FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Jetstar Airways Pty Limited (No 2) [2017] FCA 205

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| File number: | NSD 615 of 2014 |
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| Judge: | **FOSTER J** |
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| Date of judgment: | 7 March 2017 |
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| Catchwords: | **CONSUMER LAW** – remedies for a contravention of ss 18, 29(1)(i) and 29(1)(m) of the *Australian Consumer Law –* declarations made – no injunctive relief granted as the grant of such relief became unnecessary – pecuniary penalties totalling $545,000 imposed – proceeding otherwise dismissed with no orders as to costs |
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| Legislation: | *Australian Consumer Law*, ss 18, 29(1)(i), 29(1)(m) and 224 |
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| Cases cited: | *Australian Competition and Consumer Commission v Jetstar Airways Pty Limited* [2015] FCA 1263; [2016] ATPR 42-523  *Australian Competition and Consumer Commission v Virgin Australia Airlines Pty Ltd (No 2)* [2017] FCA 204  *Australian Competition and Consumer Commission v AirAsia Berhad Company* [2012] FCA 1413  *Australian Competition and Consumer Commission v Chrisco Hampers Australia Ltd (No 2)* [2016] FCA 144  *Australian Competition & Consumer Commission v Marksun Australia Pty Ltd* [2011] FCA 695; [2011] ATPR 42-363  *Australian Competition & Consumer Commission v Westminster Retail Pty Ltd* (2005) ATPR 42-084  *Australian Competition and Consumer Commission v Woolworths Ltd* [2016] FCA 44; [2016] ATPR 42-521  *Clean Energy Regulator v MT Solar Pty Ltd* [2013] FCA 205  *Universal Music Australia Pty Ltd v Australian Competition & Consumer Commission* (2003) 131 FCR 529 |
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| Date of hearing: | 22 December 2015 and 20 April 2016 |
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| Registry: |  |
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ORDERS

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|  | | NSD 615 of 2014 |
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| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSION  Applicant | |
| AND: | JETSTAR AIRWAYS PTY LIMITED (ACN 069 720 243)  Respondent | |

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| JUDGE: | FOSTER J |
| DATE OF ORDER: | 7 MARCH 2017 |

THE COURT DECLARES THAT:

1. On 14 May 2013, the respondent (**Jetstar**) contravened ss 18, 29(1)(i) and 29(1)(m) of the *Australian Consumer Law* by making representations on its website at the URL: http://www.jetstar.com/au/en (**Jetstar website**) that the price it would charge for air passenger services on selected dates from Brisbane to Melbourne (Tullamarine Airport) would be from $139 per person and that the price it would charge for air passenger services on selected dates from Melbourne (Tullamarine Airport) to Brisbane would be from $109 without adequately disclosing until the very end of the booking process that:
   1. The said air passenger services were subject to a condition that required the payment of a booking and service fee of $8.50 per passenger per flight for certain Australian domestic air passenger services booked through the Jetstar website, depending upon the payment method chosen by the consumer (**Website Booking Condition**), in addition to the said sums of $139 and $109 respectively; and
   2. The lowest price (including the booking and service fee) that could be payable by a customer purchasing the air passenger services referred to above through the Jetstar website, in circumstances where the Website Booking Condition became applicable, was $147.50 and $117.50 respectively.
2. On or about 21 March 2014, Jetstar contravened ss 18, 29(1)(i) and 29(1)(m) of the *Australian Consumer Law* by making representations on its mobile website at https://mobile.jetstar.com/ (**Jetstar mobile site**) that the price it would charge for air passenger services from Melbourne (Tullamarine Airport) to Sydney on 1 April 2014 would be $85 per person without adequately disclosing until the end of the booking process that:

(a) The said air passenger services were subject to a condition that required the payment of a booking and service fee of $8.50 per passenger per flight for certain Australian domestic air passenger services booked through the Jetstar mobile site, depending upon the payment method chosen by the consumer (**Mobile Site Booking Condition**), in addition to the sum of $85; and

(b) The lowest price (including the booking and service fee) that could be payable by a customer purchasing the air passenger services referred to above through the Jetstar mobile site, in circumstances where the Mobile Site Booking Condition became applicable, was $93.50 per person.

