

**IN THE DISTRICT COURT  
AT AUCKLAND**

**I TE KŌTI-Ā-ROHE  
KI TĀMAKI MAKĀURAU**

**CRI-2024-004-004582  
[2024] NZDC 28692**

**COMMERCE COMMISSION**  
Prosecutor

v

**KIWIBANK LIMITED**  
Defendant

Hearing: 26 November 2024

Appearances: J Dixon KC and A Luck for the Prosecutor  
E Rushbrook and J Everypalmer for the Defendant

Judgment: 26 November 2024

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**NOTES OF JUDGE S BONNAR KC ON SENTENCING**

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[1] Kiwibank Limited has accepted liability for, and pleaded guilty to, 21 charges laid under ss 13(i) and 40(1) of the Fair Trading Act 1986. The offence may colloquially be described as making a false or misleading representation in the course of trade. Each charge carries a maximum available penalty of a \$600,000 fine.

[2] The parties have, helpfully, agreed a long summary of facts. I am not going to read all of the agreed facts into the record today. I will endeavour to orally summarise the facts and will annex a copy of the agreed summary to the transcript of these remarks.

[3] I also intend to annex a helpful table handed up to me by Mr Dixon KC, for the Commerce Commission, subject to the accuracy of that table being checked by counsel for Kiwibank Limited.

[4] Kiwibank is the fifth largest bank in New Zealand. It is majority owned by the state-owned Kiwi Group Capital Limited. In the financial year ending 30 June 2024, Kiwibank and its subsidiaries together reported, after tax, a net profit of \$202 million.

[5] The 21 charges arise from what are described as longstanding deficiencies or problems in Kiwibank's systems and processes. Some of those issues have been in existence for a long period of time. One in particular, which I will come to, has been an issue for a little under 15 years. The periods reflected in the charging documents, however, represent a shorter timeframe, from 2019 to May 2024.

[6] The problems with its systems resulted, in summary, in Kiwibank failing to provide its banking services on the terms which it had agreed with customers. It also resulted in customers being overcharged. The substance of the charges relates to Kiwibank's rendering of account statements to customers which, while accurately recording transactions which had occurred, did not accurately represent the terms which had been agreed with individual customers.

[7] The parties have helpfully categorised the failings into five different issues. First, there is what is described as "the member packages issue". This was an issue with Kiwibank's systems from June 2007 to 31 March 2022. The charged period relating to this issue covers the period 31 May 2019 to 31 March 2022.

[8] In essence, Kiwibank failed to provide appropriate and accurate agreed discounts to customers who had entered into package benefit agreements with it. From at least 2004, Kiwibank had offered benefit programmes to eligible customers. These were referred to as member packages. Individual member packages promised various benefits such as fee waivers and discounted interest rates.

[9] The issue with this, however, is that over the period in question, Kiwibank failed to provide the full suite of member package benefits to some of its eligible

customers. The primary cause of that failure was the use of manual processing, without adequate checking systems in place to ensure that member package benefits had been correctly applied.

[10] In the period reflected in the charges, this issue affected 5,079 customers and resulted in Kiwibank overcharging those customers the total sum of \$1,905,851, when compounded interest is included. That works out at an average of \$375 per customer. Over the entire life of the issue, a greater number of customers were affected and a significantly greater sum was overcharged, but the average per customer was less.

[11] Kiwibank formally identified the issue in relation to the member package benefits in the period from July 2020 to January 2021. Subsequently, Kiwibank apologised and paid compensation to the affected customers, which included refunds of the overcharged amounts, compounding interest on the overcharged amounts, and use of money interest. Kiwibank has paid a total of \$4,901,141 compensation in relation to this issue.

[12] The second issue is what is described as “the amortisation issue”. This problem arose when customers requested a change to a home or business loan on the day that the loan was drawn down. The issue, as I understand it from counsel, arose where there were changes to the frequency of repayments of the loan. Kiwibank’s software system did not apply the correct formula to recalculate the revised payment amounts, effectively by assuming that the first repayment amount had already been paid. This resulted in customers making smaller loan repayments over the first part of their loans meaning that, if not corrected, the customers would pay greater interest over the life of their loans. Kiwibank issued settlement letters and account statements to customers incorrectly representing the amounts they were required to pay under the loans.

[13] This issue was a live one at Kiwibank from August 2013 to 30 May 2024 and affected a total of some 9,700 customers. During the period reflected in the charges, a total of 4,143 customers were affected and the total amount overcharged was \$116,549, or an average of \$28 per customer.

[14] Kiwibank has instituted a remediation programme in relation to this issue which is still underway. It involves the bank apologising and paying compensation to all customers affected from 2013 onwards. The expected remediation will include payment of at least \$620,000 compensation to customers.

[15] The third category of failure is described as “the interest only period issue”. This issue arose where Kiwibank agreed to an interest only period in relation to some customers’ loans. In certain circumstances, Kiwibank’s system would fail to transfer customers from interest only payments back to principal payments at the correct time, effectively for the next payment period. The charge relates to the fact that, again, Kiwibank issued statements to customers which, while accurately reflecting the actual transactions, misrepresented the contractual terms which had been agreed.

[16] Kiwibank identified this issue in December 2019 and November 2020, following customer complaints. It had made improvements to its manual processes in August 2019 which reduced the incidence of this issue but did not resolve it entirely. This issue was in existence for a period of a little under 13 years, from July 2011 to 30 May 2024, and affected a total number of a little over 6,000 customers. During the charged period, the exact number of customers affected is not able to be ascertained, but the total amount of the overcharge was \$450,651.

