

Air New Zealand and IAG provide contrasting case studies on how to handle Fair Trading Act complaints

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Speed read

Fair Trading Act complaints need to be handled very carefully as corporates by then are in high risk territory. Air New Zealand's handling of the FTA concerns outlined in our [last article](#),¹ shows how there is greater risk, especially as (a) the Commerce Commission had said it was reviewing the circumstances and (b) Air New Zealand has already been prosecuted and convicted under the FTA for headline pricing not disclosing additional pricing in the small print.



There are different ways of handling FTA complaints and of course this depends on the facts. Air New Zealand has chosen to stick with and justify its approach. Sometimes that can work so long as the plan is executed well.

IAG chose a different path to deal with an FTA problem that came up: it fessed up to problems and remedied them quickly, thereby emerging with a stronger not weaker brand: in particular the regulator was highly supportive as we noted in our earlier [case study](#).²

Time will tell as to Air New Zealand's chosen path.

The Detail

What we said

This follows our last article, [Air New Zealand ad campaign provides another example for business on Fair Trading Act risk](#).³ There, we had raised concern that, by having an opt-out insurance charge of \$10 on the mobile booking app, with little reference to this charge, and in particular no reference in the headline price on the opening pages, there might be a breach of the Act which the Commerce Commission should investigate. The Commission later announced it would review the position. Our analysis built on well-established law, plus the recent decision of the Australian regulator to prosecute Jetstar and Virgin in overlapping circumstances. We also questioned whether it was appropriate and fair to its customers for a large corporate to be doing this. We raised the prospect of class action, given the evidence of the transactions is readily obtainable via electronic information (and that the sums involved may be material).

We emphasise again that we are not saying there is a breach of the Act in the booking process but rather that this is something to investigate. Likewise as to concerns around the subsequent press statements.

What Air New Zealand said after our NBR article

NBR quotes Air New Zealand as saying:

"We make it clear to customers in a banner at the top of the relevant online page that we have opted them into travel insurance. We also provide four opportunities for customers to 'opt-out' of the travel insurance through the online booking process."

But, in relation to the online booking app squarely and solely raised in NBR (the new mobile booking app released this year), this does not describe the actual position. As we outline below, the mobile app has no such banner, and provides only two not four opt-out opportunities.

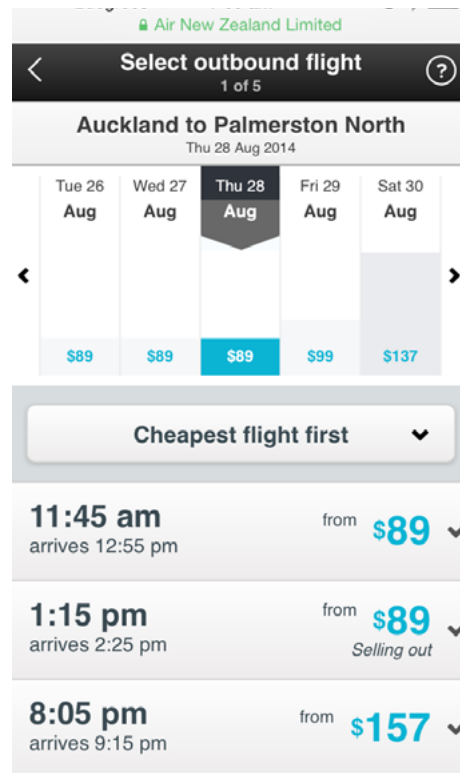
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Air New Zealand appear instead to describe what happens on the online booking app accessed from PCs instead of by mobile and that app has fewer FTA problems, but it nonetheless has possible FTA issues.

So, instead of Air New Zealand dealing with the less compliant app that had been solely raised in the earlier NBR article, it dealt with a different and more compliant app in its media statement. Both the mobile and the PC based apps are online apps.

