IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2020-404-000819
[2021] NZHC 399

UNDER	The Financial Markets Conduct Act 2013
BETWEEN	FINANCIAL MARKETS AUTHORITY Plaintiff
AND	ANZ BANK NEW ZEALAND LIMITED Defendant

Hearing:	12 February 2021
Counsel:	N F Flanagan and A D Luck for the Plaintiff A Horne and A Payne for the Defendant
Judgment:	5 March 2021

JUDGMENT OF MUIR J

This judgment was delivered by me on 5 March 2021 at 4.00 pm
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date:…………………………….

Solicitors:
Meredith Connell, Auckland
Minter Ellison Rudd Watts, Auckland

Introduction

[1] On 4 June 2020 the Financial Markets Authority ("FMA") filed civil proceedings against ANZ Bank New Zealand Limited ("ANZ") alleging various breaches of the Financial Markets Conduct Act 2013 ("the Act").

[2] In its Admission of Causes of Action and Facts dated 2 September 2020 ANZ admitted the relevant causes of action.

[3] The Court is now asked to impose an appropriate penalty. After extensive and, in my view, responsible discussions, the parties agreed that this should be $280,000, acknowledging, however, that the amount of any pecuniary penalty is ultimately a matter for the Court.

[4] I am satisfied that the proposed penalty is appropriate. My reasons follow.

Background

[5] The background to this claim may be stated relatively briefly.

[6] ANZ issues and manages consumer credit cards in the course of its business.

[7] Between 1991 and September 2019 it offered credit card repayment insurance ("CCRI") policies to customers holding credit cards. CCRI policies are a form of insurance which cover some or all of a customer's outstanding credit card repayments in certain circumstances, for example, in the event of the customer's bankruptcy, redundancy, injury, illness or death.

[8] ANZ received a commission for providing information on prospective customers to insurers who would then sell CCRI policies to those customers. Until May 2016, ANZ also sold CCRI policies directly.

[9] At all relevant times, ANZ issued monthly credit card statements to its customers. These statements included the customer's outstanding credit card balance and any premiums ANZ represented were owing in respect of the CCRI policies sold

to that customer. These premiums were determined as a percentage of the amount owing on the last date of the statement period.

[10] Between 2017 and 2018 ANZ identified two problems with its CCRI offerings—duplicate policies and ineligible customers. The issues affected approximately 0.3 per cent of relevant CCRI policyholders. I will address each problem in turn.

Duplicate policies issue

[11] From approximately December 1998, ANZ issued some customers already holding an existing CCRI policy with one or more additional policies ("Duplicate Policies"). It did so due to deficiencies in its sales and fulfilment systems and errors in its computer systems. The Duplicate Policies did not provide any additional benefits beyond those conferred by the customers' existing policies.

[12] In the period since commencement of the Act (1 April 2014):

(a) ANZ issued 186 customers with Duplicate Policies;

(b) ANZ charged a total of $176,769.57 (including premiums, fees and interest) on such policies; and

(c) ANZ received a total of $20,458.43 in relevant commissions.

[13] The issue persisted until 23 August 2019, by which time ANZ had cancelled all of the Duplicate Policies then in force.

Ineligible customers issue

[14] Between 1997 and 1 May 2018, customers were not eligible to hold some CCRI policies if they were aged over 65 or 75 years old, depending on the policy ("Ineligible Customers").

[15] During that time, ANZ issued CCRI policies to some customers who exceeded the maximum age of eligibility. ANZ also failed to cancel the CCRI policies held by

some customers who exceeded this maximum and it continued to collect premiums on those policies. The CCRI policies conferred no rights or benefits on Ineligible Customers, albeit that none were declined on age eligibility grounds.

[16] Again taking the position as from 1 April 2014:

(a) 121 Ineligible Customers held, or were issued with, CCRI policies;

(b) ANZ invoiced Ineligible Customers a total of $22,351.19 (including premiums, fees and interest) on such policies; and

(c) ANZ received a total of $337.42 in relevant commissions.

[17] From 1 May 2018, all of ANZ's CCRI policies were available to customers up to 99 years of age.

ANZ's response to the issues

[18] ANZ became aware that some customers may have been or were affected by:

(a) the Duplicate Policy issue, in or around September 2017; and

(b) the Ineligible Customers issue, in or around May 2018.

[19] In April 2018, the FMA and the Reserve Bank of New Zealand ("RBNZ") launched a joint review into the conduct and culture of 11 New Zealand retail banks including ANZ.