[17] In terms of remediation, again, Kiwibank has apologised and paid compensation to the majority of affected customers. It expects to pay total compensation of at least \$3,437,000 to all affected customers, including those who fall outside the charging period.

[18] The fourth issue is referred to as “the overdraft interest rate issue”. For a long time, Kiwibank offered preferential overdraft interest rates on everyday accounts to customers who held home loans with it. Kiwibank relied on a manual process which was not followed consistently throughout. Again, there was a lack of adequate quality assurance processes in place to detect whether or not customers were being charged the correct overdraft interest rates.

[19] In relation to this issue, the charged period covers the entire duration of the issue. The charged period runs from 1 November 2019 to 4 September 2022. A total of 1,434 customers were affected. Kiwibank effectively overcharged a total sum of \$53,074 including compounding interest, the average per customer being \$37.

[20] In terms of remediation, Kiwibank has, again, apologised and paid compensation to the majority of affected customers. It expects to pay compensation of at least the amount overcharged, plus compounding interest and use of money interest.

[21] The final issue is referred to as “the preloaded fees issue”. For home loan customers, Kiwibank adopted a system of “preloading” its home loan fees at the time the loan was settled, in anticipation of the fees being charged later. Kiwibank did not have sufficient measures in place to ensure that the preloaded fees information was updated, from time to time, as its fee terms were amended. As a result, some Kiwibank home loan customers with preloaded fees were overcharged by reason of being charged fees that Kiwibank had, subsequently, removed from its terms and conditions or by being charged fees at historically higher amounts where the fee amounts had later decreased.

[22] This was an issue for a period of some seven years and nine months and a total of 1,847 customers were affected. In terms of the charged period, a total of 1,128 customers were affected and the overcharge amount totalled \$116,707, or an average per customer of \$103. Again, Kiwibank has since apologised and paid compensation to the majority of affected customers. Total compensation expected to be paid is in the sum of at least \$204,717.

[23] Kiwibank self-reported these issues to the Commerce Commission on various dates from April 2022. It also provided information to the Commission regarding the issues both on a voluntary basis and in response to statutory notice.

[24] Kiwibank has previously admitted three breaches of s 22 of the Financial Markets Conduct Act 2013. In October 2023 the High Court ordered the bank to pay a pecuniary penalty of \$812,500 in relation to those breaches.

[25] Kiwibank has also previously admitted a breach of s 9C of the Credit Contracts and Consumer Finance Act 2003 and, under a settlement agreement with the Commission in relation to that breach, agreed to pay \$5.2 million to more than 48,000 affected customers.

[26] There is a significant degree of consensus between the parties as to the approach that the Court should take to sentencing. The parties have referred me to the leading authorities on the approach that courts must take in such cases: *Commerce Commission v L D Nathan & Co Ltd* and *Commerce Commission v Steel & Tube Holdings Ltd*.<sup>1</sup> Those cases identify the various factors that go into the assessment of the culpability of the offender, the seriousness of the offence and the circumstances of the offending. I do not propose to repeat all those factors today.

[27] In relation to the factors relevant to the assessment of a starting point for sentence, the prosecution submits that the conduct which Kiwibank engaged in undermined the objectives of the Fair Trading Act which is, of course, designed to ensure that consumers are protected and that consumers and businesses are able to confidently participate in the trading environment or marketplace. Kiwibank does not take any issue with that factor.

[28] As to the extent of the offending, the prosecution refers to its duration, the number of customers affected, the extent of the financial harm caused, and the number of systemic issues involved. Kiwibank points out that this is not a case of total failure in respect of all of its customers and submits that, in the overall scheme of things and having regard to the extent of its business, these issues were not widespread.

[29] The parties do not agree as to how Kiwibank's failings should be described. The prosecution submits that the failures here can be considered as "highly careless and systematic". Kiwibank takes issue with the categorisation of its failures as "highly careless". In that respect, Kiwibank relies on a judgment of Judge Lance of this Court in *Commerce Commission v Mercury New Zealand Ltd*.<sup>2</sup>

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<sup>1</sup> *Commerce Commission v L D Nathan & Co Ltd* [1990] 2 NZLR 160; *Commerce Commission v Steel & Tube Holdings Ltd* [2020] NZCA 549.

<sup>2</sup> *Commerce Commission v Mercury New Zealand Ltd* [2023] NZDC 7018.

[30] While I understand the parties' concerns as to how the failures are to be described, I do not need to determine whether it is more accurate to refer to the failures here as being "highly careless" or simply "careless". Kiwibank makes the point, which is not in dispute, that it was not deliberately or wilfully misleading its customers. Of course, if it had been, its offending would necessarily fall into a more serious category of failure.

[31] The parties agree that the nature of services which were being provided was the provision of credit under credit contracts, by way of home and business loans. Both parties also accept that a relevant purpose of sentencing is the need to impose penalties which, in a real sense, deter banks and other financial providers from similar failures. Kiwibank accepts that general deterrence is a relevant factor here.

[32] Although the parties may not necessarily be completely ad idem as to the process by which the Court gets to an appropriate starting point for sentence, they are agreed as to what that starting point should be. They agree that an appropriate starting point, giving effect to all relevant purposes and principles of sentencing and having regard to the facts of this case, is a global fine in the sum of \$2.3 million. I also agree. I adopt that as the appropriate starting point.

