FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Jetstar Airways Pty Limited [2015] FCA 1263

|  |  |
| --- | --- |
| Citation: | Australian Competition and Consumer Commission v Jetstar Airways Pty Limited [2015] FCA 1263 |
|  |  |
| Parties: | **AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v JETSTAR AIRWAYS PTY LIMITED (ACN 069 720 243);**  **AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v VIRGIN AUSTRALIA AIRLINES PTY LTD (ACN 090 670 965)** |
|  |  |
| File numbers: | NSD 615 of 2014  NSD 616 of 2014 |
|  |  |
| Judge: | **FOSTER J** |
|  |  |
| Date of judgment: | 17 November 2015 |
|  |  |
| Catchwords: | **CONSUMER LAW** – whether, by material presented on low-cost airlines’ websites, mobile sites and in subscription emails, the airlines falsely represented that certain specific fares displayed on their websites, mobile sites and in their subscription emails were firm fares which were not subject to increase by reason of the imposition of a booking and service fee – whether, in the event that the low-cost airlines made the alleged representations, or some of them, they contravened ss 18(1), 29(1)(i) and 29(1)(m) of the *Australian Consumer Law* |
|  |  |
| Legislation: | *Australian Consumer Law*,ss 18(1), 29(1)(i), 29(1)(m), 48, 224, 232 and 246(2)(d)  *Competition and Consumer Act 2010* (Cth)  *Federal Court of Australia Act 1976* (Cth), s 21 and s 43  *Trade Practices Act 1974* (Cth), ss 52(1), 53(e) and 53(g) |
|  |  |
| Cases cited: | *Australian Competition and Consumer Commission v AirAsia Berhad Company* [2012] FCA 1413  *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* (2014) 317 ALR 73  *Australian Competition and Consumer Commission v Nonchalant Pty Ltd (In Liq)* [2013] FCA 605  *Australian Competition and Consumer Commission v Singtel Optus Pty Ltd* [2010] FCA 1177  *Australian Competition and Consumer Commission v Telstra Corporation Ltd* (2004) 208 ALR 459  *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640  *Bayswater Car Rental Pty Ltd v Department of Employment and Consumer Protection* [2008] WASCA 43  *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45  *Global One Mobile Entertainment Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 134; [2012] ATPR 42-419  *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82  *Godfrey Hirst NZ Ltd v Cavalier Bremworth Ltd* (2014) 3 NZLR 611  *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435  *Medical Benefits Fund of Australia Ltd v Cassidy* (2003) 135 FCR 1  *Miller and Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357  *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191  *SAP Australia Pty Ltd v Sapient Australia Pty Ltd* (1999) 169 ALR 1  *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 |
|  |  |
| Date of hearing: | 1–2 December 2014 |
|  |  |
| Date of last submissions: | 8 December 2014 |
|  |  |
| Place: | Sydney |
|  |  |
| Division: | GENERAL DIVISION |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 204 |
|  |  |
| **NSD 615 of 2014:** |  |
| Counsel for the Applicant: | Mr ST White SC and Mr J King |
|  |  |
| Solicitor for the Applicant: | Australian Government Solicitor |
|  |  |
| Counsel for the Respondent: | Mr PJ Brereton SC and Mr MA Izzo |
|  |  |
| Solicitor for the Respondent: | Johnson Winter & Slattery |
|  |  |
| **NSD 616 of 2014:** |  |
| Counsel for the Applicant: | Mr S White SC and Mr JB King |
|  |  |
| Solicitor for the Applicant: | Australian Government Solicitor |
|  |  |
| Counsel for the Respondent: | Mr NJ Young QC and Mr MJ Darke SC |
|  |  |
| Solicitor for the Respondent: | Gilbert + Tobin Lawyers |

|  |  |
| --- | --- |
| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 615 of 2014 |

|  |  |
| --- | --- |
| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSION  Applicant |
| AND: | JETSTAR AIRWAYS PTY LIMITED (ACN 069 720 243)  Respondent |

|  |  |
| --- | --- |
| JUDGE: | FOSTER J |
| DATE OF ORDER: | 17 NOVEMBER 2015 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. By 30 November 2015, the applicant serve upon the respondent and lodge with the Associate to Foster J a draft of the declarations, injunctions and other orders which it considers appropriately reflect the decisions explained in Reasons for Judgment published this day by Foster J (*Australian Competition and Consumer Commission v Jetstar Airways Pty Limited* [2015] FCA 1263).
2. By 7 December 2015, the respondent inform the applicant and the Associate to Foster J whether the respondent agrees that the declarations, injunctions and orders proposed by the applicant accurately and adequately reflect Reasons for Judgment of Foster J published this day (*Australian Competition and Consumer Commission v Jetstar Airways Pty Limited* [2015] FCA 1263).
3. The question of costs be reserved.
4. Each party have liberty to apply on three (3) days’ notice or on such shorter notice as a Judge might allow.
5. The proceeding be adjourned to a date to be fixed after 7 December 2015 for the purpose of making final orders and determining the question of costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

|  |  |
| --- | --- |
| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 616 of 2014 |

|  |  |
| --- | --- |
| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSION  Applicant |
| AND: | VIRGIN AUSTRALIA AIRLINES PTY LTD (ACN 090 670 965)  Respondent |

|  |  |
| --- | --- |
| JUDGE: | FOSTER J |
| DATE OF ORDER: | 17 NOVEMBER 2015 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. By 30 November 2015, the applicant serve upon the respondent and lodge with the Associate to Foster J a draft of the declarations, injunctions and other orders which it considers appropriately reflect the decisions explained in Reasons for Judgment published this day by Foster J (*Australian Competition and Consumer Commission v Jetstar Airways Pty Limited* [2015] FCA 1263).
2. By 7 December 2015, the respondent inform the applicant and the Associate to Foster J whether the respondent agrees that the declarations, injunctions and orders proposed by the applicant accurately and adequately reflect Reasons for Judgment of Foster J published this day (*Australian Competition and Consumer Commission v Jetstar Airways Pty Limited* [2015] FCA 1263).
3. The question of costs be reserved.
4. Each party have liberty to apply on three (3) days’ notice or on such shorter notice as a Judge might allow.
5. The proceeding be adjourned to a date to be fixed after 7 December 2015 for the purpose of making final orders and determining the question of costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

|  |  |
| --- | --- |
| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 615 of 2014 |

|  |  |
| --- | --- |
| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSION  Applicant |
| AND: | JETSTAR AIRWAYS PTY LIMITED (ACN 069 720 243)  Respondent |

|  |  |
| --- | --- |
| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 616 of 2014 |

|  |  |
| --- | --- |
| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSION  Applicant |
| AND: | VIRGIN AUSTRALIA AIRLINES PTY LTD (ACN 090 670 965)  Respondent |

|  |  |
| --- | --- |
| JUDGE: | FOSTER J |
| DATE: | 17 NOVEMBER 2015 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

# Introduction

1. Jetstar Airways Pty Limited (**Jetstar**) and Virgin Australia Airlines Pty Ltd (**Virgin**) are the two largest low-cost passenger airlines operating passenger flights within Australia and between Australia and certain destinations overseas. Together they have a very substantial share of the relevant market for the provision of passenger carriage services by air.
2. The Australian Competition and Consumer Commission (**ACCC**), in its capacity as the regulator under the *Competition and Consumer Act 2010* (Cth) (**CCA**), has brought a proceeding against each of Jetstar and Virgin alleging against both corporations that, in connection with the promotion and sale of fares for airline passenger travel, both airlines engaged in misleading or deceptive conduct or conduct that was likely to mislead or deceive. The airlines also stand accused of making false representations in connection with the sale of such travel services.
3. The statutory provisions relied upon by the ACCC are ss 18(1), 29(1)(i) and 29(1)(m) of the *Australian Consumer Law* (**ACL**). The ACL is Sch 2 to the CCA.
4. The ACCC seeks declarations, injunctions, corrective advertising and pecuniary penalties. It also seeks the costs of both sets of proceedings. As far as its claims for relief are concerned, the ACCC relies upon ss 224, 232 and 246(2)(d) of the ACL. It also relies upon s 21 and s 43 of the *Federal Court of Australia Act 1976* (Cth).
5. The proceeding against Jetstar and the proceeding against Virgin were heard at the same time although much of the evidence in each case was not common. At the initial trials, only the ACCC’s claims for declarations and injunctions are to be determined. Its claims for corrective advertising orders and pecuniary penalties are, if necessary, to be dealt with subsequently.
6. The contraventions alleged against Jetstar concern past conduct on its part being conduct engaged in by it in 2013 and 2014. Jetstar has subsequently modified its behaviour. Nonetheless, the allegations made by the ACCC against Jetstar have ongoing significance because they raise for the Court’s consideration the limits of certain promotional and advertising techniques adopted by businesses which use the internet and mobile phone networks to promote and sell their products and services.
7. The contraventions alleged against Virgin relate to conduct by Virgin in 2014. The evidence before me suggests that that conduct is continuing.
8. The ACCC’s complaint is that both Jetstar and Virgin advertised and promoted airfares for sale at a prominent headline price without adequately disclosing to potential customers that they would be required to pay a booking and service fee for payments made using one or more popular and commonly used payment methods including paying by widely accepted debit cards and credit cards. It was submitted by the ACCC that, in practice, while it was possible to avoid paying this booking and service fee, most customers, in fact, paid the fee in respect of most transactions.
9. The ACCC argued that the technique deployed by both airlines was to require each online or mobile customer to enter a carefully constructed staged booking process throughout which information was disclosed on a progressive basis. As a result of this series of progressive disclosures, the headline price was, bit by bit, qualified and increased until the final, larger price for the particular airfare was arrived at. The ACCC submitted that the overall effect of this process was that the most attractive feature of the promotion viz the headline price was initially and thereafter repeatedly emphasised while those aspects of the likely transaction (including the existence of the booking and service fee) were de-emphasised in comparison and only disclosed piecemeal and late in the process.
10. The ACCC submitted that the vice in this type of conduct was aptly described by Tracey J in *Australian Competition and Consumer Commission v AirAsia Berhad Company* [2012] FCA 1413 where his Honour said (at [31]) in relation to conduct proscribed by s 48 of the ACL:

I accept that it is necessary to have regard to the entire booking process and to the fact that, having completed it, a consumer would have become aware of the full price to be paid before committing him or herself to a purchase. It is also relevant that, on Page 2, the potential customer was advised that the fares there quoted excluded taxes and fees. These considerations do not, however, weigh heavily in mitigation. The principal vice to which s 48 is directed is the seductive effect of a quoted price which is lower than the actual amount which the consumer will have to pay in order to receive the relevant service. Unless the full price is prominently displayed the consumer may well be attracted to a transaction which he or she would not otherwise have found to be appealing and grudgingly pay the additional imposts rather than go to the trouble of withdrawing from the transaction and looking elsewhere. The company which is seeking to attract business in contravention of s 48 will also obtain an advantage over competitors who are compliant. The relevant errant conduct continued over many months and had the potential to influence thousands of bookings.

1. The ACCC accepted that the existence of the booking and service fee and the terms upon which it would be levied were ultimately disclosed in every case before the customer entered into any binding legal obligation to purchase and pay for a seat on any particular flight. Nonetheless, it contended that all of the impugned conduct in the present proceedings was in that class of case sometimes described as the seduction of consumers into the seller’s *“web of negotiation”* or *“marketing web”*, which conduct is capable of contravening s 18 and s 29 of the ACL even though the customer is apprised of the truth before the purchase transaction is completed. In support of these latter propositions, the ACCC drew the Court’s attention to 652–655 ([39] and [45]–[50]) in the joint judgment of French CJ, Crennan, Bell and Keane JJ in *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 (*TPG*) and the cases cited in those paragraphs.
2. The ACCC urged a two-step analysis upon the Court. This analysis requires the Court to answer two questions, namely:
3. Which of the representations pleaded in the Fast Track Statements (if any) were conveyed by the airlines’ conduct? and
4. At the time each such representation was made, was the representation misleading or deceptive, or likely to mislead or deceive, or false?
5. The ACCC submitted that, if the second of those questions is answered *“yes”*, it does not matter that the representation was later corrected. In other words, it was the ACCC’s case that, if, by their conduct, the airlines represented at the outset or near the beginning of the booking process that seats on a number of particular flights could be purchased for a specific price in such a way as also to convey at the same time that there would be no additional fees and charges imposed on the customer simply because of the method of payment chosen by the customer, then the airlines contravened the ACL notwithstanding that the booking and service fee was later comprehensively and accurately disclosed before the transaction was completed.
6. It is apparent from the above synopsis of the ACCC’s case against the airlines that the first integer of that case is that by their conduct, the two airlines made the pleaded representations. Thus, the ACCC’s case against both Jetstar and Virgin depends upon the Court finding that each of them made the representations alleged. If the Court concludes that no representations in the terms relied upon by the ACCC were made by the airlines, then the ACCC’s case will fail. It is only if, upon analysis, the Court finds that the airlines made the representations as alleged or, at least, one or more of them, that it will be necessary to consider whether certain qualifying statements operated to overcome the impact of those representations and thereby corrected the false impression created by them (see, for example, the judgment of McLure P in *Bayswater Car Rental Pty Ltd v Department of Employment and Consumer Protection* [2008] WASCA 43).
7. In certain circumstances, it may be that, because corrective or qualifying material is published prominently and in proximity to the allegedly false representations, no false representation was made in the first place. Whether that is so in any given case will depend upon all of the circumstances of the particular case.
8. Jetstar and Virgin argued that their conduct did not convey the representations which the ACCC suggested were conveyed by that conduct and that, even if it did, they did not contravene the ACL because adequate disclosure of the existence and terms of the booking and service fee was made before any binding legal obligation was entered into between them and the customer.
9. In order to determine on which side of the line these cases fall, it will be necessary to examine the airlines’ conduct in some detail. Before doing so, I propose to discuss the relevant legal principles. These principles will apply to both cases.