THE COURT ORDERS THAT:

1. Pursuant to s 224 of the *Australian Consumer Law,* in respect of its conduct referred to in pars 1 and 2 above, Jetstar pay to the Commonwealth of Australia pecuniary penalties totalling $545,000.
2. The proceeding otherwise be dismissed.
3. Each party is to bear its own costs.

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

REASONS FOR JUDGMENT

FOSTER J:

1. In a Judgment delivered by me on 17 November 2015 (*Australian Competition and Consumer Commission v Jetstar Airways Pty Limited* [2015] FCA 1263; [2016] ATPR 42-523 (**the liability judgment**)), I found that Jetstar Airways Pty Limited (**Jetstar**) had contravened ss 18, 29(1)(i) and 29(1)(m) of the *Australian Consumer Law* (**ACL**) in two particular respects:
2. First, by making false representations on its website on 14 May 2013 (**website conduct**) concerning the price it would charge per person for two particular flights in circumstances where those representations did not disclose the existence of an $8.50 booking and service fee per person per flight which applied to all bookings other than those paid for by using certain payment methods; and
3. Second, by making false representations on its mobile site on 21 March 2014 (**mobile site conduct**) relating to the price it would charge for a particular flight in circumstances where those representations did not disclose the existence of the same booking and service fee.
4. A contravention of s 18 of the ACL does not render the contravener liable to a pecuniary penalty whereas a contravention of s 29(1) of the ACL does render the contravener liable to the imposition of a pecuniary penalty.
5. Section 224 of the ACL is the source of power for this Court to impose a pecuniary penalty upon a person who, or a corporation which, contravenes s 29(1) of the ACL. The maximum penalty for each act or omission to which s 224 applies is $1.1 million in the case of a body corporate such as Jetstar (s 224(3), Item 2).
6. The liability judgment also addressed a separate proceeding instituted by the Australian Competition and Consumer Commission (**ACCC**) against Virgin Australia Airlines Pty Ltd (**Virgin**) (proceeding NSD 616 of 2014).
7. Although in the liability judgment I addressed the ACCC’s case against Virgin as well as its case against Jetstar, for reasons which will become apparent, it is appropriate that I deliver separate judgments dealing with the remedies to be ordered by the Court in respect of the particular case brought against each of the airlines rather than deliver a single judgment dealing with all outstanding issues in both cases.
8. I have assumed that any person who reads these Reasons for Judgment will already have read and considered the liability judgment.
9. Immediately before delivering this Judgment, I delivered a Judgment in the Virgin proceeding (*Australian Competition and Consumer Commission v Virgin Australia Airlines Pty Ltd (No 2)* [2017] FCA 204 (*Virgin No 2*)). That judgment should also be read together with this Judgment.
10. The ACCC contends that Jetstar committed two contraventions of the ACL. It contends that it should be punished accordingly. The ACCC argues for a pecuniary penalty of $300,000 in respect of the website conduct and an additional penalty of $250,000 in respect of the mobile site conduct.
11. Jetstar, on the other hand, argues that the website conduct and the mobile site conduct are *“the same conduct”* within the meaning of that expression in s 224(4)(b) of the ACL or, alternatively, that the contraventions should be punished as comprising a single course of conduct. Jetstar contends that the appropriate penalty for all of the contravening conduct is $100,000 in total.
12. In *Virgin No 2*, I imposed an agreed penalty of $200,000 in respect of a single contravention effected by Virgin on its mobile site in April 2014.

