FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited (No 3) [2020] FCA 1421

File number:	QUD 445 of 2019
Judgment of:	**ALLSOP CJ**
Date of judgment:	1 October 2020
Date of publication of reasons:	13 October 2020
Catchwords:	**BANKING AND FINANCIAL INSTITUTIONS** – where the defendant (**ANZ**) offered regular automated payment service commonly known as a periodical payment – where ANZ charged non-payment fees for periodical payments that failed because of insufficient funds (**non-payment fees**) – where ANZ charged transaction fees for successful periodical payments (**transaction fees**) – where ANZ charged non-payment fees and transaction fees for periodical payments made between accounts in the same name (**same-name fees**) – where ANZ admitted to contraventions of s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) comprising unconscionable conduct by charging certain same-name fees and by not making certain remediation payments – where ANZ admitted to contraventions of ss 912A(1)(a) and 912A(1)(c) of the *Corporations Act 2001* (Cth) comprising unconscionable conduct by charging certain same-name fees and by not making certain remediation payments – where parties jointly seek declarations and orders for agreed penalties – principles and considerations relevant to the imposition of penalties – whether each proposed agreed penalty an appropriate sum in the circumstances – agreed declarations and orders made
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth), ss 12CB, 12CC *Corporations Act 2001* (Cth), ss 912A(1)(a), 912A(1)(c) *Fair Work Act 2009* (Cth), s 557
Cases cited:	*Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330; 327 ALR 540 *Australian Competition and Consumer Commission v Lux*

	Distributors Pty Ltd [2013] FCAFC 90 *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd (No 2)* [2020] FCA 802 *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25 *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18; 368 ALR 1 *Australian Securities and Investments Commission v Westpac Banking Corporation (No 3)* [2018] FCA 1701; 131 ACSR 585 *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* [2019] FCAFC 187; 272 FCR 170 *Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14; 151 CLR 447 *Commonwealth v Director, Fair Work Building and Industry Inspectorate* [2015] HCA 46; 258 CLR 482 *Jenyns v Public Curator (Qld)* [1953] HCA 2; 90 CLR 113 *Johnson v Buttress* [1936] HCA 41; 56 CLR 113 *Markarian v The Queen* [2005] HCA 25; 228 CLR 357 *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72; ATPR 41-993 *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* [1996] FCA 1134; 71 FCR 285 *Paciocco v Australia and New Zealand Banking Group Ltd* [2014] FCA 35; 309 ALR 249 *Paciocco v Australia and New Zealand Banking Group Ltd* [2015] FCAFC 50; 236 FCR 199
Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	81
Date of hearing:	1 October 2020
Counsel for the Plaintiff:	Mr S Couper QC with Ms C Schneider
Solicitor for the Plaintiff:	Australian Government Solicitor
Counsel for the Defendant:	Dr M Collins QC and Dr M Rush QC with Ms C Van

	Proctor
Solicitor for the Defendant:	Ashurst Australia

ORDERS

QUD 445 of 2019

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED** Defendant

ORDER MADE BY: **ALLSOP CJ**

DATE OF ORDER: **1 OCTOBER 2020**

In this Order, '**Same Name PP Fees**' means non-payment fees and transaction fees charged by the Defendant (**ANZ**) to its customers in relation to a periodical payment between two accounts held in the same customer name.

THE COURT DECLARES THAT:

1. By charging the Same Name PP Fees on each occasion between 26 July 2013 and 24 September 2015 to non-loan retail customers and commercial customers, when ANZ lacked any contractual entitlement to charge those fees and knew, from on or about 11 July 2011, that the charging of those fees was at risk of being without contractual entitlement, ANZ:

    1.1. engaged on 327,895 occasions in conduct in trade or commerce and in connection with the supply or possible supply of financial services that was, in all the circumstances, unconscionable in contravention of s 12CB(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**);

    1.2. breached its general obligation to comply with the financial services laws in contravention of s 912A(1)(c) of the *Corporations Act 2001* (Cth) (**Corporations Act**); and

    1.3. breached its general obligation to do all things necessary to ensure that the financial services covered by ANZ's financial services licence were provided efficiently, honestly and fairly, in contravention of s 912A(1)(a) of the Corporations Act.

2. By not making remediation payments after 11 December 2013 to:

2.1. non-loan retail customers; and

2.2. commercial customers,

who had been charged Same Name PP Fees in the period between 11 July 2005 and 31 December 2007, ANZ:

2.3. engaged on 2 occasions in conduct in trade or commerce and in connection with the supply or possible supply of financial services that was, in all the circumstances, unconscionable in contravention of s 12CB(1) of the ASIC Act;

2.4. breached its general obligation to comply with the financial services laws in contravention of s 912A(1)(c) of the Corporations Act; and

2.5. breached its general obligation to do all things necessary to ensure that the financial services covered by ANZ's financial services licence were provided efficiently, honestly and fairly, in contravention of s 912A(1)(a) of the Corporations Act.

THE COURT ORDERS THAT:

3. Within 30 days of the date of this order, ANZ pay to the Commonwealth of Australia pecuniary penalties totalling $10 million in respect of ANZ's conduct declared to be contraventions of s 12CB(1) of the ASIC Act.

4. Within 30 days of the date of this order, ANZ take all reasonable steps to cause to be published, at its own expense, a notice in the terms set out in Annexure A:

4.1. on the appropriate part of its website www.anz.com in Arial font no less than 10 point, such notice not to be removed for a period of 6 months; and

4.2. in the Australian Financial Review newspaper, such notice to be at least 20 centimetres by 11 centimetres [quarter page] in size.

5. Within 30 days of the date of this order, the Defendant pay a contribution to the Plaintiff's costs in the amount of $1 million.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

Annexure A

Notice published by order of the Federal Court of Australia

ANZ found to have engaged in unconscionable conduct and breaches of its financial services licence

The Federal Court of Australia has ordered that Australia and New Zealand Banking Group Limited (**ANZ**) pay a $10 million civil penalty for unconscionable conduct. The Federal Court has also declared that ANZ has breached its obligation to comply with financial services laws and failed to do all things necessary to ensure that the financial services covered by ANZ's financial services licence were provided efficiently, honestly and fairly.

ANZ has admitted that:

- on 327,895 occasions between 26 July 2013 and 24 September 2015, ANZ charged non-payment fees and transaction fees to non-loan retail customers and commercial customers in relation to periodical payments between accounts in the same name when it was not contractually entitled to do so, despite knowing, from on or about 11 July 2011, that the charging of those fees was at risk of being without contractual entitlement (the "**Charging Conduct**"); and

- ANZ did not make remediation payments after 11 December 2013 to non-loan retail and commercial customers who had been charged these fees without contractual entitlement in the period between 11 July 2005 and 31 December 2007 (the "**Remediation Conduct**").

The Court found that by engaging in this conduct, ANZ:

- engaged in unconscionable conduct in contravention of s 12CB(1) of the *Australian Securities and Investments Commission Act 2001*;

- breached its general obligation to comply with the financial services laws in contravention of s 912A(1)(c) of the *Corporations Act 2001*; and

- breached its general obligation to do all things necessary to ensure that the financial services covered by ANZ's financial services licence were provided efficiently, honestly and fairly, in contravention of s 912A(1)(a) of the *Corporations Act 2001*.