# The Relevant Law

## The Relevant Statutory Provisions

1. Section 18 and s 29 of the ACL are in the following terms:

**18 Misleading or deceptive conduct**

(1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

(2) Nothing in Part 3–1 (which is about unfair practices) limits by implication subsection (1).

Note: For rules relating to representations as to the country of origin of goods, see Part 5–3.

…

**29 False or misleading representations about goods or services**

(1) A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:

(a) make a false or misleading representation that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use; or

(b) make a false or misleading representation that services are of a particular standard, quality, value or grade; or

(c) make a false or misleading representation that goods are new; or

(d) make a false or misleading representation that a particular person has agreed to acquire goods or services; or

(e) make a false or misleading representation that purports to be a testimonial by any person relating to goods or services; or

(f) make a false or misleading representation concerning:

(i) a testimonial by any person; or

(ii) a representation that purports to be such a testimonial;

relating to goods or services; or

(g) make a false or misleading representation that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits; or

(h) make a false or misleading representation that the person making the representation has a sponsorship, approval or affiliation; or

(i) make a false or misleading representation with respect to the price of goods or services; or

(j) make a false or misleading representation concerning the availability of facilities for the repair of goods or of spare parts for goods; or

(k) make a false or misleading representation concerning the place of origin of goods; or

(l) make a false or misleading representation concerning the need for any goods or services; or

(m) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (including a guarantee under Division 1 of Part 3–2); or

(n) make a false or misleading representation concerning a requirement to pay for a contractual right that:

(i) is wholly or partly equivalent to any condition, warranty, guarantee, right or remedy (including a guarantee under Division 1 of Part 3–2); and

(ii) a person has under a law of the Commonwealth, a State or a Territory (other than an unwritten law).

Note 1: A pecuniary penalty may be imposed for a contravention of this subsection.

Note 2: For rules relating to representations as to the country of origin of goods, see Part 5–3.

(2) For the purposes of applying subsection (1) in relation to a proceeding concerning a representation of a kind referred to in subsection (1)(e) or (f), the representation is taken to be misleading unless evidence is adduced to the contrary.

(3) To avoid doubt, subsection (2) does not:

(a) have the effect that, merely because such evidence to the contrary is adduced, the representation is not misleading; or

(b) have the effect of placing on any person an onus of proving that the representation is not misleading.

1. The conduct proscribed by s 18(1) of the ACL is the same conduct as was forbidden by s 52(1) of the *Trade Practices Act 1974* (Cth) (**TPA**).
2. Further, subsections 29(1)(i) and 29(1)(m) are, in substance, in the same terms as s 53(e) and s 53(g) of the TPA respectively.
3. The jurisprudence developed in respect of those TPA provisions continues to apply in respect of the equivalent provisions under the ACL.

## The Relevant Case Law

1. A representation is misleading if it leads or is likely to lead the person or persons to whom it is made into error (*Miller and Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357 at 368 [15]). That is to say, there must be a sufficient causal link between the conduct and the error on the part of the persons exposed to it (*TPG* at 651–652 [39]). There is no meaningful difference between the phrases *“misleading or deceptive”* and *“mislead or deceive”* as used in s 18(1) of the ACL and *“false or misleading”* as used in s 29(1)(i) and s 29(1)(m) of the ACL (see *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* (2014) 317 ALR 73 at 81 [40] per Allsop CJ).
2. As the Full Court (French, Heerey and Lindgren JJ) said in *SAP Australia Pty Ltd v Sapient Australia Pty Ltd* (1999) 169 ALR 1 (*SAP*) at 14 [51]:

… The characterisation of conduct as “misleading or deceptive or likely to mislead or deceive” involves a judgment of a notional cause and effect relationship between the conduct and the putative consumer’s state of mind. Implicit in that judgment is a selection process which can reject some causal connections, which, although theoretically open, are too tenuous or impose responsibility otherwise than in accordance with the policy of the legislation. In some cases there will be a selection process analogous to that which arises under s 82 of the TP Act in a determination of whether or not a claimed loss was caused by a contravention: *State Government Insurance Corp* at FCR 562.

1. A representation is likely to mislead or deceive if it may be expected to or has a capacity or tendency to mislead or deceive. In such a case, likelihood means a real and not remote chance or possibility of having that effect (*Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82 at 87 per Bowen CJ, Lockhart and Fitzgerald JJ).
2. Whether an advertisement is misleading is a question of fact to be decided having regard to all of the circumstances of the particular case (*Australian Competition and Consumer Commission v Telstra Corporation Ltd* (2004) 208 ALR 459 (*ACCC v Telstra*) at 475 [49] per Gyles J). The Court must form a view as to what message would be conveyed to the target audience (*ACCC v Telstra* at 475 [49]).
3. At par 18 of its Written Submission in Chief dated 26 November 2014, the ACCC summarised the relevant principles in relation to the publication of advertisements as follows (footnotes omitted):

The relevant principles may be conveniently summarised as follows:

18.1. When considering an advertisement through the eyes of a reasonable consumer, the court must take into account that *“an advertisement published to the world at large is designed and calculated to be seen and read by a wide range of persons”*, especially in the case of internet advertisements;

18.2. The range of persons will include the shrewd and the ingenuous, the educated and the uneducated, the experienced and inexperienced in commercial transactions; it will include the astute, the informed, those who are sceptical and read the small print, those who are intelligent and those who are well informed, and it will also cover many who do not possess those characteristics and those who are less informed and those with average intelligence;

18.3. the question whether or not an advertisement is misleading is to be tested by the effect on a person, not particularly intelligent or well informed, but perhaps of somewhat less than average intelligence and background knowledge;

18.4. the court is not entitled to assume that the reader *“will be able to supply for himself or herself omitted facts or to resolve ambiguities”*, and an advertisement may be misleading even though it fails to deceive more wary readers.

1. I think that the ACCC’s summary which I have extracted at [26] above is an accurate summary of some of the relevant principles. I accept that summary as far as it goes.
2. In the present case, the impugned conduct comprises:
3. Advertisements;
4. Promotional activity;
5. The presentation of certain webpages and the structure and layout of an online booking flow or process; and
6. The presentation of pages on the airlines’ mobile sites and the structure and layout of the mobile sites’ booking flow or process.
7. Some of the conduct which is criticised is not properly characterised as the publication of advertisements. However, whatever label is placed upon the conduct, it is necessary for the Court, when endeavouring to assess the conduct against the statutory prohibitions, to identify the class of consumers likely to be affected by the conduct (*Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 (*Puxu*) at 199 per Gibbs CJ). It is the *“ordinary”* or *“reasonable”* members of that class who must be considered (*Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435 (*Google*) at 443 [7] per French CJ, Crennan and Kiefel JJ) and *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45 (*Nike*) at 85 [102]–[103] per Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ). The extremely stupid, the unusually gullible and those whose reactions are extreme or fanciful would not be included. The question is whether a not insignificant number of those persons are likely to have been led into error by the conduct as a matter of inference (*Global One Mobile Entertainment Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 134; [2012] ATPR 42‑419 at [108] per Greenwood, Logan and Yates JJ).
8. The ACCC submitted that, in the present case, the relevant class of consumers was the public at large.
9. While it is true that the airlines’ websites were accessible to all members of the public who had access to the internet, it seems to me that the relevant class of consumers here comprised those members of the public who were interested from time to time in purchasing passage for a particular journey from a low cost airline.
10. The ACCC contended that, without disclosing the existence of the booking and service fee and the terms upon which that fee would be required to be paid, both airlines were likely to mislead reasonable or ordinary members of the class which I have described at [31] above into thinking (erroneously) that fares were available at the prices published on the airlines’ websites regardless of which of the available payment methods was chosen by the consumer in any given case.
11. A critical element in the ACCC’s argument is the proposition that, by the conduct of each airline, a dominant message was conveyed. The ACCC characterised the means by which that dominant message was conveyed as a *“representation”*. The ACCC said that the substance of the representation must be discerned by considering it in context. That context includes the medium in which the presentation is expressed (*Australian Competition and Consumer Commission v Singtel Optus Pty Ltd* [2010] FCA 1177 (*ACCC v Singtel Optus*) at [5] per Perram J). I agree that the alleged contravening conduct must be assessed in context. Whether the present cases should be regarded as falling within the *“dominant message”* category of cases is a matter of contest. The airlines submitted that the *“dominant message*” analysis was not apt in the present cases because, unlike advertisements, where the consumer’s mind is engaged only fleetingly with the subject matter, the potential purchaser of a cheap air fare will focus carefully on the booking process and tarry at particular points in that process for as long as may be necessary for that purchaser to satisfy himself that he has secured the best available deal. They submitted (correctly) that whether the *“dominant message”* analysis is apt is essentially a question of fact.
12. In *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 at 199, Deane and Fitzgerald JJ said:

It is, in the circumstances, unnecessary that we form or express any concluded view on the question whether it is a principle of the law of passing-off that deception must continue, or be likely to continue, to the “point of sale”. As a matter of principle and of logic, it is difficult to see why it should be. For the purposes of the present appeal, it suffices to say that, even if such a limitation should be recognized in the law of passing-off, we see no ground for importing it into the provisions of s 52 of the Act. In our view, it is sufficient to enliven s 52 that the conduct, in the circumstances, answers the statutory description, that is to say, that it is misleading or deceptive or is likely to mislead or deceive. It is unnecessary to go further and establish that any actual or potential consumer has taken or is likely to take any positive step in consequence of the misleading or deception. That is not to say that evidence of actual misleading or deception at the point of sale and of steps taken in consequence thereof is not likely to be both relevant and important on the question whether the relevant conduct in fact answers the statutory description and as to the relief, if any, which should be granted.

(See also *SAP* at 14 [51] per French, Heerey and Lindgren JJ where the Full Court held that conduct may be misleading if it leads a consumer into error even though the true position is disclosed before the transaction is concluded.)

1. At 654–656 [47]–[52] in *TPG*, French CJ, Crennan, Bell and Keane JJ said:

47 This case is in stark contrast to *Puxu* in three respects. First, TPG’s target audience did not consist of potential purchasers focused on the subject matter of their purchase in the calm of the showroom to which they had come with a substantial purchase in mind. Here, the advertisements were an unbidden intrusion on the consciousness of the target audience. The intrusion will not always be welcome. The very function of the advertisements was to arrest the attention of the target audience. But while the attention of the audience might have been arrested, it cannot have been expected to pay close attention to the advertisement; certainly not the attention focused on viewing and listening to the advertisements by the judges obliged to scrutinise them for the purposes of these proceedings. In such circumstances, the Full Court rightly recognised that “many persons will only absorb the general thrust” [*TPG Internet Pty Ltd v Australian Competition and Consumer Commission* (2012) 210 FCR 277 at 289 [103]]. That being so, the attention given to the advertisement by an ordinary and reasonable person may well be “perfunctory”, without being equated with a failure on the part of the members of the target audience to take reasonable care of their own interests.

48 Secondly, the Full Court did not recognise that the tendency of the advertisements to mislead was to be determined, not by asking whether they were apt to induce consumers to enter into contracts with TPG, but by asking whether they were apt to bring them into negotiation with TPG rather than with one of its competitors on the basis of an erroneous belief engendered by the general thrust of TPG’s message.

49 It might be said, as TPG did, that consumers, acting reasonably in their own interest, could be expected to obtain a clear understanding of their rights and obligations before signing up with TPG; but to say that is to confuse the question whether the consumer has suffered loss with the anterior question as to whether the advertisement, viewed as a whole, has a tendency to lead a consumer into error. Thus, in *Campbell v Backoffice Investments Pty Ltd* [(2009) 238 CLR 304 at 318 [24]; [2009] HCA 25] French CJ noted that the question of characterisation as to whether conduct is misleading is “logically anterior to the question whether a person has suffered loss or damage thereby”. French CJ observed that characterisation of conduct “generally requires consideration of whether the impugned conduct viewed as a whole has a tendency to lead a person into error” [*Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at 319 [25]]. As observed earlier in these reasons, questions of carelessness by consumers in viewing advertisements may be relevant to that question of characterisation.

