IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV 2022-485-422
[2022] NZHC 3610

UNDER	the Financial Markets Conduct Act 2013
BETWEEN	FINANCIAL MARKETS AUTHORITY Plaintiff
AND	CIGNA LIFE INSURANCE NEW ZEALAND LIMITED Defendant

Hearing: 17 October 2022

Counsel: F J Cuncannon and P I C Comrie-Thomson for Plaintiff
B A Keown and K E Crichton for Defendant

Judgment: 22 December 2022

JUDGMENT OF MALLON J

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Introduction

[1] Cigna Life Insurance New Zealand Limited (Cigna) is an insurer operating in New Zealand. It offers a range of insurance products to New Zealand customers, including life, income protection, trauma, accidental death, bill protection and permanent disability cover. It admits that it made false or misleading representations to its customers in breach of the Financial Markets Conduct Act 2013 (the Act).[1] It accepts that a pecuniary penalty is to be imposed for that breach.

[2] The Financial Markets Authority (FMA) and Cigna recommend that the Court impose a starting point for that penalty of $5.5 million. They have not reached agreement on a recommended discount for mitigating factors. The FMA submits that the discount should not exceed 30 per cent of the starting point whereas Cigna considers that the discount should be up to 40 per cent of the agreed starting point.

[3] The FMA also seeks a declaration of contravention[2] and an order that the pecuniary penalty is first applied to the FMA's actual costs in bringing this proceeding.[3] Cigna does not oppose the declaration or order.

Agreed facts[4]

Background

[4] Cigna entered into policies with its customers under its own name, as well as contracts that carried the branding of third parties but that were underwritten by Cigna. The policies with the branding of third parties were referred to as "white label" policies. Cigna administered the policies by communicating with customers regarding policy documentation, cover and premium.

[5] The policies (including white label policies) often included "indexation" benefits. This allowed for increases to be made to a customer's cover and premiums to keep up with inflation without requiring any further underwriting assessment.

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1 Financial Markets Conduct Act 2013, ss 22(d), (f) and (h).
2 Section 486.
3 Section 484(1)(b).
4 In addition to the facts pleaded in the statement of claim and accepted by Cigna, the parties filed a comprehensive agreed statement of facts pursuant to the Evidence Act 2006, s 9.

During the period 25 January 2013 to 21 November 2019 Cigna employed indexation clauses in at least 40 different types of policies (relevant policy types). These relevant policy types either had variable-rate or fixed-rate clauses.

[6] There were at least 33 types of policies that had variable-rate clauses. Of these:

(a) Twenty-nine provided that Cigna may or would offer a customer an annual increase to their cover on a compounding basis, subject to a specified minimum or maximum percentage. They also provided that the amount of the increase would be determined by Cigna based on the Consumer Price Index (CPI) or inflation.

(b) Four provided that the customer's cover would be increased at the official rate of inflation subject to a specified minimum or maximum percentage on a compounding basis (official rate of inflation clause).

[7] There were at least seven types of policies that had fixed-rate clauses. These provided for indexation increases to occur at pre-specified fixed rates of three per cent, five per cent or 10 per cent. Of these:

(a) Five provided that the customer's premium amount and cover would increase by the specified percentage of the original cover on the anniversary date that the policy was originally issued.

(b) Two provided that Cigna may or would offer a yearly increase at the specified percentage on each anniversary date to help keep the customer's cover up to date with inflation; and the customer did not have to accept an indexation increase but no further increases would be offered if the customer declined three successive indexation increases.

[8] Prior to March 2013 Cigna generally applied indexation rates in line with the average rate of CPI for policies with variable-rate clauses and the relevant fixed rate for the policies with the fixed-rate clauses. The conduct at issue began in 2013 and

continued until 2019 (a six-year period). During this six-year period the CPI ranged from 0.1 per cent to 2.2 per cent and averaged 1.12 per cent.

[9] The background to the conduct began with a decision in around October 2012 to move the indexation rate from 5.3 per cent to 2.5 per cent for many policies that contained variable-rate clauses. This change was made to reflect a drop in the CPI rate that was closer to one per cent and the minimum indexation in certain policies of two per cent and 2.5 per cent. Cigna's senior management discussed this change in late December 2012. They discussed that there had been no sign off for this change and no consideration had been given to the impact it would have for revenues and sales. Senior management decided to apply the five per cent indexation rate to policies that contained variable-rate clauses.

Misleading conduct (premiums)

[10] After the December 2012 senior management discussion:

(a) Between March 2013 until about 31 March 2019 Cigna applied a flat indexation rate of 10 per cent on a simple-interest basis on some "accidental death insurance" policies that had variable-rate clauses.

