IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2025-404-000015
[2025] NZHC 1027

BETWEEN	FINANCIAL MARKETS AUTHORITY Plaintiff
AND	WESTPAC NEW ZEALAND LIMITED Defendant

Hearing: 1 May 2025

Appearances: N Flanagan and A Luck for Plaintiff
E J Rushbrook and M C Kavanagh for Defendant

Judgment: 1 May 2025

JUDGMENT OF VENNING J

This judgment was delivered by me on 1 May 2025 at 3.00 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors: Meredith Connell, Auckland
Russell McVeagh, Wellington

Introduction

[1] Westpac New Zealand Limited (Westpac) admits that it breached s 22 (a), (f) and/or 22(h) of the Financial Markets Conduct Act 2013 (the Act) as set out in the three causes of action in the statement of claim and notice of admissions dated 20 December 2024.

[2] Specifically for the purposes of this proceeding, Westpac accepts that it made false and/or misleading representations by:

(a) failing to provide package benefits to customers in relation to its employee gold and platinum (EGP) packages and representing that it had the right to charge amounts that it was not entitled to charge (EGP representations);

(b) failing to provide package benefits to customers in relation to its association (Association) packages and representing that it had the right to charge amounts it was not entitled to charge (Association representations); and

(c) failing to provide agreed pricing to customers with Business Transact Accounts (BTA) and representing that those customers had received the agreed pricing and Westpac had the right to charge the incorrect amounts (BTA representations).

[3] Once it identified the issues Westpac promptly reported them to the Financial Markets Authority (FMA) and engaged in an extensive remediation exercise.

[4] Westpac and the FMA now seek the imposition of an agreed pecuniary penalty for the contraventions of the Act. They jointly suggest the Court impose a pecuniary penalty of $3.25 million on Westpac. They also agree it is appropriate that declarations are made that Westpac contravened:

(a) s 22(h) and/or (a) and (f) of the Act in relation to the EGP and Associated representations;

(b) s 22(f) and/or (h) of the Act in relation to the BTA representations;

(c) finally they seek an order under s 493 of the Act that the penalty be applied first to the FMA's costs in bringing the proceedings.

Background

[5] Westpac is New Zealand's fourth largest bank by total assets. For the financial year ended 30 September 2024 it had a net profit of $1,055,000,000.

[6] To attract and retain customers Westpac offered various package benefits to consumer and business customers and preferential pricing for business customers.

EGP packages

[7] Between February 2004 and November 2021, Westpac offered the EGP packages. The various versions of the EGP package offered a combination of benefits. Eligibility was dependent upon a number of criteria.

[8] Westpac had processes in place to deliver the benefits when a customer first signed up. However if customers became entitled to the EGP packages at a later point in time, staff were required to manually record a customer's entitlement on the customer's profile. Throughout the relevant period, Westpac failed to ensure customers continued eligibility for the package benefits when setting up additional products and services at a later point in time. The failure arose from the fact Westpac had no guidance or processes in place for staff to check customers' eligibility in those circumstances.

[9] In 2016 Westpac embarked on a programme of work to ensure all Westpac products and services were being regularly reviewed. In July 2017, Westpac undertook a product and service review of its EGP package arrangements. The review identified a possible risk around the manual processes. It also identified further work was required to investigate the risk. In late 2017 Westpac informed the FMA it would undertake a review of its packages and processes. The review of the Bank's packages was a large scale and highly complex exercise.

[10] The review disclosed that a number of customers did not receive the EGP package benefits to which they were entitled. From 1 January 2012 to November 2021, the EGP failures affected 15,462 customers, who suffered quantifiable harm of up to $3,848,973.67 made up of $3,832,868.80 incorrectly charged fees/premia, $11,573.26 in net savings interest not delivered and $4,531.61 of associated withholding tax not deducted.

[11] Following its initial reports to the Commerce Commission and FMA in 2017, in August 2019, Westpac offered two enforceable undertakings to the FMA relating to the package arrangements. Westpac prioritised rectification and customer remediation activities for the packages covered by the enforceable undertakings.