ANZ's Charging Conduct affected 327,895 fees and approximately 69,000 customers. The total value of fees that ANZ charged these customers without contractual entitlement was $3,101,102.90. ANZ has made remediation payments to some of these affected customers, totalling $2,570,327.39. The remediation amount includes repayment of the fees charged without contractual entitlement, as well as further amounts by way of compensation on account of the time that had passed. ANZ admits that it did not or could not pay a further $637,901.60 in remediation payments to the remaining affected customers, and such amount has been or will be paid to ASIC as unclaimed moneys or to charity.

ANZ's Remediation Conduct related to approximately 175,000 fees. The total value of the fees that ANZ charged without contractual entitlement was approximately $3 million. Save to the extent that affected customers received payments as part of a class action settlement relating to the charging of certain periodical payment fees, ANZ has not made remediation payments to those customers.

For further information, visit [insert link to ASIC media release]

REASONS FOR JUDGMENT

(Revised from the transcript)

ALLSOP CJ

1 In this matter, the Australian Securities and Investments Commission (**ASIC**) has proceeded against the Australian and New Zealand Banking Group Limited (**the Bank** or **ANZ**) for declarations and penalties and other relief involving the charging of bank fees over a period from 2003 to 2016. The nature of the original allegations can be seen in the clear and well-drafted concise statement by which these proceedings were commenced.

2 Let me say at the outset, in fairness to ANZ, that from the beginning of the proceeding, the Bank has approached the litigation with a proper degree of cooperation and, if I may use the expression without being misunderstood, in a proper spirit of good faith litigation to allow the Court expeditiously to resolve the matter. That degree of cooperation is, in penal proceedings, a matter of significant public importance and should be, and is, taken into account by the regulator in its agreement and recommendations as to penalty, and which I am prepared to recognise at the outset as important.

3 The essence of the case can be simply understood by recognising that the Bank, pursuant to its terms and conditions, by way of contracts of adhesion, charges, and has charged, bank fees, as part of its ordinary course of business. Those bank fees have included the charging of fees for the carrying out of transfer transactions by way of periodical payments and also the charging of fees for not being able to effect the transfer transaction because of the lack of funds in the originating account. Neither fee was and is unusual in the conduct of banking business in Australia.

4 The difficulty that arose (upon its discovery) and which gave rise to these proceedings was the terms and conditions drawn by ANZ itself. The terms and conditions are set out briefly in para 25 of the statement of agreed facts and joint submissions, which document can be accessed on the court file by anyone wishing to place this judgment in more detailed context. The terms of the relevant condition were as follows:

> A periodical payment is a payment that you have instructed us to pay from your ANZ account to the account of another person or business by providing your account number and branch number.

5 The difficulty is that these transaction fees and non-payment fees for periodical payments were charged to customers by reference to periodical payments from an account and to an account *in the same name of the customer*.

6 The original claim made by ASIC included all the matters in para 3 of the statement of agreed facts, as follows:

> By way of overview, in its Concise Statement dated 25 July 2019, ASIC alleged (among other things) that ANZ:
>
> 3.1. contravened ss 12DA(1) and 12DB(1)(i) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) and 912A(1)(c) of the *Corporations Act 2001* (Cth) (**Corporations Act**) by making misrepresentations to its customers concerning its contractual entitlement to charge same-name fees on at least 1,340,087 occasions from 26 July 2013: Originating Process, proposed declaration 1 (**misrepresentation claim**);
>
> 3.2. contravened s 12CB(1) of the ASIC Act and s 912A(1)(a) of the Corporations Act by:
>
> 3.2.1. charging same-name fees to its customers on at least 1,340,087 occasions from 26 July 2013 when it knew that the charging of those fees was unlawful or was at risk of being unlawful: Originating Process, proposed declarations 2.1 and 3.1 (**charging claim**); and
>
> 3.2.2. deliberately not making remediation payments to customers who had been charged same-name fees between August 2003 and 31 December 2007: Originating Process, proposed declarations 2.3 and 3.2 (**remediation claim**); and
>
> 3.3. contravened s 912(1)(a) of the Corporations Act by providing incomplete or misleading information to ASIC: Originating Process, proposed declaration 3.5 (**ASIC claim**).

7 Two claims were not pressed: that ANZ had misrepresented the position: [3.1]; and that it had misled ASIC in 2014: [3.3].

8 Two claims were pressed and were the subject of admissions, although not to the complete scope of the claim: [3.2]. The first claim was the charging of same-name fees to its customers. Originally this was claimed to be to its customers on over a million occasions from 26 July 2013, when it knew that the charging of those fees was unlawful or was at risk of being unlawful. The agreed fact and admission was more limited. The second claim was deliberately not making remediation payments to customers who had been charged same-name fees between August 2003 and 31 December 2007. As I will make clear in a moment, the admission and the agreed contraventions do not take that precise form nor that precise number of occasions and care must be taken to recognise that.

9 For the ease of understanding, the relevant dates should be explained. The claim for penalties and contraventions arises from 26 July 2013 because that is the earliest date by reference to the filing of the claim in 2019 that penalties could be sought. But the charging of the fees without, or at the risk of lack of, authority began in August 2003. The claim for unconscionability for not making remediation to people before 31 December 2007 arose, as will be clear in a moment, from the Bank's choice as to whom to remediate, and from when it would remediate, when it chose to remediate past customers. It chose to remediate persons within six years of a time that it perceived it became aware of the issue. The Bank chose to go back to 1 January 2008, taking a date of knowledge from 1 January 2014. In fact, as will become clear, the Bank became aware of the risk in July 2011, when its lawyers advised it, or officers of it, of that risk. Thus, the appropriate date on that hypothesis was to attempt to remediate customers back to July 2005.

10 The admissions of ANZ are contained in para 5 of the statement of agreed facts, and the subject of declarations. Paragraph 5 is in the following terms:

> ANZ admits to (**the admitted contraventions**):
>
> 5.1. 327,895 contraventions of s 12CB of the ASIC Act comprising unconscionable conduct by charging same-name fees between 26 July 2013 and 24 September 2015 (**the charging conduct period**) to non-loan retail customers and to commercial customers (including non-loan and loan customers), when ANZ lacked any contractual entitlement to charge those fees and knew, from on or about 11 July 2011, that there was a risk that it was not contractually entitled to charge those fees to those customers (the **charging conduct**);
>
> 5.2. two contraventions of s 12CB of the ASIC Act comprising unconscionable conduct by not making remediation payments after 11 December 2013 to:
>
> 5.2.1. non-loan retail customers; and
>
> 5.2.2. commercial customers
>
> who had been charged same-name fees in the period between 11 July 2005 and 31 December 2007 (**the remediation conduct period**) (the **remediation conduct**);
>
> 5.3. two contraventions of each of sections 912A(1)(a) and 912A(1)(c) of the Corporations Act flowing from:
>
> 5.3.1. the charging conduct (with the admitted contraventions at paragraph 5.1, the **charging contraventions)**; and
>
> 5.3.2. the remediation conduct (with the admitted contraventions at paragraph 5.2, the **remediation contraventions**).

