

DON'T BE A DRIP WITH PRICING THIS CHRISTMAS

By Leanne Jezercic, Solicitor

27 November 2015

With the holiday and gift-giving season upon us, many are now turning their attention to online shopping to book in last minute trips or avoid the Christmas queues. However, as consumers are increasingly aware, online shopping prices can at times be a bit of a moving feast, and the regulators have had enough, which means increasing risks for online retailers. Set out in this article is an update of a recent Australian Competition and Consumer Commission action in relation to a common pricing scenario – **drip pricing**.

You may be familiar with this scenario - it's the end of year and you're desperate for a holiday. After a particularly hard day at work, you get an email advertising a sale on flights to Hawaii and it's so cheap that you can't believe it. You grab your credit card and navigate through to the website. After taking the time to tediously enter and check all your details, read the terms (or is that just us lawyers?), create an account, set up a password and tick the disclosures, you finally get to the payment page only to find out that the "great deal" being offered doesn't actually exist as you're about to get hit with a booking fee, taxes, and credit card surcharge that jacks up the total price.

And then you realise – you've been sucked in by drip pricing, a technique used by online retailers where a headline price is advertised at the beginning of the purchase process, but once payment is reached, additional and unavoidable fees – such as booking / administration fees, credit card surcharges, applicable taxes or industry fees – have been incrementally added and disclosed to you, or "dripped", meaning that headline price wasn't really available to you. The result is that you end up being charged a higher price than what was "sold" to you at the outset.

Over the past year in particular, the ACCC has been on a mission to do something about drip pricing and has been liaising with the industry, including some of our clients. The ACCC has also commenced various investigations and actions in respect of drip pricing in particular, on the basis that it is misleading and/or a false representation. This is off the back of an international sweep headed by the International Consumer Protection and Enforcement Network, which has called upon consumer protection agencies across the world to investigate websites and mobile apps offering online bookings for services such as flights, accommodation, travel services, vehicle hire, car parking and entertainment ticketing. It was also a priority enforcement area set out in the ACCC's 2014 Compliance and Enforcement Policy and remains a focus of the ACCC. The ACCC has taken its own action against Ticketek and Ticketmaster as well as Airbnb and eDreams who all resolved to improve their pricing practices.

More recently, in November 2015, the ACCC had some success in the Federal Court, with the Court finding that the ACCC's concerns against the Jetstar and Virgin airlines that some of their pricing practices were false or misleading were indeed on the money.

Through that decision, it has now been confirmed by the Federal Court that a headline price can amount to misleading conduct or a false representation if additional or unavoidable fees and charges are not adequately disclosed early in the booking process. This does not however mean that the practice of using a headline price with extra added charges is banned per se – an online retailer could still engage in this practice provided that:

- it gives a **prominent disclosure** of the existence and amount of any extra costs and fees (such as credit card surcharges and booking fees). By "prominent", it has to draw the attention of a reasonable consumer, such as through its size, colour, positioning and content (a pop up box next to the advertised price was also deemed to be sufficient); and

ABN 40 134 644 689

Sydney • Suite 301, 22 Atchison Street, St Leonards NSW 2065 • T +61 2 9460 6611 F +61 2 9460 7200

Melbourne • Level 5, 492 St Kilda Road, Melbourne VIC 3004 • PO Box 7271, Melbourne VIC 3004 • T +61 3 9866 3644 F +61 3 9866 2844

Central Coast • Suite 3, Erina Plaza, 210 The Central Coast Highway, Erina NSW 2250 • PO Box 3685, Erina NSW 2250 • T +61 2 4331 0400 F +61 2 4331 0499

- the fees and charges are disclosed **as early as possible** in the online booking or transaction process, ideally at the same time as advertising the headline price (and definitely not at the payment stage).

What happened in this latest case was that both Jetstar and Virgin's online booking processes imposed a "booking and service fee" of \$8.50 and \$7.70 respectively, which was charged on bookings paid using most credit cards or PayPal (and additionally in the case of Virgin, by debit card). In many cases, this fee was only disclosed at the payment stage of the booking process and while it was possible to avoid paying these fees depending on selection of certain payment methods for instance, most customers in fact paid them as they were charged on the most common methods.

The Federal Court held that the airlines engaged in misleading "drip pricing" practices in relation to some of their platforms because they used an attractive headline price to encourage consumers to enter their online airfare booking systems and then progressively "dripped" the booking and service fee to consumers at a later stage through a carefully constructed and staged booking process. The dominant message conveyed by the headline prices on both airlines' mobile phone sites was that these headline prices were fixed or "firm sums" and the emphasis on these prices was subsequently misleading. The fact that both airlines disclosed the existence and amount of the booking and service fees at the payment stage, that is, before the customer made the final decision to purchase the service, was not sufficient to overcome any misconception created by the headline price.

In one example, the Court determined that advertising fares "from \$X" did not represent "firm prices" and instead indicated that this was the "base fare" and subject to conditions such that a reasonable customer would not expect the fare to remain that price. Therefore the use of a conditional word like "from" in pricing will also mitigate the risk of misleading consumers, but in our view, it will depend on the overall context and prominence given to the headline price as to whether this is sufficient on its own.

The take home message here is that businesses which use internet platforms and apps to sell to customers need to ensure that all fees and charges that are above the headline price are prominently disclosed to the customer as early as possible in a booking or transaction process and that overall their materials and claims are not misleading or false representations. Accordingly, you or your clients may need to review online pricing practices to ensure the disclosure of extra fees and charges accords with these principles as drip pricing remains a focus and enforcement priority for the ACCC. In this regard, the ACCC has warned online retailers to pay particular attention to drip pricing practices that involve additional charges that are likely to be paid by all or the majority of consumers and any optional extras that have been pre-selected in a non-transparent manner to increase the price.

Contact us

If you would like further information on pricing and price promotions, please contact one of our experts below. We can provide tailored legal and practical advice to assist you with reviewing or clearing advertising material.

Leanne Jezercic
+61 2 8935 8805
leanne@anisimoff.com.au



www.anisimoff.com.au



<https://www.facebook.com/AnisimoffLegal>

Clint Fillipou
+61 3 9907 4302
clint.fillipou@anisimoff.com.au



<https://twitter.com/AnisimoffLegal>



<http://www.linkedin.com/company/anisimoff-legal>