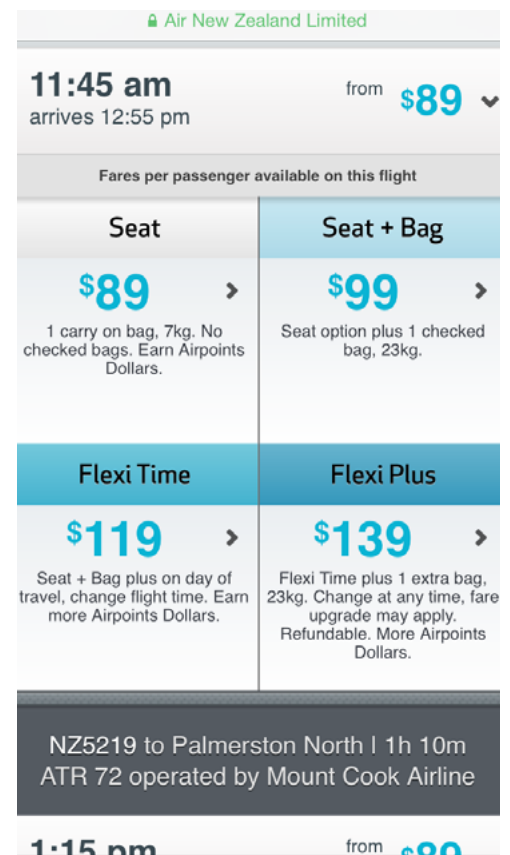
What actually happens on the mobile booking app

We booked a flight from Auckland to Palmerston.



Here's the first page stating the fares from \$89 and no reference to \$10 insurance. (No reference either to the \$4 booking fee for using cards to pay, but that is another story we talked about in our earlier commentary⁴ – and that's what Jetstar and Virgin are in the sights for in Australia).

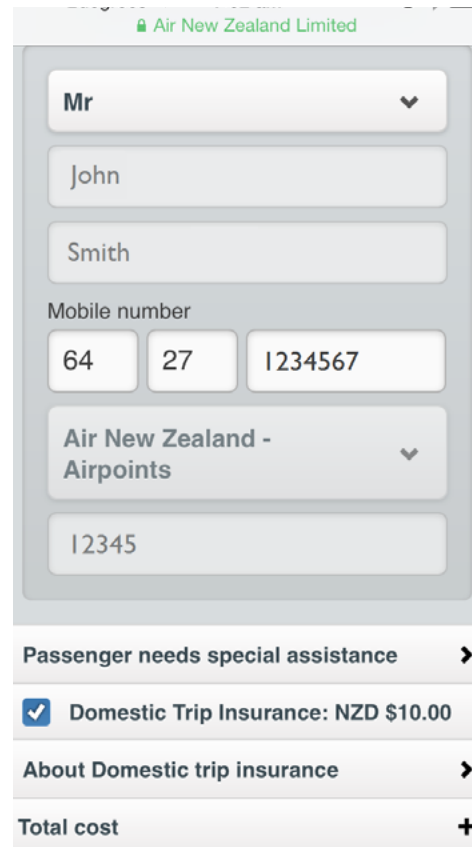
On to the next page that comes up:



Still no mention of insurance. In the lingo of the FTA cases, we are well into the "marketing web", which is a major FTA issue, as outlined in our article, Carpet Manufacturers' spat clarifies marketers' legal obligations.⁵

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We chose the cheapest fare and we get this:



Air New Zealand Limited

Mr

John

Smith

Mobile number

64 27 1234567

Air New Zealand - Airports

12345

Passenger needs special assistance >

Domestic Trip Insurance: NZD \$10.00

About Domestic trip insurance >

Total cost +

So this is the first time we get to see the \$10 add on for insurance. The site user has to take out the tick (opt out) to remove the insurance. There's nothing else on this page about insurance (and there's more on the page than in the screen shots so the insurance isn't quite as prominent).

Just taking a little detour, we clicked "About Domestic trip insurance" to find out details of this insurance. We got sent directly to this document.