11 The number of contraventions (327,895) is less than the 1,340,087 that were claimed. This is brought about by the agreement that two classes of customer are the subject of the admission and agreed contraventions, and one not. That is, retail non-loan fees and commercial fees are the subject of the admission, but not retail loan fees. Importantly, as Annexure A to the statement of agreed facts makes clear, this reduces the total of admitted fees to somewhat over $3 million, rather than the total fees, which had been claimed, of over $7.8 million, and the number of customers is not in the order of 235,000, but in the order of almost 69,000. The scale of the contraventions is still large, but not as large as that originally claimed in the concise statement.

12 The agreed facts need not all be recited. It goes without saying that ANZ is a major Australian bank. It is appropriate to commence my reasons for accepting the agreement as to contravention, to say some things generally about the nature of the proceeding and the norm in the statute which has been contravened. The penalties are sought in relation to statutory unconscionability in s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**). There are other contraventions of the *Corporations Act 2001* (Cth) (**Corporations Act**), being ss 912A(1)(a) and (c), but those do not sound in penal consequences.

13 The importance of the banking system in Australian social and commercial life need only be stated. Reliance by customers on the integrity and good faith of their bank is at the heart of social and commercial life in this country. It is highlighted in general life from advertising by banks and by community expectations. Despite all other features, the banker and customer relationship is at the heart of the economic system. It is a relationship based on contract, but, as the Code of Banking Practice reveals, it is founded on trust and good faith in a commercial sense.

14 It would shock any customer to know that his or her bank took and was continuing to take his or her money in fees when it knew that there was a risk that it had no authority to do so, and without thereafter coming to a view that it did have that authority. This would be especially the case if the customer knew that, upon a view that the terms would be changed in the ordinary course of business, no decision would be made to stop taking the fees because that was difficult and would lead to other fees about which there was no risk not being charged. The customer might well consider that he or she had not been treated fairly and in good faith in those circumstances. But, of course, in their position the customers were not privy to that knowledge,

especially in relation to terms and conditions that reflect contracts of adhesion (or standard form contracts) in the ordinary course of business.

15 The conduct is not to be broken down into minute constituent parts. The whole is to be understood; the whole pattern of what occurred appreciated. One must approach this from the proper focal distance or level of abstraction to assess the nature and seriousness of the conduct. There is a modern cast of mind to break down whole conduct, especially relational commercial or relational human conduct, into little pieces to order and taxonomise those pieces, having disaggregated them from the whole. To a degree this is seen in legislation breaking down whole concepts into subcategories and paragraphs. Such analysis can be helpful to ensure the completeness and comprehensiveness of the thought process, but it must never be a substitute for understanding the whole. This is especially important in dealing with such concepts as unconscionability.

16 Thus, from this, one understands the fundamental importance of the technique of Equity in this area of discourse; that is, why the decision of the High Court in *Jenyns v Public Curator (Qld)* [1953] HCA 2; 90 CLR 113, is so important. In looking at the cognate notion of unconscionability in equity, Dixon CJ, McTiernan and Kitto JJ said that:

> A court of law works its way to short issues, and confines its views to them. A court of equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case.

That is why, in *Paciocco v Australia and New Zealand Banking Group Ltd* [2015] FCAFC 50; 236 FCR 199, [296] is not broken up into subparagraphs. It is not just a matter of style, it is a way of approaching the problem to draw from the circumstances the proper characterisation of the human, here, commercial conduct.

17 I have sufficiently identified the nature of the periodical payments by automated systems. During the relevant period, debit accounts of the affected customers were subject to standard terms in account conditions and fee booklets. From time to time the Bank made changes to the standard terms but, relevantly, did not change the definition of periodical payment. In the reality of life people take what they get in these terms. It is unrealistic to consider that there is other than a degree of consumer vulnerability in dealing with banks with carefully drawn contracts of adhesion which can be changed at will by the bank on a take-it-or-leave-it basis. Contracts of adhesion are a central part of commercial life and much commerce could not be undertaken without them. They are not evil things in their own right. Nevertheless, they must

be understood to be what they are, that is, standard forms drafted by the bank or the contracting commercial house, in these kinds of circumstances, on a take-it-or-leave-it basis. The customer can leave, of course, and they are free to do so, but the reality of commercial and consumer life is that the customer expects that the bank will at all times adhere, and adhere strictly and faithfully, to its contractual rights which it has chosen to express in its contract of adhesion.

18 That throws the risk agreed in this case into a proper sense of reality. The context of the discovery of the risk was the first of two major class actions against the Bank that involved a number of issues and included the issue of the legitimacy of its charging fees. From about 11 July 2011, after receiving communications from its external lawyers, ANZ knew that there was a risk that it was not contractually entitled to charge same-name fees to the affected customers. Within six months, and for about a year from January 2012 to January 2013, ANZ considered amending the standard terms to address the same-name fee risk, but did not do so.

19 From July 2011 through to early December 2013, ANZ did not take any other steps to address the same-name fee risk. Despite knowing of the same-name fee risk since mid-July 2011, prior to 3 December 2013, ANZ did not determine whether it was contractually entitled to charge the same-name fees to the affected customers. During this period ANZ did not form a concluded view that ANZ was entitled to charge the same-name fees to the affected customers. At all times during this period, 11 July 2011 to 3 December 2013, and in fact thereafter, ANZ continued to charge same-name fees to the affected customers. I raised with counsel during a short debate whether it was open to draw inferences from these matters as to why this did not occur. I am prepared not to draw any unfavourable inferences beyond the terms of the admission.

20 In December 2013, an important event occurred. By that time a second class action had been brought in the name of the lead plaintiff, Mr Paciocco. The Andrews proceeding which had begun in 2010 had been heard in part and removed to the High Court. On 3 December, the Paciocco proceedings had been called on for hearing, and the applicant amended its points of claim to allege that the Bank had charged Mr Paciocco same-name fees, which were not authorised by the standard terms that applied to him. Eight days later, the Bank admitted that, in those proceedings, Mr Paciocco was entitled to damages for breach of contract in respect of the same-name fees charged to his account. The admission was made only in respect of Mr Paciocco and not any other group member. After receiving those points of claim, ANZ decided

that it would investigate the same-name fee risk, with a view to making changes to the standard terms, and remediating customers who had been charged same-name fees.