# General Principles

1. At [10]–[28] in *Virgin No 2*, I set out the general principles that should be applied in a case such as this. I rely upon those paragraphs for the purposes of these Reasons and incorporate them into these Reasons. I will need to supplement those paragraphs with some observations concerning the meaning of s 224(4)(b) of the ACL and the concept of a single course of conduct in the present context.

# Penalty Factors

1. Section 224(2) is in the following terms:

(2) In determining the appropriate pecuniary penalty, the court must have regard to all relevant matters including:

(a) the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission; and

(b) the circumstances in which the act or omission took place; and

(c) whether the person has previously been found by a court in proceedings under Chapter 4 or this Part to have engaged in any similar conduct.

## Number of Acts or Omissions

1. Jetstar argued that the website conduct and the mobile site conduct are *“the same conduct”* within the meaning of s 224(4)(b) of the ACL. Section 224(4) provides:

(4) If conduct constitutes a contravention of 2 or more provisions referred to in subsection (1)(a):

(a) a proceeding may be instituted under this Schedule against a person in relation to the contravention of any one or more of the provisions; but

(b) a person is not liable to more than one pecuniary penalty under this section in respect of the same conduct.

1. Jetstar’s argument that the two pieces of conduct constituted the same conduct may be summarised as follows:
2. I gave no separate treatment in the liability judgment to the mobile site conduct. At [189] of my Reasons, I simply referred back to the reasoning which I had applied to Jetstar’s website conduct;
3. The vice which I identified in respect of both contraventions was the same, namely, the failure to disclose the existence and quantum of the booking and service fee until a consumer arrived at the payment page; and
4. There is no material difference between the circumstances of the website conduct and the mobile site conduct.
5. Jetstar supported these arguments by reference to *Australian Competition and Consumer Commission v AirAsia Berhad Company* [2012] FCA 1413, *Australian Competition & Consumer Commission v Marksun Australia Pty Ltd* [2011] FCA 695; [2011] ATPR 42-363 and *Australian Competition and Consumer Commission v Chrisco Hampers Australia Ltd (No 2)* [2016] FCA 144.
6. The ACCC answered these arguments by pointing out that the two pieces of conduct took place almost twelve months apart and on different media and by emphasising the proposition that the purpose of s 224(4) is to prevent separate (and thus cumulative) penalties being ordered for contraventions of two or more provisions of the ACL in respect of the same conduct. Thus, for example, the subsection would operate so as to prevent the Court from imposing two pecuniary penalties in respect of Jetstar’s website conduct in the present case—one under s 29(1)(i) and another under s 29(1)(m). The ACCC ultimately submitted that the website conduct and the mobile site conduct are not the same conduct for the purposes of s 224(4)(b) of the ACL.
7. In my judgment, the text of s 224(4) favours the ACCC’s interpretation and I accept it as the correct interpretation. For this reason, I do not think that the two pieces of conduct in question are the same conduct for the purposes of s 224(4)(b) of the ACL.
8. Jetstar also argued that the two pieces of conduct in question here comprise a single course of conduct. It submitted that the two pieces of conduct were so closely related that, as a matter of discretion, the maximum penalty for a single contravention should be treated as a guide, though not a limit, to the penalty to be imposed for both contraventions (see *Australian Competition and Consumer Commission v Woolworths Ltd* [2016] FCA 44; [2016] ATPR 42-521 (*Woolworths*) at [120]). Jetstar argued that the course of conduct principle is based upon an underlying concern to avoid double punishment where there is an inter-relationship between the legal and factual elements of two or more offences (*Woolworths* at [120]).
9. It was submitted on behalf of the ACCC that the two contraventions in question in the present case did not comprise a single course of conduct. It contended that Jetstar’s contraventions cannot be seen as a single incident which led to multiple contraventions being alleged. Rather, according to the ACCC, those contraventions involve the same deception being practised on different occasions and across two separate media. The contraventions occurred almost twelve months apart.
10. In *Clean Energy Regulator v MT Solar Pty Ltd* [2013] FCA 205 (*MT Solar*) at [75]–[77], I set out my understanding of the relevant principles in this context. At those paragraphs, I said:

