

Article Information

Authors: Anne Freeman, Millie Byrnes Howe, Lisa H Nguyen

Service: Competition & Trade, Corporate & Commercial, Dispute Resolution & Litigation

The dangers of fake reviews: Service seeking fined for its 'fast feedback' review system

On 22 July 2020, online jobs platform Service Seeking was fined \$600,000 for allowing businesses to publish reviews about their own work which falsely represented that those reviews were written by customers. This amounted to a breach of sections 18, 29(1)(e) and 34 of the Australian Consumer Law.

Australian Competition and Consumer Commission v Service Seeking Pty Ltd [2020] FCA 1040

Service Seeking operates a website and mobile app (together, **Platform**) which connects potential customers who require certain services with businesses registered on the Platform offering those services. On the Platform, reviews and star ratings for businesses were visible so that customers could choose a business to use. From 12 July 2016 until 29 November 2018 (**Relevant Period**), Service Seeking had a 'Fast Feedback' review system, which allowed a business to generate a review and star rating to send to the customer. The customer could then indicate whether they agreed with the review or they could alternatively write their own review. If a customer failed to respond or dispute the review within 72 to 96 hours of receiving the email, then the review would automatically be published on the business' profile on the Platform and be incorporated into its overall rating profile. During the Relevant Period, approximately 80% (being 17,531) of the reviews published through the Fast Feedback system were published by default i.e. because the customer had not responded to the email.

Consequently, the ACCC commenced proceedings, alleging that Service Seeking contravened the misleading and deceptive conduct provisions of the *Australian Consumer Law (ACL)*.

The representation

There was no dispute between the parties that the published Fast Feedback reviews were representations made by Service Seeking that purported to be testimonials by customers who utilised the business' services (**Customer Testimonial Representation**). This representation continued until 13 May 2019, as the reviews remained on the Platform until this time. There were three different review formats used between different periods, which comprised the following statements:

1. "[name of business] did a [description of services] job for me in [location] and the job was completed on time, on budget, to a professional standard and with good communication" (between 12 July 2016 and around March 2018);
2. "[business name] completed this job and reported that [first name of customer] was satisfied because the job was completed on time, on budget, to a professional standard and with good communication" (between March 2018 and around August 2018); and
3. "[business name] reported the job was completed on time, on budget, to a professional standard and with good communication" (between August 2018 and 13 May 2019).

After each of these review formats, the words 'Fast Feedback' appeared, as well as the name and location of the specific customer. Although the second and third review formats were not expressed as if it came directly from the customer, Jackson J nonetheless held that the Customer Testimonial Representation was still conveyed in those formats given the entire context in which the representation was made on the Platform. His Honour highlighted that the main contextual matters that were likely to reinforce this representation were:

1. the use of the words 'Fast Feedback' indicated feedback on the services provided by the business, which would

- customarily come from the customer;
- 2. the default reviews appeared under the prominent heading 'Reviews', which ordinarily means a customer's evaluation of services;
- 3. reasonable users would naturally assume that the purpose of reviews was to assist potential customers in deciding whether to use the business by reading feedback provided by other customers;
- 4. the default reviews were intermingled with genuine reviews;
- 5. reasonable users would generally perceive the star ratings provided before each default review to be a rating given by a customer; and
- 6. it could be expected that the customer would skim the reviews rather than read them closely.

Were the default Fast Feedback reviews misleading and deceptive?

There was no dispute that Service Seeking's conduct was misleading or deceptive, or that the representations made were false. This was because:

1. *First*, the Customer Testimonial Representations falsely represented that the businesses had received more positive reviews and higher aggregate star ratings given by customers than they had actually received;
2. *Second*, by publishing and leaving the Fast Feedback reviews on the Platform, Service Seeking breached s 29(1)(e) of the ACL as it made false or misleading representations that purported to be the opinion of a customer who used the business' services. Jackson J noted that the relevant services were that of the businesses registered on the Platform, not of Service Seeking, but that the services did not have to be provided by the person said to have breached the provision; and
3. *Third*, the parties agreed that Service Seeking's conduct contravened s 18 of the ACL as well as s 34 as it was "liable to mislead the public as to the nature, and the characteristics and suitability for their purpose of services of businesses" on the Platform.

Pecuniary penalty

The parties sought declarations of contravention, an injunction prohibiting the conduct, corrective publication and the imposition of a compliance program at Service Seeking's expense. The parties also sought a pecuniary penalty of \$600,000 for the contraventions of the ACL.

In assessing the appropriate penalty, his Honour stated that the Court must be satisfied that the amount is appropriate in all the circumstances, noting that a civil penalty is concerned with promoting the public interest of compliance through specific deterrence (i.e. directed at the contravenor) and general deterrence.

Under the ACL, each instance of publication of a misleading Fast Feedback review could be characterised as a contravening act, and as such, if assessed in accordance with s 224(3), the penalty imposed could have been billions of dollars. Jackson J held that the essence of Service Seeking's contravening conduct was in setting up and implementing the Fast Feedback review system, and as such, considered that the multitude of reviews published through the Fast Feedback system was one course of conduct.

The Court found that the nature of the conduct was serious as it involved the deliberate construction of a system which resulted in many misleading reviews and affected hundreds of thousands of users. Whilst Jackson J accepted that it was not possible to quantify the loss or damage suffered, his Honour found that the loss was significant.

Whilst the parties submitted that the appropriate penalty was \$800,000, it was accepted by the Court that this should be discounted to \$600,000 to reflect Service Seeking's cooperation with the ACCC.

Takeaway

Given the increasing reliance placed by customers on online reviews in making purchases, it is crucial for businesses to have accurate reviews which reflect the independent opinion of customers. Where customers might be deceived about the authenticity of reviews, there is likely to be a breach of the ACL, which may result in significant legal, financial and reputational consequences.

If you are unsure whether your business is compliant with the legislation or whether its activities might be considered misleading and deceptive, contact Piper Alderman for assistance.