



## PROACTIVE RELEASE COVERSHEET

<b>Minister</b>	Hon David Parker	<b>Portfolio</b>	Environment
<b>Name of package</b>	Proposal to publicly consult on a hazardous substance infringement offence scheme under the Hazardous Substances and New Organisms Act 1996	<b>Date to be published</b>	10/10/2023

### List of documents that have been proactively released

<b>Date</b>	<b>Title</b>	<b>Author</b>
22 June 2023	<a href="#">Cabinet paper: Proposal to publicly consult on a hazardous substance infringement offence scheme under the Hazardous Substances and New Organisms Act 1996</a>	Ministry for the Environment
22 June 2023	<a href="#">ENV-23-MIN-0025 - Cabinet Environment, Energy and Climate Committee Minute of Decision</a>	Cabinet Office
26 June 2023	<a href="#">CAB-23-MIN-0263 – Cabinet Minute of Decision</a>	Cabinet Office

### Information redacted **YES**

Any information redacted in this document is redacted in accordance with the Ministry for the Environment's policy on proactive release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982. Where this is the case, the reasons for withholding information are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

### Summary of reasons for redaction

Some information has been withheld from *CAB-23-MIN-0263 Report of the Cabinet Environment, Energy and Climate Committee Minute* under Section 9(2)(f)(iv) of the Official Information Act to maintain the confidentiality of advice tendered by Ministers of the Crown and officials.

**In Confidence**

**Office of the Minister for the Environment**

**Chair, Cabinet Environment, Energy and Climate Committee**

**Proposal to publicly consult on a hazardous substance infringement offence scheme under the Hazardous Substances and New Organisms Act 1996**

**Proposal**

- 1 This Cabinet paper seeks Cabinet agreement to publicly consult on a proposed hazardous substance infringement offence scheme under the Hazardous Substances and New Organisms Act 1996 (HSNO Act).

**Relation to government priorities**

- 2 The proposal to create a hazardous substances infringement offence scheme under the HSNO Act is necessary to implement a prior Cabinet decision [CAB 13 (400) refers].

**Executive Summary**

- 3 Hazardous substances are regulated in New Zealand under the HSNO Act and Health and Safety at Work Act 2015 (HSWA). The HSNO Act currently enables enforcement agencies to use a number of enforcement tools to respond to hazardous substance non-compliances including warning letters, compliance orders, and prosecution.
- 4 However, under the HSNO Act no intermediate enforcement tool currently exists between lower level compliance tools, such as warning letters and compliance orders, and the more serious tool of prosecution. This limits the ability of enforcement agencies to respond to and deter minor offences in a proportionate and efficient way.
- 5 In 2013, Cabinet approved a proposal to develop regulations prescribing infringement offences for hazardous substance offences under the HSNO Act [CAB 13 (400) refers]. Following Cabinet agreement, attempts were made to develop this infringement offence scheme but due to competing priorities this work has not been completed.
- 6 The Ministry for the Environment (MfE) and the Environmental Protection Authority (EPA) have developed an infringement offence scheme for hazardous substance offences under the HSNO Act. This scheme would prescribe infringement offences and their fees under the HSNO Act, allowing hazardous substance enforcement agencies to issue infringement notices ('on-the-spot fines') for these offences. Infringement offence fees under this scheme would range from \$200 to \$3,000.
- 7 Should Cabinet agree to the recommendations outlined in this paper, the attached consultation document *Implementation of a hazardous substances infringement scheme* will be released on the EPA's website for public comment.