21 On 5 February 2014, Gordon J published a judgment in *Paciocco v Australia and New Zealand Banking Group Ltd* [2014] FCA 35; 309 ALR 249. That judgment dealt with the fees; and her Honour said what the following at [231]–[232]:

> 231 At the time Exception Fees 2 and 3 were charged, Saving Account 156 was governed by the terms and conditions set out in the August 2008 Terms and Conditions and the August 2008 Fees and Charges Booklet (collectively, the **PP Terms**). The PP Terms defined "Periodical Payment" and set out the circumstances in which ANZ was contractually entitled to charge a Periodical Payment Non-Payment Fee to that account. The August 2008 Terms and Conditions relevantly provided:
>
> 1. at cl 2.6 that "A Periodical Payment is a debit from your ANZ account, which you instruct ANZ to make *to the account of another person or business*";
>
> 2. at cl 2.7 that "A Periodical Payment Non-Payment Fee is charged if you have authorised a Periodical Payment that is not made because there are insufficient cleared funds in your account".
>
> The PP Terms did not contain any other terms relevant to the imposition of Periodical Payment Non-Payment Fees.
>
> 232 In the case of each of Exception Fees 2 and 3, the Exception Fees were charged and extracted as a consequence of Mr Paciocco initiating an instruction to ANZ to make a payment from Saving Account 156 to a home loan account held by him with ANZ (**Paciocco Home Loan Account**). The Paciocco Home Loan Account was not an "account of another person or business" within the definition of Periodical Payment in cl 2.6. Any instruction by Mr Paciocco to make payments from Saving Account 156 to the Home Loan Account was not an instruction to make a Periodical Payment within the meaning of cl 2.6 and, as a consequence, Exception Fees 2 and 3 were not authorised by the PP Terms or any other term of any contract between Mr Paciocco and ANZ and were debited to the Account in breach of contract.

22 Broadly speaking, for present purposes, her Honour found the fees not to be soundly contractually based. In June 2014, a few months after Gordon J's judgment, the Bank decided to amend the standard terms to address the same-name fee risk by replacing the relevant paragraph by one which encompassed the payment to an account of the same name. A year later, or thereabouts, in July 2015, the Bank commenced notifying customers of the amendment to come. The fee amendment took place for most customers by late November 2015. During this time the fees continued to be charged.

23 In August 2016, the Bank commenced making remediation payments, including to affected customers. Between February 2014 – that is, when Gordon J handed down her judgment – and November 2014, the Bank considered whether it should stop charging all non-payment and

transaction fees to all customers, including but not limited to the same-name fees, as an interim measure, pending implementation of the fee amendment. That would have meant that it did not undertake the risk of removing money from people's accounts, if there was no authority to do so. In about April and May 2015, it considered again stopping all non-payment and transaction fees as an interim measure. In both cases, in 2014 and 2015, the Bank concluded that it was not possible to stop charging same-name fees without stopping other fees about which there was no risk. The Bank therefore decided that it would not stop charging all non-payment and transaction fees.

24 After receiving the additional points of claim to which I have referred, ANZ decided to investigate remediating customers who had been charged same-name fees. Its starting point was that remediation would be made in respect of transactions which had occurred six years or less after the date of discovery. In relation to the same-name fees, that discovery of the risk was 11 July 2011, and thus if the procedure had been applied according to its terms, it would have been a decision to remediate customers from July 2005.

25 But ANZ decided that the start date for the remediation period would be 1 January 2008 – that is, six years prior to 1 January 2014 around the time when the Bank began responding to the risk that had been earlier disclosed to it by the lawyers. The effect of this decision was that the Bank decided that the remediation to be undertaken by it did not extend to same-name fees charged prior to 1 January 2008 to the relevant customers: here, the non-loan retail customers and the commercial customers. In August 2016, remediation payments commenced to some customers.

26 In December 2016, a new claim was made by applicants in the Andrews proceeding. That new claim concerned ANZ's entitlement to charge same name non-payment fees. Unlike Mr Paciocco, in requesting that the Bank make relevant regular automated payments, one of the lead applicants in the Andrews proceedings had signed a form that included a statement which recognised that the Bank might debit the account with fees. The term was in the following form:

> ANZ may debit my/our account with a fee for non-payment which may be charged by ANZ from time to time in the event ANZ is unable to effect any such periodical payment(s) of the payment date because insufficient funds are held in my/our account on the payment date to meet such payment(s).

There is no evidence before the Court about whether there were similar forms signed by other group members.

27 As described in paras 53–55 of the statement of agreed facts, from late 2018 the Andrews proceeding was mediated and came to settlement, which settlement was approved by Middleton J in 2019. The same name transaction fees charged by the Bank to customers, including the affected customers of non-loan retail customers and commercial customers, did not form part of the Andrews proceeding.

28 As set out in paras 56–60 of the statement of agreed facts, the Bank knew, or ought to have known, that it would not remediate all affected customers. Between July 2013 and September 2015, the Bank's general practice was to make remediation payments by way of direct deposit only to customers who continued to hold the account that was eligible for remediation or another account that had the same customer ownership. Between February 2014, when the Bank first considered remediation, and September 2015, the Bank knew or ought to have known that where customers had no relevant account of that character, the Bank could only make remediation by sending a cheque to the customer, by mail, and if the customer did not have other accounts, the longer the period from when the customer closed their accounts, the greater was the risk that the Bank's address details for the customer were out of date. For these customers, the Bank sent the customer's details to an external agency in order to determine whether the agency had a more current address for the customer, but it was not always possible to locate sufficient details to send a cheque to the customer. When the Bank's systems recorded that the customer was dead, it was not always possible for the Bank's deceased estates team to locate contact details for the estate. Even where the Bank could locate a last known address for a customer, a portion of mail sent to customers at last known addresses were returned.

29 Between February 2014 and September 2015, the Bank ought to have known that a proportion of customers who received remediation payments by cheque would not bank them for any number of reasons that common sense and human experience would tell.

30 All these sums were individually in modest amounts. Also, when providing remediation payments as part of the process, the Bank had a practice of not attempting to remediate customers who no longer had an ANZ account and who only had a low amount of remediation to be paid. The Bank had a practice of donating that amount to charity, a practice which was not restricted to this bank for these kinds of circumstances. It was industry practice, as later acknowledged by ASIC in its regulatory guide.

31 Thus, at all times between February 2014 and September 2015, ANZ ought to have known that there was a risk that it would not be able to repay all same-name fees that it continued to charge

to the affected customers, and because of its practices of donating low-value remediation amounts to charity, it knew or ought to have known that some of the fees that it was continuing to charge would never be repaid to those customers.

32 The charging conduct affected 327,895 same-name fees to approximately 69,000 affected customers. During the period the Bank also charged same-name fees to customers other than the affected customers. In relation to the same-name fees charged to the affected customers during the relevant period, that is, 26 July 2013 to 24 September 2015, ANZ made approximately $2,570,000 in remediation payments to affected customers, comprising $2,406,000 referable to the same-name fees and an additional $164,000 in compensation on account of the time value of money.

33 The Bank paid approximately $33,400 to charity because of the difficulty and cost to be incurred in locating 4,300 affected customers who had been charged fees, the fees being $31,700 with an additional $1,700 in compensation for the time value of money. The Bank attempted to pay, but was unable to pay, approximately $604,000 in remediation payments in respect of approximately 65,000 of those fees, comprising $572,000 of fees and $32,000 in compensation for the time value of money.

34 The ANZ has also conducted a corresponding remediation program in respect of fees, being fees other than to the affected customers.