[20] Between 3 May 2018 and 21 June 2018, ANZ engaged in correspondence with the FMA and the RBNZ in relation to that review. However, although ANZ had identified both the Duplicate Policy issue and the Ineligible Customers issue by May 2018, it did not disclose those issues to the FMA/RBNZ. This was despite specific requests from those bodies that ANZ provide information on "any work underway to remediate any identified issues where bank conduct has resulted in detrimental outcomes for customers". The FMA accepts, however, that this was not on account of

any wilful decision on ANZ's part to withhold the information from the Regulators but rather as a result of inadequacies in its systems whereby the issue was not appropriately escalated to ANZ's Remediation Governance Forum ("RGF"), which was dealing with the FMA at the time, and the RGF's failure to interrogate adequately all relevant aspects of the bank's operation.

[21] By contrast, ANZ did advise the insurer for the majority of its CCRI Policies (Cigna Life Insurance New Zealand Limited) of:[1]

(a) the Duplicate Policy issue on or around 10 May 2018; and

(b) the Ineligible Customers issue on or around 24 May 2018.

[22] ANZ ultimately reported these issues to the FMA on 27 and 28 June 2019 by which time it says it had identified the extent of the problems and was well advanced in its assessment of how they could be appropriately and fairly remediated (a position complicated by the fact that a proportion of those affected carried ongoing debit balances on their credit cards with the result that inappropriately charged premiums themselves attracted interest at credit card rates—I accept that in this context there was likely to be significant complexity in the calculation of relevant compensation).

[23] ANZ has since taken steps to contact and reimburse customers affected by these issues. Where customer identification has been possible (approximately 98 per cent of those affected) it has reimbursed all charges paid for duplicate or ineligible CCRI policies, including premiums, fees and interest. In the case of customers who habitually paid the full sum outstanding on their cards on the due date, it has refunded premiums and paid use-of-money interest. In the case of the very small number of customers it has been unable to locate (7 of 307 or approximately 2 per cent) it intends to pay the relevant sums to Inland Revenue as unclaimed monies.

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[1] ANZ's CCRI Policies have been underwritten by various insurers at various times. Since at least 2001, the insurer for the majority of ANZ's CCRI Policies was Cigna Life Insurance New Zealand Limited.

The current application

[24] In its claim the FMA alleged various breaches of s 22(d) and/or (h) of the Act in respect of the Duplicate Policies issue, and s 22(a) and/or (h) in respect of the Ineligible Customers issue.

[25] Section 22 of the Act provides:

> 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 by any means of the supply or use of financial services, make a false or misleading representation—
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> (a) that the products or services are of a particular kind, standard, quality, grade, quantity, composition, or value, or have had a particular history; or
>
> …
>
> (d) that the products or services have any sponsorship, approval, endorsement, performance characteristics, accessories, uses, or benefits; 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; or …

[26] In particular, the FMA alleges that by issuing statements to customers affected by the Duplicate Policy issue, ANZ made false and/or misleading representations that:

(a) the Duplicate Policies conferred additional benefits beyond those already conferred by the customer's existing CCRI Policy, in breach of s 22(d) of the Act; and

(b) it was entitled to charge the premiums that appeared on the statements in breach of s 22(h) of the Act.

[27] Likewise, the FMA alleges that by issuing statements to those affected by the Ineligible Customers issue ANZ made false and/or misleading representations that:

(a) the Policy charged for was a valid and enforceable CCRI Policy in respect of the Ineligible Customer, in breach of s 22(a) of the Act; and/or

(b) it was entitled to charge the premiums that appeared on the statements in breach of s 22(h) of the Act.

[28] ANZ admits these breaches. It also accepts:

(a) that the FMA is entitled to a declaration that ANZ contravened s 22(d) and/or (h) of the Act by issuing statements to customers affected by the Duplicate Policy issue; and

(b) that the FMA is entitled to a declaration that ANZ contravened s 22(a) and/or (h) of the Act by issuing statements to those affected by the Ineligible Customers issue.

[29] The parties have also agreed that a pecuniary penalty of $280,000.00 should be imposed on ANZ. They now seek the Court's approval of that penalty.

General approach to recommended penalties

[30] The quantum of any pecuniary penalty to be imposed is a matter for the Court. However, the Court is mindful of the significant public interest in bringing about the prompt and efficient resolution of penalty proceedings. In *Commerce Commission v Alstom Holdings SA*, Rodney Hansen J stated:[2]

> Finally, in discussing the general approach to fixing penalty, I acknowledge the submission that the task of the Court in cases where penalty has been agreed between the parties is not to embark on its own enquiry of what would be an appropriate figure but to consider whether the proposed penalty is within the proper range – see the judgment of the Full Federal Court in *NW Frozen Foods v ACCC* (1996) 71 FCR 285. As noted by the Court in that case and by Williams J in *Commerce Commission v Koppers*, there is a significant public benefit when corporations acknowledge wrongdoing, thereby avoiding time-consuming and costly investigation and litigation. The Court should play its part in promoting such resolutions by accepting a penalty within the proposed range. A defendant should not be deterred from a negotiated resolution by

2 *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) at [18].