(b) Between March 2013 until about 30 September 2015 Cigna applied a five per cent indexation rate on a compounding basis to policies that had the official rate of inflation variable-rate clauses (refer [6(b)] above). From about 1 October 2015 until 31 March 2019 Cigna adopted the CPI rate as at 1 March 2015 (0.3 per cent) as the indexation rate for the variable-rate policies that had the official rate of inflation[5] clauses.

(c) The five per cent indexation rate was automatically applied to other variable-rate clause policies, other than those where the 10 per cent rate was applied (refer (a) above), renewed on or after 1 March 2013 until 31 March 2019. This rate was applied unless customers decided not to

5 See statement of claim at [8(b)] but compare with [33] of the agreed statement of facts. See n 7 below.

accept this increase or sought an increase of an alternative amount. Cigna applied this rate having considered, but not actioned, amending the policy documents to remove any dependence on the CPI going forward.

[11] Together these policies are referred to as the affected policies.

[12] By applying flat rates that were not set by reference to CPI or the fixed rate contained in the policy, Cigna made false and misleading representations to customers with the variable-rate and fixed-rate clauses. In charging premiums on the basis of those flat rates, Cigna falsely or misleadingly represented that the indexation increase had been calculated in accordance with the customer's policy and that Cigna was entitled to charge the premium.

Misleading conduct (annual notification letters)

[13] In general, each policy would automatically renew on the anniversary date until the policy was cancelled or the termination date in the policy was reached. Around five weeks before the anniversary date, Cigna would notify the customer of any indexation increase. The annual notification letter advised the customer that the indexation increase would automatically apply unless the customer opted out of the increase by contacting Cigna.

[14] During the period 25 January 2013 to 21 November 2019 Cigna had standard-form annual notification letters. Their content varied over time:[6]

(a) Type 1 letter: This was used between 25 January 2013 and October 2015. The letter stated that:

(i) the customer's cover was adjusted annually to ensure it kept its original value as inflation increased;

6 From October 2015 the standard form annual notification letters varied depending the type of policy, whether the policies included provision for indexation and whether the policy included a provision for rerating.

(ii) Cigna used the most recent increase in CPI to calculate the increase in cover; and

(iii) the new premium would be charged to the customer unless the customer advised Cigna that it did not want to accept the "inflation adjustment".

(b) Type 2 letter: this was used from October 2015 until at least 19 November 2019. The letter stated that:

(i) the increase (either 10 per cent or five per cent) was to help keep the customer's cover up to date and to protect against inflation (with an asterisk that said that it was subject to any limitation in the policy);

(ii) the increase was guaranteed regardless of the customer's current health;

(iii) the customer did not have to accept the increase if they wanted to keep cover at the existing level, but the new premium would be charged unless they advised Cigna that they wanted to leave cover at the existing level; and

(iv) the customer could contact Cigna if they wanted to discuss their options or any other matter relating to their policy.

(c) Type 3 letter: this was used from October 2015 until at least 26 May 2016. It stated that:

(i) the customer's cover was adjusted on its anniversary date to take into account the customer's age and inflation;

(ii) to help make sure the value of the policy did not decrease over time and to help keep the cover up to date and to protect against inflation, the customer's cover could be increased by

(depending on the policy) either 10 per cent or five per cent (with an asterisk stating that this was subject to any limitation within the policy);

(iii) the increase was guaranteed regardless of the customer's current health;

(iv) the customer did not have to accept it if they wanted to keep cover at the existing level, and if the customer wanted to increase their cover to a different level than the percentage increase in the letter, then Cigna would be pleased to help and the customer should contact Cigna as soon as possible;

(v) but the new premium would be charged to the customer unless they advised Cigna that they wanted to leave cover at the existing level or wanted to increase their cover by a different amount; and

(vi) the customer should contact Cigna if they wanted to discuss their options or any other matter relating to the policy.

(d) Type 3A letter: this was used by Cigna from 26 May 2016 until at least 21 November 2019. The letter stated that:

(i) to ensure the value of the customer's policy did not decrease over time, to help keep the customer's cover up to date and to protect against inflation, the customer's cover would be increased by (depending on the policy) either 10 per cent or five per cent (with an asterisk stating that this was subject to any limitation within the policy);

(ii) the increase was guaranteed regardless of the customer's current health;

(iii) the customer did not have to accept if they wanted to keep cover at the existing level, but the new premium would be charged to the customer unless the customer advised Cigna that they wanted to leave the cover at the existing level; and

(iv) if the customer wanted to increase their cover to a different amount, they should contact Cigna as soon as possible and they should also contact Cigna if they wanted to discuss their options or any other matter relating to their policy.

