

## Optimising and attacking ICT and online contract terms: Part 4

July 2015

### Speed read

In this series of articles, we overview some of the issues that we addressed at the New Zealand Law Society's May 2015 IT and Online Law Conference.

In Part 4 we discuss B2C issues around the new unfair contract terms regime in the FTA.

This new regime should be an early focus for ICT and online providers. Many existing contract are in breach of the regime.

Below, we use Air New Zealand's opt-out insurance charge to illustrate unfair contract term regime issues and other online contract issues.



### The Detail

#### This follows our earlier articles:

- [Optimising and attacking ICT and online contract terms: Part 1](#)
- [Optimising and attacking ICT and online contract terms: Part 2](#)
- [Optimising and attacking ICT and online contract terms: Part 3](#)

The new FTA unfair contract terms regime, which came into force March 2015, raises B2C issues around ICT and online contracts.

The handful of industries and sales that the Commission has said that it will focus on first include telecommunications and online sales. Plus, the regulator has said that it will hit the ground running on enforcement. See our article, [Regulator hits ground running on new unfair contract terms](#). Therefore, this new regime should

be an early focus for ICT and online providers.

Many existing contracts are in breach of the regime.

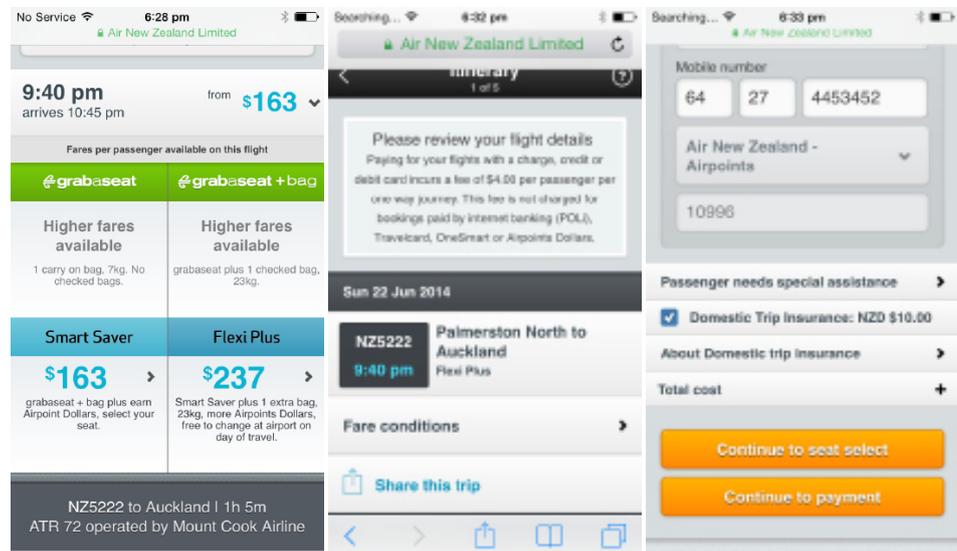
We've summarised our views in our article, [Unfair contract terms regime starts 17 March: a summary of key issues](#).

We've also described some of the internet and telecommunications problems with contract clauses in our article, [Common Telco B2C contract clauses likely to be unenforceable from March 2015](#).

#### **A case study: Air New Zealand's opt-out insurance charge illustrates online unfair contract term FTA issues and also law of contract issues**

We were involved in Air New Zealand dropping its opt-out insurance charges, as on mobile app screens such as this sequence of 3 screens:

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It's a great example of two big online issues; (a) incorporating the contract terms in the contract (the Lord Denning red hand rules, the car park ticketing cases etc.)<sup>3</sup> and (b) the unfair contract terms regime (which the Commission didn't review earlier this year, as that was about the misleading and deceptive conduct regime).

First, some background; in the words of the Commission's warning letter to Air New Zealand earlier this year (italicization 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.*

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."*

**Was the Air New Zealand opt-out an unfair contract term?**

When we prepared the NZLS conference paper, the new unfair contract term regime had come into force, and Air New Zealand still was running its opt out insurance approach as above. Could the \$10 opt out charge have been declared to be an unfair contract term under s 46L?

It's an interesting example, as it's probably not in the non-exclusive list of examples in s 46M, and also it involves an "upfront price".<sup>2</sup> "Upfront price" is generally carved-out of unfair contract terms by s 46K, as a matter of policy as it is contractual consideration, which is at the heart of contract theory and should not be diluted.

However, if a part of the upfront price is not "transparent", the carve-out doesn't apply (s 46K). To be "transparent", the term must be in reasonably plain language, legible, presented clearly and readily available to the party affected by the term (s 2).

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 is not transparent. It 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.*

So, is it an unfair contract term? Of course, even though it's not in something formal such as the T's and C's 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 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.



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

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

Wigley+Company  
PO Box 10842  
Level 6/23 Waring Taylor Street, Wellington  
T +64(4) 472 3023 E [info@wigleylaw.com](mailto:info@wigleylaw.com)  
and in Auckland  
T +64(9) 307 5957  
[www.wigleylaw.com](http://www.wigleylaw.com)

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