

## Air NZ's opt-out insurance charge an example of two big online contract issues

### Speed read

Air New Zealand recently dropped its opt-out insurance model following pressure from the Commerce Commission.

However, such an opt-out charge is also a great example of two other big online contract issues:

- the new Fair Trading Act unfair contract terms regime; and
- incorporating the contract terms in the online contract.



Below, we provide background to the Air New Zealand situation and ask whether it could be declared an unfair contract term under the new regime, up to the date there was change. The answer might be yes.

We also look at the issue of inadequate incorporation of terms into a contract. This is a big problem with many online contracts, and one which lawyers often miss because they are busy making the words of the contract as compelling as possible. Again, the opt-out regime provides a useful example.

April 2015

### The Detail

#### A case study: Air New Zealand's opt-out insurance charges

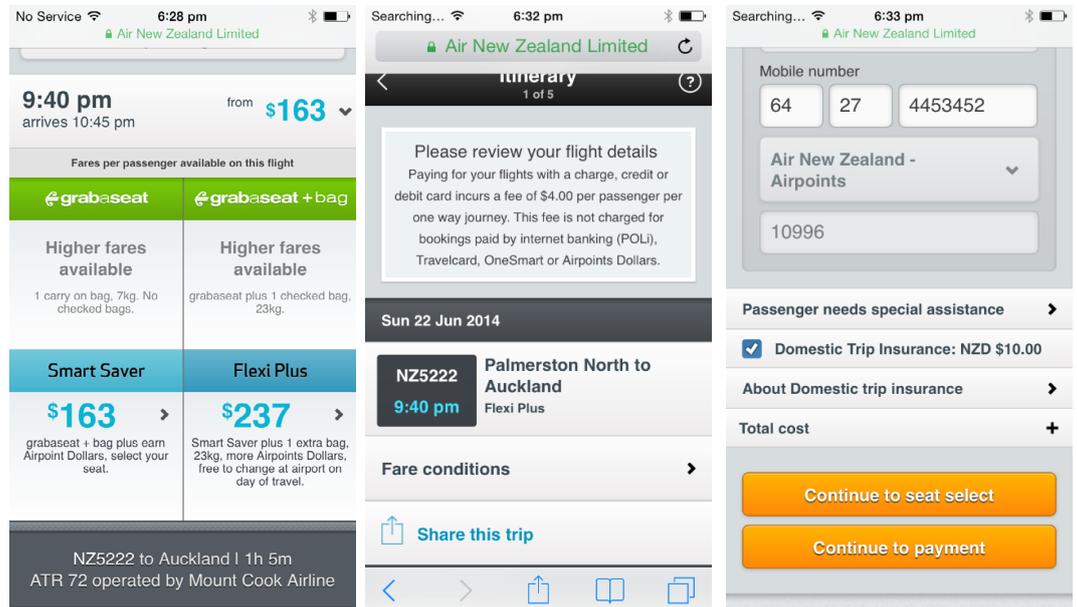
We were involved in Air New Zealand dropping its opt-out insurance charges, as on mobile app screens such as the sequence of 3 screens on the next page (there's another screen too referring to the charge).

First, some background; in the words of the Commission's warning letter to Air New Zealand earlier this year (highlighting added):

"4. During our investigation, the Commission considered Air NZ's practice of offering travel insurance on an opt-out basis when booking online or via Air NZ's mobile app.

5. After a customer has entered an airfare search enquiry and is quoted for the price for an airfare (the headline price), **Air NZ pre-selects the travel insurance option and adds the charge for travel insurance to the headline price. Unless customers take the additional step of de-selecting the pre-selected travel option on subsequent pages they will acquire a bundle of services, namely an airfare and travel insurance. Air NZ does not disclose this additional travel insurance charge on the front page of its booking process, nor does it disclose on the same page that it is effectively offering a bundle of services at a greater price than the headline price.**

Air NZ's opt-out insurance charge an example of two big online contract issues



6. *The Commission's concern has been that, as a result of the opt-out nature of the travel insurance, there is a significant risk that some customers would have inadvertently purchased it.*

....