50 It has long been recognised that a contravention of s 52 of the TPA may occur, not only when a contract has been concluded under the influence of a misleading advertisement, but also at the point where members of the target audience have 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 [*Trade Practices Commission v Optus Communications Pty Ltd* (1996) 64 FCR 326 at 338-339; *SAP Australia Pty Ltd v Sapient Australia Pty Ltd* (1999) 169 ALR 1 at 14 [51]; *Australian Competition and Consumer Commission v Commonwealth Bank of Australia* (2003) 133 FCR 149 at 171-172 [47]. See also *Bridge Stockbrokers Ltd v Bridges* (1984) 4 FCR 460 at 475]. That those consumers who signed up for TPG's package of services could be expected to understand fully the nature of their obligations to TPG by the time they actually became its customers is no answer to the question whether the advertisements were misleading.

51 Thirdly, this is not a case where the tendency of TPG’s advertisements to lead consumers into error arose because the target audience might be disposed, independently of TPG's conduct, to attend closely to some words of the advertisement and ignore the balance. The tendency of TPG's advertisements to lead consumers into error arose because the advertisements themselves selected some words for emphasis and relegated the balance to relative obscurity. To acknowledge, as the Full Court did [*TPG Internet Pty Ltd v Australian Competition and Consumer Commission* (2012) 210 FCR 277 at 289 [103]], that “many persons will only absorb the general thrust” is to recognise the effectiveness of the selective presentation of information by TPG. The Full Court erred in failing to appreciate the implication of that finding.

52 It was common ground that when a court is concerned to ascertain the mental impression created by a number of representations conveyed by one communication, it is wrong to attempt to analyse the separate effect of each representation [*Arnison v Smith* (1889) 41 Ch D 348 at 369; *Gould v Vaggelas* (1984) 157 CLR 215 at 252; [1985] HCA 68; *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 199, 210-211]. But in this case, the advertisements were presented to accentuate the attractive aspect of TPG’s invitation relative to the conditions which were less attractive to potential customers. That consumers might absorb only the general thrust or dominant message was not a consequence of selective attention or an unexpected want of sceptical vigilance on their part; rather, it was an unremarkable consequence of TPG’s advertising strategy. In these circumstances, the primary judge was correct to attribute significance to the “dominant message” presented by TPG’s advertisements.

1. In *ACCC v Telstra*, at 478 [58], Gyles J said:

One aspect of this branch of the law which can be regarded as settled by authority is that advertising which is misleading is caught by the Act even if the effect of it is, or is likely to be, dispelled prior to any transaction being effected.

(See also *Medical Benefits Fund of Australia Ltd v Cassidy* (2003) 135 FCR 1 (*Cassidy*) at 11 [17] per Mansfield J and at 18–19 [43] per Stone J.)

1. To similar effect were the following remarks made by Perram J in *ACCC v Singtel Optus* at [26]:

Nor, contrary to Optus’ submissions, is the misleading nature of the advertisement reduced by the statements Optus makes, or seeks to have made on its behalf, at the point of sale. As I have explained above, when dealing with the objections to the evidence, it is an error to ask whether consumers who purchased the product were misled. This is for practical reasons set out above – the capacity of the advertisement to induce people to begin dealing with Optus (rather than others) without necessarily closing the transaction – and also for the textual reason that s 52 simply does not contain any limitation about what it is that consumers must be misled into doing to contravene the prohibition. Accepting in Optus’ favour that some kinds of statements were made to consumers through the sales process and website this does not undo, in this case, the plainly misleading and deceptive nature of the advertisement. In that regard, I have found the evidence about the traffic across the website of little utility. For completeness, I reject also Optus’ contention, based on its survey evidence, that the time taken by consumers to make broadband purchasing decisions and their reliance upon on-line and other forms of research means that the advertisement should not be seen as being misleading. This is largely for the reasons already given – it gives no weight to the initial inducement the advertisement provides to head down the path with Optus and puts at nil the negative consequences for consumers and competitors alike of that form of enticement. Of course it is true that the purchase of a broadband plan is a substantial purchase rather than an impulse purchase although even that fact was kept in fairly small print at the bottom of the page. But even so, this is not sufficient to overcome the very misleading nature of the principal message.

1. The ACCC submitted that, where a price is advertised on the home page of a website and there is no disclosure of additional fees which have the effect of increasing the price until the consumer has been drawn into the website and commenced the booking process, the belated disclosure cannot negate or correct the effect of the otherwise misleading price representation on the home page. The ACCC claimed that this submission was supported by the observations of Gordon J in *Australian Competition and Consumer Commission v Nonchalant Pty Ltd (In Liq)* [2013] FCA 605 at [34]–[35]. I think that the remarks which her Honour made at those paragraphs related specifically to the case with which her Honour was then dealing. Of course, her Honour’s observations may be apt to be applied in other cases. Whether that is so will depend upon the particular facts and circumstances of each case. However, I do not think that a principle of general application as wide as the ACCC’s submission can be extracted from the authorities.
2. In the case where a headline representation is sought to be qualified by other material, the qualifying material must be sufficiently prominent to prevent the headline representation from being misleading. The degree of prominence required will vary with the potential for the primary statement to be misleading (*Cassidy* at 17–18 [37]–[41] per Stone J). The overall impression created by the representation must be assessed.
3. In considering the impact of headline representations with qualifying information for the purposes of the New Zealand statutory provisions which correspond with s 18 and s 21 of the ACL, the New Zealand Court of Appeal in *Godfrey Hirst NZ Ltd v Cavalier Bremworth Ltd* (2014) 3 NZLR 611 (*Godfrey Hirst*) at 627–628 [59] held that:

In considering whether headline representations such as these breach ss 9 and 13(i) of the Act the following principles should guide a court:

(a) *Overall impression:* it is the “dominant message” or “general thrust” of the advertisement that is of crucial importance [*ACCC v TPG*, above n 46, at [45], [51] and [52]; *Australian Competition and Consumer Commission v Signature Security Group Pty Ltd* [2003] FCA 3, (2003) ATPR 41–908 at [28] [*ACCC v Signature Security*].

(b) *Wrong only to analyse separate effect of each representation*: as a corollary from (a), when assessing the mental impression on consumers created by a number of representations in a single advertisement, it is insufficient only to analyse the separate effect of each representation [*ACCC v TPG*, above n 46, at [52], citing *Arnison v Smith* (1889) 41 Ch D 348 (CA) at 369; *Gould v Vaggelas* [1985] HCA 75, (1985) 157 CLR 215 at 252; *Puxu* (High Court), above n 17, at 199 and 210–11]. The overall impression cannot be assessed by analysing each separate representation in isolation.

(c) *Qualifying information sufficiently prominent?*: whether headline representations are misleading or deceptive depends on whether the qualifications to them have been sufficiently drawn to the attention of targeted consumers [*ACCC v Signature Security*, above n 67, at [25]]. This includes consideration of:

(i) the proximity of the qualifying information [*ACCC v Signature Security*, above n 67, at [26], citing *George Weston Foods Ltd*, above n 30, at [46]];

(ii) the prominence of the qualifying information [*ACCC v Signature Security*, above n 67, at [27]; *National Exchange Pty Ltd v Australian Securities and Investment Commission* [2004] FCAFC 90, (2004) 49 ACSR 369 at [51]–[52] [*National Exchange v ASIC*]] and

(iii) whether the qualifying information is sufficiently instructive to nullify the risk that the headline claim might mislead or deceive [*Medical Benefits Fund of Australia Ltd v Cassidy* [2003] FCAFC 289, (2003) ATPR 41-971 at [35]–[41]; *Energizer NZ Ltd*, above n 10, at [81]].

(d) *Glaring disparity:* where the disparity between the headline representation and the information qualifying it is great, it is necessary for the maker of the statement to draw the consumer’s attention to the true position in the clearest possible way [*National Exchange v ASIC,* above n 71, at [55], [58] and [62]; *ACCC v Signature Security*, above n 67, at [27]].

(e) *Tendency to lure consumers into error:* applying principles (a) to (d), the question for the court is whether the advertisement viewed as a whole has a tendency to entice consumers into “the marketing web” by an erroneous belief engendered by the advertiser, even if the consumer may come to appreciate the true position before a transaction is concluded [*ACCC v TPG,* above n 46, at [50], citing *Trade Practices Commission v Optus Communications Pty Ltd* (1996) 64 FCR 326 (FCA) at 338–9; *SAP Australia Pty Ltd v Sapient Australia Pty Ltd* [1999] FCA 1821, (1999) 169 ALR 1 at [51]; *Australian Competition and Consumer Commission v Commonwealth Bank of Australi*a [2003] FCA 1129, (2003) 133 FCR 149 at [47]; and *Bridge Stockbrokers Ltd v Bridges* (1984) 4 FCR 460 (FCAFC) at 475]. Enticing consumers into “the marketing web” includes, for example, attracting them into premises selling the advertiser’s product. Once a prospective customer has entered, he or she will often be more likely to buy. The misleading advertising would then have contributed to any sale. It must follow that rival traders would also have been prejudiced, although protecting them is not the aim of ss 9 and 13 [*Trust Bank Auckland v ASB Ltd* [1989] 3 NZLR 385 (CA) at 389; *Commerce Commission v Noel Leeming Ltd* HC Christchurch AP196/96, 21 August 1996 at 4–5; *Zennith Publishing Ltd v Commerce Commission* HC Auckland AP139/98, 20 November 1998 at 11–12; *Taco Company of Australia In*c, above n 6, at 197–199; *Commerce Commission v ABC Motor Group* [2005] DCR 262 (DC) at [10]. That consumers could be expected to understand fully the limitations of the warranties by the time they actually purchased a carpet is no answer to the question whether the advertisement was misleading.

1. I find this distillation of appropriate guidelines most helpful. I intend to consider the present cases with these guidelines in mind.

# Jetstar’s Conduct

## Some General Introductory Remarks

1. The conduct of Jetstar relied upon by the ACCC as constituting contraventions of the ACL took place in connection with the use by Jetstar of three separate forms of communication, namely the Jetstar website located at the URL http://www.jetstar.com/au/en/home (**Jetstar website**),the Jetstar mobile site located at https://mobile.jetstar.com/ (**Jetstar mobile site**) and common-form emails sent to persons who subscribed to an email mailing list described as the *“Jetmail”* list (**Jetmail**).
2. The case propounded by the ACCC requires the Court to make findings as to the contents of certain communications made by Jetstar over those three media. The Court is also required to make findings as to the process by which consumers navigate the Jetstar website and the Jetstar mobile site.
3. All of these findings are properly characterised as findings as to the primary facts. The evidence as to the primary facts was not in dispute.
4. It was also the ACCC’s case, as pleaded and conducted at trial, that by making certain statements on its website, on its mobile site and in emails sent by Jetmail, in the circumstances in which those statements were made, Jetstar made certain representations to the public at large about the price of the air passenger services which it was offering to provide which were untrue and, for that reason, misleading or deceptive, or likely to mislead or deceive potential purchasers of those services. The ACCC contended that, by its conduct, Jetstar represented that the price as initially disclosed by Jetstar was a firm price regardless of the method of payment ultimately used by the customer and that that representation was false because, in the case of payments made by widely available credit cards, debit cards and PayPal, a booking and service fee was payable in the amount of $8.50 per passenger per flight for domestic flights and $12.50 per passenger per flight for international flights. Further, the ACCC argued that, by its conduct, Jetstar also represented that the provision of passenger carriage services by air as offered by it was not subject to a condition which would alter the price of those services depending upon the payment method used and that that representation was false.
5. It was accepted by the ACCC that the requirement to pay the booking and service fee was disclosed at some point in the process prior to any particular transaction being entered into. In some cases, that requirement was disclosed more than once during the booking process.
6. The ACCC contended that the disclosures made by Jetstar during the booking process were not sufficient to negate the impact of the falsity of the representations as to price made early in that booking process and that, in effect, consumers were being drawn into a *“web of negotiation”* by the headline representations as to price which representations were false at the time when they were made.
7. The characterisation of Jetstar’s conduct urged upon the Court by the ACCC was not accepted by Jetstar. Jetstar argued at trial that it did not make the representations which the ACCC suggested should be teased out of Jetstar’s conduct and that, in any event, the disclosures made by it as to the nature and quantum of the booking and service fee were sufficient to dispel any misunderstandings on the part of some consumers concerning that fee.

## The Primary Facts

1. In this section of these Reasons, I set out my findings as to the primary facts.

### Jetstar Website Conduct

1. The ACCC chose to prove the primary facts relating to the Jetstar website by tendering in evidence a number of video captures taken by officers of the ACCC or consultants to it. On a number of occasions, an officer or consultant of the ACCC went to the Jetstar website and navigated that website in order to simulate the booking process that would be undertaken by a prospective customer of Jetstar who wished to make an online flight booking and, while moving through that process, took a video capture of all of the screens or webpages that presented themselves during that process. In this way, the Court was provided with evidence of:
2. The configuration and layout of the website at the particular dates referred to in the Amended Fast Track Statement filed on 24 November 2014 in the Jetstar proceeding (**Jetstar AFTS)**;
3. The precise format of each screen or webpage presented to the consumer at each stage of the process including where relevant links, hyperlinks, font size and print colours; and
4. A clear exposition of the steps involved in making an online booking via the Jetstar website.
5. I am satisfied that the video captures tendered in evidence by the ACCC provide a comprehensive, accurate and fair depiction of the online booking process using the Jetstar website at each of the times referred to in the Jetstar AFTS.
6. I shall now address the specific contraventions alleged against Jetstar by reason of its conduct in configuring its website in the manner in which it did as at the specific dates referred to in the Jetstar AFTS.

