganised for tax and/or management purposes.

Solvent liquidations will not be subject to the licensing regime for two reasons:

- There is no need to reserve them to professionals specialising in insolvency practice because they are usually relatively easy processes.

- There is no creditor interest to protect because, by definition, the liquidation of a solvent company will not lead to any shortfall for creditors of the company.

However, solvent liquidations will need to be carried out by a licensed insolvency practitioner, or a member of a professional accounting body or the New Zealand Law Society. The purpose of this restriction is to ensure that a solvent company liquidator (who is not a licensed insolvency practitioner) is subject to an ethical obligation to transfer the liquidation to a licensed insolvency practitioner should they discover that it is an insolvent liquidation even though the directors had certified that the company would be able to pay its debts under s243(8) of the Companies Act.

Compromises are outside the scope of the licensing regime

An insolvent company can continue to operate by agreeing a compromise arrangement with its creditors (e.g. by cancelling some or all of the debt, or varying creditors' rights or the terms of the debt). The main benefit of the compromise regime is to provide a simple and flexible alternative to other statutory processes.

In order to apply the licensing regime to compromises, it would be necessary to create 'compromise trustee' as a statutory office, define the role and set out a set of specific duties, rights or powers. There is a significant risk that the simplicity and flexibility benefits would be consequentially lost and discourage people from the regime. For this reason, compromises will not be subject to the licensing regime.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES

The licensing regime to be introduced by the SOP to the Bill was recommended in a report by the Insolvency Working Group, *Review of Corporate Insolvency Law – Report No. 1 of the Insolvency Working Group, on insolvency practitioner regulation and voluntary liquidations* (July 2016).

The Insolvency Working Group comprised an independent chair, two insolvency practitioners, two lawyers specialising in insolvency law, an expert in debt collection and a representative of the Official Assignee.

The Insolvency Working Group's report can be found here:

http://www.mbie.govt.nz/info-services/business/business-law/insolvency-law-working-group/insolvency-practitioner-regulation-and-voluntary-liquidations/report-no-1-insolvency-practitioners-regulation-and-voluntary-liquidations.pdf

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES

There are two regulatory impact statements.

Title: The Regulation of Insolvency Practitioners

Authoring agency: The Ministry of Business, Innovation and Employment

Date: 1 November 2016

http://www.mbie.govt.nz/info-services/business/business-law/documents-image-library/Revised%202.0%20Regulatory%20Impact%20Statement%20for%20regulating%20insolvency%20practitioners%20-FINAL%20for%20website.pdf

Title: Regulation of Insolvency Practitioners

Authoring agency: The Ministry of Economic Development

Date: Unknown date in 2010

http://www.mbie.govt.nz/publications-research/publications/business-law/Insolvency%20Practitioners%20Regulatory%20Impact%20Statement%20-60%20kB%20PDF.pdf

No content has been withheld from either RIS.

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	NO

Neither of the RIS's met the threshold for RIA Team assessment.

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	**NO**

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	**NO**

2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	**NO**
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	**NO**

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	**YES**
(b) the nature and level of regulator effort put into encouraging or securing compliance?	**YES**
The benefits of licensing insolvency practitioners are only likely to be achieved in full if the frontline regulators effectively monitor compliance and use their enforcement powers where necessary and the Registrar is diligent in carrying out the accreditation and oversight functions.	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
MBIE consulted with the Ministry of Foreign Affairs and Trade in relation to access to the licensing regime by overseas practitioners and New Zealand's international obligations. The advice that MFAT provided MBIE appears in paragraph 71 of the Cabinet paper referred to above that recommended insolvency practitioner licensing [EGI-16-SUB-0304]. http://www.mbie.govt.nz/info-services/business/business-law/documents-image-library/EGI%20paper%20-%20Insolvency%20practitioners%20and%20voluntary%20liquidations%20-%20for%20public%20release%20version.pdf

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?
No specific steps have been taken to determine that the policy of the SOP is consistent with the principles of the Treaty of Waitangi.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?	**NO**
The Ministry of Justice has been consulted in relation to consistency with the New Zealand Bill of Rights Act 1990. The Ministry of Justice has advised MBIE that it will not be providing advice to the Attorney-General in relation to compliance with that Act.	