[12] Rectification and remediation work in relation to the EGP failures commenced in October 2019. The first remediation payments were made in September 2021. In November 2021, Westpac informed the FMA of the details of the EGP failures in its conduct and culture review update. Further details were provided through 2022 and 2023. Westpac's remediation of the EGP packages issue is now complete. It has paid affected customers remediation of $3,938,214.20 including use of money interest of $89,240.53.[1]

[13] Westpac accepts that the EGP representations were made by it in connection with the supply of financial products and services in the course of its business as a registered bank. It also accepts that by making the representations it made false and/or misleading representation concerning the existence of its rights to the amounts recorded in the account statements, policy schedules and renewal letters and/or where the EGP package should have increased the amount payable by Westpac to the customer, that the products and/or services were of a particular value, in breach of s 22(a) of the Act, and should have reduced the amount payable by the customer with respect to the price of the products and/or services in breaches of s 22(f) of the Act.

---

[1] From the date the Act came into force on 1 April 2014 the quantifiable harm totalled up to $3,244,656.45.

Association packages

[14] From at least January 2012 to July 2022 Westpac also offered Association packages to various personal and business banking customers who met the qualifying conditions. Again there were a number of versions of the Association packages. Westpac also created new package codes for each Association. The Association packages offered a combination of various benefits for both retail and business customers.

[15] Between January 2012 and July 2022, when customers entered into an Association package agreement, Westpac required staff to manually record a customer's entitlement to Association package benefits on the customer's file. Any products or services the customer acquired at the same point would accordingly be provided with the benefits. However Westpac failed to ensure that customers were also given Association package benefits on products and services they acquired after they first entered an Associate package agreement. The failure arose from the fact Westpac had no guidance or processes in place for staff to check customers' eligibility for Association packages when setting up products and services acquired after customers first entered into the Association package agreement and had no systems, processes or controls to periodically check. Essentially the Association failures led to Westpac charging amounts they were not entitled to charge (by charging a fee at an ordinary amount rather than a discounted amount) or charging an insurance premium other than at a discounted package rate. Customers were affected from at least 1 January 2012.

[16] From 1 January 2012 to 31 July 2022 the Association failures affected 8,714 customers, who suffered harm of up to $2,077,409.29 comprising $1,232,043.84 incorrect fees and $600,101.48 in net savings interest not delivered and $245,263.97 of associated withholding tax not deducted.[2]

[17] While Westpac received a number of complaints between 2016 and 2020 the complaints were resolved by frontline staff and not escalated. In July 2017, Westpac identified there was a risk it was not providing the promised benefits and carried out

---

[2] From 1 April 2014 to 31 July 2022, the quantifiable harm was up to $1,823,401.36.

the investigation referred to above. Remediation work in relation to the Association failures that began in October 2019 is now complete. Westpac has paid remediation to affected customers of $2,117,138.54 including use of money interest of $39,729.25.

[18] However, Westpac accepts that it made false or misleading representations concerning the existence of its rights to the amounts recorded in the account statements, policy schedules and renewal letters in breach of s 22(h) of the Act, and/or where the Association package should have increased the amount payable by Westpac to the customer that the products and/or services were of a particular value in breach of s 22(a) of the Act and should have reduced the amount payable by the customer with respect to the price of products and/or services in breach of s 22(f) of the Act.

Business Transact Accounts

[19] Westpac also offered an agreed pricing arrangement to some business customers who held BTA with it. BTA pricing included a number of plans.

[20] Westpac accepts that between June 2011 and October 2021 it failed to provide the correct PAYG pricing for some BTA customers. The failure arose because prior to June 2011 Westpac used one charge code to apply PAYG pricing for BTA customers. In June 2011 it ceased using that code and replaced it with another one. Westpac systems automatically applied the new charge code to all new BTA customers. Charge code "D" applied PAYG pricing which included a $6 monthly account maintenance fee and a waiver of transaction fees for the customers' 15 most expensive transactions per month.

[21] From June 2011, when an existing customer on a monthly plan fee requested to be moved to a PAYG plan Westpac required its staff to manually process the change. Westpac directed staff to use the new "D" code but did not discontinue an old "A" code in its systems. When the "A" code was selected it resulted in a customer not receiving a waiver of the 15 most expensive transaction fees each month. In 2015 Westpac also updated the charge code "A" to apply a different pricing for customers on a BizPac plan. It was less beneficial than the PAYG plan.

[22] In a period prior to 2015 a number of BTA customers who were on PAYG but were incorrectly placed on the charge code "A" rather than "D" did not receive discounts for which they were eligible and were overcharged as a result. From 2015 onwards those BTA customers who were on PAYG but were incorrectly placed on charge code "A" rather than "D" were incorrectly charged higher monthly account maintenance fees and in most instances did not receive the monthly transaction fee waiver.