Counsel for the regulator submitted that, in the context of sentencing offenders for criminal offences, it is well recognised that the same, or very similar, conduct may give rise to a number of technically distinct offences. He submitted that the law recognises that an offender who is to be sentenced in such circumstances should be given a sentence which fairly reflects the substance of the offending conduct, rather than a purely mathematical accumulation of sentences for each separate offence which may be able to be technically identified. He said that, in cases where multiple offences truly represent only one multi-faceted course of conduct, the course of conduct principle is a *“tool of analysis”* which can be used to avoid any double punishment for those parts of the legally distinct offences which involve overlap in wrongdoing (*Pearce v The Queen* (1998) 194 CLR 610 (*Pearce*) at 623 [40]–[42]; *Johnson v The Queen* (2004) 205 ALR 346 (*Johnson*) at 348 [4]–[5] and 356 [27]; and *Attorney-General (SA) v Tichy* (1982) 30 SASR 84 (*Tichy*) at 92–93).

Counsel went on to submit that the same principles are now accepted as applying in the civil penalty context (*Mornington Inn Pty Ltd v Jordan* (2008) 168 FCR 383 (*Mornington Inn*) at 396–398 [41]–[46] (per Stone and Buchanan JJ); and *Construction, Forestry, Mining and Energy Union v Cahill* (2010) 194 IR 461 at 473–474 [38]–[42] (per Middleton and Gordon JJ)). He submitted that the question which arises in each case is whether the contravention should be treated as being truly a single course of conduct or whether the contravention’s separate character should be maintained when penalties are imposed. He said that this is a factual enquiry to be made having regard to all of the circumstances of the case.

I agree with the substance of the submissions made by Counsel on behalf of the regulator which I have summarised at [75]–[76] above.

1. As submitted by the ACCC, the single course of conduct principle provides a discretionary tool of analysis which can be used to avoid double punishment for multiple offences arising from the same conduct. A decision in relation to whether to apply that tool of analysis depends upon the Court’s assessment of the facts. It requires the weighing of elements, not the formulation of adjustable rules or benchmarks.
2. I do not think that the present case attracts the application of the single course of conduct principle. While the misrepresentation made on the Jetstar website is substantially the same as the misrepresentation made on the Jetstar mobile site, and while the booking flow or process to be undertaken in each case is broadly similar, the contraventions were, as submitted by the ACCC, separate. They occurred at different times and on different media.
3. For these reasons, I do not propose to apply the single course of conduct principle in the present case. For the purposes of determining the appropriate civil pecuniary penalties to be applied in this case, I will treat the two contraventions which I have found as separate.
4. I now turn to consider relevant factors going to penalty.

## Nature and Extent of the Conduct and the Circumstances in which the Conduct Took Place

1. Jetstar submitted that the contravening conduct in the present case is at the lower end of the scale of seriousness. It then endeavoured to support that proposition with a number of additional submissions. Those submissions may be summarised as follows:
2. The contravening conduct was not likely to have created a misleading impression in the minds of a significant number of consumers, who must be taken already to have known of the existence of a booking and service fee. Jetstar referred to the observations which I made at [171] in the liability judgment;
3. No consumer would ultimately have been misled if they proceeded to purchase a fare because the relevant disclosure was made prior to that point in time in the booking process;
4. A majority of consumers did not pay the booking and service fee at all; and
5. The question of whether Jetstar committed a contravention at all was a contestable proposition at all relevant times. Jetstar did not flout its obligations under the ACL but rather adopted a position which had some attraction on the merits.
6. The ACCC addressed these submissions both orally and in its Written Submission in Reply.
7. First, the ACCC submitted that the ultimate finding of the Court was that there had been a contravention and that this is the basis upon which the penalty must be assessed.
8. Second, the fact that no consumer would have been misled by the time that payment was made has no logical connection to the Court’s assessment of the seriousness of the contravention as found.
9. Third, the Jetstar website and the Jetstar mobile site are heavily used by consumers for the purpose of booking flights with Jetstar. Very large numbers of bookings are made through these media every year. The Court is entitled to infer that substantial revenue generating some profit is earned by Jetstar from the payment of booking and service fees. The gross amount for the 2012–2013 year earned by Jetstar from booking and service fees was very substantial. The precise figure is confidential.
10. I have considered the above arguments carefully. I do not agree that the contraventions are not serious. Nonetheless, they are not at the most serious end of the relevant spectrum. I propose to view them as being a little below a third of the way along the spectrum.
11. In *Universal Music Australia Pty Ltd v Australian Competition & Consumer Commission* (2003) 131 FCR 529, the Full Court said (at 598 [308]):