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	**YES**
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	**YES**

The SOP creates a significant number of new offence and penalty provisions.

The new strict liability offences are listed in Appendix 1.

The new offences that include knowledge elements comprise:

- clause 3B (s239F(4)) – acting as an administrator despite being disqualified – maximum fine of $75,000
- clause 3L (s239ACD(4)) – acting as a deed administrator despite being disqualified – maximum fine of $75,000
- clause 5 (s280(4) – being appointed as a liquidator despite being disqualified – maximum fine of $75,000
- clause 13 (s5(3)) – being appointed or acting as a receiver despite being disqualified – maximum fine of $10,000
- clause 78(3) – insolvency practitioner obtains a portion of the benefit of a transaction without obtaining the leave of the High Court – maximum fine of $75,000

The High Court has an inherent jurisdiction to supervise liquidators and there are related order-making powers under ss 284-286 of the Companies Act. The High Court noted the very limited scope of the current powers under s286 in paragraphs 68-78 of *The Commissioner of Inland Revenue v Imran Mohammed Kamal* [2016] NZHC 1053. Clause 5E includes amendments which will make the powers in s286 effective.

3.4.1. Was the Ministry of Justice consulted about these provisions?	**YES**
The Ministry of Justice has been consulted in relation to vetting the offences and penalties contained in the SOP.	

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	**YES**
Clauses 39-45 provide for the establishment and operation of a register of licensed insolvency practitioners. Those provisions comply with the public register privacy principles listed in s 59 of the Privacy Act 1993. The only personal information that will appear on the public register will be each licensee's full name (see clause 42, which details the content of the register).	

3.5.1. Was the Privacy Commissioner consulted about these provisions?	**YES**
MBIE consulted with the Office of the Privacy Commissioner (OPC), drawing particular attention to the provisions in the Bill relating to the new public register of licensed insolvency practitioners that will be established under subpart 3 of Part 4. The OPC noted that the SOP provides for personal information to be added to the register through regulations. The OPC advised, therefore, that a suppression mechanism should be added to allow the Registrar to have discretion to remove personal information in cases where personal safety issues arise. As a result, a suppression mechanism has been added to the SOP.	

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	**YES**
There has been consultation on the policy of the SOP and a draft of Parts 3-6 of the SOP. All of the main policy issues were addressed in the Insolvency Working Group's report entitled *Review of Corporate Insolvency Law – Report No. 1 of the Insolvency Working Group, on insolvency practitioner regulation and voluntary liquidations* (July 2016). MBIE released this report for public comment later in 2016. 30 submissions were received. MBIE consulted on the licensing regime in Parts 3-6 with four insolvency practitioners, two lawyers specialising in insolvency law and the Head of NZ Regulation at Chartered Accountants Australia and New Zealand. Those experts were provided with a near-final 'draft for consultation' version, along with explanatory material relating to the transition from the status quo to the introduction of the licensing regime. MBIE officials held three meetings with the experts and also obtained written comments. This consultation took place from July to September 2017.	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	**YES**
The co-regulatory licensing regime contained in the Bill is very similar to the co-regulatory licensing regime in the Auditor Regulation Act 2011. Many individual provisions in the SOP are either the same as or similar to provisions in the Auditor Regulation Act.	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	**NO**

Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	**YES**
Clause 92(1)(h), provides for "prescribing fees and charges that the Registrar of Companies may require to be paid to the Registrar (or the rate at which the method by which fees and charges are to be calculated) in connection with the exercise or performance by the Registrar of any function, power, or duty conferred by or under this Act." Subsection (2) provides for regulations to be made prescribing the method of payment of a fee, charge or cost.	

Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	**NO**

Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	**YES**
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	**NO**
The SOP includes a number of strict liability offences. The description and explanations for the need for these provisions are set out in Appendix One.	

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	**YES**
Clause 85 protects an accredited body from liability in relation to anything it may do or fail to do in the exercise of its functions, powers and duties under the Act. Equivalent liability protections are provided to officers, employees and agents of an accredited body. This provision is the same in substance as section 94 of the Auditor Regulation Act.	

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	**YES**

The Bill will allow professional bodies accredited under the Insolvency Practitioners Regulation Act to regulate their members in relation to regulated insolvency engagements.

The professional bodies will set licensing criteria subject to constraints imposed by the Registrar of Companies under clause 34 (Registrar may prescribe licensing and other matters), clause 35 (minimum standards for a licence) and clause 36 (principles guiding prescribing of licensing and other matters).

Additional safeguards are provided by the accreditation system under subpart 4 of Part 4. A professional body will need to have been assessed by the Registrar of Companies that the body's regulatory systems and processes are suitable for performing the frontline regulatory functions. Accredited bodies will also be subject to continuing oversight by the Registrar. This includes requirements by the Registrar to monitor and report on each accredited body's regulatory systems (clauses 52-53) and powers to give directions (clause 54).

Accredited bodies and the Registrar will be subject to administrative law and the rules of natural justice in the exercise of their powers.

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	**NO**

4.8. Does this Bill create or amend any other powers to make delegated legislation?	**NO**

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	**YES**

Two of the principles guiding prescribing of licensing and other matters (clause 36) are unusual. These principles state that:

(b) the matters should not unnecessarily restrict the licensing of insolvency practitioners

(c) the matters should not impose undue costs on insolvency practitioners or on creditors.

The purpose of these provisions is to guard against the risk of accredited professional bodies imposing unnecessary barriers to entry by setting regulatory requirements that are more than is needed to protect the public interest.

Appendix One: Further Information Relating to Part Four

Strict liability offences – questions 3.4 and 4.4

There are two rationales for including strict liability offences in the SOP:

- The impracticality of including a mental element
- The need to include public welfare regulatory offences.

Reason 1: impracticality of including a mental element

The offences listed below are strict liability offences because any mental element would be inherently impractical to test as it would only be within the knowledge of the defendant. If the provisions included a mental element, an assertion by the person that they "forgot" would impose the very difficult task on the prosecution of having to disprove this.

Amendments to the Companies Act 1993

- clause 3B (s239G(2)) – failure to comply with certification requirements before being appointed as an administrator – maximum fine of $10,000
- clause 3E (s239R(3)) – failure by a replacement administrator to table an interests statement – maximum fine of $10,000
- clause 3G (s239TA(3)) – failure by an administrator to provide information and assistance to a successor administrator – maximum fine of $10,000
- clause 3HB (s239AMB(5)) – failure by an administrator to provide a notice to known creditors – maximum fine of $10,000
- clause 3I (s239AP(2)) – failure by an administrator to table an interests statement at the first creditors' meeting – maximum fine of $10,000
- clause 3K (s239ABYA(2)) – failure by an administrator to provide information and assistance to a liquidator – maximum fine of $10,000
- clause 3L (s239ACE(2)) – failure to comply with certification requirements before being appointed as a deed administrator – maximum fine of $10,000
- clause 3N (s239ACJA(3)) – failure by a deed administrator to provide information and assistance to a successor deed administrator – maximum fine of $10,000
- clause 3P (s239ACZ(4)) – failure by an administrator or deed administrator to file a summary report – maximum fine of $10,000
- clause 3Q (s239ACZA(4)) – failure by a deed administrator to file summary report – maximum fine of $10,000
- clause 4DB (s245C(5)) – failure by a liquidator to provide a notice to every known creditor – maximum fine of $10,000
- clause 4E (s255(3C)) – failure by a liquidator to file an initial report or an interests statement with the Registrar – maximum fine of $10,000
- clause 4F (s256(4)) – failure by a liquidator to retain records – maximum fine of $10,000
- clause 4G (s256A(4)) – failure by a liquidator to comply with duty relating to company money – maximum fine of $10,000
- clause 4H (s257(3)) – failure by a liquidator to comply with duty in relation to final report and accounts – maximum fine of $10,000
- clause 5B (s282(2)) – failure to comply with certification requirements before being appointed as a liquidator – maximum fine of $10,000
- clause 5C (s283(9)) – failure by liquidator to give written notice of vacancy in office – maximum fine of $10,000
- clause 5D (s283A(3)) – failure by a liquidator to provide information and assistance to a successor liquidator – maximum fine of $10,000