#### First Alleged Contravention (14 May 2013)

1. The first website contravention alleged against Jetstar relates to its conduct on 14 May 2013. The relevant allegations are made in pars 14 and 15 of the Jetstar AFTS. The evidence of the primary facts is found in the video capture of the booking process recorded on the DVD which is Ex JFC-1 to the affidavit of John Frederick Cream affirmed on 17 June 2014. At the time when he affirmed that affidavit, Mr Cream was the ACCC’s Assistant Director, Enforcement Group – Queensland.
2. The booking process revealed by Ex JFC-1 was as follows:
3. A potential customer would go to the home page on the Jetstar website. Once the customer had the home page on the screen, the customer would see near the top of the home page a number of links displayed across the page. One such link or banner of interest was the banner on the far left of the page called *“Flights”*. Associated with that banner and already displayed immediately under it was a rectangular box headed *“Book flights”*. There was an opportunity to use the links provided in that box to navigate to the next webpage (*“Select Flights”*). Other links were provided under the headings *“Planning & booking”* and *“What we offer”*;
4. Also on the home page, commencing at approximately one third of the way down that page, various *“Hot Fares”* were listed. These fares were shown as relating to specifically identified journeys and were always expressed as *“From”* a particular dollar figure. They were generally displayed in bold and large font. The dollar figure was in orange and the text in dark blue;
5. In a rectangular box to the immediate right of the *“Book flights”* box, a number of special offers would appear in a rotating display;
6. Once at the home page, the customer would be taken to the webpage entitled *“Select Flights”*. Generally, the customer would be taken to that webpage by inserting certain details of the desired flight into the rectangular box on the home page headed *“Book flights”* and by then clicking his mouse cursor on the link *“Search for flights”*. The details entered by the customer in the box on the home page were the origin and destination of the desired flights, the date of each flight and the number of adults and children (including infants) who would be travelling. Once those details were entered, the customer would click on the icon *“Search for flights”.* The customer would then be taken to the *“Select Flights”* webpage;
7. Once at the *“Select Flights”* webpage, the customer would then be required to choose the most desired flights (forward and return) from a number of specific flights listed on that webpage which met the original criteria inserted into the box on the home page and which had seats available on them as at the date of the relevant inquiry. On the *“Select Flights”* webpage, there was specified against each identified flight a dollar figure under a heading in a box:

Starter

Economy cabin

What is included?

Each dollar figure listed on this webpage signified the fare for the particular flight to which it related and had a blank circle next to it (called a *“radio button”*) upon which the customer might choose to click his mouse cursor. If the customer clicked on any radio button, two things would happen more or less simultaneously. The first thing which would happen was that a side panel entitled *“Booking Summary”* would appear on the right-hand side of the screen. The first item in that side panel was headed *“Total AUD”* and showed the fare which the customer had chosen by clicking on the radio button adjacent to the particular fare. That fare was expressed as a specific dollar figure not as *“from”* a specific dollar figure. If, for example, the customer chose a flight which showed a dollar figure next to it of $139, the fare that would be shown in the Booking Summary side panel was that figure or that figure multiplied by the number of persons travelling. Under the heading *“Fees & taxes”*, $0.00 appeared. This made clear that *“Fees & taxes”* were included in the fare displayed in the Booking Summary side panel under the heading *“Total AUD”*. The other thing that would happen when a customer clicked on any radio button was that three vertical rectangular boxes would come onto the screen. Two of those boxes contained a list of extra services. One box contained a description of the services provided as part of the Starter fare. The Starter fare was the most basic (and thus the cheapest) fare on offer. The services provided as part of the Starter fare were the seat on the aircraft and the right to bring on board a small piece of cabin luggage. Each of the other two boxes contained a list of bundled services that might be provided by Jetstar at the election of the customer in each case for an extra payment in each case (**Value Bundles**). One or other of these Value Bundles might be added to the booking at this stage at the election of the customer.

On the *“Select Flights”* webpage as at 14 May 2013, there was a note under the table of available flights in the following terms:

Prices quoted are per adult passenger, in AUD and include airfare related surcharges, fees and taxes. Unless otherwise stated, fares are non refundable, limited changes are permitted charges apply. Starter fares include 10kg carry-on baggage. Additional fees apply for checked in baggage, which will be available for purchase on the next page. Adding checked baggage after booking costs more at the airport, over the phone and on our web site. 7kg per item cabin baggage limit applies on Qantas flights.

The same process would occur when the customer selected his return flight.

After the customer had made his choices in respect of each flight (including choices of extras in accordance with the Value Bundles offered), those choices would then be reflected in the Booking Summary side panel on the *“Select Flights”* webpage. As a minimum, the price shown for the Starter fare for each chosen flight would populate that Booking Summary side panel. In addition, any selected bundled extras would be included.

The total price for the chosen fares reflected in the Booking Summary side panel would also be prominently displayed outside the Booking Summary side panel at the bottom of this webpage in large coloured font immediately above the *“Continue”* link;

1. The customer would then be directed to the webpage headed *“Passengers”*. On that page, the customer was required to enter the name, address and contact details of each passenger who was to travel on that booking. After that task was completed, the Booking Summary side panel would reflect all of the information inserted as a result of the choices made by the customer up to that point. However, the Booking Summary side panel would reflect only information of that kind. As at this point in the booking process, it would contain no reference to the booking and service fee. The Booking Summary side panel by now also would include a reference to *“Additional Extras”* which were to be addressed in detail by a later webpage. No amount for those items would be included at this stage. In addition, at the point when the customer left the *“Passengers”* webpage, the Booking Summary side panel would be populated with details of the customer’s baggage choice if that customer chose to pay for the right to check in his baggage;
2. The customer would then be directed to the webpage headed *“Seats”.* On that webpage, the customer would be invited to indicate his seating preferences. The Booking Summary side panel would then expand as necessary so as to include the cost of seating choices (if any) made by the customer. Baggage and seating choices would appear under a heading *“Optional Extras”*;
3. The customer would then be directed to the *“Extras”* webpage. On this webpage the customer would be offered a number of additional services not already covered by the choices offered earlier (travel insurance, hotels, rent-a-cars and other activities). If any of those *“Extras”* were selected, they would be added to the items listed in the Booking Summary side panel and the costs thereof factored into the specified cascading list of charges set out in that Booking Summary side panel. They would all appear under the heading *“Additional Extras”* and be individually itemised;
4. The customer would then be directed to the *“Payment”* webpage. It is at this point in the booking process, for the very first time, that the customer would be apprised of the existence and quantum of the booking and service fee. When the customer left the *“Extras”* webpage, there was added to the Booking Summary side panel as the very last entry before the total an item:

*Booking and Service Fee*

*$0.00*

So, when the Booking Summary side panel first appeared on the *“Payment”* webpage, that item was already shown in that side panel although no amount would be specified until the customer had moved through all but the last step required to be taken on the *“Payment”* webpage;

1. On this webpage, under a heading in bold font: *“How would you like to pay?”*, the following text appeared:

Please select a payment method below. Please note that payment cannot be split between different payment methods except for voucher and credit card; and voucher and POLi in Australia and New Zealand, for Jetstar Airways (JQ) and Jetstar Asia (3K) bookings in AUD or NZD.

We charge a Booking and Service Fee for some bookings completed online. The options below indicate whether a booking and service fee applies. Jetstar waives this Booking and Service Fee for all bookings paid for using a Jetstar MasterCard, Jetstar Platinum MasterCard, Jetstar Vouchers and some other forms of payment (as indicated below). We actively encourage our customers to pay using one of the payment methods for which no Booking and Service Fee applies.

As I have already mentioned, when the customer was first taken to the *“Payment”* webpage, the Booking Summary side panel had added to it as the very last item prior to the total the following text:

|  |
| --- |
| *Booking and Service Fee* |
| *$0.00* |

In the centre of the *“Payment”* webpage, the customer was given the option of paying for the booking which the customer desired by credit card, PayPal, POLi or Jetstar vouchers. Those options were presented to the customer in a series of horizontal rectangular boxes cascading down the webpage which were labelled appropriately. Immediately next to and to the right of each specific option and within the relevant horizontal rectangular box, a note appeared. For payment by credit card, the note was:

Pay with a Credit Card (Booking and Service Fee applies except for Jetstar MasterCard).

The note next to the PayPal option was in the following terms:

Pay via PayPal (Booking and Service Fee applies).

1. The note next to the POLi and Jetstar vouchers method of payment simply stated that no booking and service fee was payable if either of those methods of payment was chosen. If the customer chose to pay by credit card other than Jetstar MasterCard, the customer was again reminded as soon as the customer hovered over the appropriate credit card’s icon that a booking and service fee was payable. In this way and at this point in the process, the customer would be told that, for each of the methods of payment where a booking and service fee was payable, the booking and service fee was AUD $17 per passenger per booking. This was the first occasion in the entire booking process when the quantum of the booking and service fee was disclosed.
2. I set out below an example of a completed Booking Summary which is generally in the form in which it would have existed immediately before payment:



#### The Second to Fifth Contraventions (February to June 2014)

1. Before specifically addressing these alleged contraventions, I note that, in July 2013, representatives of Jetstar met with officers of the ACCC in order to discuss concerns that the ACCC had raised with Jetstar about the disclosure of the booking and service fee on the Jetstar website. After that meeting, Jetstar made a number of changes to its website in an endeavour to address the ACCC’s concerns. Those changes were notified to the ACCC in September 2013 and implemented at about the same time.
2. In substance, the changes made by Jetstar to its website in September 2013 added additional text to its website at various points in the booking process. Notwithstanding these changes voluntarily effected by Jetstar, the ACCC took the view that the manner in which Jetstar addressed the booking and service fee on its website remained misleading or deceptive, or likely to mislead or deceive consumers. The ACCC also considered that, even after these changes were made to the Jetstar website, Jetstar was continuing to make false statements about the cost of flights offered by it on its website.
3. For these reasons, the ACCC recorded a series of additional video captures. These captures were made on 21 February 2014, 13 March 2014, 14 March 2014, 19–21 May 2014 and on 2 June 2014. These captures comprise the evidentiary foundation for the second to fifth contraventions of the ACL specified by the ACCC in the Jetstar AFTS (pars 16 to 26 of the Jetstar AFTS).
4. I propose to deal with the second alleged contravention in a little detail and with the third, fourth and fifth alleged contraventions more briefly since the ACCC’s case in respect of each of these latter three contraventions essentially mirrors its case in respect of the second contravention.
5. The video captures tendered in evidence as to the configuration and layout of the Jetstar website on 21 February 2014 were recorded by Skye TianTian Wu on that day. Ms Wu had been retained by the ACCC as a consultant specifically to navigate the Jetstar website and to create the necessary video captures. Those captures were recorded on a DVD which became Exhibit Ex STW-5 to Ms Wu’s affidavit affirmed on 23 June 2014.
6. Ms Wu also created and recorded video captures from the Jetstar website on 13 March 2014 and on 14 March 2014. In addition, she recorded a video capture of the Jetstar mobile site on 21 March 2014. I shall return to that video capture later in these Reasons.
7. All of the video captures referred to at [61] above were recorded on Ex STW-5.
8. The contraventions which allegedly took place on 21 February 2014 in connection with the Jetstar website concern a Jetstar promotion described as the *“Up in the air”* sale.
9. That promotion was drawn to the attention of consumers in a horizontal rectangular box placed prominently on the home page of the Jetstar website. On the occasion when Ms Wu navigated the Jetstar website on 21 February 2014, the sale being advertised in the rectangular box to which I have referred was a one way flight from Brisbane to Melbourne (Tullamarine) for $79 on selected travel dates, checked baggage not included. The promotion itself was advertised in large print. At the bottom of the rectangular box but within the box there was a statement to the effect that conditions applied to the promotional sale.
10. If a consumer wished to ascertain the terms and conditions of the advertised promotional sale and endeavour to book a flight which was the subject of that sale, the consumer would navigate to the *“Sales & special offers”* webpage on the Jetstar website. This could be done by clicking on the *“Special offers”* link on the home page or by clicking on text at the bottom of the rectangular box at the top right-hand side of the home page (*“^One-way, checked baggage not included. Selected travel dates and conditions apply”*). On the *“Sales & special offers”* webpage, there was a long list of potential destinations and travel periods available through the *“Up in the air”* promotion. On that page, the title to the page *“Sales & special offers”* appears near the top of the webpage in large bold print. Underneath that title there were boxes for the consumer to insert the point of origin, destination, travel dates and promotional offer type in order to activate an inquiry through the website as to available dates. If a potential customer took that step, the list of flights which would then appear on this page would be reduced in number because the list would reflect the customer’s desired travel choices. Immediately under those boxes, the following text appears:

\*Please note only departure and arrival points that are on sale or part of a special offer are shown in list.