35 From February 2020, the Bank undertook a further process of attempting to identify and contact affected customers who were owed the unpaid remediation amounts. With respect to the remaining unpaid remediation amounts, the Bank paid $473,000 to charity and will redirect the remaining amount to ASIC as unclaimed monies.

36 During the period between 11 July 2005 and 31 December 2007, being the period for which the remediation decision was not made (that is, six years prior to the discovery of the risk in July 2011 and up to the day before the beginning of the decided remediation period), the Bank charged approximately 175,000 same-name fees to a substantial number of affected customers. The total value of the same-name fees charged in that period in which the remediation was not decided to take place, was approximately $3 million. Save to the extent that payments in relation to non-payment fees were made as part of a settlement in the Andrews proceeding, referred to above at [27], the Bank has not otherwise remediated those affected customers.

37 Those are the essential facts, by reference to which the contraventions can be explained.

38 The parties have helpfully set out, in paras 67–70 of the joint submissions, the basis upon which the Court should make orders by consent. The matter is no longer one of controversy, after *Commonwealth v Director, Fair Work Building and Industry Inspectorate* [2015] HCA 46; 258 CLR 482 (***The Agreed Penalties Case***). The High Court there reaffirmed the practice of acting upon agreed penalty submissions as explained in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* [1996] FCA 1134; 71 FCR 285, and *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72; ATPR 41-993. Importantly, the Court, in distinguishing the matter from public remedies of sentencing in crime, expressed the importance of the role of the regulator and the party in reaching agreements about conduct, in context that civil penalties were to be understood as having an object of deterrence, and not retribution or rehabilitation, or denunciation.

39 It is worthy, however, of statement that the importance to the public of the freeing of resources of the regulator to deal with the conduct of other persons by the cooperation and reaching of agreement that is proper, with persons who have contravened provisions of legislation such as this, is to be emphasised. It is one of the reasons why it is appropriate for the Court to accept the views of the regulator and the party in reaching agreement, in circumstances where the Court is otherwise persuaded that what the parties propose is, and I emphasise, **an** appropriate remedy in the circumstances. It is not merely I who emphasise the indefinite article, an. It was emphasised by the plurality in the following extract from [58] of *The Agreed Penalties Case*:

> Subject to the court being sufficiently persuaded of the accuracy of the parties' agreement as to facts and consequences, and that the penalty which the parties propose is *an* appropriate remedy in the circumstances thus revealed, it is consistent with principle and … highly desirable in practice for the court to accept the parties' proposal and therefore impose the proposed penalty.

40 The process of reaching a view as to what is an appropriate penalty, for the purposes of s 12GBA(1) of the ASIC Act, is not one to which there is only one correct answer. Like all sentencing decisions, it is one that is reached by evaluation of all relevant circumstances, in a manner that is often referred to as one of instinctive synthesis. Although the object of the civil penalty is deterrence, and not the other considerations in crime, this expression from *Markarian v The Queen* [2005] HCA 25; 228 CLR 357 is still apt, in that there is an evaluative mental process undertaken to assess what is reasonably necessary to achieve the object of deterrence, both specific and general: that is, to deter this party and others in a like situation, from contravening the relevant provision in like manner in the future.

41 In the joint submissions from paras 73–75, there are submissions as to why the Court should make declarations. I do not propose to dwell on those submissions. It seems to me entirely appropriate to make the declarations that have been agreed. Those declarations have the utility of making clear to the public, when read with these reasons, why liability has been found, and give context to the cumulative penalty orders that will be made. Non-punitive orders are also sought in terms of a statement to the public. I have read the proposed statement and consider that its terms are appropriate. An agreed body of costs is also provided for, and I am prepared to make those orders.

42 As to the penalties, it is necessary now to say something about the approach to the admitted contraventions. The legal principles are set out in the joint submissions from paras 83–98. I need say little about the proper approach, by way of legal principle, other than the following. In a series of Full Court decisions, this Court has reached an approach which is largely uniform and is reflected in the passages from *Paciocco* 236 FCR 199 and *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18; 368 ALR 1 (***Kobelt***), to which the parties made reference; and *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90 at [23] and [41]. The recent High Court decision of *Kobelt* has raised an issue as to whether the notion of special disadvantage, derived from the equity jurisprudence, is necessary to show in statutory unconscionability. The matter arose and was addressed by Colvin J in *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd (No 2)* [2020] FCA 802. His Honour came to the view that statutory unconscionability required the exploitation of disadvantage.

43 This is not the case to explore that question; in particular, it is not the case because, sitting at first instance, it would be inappropriate for me to restate principles that the Full Court has identified. Also, it would be unnecessary because the Bank accepts that, on the facts of this case, it is not necessary to establish that affected customers suffered from some special disadvantage. The Bank accepts that the charging contraventions and the remediation contraventions involved unconscionable conduct. I would say the following, however, that with respect to Colvin J, it is not entirely clear the extent to which special disadvantage comes to be a necessary part of the analysis or that that special disadvantage is to be understood as the same kind of special disadvantage referred to in cases such as *Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14; 151 CLR 447. Without intending to go beyond the agreed facts, the view of the Bank to accept unconscionability here can be seen to be, if I may say so, an entirely reasonable one.

44 As I have said on a number of occasions already, these are contracts of adhesion. To repeat, they are not, by reason of that, a form of some commercial evil. To the contrary, they are helpful documents which smooth the workings of commerce, properly applied and properly administered. In those kinds of circumstances, to some degree, customers of banks do have a form of inequality of bargaining power and inequality of position that can be legitimately characterised as a form of disadvantage. It is not a disadvantage of mental capacity or drunkenness or improvidence of the kind traditionally found in many cases in the setting aside of individual transactions, such as *Johnson v Buttress* [1936] HCA 41; 56 CLR 113. But it is a necessary consequence of the use of otherwise useful types of contracts that consumers face a form of disadvantage of knowing whether or not regular fees being taken out of their accounts conform with the present up-to-date version of some contract of adhesion sent to them in the past which may or may not be the subject of careful filing and regular review by the customer. Common sense would say that that is unlikely to occur. It heightens the need for banks to be assiduous in their fair, honest, and good faith approach to understanding how those contracts are being administered by themselves.

45 It goes without saying that the Bank has no authority to take people's money out of their accounts if there is not a contractual foundation to do so. The proper characterisation of that, if known, is obvious; it is more than a breach of contract. That is not the agreed circumstance here; the agreed circumstance is that the Bank was aware of a risk of the kind that I have identified. I take the matter no further than that, but the importance of banks in how they treat their customers in this context is relevant to understanding the lack of bargaining power and lack of equality of position in relation to the regular taking of small amounts of money by way of fees in apparent exercise of contractual rights.

46 I say the above, if I may respectfully put it this way, in support of the Bank's current proper recognition that it engaged in conduct which was unconscionable in the terms that it has admitted.

47 For the reasons to which I will come in explaining the contraventions, the Bank also contravened ss 912A(1)(a) and (1)(c) of the Corporations Act which are in the following terms:

> A financial services licensee must:
>
> > (a) do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly; and
> >
> > …

(c) comply with the financial services laws[.]