[33] In terms of mitigating features, again, there is a great deal of agreement. First, there is, of course, Kiwibank's guilty pleas which were entered at the first reasonable opportunity. There are the significant steps taken by the bank to address the issues and to remedy the harm caused. In that respect, it is significant that Kiwibank has paid or will pay a total sum of at least \$9.2 million in remediation.

[34] These issues were self-reported to the Commerce Commission. Kiwibank acknowledged and accepted its responsibility from an early stage and fully co-operated with the Commerce Commission.

[35] By reason of that combination of factors, the parties are agreed that a total discount of 35 per cent should be applied to the starting point, leaving an end sentence of \$1.5 million. I do not differ from what the parties have responsibly submitted.

[36] I therefore impose a total fine of \$1.5 million. That will be apportioned by way of a fine of \$70,000 being imposed on the charge with the CRN number ending 2077. On each of the remaining 20 charges, a fine of \$71,500 is imposed.

[37] I thank counsel for their extensive and helpful submissions and the co-operative manner in which this matter has proceeded.

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Judge SJ Bonnar KC

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 04/12/2024



## ANNEXURE 1

### Caption Summary – for plea

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Commerce Commission v Kiwibank Limited  
(Prosecutor) (Defendant)

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#### The Member Package Issue

##### Charges 1-3

Being in trade, in connection with the supply or possible supply of services or with the promotion by any means of the supply or use of services, made a false or misleading representation concerning the existence of any right.

**Act:** Sections 13(i) and 40(1) of the Fair Trading Act 1986

**Penalty:** A fine not exceeding \$600,000 for each offence

#### The Amortisation Issue

##### Charges 4-8

Being in trade, in connection with the supply or possible supply of services or with the promotion by any means of the supply or use of services, made a false or misleading representation concerning the existence of any right.

**Act:** Sections 13(i) and 40(1) of the Fair Trading Act 1986

**Penalty:** A fine not exceeding \$600,000 for each offence

#### The Interest-only Period Issues

##### Charges 9-13

Being in trade, in connection with the supply or possible supply of services or with the promotion by any means of the supply or use of services, made a false or misleading representation concerning the existence of any right.

**Act:** Sections 13(i) and 40(1) of the Fair Trading Act 1986

**Penalty:** A fine not exceeding \$600,000 for each offence

#### The Overdraft Interest Rate Issue

##### Charges 14-17

Being in trade, in connection with the supply or possible supply of services or with the promotion by any means of the supply or use of services, made a false or misleading representation concerning the existence of any right.

**Act:** Sections 13(i) and 40(1) of the Fair Trading Act 1986

**Penalty:** A fine not exceeding \$600,000 for each offence

#### Pre-loaded Fees Issue

##### Charges 18-21

Being in trade, in connection with the supply or possible supply of services or with the promotion by any means of the supply or use of services, made a false or misleading representation concerning the existence of any right.

**Act:** Sections 13(i) and 40(1) of the Fair Trading Act 1986

**Penalty:** A fine not exceeding \$600,000 for each offence

## Summary of Facts

### 1 Introduction

- 1.1 The defendant, Kiwibank Limited (**Kiwibank**) is charged with breaches of the Fair Trading Act 1986 (**FTA**) arising from representations made to its customers regarding banking services which Kiwibank failed to provide on the agreed terms. Those representations arose from and related to Kiwibank's failures to:
- (a) provide agreed discounts to customers who had entered into package benefit agreements with it (the **Member Packages Issue**);
  - (b) correctly calculate the amounts of customers' regular repayments, where those customers requested changes to their loan at a particular point in time (the **Amortisation Issue**);
  - (c) correctly move loan customers from paying interest-only, to principal and interest, at the end of agreed interest-only periods (the **Interest-only Period Issues**);
  - (d) provide agreed discounts on the overdraft interest rates payable by home loan customers (the **Overdraft Interest Rate Issue**); and
  - (e) charge the correct amounts of various fees to certain loan customers (the **Pre-loaded Fees Issue**).
- 1.2 The failures resulted from long-standing deficiencies in Kiwibank's internal processes. Those deficiencies, and the harm flowing from them (which Kiwibank has remedied), both long predate the relevant charge periods.

### 2 Fair Trading Act 1986 (FTA)

- 2.1 The Commerce Commission (**Commission**) is a statutory body established under s 8 of the Commerce Act 1986. The Commission's purposes include protecting the interests of consumers.
- 2.2 The Commission is responsible for enforcing the FTA, the primary purposes of which are to contribute to a trading environment in which the interests of consumers are protected, and in which consumers can participate confidently. The FTA advances those purposes by ensuring that businesses provide consumers with clear and accurate information, to enable consumers to make informed choices about the goods and services they acquire.

#### Offences under the FTA

- 2.3 Section 13(i) of the FTA prohibits a person in trade, in connection with the supply or possible supply of services, from making a false or misleading representation concerning the existence, exclusion, or effect of any condition, warranty, guarantee, right, or remedy.
- 2.4 Section 40 of the FTA makes it an offence to breach s 13(i). Where the defendant is a body corporate, a single offence is punishable on conviction to a fine not exceeding \$600,000.

### 3 The defendant

- 3.1 Kiwibank is New Zealand's fifth largest bank. It was incorporated in May 2001 and is a registered bank under the Reserve Bank of New Zealand Act 1989.
- 3.2 Kiwibank offers a range of banking services, including the provision of bank accounts, transactional banking services, and loans for home, personal and business purposes.
- 3.3 Kiwibank and its subsidiaries have together consistently reported profits since at least 2009 (it does not have public records of its profitability prior to that date). In the financial year ending 30 June 2023, Kiwibank and its subsidiaries together reported an after-tax net profit of \$175 million.