Fares quoted are one way and only available online. Checked baggage [this is in orange colour print] is not included with Starter fares^ but may be added for a fee. Starter and Business fares are non-refundable. Starter Max and Business Max fares are refundable for a fee. All sale and special offer fares available until sale ends or sale or special offer is sold out. Please make sure you read the important information about sale and special offer fares [the last eight words are also in orange colour print].

1. Underneath the text which I have extracted at [65] above, a list of potential flights was set out. Underneath that list there was another reference to *“Important information about sale & special offer fares”*, also in orange print.
2. Underneath that text there appeared two photographs and some associated text. Underneath that, the following text appeared:

^Carry-on baggage limits [in orange print], including size restrictions, will be strictly applied. Passengers with more than the applicable carry-on baggage allowance will need to check in baggage [‘check in baggage’ in orange print], and charges will apply.

\*Prices based on payment by direct deposit/POLi, voucher, Jetstar MasterCard or Jetstar Platinum MasterCard for bookings through Jetstar.com. For all other bookings, a Booking and Service Fee of $8.50 per passenger per domestic fare and $8.50–$12.50 per passenger per international fare applies. $32–$42 extra per passenger, per fare for bookings through telephone 131 538.

Fares are web only, one-way, Starter and Business fares are non-refundable. Limited changes are permitted, charges apply. Availability is limited (not available on all flights or days). Limited availability on public holiday weekends and school holidays. All travel on Jetstar is subject to the Jetstar Conditions of Carriage [‘Jetstar Conditions of Carriage’ in orange print].

Before you book your international flight, and before you travel, check current Government travel advisories on www.smartraveller.gov.au [‘www.smartraveller. gov.au’ in orange print].

To book, search in the relevant travel period and note that non-sale & special offer fares will also appear. Some sale & special offer routes may have very limited availability at lower fares.

1. The orange print above the list of available flights and immediately under the list of available flights constituted a link which, if clicked upon, would take the consumer to the text at the bottom of the same page under the heading *“Important information about sale & special offer fares”*.
2. The true position about the booking and service fee was therefore able to be ascertained by a consumer who either clicked on the links to which I have referred or who in any event read the terms and conditions under the heading *“Important information about sale & special offer fares”*.
3. The headline price shown in the last column across the page in the list of flights is in orange colour bold print.
4. In addition to the matters to which I have already referred, if a consumer were to click his mouse cursor on the entries in the column referable to the list of flights entitled *“Sale or offer type”*, he would be taken to another part of the website headed *“Important Information”.* The information to which the consumer would be taken, had that pathway been chosen, was in the following terms:

**Important Information**

Please refer to the sale and special offer table for travel dates. Prices based on payment by direct deposit/POLi or voucher for bookings through Jetstar.com. For all other bookings, a Booking and Service Fee of $8.50 per passenger per fare applies.

Fares quoted are one way and non refundable. Limited changes are permitted, charges apply. Limited availability, not available all flights or days. All travel on Jetstar is subject to the Jetstar Conditions of Carriage [‘Jetstar Conditions of Carriage’ in orange print].

Starter fares do not include checked baggage. For an additional $14.50–$45 per passenger, per fare you can choose between 15kg to 40kg checked baggage. Carry-on baggage limits [‘Carry-on baggage limits’ in orange print], including size restrictions, will be strictly applied. Passengers with more than the applicable carry-on baggage allowance will need to check in baggage [‘check in baggage’ in orange print].

1. If the potential customer clicked his mouse cursor on the words *“Find Flights”* (which is in black print and bold print) he would be taken to another part of the website which briefly and in summary form recorded the details of the desired flight. The consumer would then be taken to the *“Select Flights”* webpage which substantially mirrored the same webpage as at May 2013.
2. The ACCC accepted that Jetstar had accurately disclosed the existence and quantum of the booking and service fee on the *“Sales & special offers”* page to those consumers who managed to be taken to the relevant disclosures. However, the ACCC made the following observations about that webpage:
3. Each row of the list of flights table ends with a *“Find Flights”* hyperlink which, once clicked, allowed travel dates to be selected and directed the consumer to the next page. For many customers, the booking flow was likely to entail the consumer scrolling through the table of fares to the desired flight and ending with the consumer clicking the *“Find Flights”* link at the end of the row showing the desired flight and fare. The point here being made is that many consumers would never naturally navigate to the text of the disclosures made on the *“Sales & special offers”* page or to the disclosure made on the other part of the website to which one would be taken if one clicked on the hyperlink under the heading *“Sale or offer type”*.
4. Most consumers would be unlikely to hit upon the disclosure made on the second half of the *“Sales & special offers”* webpage because that disclosure did not manifest itself on the screen while the consumer was scrolling down the list of available flights and would not be seen if the consumer moved directly from that list to the *“Find Flights”* webpage.
5. The links to the *“Important Information”* disclosed on the *“Sales & special offers”* page and in the linked box set out at [65]–[67] above were not sufficiently prominently displayed on the *“Sales & special offers”* webpage and thus would not have been seen as material to which the consumer should necessarily navigate.
6. When a potential customer of Jetstar arrived at the *“Select Flights”* webpage on 21 February 2014, the potential customer was required to select the desired travel dates by use of the date chart displayed on that webpage. When the customer’s mouse cursor hovered over a date in the chart, or when a date was actually selected, a small pop up box was immediately displayed showing the fare in large white text standing out from an orange background. The chart was designed to identify the cheapest flight in the timeframe and the price range of that flight. Underneath each chart displayed on the first part of this webpage, the following text appears:

Fares displayed are Starter fares with carry on baggage only. All prices are quoted per person in AUD, exclusive of any applicable infant fees. Prices include all airfare-related fees and taxes. Please check fare types and other conditions on the next page.

1. Once the flight details have been selected, the side panels on the right hand side of the date charts show in large text the price of the fare. The fare is described as a dollar figure per adult passenger.
2. By this stage of the booking flow, the consumer will have browsed the destinations available as part of the *“Up in the air”* promotion, selected a destination with a travel period convenient to the consumer, compared the fares in the date charts with the fares available on other dates and settled upon particular dates of travel offering the desired fare.
3. At the foot of this webpage, there was a booking summary headed *“Quick Summary”* which simply adverted to the dollar fare and nothing else.
4. In order to complete a booking pursuant to the promotional sale advertisement, the consumer was then required to confirm his flight details by moving to the next component of the *“Select Flights”* webpage. When the consumer clicked his mouse cursor on the selected flight on this webpage, an alert box immediately popped up entitled *“Important booking information”*. That box appeared immediately adjacent to and to the right of the selected fare. This alert box had a black background with white print. There was a red triangle with an exclamation mark and a red band across the black box. The contents of that pop up box were as follows:

A Booking and Service Fee of $8.50 per passenger, per domestic flight and $8.50–$12.50 per passenger, per international flight applies in some circumstances 🛈.

Some products and services throughout our booking process have been pre-selected for your convenience 🛈.

1. The same pop up box was revealed when the customer confirmed his returning flight.
2. If a user hovered his cursor over the 🛈 icon in the black box headed *“Important booking information”* immediately adjacent to the *“1. Select departing flight”* table, text describing the Booking and Service Fee appeared in the following terms:

For bookings in Australian Dollars, no Booking and Service Fee applies for bookings made using direct deposit/POLi, voucher or Jetstar MasterCard/Jetstar Platinum MasterCard. A Booking and Service Fee of $8.50 per passenger, per domestic flight … applies for all other bookings …

1. If a user hovered his cursor over the 🛈 icon in the black box headed *“Important booking information”* immediately adjacent to the *“2. Select returning flight”* table, text describing the Booking and Service Fee appeared in the following terms:

For bookings in Australian Dollars, no Booking and Service Fee applies for bookings made using direct deposit/POLi, voucher or Jetstar MasterCard/Jetstar Platinum MasterCard. A Booking and Service Fee of $8.50 per passenger, per domestic flight … applies for all other bookings …

1. The following text appeared below the *“1. Select departing flight”* table on the *“Select Flights”* webpage:

For bookings in Australian Dollars no Booking and Service Fee applies for bookings made using direct deposit/POLi, voucher or Jetstar MasterCard/Jetstar Platinum MasterCard. A Booking and Service Fee of $8.50 per passenger, per domestic flights … applies for all other bookings …

1. The same text appeared below the *“2. Select returning flight”* table.
2. Thereafter, the booking process followed much the same pathways as the standard pathways applied to non-promotional sales of flights which I have described earlier in these Reasons.
3. Thus, after the flight selections of the consumer were confirmed, the consumer was taken to the *“Payments”* webpage via the *“Additional Extras”* webpage. On that webpage, the following disclosures were made:

(a) Under the heading *“How would you like to pay?”*, the following text appears:

Please select a payment method below. Please note that payment cannot be split between different payment methods except for voucher and credit card, and voucher and POLi in Australia and New Zealand, for Jetstar Airways (JQ) and Jetstar Asia (3K) bookings in AUD or NZD.

For bookings in Australian Dollars no Booking and Service Fee applies for bookings made using direct deposit/POLi, voucher or Jetstar MasterCard/Jetstar Platinum MasterCard. A Booking and Service Fee of $8.50 per passenger, per domestic flight … applies for all other bookings … We actively encourage our customers to pay using one of the payment methods for which no Booking and Service Fee applies.

(b) In the table of payment methods, text appears next to each payment method indicating when a booking and service fee applied as follows:

(a) Next to *“Credit Card”* – text stating: *“Pay with a Credit Card (Booking and Service Fee applies, except for Jetstar MasterCard)”*; and

(b) Next to *“PayPal”* – text stating *“Pay via PayPal (Booking and Service Fee applies)”*.

(c) If the mouse cursor was hovered over and/or the user clicked on a credit card icon, text appeared indicating if a booking and service fee applied and any applicable amount in the following manner:

(a) The *“Jetstar MasterCard”* icon – text stating *“There is no booking and service fee with a Jetstar MasterCard”*;

(b) The *“Visa”* icon – text stating *“AUD $17.00 per passenger per booking applies for Visa Credit Card*s*”;*

(c) The *“MasterCard”* icon – text stating *“AUD $17.00 per passenger per booking applies for MasterCard Credit Cards”*;

(d) The *“Diner’s Club International”* icon – text stating *“AUD $17.00 per passenger per booking applies for Diner’s Club”*;

(e) The *“American Express”* icon – text stating *“AUD $17.00 per passenger per booking applies for American Express Cards”*; and

(f) The *“UATP” icon* – text stating *“AUD $17.00 per passenger per booking applies for UATP Credit Cards”*.

(d) Once two credit card numbers were entered into the credit card number field, text appeared indicating if a booking and service fee applied, as follows:

(a) Visa – text stating *“AUD $17.00 per passenger per booking applies for Visa Credit Cards”*;

(b) MasterCard – text stating *“AUD $17.00 per passenger per booking applies for MasterCard Credit Cards”*;

(c) Diner’s Club International – text stating *“AUD $17.00 per passenger per booking applies for Diner’s Club”*; and

(d) American Express – text stating *“AUD $17.00 per passenger per booking applies for American Express Cards”;*

(e) UATP – text stating *“AUD $17.00 per passenger per booking applies for UATP Credit Cards”*.

(e) After the sixth credit card number was entered, the Booking Summary side panel was automatically updated to include the amount of any applicable booking and service fee.

(f) If a customer chose to pay by Jetstar MasterCard, once two credit card numbers were entered, text appeared indicating that a booking and service fee applies. After six credit card numbers were entered (sufficient to identify the card as a Jetstar MasterCard), the text changed to *“There is no booking and service fee with a Jetstar MasterCard”*.

(g) Once PayPal was selected as the payment method, text appeared stating *“Booking and Service Fee: $17.00 per passenger per booking”*.

1. A customer might also navigate to a webpage entitled *“Fees and charges”* by clicking on the *“Planning & booking”* banner on the Jetstar home page and then on the *“Fees and charges”* webpage which is listed under the general heading *“Fares”*. If a customer were to find the *“Fees and charges”* webpage, the customer would find reference to the booking and service fee together with the following text:

Jetstar charges a Booking and Service fee for some bookings completed online. For bookings made in Australian Dollars (AUD), Jetstar waives this Booking and Service Fee for all bookings paid for using Jetstar MasterCard, Jetstar Platinum MasterCard, Jetstar Vouchers, POLi and Direct Deposit (Direct Deposit is available up to 14 days prior to departure only). A Booking and Service Fee of $8.50AUD per passenger per domestic fare and $8.50–$12.50 per passenger per international fare applies for bookings completed with any other payment type. We actively encourage our customers to complete their bookings using one of the payment methods for which no Booking and Service Fee applies. For more information, see Payment Methods.