48 The contravention of (a) will follow naturally from a conclusion of unconscionability. The contravention of (c) will also follow consequentially. There is no call, in the present case, to discuss the expression "efficiently, honestly and fairly" in para (a) of subs (1). The question that arose in *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* [2019] FCAFC 187; 272 FCR 170 recently can await a proper circumstance where it is necessary to resolve it.

49 It is now appropriate to deal with the conduct in terms of its characterisation. I have set out the factual elements of the admissions which can be seen in the earlier paragraphs of the statement of agreed facts if further elaboration is required by a reader of the judgment. From paras 99–117, the conduct which I have outlined is the subject of submissions as to its proper characterisation. The parties are agreed that the following considerations bear on the characterisation of the conduct as unconscionable in both the charging respect and the remediation respect.

50 First, that at all times during the relevant period the Bank had no entitlement to charge the same-name fees to accepted customers.

51 Secondly, at all times since July 2011, the Bank knew that there was a risk that it was not entitled to charge the same-name fees to the affected customers.

52 Thirdly, despite knowing the risk prior to December 2013, that is, when the matter was pleaded in the Paciocco proceeding, the Bank did not satisfy itself of its contractual entitlement to charge the same-name fees to the affected customers but continued to charge them. During this period it considered amending its standard terms but did not so, and it took no further steps during this period to address the fee risk.

53 Fourthly, when served with the additional points of claim, the Bank began to take steps to address the fee risk. It decided to amend the standard terms, but did not commence implementing that decision for some considerable time until July 2015 and the amendment did not take place until late November 2015.

54 Fifthly, on at least two occasions the Bank considered stopping all transaction fees to ensure that the risk did not continue, the risk being that it might be taking people's money from their accounts without any legal warrant. But it decided to keep charging the fees because it was not possible to stop charging the fees to which there was a risk without also stopping the

charging of periodical payment fees in respect of other accounts where there was no apparent risk.

55 Sixthly, between July 2013 and February 2014, the Bank did not make any decision that it would remediate affected customers for the same-name fees that it was continuing to charge.

56 Seventhly, between about February 2014 and September 2015, because of matters to which I have referred, the Bank knew or ought to have known that there was a risk that not all affected customers would be repaid all of the fees that it was continuing to charge and, at all times during the period of 2014–2015, the Bank knew or ought to have known that in relation to a portion of the same-name fees that it was continuing to charge, the affected customers would not be repaid because it had a practice of not remediating customers who no longer had an ANZ account and who only had a low amount of remediation payable.

57 Various provisions of s 12CC of the ASIC Act become relevant. I referred earlier to the danger of disaggregation and taxonomy in this area. The statute, however, helpfully assists in one's understanding of the relevant factors attending the judgment or evaluation of unconscionability for the purposes of the statute.

58 The first is s 12CC(1)(a): the question of inequality of bargaining positions; that is, the relevant strengths of the bargaining positions of the supplier and the service recipient. The affected customers were those who did not have sufficient cleared funds in their accounts, and it can be assumed that some proportion of those customers were not financially well-off or sophisticated. The amount of fees might be regarded as small and thus not sums worthy of individual complaint or recovery action. But I would also add to s 12CC(1)(a) the comments that I have already made about the relevant positions of bank and customer in relation to the administration of contracts of adhesion of these kinds.

59 Reference is also made by the parties to s 12CC(1)(i) – that, at all relevant times, the Bank knew or ought to have known, but failed to disclose, that it would not remediate low-value remediation amounts – and also s 12CC(1)(j), whereby the parties submit that during the relevant periods, the standard terms did not permit or entitle the Bank to charge the fees to the affected customers and the Bank's conduct in continuing to charge therefore represented a departure from the core element of legal policy and commercial law, which I discussed in *Paciocco* 236 FCR 199 as faithfulness of performance and fidelity to bargains and promises freely made.

60 Reference is made to the Code of Banking Practice, which stated that the Bank committed itself to act fairly and reasonably towards customers in a consistent and ethical manner. The parties put this to me in para 105 of the joint submissions: that the Bank knew that there was a risk that it was not entitled to charge the fees that it was charging; and that between July 2011 and January 2014, it did not attempt to resolve the question, but kept charging them. After January 2014, it kept charging the fees until late November 2014, during which time the fee amendment was being implemented. The affected customers ought not to have been charged the fees.

61 The intention of the Bank after January 2014 to remediate, is relevant. But that remediation, as the agreement identifies, was unlikely ever to be complete. More broadly, the context of the remediation decision was that the Bank continued to charge the same-name fees when it knew there was a risk that it was not entitled to do so, on the basis that it would subsequently pay the money back in circumstances where it could not be considered that all would necessarily be paid back. Even leaving aside the last consideration, that conduct was not conduct consistent with fair dealing and good faith, for the purposes of s 12CC(1)(l).

62 Reflecting on the correct focal length of attention, ANZ knew that there was a risk that it was taking money of customers to which it was not entitled. Good conscience, informed by not only the Code of Banking Practice, but honest commercial common sense, required that the Bank ascertain the position in a timely way, and not continue taking its customers' money. I use the expression, honest. I do not find any aspect of the conduct, on the agreed facts, was dishonest. Were I to do so, the agreed penalty of $10 million would be deeply inadequate. However, the Bank's conduct was objectively, as the parties agree, against conscience.

63 The notion of conscience here is worthy of a moment's reflection. It is not an idiosyncratic personal view. Drawing from the deep and rich well of the general law, common law and Equity, good faith and conscientious behaviour, Parliament has identified in the statute and by its provisions a standard of an Australian business conscience. It is to be assessed by reference to the factors which one draws from the statute, set against the common law and Equity in which statutory framework was passed. Thus, to say that ANZ's conduct was objectively against conscience is to recognise that the conduct was objectively against the standard of the statute of an Australian business conscience.

64 That the standard of behaviour is not defined is both reflective of its importance and its strength. These matters are not capable of definition. They will be worked out over time by

businesspeople and courts, as has happened in this case. To use a metaphor, the norm is about a space, not a line.

65 I accept that it is appropriate for the Court to declare that on each occasion, ANZ charged a same-name fee to an affected customer. During the charging conduct period, ANZ engaged in conduct that was, in all the circumstances, unconscionable, in contravention of s 12CB of the ASIC Act and, for those reasons, it is also appropriate to declare that by engaging in such conduct, ANZ contravened its obligations under ss 912A(1)(a) and 912A(1)(c) of the Corporations Act.

66 As to the remediation conduct, the Bank admits that it engaged in two contraventions of section 12CB of the ASIC Act by not making remediation payments to the non-loan retail customers and the commercial customers – that is, earlier affected customers who had been charged the same-name fees during the period, 11 July 2005 to 31 December 2007. The relevant conduct here was the conduct after 11 December 2013: that is, deciding the start date for the remediation would be 1 January 2008, which resulted in no remediation payments being made in respect of the same-name fees charged prior to 1 January 2008. The Bank should have decided, but did not decide, to remediate the non-loan retail customers in respect of the same-name fees charged between 11 July 2005 and 31 December 2007 and the commercial customers in the same period. For the avoidance of doubt, I should say this: the taking of money without the contractual warrant before 11 July 2005 without an appreciation of the risk can be characterised as a breach of contract, or as a payment under mistake of fact.

