

What will the Commerce Commission do about Air New Zealand and Jetstar's addition of credit card fees?

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Speed read

Jetstar's deal with the Commission to cease opt out additional charges for insurance, baggage and seat selection, in order to stop court action, shows how traders might carry on practices alleged to be in breach of the Fair Trading Act and then pull out by way of a settlement. In this way, the trader can gain substantial profit while continuing to trade. The Commission's tool of doing deals is valuable but in the right cases.

In a parallel case, the Australian regulator has succeeded in Court alleging misleading conduct – under legislation similar to our Fair Trading Act - by Jetstar and Virgin, arising out of adding booking fees to the base fares after the first page.

Jetstar and Air New Zealand engage in similar practices in New Zealand too, by adding fees for use of credit and debit cards, and notifying this on subsequent online pages.

The Commerce Commission some time ago said it would not progress investigating if there is breach in New Zealand as to drip price addition of credit and debit card fees until the Australian case was decided, given the parallels in the law in both countries.

Now the Australian case is decided, we expect the Commerce Commission will now consider what to do.



The Detail

Jetstar and the opt out additional charges

Around a year ago, the Commerce Commission and Air New Zealand entered a [settlement](#) by which Air New Zealand would drop its addition of insurance to the fare which was automatically added (on an opt out basis) on a page after the first page displaying the basic price.

The Commission asserted that was misleading and in breach of the Fair Trading Act. The settlement dropped

possible prosecution of Air New Zealand.

Opt-out pricing like this has two Fair Trading Act problems. First, when the fare is increased in later pages from the base fare, consumers are drawn into the "marketing web" at the low prices. This is also called "drip pricing". Second, by the opt-out approach, consumers can inadvertently miss the price increase and pay more, in the real world of online bookings.

Now when you book, you only take the insurance if you click the opt-in button.

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One of the key drivers of public disclosure of settlements like this is to educate and encourage compliance from others. As the Commission said at the time, *"We will be targeting other companies we are concerned about. We would encourage all businesses selling online to proactively change their behaviour or drop any consideration of introducing this practice."*

Now, a year later, Jetstar has also [settled](#) with the Commission, avoiding prosecution, by dropping what appears to be a bigger issue than the Air New Zealand scenario: three opt out increases after the base price is disclosed, not just one. One for insurance. One for baggage. And one for seat selection.

These add-ons to the base price on the first page, alleged by the Commission to mislead consumers under the Fair Trading Act, where the fare is disclosed, by way of the marketing web drip pricing and the inadvertent overpayment where there is opt-out, add substantial revenues for Jetstar. And in an industry where margins are tight, the impact on net profit is even greater.

Settlements to avoid prosecution are valuable tools for the Commission, and to be encouraged. They reduce cost and time where budgets are limited, to free up resources for other activities, and public disclosure can have some "name and shame" implications, pour encourager des autres.

In that regard, the role of larger companies is important, according to the then Commerce Commission Chair, when announcing a 2006 conviction of Qantas under the Fair Trading Act for misleading and deceptive conduct:

"Ms Rebstock noted that large companies like Qantas and Air New

Zealand have a high profile in the marketplace, and other businesses tend to copy their behaviour.

"Large companies have access to the best legal advice and should have compliance programmes in place to ensure they don't break the law," says Ms Rebstock."

We don't know Jetstar's strategy, but we think its effect is brilliant (so if they had this strategy, they are to be complimented, from the perspective of shareholders, although consumers have a different perspective as they pay out to line the shareholders' pockets). Whatever the intent of the strategy:

- The warning having been so clearly given to the airlines in March last year, in overlapping circumstances, one would be forgiven for thinking being seen to prosecute would be important for the Commission. But in the end, despite all the talk, and despite even that Qantas (100% owner of Jetstar) had a prior Fair Trading Act conviction, no prosecution happened. Instead, there's a settlement that hits the newspapers like the fish and chip paper it will be. The Commission is alleging that Jetstar misled its customers, and that is quite a thing. But the point slips by relatively quietly. And for the future, traders might well treat with a pinch of salt the Commission's claim last year that *"The Commission has made its position on this issue very clear and traders can be assured we will take enforcement action to stop this type of conduct in the future."*

- Another big win is that Jetstar has got another year's substantially increased profit out of this as only now do they have to stop the practice.

Whatever the strategy, one can see from this that traders have some big incentives at play to allow things to play out in this sort of way. Substantial

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increased profit and minimal reputational downside as the regulator brings the practice to an end via a settlement.