1. A similar state of affairs obtained in respect of a further webpage entitled *“Payment methods”*. A consumer would find that webpage by clicking his mouse cursor on the *“Planning & booking”* link displayed at the top of the screen at various points in the process and then navigating to the *“Payment methods”* webpage. In the event that a consumer did navigate to that page, the following disclosures were apparent:

(a) Under the heading *“Credit, debit and charge cards”*, the following text appeared:

Visa, MasterCard, American Express, Diners Club and UATP cards are accepted, including credit cards, debit cards and charge cards. A Booking and Service Fee will apply. If you pay with a Jetstar MasterCard of Jetstar Platinum MasterCard you’ll avoid the Booking and Service Fee. …

See the Fees & Charges page for more details on the Booking and Service fee.

(b) Under the heading *“PayPal”*, the following text appeared:

If you choose to pay via PayPal, you will be redirected to the PayPal website where you can login or create a PayPal account and submit your payment. Upon full payment, you will be transferred back into the Jetstar website to obtain your final booking confirmation. A Booking and Service Fee will apply.

See the Fees & Charges page for more details on the Booking and Service Fee.

1. The third alleged contravention relates to the *“Fare-Well Summer Sale”* promotion in respect of which a video capture was made on 13 March 2014. There is no material difference between the primary facts relevant to the second alleged contravention and the primary facts relevant to the third alleged contravention.
2. The fourth alleged contravention relates to a promotion undertaken by Jetstar on 14 March 2014 which involved promoting return air fares rather than a single leg. In addition, the flight choices available on the *“Sales & special offers”* webpage were more restricted than those which had been made available in respect of the earlier promotions. Otherwise, the primary facts relevant to the fourth alleged contravention were essentially the same as those relevant to the second alleged contravention.
3. The fifth alleged contravention by Jetstar concerned the *“Take a Friend for FREE”* promotion which took place in the period 19–21 May 2014.
4. The flow of the booking process in respect of this promotion was essentially the same as that which obtained in respect of the second alleged contravention. However, instead of taking a prospective customer to the *“Sales & special offers”* webpage, the prospective customer was taken to a special webpage entitled *“Take a Friend for FREE”*.
5. The ACCC made the same complaint about this promotion as it made about the promotions featured in the second, third and fourth alleged contraventions. However, in respect of the fifth alleged contravention, the ACCC made an additional complaint. It submitted that the second traveller who was supposed to travel for *“free”* was in fact not travelling for *“free”* because the customer was required to pay a booking and service fee in respect of such a traveller if the customer chose to make payment for the total booking by deploying one of the methods where such a booking and service fee was payable.
6. On the *“Take a Friend for FREE”* webpage, the column headed *“Price”* contained an asterisk which was linked to text found elsewhere on that webpage in the following terms:

\*Prices based on payment by direct deposit/POLi/voucher/Jetstar MasterCard or Jetstar Platinum MasterCard for bookings through jetstar.com. For all other bookings, a Booking and Service Fee of $8.50 per passenger per domestic fare … applies.

1. The column headed *“Sale or offer type”* on the same webpage contained a hyperlink entitled *“Important info”* with an arrow inviting customers to click on that arrow. If a customer clicked on that hyperlink, the customer would then be shown a pop up box which included the following text:

\*Prices based on payment by direct deposit/POLi or voucher for bookings through Jetstar.com. For all other bookings, a Booking and Service Fee of $8.50 per passenger per flight applies.

1. The text below the fares table was in the following terms:

“Please make sure you read the important information about sale and special offer fares”.

1. That text was then linked by hyperlink to an explanation on the same page which was in the following terms:

Important information about sale and special offer fares

… \*Prices based on payment by direct deposit/POLi, voucher, Jetstar MasterCard or Jetstar Platinum MasterCard for bookings through jetstar.com. For all other bookings, a Booking and Service Fee of $8.50 per passenger per domestic fare … applies.

1. In addition, all of the other disclosures to which I have referred at [93]–[96] above, the disclosures made on the *“Select Flights”* webpage, the *“Payment”* webpage, the *“Fees and charges”* webpage and the *“Payment methods”* webpage described at [65]–[86] above were also made in respect of this promotion.

## The Jetstar Mobile Site

1. In the Jetstar AFTS, the ACCC alleges that Jetstar contravened the ACL by engaging in misleading and deceptive conduct on or about 21 March 2014 by conduct in connection with its mobile website. The case pleaded by the ACCC is found at pars 32 and 33 of the Jetstar AFTS.
2. The ACCC submitted that the class of consumers affected by Jetstar’s conduct in connection with its mobile site were members of the public with access to the internet through their mobile devices.
3. When a potential consumer arrived at the *“Select flight”* page on the Jetstar mobile site, the consumer was presented with a number of flights as being available on particular days. The particular allegations made in the Jetstar AFTS by the ACCC concern the 7.30 am flight depicted on the Jetstar mobile site for 1 April 2014. Toward the right hand side of the screen, displayed on the *“Select flight”* page, the price for that flight was listed as $85. A downward facing triangle was visible immediately to the right of the price. When the price for that fare was clicked, the downward facing triangle changed to an upward facing triangle and further details of the chosen flight were displayed below the abbreviated flight details.
4. The prospective purchaser then moved through the *“Value Bundles”* page, the *“Extras”* page, the *“Seats”* page and arrived at the *“Payment”* page.
5. The ACCC contended that, by repeatedly referring to the fare in specific and concrete terms on all of these pages and only permitting adjustments to be made to the fare by reference to selections made from choices provided on these pages, the original price of $85 was represented to be a firm price for the fare in question. It was submitted that that representation carried with it the concomitant representation that the passenger carriage services being offered on the Jetstar mobile site were not subject to a condition which would alter the price depending upon the payment method chosen by the consumer.
6. In contradistinction to the later versions of the *“Select flight”* webpage and subsequent webpages in the booking process on the Jetstar website, apart from the disclosure made on the Jetstar mobile site home page, no further mention or disclosure of the booking and service fee is to be found in the booking process undertaken on the Jetstar mobile site until the consumer reaches the payment page. On the payment page, under the heading *“Payment method”*, the following text appeared:

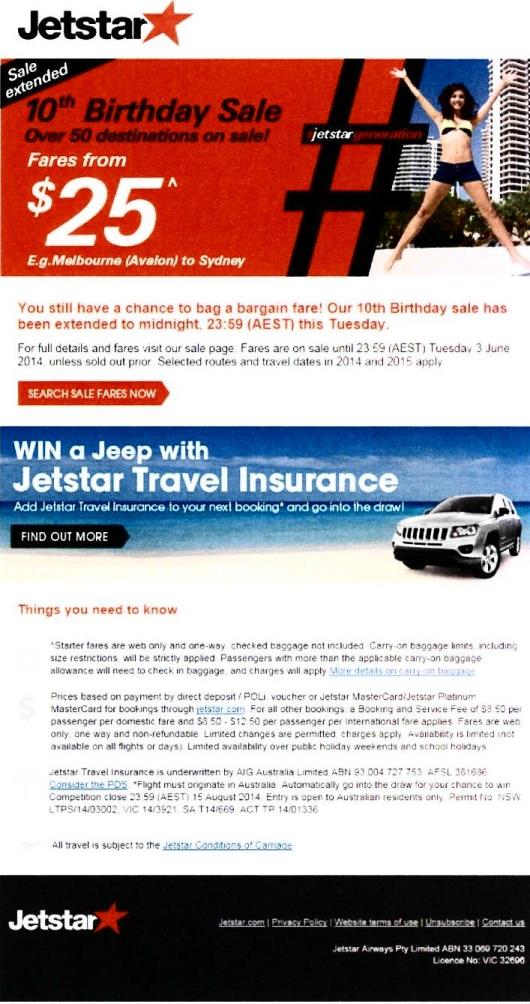
Please select a payment method below. Please note that payment cannot be split between different payment methods except for voucher and credit/debit card.

We charge a Booking and Service Fee. However, we encourage you to use one of the following free forms of payment: Jetstar MasterCard, Jetstar Platinum MasterCard, MasterCard Debit, and Jetstar vouchers and some other forms of payment (as indicated below).

1. Once the customer selected the chosen payment method, the fee was added to the booking summary side panel in the way in which this occurred in respect of bookings made online on the Jetstar website.

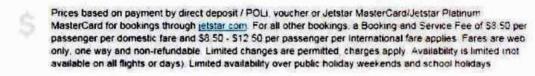
## The Jetmail Representations

1. These alleged contraventions are to be found at pars 27–31 of the Jetstar AFTS. Those paragraphs of the Jetstar AFTS relate to two promotional emails sent by Jetstar to subscribers to its Jetmail email facility, one sent on 1 June 2014 concerning the *“10th Birthday Sale”* promotion and one sent on 6 June 2014 concerning the *“Friday Fare Frenzy”* promotion. The allegations in respect of these emails relate only to the representations made on the face of the emails themselves.
2. I now produce below a copy of the emails in question.





1. As can readily be seen from the reproduction of the two emails in question, the email concerning the *“10th Birthday Sale”* directed an interested consumer to the *“Sale”* webpage. The same circumstance obtained in respect of the *“Friday Fare Frenzy”* promotion.
2. On the bottom half of both emails, under the heading in bold orange print *“Things you need to know”*, a number of relevant carriage conditions are stated. Next to a large dollar sign in grey font and under that heading, the following text appeared:



1. The ACCC contended that the carriage conditions on the second half of the email in each case would not ordinarily have been noticed or read by a prospective customer and that, given that the fares stipulated on the *“Sale fares”* webpage were in an unqualified and specific dollar amount, Jetstar was guilty of again falsely representing that the specific fares listed on the *“Sale fares”* webpage could be purchased irrespective of how payment was made.

# Virgin’s Conduct

## Introduction

1. The ACCC’s case against Virgin is premised upon the same fundamental propositions as underpin its case against Jetstar.
2. As was the case with Jetstar, the conduct of Virgin relied upon by the ACCC as constituting contraventions of the ACL took place in connection with the use by Virgin of three separate forms of communication, namely, the Virgin website located at URL http://www.virginaustralia.com/en/ (**Virgin website**), the Virgin mobile site located at https://mobile.virginaustralia.com/ (**Virgin mobile site**) and common-form emails sent to persons who subscribed to an email mailing list described as the *“V-mail”* list (**V-mail**).
3. As pleaded in its Amended Fast Track Statement filed on 24 November 2014 in the Virgin proceeding (**Virgin AFTS**), the conduct relied upon by the ACCC as constituting the alleged contraventions all took place in the first half of 2014.
4. As was the case with Jetstar, the ACCC gathered evidence by instructing one of its officers or consultants to navigate to the Virgin website and the Virgin mobile site and to make video captures of the process undertaken by that officer or consultant in working through a simulated booking.
5. Again, as was the case with Jetstar, the ACCC’s case against Virgin, as pleaded and conducted at trial, was that, by making certain statements on its website, on its mobile site and in emails sent by V-mail, in the circumstances in which those statements were made, Virgin made certain representations to the public at large about the price of the passenger carriage services which it was offering to provide which were untrue and, for that reason, misleading or deceptive, or likely to mislead or deceive potential purchasers of those services. The ACCC contended that, by its conduct, Virgin represented that the price as initially disclosed by it was a firm price regardless of the method of payment ultimately used by the customer and that that representation was false because, in the case of payments made by widely available credit cards, debit cards and PayPal, a booking and service fee was payable in the amount of $7.70 per passenger per flight for domestic flights. Further, the ACCC argued that, by its conduct, Virgin also represented that the provision of the passenger carriage services as offered by it were not subject to a condition which would alter the price depending upon the payment method used, which representation was false.
6. It was accepted by the ACCC that the requirement to pay the booking and service fee was disclosed at some point in the process prior to any particular transaction being entered into. In some cases, that requirement was disclosed more than once during the booking process.
7. The ACCC contended that the disclosures made by Virgin during the booking process were not sufficient to negate the impact of the falsity of the representations as to price made early in that booking process and that, in effect, as was the case with Jetstar, consumers were being drawn into a *“web of negotiation”* by the headline representations as to price which representations were false at the time when they were made.
8. Virgin contended that it did not make any of the representations alleged by the ACCC to have been made by it. It also argued that, if it made any such representations, the disclosures made by it as to the nature and quantum of the booking and service fee were sufficient to dispel any misunderstandings on the part of some consumers concerning that fee.