… It was conduct which, at least, ran a serious risk of being in breach of the Act. If this was appreciated, then the fact that the risk came home against expectations does not entitle the perpetrator to a discount. If the existence of the risk was not appreciated, then the company concerned misunderstood the law applicable to an important area of commerce and would not be entitled to any discount.

1. Those remarks are apt to be applied in the present case. The reasonableness of Jetstar’s stance in relation to the alleged contraventions does not provide a basis for discounting the penalty that might otherwise be imposed.

## Correspondence between the ACCC and Jetstar

1. Both parties made detailed submissions as to the relevance of communications between the ACCC and Jetstar in 2013 and 2014. In the end, I have not found those submissions overly helpful. The fact was that, soon after the website conduct took place, Jetstar and the ACCC entered into a series of communications in an endeavour to sort out the different interpretations which the parties placed upon the true requirements of the ACL in respect of Jetstar’s booking processes on its website and on its mobile site. Some changes were made but they were not sufficient to avoid committing the contravention on the mobile site which I have found was committed.

## The Amount of Loss or Damage

1. It was common ground that there were three bookings made on the day the website conduct took place and no bookings made on the day the mobile site conduct took place. There was no direct evidence before the Court in relation to any quantifiable loss or damage suffered by consumers or competitors as a result of the contravening conduct on the part of Jetstar.
2. Notwithstanding the circumstances to which I have referred at [34] above, the ACCC nonetheless submitted that harm to consumers was very likely to have been caused by the conduct in question.
3. I consider that the absence of quantifiable loss or damage is a mitigating factor. On the other hand, the likelihood of harm being caused to consumers (which I accept as probable in this case) takes the matter in the opposite direction. Overall, I propose to regard the absence of loss or damage as a mitigating factor but only a small one.

## The Size and Market Power of the Contravener

1. At [37]–[40] in *Virgin No 2*, I said:

Virgin is a substantial corporation. It is the second largest airline in Australia.

In the evidence tendered before me at the penalty hearing, Virgin provided a good deal of detail as to its financial position and the size of its business.

At [23] of the joint submission, the parties said:

Although Virgin Australia is a large company with large resources, this does not mean that the maximum penalty should automatically be awarded against it unless this was otherwise warranted by the nature of its conduct, nor are these necessarily reasons for imposing a higher penalty than would otherwise be imposed. As was observed by Allsop CJ in *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Limited* [2015] FCA 330, the financial resources of a firm “do not alone justify a higher penalty than might otherwise be imposed…[however], they are clearly relevant to considering the size of the penalty required to achieve specific deterrence and can be weighed against the need to impose a sum which will be recognised by the public as significant and proportionate to the seriousness of the contravention for the purposes of achieving general deterrence.”

I accept that submission. It is correct.

1. I adhere to those views for the purposes of the present case. They are applicable to my consideration of the appropriate penalties to be imposed in this case.

