IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2023-485-251
[2023] NZHC 3312

UNDER	the Financial Markets Conduct Act 2013
BETWEEN	FINANCIAL MARKETS AUTHORITY Plaintiff
AND	MEDICAL ASSURANCE SOCIETY NEW ZEALAND LIMITED Defendant

Hearing: 21 November 2023

Appearances: B H Dickey and Y Fu for Plaintiff
E J Rushbrook and M C Kavanagh for Defendant

Judgment: 22 November 2023

JUDGMENT OF CHURCHMAN J

Introduction

[1] The Medical Assurance Society New Zealand Ltd (MAS) is a mutual society that provides membership-based insurance, investment and financial advice services. MAS's wholly owned subsidiaries, Medical Life Assurance Society Ltd (MLA) and Medical Insurance Society (MIS), are the licenced insurers in the group. The group offers, promotes and underwrites a large range of insurance products, and enters contracts of insurance with customers. MLA and MIS administer and manage the insurance policies.

[2] MAS provides MLA and MIS the staff and resources necessary for their operation, receives distributions of surplus from its subsidiaries and retains capital in

order to sustain the MAS group.[1] It also owns the brand and logo under which the MAS group operates. MAS is governed by a board (the directors of which also serve as directors for most of MAS's subsidiary companies), but it is a mutual society wherein customers of its subsidiaries become members of the MAS Members' Trust, which holds 99.99 per cent of the shares in MAS.

[3] The parties to this claim are jointly seeking the imposition of an agreed pecuniary penalty on MAS for four discrete contraventions of ss 22(d), (f), (g) and/or (h) of the Financial Markets Conduct Act 2013 (the FMCA). The Financial Markets Authority (the FMA) and MAS have agreed to recommend that this Court:

(a) adopts a starting point of $3,000,000;

(b) applies a 30 per cent discount for all mitigating factors; and

(c) imposes a pecuniary penalty of $2,100,000.

[4] The FMA further seeks:

(a) declarations of breach under s 486 of the FMCA; and

(b) an order under s 493 of the FMCA that the pecuniary penalty must be applied first to pay the FMA's actual costs in bringing this proceeding. The FMA seeks no further order as to costs.

The FMCA breaches

[5] By notice of admissions dated 26 September 2023, MAS has admitted to making false and/or misleading representations to its customers (or customers of its wholly owned subsidiaries), constituting four classes of affected customers and four distinct breaches of the FMCA. These four breaches are discussed below in further detail.

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[1] Under s 536 of the Financial Markets Conduct Act 2013 [FMCA], the impugned conduct engaged in by MIS and MLA (for example in issuing incorrect invoices or remittance letters) is considered to be conduct engaged in on behalf of MAS, and so is treated as the conduct of MAS in turn.

[6] MAS self-reported the issues to the FMA and admitted its breaches of the FMCA. The cause of the breaches was related to flaws in MAS's systems and processes. The relevant systems relied heavily on manual accuracy with there being no proper checking or auditing systems. MAS also failed to take prompt action when some of these issues first came to light.

The multi-policy discount issue

[7] The first issue relating to a breach of s 22 involves MAS's multi-policy discount (MPD). Since 2014, customers have been eligible to receive an MPD in certain circumstances. However, from about April 2014, MAS did not apply the MPD or incorrectly applied it at a lower rate (the MPD issue). Customers affected by this issue received invoices that recorded incorrect premium amounts (the affected MPD invoices).

[8] From at least March 2014, MAS's General Insurance Product Manager was aware that some MPDs were being misapplied. The issues were wrongly considered to be isolated at the time, and so they persisted until a large-scale investigation commenced in November 2015. The investigation found that 20,200 policies had been affected with customers both overcharged and undercharged, and that approximately $588,132 in refunds were due to customers. In August 2016, MAS's General Manager of Risk and Compliance recommended that the MPD issue only be fixed at each customer's next renewal date with no remediation to be paid to customers who had been overcharged. In December 2016, the matter was closed with no remediation for customers, no further investigation, and no further reporting or confirmation that the issue had been resolved at a systems level (which it had not).

[9] The MPD issue was identified again in February 2019, investigated by MAS between March 2019 and July 2021, and reported to the FMA in August 2021. Between April 2014 and November 2021, the MPD issue affected 8,864 customers (16.12 per cent of all customers eligible to receive an MPD). Of the $71,563,988.98 in premiums charged during this period, $3,318,997.75 was overcharged.

