

*Significant penalties are being used by the Courts to ensure businesses both correctly market their goods and services and maintain adequate processes and systems to ensure that promises to customers are carried out.*

In this article we discuss recent cases involving breaches of consumer protection laws. These cases include two where record penalties were imposed by the Court. We also discuss some key learnings for businesses to ensure they comply with consumer protection laws.

## **RECORD \$3.675M FINE FOR ONE NZ FOR BREACHING FAIR TRADING ACT**

The High Court in August 2023 imposed a record fine of \$3.675 million on One NZ, formerly known as Vodafone NZ, for misleading consumers in the marketing of its FibreX broadband service. The fine is the highest ever awarded under the Fair Trading Act, and was intended by the Court to serve as a deterrent to a company that had (according to the Court) a history of non-compliance with the Fair Trading Act.

One NZ was found guilty by the District Court in 2021 for misleading consumers into believing its FibreX service was fibre-to-the-home broadband, when it was not. It was also found guilty of falsely suggesting to consumers that FibreX was the only available broadband service at their address, which was not true.

In discussing the judgment, Commission Chair, John Small, said “[t]his judgment against One NZ is a significant win for Kiwi consumers – because every New Zealander should be able to trust what businesses are saying in their marketing and promotion of their services.”

*“The Fair Trading Act requires claims to be truthful and accurate in order to give you the information you need to make an informed purchasing decision.”*

A copy of the Commission’s 14 August 2023 press release is available [here](#).

## **CUSTOMERS REFUNDED OVER \$470,000 IN COMMERCE COMMISSION FAIR TRADING ACT SETTLEMENT**

A Commerce Commission investigation and subsequent High Court proceedings has resulted in more than 2,600 customers of Vocus Group companies being refunded a total of nearly \$480,000 after breaches of the Fair Trading Act. The companies entered into fixed-term agreements via uninvited direct sales – these are sales that are made door-to-door or over the telephone and are made at the instigation of the business rather than at the request of the customer.

Businesses making uninvited direct sales must comply with the detailed requirements of the Fair Trading Act. These requirements include providing clear and accurate information to customers, including the total price and other consideration payable by the customer. Vocus Group failed to adequately disclose early termination fees payable by customers. The Court found these fees to be part of the *total price payable and other consideration* that is required to be disclosed to customers, and that Vocus Group breached the Fair Trading Act.

As a result of the High Court’s findings, Vocus Group agreed to enter into a settlement agreement with the Commission agreeing to refund early termination fees of a total of \$473,688 paid by over 2,600 affected customers.

A copy of the Commission’s 27 September 2023 press release is available [here](#).

## **RECORD \$3.9M PENALTY FOR VERO’S MISLEADING REPRESENTATIONS**

In a recent judgment by the Auckland High Court, insurer Vero has received a massive fine of \$3.9 million for making misleading representations about multi-policy discounts affecting approximately 42,000 customers. The Financial Markets Authority (FMA) has indicated that this is the largest fine of this nature that they have issued.

In June, Vero acknowledged that they breached the Financial Markets Conduct Act of 2013 (**FMC Act**), by confirming that they failed to provide certain customers with multi-policy discounts which they were entitled to. The FMA found that the breach was fundamentally caused by errors and deficiencies with Vero's systems and some data input errors by staff. Vero effectively overcharged customers approximately \$9.9 million in premiums. While Vero first alerted the FMA in December 2019, their initial review overlooked some affected channels. The FMA requested a full investigation which revealed additional affected customers. During the sentencing, Justice Geoffrey Venning emphasized that Vero neglected a fundamental commitment to its customers by not billing accurately. Justice Venning further expressed concerns regarding Vero's lack of satisfactory explanation for its delay in identifying and addressing the issue. The head of FMA enforcement, Margot Gatland, highlighted that the fine *"reinforces the importance to firms of the need to invest properly in systems that deliver benefits promised to customers and should remind the industry that financial institutions will be held to account if they fail to sufficiently invest in systems, controls and processes that ensure all customers are treated fairly."* Vero has compensated the affected customers an aggregate amount of \$13.97 million. Vero donated a further \$95,845 to charitable organizations in instances where the affected customers were non-responsive or could not be contacted. The FMC Act came into effect on 1 April 2014. Therefore, proceedings by the FMA under the FMC Act can only address conduct post 1 April 2014. Despite this, Vero took the initiative and recompensated its customers for conduct preceding this date.

A copy of the FMA'S 12 October 2023 press release is available [here](#).

## KIWIBANK'S GUILTY OF MISLEADING CUSTOMERS ABOUT TRANSACTION FEES

Kiwibank was also recently found guilty under the FMC Act in the Wellington High Court and fined \$812,500 for providing misleading information to its customers about transaction fees over almost 15 years.

The breaches related to Kiwibank's general terms and conditions, in which it was stated that there would be no transaction fees payable on accounts for customers if they also had a Kiwibank home loan. Kiwibank failed to waive account fees for about 35,000 home loan customers who were collectively over charged around \$1.17 million between September 2005 and March 2020. The scope of the case only reached 19,000 of the affected customers and approximately \$576,800 of overcharged fees.

Justice Francis Cooke explained that the amount of the fine is justifiable due to the huge number of affected customers and the incredibly long period of time that the misrepresentations took place. He also expressed that customers should be able to expect that their bank will use adequate systems to accurately calculate and apply financial entitlements.

A copy of the FMA'S 12 October 2023 press release is available [here](#).

## LEARNINGS

Some of the learnings that can be taken from recent cases include:

1. **Regulators and the Courts are focussed on deterrence.** Penalties are being used by the Courts to ensure businesses – particularly those that are large and well-resourced – maintain adequate processes and systems.
2. **Substantiate your marketing claims before making them.** If you make a claim about a good or service, you must have reasonable grounds for believing the claim is true at the time you make it. Any claim should be supported as much as possible by facts, figures and credible sources of information. Claims made on the back of guesses or unsupported opinions will not comply with the law.
3. **Make sure that your systems and processes are capable of delivering on your claims.** Ensure that your systems are fit for purpose, reliable and can deliver on your claims.

# Legal Update

4. **Train your staff.** To ensure you deliver on your marketing claims you should train your customer facing staff and relevant administrative staff to ensure you correctly market and sell your goods and services, and you correctly enter data into your systems.
5. **Check for issues and escalate:** Regularly check your systems and processes for issues and deal with any issues that are identified. Escalate issues internally to ensure that issues are appropriately dealt with.

## FURTHER INFORMATION

For further information about these cases or to discuss compliance with consumer protection laws, please contact usual Jackson Russell Business Law advisor or one of the team listed.

## KEY JACKSON RUSSELL CONTACTS

Darryl King PARTNER  
BUSINESS LAW TEAM

DDI +64 9 300 6935 | M +64 21 326 087

E [darryl.king@jacksonrussell.co.nz](mailto:darryl.king@jacksonrussell.co.nz)

David Alizade PARTNER  
BUSINESS LAW TEAM

DDI +64 9 300 6 937 | M +64 21 224 8055

E [david.alizade@jacksonrussell.co.nz](mailto:david.alizade@jacksonrussell.co.nz)

Janice Lamont LAWYER  
BUSINESS LAW TEAM

DDI +64 9 300 6 924 | M +64 211 415 428

E [janice.lamont@jacksonrussell.co.nz](mailto:janice.lamont@jacksonrussell.co.nz)



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