

Will regulator take a look at Air New Zealand's "drip" pricing?

June 2014

Speed read

Jetstar and Virgin are being prosecuted for breach of trade practices law applicable in NZ. The cases raise big issues for online booking apps and how pricing is presented. We use Air New Zealand's new mobile booking app to show how the issues crop up in NZ.

This article first appeared in National Business Review on 21 June 2014.



The Detail

Last week was a big week for B2B and B2C contract and marketing law with large implications for all businesses flowing from new law, as we outline [here](#).¹ It could end up being a big consumer law week for Air New Zealand too, if the Commerce Commission decides to follow its Australian counterpart's lead and investigate Air New Zealand's online booking practices.

On Thursday, the Australian regulator, ACCC, [announced](#)² it is prosecuting Virgin and Jetstar for something called drip pricing. It's a big issue for NZ businesses too, especially those doing online sales. Are there implications for New Zealand, given our legislation - the Fair Trading Act (FTA) - is materially the same? We'll use Air New Zealand's online booking process to illustrate.

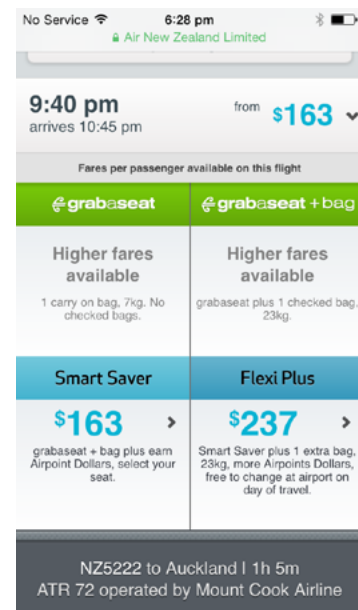
Says ACCC, "drip pricing is where a headline price is advertised at the beginning of an online purchasing process and additional fees and charges which may be unavoidable are then incrementally disclosed (or "dripped"). This can result in paying a higher price than the advertised price or spending more than you realise".

ACCC alleges that Jetstar and Virgin drip feed a booking and service fee on top of the fare initially stated, by adding \$8.50 and \$7.70 respectively when payment was made by credit

card or PayPal (or debit card too in the case of Virgin). There weren't added charges for other methods, but fees for cards and Paypal were added in the substantial majority of online bookings, said ACCC.

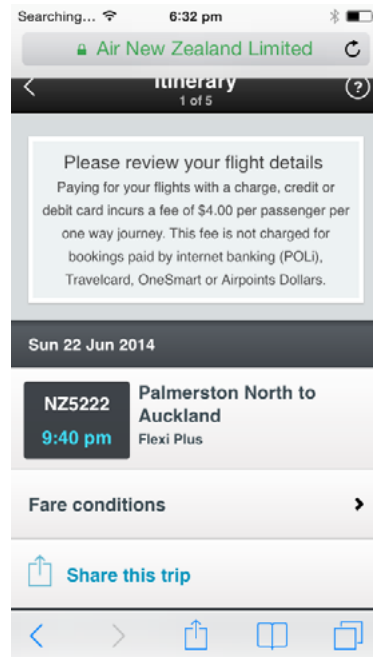
Most NBR readers fly frequently on Air New Zealand domestically. So they'll know passengers booking online go through a series of steps:

1. On the second and third pages, the passenger gets to the base airfare, like this (using the most current mobile app):

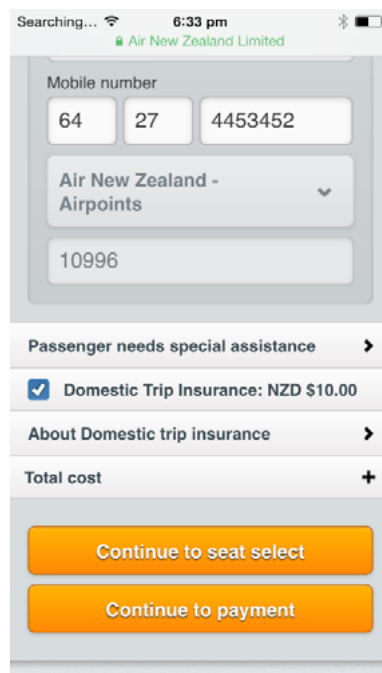


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- On the next page, the passenger gets told there's an additional \$4 is charged for credit and debit card payments. Nothing is payable for Travelcard, internet banking or One Smart payments):



- The next page adds an extra \$10 for insurance, unless that choice is de-selected (i.e. there is an opt-out):



Quite a few passengers will miss this and not opt-out even though they don't want the insurance. That's why there's quite a bit of opposition to an opt-out approach online instead of an opt-in. That applies in a wide array of areas such as privacy and contract.