> fears that a settlement will be rejected on insubstantial grounds or because the proposed penalty does not precisely coincide with the penalty the Court might have imposed.

[31] Similarly, in *Commerce Commission v Kuehne + Nagel International AG* Venning J said:[3]

> … as has been confirmed by the full Court in *Commerce Commission v NZ Milk Corporation Ltd* and adopted in a number of subsequent cases, there can be no objection to a joint view of the parties on submissions as to penalty. Nor is there any issue with the view being reached as a result of negotiations so that it represents what could be described as a settlement. Such settlements are in the interests of the parties, the community and the judicial system enabling as they do early disposal of the proceedings. They also encourage a realistic view of the culpability and penalty and avoid the need for a full hearing with the attendant costs associated with such a hearing.

[32] While agreed penalty proposals have significant public benefit, the Court must still be satisfied that the proposed final figure satisfies the objectives of the Act and reflects the particular circumstances of the case before it. In that context, it is the final amount that matters; the Court need not accept each step of the methodology proposed, so long as it is satisfied that the recommended penalty is in an appropriate range.[4]

The penalty regime under the Act

[33] The FMA was established in response to the global financial crisis of 2007–2008 which substantially undermined public confidence in financial markets.[5] The Act was enacted shortly afterwards in an attempt to consolidate and reform the law while protecting the interests of those who dealt in such markets. Its main purposes are to—[6]

> (a) promote the confident and informed participation of businesses, investors, and consumers in the financial markets; and
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> (b) promote and facilitate the development of fair, efficient, and transparent financial markets.

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3 *Commerce Commission v Kuehne + Nagel International AG* [2014] NZHC 705 at [21] (citations omitted) referring to *Commerce Commission v New Zealand Milk Corporation Ltd* [1994] 2 NZLR 730 (HC) at 733.

4 *Commerce Commission v Air New Zealand Ltd* [2013] NZHC 1414 at [27].

5 Financial Markets Authority Act 2011, s 6.

6 Financial Markets Conduct Act 2013, s 3.

[34] Additionally, it is intended to:[7]

> … provide for timely, accurate, and understandable information to be provided to persons to assist those persons to make decisions relating to financial products or the provision of financial services:

[35] To that end, the Act introduced a range of "fair dealing" provisions including s 22. Many of these are modelled on the unfair conduct provisions in Part 1 of the Fair Trading Act 1986 ("FTA").[8] Under s 489 of the Act, the FMA can, where a person has breached a civil liability provision such as s 22, apply for a pecuniary penalty order. That is precisely what the FMA did in this case.

[36] Counsel advises that this is the first penalty application to be heard under the Act. I will resist any resultant temptation to lay down a broad framework for the purpose of future cases because, on the submissions before me, there is in fact much commonality between the parties and, in those few areas where differences do occur, the practical implications in terms of the penalty mutually advanced for the Court's approval are nil.

[37] I accept at the outset, however, that there is no reason to consider that the general approach to setting penalties under the Act should be any different to that under its predecessor the Securities Markets Act 1988, in which context this Court has held that the principles applicable to imposition of penalty under the Commerce Act 1986 are, in turn, engaged.[9] So, the Court should first determine the maximum penalty, secondly set a starting point having regard to the relevant statutory criteria and thirdly adjust that starting point by applying an uplift or a discount on the basis of circumstances personal to the individual defendant.[10]

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7 Section 4(a).

8 The wording of s 22 of the Financial Markets Conduct Act in particular is very similar to s 13 of the Fair Trading Act 1986, notwithstanding that s 22 concerns financial products and financial services whereas s 13 is directed at goods and services generally.

9 See *Financial Markets Authority v Warminger* [2017] NZHC 1471 at [13]; and *Financial Markets Authority v Henry* [2014] NZHC 1853 at [34].

10 As such the approach is broadly reflective of that applicable to criminal sentencing. In *Department of Internal Affairs v Ping An Finance (Group) New Zealand Co Ltd* [2017] NZHC 2363, [2018] 2 NZLR 552 at [90], Toogood J recognised that this analogy has its limitations, particularly in respect of penalties for "a number of different types of civil liability act[s]" where the totality principles adopted in the criminal law cannot be "easily adopt[ed]. However, despite these limitations, the approach remains well supported in the authorities and in my view useful.

[38] I consider each stage in turn.