[15] By applying flat rates that were not set by reference to CPI or the fixed rate contained in the policy, Cigna made false and misleading representations to customers with the variable-rate and fixed-rate clauses in its letters. In particular, it made false and misleading representations that:

(a) the specified increase had been calculated in accordance with the customer's policy;

(b) for Type 1 letters, that the CPI had been used to calculate the specified indexation increase;

(c) for Type 2, 3 and 3A letters, that the specified increase was based on a reasonable measure of inflation and/or linked to CPI; and

(d) Cigna was entitled to charge the premiums specified in the letters.

Reviews and external advice

[16] Cigna sought some legal advice in 2012 from an external, appropriately qualified lawyer, prior to implementing the five per cent indexation rate.

[17] Cigna reviewed its indexation practices in 2014 and 2015. The 2015 indexation review arose out of concerns raised by Cigna's appointed actuary in 2015 as to whether Cigna was operating in accordance with the policy wording for the variable-rate clauses. It made some changes to its practices. Cigna also obtained legal

advice in 2015 from the same lawyer about the flat indexation rates it was applying and its annual notification letters. It also obtained advice from the same lawyer on the 2017 annual notification letters.

[18] Cigna generally followed the 2015 and 2017 legal advice. It did this by reducing the indexation rate to 0.3 per cent for policies with the official rate of inflation[7] clauses. It also followed the advice by amending the annual notification letters. However, it did not individually review its many policy wordings, nor amend its indexation rates each year to maintain some relativity with CPI, nor amend its policy wordings going forward to avoid the issue altogether.

[19] Cigna acknowledges that it did not give sufficient consideration to whether or not the 0.3 per cent, the five per cent or 10 per cent indexation rates (refer [10] above) reflected customer expectations. Customers could opt out of the automatic indexation increase. Following 2015, they were expressly given the option in the annual notification letters to increase their cover by a different amount. However, the burden was on the customer to determine whether an alternative indexation rate would better meet their needs.

[20] Cigna also acknowledges that it ought to have considered more carefully whether changes to its policy documents and communications were required to ensure its existing and future customers would not be misled. It acknowledges that it continued to sell policies with the unamended variable-rate clauses after it had adopted the five and 10 per cent indexation rates referred to above ([10(a) and (b)]) between January 2013 and March 2019.

[21] Following a 2018 review, in about January 2019 it changed the indexation rate for affected policies with variable-rate clauses to two per cent (the published CPI rate at the time) to take effect on the anniversary dates of those policies on or after 1 April 2019. On 21 November 2019 Cigna changed its system to set the rate of indexation to match CPI. This took effect for affected policies with variable-rate clauses on the anniversary dates of the policies on or after 1 February 2019.

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7 The agreed statement of facts at [33] refers to official rate of “Indexation” clauses. This appears to be a mistake as the agreed pleading refers to the official rate of “inflation” clauses.

[22] The FMA acknowledges that Cigna did not intend to breach the Act.

Remediation programme

[23] In June 2018 the FMA and the Reserve Bank of New Zealand commenced a joint Conduct and Cultural Review into the conduct and culture of New Zealand life insurers.[8] Following this review, in around February 2019 Cigna commenced an investigation and self-reported to the FMA that it had applied indexation at rates exceeding CPI. In about September 2019 Cigna initiated a remediation programme. This covered all policies where the indexation rates applied did not match the rate of CPI (for policies with variable-rate clauses) or the fixed rate (for policies with fixed-rate clauses) between March 2013 and January 2021.

[24] The remediation programme provided different offers depending on the following classifications:

(a) Customers who had received indexation rate increases and who continued to hold policies: they were offered the option of maintaining the higher cover and associated premiums or reducing their cover to the level it would have been had indexation matched CPI or the relevant fixed rate and a refund of the additional premium charged for the higher indexation applied.

(b) Existing customers who had declined indexation rate increases: they were offered the option of maintaining their lower level of cover and associated premiums or increasing their cover and associated premiums to the level it would have been had indexation matched CPI or the relevant fixed rate.

(c) Existing customers who received indexation increases in some years but declined them in other years: they were offered the options in (a) and (b) as applicable in each year.

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8 I understand from counsel at the hearing that this was a general review. It did not relate directly to the conduct at issue here.

(d) Existing customers with fixed-rate clauses who received a lower indexation rate than they were entitled to under their policy: they were offered the option of adjusting their cover to the level that ought to have applied.

(e) Customers who received indexation increases but who no longer held policies: they were offered a refund reflecting the amount charged for premiums above the amount they would have been charged had indexation matched CPI or the relevant fixed rate unless the refund was $20 or less and they had not contacted Cigna – in which case Cigna retained the amount for payment to charity.