## Background

### *Enforcement tools for hazardous substance compliance in New Zealand*

- 8 Hazardous substances are regulated in New Zealand under the HSNO Act and HSWA. The HSNO Act enables controls to be set for the use, disposal, classification, storage, packaging, and labelling of hazardous substances to protect the environment and health and safety of people and communities.
- 9 To ensure that these controls are complied with, several central government agencies and local authorities are delegated compliance monitoring and enforcement responsibilities for hazardous substances. The HSNO Act allows enforcement agencies to use several enforcement tools to respond to hazardous substance non-compliances including warning letters, compliance orders, and prosecution.
- 10 While lower-level compliance tools such as warning letters and compliance orders can encourage compliance for those individuals willing to comply, these tools may not provide sufficient incentives to comply with hazardous substance controls in all scenarios, particularly in instances of repetitive and deliberate non-compliance.
- 11 Prosecution provides a strong disincentive to non-compliance but is a disproportionate response to minor offences and has large associated costs for enforcement agencies, courts, and offenders. It is also difficult for enforcement agencies to show that a prosecution for a minor offence is required in the public interest.
- 12 Currently, no intermediate enforcement tool currently exists under the HSNO Act between lower-level compliance tools such as warning letters and compliance orders and the more serious tool of prosecution. Infringement notices are a common enforcement tool that function as such an intermediate enforcement tool. Infringement offences are a subset of criminal offences that do not result in criminal convictions.
- 13 Infringement offence schemes have been implemented under other legislation including the Resource Management Act 1991, the Conservation Act 1987, the Biosecurity Act 1993, and the Civil Aviation Act 1990. Notably, following health and safety reforms in 2017, a hazardous substances infringement offence scheme was also introduced under HSWA.

### *Previous policy decisions*

- 14 Section 140(1)(h) and section 140(1)(i) of the HSNO Act enable regulations to be made that prescribe hazardous substance infringement offences and their associated fees. These regulations would be made through an Order in Council.
- 15 In 2013, Cabinet approved a proposal to develop regulations prescribing infringement offences for hazardous substance offences under the HSNO Act [CAB 13 (400) refers]. Following Cabinet agreement, attempts were made to develop this infringement scheme but due to competing priorities this work was not completed.
- 16 In 2015, an amendment was made to the HSNO Act through the Health and Safety Reform Bill to increase the maximum infringement fee from \$1,000 to \$3,000 and to extend the existing entitlement for territorial authorities to retain all infringement fees they collect to also include regional councils.

## Analysis

### *Proposed infringement offence scheme*

- 17 MfE and the EPA have developed a proposed infringement offence scheme for hazardous substances offences under the HSNO Act. This scheme would prescribe infringement offences and their fees under the HSNO Act, allowing hazardous substance enforcement agencies to issue infringement notices ('on-the-spot fines') for these offences. These proposed infringement offences are listed in appendix 1 of the attached consultation document.
- 18 Fees for these infringement offences would range from \$200 to \$3,000. Officials at the EPA and MfE have set these proposed fees according to the *degree of potential harm these offences may cause to the environment and health and safety of people and communities*, grouped into three categories: low, medium, and high. In addition, officials have used proportionality and fairness as a moderating consideration to ensure the proposed fees are not excessive in achieving their purpose, especially where non-compliant parties are likely to be households. Table 1 below shows examples of existing offences that would become infringement offences with fees.

**Table 1: Examples of proposed infringement offences and their fees**

Regulation	Description of offence	Fee
Hazardous Substances (Fireworks) Regulations 2001 - Regulation 6(3)	Selling fireworks to a person aged under 18 years	\$3,000
Hazardous Substances (Labelling) Notice 2017 – Clauses 8 and 32	Supplying a hazardous substance without a correct label	\$3,000
Hazardous Substances (Safety Data Sheets) Notice 2017 - Clause 9(3)(b)	Failing to establish a record for alternative compliance before importing or manufacturing a hazardous substance	\$200
Hazardous Substances (Packaging) Notice 2017 - Clauses 9(2) and 9(4)	Where the drop test is not required, failing to display a warning statement on the outside the packaging that is in English and easily readable that the package may not withstand a drop of 0.5m	\$1,000
Hazardous Substances (Hazardous Property Controls) Notice 2017 - Clause 47	Failing to ensure that equipment used for ecotoxic substances meets the requirements of regulation 13.7 of the HSW Hazardous Substances Regulations 2017	\$1,000
Hazardous Substances (Importers and Manufacturers) Notice 2015 - Clause 10(4)	Failing to provide NZ Customs with an Explosives Import Certificate issued by the EPA	\$3,000

- 19 Under the proposed infringement scheme, importers, manufacturers, suppliers, and users of hazardous substances who commit an infringement offence would be liable to receive an infringement offence notice. While Ministry of Justice guidance specifies that infringement fees should rarely exceed \$1,000, the HSNO Act does not allow

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different fees to be specified for individuals and entities/businesses.<sup>1</sup> As such, where appropriate, fees exceeding \$1,000 have generally only been applied to infringement offences that would be committed by importers, manufacturers, and suppliers of hazardous substances or committed in workplaces.