Stage one: the maximum penalty

[39] ANZ has admitted to breaching:

(a) section 22(d) and/or (h) by issuing statements to customers affected by the Duplicate Policy issue; and

(b) section 22(a) and/or (h) by issuing statements to those affected by the Ineligible Customers issue.

[40] Sections 38(2) and 490 of the Act provide that the maximum amount of a pecuniary penalty for a breach of s 22 by a body corporate will be the greatest of:

(a) the consideration for the relevant transaction;

(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 civil liability provision; or

(c) $5 million.

[41] In the present case, the "consideration for the relevant transactions" was just under $200,000.00 for both issues, a relatively small proportion of which (approximately 10 per cent) represented the gain to ANZ in premiums and commissions. The applicable maximum penalty per breach is therefore $5,000,000.00.

[42] The FMA submits, and I agree, that the two breaches occurred over substantially the same period of time and resulted from similar deficiencies in ANZ's processes and systems and that, for this reason, although the notional maximum penalty for the two breaches might be $10 million, the starting point should realistically be assessed against the maximum penalty for a single breach.

Stage two: fixing a starting point

[43] Under this stage, the Court will fix a starting point having regard to the relevant statutory criteria. Section 492 provides that the Court must have regard to "all relevant matters", including:[11]

> (a) the purposes stated in sections 3 and 4 and any other purpose stated in this Act that applies to the civil liability provision; and
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> (b) the nature and extent of the contravention or involvement in the contravention; and
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> (c) the nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in contravention or who was involved in the contravention, because of the contravention or involvement in the contravention; and
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> (d) whether or not a person has paid an amount of compensation, reparation, or restitution, or taken other steps to avoid or mitigate any actual or potential adverse effects of the contravention; and
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> (e) the circumstances in which the contravention, or involvement in the contravention, took place; and
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> (f) whether or not the person in contravention, or who was involved in the contravention, has previously been found by the court in proceedings under this Act, or any other enactment, to have engaged in any similar conduct; and
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> (g) in the case of section 534 (directors treated as having contravened), the circumstances connected with the director's appointment (for example, whether the director is a non-executive or an independent director); and
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> (h) the relationship of the parties to the transaction constituting the contravention.

[44] This section largely adopts the penalty considerations (again non-exclusive) identified in s 42Y of the Securities Markets Act. For ANZ, Mr Horne's written submissions note the omission from s 492 of the s 42Y reference to "the likelihood, nature, and extent of any damage to the integrity or reputation of any of New Zealand's securities markets because of the contravention". He suggests this detracts from the FMA's submission that deterrence "must be a relevant consideration" in setting a penalty under s 492. In oral argument the position of the parties became closer however. For the FMA, Mr Flanagan pointed out that the list of relevant factors in

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[11] Section 492.

s 492 included the "purposes of the Act" and that one of the primary purposes identified in s 3 is "promot[ing] the confident and informed participation of businesses, investors, and consumers in the financial markets". He submitted that, materially, this captured the same concept as potential "damage to the integrity or reputation" of the relevant market. Mr Horne did not demur and I agree.

[45] In the context of pecuniary penalties, deterrence will always be a relevant consideration. It may, as Toogood J observed in *Department of Internal Affairs v Ping An Finance (Group) New Zealand Co Ltd*, in fact be "the overriding objective", unlike the position in the criminal law where it is only one of the relevant principles and purposes of sentencing.[12] Such deterrence may be both specific to the defendant or more general, in the sense that it creates a strong incentive for financial institutions, and particularly large and well-resourced ones like trading banks, to maintain adequate processes and systems. Regimes such as that imposed by the Act must be considered to be premised on the assumption that the penal consequences of deficiencies in such systems should significantly incentivise improvement. To this extent, deterrence sits permanently within the Court's penalty framework. But that does not mean to say, as the FMA acknowledges, that heavy deterrent penalties are in every case warranted. Each case will be fact specific.

Section 429(a): the purposes of the Act

[46] Both parties agree that one of the central purposes of the Act is to promote the confident and informed participation of consumers in financial markets.[13]

[47] ANZ submits that, because it did not misdescribe the products, but merely misled customers by charging them for products which provided no benefit to them, their conduct is unlikely materially to undermine confidence in financial markets. It further submits that its customers were only partially uninformed, as those affected by the Duplicate Policy issue could have seen from their credit card statements that they were being charged for two premiums, and those affected by the Ineligible Customers

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[12] *Ping*, above n 10, at [92].
[13] Financial Markets Conduct Act, s 3(a).

issue could have identified the maximum age of eligibility by reading the terms of the policies.

[48] I do not find these arguments particularly persuasive. ANZ has admitted issuing CCRI policies to some customers who exceeded eligibility requirements for those policies. That necessarily involves some element of misdescription. Had ANZ accurately described the eligibility requirements, the customers would, undoubtedly, not have agreed to purchase the policies.