[25] Cigna also grouped affected former and existing customers into seven groups based on their potential refund (ranging between $20 or less and up to $7,000 or more). These groupings determined the type of communication they would receive. Those in the group with the highest potential refund received a letter, a phone call from a Cigna senior executive, a dedicated case manager, and a notification to the customer's broker. Former customers with a potential refund of $20 or less were not proactively contacted. In between these groups, customers received a letter or email, or a letter and email with different levels of follow up.

[26] Cigna also developed eight template letters to cover the different ways that existing customers may have been affected. It developed separate letters for existing and former customers where the potential refund was $20 or less. In October 2019 Cigna also advised the FMA of the approach it was intending to take to remediation. Its aim was to ensure that customers did not feel they had been disadvantaged by Cigna's indexation practices.

[27] The FMA considered that two of Cigna's eight template letters (which applied to 23,502 and 1,246 policies respectively) did not explain that Cigna had applied indexation increases that were inconsistent with the terms of the customer's policy, nor that they had received more cover than they had contracted for and therefore more cover than they may have wanted.

[28] Cigna therefore agreed to send further letters to customers who received these letters and elected to maintain their existing cover. These letters would:

(a) explain that the FMA had completed an investigation and that Cigna admitted it applied indexation rates that were inconsistent with the customer's policy;

(b) say that, in its earlier communications Cigna had already given customers the choice to change their level of cover to ensure it was right for them; and

(c) say that customers should continue to ensure that their cover is right for them and they should contact Cigna if they have any questions about their cover or the letter.

[29] As at 8 August 2022 (the date of the agreed statement of facts) Cigna had repaid $10,786,685 (including interest) of additional premiums to customers through its remediation programme.

Impact of misleading conduct

[30] The total number of affected policies to which the five per cent, 10 per cent or 0.3 per cent indexation rates, rather than indexation rates based on CPI or the relevant fixed rate were applied, was 52,363. By applying these rates rather than the policy indexation rates, customers paid $13,522,689.54 in additional premiums under the affected policies between 1 April 2014 and 31 March 2019. The average amount of additional premium paid by a customer was a total of $258 over the six-year period, the median paid was a total of $69 and the maximum paid by a customer was a total of $33,370.29 over the same six-year period.

[31] On the other side of the coin, customers under these policies received additional cover totalling $841 million, without an underwriting assessment, and Cigna was correspondingly at risk for that total additional cover. This corresponded to an average total of $32,500 of additional cover per customer over the six-year period.

[32] From the additional premiums charged of $13,522,689.54, Cigna has paid out around $6,051,000 as a result of the additional cover provided, paid out $1,765,000 in third party commissions, and assessed $1,150,000 in additional premium reserves. On this basis, Cigna's net gain is around $4,556,000. This net gain will continue to reduce over time as future claims are paid out in respect of the additional cover.

Other contraventions

[33] Cigna has admitted liability under s 536 of the Act for breaches relating to misleading representations ANZ Bank made when issuing monthly credit card repayment insurance policies with Cigna. Cigna has entered into an undertaking with the FMA about this. However, the indexation issues and Cigna's self-report of them predate the credit card repayment insurance policy issue and its self-report of those issues. The FMA therefore considers that in the present case Cigna can be treated as a party that has not previously contravened the Act.

Relationship of trust

[34] Cigna acknowledges that providers of financial services, including insurers, have a special relationship of trust with their customers. It also acknowledges that customers are entitled to trust that Cigna will be clear and transparent in its communications with its customers.

Cigna's size and resources

[35] Cigna is a wholly-owned subsidiary of Cigna New Zealand Holdings Limited. Its ultimate parent is Chubb Limited. Chubb Limited is a Fortune 500 insurance and financial services company.

[36] Cigna's premium revenue from insurance contracts for the year ended 31 December 2020 was $270,969,000 and for the year ended 31 December 2021 was $302,629,000.

Process improvements and cooperation

[37] In early 2019 Cigna adopted an enhanced development process. In January 2020 it adopted enhanced formal processes for identifying and applying indexation increases.

[38] At an early stage Cigna advised the FMA of its intended remediation approach and customer contact. It kept the FMA informed of the steps it was taking throughout the process. It kept the FMA up to date with its customer contact and remediation programme. It also cooperated with the FMA throughout the investigation. It accepted it had contravened the Act at the earliest stage. It agreed to settle the present proceeding on terms acceptable to the FMA.