## Was the Contravention Deliberate?

1. As was the case in *Virgin No 2*, the design of the booking process and the implementation of that design were decisions deliberately made. The contraventions were not inadvertent. However, it is quite clear that, in proceeding as it did, Jetstar believed that it was not contravening the ACL and was operating within the law. That belief was not unreasonable although I have found that it was incorrect.
2. I am not persuaded that there was any flouting of the law or wilful breach of the relevant provisions. The booking process undertaken by Jetstar reflected a robust (but incorrect) view of the law.
3. I propose to take into account the fact that Jetstar stood its ground in the way that it did, with the approval of its senior management, as a factor supporting a more significant pecuniary penalty than had the circumstances been otherwise. But I do not regard this factor as warranting a large difference in penalty.

## Jetstar’s Corporate Culture and Co-Operation

1. The ACCC argued that, after some limited co-operation at the investigation stage, Jetstar proceeded to contest the proceeding at both the liability and penalty stages. The ACCC accepted that Jetstar was entitled to do so. It also accepted that no additional penalties should be payable by Jetstar by reason of its choice to contest liability (*Australian Competition & Consumer Commission v Westminster Retail Pty Ltd* (2005) ATPR 42-084 at [31]). Equally, so it was submitted by the ACCC, Jetstar is not entitled to any discount for co-operation in the litigation phase because it did not co-operate at all during that phase.
2. Jetstar has had a compliance program in place since at least 2007. It was not adequate to prevent the contraventions in this proceeding. However, the program is detailed, focussed and ongoing and must be regarded by the Court as a serious and generally effective endeavour to ensure that the corporation complies with the law, including the ACL.
3. There is no evidence to suggest that Jetstar has taken any further steps either to discipline or to require further training for staff involved in the contraventions found by the Court.
4. Ultimately, the ACCC submitted that no discount for co-operation should be applied in the present case.
5. Jetstar took issue with the proposition that its co-operation in the investigation stage was *“limited”*.
6. It was Jetstar’s submission that it had co-operated fully, or at least more substantially than the ACCC was prepared to accept, during the investigation stage and had promptly addressed the ACCC’s concerns.
7. Jetstar also relied upon a statement from its Chief Legal Officer (Competition) to the effect that Jetstar accepted the findings in the liability judgment and apologised for committing the contraventions founded by the Court as evidence of relevant contrition (see par 19 of the affidavit of Anna Rachel Pritchard affirmed on 15 April 2016). I accept that evidence. It is to be weighed in the balance in favour of Jetstar.
8. Having regard to the detailed submissions made by Jetstar, I do not think that Jetstar’s co-operation during the investigative stage was as limited as the ACCC has submitted. However, it was not entirely voluntary and proactive and is more accurately described as reactive—that is to say, responding to significant prodding from the ACCC.
9. There is no doubt that there has been no co-operation since the commencement of the proceeding.
10. In all the circumstances, I propose to regard the co-operation undertaken by Jetstar with the ACCC in 2013 and early 2014 as a slightly mitigating factor.

## Similar Conduct in the Past

1. Jetstar has not previously been found by a Court to have contravened the ACL.

## Deterrence

1. Jetstar made a number of submissions suggesting that there was no need for the Court to give significant weight to the question of specific deterrence in the present case. These submissions were:
2. Jetstar has acknowledged the findings of contravention made by the Court and has expressed its regret at having engaged in the misleading and deceptive conduct which the Court has found to have occurred;
3. There is no evidence that Jetstar made any profit from the contravention; and
4. The Court may take into account (and should take into account) the substantial adverse publicity which Jetstar has suffered as a result of this proceeding having been brought by the ACCC.
5. As a result of the above, Jetstar claimed that it has suffered reputational damage which ought to be weighed in the balance in considering whether there is any need for specific deterrence in the present case. I have been urged by the ACCC to place no weight on this circumstance, an approach with which I agree.
6. I think that the contravening conduct is unlikely to be repeated because Jetstar has changed its booking process on both its website and on its mobile site in order to accommodate to a significant degree the views of the ACCC since the contravening conduct occurred. It has also made clear that it accepts the findings in the liability judgment and will, no doubt, conduct its business in the future in a fashion which conforms to those findings.
7. The ACCC criticised Jetstar’s submissions for failing to address general deterrence.
8. The concept of general deterrence has repeatedly been stated by Judges of this Court as the primary object of the imposition of civil penalties.
9. As would ordinarily be the case, I propose to give significant weight to the need to ensure that traders using booking processes such as those used in the present case respect the needs of consumers to be dealt with openly, fairly and frankly at all relevant times. The penalties which I shall impose are designed to discourage similar behaviour by others.