### 4 The Member Packages Issue (charges 1-3)

#### *Background*

- 4.1 Over time, Kiwibank has offered various benefit programmes to certain eligible customers (each a **Member Package**). The various Member Packages had different start dates but the first of these operated from at least September 2004. The Member Packages included programmes for:
  - (a) customers who were employees of various organisations, including Kiwibank employees; those programmes being referred to by Kiwibank as "Love Your Perks", "Mates Rates" and "Public Service Association (PSA)";
  - (b) customers who were students in tertiary studies (through a programme referred to as the "Tertiary Package"); and
  - (c) customers who had completed tertiary studies within the previous two years (through a programme referred to as the "Graduate Package").
- 4.2 Kiwibank agreed to provide a suite of benefits as part of each Member Package, including:
  - (a) for home loan customers: discounted home loan interest rates, and waivers of the fees for providing 'top up' loans;
  - (b) for credit card customers: discounted interest rates on purchases and cash advances, and waivers of the annual card fee;
  - (c) for arranged overdraft customers: interest-free periods, discounted interest rates, and waivers of the overdraft application fee.
- 4.3 To be eligible for a Member Package, a customer was required to transfer their personal banking to Kiwibank (or keep their personal banking with Kiwibank, if they were an existing customer), and notify Kiwibank that they were eligible to receive a Member Package. From that point on, the Member Package terms formed part of the customer's agreement with Kiwibank.
- 4.4 Kiwibank marketed the Member Packages on its website, in marketing brochures, in communications with Kiwibank customers, and in promotional material disseminated to eligible staff.

### *The issue*

- 4.5 From at least June 2007, Kiwibank failed to provide Member Package benefits to some eligible customers.
- 4.6 The primary cause of that failure was the use of manual processes without any systems in place within Kiwibank to reliably check whether Member Package benefits had been correctly applied where they should have been. In this respect:
- (a) Kiwibank required its staff to manually apply the benefits customers were entitled to. To do so, staff were required to check one of Kiwibank's systems which recorded whether the person should have been receiving a Member Package benefit and then to manually enter that information in a separate system used to apply the benefits. There were no systems in place to ensure this manual process was followed.
  - (b) For customers who applied to re-fix a home loan through Kiwibank's online self-service system, the automated process did not allow for relevant benefits (such as discounted interest rates on home loans) to be applied. The manual process that was then required to apply the relevant benefit was not always followed.

### *The representations*

- 4.7 Kiwibank rendered account statements to customers affected by the issue which included line items showing the fees and interest charged on the customers' account.
- 4.8 In each case, the account statements recorded the incorrect amounts of Kiwibank's fees and the incorrect amount of interest the customer was entitled to pay on their loans. By doing so, Kiwibank accordingly represented that the amounts of the fees and interest in the account statements reflected what the customer was required to pay Kiwibank in accordance with their Member Package agreement, when this was not the case; in breach of s 13(i) of the FTA.

### *Kiwibank's awareness of the issue and response*

- 4.9 Kiwibank received customer complaints regarding the Member Package Issue. Those complaints were received and handled by front-line staff, but until November 2019 there was no system in place within the bank to ascertain whether complaints that had been resolved by the front-line raised more widespread issues.
- 4.10 Kiwibank formally identified the issues in July 2020 (in respect of the credit card benefits), December 2020 (in respect of the home loan benefits) and January 2021 (in respect of overdraft benefits).
- 4.11 Kiwibank continues to offer the "Love Your Perks" Member Package for its employees but has ceased offering the others. It ceased offering the Tertiary and Graduate Packages to new customers from February 2021. It also ceased offering the PSA and Mates Rates Packages to new customers from April 2021, and ceased offering benefits under those packages to existing customers a year later.
- 4.12 For the "Love Your Perks" Member Package, the terms and conditions were updated and made available to staff in June 2022. As part of the update, certain benefit types assessed as higher risk were removed. Kiwibank also enhanced its controls relating to the package.

### *Detriment*

- 4.13 From June 2007 to March 2022, Kiwibank has identified that the Member Package Issue affected 15,691 customers, who were overcharged by \$4,219,744 as a result, comprising initial overcharges totalling \$3,816,761 and \$402,983 in compounding interest.
- 4.14 In the period from 31 May 2019 to 31 March 2022, Kiwibank has identified that the issue affected a total of 5,079 customers, with overcharges totalling more than \$1,905,851 (comprising initial overcharges of \$1,795,202 and \$110,649 in compounding interest).

### *Remediation*

- 4.15 Kiwibank has since apologised and paid compensation to affected customers. The compensation paid includes refunds of overcharged amounts, compounding interest on the overcharged amounts and use-of-money interest. In addition to paying money direct to customers, Kiwibank has paid some money to charity in lieu of making a payment to an affected customer and some has been held to be paid to Inland Revenue as unclaimed monies in due course.
- 4.16 Kiwibank has paid compensation of \$4,901,141 (comprising \$4,175,720 in initial overcharged amounts, \$412,341 in compounding interest and \$313,080 in use of money interest).<sup>3</sup>

## **5 The Amortisation Issue (charges 4-8)**

### *Background*

- 5.1 Since January 2002 Kiwibank has used the same software system for its core banking system ("**Software System**").
- 5.2 The legacy Software System is in the process of being replaced. In 2013 Kiwibank commenced a project to replace the Software System, but discontinued that project in 2017 on the basis that the chosen replacement had ceased to be fit for purpose. Kiwibank has since continued to use the Software System, making upgrades to it from time to time. A project to replace the core banking system, including the Software System, is currently underway but will not be completed for some time.

