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## Gaming the system: Fake online reviews v. consumer law<sup>☆</sup>

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### ABSTRACT

#### Keywords:

Fake online reviews  
Consumer law  
Misleading deceptive conduct  
False representations  
Advertising  
Australia

Consumer information and its communication in the digital space has undergone a paradigm shift in the past decade. Online reviews are one form of consumer information which is gaining increasing commercial value and consumer influence. Retailers, marketers, PR firms, competitors and commercial online review providers are all implicated in exploiting this situation through the strategic creation and dissemination of fake online reviews. Recent studies suggest that fake online review prevalence is escalating and representing a growing problem in terms of online informational accuracy and potentially, market regulation. The UK Advertising Standards Authority has already found against *TripAdvisor* in this regard and other ubiquitous, highly popular review platforms are increasingly being examined by regulators for review accuracy as well. This paper considers fake online reviews and their potentials to mislead consumers, breach consumer laws and to undermine market efficacy. An examination of Australian law reveals that misleading and deceptive conduct and false testimonials in the form of fake online reviews are potentially actionable and that cases are starting to emerge which justify regulatory action. The paper also considers potential legal, technical and industry solutions, such as mandating best practice fake review detection and increasing enforcement and consumer education actions. The author concludes with the view that whilst the online environment is infinitely evolving and challenging, Australian consumer law is presently adequate to the task – provided that deficiencies in legal enforcement, fake review detection and consumer awareness are proactively addressed.

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*As the collective wisdom of the crowd displaces traditional advertising, the roaring engines of e-commerce are being stoked by favourable reviews.<sup>1</sup>*

Consumer information and its communication in the digital space has undergone a paradigm shift in the past decade. From static branded websites to the highly interactive social media of today, consumer-targeted communications have never been so

<sup>☆</sup> In this paper, the term 'online' refers to marketing and advertising on electronic networks such as the internet. Terms are used in a device-neutral manner; that is, include use on computers, mobile, smartphones and tablets. This reflects US Federal Trade Commission ('FTC') use. 'TripAdvisor' is spelt using the Australian spelling throughout and other acronyms are re-defined for ease of reference in the Appendix.

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<sup>1</sup> Streitfeld, David 'For \$2 a Star, an Online Retailer Gets 5-Star Product Reviews' *The New York Times* (26 Jan 2012 Accessed 09.04.14) <[http://www.nytimes.com/2012/01/27/technology/for-2-a-star-a-retailer-gets-5-star-reviews.html?\\_r=2&hp&](http://www.nytimes.com/2012/01/27/technology/for-2-a-star-a-retailer-gets-5-star-reviews.html?_r=2&hp&)>

plentiful, accessible and inexpensive. Add the growing emergence of user generated content, and the informational cocktail becomes a potent mix of voices, differing perspectives and competing motivations. Never has there been so much noise and clutter<sup>2</sup> in such a fiercely competitive market environment. The power of the internet as a communications tool and social media as an information driver is indisputable.<sup>3</sup> In the digital economy,<sup>4</sup> a business presence is inevitable,<sup>5</sup> as is a public, crowd-sourced opinion of that business – in the form of consumer reviews and ratings. The internet and social media have reinvented the marketing (*marcomm*)<sup>6</sup> challenge: to maximise a blue-sky opportunity, to minimise online risks and to control the message in a manner which optimises sales and brand, whilst marginalising competition and criticism. Allies in this challenge are burgeoning ‘support’ industries in SEO and PR, reputation management, analytics, fake review detection and so on. Against this stands a fledgling but growing regulatory pressure for legal compliance.

This paper explores fake online reviews in the Australian consumer law context. While often the law is criticised as slow, reactive and “overmatched”,<sup>7</sup> the view is argued that present consumer protection laws, guidelines and industry codes do appropriately regulate fake reviews, albeit enforcement actions and consumer education in the area has lagged until recently. From a policy perspective, it is arguably not desirable to treat misleading and deceptive reviews as any different to other forms of consumer misinformation in different media and there is a clear public interest in the laws regulating the provision of consumer information being consistent theoretically and practically wherever possible.<sup>8</sup>

<sup>2</sup> Nielsen ‘Global survey of trust in advertising’ *The Nielsen Company* (2013 Accessed 04.04.14) [3] <<http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2013%20reports/nielsen-global-trust-in-advertising-report-september-2013.pdf>>.

<sup>3</sup> See the discussion in part one.