Where that happens, the charges on the opening page can end up being \$14 higher when insurance and the booking fee charges are added. That's on top of the \$163 fare in this case.

We expect that, as with Jetstar and Virgin, a substantial majority of Air New Zealand bookings attract the \$4 charge. Few would pay with TravelCard, OneSmart or by internet banking. More to the point, only those very familiar with the website are likely to take TravelCard or OneSmart, and the FTA is targeted anyway at a wide array of users not just business fliers who are typically familiar with these additional charges.

Air New Zealand has made the choice to continue this online approach as recently as this year, as it has been incorporated in the new online app many of us have installed on our mobiles.

Air New Zealand knows all about the relevant FTA law: they were found guilty of FTA breaches in 2006 for a print media approach involving the same FTA provisions, as we said back then.³ There, the headline in an ad read "\$189 fares to Sydney!*" The small print at the linked asterisk added insurance and fuel charges on top of the headline \$189 fare. Was that enough to avoid FTA breach in terms of drawing attention to the insurance and fuel charges on top of the base fare? No, said the judge. The judge explained the purpose of the law, in a way applicable to drip pricing too:

"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. The burden will be on the advertiser when such a method of attracting attention is resorted to. Therefore for the reader to have an accurate picture

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of relevant detail of what is being offered, the path for picking up any additional information should not seem like a search, but a matter of natural and intuitive progression. ... Therefore the 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."

And Australia's highest court has recently explained why the need to have adequate disclosure in the headlines is important:

"It has long been recognised that a contravention of s 52 of the TPA [largely the same as s 9 FTA] may occur, not only when a contract has been concluded under the influence of a misleading advertisement, but also at the point where a member of the target audience has been enticed into "the marketing web" by an erroneous belief engendered by an advertiser, even if the consumer may come to appreciate the true position before a transaction is concluded. That those consumers who signed up for [the suppliers'] package of services could be expected to understand fully the nature of their obligations to [the supplier] by the time they actually became its customers is no answer to the question whether the advertisements were misleading."

We haven't analysed the Air New Zealand position in detail and we are not at all saying they have breached the Act. There does seem to be something for the Commission to consider. So, what can the Commission do with this?

If the Commission decides there are breaches, a number of options are available, including beyond prosecution. It could for example bring a claim seeking a refund to passengers of booking fees and/or insurance payments. If that happened to Air New Zealand, the impact on Air New Zealand could be considerable. (We haven't looked at the Jetstar and Virgin websites for their NZ-focussed offerings or at Jetstar and Virgin in Australia). The Commission took such a step with [Carter Holt](#)⁴ in relation to misrepresentations about timber quality. It brought a claim similar to a class action, as it is not viable for individuals to run a claim like this.

In the end, the Carter Holt claim was settled for relatively modest sums due in part it seems to the difficulty of tracking down affected users. That won't be a problem as to the airlines though, given the airlines, via email addresses, identified passenger names, and accounting systems recording the additional charges, have all the detail that is necessary to establish who should be paid what. The repayment process can be streamlined.

What this tells us is that a breach of this nature can escalate from relatively low fines and the bad PR of a conviction, to a liability that has substantial impact on the bottom line. Historical claims can be large. That says that traders must be very careful. Plus, as class action lawyers reckon its worthwhile suing banks for relatively small bank charges, they might well see things the same way for relatively small additional payments to airlines, either or both in Australia and New Zealand.

Is it a risk worth taking for online suppliers, with recent court cases saying that they will consider stripping profits made by breaches?

Finally, the Commission has already had a look at the booking fee charged by [Air New Zealand](#).⁵ But this seems to have been limited to addressing whether Air New Zealand correctly described the billing charge as a cost: the Commission said it did. So the issue in this article is different.

1. <http://www.wigleylaw.com/assets/Uploads/Summary-Fair-Trading-Act-and-Consumer-Guarantees-Act-changes.pdf>

2. <http://www.accc.gov.au/media-release/accc-takes-action-against-jetstar-and-virgin-for-drip-pricing-practices>

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

4. <http://www.comcom.govt.nz/consumer-credit/consumer-credit-enforcement-responses/enforcement-response-register-consumer-credit/detail/766>

5. <http://www.comcom.govt.nz/the-commission/media-centre/media-releases/2013/commission-closes-air-new-zealand-credit-card-surcharge-investigation/>