### *The issue*

- 5.3 The Amortisation Issue arose when a Kiwibank customer with a home or business loan requested a particular change to their loan on the day the loan settled. Those changes were processed in a maintenance screen within the Software System.
- 5.4 In those circumstances, the Software System did not apply the correct formula to recalculate the customer's revised repayment amount. Instead, the system recalculated the repayment amount based on what the loan principal would have been if the customer had already made a loan repayment. This meant that:

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<sup>3</sup> The difference between these figures and those in paragraph 4.12 reflects the fact that there were additional overcharges between the end of the charge period and when Kiwibank rectified the issue and remediated customers, in October-November 2023.

- (a) customers made smaller loan repayments over the first fixed term of their loans, as a result of Kiwibank's system having calculated their repayments on the basis of the wrong sum of principal owing; and
- (b) unless corrected, customers would pay greater interest charges over the life of their loans, given that they had repaid less loan principal than what ought to have been the case.

5.5 Kiwibank had some quality assurance processes in place during the relevant period, but given the technical nature of the issue, those processes did not identify it.

#### *The misrepresentations*

5.6 Kiwibank made representations to customers affected by this issue in settlement confirmation letters and account statements.

5.7 In each case, the confirmation letters and account statements recorded the incorrect regular repayment amounts. By issuing those documents, Kiwibank accordingly represented that the repayment amounts stated in those documents reflected the agreed loan terms, when that was not the case; in breach of s 13(i) of the FTA.

#### *Kiwibank's awareness of the issue and response*

5.8 Kiwibank has confirmed that the issue occurred since at least August 2013, which is the earliest point in time for which Kiwibank has reliable data. Kiwibank has advised that the issue is likely to have existed since January 2002, when the Software System was first used.

5.9 In July 2019 Kiwibank identified that the issue affected business customers, and in March 2020 it identified that the issue affected home loan customers.

5.10 The underlying system issue is not fixed pending the replacement of the core banking system. In November 2021 Kiwibank put in place additional quality assurance processes to identify instances where the issue was occurring, but those processes did not completely resolve the issues or prevent all further instances of them. Since November 2021, Kiwibank has also:

- (a) enhanced internal training and processes to require staff not to process the particular change on the settlement date; and
- (b) implemented a control report to identify any customers who may become impacted, despite the process enhancements (including continuing quality assurance), so that repayment amounts can be corrected.

#### *Detriment*

5.11 From August 2013 to 30 May 2024, Kiwibank has identified that the issue affected a total of:

- (a) 7,013 home loan customers, who were overcharged by a total of \$91,094 in compounding interest as a result of them underpaying loan principal; and
- (b) 2,720 business loan customers, who were overcharged by a total of \$252,785 in compounding interest as a result of them underpaying loan principal.

- 5.12 In the period from May 2019 to 30 May 2024, Kiwibank has identified that the issue affected 4,143 consumer and business customers who were overcharged by a total of approximately \$116,549 in compounding interest as a result of them underpaying loan principal.

#### *Remediation*

- 5.13 Kiwibank has a remediation programme underway which will involve apologising and paying compensation to customers affected from August 2013 onwards.
- 5.14 Kiwibank expects the remediation to include payment of, at least, compensation of \$620,000 (comprising \$380,000 compounding interest, additional principal of \$220,000 and \$20,000 in use-of-money interest).<sup>4</sup> These sums include money that will be paid to charity in lieu of making payments to affected customers and money that will be paid to Inland Revenue as unclaimed monies in due course.

## **6 The Interest-only Period Issues (charges 9-13)**

### *Background*

- 6.1 Kiwibank and some home and business loan customers agreed an interest-only period during the customers' loan term. The effect of those agreements was that customers would make smaller repayments to repay only interest (not loan principal) for the interest-only periods, and would be required to repay interest and loan principal once the interest-only period had ended.

### *The issues*

- 6.2 Kiwibank failed to transfer some customers from their interest-only periods when those customers became contractually required to repay principal on their loans. Those failures arose in two distinct circumstances.
- 6.3 The first cause affected the majority of cases. It arose because Kiwibank relied on manual procedural steps for staff to change customers' loans from interest-only, to include repayments of principal. That process was not consistently followed and Kiwibank had no systems or processes in place to check whether or not the manual processes were being followed and so whether the agreed changes to principal and interest payments were being implemented.
- 6.4 The second cause affected the remaining cases and arose where customers attempted to refix their loans via Kiwibank's internet banking and/or mobile banking systems. If a customer attempted to refix their loan during an interest-only period in order to repay principal and interest, Kiwibank's Software System would replicate the last interest only period repayment amount for the first repayment. That resulted in the customer continuing to pay interest only for their next repayment, and then principal and interest for the following repayments. Kiwibank's quality assurance processes were not sufficiently robust to detect that issue.

### *The misrepresentations*

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<sup>4</sup> These figures reflect Kiwibank's best estimate of the total amounts to be paid when it commences the remediation.