67 If characterised as a breach of contract, there would be no apparent reason why a party in the position of the Bank should not apply a statute of limitations period to such circumstances, unless there were other circumstances which would make that conduct inappropriate; hence the legitimacy of the regulator confining the remediation contravention to the period from 11 July 2005 and not August 2003, when the conduct actually began. The question may differ depending on statute for any restitutionary action for payment under mistake: cf *Paciocco v* 236 FCR 199 at 290–291 [377]–[378].

68 The decision relating to the remediation start date was unconscionable by reference to at least the following: at all relevant times, the Bank's remediation practice was to start to make the remediation payments in respect of transactions which had occurred six years or less from the time of discovery. The time of discovery of the risk was July 2011. Also, the amount of each same-name fee charged to affected customers prior to 2009 was significantly higher than that

charged after 2009. In relation to this decision, considerations of the factors set out in paras (a), (f) and (j) of s 12CC(1) are relevant. Further, the Bank departed from the approach of its usual manner of six years prior to discovery. In doing so, its conduct was unfair to those customers and inconsistent with its own practice. In all the circumstances that had arisen after 2011, and in the circumstances of the time it took for the fee terms to be amended and the remediation to take place, I am satisfied that the parties' agreement that the remediation conduct was unconscionable and also a breach of ss 912A(1)(a) and 912(1)(c) is appropriate.

69 The principles as to the imposition of civil penalties are helpfully set out at paras 118–150 of the joint submissions. Sitting as a single judge, it is not appropriate for any exegesis on the governing principles. Let me make some comments about the submissions so that my views are not misunderstood in my reference to any apparent precise adoption of the submissions. There is no particular aspect of the submissions with which I would cavil, but some of the submissions attend some sensitive issues that have been and still are being worked out in Full Courts of this Court.

70 Let me begin by re-emphasising the matter from *The Agreed Penalties Case* in [58] that the Court needs to be satisfied that the agreed penalty is an appropriate remedy in the circumstances. Of that I am so satisfied. As I said earlier, there is no such thing as the, and the only, appropriate penalty. Like questions of valuation in land valuation or sentencing in crime, the evaluation of what is appropriate or just or true is impossible to fix at one point.

71 The response of the regulator in its claims to the conduct, and the Bank in its response to the claim, has been, if I may respectfully say, a model of how this kind of regulatory litigation in commercial life should take place. That question of cooperation, and in no grudging way, is important to take into account and I would give significant weight to that. The process is not one of identifying starting points and taking discounts. It is a process of evaluating all the circumstances to reach an appropriate penalty, having close regard to the maximum for each contravention.

72 The central object of imposing penalties is to secure compliance through deterrence. The parties have grouped the multiple contraventions into what they have described as courses of conduct. The Court has been astute in a number of cases in recent years to express caution as to that phrase. In some statutes such as the *Fair Work Act 2009* (Cth), in particular s 557, the phrase is a statutory one which therefore has a body of content. There is, as it is often expressed to be, a principle of sentencing or imposition of penalty of a course of conduct: the so-called

course of conduct principle. With respect, as a number of the cases have said recently in the Full Court, it is preferable to focus on the object of imposition of penalties being deterrence and not to penalise twice for the same conduct. Thus, the so-called course of conduct principle is but a tool of analysis to ensure that the appropriate penal response is reached in relation to all the contraventions that have been proved.

73 Difficulty arises, of course, if there are so many contraventions that it becomes meaningless to impose a penalty for each, or indeed, in some cases, if it is impossible to impose a penalty for each given the lack of clarity as to how many there were. Thus, it can be appropriate for the individual contraventions not to be the subject of individual penalties and for there to be an overall imposition of an amount. That approach has its attractions. The first and most important, as between a regulator and a cooperative and responsible respondent such as was present here, is that it makes reaching an overall and appropriate settlement easier and thus less costly and less time consuming. It has a danger in that if the eye is taken away from the number of contraventions, less weight might be given to the seriousness of the body of contraventions. I am persuaded that no such danger exists here.

74 The particular danger of using the course of conduct principle is to translate a view that there was one episode or course of behaviour into a conclusion that there was one contravention. The Court has been clear in its rejection of that approach. A careful reading of the submissions recognises that no such error is embodied in the joint submissions. The deterrent nature of the penal response is the central, if not the sole, purpose of an object of the penalty. A number of matters need to be stated about that here. The banking industry is large and involves consumer choices. There should be, and is, by the agreed penalty, a strong deterrent as to conduct which risks the rights of consumers and customers, by reference to any approach which risks their interests against the interests of the Bank. The considerations of the contract of adhesion and its administration, to which I have referred, are central in this regard. Put in economic terms, the market efficiency upon which consumer confidence rests, relies on reliability, good faith, fairness and honesty of conduct. It should be made clear to all businesses – here, banks, but all businesses – that the consumer should be dealt with in a way that accords with the Australian business conscience for which Parliament has legislated, and here, banks should be, as the submissions make clear, left in no doubt of the need for proper and strong compliance programs, sufficient to detect and address conduct of the present kind. The penalties to be imposed will also play their part in persuading the public, more broadly, that banks should be held to proper account in the level of appropriate penalties for breaches of the statute involving

the commercial standard of unconscionability. The submissions refer to specific deterrence. The reality was that the Bank's systems were not robust enough to prevent wrongdoing, and, for whatever reason, those who appreciated that there was a risk did not take steps to ensure the Bank came to a view that it was required to come to about the appropriateness of charging the fees.

75 Reference is made to the earlier litigation in 2017 of the Bank Bill Swap Reference Rate case (*Australian Securities and Investments Commission v Westpac Banking Corporation (No 3)* [2018] FCA 1701; 131 ACSR 585) and the admissions as to attempted unconscionability in that regard. I do not think these matters affect my characterisation of the gravity of the conduct here. As to grouping the various contraventions by way of course of conduct, there are really two bodies of conduct to speak of. The first is the two remediation contraventions, being the contraventions not to remediate the earlier customers in two categories. That is not so much a question, of course, of conduct, as two contraventions; that is, the unconscionability in each case of deciding not to remediate. The parties agree that in respect of these two contraventions, a total of $2 million in penalties is appropriate; that is, $1 million for each remediation contravention. Those sums are reached, and I am prepared to accept as appropriate, bearing in mind the considerations to which I have referred, and in particular the cooperation exhibited by the Bank in the conduct of these proceedings and in the investigation. As an illustration of the point I made that it is necessary for the Court to be satisfied that this is an appropriate penal response, on the agreed facts, if I were to have been required to come to a figure I would likely have considered a figure slightly lower than $2 million.

76 As to the 327,895 charging contraventions, which are admitted, as I said earlier breaking that many contraventions up with a maximum penalty per contravention of $1.7 million, up to 31 July 2015, and of $1.8 million from 1 August 2015 would be meaningless and potentially oppressive. As was made clear in *Markarian v The Queen* [2005] HCA 25; 228 CLR 357 and *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25 it is necessary to have close regard to the maximum penalty, but it lacks meaning and risks oppression to relate the maximum penalty to each of these individual contraventions of fee extraction.