[49] Moreover, a central purpose of the Act is to promote the "confident and informed participation" of consumers in financial markets.[14] Consumers cannot be "confident" in their participation if they are required to doublecheck the precise details of every transaction with their bank. They are entitled to trust in the accuracy of any bank's communications and in its systems. The fact that a vigilant consumer could have identified the problem earlier does not in my view materially mitigate culpability. So could have a more vigilant ANZ .

[50] In my view this is precisely the sort of conduct which does undermine confidence in financial markets and the purposes of the Act.

Section 429(b): the nature and extent of the contravention

[51] The FMA suggest that the conduct spans a significant period of time and affected several hundred customers with the Duplicate Policies issue persisting for close to five and a half years after the commencement of s 22 and the Ineligible Customers issue persisting for over four years. It says the duration of the breaches is a significant aggravating factor in that it indicates a persistence of inadequate investment and resources into identifying such issues.

[52] ANZ says that the problem existed for the time it did simply because it was not discovered earlier which was likely the result of the very small proportion of policy holders who were affected. It says that it put in place systems which were believed to be effective and were so for the overwhelming majority of its CCRI policy holders.

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[14] Section 3(a).

[53] As such, the respective arguments dovetail with the positions taken by the parties on the extent to which—by virtue of the incentive it creates to implement better systems—a general deterrent sentence is appropriate. I will consider the issue more fully in that context.

Section 492(c): the nature and extent of any loss or damage

[54] ANZ accepts that it charged affected customers a total of $199,120.76 as a result of its errors, including premiums, interest and fees. That sum represents an average overcharge of $648.60 per customer. I accept that is a substantial amount. However, s 492(c) also engages the concept of "gains made or losses avoided by the person in contravention". The "gains" made by ANZ were small, totalling $20,587.26 for the relevant commissions.

[55] I accept the FMA's submission that, to achieve deterrence, it will generally be appropriate for the starting point to be substantially higher than the gain obtained. This ensures that penalties are set at a level where they are not seen merely as a cost of doing business and sends appropriate signals to the market in terms of the importance of compliance with the Act. Again I revert to this issue in my discussion concerning deterrence.

[56] In terms of the loss sustained by customers, I take into account that no claims were declined on account of the Ineligible Policies issue, albeit ANZ's conduct exposed affected customers to that risk.

Section 492(d): whether or not compensation has been paid

[57] The FMA acknowledges that ANZ has refunded the premiums paid by 300 of 307 affected customers, compensated for interest charged at credit card rates where appropriate, paid use of money interest where otherwise appropriate and has acted generally as a responsible Corporate should on identification of such a problem. However, it says there was significant delay in doing so after the matter first came to its attention. ANZ resists that proposition, emphasising the complexities involved in identifying precisely which accounts were affected, the duration of the problem in each case and the very significant difficulties in accurately quantifying interest entitlements

for credit card holders who periodically or permanently carried ongoing debit balances on their cards.

[58] I am prepared to accept that this was a complex process. It would in my view have been preferable for ANZ, having identified those customers affected, to have notified them that a problem existed, albeit also advising that exact quantification of losses may take some further time to complete. I do not, however, consider that this conclusion impacts materially on the penalty appropriately imposed. Overall, my assessment is that ANZ is entitled to substantial credit for what has been full compensation effected with reasonable timeliness in all the circumstances.

Section 492(e): the circumstances in which the contravention took place

[59] The FMA says that, although inadvertent, the contraventions were the product of deficient processes and systems which were in place for a significant period of time. It says that given ANZ's size and resources and its position as one of New Zealand's leading banks, its systems should have been sufficiently robust to detect such issues earlier. That position is, in my view, essentially unarguable and I will return to it when I discuss the extent to which deterrence is relevant to penalty in this case. However, in my view the inadequate resources and systems submission needs also to take into account the fact that the number of customers affected as a percentage of those holding CCRI policies was extremely small which has implications both in terms of:

(a) how likely the problem was to be identified earlier; and

(b) how, in respect of the overwhelming majority of cases, ANZ's systems proved sufficiently robust.

Section 492(f): similar contravening conduct

[60] The FMA submits that although ANZ has not previously breached the Act, it has been held liable for four breaches of the FTA between 1996 and 2015. It concedes that these breaches arose out of ANZ's marketing practices rather than deficiencies in its operational systems and processes but says that, notwithstanding this, the Court

may take into account the fact that ANZ has some history of failing to ensure the accuracy of information provided to its customers.

[61] ANZ points out that the most recent of these cases was determined by the Court six years ago, that the other examples are all more than 15 years old and that one occurred 25 years ago. It emphasises the very different nature of the breaches.