- 6.5 In either case, Kiwibank issued account statements to the affected customers which included line items recording the principal and interest repaid on their loans during the statement period. For customers affected by the issue, the account statements showed the interest being deducted from the customers' loan, but not any loan principal.
- 6.6 By issuing account statements in those terms, Kiwibank represented to the affected customers that the amount it had charged the customer for repayment of the loan was consistent with the contract between the parties. This misrepresented the contractual terms in breach of s 13(i) of the FTA.

*Kiwibank's awareness of the issue and response*

- 6.7 Kiwibank has confirmed that the issue occurred since at least July 2011, which is the earliest point in time for which it has reliable data. Kiwibank has advised that the issue is likely to have existed since January 2002, when the Software System was first used.
- 6.8 Kiwibank first identified instances of the issue in December 2019 (in relation to the second cause) and November 2020 (in relation to the first cause), following customer complaints. The systemic nature of the issues was identified in December 2020.
- 6.9 Kiwibank made improvements to its manual processes in August 2019 (prior to the issue being identified) which reduced the incidence of the issue but did not resolve it. In November 2021 Kiwibank put in place additional quality assurance processes to identify instances where the issues were occurring, but those processes did not completely resolve the issues or prevent all further instances of them. Further instances are now captured through a control report and the issue resolved (either by implementing principal and interest only payments or ascertaining that the customer wishes to remain on interest only payments and agreeing that contractual change with the customer).

*Detriment*

- 6.10 The effect of the issue was that customers:
- (a) were required to make lower repayments during the affected period, when they were entitled to pay principal as well; but
  - (b) became liable to paying higher interests costs over the life of their loans, due to not having paid down any loan principal during the affected periods.
- 6.11 From July 2011 to 30 May 2024, Kiwibank has identified that the issue affected a total of:
- (a) 3,958 consumer borrowers, who were overcharged by approximately \$731,239 of compounding interest on underpayments; and
  - (b) 2,072 business lending customers, who were overcharged by approximately \$1,322,686 of compounding interest on underpayments.
- 6.12 The estimated overcharge within the charge period, being from 31 May 2019 to 30 May 2024, is approximately \$450,651 in compounding interest on underpayments by both consumer and business customers.
- 6.13 The detriment from the issue may have been compounded by the prevailing interest rate environment. For illustration, in November 2011 the Official Cash Rate was 2.5%, whereas at



the time of filing it is 5.5%. Accordingly, if there were customers who may have been in the financial position to make higher repayments of principal during the years of relatively low interest rates (ie. between mid-2009 and mid-2022) have now lost the opportunity to do so for the foreseeable future. On the other hand, customers had the benefit of the use of their money that would otherwise have been applied to principal during that time and were free to use it as they wished.

#### *Remediation*

- 6.14 Kiwibank has since apologised and paid compensation to the majority of affected customers. In total, Kiwibank expects to pay compensation of, at least, \$3,437,123 (comprising \$2,053,925 in interest overcharged, \$1,315,348 in additional principal and \$67,850 in use-of-money interest). These sums include money that will be paid to charity in lieu of making payments to affected customers and money that will be paid to Inland Revenue as unclaimed monies.

## **7 The Overdraft Interest Rate Issue (charges 14-17)**

#### *Background*

- 7.1 For over twenty years, Kiwibank has offered preferential overdraft interest rates on everyday accounts to customers who held home loans with it: for instance, by offering a 12.9% overdraft interest rate, when its prevailing overdraft interest rate was 16.9%. Prior to September 2015, those preferential interest rates only applied when the overdraft facility itself was secured by the home loan mortgage. In this regard, overdraft facilities were contractually provided and documented on either a secured or an unsecured basis. Between September 2015 and 31 October 2019, Kiwibank's website included reference to a "preferential" interest rate, but the website did not specify the terms on which customers were entitled to that rate.

#### *The issue*

- 7.2 From 1 November 2019, Kiwibank stated on its website that the preferential overdraft interest rate was available to all existing and joining customers who held home loans with it, rather than only to those customers with secured overdraft facilities.
- 7.3 Kiwibank's internal policies at the time were also that customers were entitled to the preferential interest rates in three circumstances: where they took out a home loan and an overdraft at the same time, where they had an existing home loan and subsequently took out an overdraft, and where they had an overdraft and subsequently took out a home loan.
- 7.4 The process intended to apply the correct overdraft rate in each of those three cases was different, but in each instance it relied on manual processes which were not consistently followed. Kiwibank also had no quality assurance processes in place to detect whether or not customers were being charged the correct overdraft interest rates.

#### *The misrepresentations*

- 7.5 Where customers were affected by the issue, Kiwibank rendered account statements which showed interest being charged at the incorrect, higher interest rates. By doing so, Kiwibank represented that the interest charged on those loans represented the interest it was entitled

to charge on its arranged overdrafts, when that was not the case; in breach of s 13(i) of the FTA.

#### *Kiwibank's awareness of the issue and response*

7.6 In January 2022, Kiwibank conducted a review of its overdraft process to determine whether customers were being charged the discounted interest rates. The issue was identified in the course of that review.

7.7 In September 2022, Kiwibank removed its offer of the discounted overdraft rates for new customers. From October 2023, the issue was rectified for existing customers who were eligible for the preferential overdraft rate before September 2022.

#### *Detriment*

7.8 From 1 November 2019 to 4 September 2022, the issue affected approximately 1,434 customers who were overcharged by approximately \$53,074 (comprised of \$47,054 in initial overcharges and \$6,020 in compounding interest).