## Appropriate Penalty

1. Taking into account all of the factors to which I have made reference above and the views which I have expressed in relation to each of those factors, I am of the view that a civil pecuniary penalty of $295,000 in respect of the website conduct is appropriate and an additional civil pecuniary penalty of $250,000 in respect of the mobile site conduct is appropriate. The total of the two penalties is $545,000. As will be clear from the amounts which I have determined, I regard the website conduct as more serious than the mobile site conduct, essentially because the website is used by consumers far more often than the mobile site in order to make bookings with Jetstar.
2. These penalties are fixed at the lower end of the scale when regard is had to the maximum penalty that may be imposed in each case. They reflect some mitigating circumstances to which I have referred above but also recognise that there is a need in the present case for the penalty to reflect the Court’s long standing approach to general deterrence and the fact that, to some extent, Jetstar consciously conducted itself upon the basis that its view of the law was correct in circumstances where I have found that that was not so.

# The Form of Relief

1. I propose to make appropriate declarations in respect of the two contraventions which I have found. There did not seem to be any dispute between the parties as to the appropriateness of my doing so.
2. Because the conduct which constituted the two contraventions was not ongoing by the time of the liability hearing before me, I have taken the view that it is not appropriate to grant any injunctive relief. That also seems to be a matter which is not in dispute.
3. The parties are not *ad idem* as to the appropriate order for costs.
4. The ACCC argued that each party had had a mixed result at the liability stage of this proceeding. The ACCC failed to prove a number of contraventions which it pleaded in its Amended Fast Track Statement yet ultimately succeeded on the two contraventions which are now the subject of these Reasons for Judgment. It advocated an order that each party bear its own costs in respect of the whole proceeding.
5. Jetstar, on the other hand, accepted that it should pay the ACCC’s costs of the penalty hearing but claimed that the appropriate order in respect of the liability stage of the proceedings is that the ACCC pay 75% of Jetstar’s costs in respect of that stage and Jetstar pay 25% of the ACCC’s costs in respect of that stage. Or, as Jetstar put in its Written Submission in Chief prepared for the penalty hearing, the ACCC should pay 50% of Jetstar’s costs of the liability stage of the proceeding and otherwise bear its own costs. These submissions were made upon the basis that the orders proposed by Jetstar reflect the measure of the parties’ respective successes on the liability issues.
6. An issue by issue approach to the assessment of costs may be warranted in some cases. Indeed, it may be superficially attractive to apply such an approach in the present case.
7. However, each of the alleged contraventions raise subtle permutations of the same substantive conduct for the consideration of the Court, some of which fell on the right side of the line and some of which did not.
8. I think that a fair overall assessment of the whole case leads to the conclusion that the parties have fought themselves essentially to a draw and that the order for costs should reflect that circumstance. This was the agreed position reached by the ACCC and Virgin in the Virgin proceeding. Such an outcome seems to me to reflect a fair assessment of the overall outcome.
9. For these reasons, I propose to make an order that each party bear its own costs of the whole of the proceeding.
10. There will be orders accordingly.

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| I certify that the preceding seventy (70) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Foster. |

Associate:

Dated: 7 March 2017