<sup>4</sup> The term ‘digital economy’ means “the network of economic and social activity that is enabled by information and communication technologies, such as the internet, mobile and sensor networks.” Department of Broadband, Communications & the Digital Economy, *Australia’s Digital Economy: Future Directions* (July 2009 Accessed 21.02.14) <[http://www.dbcde.gov.au/digital\\_economy/what\\_is\\_the\\_digital\\_economy/australias\\_digital\\_economy\\_future\\_directions/final\\_report/australias\\_digital\\_economy#digitaleconomy](http://www.dbcde.gov.au/digital_economy/what_is_the_digital_economy/australias_digital_economy_future_directions/final_report/australias_digital_economy#digitaleconomy)>.

<sup>5</sup> There are now many sites which will list a business without its input or knowledge, including allowing consumer reviews. These include Yelp, TrueLocal, FindinAustralia or Local Directories.

<sup>6</sup> In this paper, ‘marcomm’ refers to marketing and advertising communication in the digital space. This reflects Australian Association of National Advertisers (AANA) guideline use.

<sup>7</sup> Michael Learmonth, ‘As fake reviews rise, Yelp, others crack down on fraudsters: Value of this essential local-marketing tool can breed bad actors’ *Advertising Age* 35: 11 (1 Oct 2012 Accessed 12.04.14) <<http://search.proquest.com.ezproxy.bond.edu.au/docview/1082296720>>.

<sup>8</sup> Albeit beyond this scope of this paper, it is worth noting that the same position may not apply to certain intellectual property laws such as copyright, which fit uncomfortably with the technology and context of social media. Arguably, these may need a conceptual realignment: see for example Latara Appleby ‘Social media creates copyright problem’ *Reporters Committee for Freedom of the Press* <<http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-fall-2013/social-media-creates-copyright#sthash.QX7DiIMX.dpuf>>.

Those laws not only regulate business and consumer conduct in a commercial context online, but also promote market efficiency, information symmetry and fair competition in the marketplace.

Part one of this paper places online reviews in the context of their significant commercial value and consumer influence, against potentials for misleading reviews to undermine market efficacy<sup>9</sup>; part two defines review fakery in the digital context; part three considers the consumer law regime including regulatory guidelines, industry codes of practice and regulatory enforcement approaches; and part four examines extant Australian case law, with several recent international examples. Part five considers potential legal, technical and industry solutions, such as mandating best practice fake review detection and increasing enforcement and consumer education actions. Part six then concludes with the view that whilst the online environment is infinitely evolving and challenging, Australian consumer law is adequate to the task – provided that deficiencies in legal enforcement, fake review detection and consumer awareness are proactively addressed.

## 1. Fake reviews in a digital context

Fake online reviews are false, misleading and deceptive communications in a digital environment which do not “reflect the genuinely held opinion of the author”.<sup>10</sup> Platforms on which fake reviews commonly<sup>11</sup> appear include brand or business websites,<sup>12</sup> social media,<sup>13</sup> blogs,<sup>14</sup> and business or product review sites such as Yelp. These sites have differing functionality and are in turn accessible on multiple consumer devices, from mobile phones to desk top computers. Their essence is the instantaneous provision of information about the marketer’s product or service, which may influence purchasing behaviours both in store and online.

This part considers the context of fake reviews; the size and nature of the online marketplace, consumer trust in reviews and potential information asymmetries, and the estimated prevalence of fake reviews online.

<sup>9</sup> Justin Malbon, ‘Taking Fake Online Reviews Seriously’ *Journal of Consumer Policy*, (2012) 36:2: 139–157 [153] <<http://link.springer.com/article/10.1007%2Fs10603-012-9216-7#page-1>>.

<sup>10</sup> Australian Competition & Consumer Commission, ‘Online Reviews – a guide for business and review platforms’ (2013 Accessed 10.02.14) [4] <[www.accc.gov.au/publications/online-reviews-a-guide-for-business-review-platforms](http://www.accc.gov.au/publications/online-reviews-a-guide-for-business-review-platforms)>.

<sup>11</sup> Given the rapid growth in fake reviews, it is not improbable that other platforms could become implicated albeit the technology may be less suited: social news sites, wikis, apps, instant messaging, video and photo sharing, Pinterest, podcasts.

<sup>12</sup> Mobile and tablet versions.

<sup>13</sup> Examples include Facebook, MySpace and LinkedIn.

<sup>14</sup> For example, Twitter.

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