## The Primary Facts

### Virgin Website Conduct

1. Because there is only one version of the Virgin website which calls for consideration by the Court in the Virgin proceeding, it is not necessary to look at each particular transaction relied upon by the ACCC as constituting a contravention of the ACL. It will be sufficient, for present purposes, if I briefly explain the booking process that would ordinarily be undertaken by any potential customer of Virgin interested in acquiring a seat on a particular journey.
2. Consumers interested in acquiring the right to travel on a particular Virgin flight will navigate to the Virgin website. The first port of call on that website is the home page. The home page resembles the home page on the Jetstar website in terms of the content displayed there and the way in which the customer is invited to progress her inquiry forward through the system commencing at the home page itself.
3. As was the case with Jetstar, there is a box headed *“Book Flights”* on the left hand side of the home page into which the customer is invited to insert details of the flight desired by that customer including the point of origin, the destination and the travelling dates. The customer is also invited to specify the travel class and the number of adults, children and infants likely to be travelling on the particular booking. Once that information is inserted into the box on the home page, the customer clicks on the link *“Find Flights”* and proceeds to the webpage entitled *“View Best Fares”*.
4. On the *“View Best Fares”* webpage, relevant sale fares are displayed. On this webpage, the dollar figures for the fares are all described as *“Fares* ***from****”* the particular dollar figure. The *“from”* fares are related to a range of travel dates specified in a column on that page. At the far right of the line specifying the *“from”* fares there is a further link *“Find Flights”*.
5. At the bottom of the *“View Best Fares”* page in small print, there is a heading in bold *“Australian Domestic flights”*. Under that heading, there are seven lines of text. Included within that text is the following material:

Booking and Service fee will apply if payment is made by credit card, debit card or PayPal. See Fees and Surcharges page for more information.

1. The text which I have quoted at [122] above includes a link to the *“Fees and Surcharges”* webpage. The *“Fees and Surcharges”* webpage includes reference to the booking and service fee. The text which appears on that webpage stipulates that such a fee is payable for credit card, debit card and PayPal bookings and is a per person fee. The amount of $7.70 per person per booking is shown as the relevant fee. The note in relation to the booking and service fee provides that it *“… covers a range of costs, activities, fees and charges in relation to the booking (including among other things) the reasonable cost of accepting card payments”.*
2. If the consumer clicks her mouse cursor on the *“Find Flights”* link on the *“View Best Fares”* webpage, she will be taken to the *“Book a Flight”* page.
3. If the consumer then clicks on the *“Find Flights”* link on the *“Book a Flight”* page, the consumer is then taken to the *“Calendar”* page and then to the *“Select Flights”* page.
4. At the top of the *“Calendar”* page, there is a note in the following terms:

Prices are quoted per adult in AUD, include taxes and fees but exclude booking and service fee surcharges.

1. If the consumer then clicks *“Continue”* from the *“Calendar”* page, she is taken to the *“Select”* page. At the top of that page, there is a note in the following terms:

Prices are quoted per adult in AUD and include taxes and fees except for the Booking and Service Fee which is charged per Guest per booking for payment by credit or debit card and PayPal…

1. Under that note, there is then listed a series of available flights which meet the criteria chosen by the consumer.
2. Immediately under the list of available flights, the following text appears:

Credit card, debit card and PayPal bookings are subject to a Booking and Service Fee per guest per booking, this will be added to the total price of your booking payment.

1. Within that text, there is a hyperlink which enables a customer to navigate to the *“Fees and Surcharges”* webpage from which the customer can then ascertain the same material on that webpage as the material to which I have referred at [129] above.
2. Once the customer has chosen her desired flight and clicked the *“Continue”* button at the bottom of the page, she will be taken to the *“Passenger”* page of the booking process. The customer is required to insert various details concerning the identity of the passengers travelling on the booking and other details concerning that travel. No relevant disclosures are made on the *“Passenger”* page.
3. The customer is then taken to the *“Extras”* page.
4. At the top of the *“Extras”* webpage, the following text appears:

Prices are quoted per adult in AUD and include taxes and fees except for the Booking and Service Fee which is charged per Guest per booking for payment by credit or debit card and PayPal. Fares exclude any local taxes that are payable at the airport.

1. The customer is then directed to the *“Seating”* webpage. The same disclosure as was made on the *“Extras”* page appears at the top of the *“Seating”* page.
2. The customer is then directed to the *“Payment”* webpage. Again, at the top of that page, the disclosure concerning the booking and service fee is made in the same terms as the notation which appeared at the top of the *“Extras”* page and *“Seating”* page.
3. On the *“Payment”* page, the customer is required to choose which method of payment best suits her. Where a booking and service fee is payable, the nature and quantum of that fee is disclosed on the *“Payment”* page. Every time the customer clicks her mouse cursor on the icon of a method of payment which attracts the fee, the customer is alerted to the fact that a fee is payable and is also alerted to the quantum of the fee.
4. In summary, unless a consumer clicks on the link to the *“Fees and Surcharges”* webpage when looking at the *“Best Fares”* page, no adequate disclosure of the booking and service fee is made by Virgin until the consumer reaches the *“Select”* webpage. There is some mention of the booking and service fee on the *“Calendar”* webpage but the disclosure is not complete.
5. After the consumer has left the *“Select”* webpage, she is taken to a series of pages all but one of which contain the disclosure at the top of the webpage which is exemplified by the disclosure made at the top of the *“Extras”* webpage. The text of these disclosures made at the top of these webpages is in small font size but is nonetheless reasonably prominent. I think that the customer’s eye will inevitably be drawn to this text because it appears right at the top of the webpage.

### Virgin Mobile Site

1. Potential customers of Virgin are able to access the Virgin mobile site by accessing the Virgin website using a mobile device. Alternatively, the mobile site can also be accessed by using the URL for that site.
2. When customers first arrive at the mobile site home page, they can obtain information about Virgin flight specials by clicking or tapping on the *“Flight Specials”* located on the home page.
3. When the *“Flight Specials”* tab is tapped or clicked, customers are taken to the *“Flight Specials”* webpage on the Virgin mobile site. On that page, fares are shown as *“from”* a particular dollar figure. There is also a note on that page that there are terms and conditions applicable to all flights.
4. If a customer chooses to check the Australian Domestic Flights Terms and Conditions, the customer is told that there is a booking and service fee although, if she wishes to find out more about that fee, she has to navigate to a further webpage called *“Domestic Fees”*. If a customer chooses to navigate to the *“Domestic Fees”* webpage, the customer is given full and accurate information about the booking and service fee.
5. The customer can also go to the home page of the Virgin website by clicking on the *“Full Site”* icon on the *“Flight Specials”* webpage.
6. If, however, the customer simply clicks on the *“Flight Specials”* box on the *“Flight Specials”* page, the customer is taken to an expanded version of the available flights. That expanded version is contained within a rectangular box which has towards the bottom the same notations as appeared on the *“Flight Specials”* webpage itself.
7. The customer is then invited to click on the *“Book”* button which will then take her to the *“Book a Flight”* webpage. She may then complete the relevant details on that webpage and then click on the *“Find Flights”* link.
8. Once a customer clicks on the *“Book”* link, she is taken to the *“Select Flights”* webpage upon which she will find a listing of available flights which meet the criteria chosen by her. Immediately under the list of available flights, the following text appears:

… Credit and debit card bookings are subject to a Booking and Service Fee per Guest per booking, this will be added to the total price of your booking at payment. Please visit our full website for alternative payment options …

1. If the customer clicks on the *“Booking and Service Fee”* link, she will be taken to the *“Domestic Fee”* page. On that page, there is full disclosure of the terms and conditions applicable to the booking and service fee. If the customer chooses to click on the *“Full Website”* link, the customer is taken to the Virgin website which, of course, contains information about the booking and service fee. However, that information is not easy to find and requires the customer to navigate the website in order to locate it.
2. Ultimately, the customer arrives at the *“Travel Extras and Payment”* webpage. A complete and accurate disclosure of the booking and service fee is made available on that page.

### The V-mails

1. The email which is the subject of complaint by the ACCC is dated 27 May 2014. It promotes a flight sale against the backdrop of a resort on a beach at sunset. The header presents, in large text, the words *“Book early and save”* and immediately below presents three examples of flights which the consumer may book early in order to achieve savings. Again, however, the specific fares are referred to as *“from”* fares.
2. There is no reference to the booking and service fee or any other qualification to the price in the body of the email. The consumer who reads the email is invited to click on the *“Find Flights”* button in the lower right hand corner of the email and move into the booking process on the Virgin website. Once in the website, the prospective customer is taken through the booking process applicable to the website which I have described at [119]–[138] above.

# Other Matters

1. Jetstar tendered evidence which established in respect of each of the alleged contraventions in the Jetstar AFTS the percentage of bookings which were made by a payment method which incurred the booking and service fee. The precise data made available by Jetstar is confidential. It is not necessary for present purposes to record that precise data. I note, however, that, in respect of a majority of the alleged contraventions, a larger percentage of the bookings made were made without incurring any booking and service fee.
2. That data is a sound basis for me to conclude that, by the time that potential Jetstar customers are required to make payment for the booking which they have made, very often more than half of them are well aware of the circumstances in which the booking and service fee will be incurred and take steps to avoid paying it.
3. In its Submissions, Virgin made certain specific submissions as to the characteristics of the class of consumers likely to be affected by the form and content of the Virgin website, the Virgin mobile site and V-mails circulated by it. In particular, Virgin made the following submissions:
4. Persons who have chosen to navigate to the Virgin website or the Virgin mobile site are likely to have decided already to engage in domestic air travel and to book their travel online or at least are contemplating doing so. Persons who visit these sites may initially do so in order actually to make a booking or perhaps to ascertain prices for comparison purposes with prices obtainable from other airlines. Such persons know from past experience that prices charged by all airlines for their flights will vary according to the conditions of carriage and the flight details chosen by the customer eg with or without luggage, mode of payment, the day of flight and the time of flight on that day.
5. Persons who have chosen to subscribe to V-mails are very likely to have travelled on Virgin’s domestic air travel services before and to have booked such travel online via the Virgin website or the Virgin mobile site. The only ways in which persons can subscribe to such email alerts are through the Virgin website or its Velocity Frequent Flyer website or its *“Happy Hour”* website.
6. All persons who have chosen to navigate to the Virgin website or the Virgin mobile site or to subscribe to V-mail must have internet access and also have a sufficient degree of familiarity and comfort with internet browsing. Also, they are likely to be familiar with the booking process on the Virgin website and the Virgin mobile site and/or the similar booking processes available on other airline websites.
7. In support of the above submissions, Virgin tendered some general statistical evidence to the following effect:
8. The number of passengers travelling on domestic airlines in Australia averaged about 4.6 million per month for each of the months from February 2014 to May 2014.
9. Of the 57 million passengers who travelled with those airlines in that period, Jetstar carried 11.4 million passengers, Virgin carried about 16.8 million passengers and Qantas carried about 22 million passengers.
10. Internet usage in Australia is very extensive. In mid 2013, 14.24 million people had access to the internet in the home. 7.5 million people used the internet via the mobile phone. 65% of adult internet users in 2012 went online at least once a day.
11. A paper published by the Reserve Bank of Australia contained data showing that 74% of all transactions in the holiday travel industry were paid for using credit or debit cards.
12. These general figures were used by Virgin to support the submissions which I have extracted at [153] above. In particular, it was submitted that these statistics supported the third of those submissions.

