

Online pricing representations and the dangers of inadequate disclosure in relation to "Drip Pricing"

Since announcing the practice of so called "Drip Pricing" as [a priority enforcement area](#) in 2014, the Australian Competition and Consumer Commission ("**ACCC**") has been particularly active in investigating and pursuing alleged drip pricing practices by online booking platforms. The ACCC considers that the practice is an important focus area for consumer protection as it is said to lead to consumers paying a higher price than what is advertised or having to spend more on a good or service than anticipated due to the incremental disclosure of additional costs and fees.

Background

The ACCC's focus in this area is now also part of a [broader global effort](#) by the International Consumer Protection and Enforcement Network to conduct web surveillance for unfair pricing practices by websites and mobile apps in the travel, tourism and leisure sectors.

In October of this year, the ACCC accepted [undertakings](#) from popular accommodation booking platforms Airbnb and eDreams in relation to alleged Drip Pricing practices.

In relation to proceedings brought in June 2014, on 17 November 2015, the Federal Court found that both Jetstar Airways Pty Limited ("**Jetstar**") and Virgin Australia Airlines Pty Ltd ("**Virgin**") contravened the misleading or deceptive conduct provisions of the Australian Consumer Law¹ ("**ACL**") (contained in Schedule 2 of the

Competition and Consumer Act 2010 (Cth)) in failing to adequately disclose that fares were subject to booking and service fees.

Implications for business

While the ACCC only succeeded in respect of part of their allegations, the decision is an important reminder to all consumer-facing businesses with an online presence to ensure that their online pricing representations do not contravene the ACL, particularly being mindful to make adequate and early disclosure of any fees or other costs that may be added to the price advertised.

In only requiring early disclosure as to the existence and quantum of booking and service fees (and not the exhaustive terms of such fees), Justice Foster adopted a pragmatic approach which reflects the reality that most contemporary consumers

Key issues

- The ACCC has a significant focus on the online sector in Australia.
- The ACCC began focusing on "Drip Pricing" as an enforcement priority in 2014.
- The ACCC is currently conducting a consultation on competition issues in relation to the online accommodation booking sector.
- Companies operating online portals should ensure that they update their processes for competition compliance.

are to some extent familiar with online purchasing processes.

The decision provides to online retailers a number of important insights in relation to the ACL's operation with respect to online marketing and pricing practices:

- for online booking platforms where consumers click through a number of web pages to

complete a transaction, businesses should endeavour to disclose the complete cost of the good or service as early as possible or otherwise incorporate any additional mandatory charges into the headline price;

- businesses should generally avoid relying on fine print to qualify headline representations however, where this is required, qualifications should be displayed prominently enough to draw the attention of the consumer;
- the use of 'from' prices is generally acceptable provided there is early and complete disclosure of relevant additional charges that may be incurred;
- particular care should be taken in relation to conveying pricing representations for mobile app sites which often involve more simplified layouts due to spacing and structural constraints;
- for a contravention to be found, a consumer needn't be led to completing the transaction on the basis of the false representation - being enticed into the 'marketing web of negotiation' is enough to satisfy the threshold; and
- businesses should ensure that mobile apps are treated with the same compliance care as other web based online platforms.

The ACCC's allegations against Jetstar and Virgin

Drip pricing in online booking process

Drip pricing involves advertising a headline price at the beginning of an online purchasing process and disclosing additional fees and charges (which may be unavoidable for

consumers) incrementally (or 'dripped').

The contravening conduct essentially involved both airlines advertising a 'from' price for certain flights and deferring disclosure of the booking and service fee applicable for commonly used payments methods (this was often as high as an additional \$17.50 to the fare in Jetstar's case) until the customer reached a very late stage in the online booking process.

Notwithstanding that Jetstar and Virgin disclosed the fee before the customer entered into any binding legal obligation to purchase and pay for a seat on any particular flight, the ACCC argued that consumers were being drawn into a 'web of negotiation' by the headline representations as to price in circumstances where such representations were false at the time when they were made.

Distinctions between conduct and subsequent changes to representations by Jetstar

An important distinction between the Jetstar and Virgin website representations was that, as at May 2013 the Jetstar booking process did not disclose the existence and quantum of the booking and service fee until customers reached the final payment stage. In contrast, the Virgin website gave early disclosure of the existence of the fee and through hyperlinks, disclosure of the quantum.

Subsequent to the ACCC raising its concerns with Jetstar in relation to the pricing representations, Jetstar modified its website in September 2013 and brought forward in the booking process disclosures of the

existence and quantum of the booking and service fee.

Substantive test and application to online representations

In considering whether the overall impression created by the airlines' conduct constituted misleading or deceptive conduct under section 18 of the ACL, or false or misleading representations under section 29(1), Foster J made an important observation of the relevant class of consumers who were targeted by the representations. His Honour distinguished the decision from previous matters in which print and TV media representations were considered to have been made to the public at large. Instead, Foster J reasoned that the appropriate class comprised those members of the public who have internet access and possess some level of experience of navigating the internet and using online booking processes. Such knowledge and experience would include an understanding of the use of hyperlinks to navigate particular websites. This characterisation was crucial to his Honour's findings in relation to Virgin's conduct and Jetstar's representations following the changes to its website.

Findings

His Honour found contraventions by both airlines in respect of the booking processes which deferred disclosure of the existence and quantum of the booking and service fee to the payment stage of the process (Jetstar's website representations as at May 2013 and both parties' mobile website processes). However he did not find contraventions in relation to Virgin's website representations.

His Honour reasoned that displaying “from” fares on the home page of the Virgin website was not misleading. The layout and text displayed on that home page indicated the existence of a potential booking and service fee as soon as the customer clicked through to search for flights. It was held that Virgin was representing that, depending upon choices yet to be made by the consumer, the fares might be obtainable at the dollar figure displayed and that no rational person could reasonably have concluded that that figure would apply regardless of the payment method used or other choices made by the consumer.

Foster J also considered that the changes made by Jetstar to its website achieved adequate disclosures as to potential additional charges that would not be missed by any reasonable consumer.

The Court directed the ACCC to propose appropriate remedies against Jetstar and Virgin which reflect his Honour's ruling by 30 November 2015. It is not yet known whether either Jetstar or Virgin will seek to appeal the judgment.

Contacts

Dave Poddar

Partner

T: +61 2 8922 8033

E: dave.poddar@cliffordchance.com

Mark Grime

Associate

T: +61 2 8922 8072

E: mark.grime@cliffordchance.com

Kiran Gill

Associate

T: +61 2 8922 8098

E: kiran.gill@cliffordchance.com

Gemma Stooke

Associate

T: +61 2 8922 8025

E: gemma.stooke@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

SYD#7851824

Clifford Chance, Level 16, No. 1 O'Connell Street,
Sydney, NSW 2000, Australia

© Clifford Chance 2015

Liability limited by a scheme approved under professional standards legislation

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

www.cliffordchance.com

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Jakarta* ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

*Linda Widyati & Partners in association with Clifford Chance.