- 20 The purpose of an infringement offence scheme is to deter conduct that is of relatively low seriousness. Prosecution would remain the tool of choice for more significant breaches that involve serious harm to people or the environment. Should an enforcement agency wish to bring a prosecution for an offence listed as an infringement offence, a court could impose a fine greater than \$3,000 but less than \$500,000.
- 21 Because a criminal conviction would not be able to be imposed by a court for offences that are prescribed as infringement offences under the HSNO Act, offences that MfE and the EPA consider to be sufficiently serious are proposed to *not* be prescribed as infringement offences. These are listed in appendix 2 of the attached consultation document.
- 22 MfE and the EPA have also engaged with the Offence and Penalty Vetting team at the Ministry of Justice, to ensure that the infringement offences and their fees meet the Legislation Design and Advisory Committee (LDAC) guidelines for infringement schemes. MfE and the EPA will also engage with the Offence and Penalty Vetting team to confirm the infringement offences meet the LDAC guidance following the consultation and prior to final policy decisions by Cabinet.

### *Benefits of this infringement offence scheme*

- 23 There are several benefits to enabling the use of infringement notices in response to relatively minor hazardous substance non-compliances. Infringement offence schemes allow more proportionate responses to relatively minor non-compliances as enforcement officers can tailor their enforcement responses to a particular situation and to escalate their enforcement approach as necessary.
- 24 Infringement notices are also more administratively efficient than prosecutions for non-compliances that warrant a greater response than warning letters and compliance orders, as they can be issued by enforcement officers at the time of inspection.
- 25 In developing the proposed infringement scheme, MfE and the EPA undertook targeted engagement with hazardous substance enforcement experts within both central government agencies and local authorities. Central government agencies included Maritime New Zealand, WorkSafe New Zealand, New Zealand Police, the Ministry of Health, Waka Kotahi NZ Transport Agency, and the Civil Aviation Authority.
- 26 While data on hazardous substance non-compliances is lacking, anecdotal evidence suggests that infringement notices would function as a useful tool for enforcement agencies responding to hazardous substance non-compliances. These enforcement experts cited a number of instances where infringement notices would likely have encouraged improved compliance or where non-compliances could have warranted the issuing of a notice.

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<sup>1</sup> In contrast, the Health and Safety at Work (Infringement Offences and Fees) Regulations 2016 contains different infringement fees for individuals and entities/businesses, and infringement fees for entities/businesses are set as high as \$9,000.

- 27 By providing a greater deterrence to non-compliances, an infringement offence scheme would be expected to reduce harms to the environment, people and communities caused by minor hazardous substance offending.

### **Financial Implications**

- 28 There are no direct fiscal implications to the Crown from the proposals in this paper.

### **Legislative Implications**

- 29 After consultation and final policy decisions have been made, regulations will be made under the Hazardous Substances and New Organisms Act 1996 by an Order in Council.

### **Impact Analysis**

#### *Regulatory Impact Statement*

- 30 MfE's Regulatory Impact Analysis Panel has reviewed the consultation document *Implementation of a hazardous substances infringement scheme*, which will function as an interim regulatory impact statement. The Panel confirms that the level of information provided meets the quality assessment criteria, for this stage of the process, and is likely to lead to effective consultation on the proposed infringement offences canvassed in the discussion document.
- 31 The consultation will provide information on the case for and the design of the infringement scheme. This will inform further policy development and allow for effective analysis of the policy intervention and comparison between the proposed offences. It will also support the later delivery of a regulatory impact analysis to inform subsequent decisions.

#### *Climate Implications of Policy Assessment*

- 32 The Climate Implications of Policy Assessment (CIPA) team has been consulted and confirms that the CIPA requirements do not apply to this proposal as the threshold for significance is not met.

### **Population Implications**

#### *Implications for Māori*

- 33 There are no specific implications of the proposals in this paper for Māori.

#### *Gender implications*

- 34 There are no specific gender implications of the proposals in this paper.

#### *Disability implications*

- 35 There are no specific disability implications of the proposals in this paper.