One of the benefits of a settlement is that the practice is brought to an end quicker than could be achieved via a prosecution. That is to the direct benefit of consumers but that needs to be weighed up with the downsides such as the ease with which traders can achieve settlements encouraging them to continue the practice. That also implies that the Commission should look at actions, as it has in the past, to recoup the prior payments where there are Fair Trading Act breaches. Such action is challenging, but considerable sums are involved, and the Commission can get an electronic database from the airlines to more readily manage the process.

Card payment fees

There's an airline drip pricing situation playing out in parallel with opt-out pricing and so far, again, the effect of the strategies is on the revenue and profit winning side for the airlines and their shareholders.

Air New Zealand booking website

On the Air New Zealand online booking service, \$4 per passenger per domestic sector (more for international) is added as a card payment fee where there are debit and credit card payments. A domestic return trip for Mum, Dad and the two kids and that's \$32 for the single card transaction.

But on the website that fee doesn't happen until 3 pages later after selecting extras and seats (2 pages later on the mobile app). Initially the traveller gets given the price without the add on for the way most people pay. With drip pricing, for example, the \$99 fare (the magic figure below a round number)

becomes in reality \$103.

On the first page there is small print reference to the booking fee, but that is regarded as insufficient notice to consumers under the Fair Trading Act.

At \$4 per sector per passenger, for most bookings, this figure is a substantial increase across the board for Air New Zealand's revenues and bottom line profit.

For reasons similar to opt out pricing, this has always looked like it may be in breach of the Fair Trading Act, for misleading consumers. But under parallel legislation in Australia, the regulator there brought proceedings against Jetstar and Virgin for similar booking fee practices. In light of that, the Commission decided to await the outcome of the Australian case. Given tight resources, that is understandable, but the effect is substantial, given on-going payments by passengers, and substantial bottom line increases in profit for well over a year so far.

In November, the [Australian court](#) decided against Jetstar and Virgin. Although the airlines won on some points, the implication is that, if this was Australia, the juxtaposition of the fixed price on the first page and the addition of the booking fee later (not particularly clearly, but even if it was clear that would be a problem) Air New Zealand likely would be in breach of the legislation.

Thus, we would expect that the Commission is engaging with Air New Zealand to address whether or not there is breach and, if yes, what action to take.

Based on past history, and if the Commission thinks there's breach, we imagine a settlement is still up for grabs, despite the strong warning signs there may be breach from the cases under

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the Fair Trading Act and, now, in closely similar circumstances in Australia. And the effect of all this? Air New Zealand will have gained extra time to charge more to consumers, and shareholders will be the better for it. That is a considerable benefit of having this pushed out for a year. Put another way, the effect of this is to stretch out quite a profit centre for an extended period.

Technically action could be taken to recoup the additional payments on behalf of travellers, and this can be done via the Commission. There are arguments that enforcement is not particularly effective without that step, but if the Commission is going to compromise on settlements, it's hardly going to litigate like that.

Jetstar NZ's mobile booking app

When you select the preferred day and destination for flying, the app comes up with flight time options with a price for the base fare (called the Starter fare). There's no mention of adding on a booking fee. That doesn't happen until the page on which the credit/debit card details are loaded, and it's noted in a way that is muted: quite a few would not pick it.

In Australia, after talks with the regulator, Jetstar added a booking fee notification to that first page on which price is disclosed. The Court said that this meant there was no breach of the legislation¹:

"185 As a result of the changes made to its website in September 2013, Jetstar brought forward in the booking process adequate disclosures of the existence and quantum of the booking

and service fee. Those disclosures were effectively made at the same time as Jetstar commenced to nominate a specific dollar figure for particular flights (ie on the 'Sales & special offers' webpage (if relevant)) and on the "Select Flights" webpage. In addition, and most importantly, when a particular flight is selected by a consumer, the pop up box containing an appropriate disclosure appears right next to the dollar figure for the fare.

186. Notwithstanding the ACCC's submissions to the contrary, I consider that this disclosure would not be missed by any reasonable consumer and is adequate. In the circumstances, this finding means that Jetstar did not make the representations which it is alleged to have made as the foundation for the second to fifth contraventions. For that reason, those alleged contraventions have not been made out."

Under the similar legislation in New Zealand, Jetstar has made no change, so, like Air New Zealand, it may also face Fair Trading Act issues.

1. Australian Competition and Consumer Commission v Jetstar Airways Pty Limited [2015] FCA 1263.

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