[62] I agree with ANZ that this is not a materially aggravating feature. The FMA does not contend otherwise.

Section 492(h): the relationship of the parties to the transaction

[63] The FMA says that ANZ's customers were entitled to trust their bank to do better and that its conduct breached that trust.

[64] The relevant relationship was that of banker and customer with the gloss that ANZ, to the extent relevant, was arranging insurance policies for its credit card products rather than providing traditional banking services. I accept ANZ's submission that it was not acting as a trustee or fiduciary in the orthodox sense but nor do I consider the FMA's submission so premised. Bank customers should be able to "trust" (in the general sense) the robustness of bank systems. ANZ let them down. This goes to the very heart of the legislative purpose.

Other relevant considerations

[65] The FMA identifies two other relevant considerations in addition to those identified in s 492. I discuss these below:

(1) ANZ's knowledge of the breaches and the circumstances of its self-report

[66] The FMA identifies as a significant aggravating feature the fact that ANZ was aware of the issues for over a year before reporting them to the FMA (and close to two years in the case of the Duplicate Policies issue). It notes that ANZ advised the insurer of the majority of the affected accounts over a year before it advised the FMA and that the issue had been identified (albeit not escalated to the RGF) at the time of the FMA's conduct and culture review. It emphasises that in the context of that review the FMA

made two requests of ANZ to disclose any issues of which it was aware that may have caused harm to customers and the Duplicate Policy and Ineligible Policy issues were not so identified. It acknowledges that there was no deliberate intention to conceal on the part of ANZ but says again, the circumstances indicate a systems or process failure.

[67] ANZ says that at the time of the conduct and culture review the matter was still under investigation and had not yet been identified as meeting the requirements to be referred to the RGF. It says that its staff considered they needed time to determine whether the issues merited escalation because of their complexity and the difficulty in identifying which customers were affected and how much to reimburse them. That was an error on their part and reflects adversely on relevant processes at the time. Proper processes would have resulted in earlier escalation and advice by the RGF to the FMA that there was a problem, albeit that its size and scope and the quantification of the compensation to be paid may take some time to finalise.

[68] However, I take into account ANZ's work with the Regulator in 2020 to refine and improve its self-reporting mechanisms. ANZ now claims to have attained, or be close to, industry leading standards. The FMA acknowledges the work that has been done in this respect.

[69] Overall, I accept the delay in self-reporting as an aggravating feature of the breaches, particularly given one of the stated additional purposes of the Act is to ensure that "appropriate governance arrangements apply", "that allow for effective monitoring" (which must include by the Regulator).[15] However, it is in part mitigated by ANZ's constructive engagement with the Regulator since.

(2) Deterrence

[70] I have previously discussed the role of deterrence in sentencing under the Act concluding that the position will necessarily be case and fact specific.

[71] In the present case, for example, the FMA acknowledges that there is no question of ANZ's default having arisen deliberately or of it electing to sustain its

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[15] Section 4(b).

position beyond identification of the problem. It also acknowledges ANZ's responsible approach to reimbursement, its self-report to the Regulator (albeit it says belated) and the changes which ANZ has implemented to its systems which will in future see any similar issues escalated faster. As such, specific deterrence is not, the FMA acknowledges, a significantly animating feature in this penalty assessment.

[72] So far as general deterrence is concerned, I accept ANZ's submission that although the principle is engaged, the very small number of affected accounts (0.3 per cent of CCRI customers) does not indicate substantially inadequate systems or a general tendency to underinvest, nor an organisation whose conduct was premised on the assumption that it could safely cut corners confident that any penalty would be at a level acceptable as a "cost of business".

[73] That said, neither is this a case where, for example, some material advance in technology has enabled ANZ to interrogate its systems in 2017/2018 in a way it was unable to do so beforehand. To some extent the problems were "hiding in plain view" and were as easily identifiable in 2007 as they were 10 years later. ANZ simply was not looking or looking adequately in the right places. That is a process or systems failure and as such general deterrence is a relevant consideration.

[74] However, I agree with the FMA's submission that, from a general deterrence perspective, the case falls at the lower end of the range. At the parties' jointly recorded starting point of $400,000 the proposed penalty represents a multiple of approximately 20 times the profit derived from the problem policies over the relevant period. On all the facts before me, I consider this adequately captures general deterrence to the extent relevant.

[75] I take into account also the inherent deterrent effect on any major financial institution of the negative publicity necessarily associated with any such proceedings.

Cumulatively, what do these factors suggest the starting point should be?

