

Article Information

Service: Competition & Consumer

Federal Court turns off the tap on drip pricing

The Federal Court of Australia recently ruled that both Jetstar and Virgin engaged in misleading and deceptive conduct and the making of false or misleading representations in contravention of the Australian Consumer Law

The Federal Court of Australia recently ruled that both Jetstar and Virgin engaged in misleading and deceptive conduct and the making of false or misleading representations in contravention of the Australian Consumer Law, through a practice commonly referred to as “drip pricing”, in relation to some of their airfare promotions and advertisements.

The Australian Competition and Consumer Commission (ACCC) defines “drip pricing” as the advertisement of a headline price at the beginning of an online purchasing process and the incremental disclosure (or “dripping”) to consumers of additional fees and charges which may be unavoidable.

The Claim

The ACCC claimed that both Jetstar Airways Pty Limited (**Jetstar**) and Virgin Australia Airlines Pty Ltd (**Virgin**) engaged in misleading or deceptive conduct or conduct that was likely to mislead or deceive in connection with the promotion and sale of airline fares. It also claimed that the conduct of both companies amounted to the making of false or misleading representations in connection with the sale of such travel services. By way of remedy, the regulator sought declarations, injunctions, corrective advertising, pecuniary penalties and recovery of its own legal costs of the action.

The case against both companies centred on the existence of “booking and service fees” for fare payments made using one or more popular and commonly used payment methods like PayPal and widely accepted credit cards (Jetstar: \$8.50 for domestic flights and \$12.50 for international flights; Virgin: \$7.70 for domestic flights).

The ACCC took issue with the promotion and advertisement by both airlines of prominent headline prices that did not adequately disclose the existence of the potential booking and service fees. It argued that even though relevant fees were fully disclosed to consumers prior to entry into any binding legal transaction, the carefully constructed staged booking processes that the consumers were made to go through before they could obtain a ticket were designed to seduce consumers into the “webs of negotiation” or “marketing webs” of both companies.

The conduct complained of took place in 2013 and 2014 via:

- the Jetstar website, the Jetstar mobile site and through email promotions for Jetstar (**Jetmail**)
- the Virgin website, the Virgin mobile site and through email promotions for Virgin (**V-mail**).

The Representations

The ACCC’s case against each of Jetstar and Virgin contained an allegation to the effect that, by their conduct, each of the airlines had made representations that:

- the price displayed for the specific flights identified, in every case, would be the actual price of the passenger carriage services to which that displayed price related
- those passenger carriage services could be purchased for that price regardless of the payment method used
- those passenger carriage services were not subject to a condition which would alter the price depending upon the payment method used.

The ACCC then argued that these representations were false or misleading because:

- the displayed prices were only available if the passenger carriage services were paid for using certain branded credit cards or airline vouchers
- the relevant passenger carriage services were subject to the payment of a booking and service fee if payment was made using other credit cards, certain debit cards or PayPal
- the provision of such services was subject to the booking fee condition.

The Result

In relation to Jetstar, the Court found that representations made on its website in 2013 and its mobile site in 2014, constituted conduct on the part of Jetstar which was misleading or deceptive or likely to mislead or deceive as well as the making of false or misleading representations. The claim against Jetstar's website in 2014 and its Jetmail were found not to have contravened the Australian Consumer Law (**ACL**).

In relation to Virgin, the Court found that representations made on its mobile site in 2014 constituted conduct on the part of Virgin which was misleading or deceptive or likely to mislead or deceive as well as the making of false or misleading representations. However, the Court found that the Virgin website and V-mail representations did not contravene the ACL.

The issue of costs is still to be determined by the Court following further submissions to be provided by the parties in the near future.

Analysis

The conduct and representations on the Jetstar Website (in May 2013) amounted to contraventions of the ACL because customers were not told about any booking and service fee until they arrived at the "Payment" webpage. The price displayed at the "Select Flights" webpage was found to have been presented as a "firm figure" that would be subject only to such extra features as they chose on the following "Extras" webpage. The indication that payment of a booking and service fee might be required at payment came too late to cure the firm figure representation.