#### *Remediation*

7.9 Kiwibank has since apologised and has paid compensation to the majority of affected customers. In total, Kiwibank expects to pay compensation of, at least, \$53,074 plus compounding interest and use-of-money-interest. These sums include money that will be paid to charity in lieu of making payments to affected customers and money that will be paid to Inland Revenue as unclaimed monies in due course.

## **8 The Pre-loaded Fees Issue (charges 18-21)**

#### *Background*

8.1 Throughout the relevant period, Kiwibank's terms and conditions have provided that the fees payable by customers, and the amounts of those fees, are those set out in a separate brochure published by Kiwibank, called "Fees & Limits". The fee terms set out in those brochures formed part of the contract between Kiwibank and the customer.

8.2 When Kiwibank amended its fees, it was required to do so by preparing a new version of the operative "Fees & Limits" brochure. Kiwibank also published the amounts of its fees on its website.

#### *The issue*

8.3 In the case of its home loan customers, Kiwibank adopted a system of "preloading" the amounts of its home loan fees at the time the loan settled, in anticipation of those fees being charged later.

8.4 Kiwibank did not have sufficiently robust measures in place to ensure that the preloaded information was updated as its fee terms were amended. As a result, some Kiwibank home loan customers with pre-loaded fees were overcharged by virtue of being:

(a) charged fees that Kiwibank had removed from its terms and conditions; and

- (b) charged fees at the historically higher amounts, where the fee amount in the “Fees & Limits” brochure had decreased.
- 8.5 There were also instances where the incorrect fee amounts were manually loaded at the time they were meant to have been charged, but at the wrong amount.
- 8.6 Kiwibank did not have systems in place to mitigate the risk of human error in these processes or to check that the fee amounts were correctly charged (save that, the process for pre-loading fees during the discharge of security process was updated in 2017 to include checks for fee changes).
- 8.7 The issue affected the following home loan fees:
- (a) the “consent fee”, charged whenever the customer’s solicitor requested Kiwibank’s consent to a legal arrangement affecting the customer’s property (for instance, for registering a covenant or a cross-lease);
  - (b) the “discharge of security fee”, charged whenever the customer requested Kiwibank to discharge a mortgage or security in full or in part; and a separate fee charged for urgent requests of that kind;
  - (c) the “early exit fee”, charged whenever the customer repaid their loan within three years from the date the loan was drawn down;
  - (d) the “lump sum repayment (administration) fee”, charged for all repayments made in excess of the early repayment limit on the customer’s loan;
  - (e) the “settlement statement fee”, charged whenever the customer requested a settlement statement; and
  - (f) the “top up fee”, charged whenever the customer obtained further credit under their existing home loan facility.

#### *The misrepresentations*

- 8.8 Where customers were affected by the issue, Kiwibank rendered account statements which showed the fees being charged at the incorrect, higher amounts (or in circumstances where the fees should not have been charged at all). By doing so, Kiwibank represented that it was entitled to charge those fees, or fees in those amounts, under its terms and conditions, when that was not the case; in breach of s 13(i) of the FTA.

#### *Kiwibank’s awareness of the issue and response*

- 8.9 Kiwibank has confirmed instances of the issue dating back to June 2015, which is as far back as it has reliable data.
- 8.10 Kiwibank first identified the issue in June 2020, when a product manager conducted an internal review and observed in Kiwibank’s general ledger account that it had been charging early exit fees, when those were meant to have been discontinued.
- 8.11 In April 2023, Kiwibank implemented system changes to avoid the issue occurring in the future. This included the introduction of a control report to pick up any further instances of the issue occurring.

*Detriment*

8.12 The extent of the overcharge differed for each fee and over time. The table below sets out the highest and lowest amounts of the overcharges at a customer level<sup>5</sup> for each fee during the relevant period:

<b>Fee type</b>	<b>Lowest per-fee overcharge during relevant period</b>	<b>Highest per-fee overcharge during relevant period</b>
Consent Fee	\$20 (being a customer charged \$50 when the fee should have been \$30, i.e. an overcharge of \$20)	\$100 (being a customer who was charged the fee in two instances at \$100 when the fee was set at \$50)
Discharge of Security Fee	\$15 (being a customer charged \$75 when the fee was set at \$60)	\$390 (being a customer who was charged \$600 in relation to seven discharge fees when the total should have been \$210 as the fee was set at \$30, i.e. an overcharge of \$390)
Discharge of Security Fee (urgent)	\$50 (being a customer charged \$50 when the fee was set at \$0)	\$50 (being a customer who was charged \$50 when the fee was set at \$0)
Early Exit Fee	\$250 (being a customer charged \$250 when the fee was set at \$0)	\$750 (being a customer who was charged the fee in three instances at \$250 when the fee was set at \$0)
Lump Sum Repayment Fee	\$10 (being a customer charged \$10 when the fee was set at \$0)	\$4,400 (being a customer who was charged this amount on repayment (which potentially related to another fee type, such as an early repayment fee but was coded as a lump sum repayment fee)) and when the lump sum repayment fee was \$0.
Settlement Statement Fee	\$5 (being a customer charged \$50 when the fee was set at \$45)	\$150 (being a customer charged the fee in four instances at \$45, when the fee was set at \$0 in two instances, and \$15 in the other two instances)
Top Up Fee	\$15 (being a customer charged \$200 when the fee was set at \$185)	\$80 (being a customer charged \$200 when the fee should have been \$120, i.e. an overcharge of \$80)

<sup>5</sup> Note these amounts may be multiple charges of one type of fee to a single customer, eg. a customer who was incorrectly charged a fee three separate times.