10. *In this case, the Commission's view is that Air NZ's conduct was likely to have breached sections 11 and/or 13(g) of the Fair Trading Act.*

11. *Section 11 prohibits traders from engaging in conduct that is liable to mislead the public as to the nature, characteristics, suitability for a purpose, or quantity of services.*

12. *We consider that Air NZ is likely to have breached section 11 as it does not make it sufficiently clear to its customers that the service they will purchase includes travel insurance unless they take the positive step of de-selecting it. In our view, Air NZ's disclosure of the requirement to opt-out of the insurance is insufficient to bring it to the attention of all reasonable customers. At least some customers are not aware that they will have also purchased insurance.*

13. *Section 13(g) prohibits false or misleading representations about the price of services.*

14. *We consider it likely that Air NZ has breached section 13(g) as the headline price shown on the first page of the booking process does not include the cost of the pre-selected travel insurance. We think this has the potential to be misleading because customers will pay the insurance inclusive price, unless they take the additional step of de-selecting the travel insurance option. Air NZ's disclosure is insufficient to bring this to the attention of all reasonable consumers."*

**Could the Air New Zealand opt-out be declared to be an unfair contract term?**

Air New Zealand has now dropped their opt-out insurance model, but could the \$10 opt out charge be declared to be an unfair contract term under s46L of the new Fair Trading Act (FTA) unfair contract regime,<sup>1</sup> up to the point that it was dropped?

It's an interesting example, as it's probably not in the non-exclusive list of examples in s46M, and also it involves an "upfront price".<sup>2</sup>

"Upfront price" is generally carved-out of unfair contract terms by s46K, as a matter of policy as it is contractual consideration, which is at the heart of contract theory and should not be diluted.

**Air NZ's opt-out insurance charge an example of two big online contract issues**

However, if a part of the upfront price is not "transparent", the carve-out doesn't apply (s46K). To be "transparent", the term must be in reasonably plain language, legible, presented clearly and readily available to the party affected by the term (s2).

Based on what the Commission says above on the issues it was looking at, it looks to be arguable that the \$10 opt-out insurance charge was not transparent. It was, said the Commission "...insufficient to bring it to the attention of all reasonable customers. At least some customers are not aware that they will have also purchased insurance."

So, is it an unfair contract term? Of course, even though it's not in something formal such as the Ts and Cs of a contract, it is just as much part of a contract.

A term is an unfair contract term if it:

- Causes a significant imbalance between the rights and obligations between the parties; and
- Is not reasonably necessary to protect the legitimate interests of the supplier; and
- Would cause detriment to the customer, financial or otherwise, if applied, enforced or relied upon.

There are some quite challenging issues to iron out over time as to where unfair contract terms start and stop, given the Act's definitions require some interpretation.

Without definitively answering the issue here, and given the policy underlying the new law, we think it arguable that this would be capable of being declared an unfair contract term. Someone unwittingly gets something that they know nothing about, they pay for it, and because they don't know about it, they usually won't get the benefit.

**Incorporation of terms into the contract – a contract law issue**

Air New Zealand's opt-out charge is a useful example of this too.

A big issue in online contracts is that, if insufficient attention is not drawn to the

terms, they are not legally binding. Ask any law student doing contract law and they'll give you a treatise on carpark ticketing cases and Lord Denning's red hand test.<sup>3</sup>

Often online, the real legal issue for contracts is not whether the Ts and Cs are up to scratch and work; frequently the supplier loses at first base as the terms are not adequately incorporated in the contract.

This is a very common failing in online contracts. Given that many users of the Air NZ booking app would fail to see the opt-out charge, as the Commission believes, clearly there is a good argument that the contract term is not binding, as insufficient attention has been drawn to it.

**What does this mean in practice?**

Lawyers will often fuss over getting the words of the online contract to be nice and robust. However, they may not think of what can in fact be a bigger issue; are the pretty terms online actually going to be enforceable? Is there sufficient attention drawn to the terms? This is a legal question and sometimes the attention is better placed there, instead of on making the terms 20% better.

---

1. For more about the new FTA regime, see our article [Unfair contract terms regime starts 17 March: a summary of key issues](#), and for more about the Commerce Commission targeting unfair online sales, see [Regulator hits ground running on new unfair contract terms](#).

2. As it comes after the first page, it might be argued it is not an upfront price, but we'll assume it is.

3. See *J Spurling Ltd v Bradshaw* [1956] 1 WLR 461; *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163.