Amendments to the Receiverships Act 1993

- clause 13A (s6A(2)) – failure to comply with pre-appointment and certification requirements before being appointed as receiver – maximum fine of $10,000
- clause 13D (s11A(3)) – failure by a receiver to provide information and assistance to a successor receiver – maximum fine of $10,000
- clause 13E (s21(2)) – failure by a receiver to keep money relating to a receivership separate from other money – maximum fine of $10,000
- clause 13F (s22(3)) – failure by a receiver to keep proper accounting records in relation to the property in receivership – maximum fine of $10,000
- clause 13H (s24(5)) – failure by a receiver to prepare 6 monthly reports or a final report – maximum fine of $10,000
- clause 13H (s24A(3)) – failure by a receiver to file a summary report on the receivership – maximum fine of $10,000

Provisions that will be included in the new Insolvency Practitioners Regulation Act

- clause 32(4) – failure by an accredited body to notify the Registrar of suspension or cancellation of a licence – maximum fine of $30,000
- clause 43(3) – failure by an accredited body to provide prescribed information – maximum fine of $30,000
- clause 49(5) – failure by an accredited body to supply an annual report and annual confirmation – maximum fine of $50,000
- clause 56 – failure by an accredited body to comply with a direction issued by the Registrar – maximum fine of $50,000
- clause 65(4) – failure by an accredited body to provide reasonable assistance to the Registrar or otherwise hinder, obstruct or delay the Registrar in the course of an investigation – maximum fine of $30,000
- clause 71(5) – failure by an insolvency practitioner to comply with the duty to report serious problems – maximum fine of $10,000
- clause 72(2) – failure by an insolvency practitioner to provide further assistance after providing a report after reporting a serious problem to the Registrar, or any other person to whom the report is provided – maximum fine of $10,000
- clause 88(1) – false declaration and representations for the purpose of obtaining a licence or accreditation – maximum fine of $50,000

Reason 2: public welfare regulatory offences

The offences listed below are regulatory offences that seek to protect the public. The objective of the strict liability offences is to provide the public with confidence that regulated insolvency engagements will be performed to a high professional standard and that the practitioner will act honestly and with integrity. Having unqualified people performing this work raises the risk of incompetence, dishonesty and debtor-friendly behaviour, to the detriment of the debtor company's creditors and to the integrity of the corporate insolvency system.

- clause 21(2) – acting as an insolvency practitioner without a licence – maximum fine of $75,000
- clause 52(3) – accredited body fails to provide all reasonable assistance to Registrar or otherwise hinders, obstructs or delays the Registrar in carrying out its monitoring function – maximum fine of $30,000
- clause 74(4) – failure to comply with conditions relating to publication or disclosure of information – maximum fine of $75,000
- clause 76(4) – insolvency practitioner makes an arrangement for giving up, in whole or part, their remuneration to any person – maximum fine of $75,000

- clause 79(3) – insolvency practitioner purchases assets of the debtor company without the leave of the High Court – maximum fine of $75,000
- clause 80(2) – a person acts as a solvent company liquidator without being a member of a recognised professional body or a licensed insolvency practitioner – maximum fine of $75,000
- clause 83(5) – a person fails to comply with a requirement imposed by the Registrar under the Registrar's powers of inspection, or obstructs or hinders the Registrar or a person authorised by the Registrar in exercising such a power – maximum fine of $30,000.