[76] The FMA submits an appropriate starting point is in the range of $400,000–$500,000. It says that a penalty in that range:

(a) would situate the offending at approximately 10 per cent of the maximum for a single breach, which appropriately reflects the balance of aggravating features present in the case;

(b) would reflect ANZ's significant size and resources and its organisational culpability in failing to report the issues to the FMA for an extended period of time;

(c) is a sufficiently large sentence to serve as an effective deterrent to a large corporate entity such as ANZ and to encourage other such entities to invest in compliance; and

(d) appropriately reflects the extent of the harm caused to ANZ's customers (representing 2 times to 2.5 times the amounts charged during the relevant period).

[77] In advancing that submission it references three recent District Court cases under the FTA involving telecommunications companies whose customers had terminated their accounts.[16] In each of these cases, the representations were to the effect that the customer was obliged to pay for a full month's worth of services. In reality, because services terminated part-way through the month, adjustments were necessary.

[78] I agree that these cases are usefully considered in the present context. They each emphasise the importance of major corporates having proper systems in place to prevent such problems from occurring which, for the reasons I have indicated, is an equally relevant consideration in this case. However, in the telecommunications cases the problems were substantially more widespread. In *Spark*'s case 72,163 customers were affected. In *Vodafone*'s case, 29,425 customers and in the *CallPlus* case, 5,951

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[16] See *Commerce Commission v Spark New Zealand Trading Ltd* [2019] NZDC 7801 (72,163 customers were overcharged by approximately $6.6 million over a period of three and a half years, global starting point of $900,000 penalty on all charges); *Commerce Commission v Vodafone New Zealand Ltd* [2019] NZDC 15705 (29,425 customers were overcharged by approximately $285,000, starting point of $450,000 adopted); and *Commerce Commission v CallPlus Services Ltd* [2020] NZDC 2655 (5,951 customers were overcharged by approximately $132,000 over six years, global starting point of $180,000 adopted).

customers. The opportunities for intermediate identification of the problem (in fact, recognised for some time by some of the companies' front line staff), were thus significantly greater than in the present case where so few of the relevant customers were affected.

[79] The FMA also refers by analogy to penalties under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009. In the first of those cases, *Ping*, Toogood J considered a report of the Law Commission in 2014 which identified that the purpose of pecuniary penalties was both "deterrent and denunciatory" given that their effect is to "single out a person or entity as having breached the law" and to "inflict a negative consequence".[17]

[80] In *Ping* and subsequent cases,[18] the Courts have imposed penalties at:

(a) between 50 and 70 per cent of the available maximum for conduct involving:

(i) "serious, systemic deficiencies in complying with a multiplicity of obligations under the Act" in circumstances showing a disregard of the Act's requirements.[19]

(ii) long-term noncompliance with the Act, despite prior oversight and warnings from the Department of Internal Affairs and despite the company having had ample evidence that the transactions' processed were suspicious.[20]

(iii) "brazen" contraventions of the enhanced due diligence requirements occurring across a significant volume of transactions.[21]

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17 Law Commission *Pecuniary Penalties: Guidance for Legislative Design* (NZLC R133, 2014) at [4.17] as cited in *Ping*, above n 10, at [93].

18 *Department of Internal Affairs v Jin Yuan Finance Ltd* [2019] NZHC 2510; *Department of Internal Affairs v OTT Trading Group Ltd & Ors* [2020] NZHC 1663; and *Department of Internal Affairs v Qian Duoduo Ltd* [2018] NZHC 1887.

19 *Ping*, above n 10, at [6].

20 See *Jin Yuan Finance*, above n 18, at [40]–[45].

21 See *OTT Trading Group*, above n 18, at [70], [105] and [108].

(b) between 25 and 33 per cent of the available maximum for conduct involving significant contraventions, but in circumstances which suggested that a defendant had made at least some attempt to comply with their obligations;[22] and

(c) between 6 and 11 per cent of the available maximum for conduct involving inadvertent breaches by a company which was unaware that it was substantially noncompliant.[23]

[81] The FMA acknowledges that ANZ's conduct would, by analogy, fall within the third of these categories and notes that its proposed starting point of $400,000 to $500,000 sits towards the upper end of that band consistent with the expectation that organisations of ANZ's size and resources will comply with their legal obligations.

[82] Finally, the FMA refers to relevant Australian case law and in particular the recent decision of *Australian Securities and Investments Commission v Commonwealth Bank of Australia*.[24] In that case, the Commonwealth Bank of Australia admitted to having sold financial services to farmers which it could not guarantee it could provide. It did so on account of deficiencies in its systems. The relevant conduct covered a period of 21 months, affected 6,953 customers and resulted in a gain to the bank of $1.7 million. The bank was fined $5 million for the breach (or roughly equivalent to three times the amount gained net of all mitigating factors).[25]

[83] In imposing that penalty, the Federal Court held that:

(a) a deterrent penalty was warranted given that the bank was a "substantial Australian bank with not insignificant financial resources" which failed to provide the services promised "for a protracted period";[26]

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22 At [73].
23 See *Qian Duoduo*, above n 18, at [65] and [167].
24 *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2020] FCA 790.
25 At [148].
26 At [81].