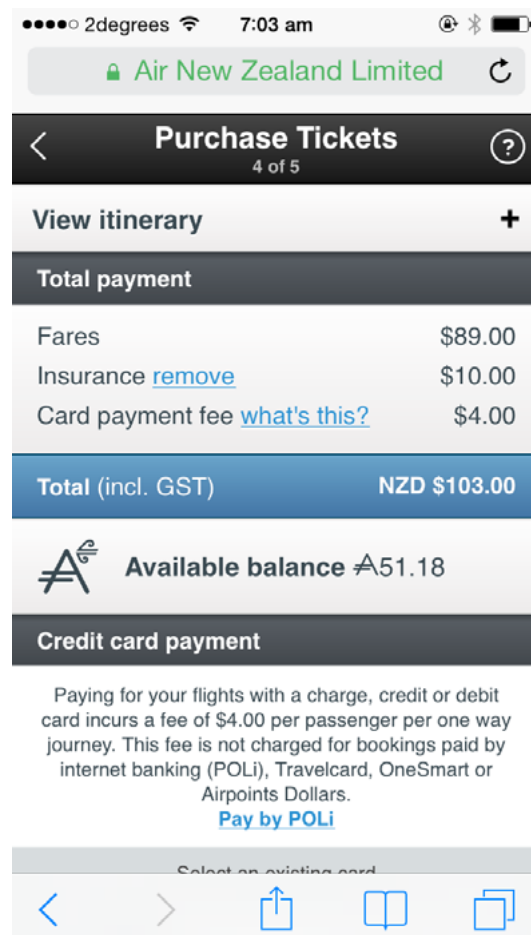


It's a detailed insurance policy: the sort of legalese we're paid in 6 minute time slots to dissect, but not the sort of thing folks read when booking flights. No nice short description of the benefits of this insurance.

Looks like there's been more thought put into the eye catching \$89 airfare headline than this opt-out insurance, which adds \$10 to the \$89.

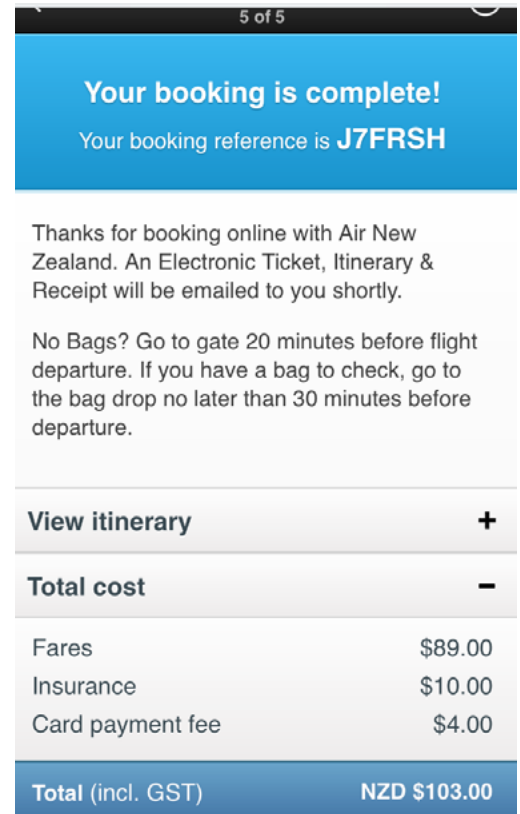
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Moving on, we get to the next page:



This is the second reference to the insurance charge and there's nothing else on the page. It's our second chance to opt out.

So we buy the fare complete with the insurance as we haven't opted out.



We've already bought the fare and so the reference to the insurance is irrelevant, as it's contracted and paid for. Anyway you only see the insurance component if you click on the screen to expand it to get there (normally you don't get to see it as in the real world you don't expand to look at this).

So in summary, there are 2 opt-out opportunities and no headline banner. The two opt-outs don't come up until the passenger is well into the "marketing web".

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There are some who would deliberately choose the insurance as it is useful to them and so not opt-out, and others who sign up inadvertently. For example, we've inadvertently bought this insurance a number of times even though it is no use to us. That happens as the opt out option is missed in the real world of quick airline ticket buying.

Comms around regulatory issues

In the context of the clear focus of what was in NBR (the mobile booking app) Air New Zealand should take particular care in how it responds in the media.

Similarly if there are problems that might be fixed but the corporate pushes on to support its prior position; that can increase risk too of the regulator taking action when it might not otherwise do so. That might sometimes be the right thing to do – and overall it is possibly the right call here - but that is a decision to make and execute carefully.

From a comms perspective also, toughing it out can sometimes have the problem blowing over, where a supplier faces criticism. Today's news, tomorrow's fish and chip paper. That also is an understandable strategy, but one to run carefully. We are not saying that Air New Zealand is doing that here.

Air New Zealand has been convicted already for overlapping dealings with consumers

Where there is history, the supplier should be especially careful.