### **Human Rights**

- 36 The proposals in this paper and the attached consultation document are consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

## Consultation

- 37 The following agencies have been consulted on this paper and their views have been taken into account: EPA, Maritime New Zealand, WorkSafe New Zealand, New Zealand Police, the Ministry of Health, Waka Kotahi NZ Transport Agency, Fire and Emergency New Zealand, the Civil Aviation Authority, New Zealand Customs Service, the Ministry for Primary Industries, the Ministry of Business, Innovation and Employment, and the Ministry of Transport.

## Communications

- 38 Should Cabinet agree to the recommendations outlined in this paper, the attached consultation document *Implementation of a hazardous substances infringement scheme* will be released on the EPA's website for public comment, accompanied by a media release.

## Proactive Release

- 39 I propose to proactively release this paper on MfE's website within 30 business days, including any redactions as appropriate under the Official Information Act 1982.

## Recommendations

I recommend that the Committee:

- 40 **note** that Cabinet previously agreed that a hazardous substances infringement offence scheme should be developed [CAB 13 (400) refers];
- 41 **note** that the Ministry for the Environment and Environmental Protection Authority have undertaken engagement with key enforcement agencies to develop the proposed hazardous substances infringement offence scheme;
- 42 **agree** to a public consultation on the proposed hazardous substances infringement offence scheme;
- 43 **approve** the document *Implementation of a hazardous substances infringement scheme* for this public consultation;
- 44 **authorise** the Minister for the Environment to make minor design, editorial and technical changes to the consultation document as needed prior to its release.
- 45 **note** that I will seek Cabinet approval of final policy decisions through Cabinet's Environment, Energy and Climate Committee.

Authorised for lodgement

Hon David Parker

Minister for the Environment

Appendix 1. Consultation document – *Implementation of a hazardous substances infringement scheme*



# Cabinet Environment, Energy and Climate Committee

## Minute of Decision

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*This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.*

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### Proposal to Publicly Consult on a Hazardous Substance Infringement Offence Scheme Under the Hazardous Substances and New Organisms Act 1996

Portfolio                      Environment

On 22 June 2023, the Cabinet Environment, Energy and Climate Committee:

- 1        **noted** that in July 2013, Cabinet agreed that a hazardous substances infringement offence scheme should be developed under the Hazardous Substances and New Organisms Act 1996 (HSNO Act) [CAB Min (13) 24/13];
- 2        **noted** that the Ministry for the Environment and Environmental Protection Authority have undertaken engagement with key enforcement agencies to develop the proposed hazardous substances infringement offence scheme;
- 3        **agreed** to a public consultation on the proposed hazardous substances infringement offence scheme;
- 4        **approved** the discussion document *Implementation of a Hazardous Substances Infringement Scheme*, attached to the submission under ENV-23-SUB-0025, for public consultation;
- 5        **authorised** the Minister for the Environment to make minor design, editorial and technical changes to the consultation document as needed prior to its release;
- 6        **noted** that public consultation is expected to start in July 2023 and will run for a period of four weeks;
- 7        **noted** that the Minister for the Environment will seek Cabinet approval of final policy decisions through Cabinet's Environment, Energy and Climate Committee.

Rebecca Davies  
Committee Secretary

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**Present: (see over)**

**Present:**

Hon Dr Megan Woods  
Hon Dr Ayesha Verrall  
Hon Willie Jackson  
Hon David Parker (Chair)  
Hon Peeni Henare  
Hon Kieran McAnulty  
Hon Willow-Jean Prime  
Hon Rachel Brooking

**Officials present from:**

Office of the Prime Minister  
Officials Committee for ENV



# Cabinet

## Minute of Decision

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### Report of the Cabinet Environment, Energy and Climate Committee: Period Ended 23 June 2023

On 26 June 2023, Cabinet made the following decisions on the work of the Cabinet Environment, Energy and Climate Committee for the period ended 23 June 2023:

ENV-23-MIN-0027	s 9(2)(f)(iv)	
ENV-23-MIN-0020		
ENV-23-MIN-0024		
ENV-23-MIN-0021		
ENV-23-MIN-0022		
ENV-23-MIN-0023		
ENV-23-MIN-0025		<p><b>Proposal to Publicly Consult on a Hazardous Substance Infringement Offence Scheme Under the Hazardous Substances and New Organisms Act 1996</b></p> <p>Portfolio: Environment</p>

s 9(2)(f)(iv)

ENV-23-MIN-0026

ENV-23-MIN-0028



Diana Hawker  
Acting Secretary of the Cabinet