Inflation adjustment issue

[10] The second issue relates to incorrect inflation adjustments to customers' premiums. From April 2009, MAS has offered an inflation-adjusted cover option which provided customers with the option to increase cover with an equivalent uplift to the premium to adjust for inflation each year. From 2009 until 31 July 2017, MAS's system automatically applied an inflation adjustment of 3 per cent instead of the adjustment specified in customers' policies (the inflation adjustment issue).[2]

[11] The affected customers were issued invoices that recorded incorrect premium amounts not in fact owed by them (the affected adjustment documents). For some of these customers, these invoices also contained a further statement falsely representing that an inflation adjustment had been applied to their premiums (the inflation wording), when in fact a different rate unrelated to inflation had been applied. The issue arose because of an incorrect input into MAS's computer policy administration programme, which went uncorrected between 2012–2017.

[12] MAS employees first identified the existence of some affected customers in 2012. In 2017, it identified the systems error. Steps were taken to correct the adjustment rate applied but no broader investigation was carried out until the issue was re-identified and escalated to senior employees in March 2019, after which an investigation began into all policies potentially affected by the issue.

[13] MAS first reported the error to the FMA (regarding one of its products) in May 2019 and then, more broadly, again in August 2021. Between April 2014 and June 2022, the inflation adjustment issue affected 6,267 customers. Of the $118,120,727 charged in premiums, $1,714,067 was overcharged. 325 customers made claims on their policies and received $419,605 in benefit payments above what they would otherwise have received had the error not occurred.

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[2] For some customers, the policy terms included an "Index of Wage Rates". This term was not internally defined, nor is it an index that is tracked by Statistics New Zealand.

Benefit payment issue

[14] The third issue arises from errors by MAS in calculating benefit payments in relation to life and disability insurance products (the benefit payment issue). The calculation errors were made by claims staff, who manually calculated the benefits payment and then used a basic Microsoft Excel worksheet to calculate payment periods. Customers affected by the benefit payment issue were issued with remittance letters that referred to the incorrect benefit payment amount owed to them (the affected remittance letters).

[15] MLA identified the first instance of a benefit payment error in August 2019. Between August 2019 and 2021, it investigated and identified further errors. The benefit payment issue was reported to the FMA in August 2021. Between 1 April 2014 and 1 June 2022, the benefit payment issue affected 104 customers and resulted in a total of $1,047,059.60 in underpayments.

No claims bonus issue

[16] The fourth issue relates to the misapplication of a no claims bonus (NCB) in circumstances where customers were entitled to a higher grade of NCB but did not receive it, instead receiving a lower grade and paying a higher premium accordingly (the NCB issue). This misapplication occurred where a customer's NCB grade was downgraded as a result of:

(a) a failure by MAS staff to reverse a selection on one of the customer's lines of cover; and

(b) customers' policies being incorrectly flagged as having an open claim at their renewal date.

[17] These customers were issued invoices that recorded incorrect premium amounts that were in fact not owed by them (the affected NCB invoices). MAS employees became aware of the issue regarding lines of cover in May 2014, but no systemic fix was implemented. The issue was re-identified in June 2019 and MAS investigated the issue between November 2019 and April 2022. The second issue

regarding open claims was identified in June 2022. The NCB issue was reported to the FMA in November 2021 (regarding the lines of cover issue) and July 2022 (regarding open claims).

[18] Between April 2014 and July 2022, the affected NCB invoices were issued to 1,235 customers who were entitled to a higher grade of NCB but did not receive it. This was approximately three per cent of eligible NCB customers. Of the $14,800,926.55 charged in premiums, $572,061 was overcharged.

Civil liability under the FMCA

[19] The FMCA was enacted as part of reforms made in response to the global financial crisis. Its purposes are as follows:

> **3 Main purposes**
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> The main purposes of this Act are to—
>
> (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.
>
> **4 Additional purposes**
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> This Act has the following additional purposes:
>
> (a) to 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:
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> (b) to ensure that appropriate governance arrangements apply to financial products and certain financial services that allow for effective monitoring and reduce governance risks:
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> (c) to avoid unnecessary compliance costs:
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> (d) to promote innovation and flexibility in the financial markets.