In that regard, Air New Zealand would need to be particularly careful, as it has form in this area. It was convicted, with the Commission as prosecutor, in 2006 for an overlapping type of issue, namely a headline price claim where the small print increased the total price. As the Judge told Air New Zealand then:

"It would not be fair that a reader of such advertisements should have to assume a burden to check any information to make sure that the headline information is correct.....[T]he

prominence and ease of apprehension of the additional information must apply to the first point of drawing attention to the existence of it, to the route to find it, and then to the information itself."

That's the case we often refer to when advising clients on headline claims such as on the booking mobile app where the small print pricing is different (here, the \$10 insurance and the \$4 booking fee).

We wrote about that case in our article, [\\$189 Fares to Sydney!!*](#).⁶

Our view is that an ad with headline pricing, which is altered in the small print, is legally similar for these purposes to a headline price claim where additional and optional charges are added later in a relatively low key opt-out manner.

Given that history, if the Commission concludes it thinks there is a breach this year, prosecution is more likely (and any penalty is likely to be higher if convicted).

IAG's approach: "It's the putting it right that counts"

Air New Zealand has stuck to its guns in justifying what it is doing on the website. Maybe that's the best thing to do here.

It's helpful to show a contrasting approach (but all cases differ on the facts). There's great power in that LV Martin mantra back in the day, "*It's the putting it right that counts*", as IAG found.

IAG followed LV Martin's mantra when it encountered FTA problems. See our article, [Managing Fair Trading Act complaints – a great example](#).⁷ They quickly fessed up, refunded customers and had a settlement agreement with the regulator following which the latter was complimentary of IAG in a media release. IAG emerges as a trusted brand having openly handled the problems. The outcomes were great too for the regulator (which also is to be congratulated for this and other similar lateral solutions as a means of achieving Commission objectives).

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Other issues in media statements by Air New Zealand

Back to more of what Air New Zealand had to say to NBR readers in NBR:

"Air New Zealand spokeswoman ... says...the airline makes the choice transparent enough for customers that they understand what they are getting themselves into (or out of)....."The majority of our customers do 'opt-out' of travel insurance which supports our view that our notification is clear."

Experienced marketers know that opt-out is often overlooked by consumers. That most customers do opt-out does not justify the approach: many of the minority often won't realise they have chosen to pay \$10 for insurance.

Says Air New Zealand "...the airline makes the choice transparent". But, why is so much written internationally about the perils of opt out scenarios? And about insufficient reference to charges? This is not a new issue.

We consider that issue applies whether as to the PC based app or the mobile app.

In terms of risk assessment, for when and if the Commission exercises its statutory investigation powers, if Air New Zealand has business cases and the like justifying opt-out as a revenue strategy, that would rather escalate the problems. Of course maybe nothing exists but it's the sort of thing a regulator will look for. To us, that is part of the analysis as to what is the best approach.

Conclusion

Air New Zealand has chosen its path, just as IAG chose its path. They provide two contrasting case studies as to how to deal

with regulatory problems when they arise. Sometimes it's worth toughing it out – but the strategy must be very carefully managed and executed – and sometimes it's worth taking the approach of cooperation and rapidly fixing the problems openly.

Horses for courses.

1. <http://www.wigleylaw.com/assets/Uploads/Air-New-Zealand-ad-campaign-provides-another-example-for-business-on-Fair-Trading-Act-risk.pdf>

2. <http://www.wigleylaw.com/assets/Uploads/Fair-Trading-Act-breach2.pdf>

3. <http://www.wigleylaw.com/assets/Uploads/Air-New-Zealand-ad-campaign-provides-another-example-for-business-on-Fair-Trading-Act-risk.pdf>

4. <http://www.wigleylaw.com/assets/Uploads/Will-regulator-take-a-look-at-Air-New-Zealands-drip-pricing.pdf>

5. <http://www.wigleylaw.com/assets/Uploads/Carpet-Manufacturers-spat-clarifies-marketers-legal-obligations.pdf>

6. <http://www.wigleylaw.com/assets/pdfs/2006/fares-to-sydney-yeah-right.pdf>

7. <http://www.wigleylaw.com/assets/Uploads/Fair-Trading-Act-breach2.pdf>

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