

The ACCC continues to focus on online customer reviews

The online marketplace, and in particular the accuracy of online customer reviews, was a key priority of the ACCC's in 2015 and we continue to see the ACCC focus on this area. In fact, on 22 September 2016, the ACCC announced it will be specifically assessing the review policies of sharing economy platforms, such as Uber and Airbnb, as part of an international initiative targeting online reviews and endorsements.

In light of this announcement, businesses should update and ensure compliance with their social media policies (if they have not already done so), to prevent ACCC accusations of customer reviews posted about the business being false or misleading due to the way the business has edited, filtered (or not filtered) or incentivised the reviews.

This briefing provides high level guidance on how to address this risk with reference to the ACCC's previous investigations and guidance in this area.

Why is the ACCC interested in online reviews?

"Fake online reviews mislead consumers and hurt Australian businesses. Businesses that pay for or post fake reviews can gain an unfair advantage or damage their rivals." (Delia Rickard, ACCC Deputy Chair).

Section 29 of the *Australian Consumer Law* (Schedule 2 to the *Competition and Consumer Act 2010*)

(ACL) prohibits particular false or misleading representations made in trade or commerce in connection with the supply or use of goods or services. The particular prohibited representations are listed in the section and prohibit not only false or misleading representations in relation to the expected factors such as price, quality, use, but also specifically prohibits:

- false or misleading representations that purport to be a testimonial by any person relating to goods or services; and

Key issues

- The ACCC is continuing to focus on online issues such as the veracity of customer reviews.
- It has been active in pursuing companies who encourage or publish "fake" or misleading customer testimonials.
- The ACCC will also pursue sharing economy review websites as part of an international initiative announced in September 2016.
- Businesses should ensure they have social media monitoring policies in place that mitigate the risk of online reviews about them being false or misleading.
- This note provides some high level 'best practice' rules to include in your social media policies.
- false or misleading representations concerning (i) a testimonial by any person, or (ii) a representation that purports to be such a testimonial, relating to goods or services.

The ACCC's particular, and relatively recent, focus on online customer testimonials can be linked to the fact that online reviews are increasingly used by consumers to inform their purchasing decisions.

The consequences for being involved (including indirectly) in a breach of section 29 include penalties of up to A\$1.1 million for a company and A\$220,000 for a person, per misleading representation. Additionally, third parties who have suffered loss due to the misleading representation can commence a private action against the representor to recover damages.

Representations relating to customer testimonials are taken to be false or misleading unless evidence can be shown to the contrary. This flips the burden of proof from the person making the accusation – which is where the burden usually lies – to the person making the representation and therefore the stakes are even higher for businesses involved in publishing online customer reviews.

False or misleading reviews will often overlap with the prohibition against 'misleading and deceptive conduct' under section 18 of the ACL which is a broader prohibition and gives rise to private damages actions by third parties and declaratory and injunctive relief.

Previous investigations into online customer reviews

The ACCC has commenced investigations and/or brought proceedings against a number of businesses for alleged false and misleading customer testimonials, including the following

- True Value Solar in April 2016 – for offering incentives of A\$200 free solar panels to those of its customers who published positive (only) online reviews. True Value Solar agreed to drop the incentive scheme.
- an Electrodry Carpet Cleaning franchisor in December 2015, for engaging a contractor to post fake positive reviews on Google and True Local. The franchisor was ordered to pay a penalty of A\$215,000 as well as A\$10,000 towards the ACCC's legal costs, and the court noted that the penalty would have been larger had the franchisor not cooperated fully with the investigation.
- Meriton hotels in December 2015, for allegedly incentivising customers to remove negative reviews and only specifically inviting those customers who had not complained about the hotel to leave a review.
- Citymove Pty Ltd in July 2015, for posting fake online reviews about itself on Google and Youtube. It was ordered to pay penalties of A\$30,600.
- EuroSolar and Australian Solar Panel in January 2014, for posting fake positive testimonials on its websites and Youtube. It was ordered by the Federal Court to pay a A\$125,000 penalty, A\$10,000 towards the ACCC's legal costs and the director of the company was ordered to personally pay a penalty of A\$20,000.

Additionally, authorities in other jurisdictions have also taken action in this area, such as the Italian authority fining TripAdvisor €500,000 for asserting that the reviews posted on

its platform were "authentic and genuine" when, in fact, TripAdvisor had no measures in place to verify the reviews and prevent false reviews being posted.

What you need to do to ensure compliance

"The ACCC has three clear messages for businesses handling online reviews. Be transparent about commercial relationships and don't let those influence the order in which reviews are published, don't post or publish misleading reviews, and editing or deleting unfavourable reviews may be misleading." (Delia Rickard, ACCC Deputy Chair).

The ACCC has published detailed guidance on what to do or not do when it comes to moderating or publishing online reviews.

The below guidance summarises the ACCC's best practice guidelines and should assist in ensuring that online reviews posted about your business do not give rise to allegations of false and misleading conduct by your business. Naturally, legal advice should be taken on specific circumstances. While there may be some flexibility around some of the guidance, given the ACCC's position, it would be prudent to obtain legal advice before departing from them.

Don't encourage positive reviews only

- Any incentives provided to customers should be provided regardless of whether the review is positive or negative.
- When informing customers of the incentive scheme, be clear that it applies even if the review is negative.

Disclose any commercial and personal relationships on the relevant webpage

- Family members or friends asked to provide a review need to ensure the review is accurate (i.e. if they have not had a genuine customer experience then they should not write a review which suggests that they have), and best practice dictates that the personal relationship should be disclosed by them in the review;
- Any incentives offered to customers to provide a review should be disclosed clearly on the website;
- If a review website alters the prominence or placement of a review in return for payment, then this commercial arrangement should also be disclosed clearly on the website.

Don't delete or edit negative reviews

- Reviews that reflect the genuine experiences of the customer should not be edited or removed, even if they are negative.

Have a verification procedure in place

- Companies in charge of moderating or filtering reviews placed on a review website should ensure there is a system in place to verify that the reviews are written by genuine customers. For example, this could be by requiring the reviewer to provide their receipt or contract details before they can progress to placing a review.

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