[20] Part 2 of the FMCA introduced a range of "fair dealing" provisions, one of which being s 22, which 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 by any means of the supply or use of financial services, make a false or misleading representation—

(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

(b) that the products or services are offered, issued, transferred, or supplied by a particular person, by a person of a particular trade, qualification, or skill, or by a person who has other particular characteristics; or

(c) that a particular person has agreed to acquire the products or services; or

(d) that the products or services have any sponsorship, approval, endorsement, performance characteristics, accessories, uses, or benefits; or

(e) that a person has any sponsorship, approval, endorsement, or affiliation; or

(f) with respect to the price of the products or services; or

(g) concerning the need for 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; or

(i) concerning the place of origin of the products or services.

[21] MAS accepts that it has breached ss 22(d), (f), (g) and/or (h) as follows:

(a) sections 22(f) and/or (g) by issuing the affected MPD invoices, affected adjustment documents and affected NCB invoices;

(b) sections 22(d) and/or (h) by issuing the affected remittance letters; and

(c) sections 22(d) and/or (g) by issuing the affected adjustment documents containing the inflation wording.

[22] Section 38 of the FMCA provides that a contravention of s 22 may give rise to civil liability under subpt 3 of pt 8, which includes a pecuniary penalty. Section 38(3)

provides that a contravention of s 22 must not result in a pecuniary penalty which exceeds the greater of:

> (a) the consideration given for the relevant transaction;
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> (b) three times the amount of the gain made or the loss avoided; or
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> (c) $1 million in the case of an individual or $5 million in any other case.

[23] Subpart 3 of pt 8 of the FMCA provides further detail as to pecuniary penalties. Section 489 allows the FMA to apply for a pecuniary penalty order where a person has breached a civil liability provision, such as s 22. Under s 489(2), where the FMA applies for a pecuniary penalty order, the court:

> (a) must determine whether the person has contravened, or been involved in a contravention of, a civil liability provision; and
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> (b) must make a declaration of contravention if it is satisfied that the person has contravened, or been involved in a contravention of, a civil liability provision; and
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> (c) may order the person to pay to the Crown a pecuniary penalty that the court considers appropriate if it is satisfied that the person has contravened, or been involved in a contravention of, a civil liability provision.

[24] Section 490 mirrors the provisions in s 38 regarding the maximum amount able to be imposed as a penalty. Section 492 then sets out a non-exhaustive list of relevant factors to which the court must have regard in setting the appropriate penalty:

> **492 Considerations for court in determining pecuniary penalty**
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> In determining an appropriate pecuniary penalty, the court must have regard to all relevant matters, including—
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> (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

(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

(e) the circumstances in which the contravention, or involvement in the contravention, took place; and

(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

(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

(h) the relationship of the parties to the transaction constituting the contravention.

[25] If a court orders a person pay a pecuniary penalty, s 493 requires the court to order that the penalty must be applied first to pay the FMA's actual costs in bringing the proceedings.

The Court's role in recommended penalties

[26] The quantum of any pecuniary penalty to be imposed is a matter for the court. However, in the case of recommended or agreed penalties, the general approach taken by the courts has been to consider whether the proposed penalty is in range rather than embarking on its own inquiry of what would be appropriate. The courts have long recognised the significant public interest in bringing about the prompt and efficient resolution of penalty proceedings and the need to ensure that defendants are not deterred from a negotiated resolution by fears that a settlement will be rejected on insubstantial grounds.[3]

[27] Nevertheless, the Court must still be satisfied that the proposed penalty satisfies the objectives of the FMCA and reflects the particular circumstances of the

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[3] *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) at [18], cited with approval in *Financial Markets Authority v AIA New Zealand Ltd* [2022] NZHC 2444 at [49].

case before it. The Court need not accept each step of the methodology proposed by the parties as long as it is satisfied that the final amount of the recommended penalty is in the appropriate range.[4]

Setting the penalty

[28] Alongside the requirements in s 489 above, the courts have adopted a three-stage framework as guidance in setting a pecuniary penalty:[5]

(a) first, the court must determine the maximum penalty in accordance with ss 38(2) and 490 of the FMCA;

(b) second, the court should set a starting point, having regard to the relevant statutory criteria in s 492; and

(c) third, the court should adjust that starting point by applying an uplift or discount on the basis of circumstances personal to the individual defendant.

The maximum penalty

[29] Under ss 38(2) and 490 of the FMCA, the maximum penalty will be the greater of the consideration for the relevant transaction, three times the amount of the gain made, or loss avoided, by the contravention, or $5 million.