The Financial Markets Conduct Act

[39] The Act was enacted as part of reforms made in response to the global financial crisis. Its purposes include to:[9]

(a) promote the confident and informed participation of businesses, investors, and consumers in the financial markets;

(b) promote and facilitate the development of fair, efficient and transparent financial markets; and

(c) provide for timely, accurate and understandable information to be provided to persons to assist them to make decisions relating to financial products or the provision of financial services.

[40] Part 2 of the Act provides "fair dealing" provisions. For present purposes the relevant fair dealing provision is s 22. It provides:

> **22 False or misleading representations**
>
> A person must not, in trade, in connection with any dealing in financial products, the supply or possible supply of financial services, or the promotion

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9 Financial Markets Conduct Act, ss 3 and 4.

> by any means of the supply or use of financial services, make a false representation—
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> …
>
> (d) that products or services have any sponsorship, approval, endorsement, performance characteristics, accessories, uses, or benefits; or
>
> …
>
> (f) with respect to the price of the products or services; or
>
> …
>
> (h) concerning the existence, exclusion, or effect of any condition, warranty, guarantee, right, or remedy, including (to avoid doubt) in relation to any guarantee, right, or remedy available under the Consumer Guarantees Act 1993.

[41] Cigna accepts it was supplying financial services and that it made false or misleading representations in its letters and the premiums charged that breached s 22(d) (performance characteristics or benefits of the indexation increases), s 22(f) (price, relating to the increase in premium), and s 22(h) (right to charge the increase in premium).

[42] Section 38 provides that a contravention of s 22 may give rise to civil liability under subpart 3 of Part 8 of the Act, including a pecuniary penalty. It also provides a pecuniary penalty may not exceed the greatest of:[10]

(a) "the consideration for the relevant transaction";

(b) three times the amount of the gain made or loss avoided; and

(c) $1 million in the case of an individual or $5 million in any other case.

[43] Sections 489 and 490 are included in subpart 3 of Part 8 of the Act. Section 489 provides that the FMA may apply for a pecuniary penalty under the Act.[11] It also provides that, if the FMA does so apply, the court:[12]

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10 Section 38(2).
11 Section 489(1).
12 Section 489(2).

(a) must determine whether the person has contravened a relevant provision (here, s 22);

(b) must make a declaration of contravention if it is satisfied that the person has contravened a relevant provision; and

(c) may order the person to pay to the Crown a pecuniary penalty that the court considers appropriate if is satisfied that the person has contravened a relevant provision.

[44] Consistently with s 38, s 490 provides that the maximum amount of a pecuniary penalty is the greatest of:

(a) the "consideration for the transaction that constituted the contravention (if any)";[13]

(b) if it can be readily ascertained, three times the amount of the gain made, or the loss avoided, by the person who "contravened" the relevant provision;[14] and

(c) $1 million in the case of a contravention of an individual or $5 million in any other case.[15]

[45] Section 492 sets out a non-exhaustive list of relevant factors that the court must have regard to in determining an appropriate penalty. As relevant to the present case, they include: the purposes of the Act; the nature and extent of the contravention; the nature and extent of any loss suffered by a person, or gains made by the person in contravention; whether a person has paid compensation; the circumstances in which the contravention took place; whether the person in contravention has previously been found by the court to have contravened the Act or another enactment or to have engaged in any similar conduct; and the relationship of the parties to "the transaction constituting the contravention".[16]

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13 Section 490(1)(a).
14 Section 490(1)(b).
15 Section 490(1)(c).
16 Section 492(a)–(f) and (h).

[46] Section 493 provides that, if the court orders that a person pay a pecuniary penalty, the court must also order that the penalty must be applied first to the FMA's actual costs in bringing the proceeding.

Assessment

The court's role

[47] It is accepted that Cigna breached s 22 as alleged. It is also accepted that it is appropriate to order a pecuniary penalty. Most of the components of an appropriate penalty are also accepted. The court's role when asked to approve a pecuniary penalty agreed between the parties as part of a settlement of a proceeding under comparable legislation is well settled.[17] It has also been applied under the Act. The court does not embark on its own enquiry. Rather, it considers whether the agreed penalty is in the proper range. This reflects the interests of the parties in having agreed a resolution and the public interest in promoting a resolution and thereby avoiding costly, time-consuming and uncertain litigation.

[48] I agree with the parties that this approach remains applicable here where most of the components of an appropriate penalty have been agreed and their area of disagreement is of narrow compass.

