

## Air New Zealand ad campaign provides another example for business on Fair Trading Act risk

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### Speed read

Air New Zealand continues to provide examples around Fair Trading Act risk management, highlighted by recent ACCC prosecutions of Jetstar and Virgin. This time we write about the “up to \$49” airfares ad campaign, where online booking adds charges taking the cost over the magical round figure the \$49 is designed to avoid. The risk includes large potential class action liability: claimants have ready access to the information needed to sue. Air New Zealand was prosecuted for similar advertising back in 2006, which is a risk factor too.



There are broader commercial questions as to whether it is right (and/or too risky for the Air New Zealand brand) for Air New Zealand to run an “up to \$49” campaign when most customers are in fact going to be charged more.

This article first appeared in [National Business Review](#).<sup>1</sup>

### The Detail

Air New Zealand’s launch of its new domestic fare range featured ads such as “Grab a cheap deal between Christchurch and Wellington for \$49 one way per person.” Are there Fair Trading Act issues with this, overlapping with those we commented on in NBR following the prosecution announced in Australia against Jetstar and Virgin on overlapping issues?<sup>2</sup>

There, we queried if there are Fair Trading Act prosecution and dollar liability issues where the online booking app initially gives a fare, but later pages add, for most passengers, a \$4 booking fee. Plus \$10 insurance is added automatically by Air New Zealand, unless the customer opts out.

Jetstar and Virgin are being prosecuted by the Australian regulator, under similar legislation, for not referring to similar booking fees when the fare is first stated in the booking process.

As a leading case said, there can be breach “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.”*

Quite a few Air New Zealand customers wouldn’t even become aware of, particularly, the \$10 additional insurance charge given it is opt-out, and not highlighted in the mobile app booking process.

Following our comment in NBR, our regulator, the Commerce Commission, said to NBR.<sup>3</sup>

*“The Commission has no current plans to investigate Air NZ on drip pricing [as to the \$4 booking fee]...We are monitoring the situation across the Tasman and will await the outcome of that case...The Commission is however looking at the ‘opt-out’ nature of the travel insurance being offered by Air New Zealand but has not made a decision on that at this point.”*

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How does this relate to the new ad campaign with headlines such as "Auckland to Napier from \$79"?

Fares "from \$49" of course follow the marketing strategy of having a price point just shy of a round figure. But add the \$4 booking fee paid by most passengers online, you get to \$53. Add the insurance of \$10, the all up price moves from \$49 to \$63. If these prices were in the headlines, the sub-round figure price point strategy would be lost.

The same legal idea applies to headline fares in ads as applies to headline fares in booking apps (possibly more so as there is not such a tight link between the headlines and the detail where there is an ad). The target audience is "enticed into "the marketing web"" by initial headlines.

Air New Zealand is running this new campaign when the issues are squarely on the table. But then, none of this is news to Air New Zealand, having been convicted on similar grounds back in 2006. Then, the judge said that *"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...[T]he 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."*

We're not saying that Air New Zealand is breaching the Act. Rather, there would appear to be significant issues to be considered, and a risk assessment for it to do. In deciding what to do, the Commission would likely consider past history such as prior convictions. The risk for Air New Zealand, in addition to prosecution, is that it could be liable to refund large sums to its customers, as explained in our earlier comment. Revenues from booking fees and the \$10 insurance, going back to when these charges started (up to a maximum of around 3 years back

due to statutory limitation) would be quite a material sum on Air New Zealand's books, and quite a chunk of annual profits. It'll be interesting to see if they provision for this in the 2014 accounts.

Because the relevant sales are electronic and often have links to customers such as email addresses and Airpoint numbers, it is relatively straightforward for the Commission or class action lawyers to stitch together and deal electronically with a sizeable part of the potential list of claimants. For example the Commission could seek the database under its statutory powers. When the sums applicable to individuals are small, that is significant. Class action lawyers are already running claims against banks for similarly small figures: the electronic platform makes this easier to manage cost-efficiently. It's still complicated but then so are the bank charge cases.

On the \$4 charge, while one option would have been for the Commission to deal with it now, it's understandable they are waiting to see how this plays out first across the Tasman. The issue is still live for Air New Zealand.

Forget about the legal risk for a moment. Does this raise a broader question? Is it fair and appropriate for corporates to do such things, by which customers may end up paying more than they think they are? Is it fair and appropriate that attention is minimally drawn to the \$10 opt-out insurance charge?

1. <http://www.nbr.co.nz/article/new-ad-campaign-problematic-air-new-zealand-ns-p-158807>

2. <http://www.nbr.co.nz/article/will-regulator-take-look-air-nzs-drip-pricing-ck-p-158084>

3. <http://www.nbr.co.nz/article/investigation-air-nzs-drip-pricing-commerce-commission-weighs-ck-p-158240>

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