[30] The consideration for the relevant transactions here is the total premiums charged on the affected policies (with respect to the inflation adjustment, MPD and NCB issues) and the full benefit entitlements (with respect to the benefit payments issue). The FMA submits that it is appropriate to assess the maximum penalty for each individual breach, the sum of which should form the notional maximum penalty in this case, with a global penalty being set for all contravening conduct.

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4 Financial Markets Authority v ANZ Bank New Zealand Ltd [2021] NZHC 399 at [32].
5 Financial Markets Authority v Cigna Life Insurance New Zealand Ltd [2022] NZHC 3610 at [22].

[31] In short, the FMA submits that the consideration for the MPD issue, the inflation adjustment issue, and the NCB issue is $71.5 million, $118.1 million and $14.8 million respectively. The FMA does not have the relevant information available to it in relation to the full benefit entitlements for the purposes of assessing the consideration for the benefit payments issue. In these circumstances, the FMA submits the Court should adopt an appropriate notional maximum for this breach of $5 million. Accordingly, the FMA submits that the maximum penalty is more than $209 million.

The starting point

[32] The agreed starting point is $3,000,000. As noted above, the starting point must be set having regard to "all relevant matters", including each of the factors in the non-exhaustive list of factors set out in s 492 of the FMCA. The considerations in this case are accordingly as follows:[6]

(a) *Purposes of the FMCA*:[7]

> The making of false and misleading representations, and any associated overcharging, undermines the purposes of the FMCA in promoting confident participation of consumers and facilitating the development of transparent financial markets. Customers are entitled to trust in the accuracy of their insurance provider's communications in its systems but cannot do so where they must double check pricing and invoices (particularly where, as is the case here, customers could not verify whether amounts charged or benefits paid were correct). That being said, MAS's conduct constituted breaches of the FMCA no more or less than most breaches of s 22 and so this is not a particularly aggravating feature of the conduct in this instance.

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6 FMCA, s 492(g), relating to the circumstances connected with a director's appointment, where directors are treated as having contravened, is not relevant in this case.

7 Section 492(a), in reference to the purposes set out at ss 3(a), 3(b) and 4(a).

(b) *Nature and extent of the contravention*:[8]

While MAS submits that its conduct across the four contraventions was all of the same or very similar kind, the nature and the extent of the contraventions is a significant aggravating factor:

(i) The root cause of MAS's contraventions was in large part because of systems failures, being overly reliant on manual processes without proper checking or auditing. MAS accepts that the largely manual processes in place should have been coupled with appropriate controls to ensure failings were promptly identified and dealt with, and ought to have had in place a robust incident management system.

(ii) When the MPD issue was identified and escalated, no remediation occurred, and no care was taken to ensure a fix was put in place.

(iii) MAS's conduct took place over a lengthy period, mostly from 2014 to 2021/2022. MAS submits, however, that it has proactively managed the various process and system enhancements, investigations and remediations since 2019 in a way that was timely.

(iv) A total of 16,470 customers were affected over all four issues.[9]

(v) In regard to the inflation adjustment issue, the fact that the issue subsisted from 2009 and remained undetected until 2017 shows how significant the system failures were.

(vi) A failure to escalate the inflation adjustment issue for almost a decade is a separate aggravating feature.

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8 Section 492(b).

9 By way of reference, MAS had a customer base of 46,313 in the 2023 financial year.

(vii) The proportion of eligible customers affected by the issues also aggravates the conduct, in that 16.12 per cent of all eligible MPD customers were affected by the MPD issue, and all 6,267 customers who elected to have inflation adjustment were affected by the inflation adjustment issue).

(viii) Although the NCB issue only affected three per cent of those eligible, the number of customers affected is still significant and the issue should have been identified if MAS had undertaken the appropriate checks.[10]

(ix) The high number of affected customers suggests that it is highly likely a number of the problems would have been identified earlier had MAS had checks and balances on its systems.

(c) *Nature and extent of any loss, damage or gains*:[11]

The total harm to customers has been in the region of $6.6 million and MAS's net gain across all four issues was approximately $6.2 million, or perhaps slightly less due to costs incurred. The average overcharge per customer was approximately $378. Although only a relatively small number of customers were affected by the benefits payment issue, and the customers did receive certain amounts, the underpayments came at a time of real need or vulnerability, and on average, each customer was underpaid by $10,067.88, which resulted in direct financial, and, the FMA submits, possibly emotional, harm.