- 8.13 In the period since June 2015, the issue affected 1,847 customers, who were overcharged by a total of \$183,104 (comprised of \$181,730 in initial overcharges and \$1,277 in compounding interest).
- 8.14 In the period from 31 May 2019 to 21 March 2023, the issue has affected 1,128 customers, who have been overcharged by approximately \$116,702 (comprised of \$115,490 in initial overcharges and \$1,212 in compounding interest).

#### *Remediation*

- 8.15 Kiwibank has since apologised and has paid compensation to the majority of affected customers. In total, Kiwibank expects to pay compensation of, at least, \$204,717 (comprising \$181,730 in overcharged fees, \$1,277 in compounding interest and \$21,709 in use of money interest). These sums include money that will be paid to charity in lieu of making payments to affected customers and money that will be paid to Inland Revenue as unclaimed monies in due course.

## **9 Defendant's response to investigation and compliance history**

### **Kiwibank's response to the Commission's investigation**

- 9.1 Kiwibank self-reported the Member Packages Issue to the Commission in April 2022. It subsequently self-reported the Amortisation and Interest-only Period Issues in January 2023, and the Overdraft Interest Rate and Pre-loaded Fees Issues in May 2023.
- 9.2 Kiwibank has provided information to the Commission regarding the issues, both on a voluntary basis and in response to a statutory notice issued under s 47G of the FTA.

### **Remediation**

- 9.3 Kiwibank has remediated the majority of the customers affected by the Member Package, Interest-Only Period, Overdraft Interest Rate and Pre-loaded Fees Issues.
- 9.4 Kiwibank is currently validating and refining the affected customer numbers for the Amortisation issue and is scheduled to commence remediating customers in September 2024.

### **The defendant's compliance history**

#### *Breach of the Financial Markets Conduct Act 2013*

- 9.5 Kiwibank has previously admitted three breaches of s 22 of the Financial Markets Conduct Act 2013, arising from its self-reported failure to provide promised benefits on transactional bank accounts offered to personal and business banking customers. One of the breaches related to a benefit that certain transaction fees and service fees on everyday accounts were waived for customers who held Member Packages. There is no overlap between the package benefits at issue in that proceeding (which related to transactional accounts) and the benefits that gave rise to the Member Package Issues here (which relate to credit products and which form the background for charges 1-3).

- 9.6 In October 2023, the High Court ordered Kiwibank to pay a pecuniary penalty of \$812,500, after discounts, in respect of those admitted breaches.

*Breach of the Credit Contracts and Consumer Finance Act 2003*

- 9.7 In August 2020, following a self-report to the Commission, Kiwibank admitted having breached s 9C(2)(a)(iii) of the Credit Contracts and Consumer Finance Act 2003 by failing to have robust home loan variation policies, procedures and systems.
- 9.8 Under a settlement agreement with the Commission, Kiwibank admitted the breach and agreed to pay \$5.2m to 48,463 potentially affected customers.

## ANNEXURE 2

### Commerce Commission v Kiwibank – extent of the conduct and the harm

Within the charge period only			Throughout the life of the issues		
Charge Period and Charges	No. of affected customers	Amount of the overcharge	Life of the issue	No. of affected customers	Amount of the overcharge
<b>Member Packages Issue - charges 1-3</b>					
31 May 2019 to 31 March 2022 (2 years 10 months)	5,079	\$1,905,851 (initial overcharges of \$1,795,202 plus compound interest of \$110,649)  Average per customer: \$375	June 2007 to 31 March 2022 (14 years, 10 months)	15,691	\$4,219,744 (initial overcharges of \$3,816,761 plus compound interest of \$402,983)  Average per customer: \$269
<b>Amortisation Issue - charges 4-8</b>					
31 May 2019 to 30 May 2024 (5 years)	4,143	\$116,549  Average per customer: \$28	August 2013 to 30 May 2024 (10 years, 10 months)	9,733 (7,013 home loan customers and 2,720 business loan customers)	\$343,879 (compound interest on underpayments (\$91,094 for home loan customers and \$252,785 for business loan customers))  Average per customer: \$35
<b>Interest-Only Period Issue – charges 9-13</b>					
31 May 2019 to 30 May 2024 (5 years)	Not available.	\$450,651  Average per customer: Not available	July 2011 to 30 May 2024 (12 years, 11 months)	6,030 (3,958 consumer borrowers and 2,072 business lending customers)	\$2,053,925 (compound interest on underpayments (comprising \$731,239 for consumer borrowers and \$1,322,686 for business lending customers))  Average per customer: \$340
<b>Overdraft Interest Rate Issue – charges 14-17</b>					
1 November 2019 to 4 September 2022 (2 years 10 months)	1,434	\$53,074 (initial overcharges of \$47,054 plus compound interest of \$6,020)  Average per customer: \$37	Issue occurred entirely within charge period	Issue occurred entirely within charge period	Issue occurred entirely within charge period
<b>Pre-Loaded Fees Issue – charges 18-21</b>					
31 May 2019 to 31 March 2023 (3 years 10 months)	1,128	\$116,707 (initial overcharges of \$115,490 plus compound interest of \$1,212)  Average per customer: \$103	June 2015 to 21 March 2023 (7 years, 9 months)	1,847	\$183,104 (initial overcharges of \$181,730 plus \$1,277 in compound interest)  Average per customer: \$99
<b>Total</b>	<b>At least 11,784</b>	<b>\$2,642,827</b>	<b>N/A</b>	<b>34,735</b>	<b>\$6,853,726</b>