Further allegations about contraventions on the Jetstar Website at later periods of time were not made out because the Jetstar Website changed its layout and content in September 2013 after a July 2013 meeting with the ACCC. The changes resulted in adequate disclosures in the booking process so that they were displayed at the same time that the first specific dollar figure for the flight was given (i.e. at the "Sales and special offers" or the "Select Flights" webpages). Significantly, a "pop up" box containing an appropriate disclosure was also displayed right next to the specific dollar figure when customers selected a particular flight.

The Virgin Website did not contravene the ACL because of the "prominence, proximity and presentation" of its disclosures in relation to the booking and service fee. In contrast to the Jetstar Website, the Virgin Website provided, at the first point of contact, a specific representation as to the specific fare for a specific flight; explicit disclosures of the existence and quantum of the booking and service fee; as well as disclosure of the circumstances in which the fee will be charged at the top and bottom of the list of available flights. Identical single disclosures of the same kind are made at the top of the following two webpages and a comprehensive disclosure is then made at the "Payment" webpage. The airfares advertised on the homepage as being "from" certain amounts were found to indicate to consumers that, depending on choices made by consumers, fares in that category might be obtainable at the listed dollar figure.

The Jetstar Mobile Site and the Virgin Mobile Site contravened the ACL because neither disclosed the existence or quantum of the booking and service fee until the "Payment" webpage at the very end of the booking process. In relation to the Virgin Mobile Site, the booking and service fee was "not apparent on the face of the pages" displayed and customers were required to undertake "a series of relatively annoying steps" in order to discover the existence of the fee and the circumstances in which it would be charged.

The two Jetmail emails did not contravene the ACL because they made adequate disclosure of the existence and quantum of the booking and service fee on their face. The bottom half of both emails contained, under a heading in bold orange print of "Things you need to know" and next to a large grey dollar sign, a block of text that set out carriage conditions that explicitly set out the booking and service fee.

The V-mail email did not contravene the ACL because its terms required customers who are on the mailing list to book through the Virgin Website, which (as the Court found) contained adequate disclosures regarding the booking and service fee.

Interestingly, Justice Foster distinguished the impugned conduct of the airlines from the publication of a print advertisement in a daily newspaper or the publication of an advertisement during a radio or television broadcast. This is because publications of that kind are thrust on the public at large. In contrast, the promotions and advertisements that Jetstar and Virgin displayed do not engage members of the public unless and until a member of the public chooses to

navigate to the particular airline's website or mobile site or to subscribe to the airline's email subscription service.

Lessons for other businesses

Drip pricing conduct was a priority enforcement area in the ACCC's 2014 Compliance and Enforcement Policy, with the ACCC addressing identified behaviour across a number of industries. It remains a focus for the ACCC, as part of the ACCC's current priority area of systemic consumer issues in the online marketplace. As part of this, the ACCC is presently sweeping a range of websites and mobile apps offering online bookings for services such as flights, accommodation, cruises, ferries, trains, buses, vehicle hire, car parking and entertainment ticketing, for 'drip pricing', as it joins an international initiative to target online pricing issues in the travel, tourism and leisure sectors. The web surveillance is part of International Consumer Protection and Enforcement Network (ICPEN)'s annual internet sweep, involving over 50 consumer protection agencies around the world.

Businesses which offer online booking in the travel, tourism and leisure sectors should be particularly aware of, and alert to, this decision and the ACCC's active interest in the drip pricing issue. Also, businesses that advertise and sell goods and services online (not just in the above identified industries) should make sure that the existence and quantum of fees and charges that might qualify as a displayed dollar amount, are adequately disclosed to consumers. Particular care should be taken in regards to the design of mobile websites in order to ensure that a visually attractive layout does not open the way for liability under the ACL by obscuring, complicating or removing appropriate fee disclosures.