(d) *Compensation*:[12]

MAS has taken a comprehensive approach to compensation and repaid $6,115,271.54 to customers. Its costs in doing so are even higher. It has acted properly and repaid customers the amounts it should not have

10 In contrast to the *ANZ* case, above n 4.
11 FMCA, s 492(c).
12 Section 492(d).

taken or withheld from them. MAS also now has systems and processes in place to ensure that remediation occurs in the case of any future FMCA breaches. This is a significant mitigating factor.

(e) *Circumstances in which the contravention occurred*:[13]

The conduct is aggravated by the multiplicity of breaches, which appears to have occurred due to a wide-ranging failure to invest in compliance systems and what the FMA submits is a highly troubling compliance culture. The FMA also submits that the circumstances of the identification and escalation of some of the issues is troubling, and permitted the contravening conduct to persist, resulting in significantly greater customer harm. MAS's inaction in escalating or fixing the issues led to continued contravening conduct and further breaches. Although the FMA accepts the circumstances of the conduct here were not brazen, MAS fell well short of the standards expected of it. Although MAS is a relatively small insurer in comparison to other market participants, the harm to each customer is no less.

MAS challenges the characterisation of its conduct under this head. It says while it is regrettable that the MPD issue was not fixed at each customer's next renewal date and closed following confirmation of technology and process change, that was not as a result of a decision of, or within the knowledge of, senior managers or the board. MAS submits that its actions in respect of the investigation and self-reporting of the issues once they were re-identified in 2019 must be viewed in the context of the complexity, scale and challenging nature of the issues, and the fact that it engaged external consultants to assist it.

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13 Section 492(e).

(f) *Previous similar conduct*:[14]

MAS has not previously been the subject of proceedings under the FMCA.

(g) *Relationship of the parties to the transaction*:[15]

The contraventions, occurring in the context of an insurer–customer relationship, occurred in the context of a special relationship of trust. The relationship between MAS and its members ought to be one in which customers can trust the accuracy of information provided to them, which MAS accepts. MAS also owed obligations to its members not only as customers, but also in their capacity as members of the MAS Members' Trust, another distinct relationship of trust.

(h) *Deterrence*:

In the context of pecuniary penalties, deterrence is always a relevant consideration.[16] Any penalty must create a strong incentive for financial institutions to maintain adequate systems and processes.[17] The penalty should deter other market participants from risking similarly deficient processes or systems.[18] The FMA submits that the prevalence and duration of the issues indicates that MAS was not properly incentivised to check its own systems and processes.

Indeed, the FMA submits that due to the number of distinct breaches, the very significant number of customers affected, and the "highly troubling" decisions not to remediate customers or ensure that processes were in place to investigate or implement a fix (in relation to the MPD issue), the contravening conduct in this case is the most serious to come before the Court in any proceedings brought by the

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14 Section 492(f).
15 Section 492(h).
16 *ANZ*, above n 4, at [45].
17 At [45].
18 *AIA*, above n 3, at [90].

FMA under Part 2 of the FMCA to date. The FMA submits a penalty that "stings" is warranted.

On the other hand, specific deterrence is not a particular concern in this case, and the existence of this High Court proceeding and associated costs and court order is itself a part of the penalty being imposed. It is also important that the penalty is not set at a level that acts to deter other small financial services providers from seeking out and remediating issues proactively and constructively.

(i) *Purpose, structure, size and scale*:

Although it is generally appropriate for penalties to be set "substantially higher" than the net gain and at a level where they are "not seen merely as a cost of doing business", in this case the FMA accepts that deterrence will be met by a starting point less than the commercial gain on the basis that MAS is a much smaller insurer and market participant than others in the insurance market. To achieve deterrent aims, the starting point must be of an appropriate size and scale in relation to the particular defendant on which the penalty is being imposed, and a lower penalty than would otherwise be imposed on a larger and more profitable market participant is sufficient to meet the objectives of deterrence in this case. The fact that MAS is a mutual insurer which is owned by its members is not something relevant to the issue of deterrence. All participants in the insurance industry are bound to comply with the FMCA irrespective of their ownership structure.

(j) *Undercharges*:

In this case, MAS undercharged customers approximately $5–5.5 million as a result of errors associated with the MPD issue. While the amount that MAS undercharged its customers does not go to its net gain, it is relevant to the level of the starting point necessary for

deterrence, which is accordingly lower than it otherwise might have been.