# Consideration

## Some Common Features

1. The ACCC’s case against each of Jetstar and Virgin begins with its allegation, repeated throughout the Jetstar AFTS and the Virgin AFTS, to the effect that, by the conduct identified in those documents, each of those airlines made representations that:
2. The price displayed for the specific flights identified in the pleadings in every case would be the actual price of the passenger carriage services to which that displayed price related;
3. Those passenger carriage services could be purchased for that price regardless of the payment method used; and
4. Those passenger carriage services were not subject to a condition which would alter the price depending upon the payment method used.
5. I shall refer to these representations collectively as *“the representations”*.
6. It is then argued that the representations were false because:
7. The displayed prices were only available if the passenger carriage services were paid for using POLi, airline branded credit cards or airline vouchers;
8. 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; and
9. The provision of such services was subject to the booking fee condition.
10. In each case, three modes of communication were identified as the media by which Jetstar and Virgin made the representations. In each case, these media were the airline’s website, the airline’s mobile site and the airline’s email subscription list.
11. Notwithstanding that three modes of communication are identified, it is the use of the internet and the online booking process enabled by the internet which is at the heart of all three relevant modes of communication. In particular, it is the availability through the airlines’ website and mobile site of the instantaneous provision of information and the immediate opportunity to book passenger carriage services by air hopefully at a cheap price that has proven attractive to consumers.
12. What then is the appropriate description of the relevant class of consumers in relation to the acquisition of passenger carriage services by air in Australia by means of these online booking facilities and what are the characteristics of that class?
13. The ACCC contended that the relevant class of consumers is the public at large. Jetstar accepted that proposition. Virgin took a slightly different approach. It submitted that its conduct did not consist of advertising thrust upon the public at large but rather was conduct which engaged only with those members of the public who had already made a deliberate choice to navigate to the Virgin website or to the Virgin mobile site or to subscribe to its V-mail service.
14. In my judgment, while the impugned conduct on the part of both airlines is capable of engaging with any member of the public, it does not do so 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. Such persons would be accessing those sites and that service in order to *“price”* a particular journey which they have in mind or to book such a journey. They may be interested in accessing multiple sites for that purpose. In the present case, the multiple sites would be those of Jetstar, Virgin and Tiger Airlines, and perhaps Qantas.
15. The impugned conduct in these cases is not the same as the publication of a print advertisement in a daily newspaper or the publication of an advertisement during a radio or television broadcast.
16. What then are the attributes of the consumers in this class of consumers?
17. First, not all members of the class will possess all of the attributes which I will now discuss. It is inevitable that some consumers will be well-educated and sophisticated and that others will not. Some will be adept at using online booking services and others will not. Some will have previously navigated to the airlines’ websites and the mobile sites and others will not. There will be a wide range of ages within the class and a wide range of reasons across the class for wanting to access cheap airfares. At a general level, there will be different levels of experience of using the internet.
18. The authorities make clear that, when formulating the attributes of the relevant class of consumers, the overriding guiding principle is that the postulated class of consumers must be restricted to the ordinary or reasonable members of the relevant class (*Google* at 443 [7] and *Nike* at 85 [102]–[103]). The *“outliers”*, (as to which, see *Godfrey Hirst*), being the extremely stupid, the unusually gullible and those whose reactions are extreme or fanciful, are to be excluded. The Court must decide whether a not insignificant number of persons within that class are likely to have already been led into error by the impugned conduct or likely to be led into error in the future by such conduct.
19. As I have noted at [153] above, Virgin submitted that all of the members of the relevant class of consumers would have the attributes which I have listed in that paragraph. There is much to be said for the proposition that a significant proportion of the relevant class would possess all of those attributes and I so find. However, I am not persuaded that all of the members of that class would have all of those attributes. The one attribute which must be possessed by all is internet access. That being so, it is highly likely that the overwhelming majority of the relevant consumers would have some level of experience of navigating the internet and of using online booking processes. That knowledge and experience would include an understanding of the use of hyperlinks to navigate particular websites.
20. Second, although a significant proportion of those persons who navigate to the airlines’ websites and mobile sites would know from past experience that the ultimate price to be paid for any particular journey will vary, sometimes relatively substantially, depending upon the choices made by the customer during the booking process, not all members of the class will know this. Many first-time users will not be aware of this. Email subscribers, however, are more likely to be well aware of this circumstance because, by definition, they must have had some online booking experience in order to become such a subscriber.
21. Third, a significant proportion of the relevant class of consumers will know from previous experience that they cannot ascertain the final firm price for the journey which they intend to undertake without travelling through the booking process. Those members of the relevant class who do not know this before commencing the process become aware of it very soon after entering the process.
22. Fourth, because all of the operators in the Australian market for the provision of domestic passenger carriage services by air charge a booking and service fee of the type in question in the present cases, a significant proportion of the relevant class of consumers will be well aware of that fee before they enter the booking process. The historical data proves that many of those actually avoid paying the fee. In order to avoid the fee, the customer must have access to one of the methods of payment which does not incur a fee. Consumers will avoid paying the fee if it is important to them to do so. Those who are price sensitive will make it their business to educate themselves as to all of the available means for keeping the cost of the air fare to a minimum.
23. I now turn to describe some common features of the online processes deployed by Jetstar and Virgin in 2013 and 2014.
24. The booking process is interactive and, for the most part, consumer directed. I say *“for the most part”* because both Jetstar and Virgin do control to some extent the way in which the consumer is likely to navigate around their websites by the use of different colours, bold print, different font size, the positioning of text and graphics and the positioning and layout of hyperlinks. Many consumers will focus on their core mission—get a cheap flight on the desired days to and from the desired destination and do not worry about the fine print or, in the case of websites, do not worry about the detailed terms and conditions unless and until they matter. Subject to those comments, it is true that the consumer can navigate to any webpage on the website or mobile site, if he or she chooses to do so.
25. Further, consumers are able to take time to study particular webpages and to go back and forward between webpages should they so desire. They can click on all or some or none of the available hyperlinks. They are the ones who choose. The impact of the information displayed on webpages is not fleeting or momentary but may be able to be viewed and digested at whatever pace the individual consumer chooses. Of course, the fact that certain links are positioned and promoted in such a way as to take the consumer to particular webpages must not be forgotten. Navigating to some particular webpages is essential if the process is to be completed while others are merely optional.
26. Each of Jetstar and Virgin made certain disclosures on their websites and mobile sites concerning the booking and service fee. The manner and terms of such disclosures will be considered in the next section of these Reasons.

## The Case Against Jetstar

1. I have set out the primary facts concerning the first alleged contravention at [53]–[55] above.
2. The Jetstar website home page displays prices for selected fares as *“from $x”* with an asterisk. The asterisk takes the consumer to a note on the same page which contains some terms and conditions. Jetstar did not represent by anything displayed on the home page that any particular flight could be undertaken for any specific price.
3. When the consumer navigates to the *“Select Flights”* webpage or the *“Sales & special offers”* webpage, specific fares in relation to specific flights are displayed.
4. In May 2013, at the time of the first alleged contravention, consumers were not told about the booking and service fee until they arrived at the *“Payment”* webpage, although they were alerted to the possibility of having to pay such a fee as they left the *“Extras”* webpage.
5. In my view, although consumers who navigated as far as the *“Select Flights”* webpage should be taken to be aware that further cost components might be factored into the quantum of the fare ultimately arrived at, they were not told then or for some time thereafter that a booking and service fee might be payable depending upon the method of payment actually chosen by the individual consumer. I think that, in the booking process, on and from the webpage *‘Select Flights”*, as it stood at May 2013, Jetstar represented that the specific dollar figure for the fares displayed on those pages was a firm figure subject to factoring in the price of choices subsequently made by the consumer in respect of the services to be provided. That qualification on firm fare price did not encompass incorporating the booking and service fee in due course, at the very end of the process.
6. In those circumstances, I have concluded that the making of that representation constituted conduct on the part of Jetstar which was misleading or deceptive or likely to mislead or deceive. It also constituted contraventions of s 29(1) of the ACL as alleged.
7. The effect of that conduct remained until corrected by the disclosures made on the *“Payment”* webpage. I have no doubt that the falsity of the representation was corrected at that point. The disclosures at that point were unambiguous and were made more than once. The existence and quantum of the booking and service fee were disclosed and the fact that it need not necessarily be paid was also made clear.
8. For the above reasons, I would be prepared to make a declaration that Jetstar was guilty of the first contravention of s 18 and s 29(1) of the ACL alleged against it. Given that that conduct ceased some time ago, I would not be prepared to grant any injunctive relief.
9. As to the second to fifth alleged contraventions, I have come to a different view.
10. As a result of the changes made to its website in September 2013, Jetstar brought forward in the booking process adequate disclosures of the existence and quantum of the booking and service fee. Those disclosures were effectively made at the same time as Jetstar commenced to nominate a specific dollar figure for particular flights (ie on the *‘Sales & special offers”* webpage (if relevant)) and on the *“Select Flights”* webpage. In addition, and most importantly, when a particular flight is selected by a consumer, the pop up box containing an appropriate disclosure appears right next to the dollar figure for the fare.
11. Notwithstanding the ACCC’s submissions to the contrary, I consider that this disclosure would not be missed by any reasonable consumer and is adequate. In the circumstances, this finding means that Jetstar did not make the representations which it is alleged to have made as the foundation for the second to fifth contraventions. For that reason, those alleged contraventions have not been made out.
12. I am conscious of the fact that the conclusions which I have just expressed do not give any separate import to the additional argument in relation to the fifth alleged contravention based on the deployment of the word *“FREE”* in the promotion. I am not persuaded that, by using the word *“FREE”* in the way that it did, Jetstar made any representation to the effect that no booking and service fee would be charged in respect of the second passenger who was supposed to travel *“free”*. Relevant disclosures were effectively made at the same time as the word *“FREE”* was displayed. The existence and terms of those disclosures were sufficient to negate any momentary deception.
13. Given that Jetstar made an adequate disclosure on the face of the two Jetmail emails relied upon by the ACCC as the foundation for the email contraventions alleged against Jetstar, I am of the view that Jetstar did not make the representations alleged against it by circulating the Jetmails in question. The disclosure was there for all to see and adequate.
14. For the same reasons as I have found a contravention in respect of the May 2013 conduct alleged against Jetstar, I also find that it contravened s 18(1) and s 29(1) of the ACL in early 2014 when it did not disclose on its mobile site the existence and quantum of the booking and service fee until the consumer reached the *“Payment”* webpage. I propose to grant appropriate declaratory and injunctive relief in respect of those contraventions.

## The Case Against Virgin

1. The fares displayed on the Virgin website home page are *“from”* fares. If a consumer clicks on the *“Find Flights”* link in the box on the home page or the link in respect of the specific *“from”* fares on the bottom half of that home page, the consumer is taken either to the *“View Best Fares”* or the *“Calendar”* webpage. On the former, the existence of the booking and service fee is disclosed although the quantum thereof is not specifically referred to. However, the consumer is directed to the *“Fees and Surcharges”* webpage if they require more information. Any consumer wishing to ascertain the quantum of the booking and service fee and the terms upon which it would be charged could navigate to the *“Fees and Surcharges”* webpage and thereby ascertain an adequate explanation of the booking and service fee. On the *“Calendar”* page, there is some reference to the booking and service fee although that reference is general and not adequate. However, a consumer wishing to *“price”* a particular airfare with Virgin or to make a booking with Virgin must then continue to the *“Select”* webpage. On the Virgin website, this is the first page where Virgin arguably makes a specific representation as to the specific fare that will be charged for a specific flight. At the top of that webpage, above the list of available flights, there is an explicit disclosure of the existence of the booking and service fee and of its quantum. There is also an adequate disclosure of the circumstances in which it will be charged. Underneath the list of flights on that page, a further disclosure is made. Within that disclosure, a link to the relevant webpage forming part of the *“Fees and Surcharges”* webpage is provided. I consider that a reasonable consumer looking at the *“Select”* webpage would see and take note of these disclosures.
2. On the *“Extras”* webpage and on the *“Seating”* webpage, the disclosure concerning the booking and service fee initially made on the *“Select”* webpage is repeated. These disclosures are also at the top of the webpage.
3. Finally, comprehensive disclosures are made on the *“Payment”* webpage.
4. I do not think that Virgin made any representation on the home page of its website to the effect that the *“from”* fares displayed on that home page were firm fares which would be charged for any particular flight. Given the layout and text displayed on that home page, it seems to me that all that is being said by Virgin on that webpage is that, depending upon choices yet to be made by the consumer, the fares in the category described might be obtainable at the dollar figure displayed. As was submitted by Senior Counsel for Virgin, all that was stated was a base fare, which was itself expressed to be subject to conditions. No rational person could reasonably have concluded that that base fare would apply regardless of the payment method used or other choices made by the consumer.
5. As was the case with Jetstar, I consider that the ACCC has failed to make good its case that the representations, which it alleges constitute the misleading conduct on the part of Virgin, were made by Virgin on its website. Given the prominence, proximity and presentation of the relevant disclosures, I do not think that any of the alleged representations were made by Virgin on its website.
6. As far as the Virgin mobile site is concerned, the consumer is required to undertake a series of relatively annoying steps in order to ascertain the existence of the booking and service fee and the circumstances in which it will be charged. As submitted by the ACCC, the booking and service fee is a compulsory charge made by Virgin in respect of all bookings made via its mobile site.
7. The disclosures made in respect of the booking and service fee are not apparent on the face of the pages in the Virgin mobile site. If the customer is successfully to ascertain the existence of the booking and service fee and the terms upon which it will be charged, the customer is required to locate additional links which are not prominently displayed and which, in my view, the customer is not likely to pursue given the way in which those links are presented on the Virgin mobile site.
8. The existence and quantum of the booking and service fee is not plainly disclosed on the pages in the Virgin mobile site until the very end of the booking process.
9. For the same reasons as I have concluded that Jetstar contravened s 18(1) and s 29(1) of the ACL in connection with its mobile site, I consider that Virgin also contravened those sections by failing to disclose adequately the booking and service fee on its mobile site until the very end of the booking process which would ordinarily be undertaken by a consumer navigating Virgin’s mobile site.
10. I propose to make an appropriate declaration and to grant appropriate injunctive relief in respect of the contraventions arising out of the way in which Virgin provided access to the booking process contemplated by its mobile site.
11. The terms of the V-mails relied upon by the ACCC in its case against Virgin require consumers who are on the V-mail subscription list to make their bookings via the Virgin website. For those reasons, the complaints made by the ACCC against Virgin in respect of the V-mails fall with the complaints made in respect of the Virgin website.

# Conclusions

1. I have found a contravention against Jetstar in respect of its website as configured on 14 May 2013. In respect of that contravention, I propose to make an appropriate declaration.
2. I have also found contraventions against both Jetstar and Virgin in respect of the booking processes required to be undertaken by consumers who navigate the mobile site of each of them. In respect of those contraventions, I propose to make declarations and grant appropriate injunctive relief.
3. For the above reasons, I will require the ACCC to formulate the declaratory and injunctive relief which I have indicated I am prepared to grant. The balance of both sets of proceedings will be dismissed. I propose to hear the parties on costs.
4. There will be orders accordingly.

|  |
| --- |
| I certify that the preceding two hundred and four (204) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Foster. |

Associate:

Dated: 17 November 2015