[23] From June 2011 to 31 March 2014, 77 BTA customers were overcharged by a total of up to $974.48. From 1 April 2014 to October 2021, 4,259 BTA customers were overcharged by a total of up to $1,286,850.08. Westpac first identified the issue in March 2021 through a review of the operation of BTAs. In April 2022, Westpac reported the BTA overcharges to the FMA. Remediation work in relation to the BTA overcharges is now largely complete.

[24] In total, Westpac has paid remediation of $1,291,451.22 which included $3,626.66 use of money interest. Westpac accepts it made representations about the BTA which were false and misleading with respect to the pricing of the PAYG plan in breach of s 22(f) and/or concerning the existence of Westpac's right to charge the amounts recorded in the statements in breach of s 22(h) of the Act.

Statutory basis for the proceeding and approach

[25] Under s 489(1) of the Act the FMA may apply for a pecuniary penalty order where a person has breached the civil liability provisions such as s 22 as in this case.

[26] Under s 489(2) when the FMA makes such an application to the Court, the Court:

(a) must determine whether the person has contravened, or been involved in a contravention of a civil liability provision; and

(b) must make a declaration of contravention if satisfied the person has contravened, or been involved in a contravention of a civil liability provision; and

(c) may order the person to pay the Crown a pecuniary penalty that the Court considers appropriate if satisfied of the contravention.

[27] This proceeding is one of a series of recent cases brought by the FMA under the Part 2 Fair Dealing provisions of the Act. Other recent cases are *FMA v ANZ Bank New Zealand Ltd*; *FMA v AIA New Zealand Ltd*; *FMA v Cigna Life Insurance New Zealand Ltd*; *FMA v Kiwibank Ltd*; *FMA v Vero Insurance New Zealand Ltd*; and *FMA v Medical Assurance Society New Zealand Ltd*.[3]

[28] In *FMA v ANZ Bank NZ Ltd*, the Court confirmed the general approach to setting penalties under the Securities Markets Act 1988 and the principles applicable to setting penalties under the Commerce Act 1986 are equally applicable to setting penalties under the Act.[4]

[29] The authorities have applied a three-stage framework:

(a) the Court should determine the maximum pecuniary penalty in accordance with s 490 of the Act;

(b) the Court sets a starting point having regard to the relevant statutory criteria in s 492 of the Act; and then

(c) the Court adjusts the starting point by applying an uplift or discount on the basis of relevant circumstances personal to the particular defendant.

Maximum penalty

[30] The maximum penalty in the present for Westpac's breaches of s 22 is the greatest of:

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

---

3 *FMA v ANZ Bank New Zealand Ltd* [2021] NZHC 399; *FMA v AIA New Zealand Ltd* [2022] NZHC 2444; *FMA v Cigna Life Insurance New Zealand Ltd* [2022] NZHC 3610; *FMA v Kiwibank Ltd* [2023] NZHC 2856; *FMA v Vero Insurance New Zealand Ltd* [2023] NZHC 2837; and *FMA v Medical Assurance Society New Zealand Ltd* [2023] NZHC 3312.

4 *FMA v ANZ Bank New Zealand Ltd*, above n 1.

(b) if readily ascertainable, three times the amount of the gain made or loss avoided; or

(c) $5 million.

[31] The FMA submits the aggregate maximum is $20.2 million on the basis that the applicable maximum for the EGP representations is $9,733,000 and the applicable maximum for the Association representations is $5,470,000 and the maximum for the BTA representations would be the $5 million maximum.

[32] For its part Westpac submits that the starting point should be a maximum penalty of $15 million. While accepting the figures in the statement of claim record quantifiable harm of "up to" the amounts recorded for the purposes of this proceeding, Westpac does not accept they can be used as its ascertained "gain" for the purposes of s 490(1)(b). Westpac may have overcompensated customers who had ceased to be eligible for the packages. It submits that the maximum should be $5 million per breach (including the EGP and Association breaches) leading to a maximum of $15 million.

[33] In response, Mr Flanagan noted that the FMA had not required Westpac to conduct an assessment and avoid over-remediation. It accepted the cost would not likely have justified it.

[34] Ultimately it is unnecessary to decide the point in this case given the parties' agreement as to the starting point. I simply note the points made by the parties and reserve their position in case it becomes material in a future case. Like Cooke J in *Financial Markets Authority v Kiwibank Ltd*,[5] I accept that in this case there is a degree of artificiality in the maximum penalty as the most important step is the assessment of the starting point.