Approach to setting a penalty

[49] In *Financial Markets Authority v ANZ Bank New Zealand Ltd* the Court adopted a three stage-framework:[18]

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17 For example *Commerce Commission v New Zealand Milk Corporation Ltd* [1994] 2 NZLR 730 (HC) at 553; *Commerce Commission v Kuehne + Nagel International AG* [2014] NZHC 705 at [21]; *Commerce Commission v Air New Zealand Ltd* [2013] NZHC 1414, (2013) 13 TCLR 618 at [23]; *Commerce Commission v Visy Board (NZ) Ltd* [2013] NZHC 2097, (2013) 13 TCLR 628 at [34]; *Commerce Commission v Carter Holt Harvey Ltd* [2014] NZHC 531 at [30]; *Commerce Commission v Aurora Energy Ltd* [2020] NZHC 610 at [3]; *Commerce Commission v First Gas Ltd* [2019] NZHC 231 at [3]; and *Reserve Bank of New Zealand v TSB Bank Ltd* [2021] NZHC 2241 at [2].

18 *Financial Markets Authority v ANZ Bank New Zealand Ltd* [2021] NZHC 399, (2021) 16 TCLR 28 at [37]; subsequently applied in *Financial Markets Authority v AIA New Zealand Ltd* [2022] NZHC 2444.

(a) First, the court determines the maximum penalty under ss 38(2) and 490 of the Act.

(b) Next, the court sets a starting point having regard to the relevant factors in s 492.

(c) Last, the court adjusts the starting point by applying an uplift or discount on the basis of circumstances personal to the defendant.

[50] The parties are agreed that this approach is an appropriate one.

Maximum penalty

[51] The FMA submits the "consideration for the relevant transaction" referred to in s 38 and the "consideration for the transaction that constituted the contravention" in s 490 is the total premiums charged on the affected polices over the period 1 April 2014 to 21 November 2019. On that basis the amount is in excess of $100 million.

[52] Cigna submits the consideration for the transaction is arguably the incremental increase in annual premiums on account of indexation. Cigna has assessed the consideration on this basis as approximately $21 million.

[53] I consider it is artificial to view the relevant transaction or the transaction that constituted the contravention as the indexation component of the policy. The transaction was the offer to customers to renew their policy on terms that included the indexation rate that Cigna had advised it was applying (subject to a customer contacting Cigna to advise that they did not want to accept that indexation). Cigna made false and misleading representations in that transaction in the offer set out in the annual notification letters and in charging premiums that included the indexation cover.

[54] I therefore agree that the maximum penalty, if based on the consideration for the relevant transaction/the transaction that constituted the contravention, is at least $100 million. This sum is obviously higher than $5 million ([44(c)] above). It is also higher than three times the net gain ([44(b)] above) – the net gain is $4,556,000 (being

the additional premiums charged of $13,522,689.54, less $6,051,000 in additional cover paid out and $1,765,000 in additional commissions paid and $1,150,000 in additional premium reserves) and three times that net gain is $13,688,000. The maximum penalty is therefore $100 million.

Starting point

[55] The agreed starting point recommended to the Court is $5,500,000. This starting point has been reached with reference to the relevant factors in s 492 and a comparison with other cases.

[56] As to the relevant factors:

(a) Increasing premiums (and correspondingly increasing cover) through false and misleading representations is at odds with the Act's purposes, particularly the purposes of promoting the informed participation of consumers in financial markets and providing accurate information to assist customers' decisions.[19] Customers are entitled to expect that their insurance provider will be accurate in its communications and approach to the renewal of their policies.

(b) The conduct occurred over a significant time frame (five years after s 22 of the Act came into force)[20] and affected a large number of policies (52,363 policies). It arose from periodic decisions made by senior management.

(c) Cigna's net gain is presently $4,556,000 but will continue to reduce over time as future claims are paid out. To achieve deterrence it is generally appropriate for the starting point to be substantially higher than the net gain.[21] While customers obtained increased cover from Cigna's conduct, it is not for Cigna to decide this for customers without being clear and transparent about the basis for the increase. Further,

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19 Financial Markets Conduct Act, ss 3(a) and 4(a).

20 Section 22 came into force on 1 April 2014.

21 *Financial Markets Authority v ANZ Bank New Zealand Ltd*, above n 18, at [55].

while the increase in premiums paid was at the low end for some (median amount of $69 over six years), for others it was more significant (one customer paid a total additional premium of $33,370.29 over the six-year period).

(d) Cigna's conduct was not the result of a systems error.[22] It was the result of decisions made by senior management. External advice was periodically sought and generally followed but it did not lead to a review of the many policy wordings in place, nor a review of its indexation rates each year to maintain relativity with CPI, nor to amending the policy wording to avoid the issue altogether. The FMA acknowledges, however, that the contravention was unintentional.

(e) Cigna's relationship with its customers, as provider of insurance, is one of special trust pursuant to which customers are entitled to expect clear and transparent communications from Cigna.