[33] In determining an appropriate starting point for the penalty, I have found the decisions in *Financial Markets Authority v Cigna Life Insurance New Zealand Ltd* and *Financial Markets Authority v Vero Insurance New Zealand Ltd* to be helpful comparators.[19] The starting points adopted in each were $5.5 million and $6 million respectively. The *Cigna* case involved deliberate decisions leading to breaches, but its conduct was mitigated by other factors, including taking its position after legal advice expressly authorising it. Both cases involved more affected policies, but the harm per customer was greater in this case. It is also a specific feature of this case, that was not present in these cases mentioned, that the harm caused by the benefit payment issue affected customers at vulnerable times of their lives. This aggravates the conduct. MAS's net gain was also higher than Cigna's, but lower than Vero's.

[34] MAS submits that the decision in *Financial Markets Authority v AIA New Zealand Ltd*, in which the court adopted a starting point of $1 million, is also a helpful comparator.[20] However, I do not see this case as an apt comparison. The wrongful conduct involved in this case is significantly more serious and involved much greater harm and wide-spread and lengthy systems failures than in that case.

[35] Overall, having regard to these comparator cases and the factors mentioned above, I am satisfied that a starting point of $3 million is within the appropriate range in this case. The misconduct in this case is serious, and a starting point pitched at that level is appropriate to meet the principles of deterrence in this case, while having regard to MAS's size, and to ensure such pecuniary penalties are not simply seen as a "cost of doing business".

Adjustments

[36] The FMA acknowledges there are no aggravating factors specific to MAS.

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19 *Cigna*, above n 5; and *Financial Markets Authority v Vero Insurance New Zealand Ltd* [2023] NZHC 2837.

20 *AIA*, above n 3.

[37] The FMA accepts MAS is entitled to discounts to reflect the timing of its self-report, its admissions, and the extent of its cooperation. The FMA and MAS have agreed that a total discount of 30 per cent is available, comprised of a 25 per cent discount for MAS's cooperation with the FMA's investigation, its remediation and its early admissions, and a five per cent discount for its self-report and this being its first contravention of the FMCA.

[38] MAS says it self-reported the issues in a prompt way to the FMA once they were re-identified, and it did all that could reasonably be asked of it from 2019. MAS says it has accepted liability for the breaches and cooperated with the FMA throughout its investigation. It says it also acknowledged and accepted at the earliest possible stage that it had contravened the FMCA and has agreed to settle the proceeding on terms acceptable to the FMA.

[39] The FMA accepts that since MAS's self-reporting it has been fully cooperative. The FMA says MAS's cooperation was important and is to be encouraged, but it did not go beyond the usual level. It submits that any larger discount should be reserved for cases where a defendant provides a significantly enhanced degree of cooperation, and highlights this Court's observation in the *Cigna* case that "absent special or usual features, discounts should not be so large as to remove the deterrence object of pecuniary penalties".[21]

[40] The FMA also accepts that MAS is entitled to a discount for its remediation efforts, including its efforts to significantly invest to remediate issues in its systems, as well as the fact that the present contraventions are MAS's first contraventions of the FMCA.

[41] While I accept the submission that, from 2019, MAS co-operated appropriately with FMA, I cannot overlook its behaviour between 2014 and 2019 which means that it is not able to claim the benefit of full co-operation from the earliest discovery of the breaches.[22]

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21 *Cigna*, above n 5, at [70].

22 As the defendant was able to in *Cigna*, above n 5, at [69].

[42] For these reasons I am satisfied that a total discount of 30 per cent is within the range appropriate as a discount.

Final total penalty

[43] This results in a final total penalty of $2.1 million. I am satisfied this is a penalty which is set at a level which denounces the conduct in which MAS was involved, and acts as a sufficient deterrent. It is also a penalty which recognises the significant public benefit of the parties having reached an agreed figure and have thereby avoided time-consuming and costly litigation.

[44] The final penalty is an amount which MAS says is a significant amount for it and its members but one that MAS has agreed is appropriate in all the circumstances, including in order to bring a swift and efficient resolution to this matter.

Result

[45] Accordingly, I make the following declarations, namely that MAS contravened:

(a) sections 22(f) and/or (h) of the FMCA by issuing the affected MPD invoices, affected adjustment documents, and affected NCB invoices;

(b) sections 22(d) and/or (h) of the FMCA by issuing the affected remittance letters; and

(c) sections 22(d) and/or (g) of the FMCA by issuing the affected adjustment documents containing the inflation wording.

[46] I impose a pecuniary penalty of $2.1 million on MAS, as recommended by the parties.

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

Churchman J

Solicitors:
MC, Auckland for Plaintiffs
Russell McVeagh, Wellington for Defendant