(b) the penalty was intended to be set at a level that achieved general deterrence, as it would act as a "disincentive for large financial institutions to fail to maintain adequate processes and systems";[27] and

(c) in the bank's favour, it had taken "timely and thorough" steps once it had identified the problem and had brought the Regulator "into the loop at the earliest opportunity".[28]

[84] For ANZ, Mr Horne submits that an appropriate starting point should be in the range of $300,000 to $400,000. He acknowledges that the maximum penalty for misleading conduct under the FMA for the purposes of the present case is $5 million which is over eight times higher than that applying under the FTA.[29] He acknowledges also that this is an indication that Parliament treats misleading representations in relation to financial services as potentially more serious than general conduct in trade and says that, for this reason, ANZ accepts the starting point for penalties under the Act should be above the starting points for broadly similar breaches of the FTA. But, he says, the existence of a higher maximum penalty carries with it no necessary implication that in every case high penalties must be imposed. The circumstances of each case will ultimately be relevant. That submission has to be correct.

[85] Although I consider the range proposed by the FMA as ultimately more appropriate than that proposed by ANZ, the position is largely academic for the fact that both alight ultimately on the figure of $400,000 as the starting point which this Court should adopt. For the reasons explained above I consider that to be appropriate. It has a significant deterrent effect being essentially 20 times the gain made, fairly recognises the number of persons affected, fairly acknowledges ANZ's responsible and largely successful efforts to remediate the errors and likewise its proactive steps to improve its early reporting processes. I am mindful of previous decisions recognising that this Court should play its part in promoting the resolution of these types of claims by accepting penalties within the proposed range. As indicated, that

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27 At [82].
28 At [119].
29 See Fair Trading Act, s 40(1) where a maximum penalty of $600,000 may be imposed in respect of companies and $200,000 in respect of individuals. The Fair Trading Act also has a lower tier for contraventions of Parts 2 or 4A ($30,000 for Bodies Corporate and $10,000 for individuals).

is always subject to the Court being satisfied that the joint recommendation fairly reflects relevant principles and the defendant's culpability. For the reasons indicated, I am satisfied that such is the case here. I accordingly accept $400,000 as an appropriate starting point in the assessment of penalty.

Stage three: adjustments to the starting point

[86] There are no factors specific to the "offender" which would warrant an increase to this starting point. The FMA acknowledges that ANZ's previous breaches of the FTA do not so qualify. I agree. By the same token, ANZ does not claim any particular credit on account of this being the first occasion on which it has breached the Act. It approaches the case, as does the FMA, on the basis that prior history is a "neutral" factor. This is a responsible position on the part of both parties.

[87] As to discounts, the FMA acknowledges that ANZ engaged constructively with the FMA regarding the terms of admissions, voluntarily supplied a significant amount of information to the FMA both before and after the claim was filed and quickly and candidly admitted the breaches. It submits that, against this background, ANZ is entitled to the maximum possible discount for steps taken following its self-report. By analogy with cases under the Commerce Act 1987,[30] a discount of 30 per cent would be justified.[31] ANZ agrees with this assessment and so do I.

[88] In the result, both parties recommend a final penalty of $280,000 which I accept as being within the proper range.

[89] I note also ANZ's consent to relevant declarations.

Result

[90] I make declarations that ANZ:

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30 See *Commerce Commission v Barfoot & Thompson Ltd* [2016] NZHC 3111 at [39]; *Commerce Commission v Property Brokers Ltd* [2016] NZHC 2851 at [15]; and *Commerce Commission v Unique Realty Ltd* [2016] NZHC 1064 at [46].

31 In other claims by the Commerce Commission against real estate agents greater discounts were awarded but this was in response to offers to provide evidence against other defendants. See *Commerce Commission v Lodge Real Estate Ltd* [2016] NZHC 1494; and *Commerce Commission v Lodge Real Estate Ltd* [2016] NZHC 3115.

(a) contravened s 22(d) and/or (h) of the Act by issuing statements to customers affected by the Duplicate Policy issue; and

(b) contravened s 22(a) and/or (h) of the Act by issuing statements to customers affected by the Ineligible Customer issue.

[91] I impose a penalty of $280,000 on ANZ for its contraventions of the sections identified.

[92] I make an order under s 493 of the Act that the penalty be applied first to the FMA's costs in bringing the proceedings.

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Muir J