[57] I have not included Cigna's comprehensive approach to remediation and that it is a first time contravener of the Act in the starting point. As they are factors that are personal to Cigna, they are relevant to the third stage ([49(c)] above), rather than the starting point.

[58] In setting a starting point, general and individual deterrence is important.[23] Relevant to this, is that although Cigna obtained and generally followed external advice, it did not give sufficient consideration to its approach and the changes that were necessary. It is also relevant that Cigna is a large company with the resources to pay a pecuniary penalty. As already mentioned, a starting point should also be significantly above the net gain to meet deterrent aims.

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22 Compare with *Financial Markets Authority v ANZ Bank New Zealand Ltd*, above n 18, at [11] and [59]; and *Financial Markets Authority v AIA New Zealand Ltd*, above n 18, at [14] and [83].

23 *Financial Markets Authority v ANZ Bank New Zealand Ltd*, above n 18, at [45]; and *Financial Markets Authority v AIA New Zealand Ltd*, above n 18, at [87]. See also the Financial Markets Conduct Bill 2011 (342-1) (explanatory note) at 40.

[59] As to a comparison with other cases, the two other cases involving contraventions under Part 2 of the Act are quite different. In *ANZ Bank New Zealand Ltd*, the Court accepted as appropriate a starting point of $400,000.[24] Although the conduct extended over a similar period and involved a large company, the extent of the conduct and its impact was much less than here as it involved about 307 policies and consideration of $200,000. In *Financial Markets Authority v AIA New Zealand Ltd*, the Court adopted a starting point of $1,000,000. Again, the extent and impact of the conduct was much less – affecting 383 customers who were overcharged about $413,5000 or, in respect of seven of them, underpaid between $19,000 and $46,000. In both cases the maximum penalty was $5,000,000 (although an argument was made in *AIA New Zealand Ltd* that the maximum penalty was $15,000,000 because there were three breaches[25]) as the consideration and three times the net gain from the contravening transactions were less than this. Moreover, the cases involved inadvertent or process and system errors that were difficult to detect.[26]

[60] A starting point here that is more than ten times that in *ANZ Bank New Zealand Ltd* and more than four times that in *AIA New Zealand Ltd* cannot be said to be too high given these differences. Relative to the maximum penalty, and more importantly from a deterrence perspective relative to the net gain, it might be said to be at the lower end of the available range. However, that is appropriate given that Cigna sought external legal advice throughout and generally followed that advice and that policy holders received the benefit of additional cover.[27]

[61] The FMA's thorough submissions also discuss comparisons with penalties under other legislation and in Australia. It is not necessary to discuss these cases. I

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[24] *Financial Markets Authority v ANZ Bank New Zealand Ltd*, above n 18, at [85].

[25] The Judge did not determine this because, taking into account the principle of totality, it would not be determinative of the penalty. *Financial Markets Authority v AIA New Zealand Ltd*, above n 18, at [59].

[26] At [100(a)]; and *Financial Markets Authority v ANZ Bank New Zealand Ltd*, above n 18, at [11] and [59].

[27] I agree with Cigna's characterisation of the conduct as involving "significant contraventions, but in circumstances which suggested that a defendant had made at least some attempt to comply with their obligations" which comes from case law under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009. However, I consider it is not appropriate to apply the percentage of the maximum penalty that is discussed in those cases. The maximum penalty here, based on the consideration received from the transaction, is significantly disproportionate to the net gain.

can, however, say that nothing in these cases indicates that the agreed starting point here is out of range.

[62] I am satisfied that the agreed starting point is within the available range having regard to all relevant factors.

Personal aggravating factors

[63] There are no personal aggravating factors.

Personal mitigating factors

[64] The FMA accepts that a substantial discount is available to Cigna because it self-reported, fully cooperated throughout the investigation (including by providing its legal advice obtained during the relevant period), accepted it contravened the Act at the earliest possible stage, agreed to settle the proceeding on terms acceptable to the FMA, adopted process improvements, undertook a substantial remediation programme and kept the FMA regularly informed about that programme.