77 The regulator and the Bank have agreed upon $8 million for the charging contraventions. I am persuaded that that is an appropriate sum.

78 If it were appropriate for me to reach my own view, I would likely have imposed a penalty somewhat more than $8 million, but that does not mean that $8 million is not an appropriate penalty. Sometimes courts talk in terms of ranges. $8 million is an appropriate penal response within the appropriate "range". It is also necessary, as I do, to recognise that this is the subject of agreement, which has been the product of sensible cooperation, but also negotiation and appropriate public interest and self-interest in resolving litigation. As the High Court said in *The Agreed Penalties Case* at [57]–[58], respect should be given by the Court to the reaching of agreement in civil penalty proceedings in these circumstances.

79 For these reasons, read in the light of the joint submissions, I am prepared to conclude that the penal response agreed upon is appropriate.

80 It is also important to note that the regulator is satisfied that the penalties are significantly more than the total of sums lost by customers after remediation. That is a matter of particular consideration as it was in the case of *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330; 327 ALR 540. It should never be thought by commercial houses, including banks, that the Court will other than seek to ensure that the proper and appropriate penal response is such as to, within the limits of the maximum penalty and the gravity of the offence, ensure that it costs more to breach and contravene the Act than conform with it. That is the whole object of deterrence. Civil penalties are not to be seen as an acceptable cost of doing business. They should be seen as a cost of contravening the Act, which outweighs any advantage that may be seen in contravening or in risking contravening the Act. I am satisfied that the total sum here is such as to act meaningfully by way of specific deterrence against the Bank and general deterrence against other parties including other banks for any future contravention of like kind.

81 For those reasons, the Court is prepared to make the following declarations and orders.

In this Order, '**Same Name PP Fees**' means non-payment fees and transaction fees charged by the Defendant (**ANZ**) to its customers in relation to a periodical payment between two accounts held in the same customer name.

THE COURT DECLARES THAT:

1. By charging the Same Name PP Fees on each occasion between 26 July 2013 and 24 September 2015 to non-loan retail customers and commercial customers, when ANZ lacked any contractual entitlement to charge those fees and knew, from on or about 11

July 2011, that the charging of those fees was at risk of being without contractual entitlement, ANZ:

1.1. engaged on 327,895 occasions in conduct in trade or commerce and in connection with the supply or possible supply of financial services that was, in all the circumstances, unconscionable in contravention of s 12CB(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**);

1.2. breached its general obligation to comply with the financial services laws in contravention of s 912A(1)(c) of the *Corporations Act 2001* (Cth) (**Corporations Act**); and

1.3. breached its general obligation to do all things necessary to ensure that the financial services covered by ANZ's financial services licence were provided efficiently, honestly and fairly, in contravention of s 912A(1)(a) of the Corporations Act.

2. By not making remediation payments after 11 December 2013 to:

2.1. non-loan retail customers; and

2.2. commercial customers,

who had been charged Same Name PP Fees in the period between 11 July 2005 and 31 December 2007, ANZ:

2.3. engaged on 2 occasions in conduct in trade or commerce and in connection with the supply or possible supply of financial services that was, in all the circumstances, unconscionable in contravention of s 12CB(1) of the ASIC Act;

2.4. breached its general obligation to comply with the financial services laws in contravention of s 912A(1)(c) of the Corporations Act; and

2.5. breached its general obligation to do all things necessary to ensure that the financial services covered by ANZ's financial services licence were provided efficiently, honestly and fairly, in contravention of s 912A(1)(a) of the Corporations Act.

THE COURT ORDERS THAT:

3. Within 30 days of the date of this order, ANZ pay to the Commonwealth of Australia pecuniary penalties totalling $10 million in respect of ANZ's conduct declared to be contraventions of s 12CB(1) of the ASIC Act.

4. Within 30 days of the date of this order, ANZ take all reasonable steps to cause to be published, at its own expense, a notice in the terms set out in Annexure A:

   4.1. on the appropriate part of its website www.anz.com in Arial font no less than 10 point, such notice not to be removed for a period of 6 months; and

   4.2. in the Australian Financial Review newspaper, such notice to be at least 20 centimetres by 11 centimetres [quarter page] in size.

5. Within 30 days of the date of this order, the Defendant pay a contribution to the Plaintiff's costs in the amount of $1 million.

Annexure A

Notice published by order of the Federal Court of Australia

ANZ found to have engaged in unconscionable conduct and breaches of its financial services licence

The Federal Court of Australia has ordered that Australia and New Zealand Banking Group Limited (**ANZ**) pay a $10 million civil penalty for unconscionable conduct. The Federal Court has also declared that ANZ has breached its obligation to comply with financial services laws and failed to do all things necessary to ensure that the financial services covered by ANZ's financial services licence were provided efficiently, honestly and fairly.

ANZ has admitted that:

- on 327,895 occasions between 26 July 2013 and 24 September 2015, ANZ charged non-payment fees and transaction fees to non-loan retail customers and commercial customers in relation to periodical payments between accounts in the same name when it was not contractually entitled to do so, despite knowing, from on or about 11 July 2011, that the charging of those fees was at risk of being without contractual entitlement (the "**Charging Conduct**"); and

- ANZ did not make remediation payments after 11 December 2013 to non-loan retail and commercial customers who had been charged these fees without contractual entitlement in the period between 11 July 2005 and 31 December 2007 (the "**Remediation Conduct**").

The Court found that by engaging in this conduct, ANZ:

- engaged in unconscionable conduct in contravention of s 12CB(1) of the *Australian Securities and Investments Commission Act 2001*;

- breached its general obligation to comply with the financial services laws in contravention of s 912A(1)(c) of the *Corporations Act 2001*; and

- breached its general obligation to do all things necessary to ensure that the financial services covered by ANZ's financial services licence were provided efficiently, honestly and fairly, in contravention of s 912A(1)(a) of the *Corporations Act 2001*.

ANZ's Charging Conduct affected 327,895 fees and approximately 69,000 customers. The total value of fees that ANZ charged these customers without contractual entitlement was $3,101,102.90. ANZ has made remediation payments to some of these affected customers, totalling $2,570,327.39. The remediation amount includes repayment of the fees charged without contractual entitlement, as well as further amounts by way of compensation on account of the time that had passed. ANZ admits that it did not or could not pay a further $637,901.60 in remediation payments to the remaining affected customers, and such amount has been or will be paid to ASIC as unclaimed moneys or to charity.

ANZ's Remediation Conduct related to approximately 175,000 fees. The total value of the fees that ANZ charged without contractual entitlement was approximately $3 million. Save to the extent that affected customers received payments as part of a class action settlement relating to the charging of certain periodical payment fees, ANZ has not made remediation payments to those customers.

For further information, visit [insert link to ASIC media release]

I certify that the preceding eighty-one (81) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Chief Justice Allsop.

Associate: 

Dated: 13 October 2020