[35] In setting the starting point the Court is directed to relevant statutory criteria at s 492(a) to (h). They include:

---

5 *Financial Markets Authority v Kiwibank Ltd*, above n 3, at [23].

(a) *s 492(a) – the purposes of the Act*

Westpac accepts its contraventions are of a nature that could reduce confidence in financial markets as set out in s 3 of the Act;

(b) *s 492(b) – nature and extent of the contraventions*

I accept it is relevant that the failings occurred in the context of manual processes so that the benefits were not always applied when the customers became entitled at a later point in time. In relation to the BTA customers, while the agreed pricing plan was delivered in the vast majority of cases the failings meant it was not applied to all customers. It is also relevant, as the FMA submits, that the issues were longstanding and Westpac should have been able to identify potential issues with the EGP and Association packages, particularly, earlier given it had received a number of individual complaints. Against that, the FMA accepts that Westpac acted responsibly when the breaches were identified. That is to its credit. Finally, as for the BTA issue, I note that it is confined to a relatively small subset of Westpac's large customer base.

(c) *s 492(c) – nature and extent of any loss, damage or gains*

Westpac accepts it experienced a temporary and unintended gain from its failure to deliver its promises to customers. The Customers have been fully remediated, including those who may not have been entitled to remediation.

(d) *s 492(d) – compensation*

As noted the customers have been remediated and fully compensated. Total remediation of $7,346,000 has been paid, including use of money interest of $132,596.00. The payments have included payments to customers affected prior to the introduction of the Act.

(e) *s 492(e) – circumstances of contravention*

I accept Westpac's submission there is no suggestion that its conduct was deliberate or wilfully misleading, nor that there was any intention to intentionally deprive customers of benefits. While it had in place systems, the systems were insufficient. The point has already been made that Westpac should have identified the issue earlier.

(f) *s 492(h) – relationship of the parties*

Westpac accepts the relationship between it and its customers is one in which the customer should be able to trust the Bank. There are however no particular factors pointing to vulnerability.

Deterrence

[36] Westpac accepts deterrence is a relevant consideration but submits the suggested penalty is a significant one and one which cannot merely be seen as a cost of doing business. I agree with that submission in this case.

Knowledge of breaches and circumstances of self-reporting

[37] The FMA accepts that Westpac proactively carried out an investigation looking for issues through its internal reviews and self-reported in a timely manner. It was also fully cooperative.

[38] In the circumstances, the parties suggest a starting point of $5 million. I agree that a large bank such as Westpac should have appropriate systems and controls and processes in place. I take into account the aggravating feature of the length of time the errors occurred, and the large number of customers, particularly the EGP and Association customers, who were impacted. I also have regard to other penalties imposed in other cases. In *FMA v Kiwibank Ltd* the Court adopted a starting point of $1.25 million, although the number of customers and quantum harm was lower than the indicative harm amounts here.[6] In *FMA v Vero Insurance NZ Ltd* the Court took a

6 *FMA v Kiwibank Ltd*, above n 3.

starting point of $6 million.[7] In the circumstances I accept the figure of $5 million is an appropriate starting point.

Adjustments/mitigation

[39] I note FMA accepts there are no aggravating factors. As to mitigating factors the parties accept 35 per cent discount is appropriate. I note that a similar discount was applied in the *Vero* decision.

[40] The fact Westpac self-identified the issues, self-reported to the FMA and has cooperated fully with the FMA investigation, is relevant. Westpac acknowledged responsibility for its failures from the outset and has been entirely open and cooperative with the FMA throughout the investigation admitting liability at the earliest stage. Westpac has resolved the issue, withdrawn the packages from sale and fully remediated its customers. This is its first breach. In the circumstances, again I agree that a 35 per cent discount is appropriate.

[41] That supports the final recommended penalty amount of $3.25 million, which while a significant sum, is appropriate given the circumstances outlined above.

Result

[42] The Court makes orders:

(a) imposing the penalty of $3.25 million on Westpac;

(b) declaring that Westpac contravened:

(i) s 22(h) and/or (a) and (f) of the Act in relation to EGP and Associated representations; and

(ii) s 22(f) and/or (h) of the Act in relation to the BTA representations; and

---

7 *FMA v Vero Insurance NZ Ltd*, above n 3.

(c) that the penalty be applied first to the FMA's costs in bringing the proceedings.

_____

Venning J