[65] The FMA submits that the maximum discount in the circumstances is 30 per cent. It says this is consistent with the discount in *AIA New Zealand Ltd* where AIA's self-report and cooperation was not materially distinguishable from that of Cigna.[28] AIA also made changes to prevent further contraventions and remediated all affected customers. The discount in that case was broken down into five per cent for self-reporting, five per cent for cooperation and 20 per cent for early admission.[29]

[66] The FMA also submits a 30 per cent discount is consistent with *ANZ Bank New Zealand Ltd* for its cooperation and early admissions.[30] It also submits it is consistent with discounts in Commerce Act 1986 cases where discounts of 25 to 30 per cent have been afforded to companies that cooperated with the Commerce Commission and made reasonably early admissions.[31]

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28 *Financial Markets Authority v AIA New Zealand Ltd*, above n 18, at [111]–[112].
29 At [111].
30 *Financial Markets Authority v ANZ Bank New Zealand Ltd*, above n 18, at [87].
31 The FMA cites *Commerce Commission v Objective Corporation Ltd* [2022] NZHC 1864 at [20]–[21]; *Commerce Commission v First Gas Ltd*, above n 17, at [50]; and *Commerce Commission v GEA Milfos International Ltd* [2019] NZHC 1426 at [29]–[34].

[67] The FMA says that any larger discount should be reserved for cases where a defendant provides a significantly enhanced degree of cooperation.[32] It submits that Cigna provided the level of cooperation to be expected of a responsible company. It submits that, while this is important and is to be encouraged, a discount above 30 per cent absent special features (for example, providing evidence and assistance in the prosecution of others) risks reducing the penalty to a level where it does not provide sufficient deterrence.

[68] Cigna submits that its personal mitigating factors warrant a greater discount than in *ANZ Bank New Zealand Ltd*. Specifically, ANZ did not claim credit for an absence of regulatory contraventions and its self-report was made late. Cigna says that 30 per cent is not the cap for discounts absent special circumstances. It refers to other regulatory cases with similar features where discounts of 35 to 40 per cent have been allowed.[33]

[69] I consider that a discount in the range of at least 30 per cent but less than 40 per cent was available. I agree that this case is distinguishable from *ANZ Bank New Zealand Ltd* for the two reasons Cigna identifies. A prompt self-report following an internal investigation after the Conduct and Culture Review compares with the more than one-year delay in ANZ's self-report. Cigna's prompt self-report, although to be expected of a responsible organisation, is still worthy of recognition to appropriately incentivise responsible behaviour. A discount of not less than five per cent for this factor is warranted. I regard Cigna's full cooperation with the investigation (including remediating the contravention), acceptance of responsibility at the earliest opportunity and cooperation in settling the proceeding as warranting a discount of not less than 25 per cent. I consider a 30 per cent discount is at the bottom end of the available range for these factors and a little more would not be out of range.

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32 The FMA contrasts *Commerce Commission v Qantas Airways Ltd* HC Auckland CIV-2008-404-8366, 11 May 2011 at [51]–[62]; *Commerce Commission v British Airways* HC Auckland CIV-2008-404-8347, 5 April 2011 at [35]–[43]; *Commerce Commission v Japan Airlines* HC Auckland CIV-2008-404-8348, 29 June 2012 at [59]–[68]; and *Commerce Commission v Cathay Pacific* [2013] NZHC 843 at [56]–[62].

33 *Commerce Commission v Aurora Energy Limited*, above n 17, at [37]; *Commerce Commission v Vector* [2019] NZHC 540; *Commerce Commission v Carter Holt Harvey*, above n 17, at [53]–[54]; and *Financial Markets Authority v Henry* [2014] NZHC 1853 at [54]–[56].

[70] Some regulatory cases have allowed a discount where the defendant has contravened the regulatory regime for the first time.[34] It is a relevant factor under s 492 so should be considered. Here, however, this factor is somewhat tempered by the fact that the conduct at issue began from the inception of the Act and continued over a period of years. Nevertheless, a small discount for this factor could be allowed.

[71] I agree with the FMA that, absent special or unusual features, discounts should not be so large as to remove the deterrence objective of pecuniary penalties under the Act's regime. I also note that this is not a case where I am concerned that the agreed starting point is so high that a too low discount could put the end penalty out of range. However, standing back, it can be asked what more could Cigna have done once it realised its contravention. Its response to that contravention is to be encouraged even if it was what the FMA is entitled to expect from responsible organisations.

[72] Overall, I consider a discount of 35 per cent for all the mitigating factors is appropriate. From a starting point of $5,500,000 that means an end penalty of $3,575,000. I consider that penalty appropriately deters non-compliance while also encouraging voluntary and fulsome corrective action and cooperation.

Result

[73] Accordingly:

(a) I make a declaration that Cigna contravened s 22(d),(f) and (h) of the Act.

(b) I impose a penalty of $3,575,000 on Cigna for that contravention.

(c) I make an order under s 493 of the Act that the penalty is to be applied first to the FMA's costs in bringing the proceeding.

Mallon J

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34 See for example *Financial Markets Authority v Henry* above n 33, at [54]; and *Takeovers Panel v New Zealand Image Group Ltd* [2022] NZHC 1504 at [68] and [77].