

The logo features a decorative dashed line in the top left corner that curves upwards and then downwards, resembling a stylized wave or a series of connected dots. The text "Wigley & Company" is positioned to the right of this line.

Wigley & Company

BARRISTERS *and* SOLICITORS

\$189 FARES TO SYDNEY!!*

May 2006

* Well, actually this article is about marketers being prosecuted when an ad has a headline price, and extra cost items are linked by asterisk in the small print.

The Commerce Commission has successfully prosecuted Air New Zealand for misleading ads about airfares. They boldly stated headline prices that did not include additional costs (insurance, fuel surcharges and levies). These were outlined in the small print. What to do in similar circumstances will depend on the particular context. But this decision gives some idea of the risks not only for treatment of price but other selling points too. Importantly, the Commission is endeavouring to appeal the decision. This may lead to the boundaries being set more stringently against marketers. In the meantime, it is prudent to take a conservative approach. In this article we address these issues.

The Court reviewed Air New Zealand ads that appeared in the major dailies (the principles apply to other media too including the Internet).¹ For most of the ads (but not all) there was an asterisk alongside the headline price. That asterisk referenced another asterisk where – depending on the ad – additional charges for items (the CAA levy, an insurance charge and a fuel surcharge) were outlined. These items were given varying degrees of prominence and detail depending on the particular ad.

A marketer can be prosecuted (as well as face civil liability) under the Fair Trading Act for making “a false or misleading representation with respect to the price of any goods or services”.² The court had to figure out if Air New Zealand’s ads were false or misleading as to their handling of price.

What’s “false” and “misleading”?

- “False” is simply something that is contrary to fact, untrue or incorrect.
- A statement is “misleading” if it fails to provide adequate disclosure to deal with half-truth, ambiguity and uncertainty.

Whether something is false or misleading isn’t assessed from the point of view of an “average New Zealand shopper”. Rather, the question is whether the representation was misleading to any significant group of people within the right class of those entitled to protection of the legislation (with the focus generally on consumers).

The Court cases point to the need to prominently refer to additional information to prevent a representation from being misleading.

Air New Zealand’s approach, said the court, was “misleading” in most cases (in one case it was “false”). The judge took a straightforward, pragmatic approach. As he said:

¹ Commerce Commission v Air New Zealand Ltd (24 November 2005) District Court, Auckland.

² Fair Trading Act 1986, section 13(g).

“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 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.”

This is to be looked at from the perspective of:

“... the person who might be relaxing in a chair or standing in a bus, who opens the newspaper in the one case to read at leisure or clutches it in the other case to scan whilst commuting. Being impacted by the advertisement may only be fleeting, but the advertisement is deliberately there to be seen by such people. They are ordinary people. Where the advertisement raises interest in such a person, it must not be apt to mislead that person into incorrect impressions – it must lead that person into correct impressions about what is being offered”.”

So, given the asterisked reference to additional information in small print, the prominence of the headline price and the significance of the additional costs, most of the ads were in breach of the Act.

The Judge made an interesting distinction between operating costs (those that are inherent as part of the provision of a service) and third party costs. He said that the insurance and fuel costs should generally be included in the headline price, even though they had markedly increased. They are normal operating costs and part of the normal service (although in the particular circumstances here, insurance might acceptably be a separate item).

A different approach might be justified for something such as a levy which is imposed by a third party, although the treatment of those items could still lead to a “*misleading*” accusation.

Each case needs to be looked at on its own facts. There’s no cookie cutter solution for all cases. It is inevitable that some information needs to appear in smaller print. But there will continue to be significant risk around not including all cost items in the headline price (or not having bold and prominent reference to additional and optional costs). That risk remains heightened until possible clarification on appeal from this judgment. There are a number of areas on which the Commission can be expected to seek a tougher approach on appeal.

In conclusion, some care should be taken, particularly pending the outcome of the appeal.

Wigley & Company is a specialist law firm founded 14 years ago. Our focus includes IT, telecommunications, regulatory and competition law, procurement, and media/marketing.

With broad experience in acting for both vendors and purchasers, Wigley & Company understands the issues on “both sides of the fence”, and so assists its clients in achieving win-win outcomes.

While the firm acts extensively in the commercial sector, it also has a large public sector agency client base, and understands the unique needs of the public sector. While mostly we work for large organisations, we also act for SMEs.

With a strong combination of commercial, legal, technical and strategic smarts, Wigley & Company provides genuinely innovative and pragmatic solutions.

The firm is actively involved in professional organisations (for example, Michael is President of the Technology Law Society).

We welcome your feedback on this article and any enquiries you might have in respect of its contents. Please note that this article is only intended to provide a summary of the material covered and does not constitute legal advice. You should seek specialist legal advice before taking any action in relation to the matters contained in this article.

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