

A COSTLY REVIEW- MERITON FINED \$3 MILLION FOR MISLEADING CONSUMERS ON TRIPADVISOR

By Meagan Boschetti

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Serviced apartments accommodation provider, Meriton Property Services ("Meriton"), took a trip of its own recently to the Federal Court, over its conduct in connection with reviews of its properties on the TripAdvisor website. Meriton has numerous serviced apartment properties, mainly in Queensland and New South Wales, and these properties are reviewed/promoted on TripAdvisor by past guests, whom service providers like Meriton put TripAdvisor in contact with. Testimonials and user reviews are an increasingly important part of consumer decision-making, and have a large bearing on consumer confidence in the retail goods and services sectors in particular. This trend is what makes this case so interesting, as we detail below.

The conduct

The Court found that Meriton had engaged in misleading and deceptive conduct by taking steps to prevent guests it suspected would give an unfavourable review of its services from receiving TripAdvisor's 'Review Express' prompt email, which is routinely sent to guests after their stay with participating accommodation providers, like Meriton. Meriton's management directed staff to engage in 'masking' activities, through inserting additional letters into guests' email addresses on their database as provided to TripAdvisor, so that the prompt email from TripAdvisor never reached the intended guest. Alternatively, Meriton would simply not send the guest email addresses to TripAdvisor.

Between April to December 2015, 14,584 instances of email addresses being masked were found, including a majority of guests staying at one of its hotels during periods when there were infrastructure issues and service problems, such as no hot water and lifts not working. By essentially pulling these guests with less than 5-star experiences out of the pool of potential reviewers, Meriton created a more positive and favourable impression of its properties on the TripAdvisor website, as its strategies reduced the number of negative reviews received.

The Court held that Meriton's conduct was liable to mislead the public as to the nature, characteristics and suitability of purpose of its accommodation services. Given the increasing trend towards use of (and reliance on) online review websites and consumers basing their purchasing decisions on reviews they get through sites, such as TripAdvisor, it's vital that these sites are not manipulated and that they are allowed to accurately reflect all customers' opinions - even the disgruntled. This is not a perfect science of course, and there is no way of guaranteeing perfect balance, however what Meriton did clearly manipulated the outcome far too egregiously for the Court's liking.

The Federal Court was scathing and very strong when setting penalties recently, ordering Meriton to pay a hefty \$3 million in penalties, sending a strong message that online reviews are a growing form of credibility and Meriton's conduct cannot be tolerated. The ACCC will also be closely monitoring this space moving forward, after such a large enforcement win.

Misleading and Deceptive Conduct...by omission?

Very interestingly, as it is relatively rare, this case was a prime example that conduct can be misleading by *omission*, as well as by direct act. Since the new false testimonials provisions of the *Australian Consumer Law* came into force a few years ago, we have seen false online testimonials under increased scrutiny from the ACCC. These have included cases where marketing agencies post fabricated testimonials on various websites, purporting to be genuine customer testimonials, leading to large six figure fines. Generally the decisions are made on the basis of the false testimonials provisions and also the misleading and deceptive conduct provisions in the *ACL*.

However, the recent Federal Court decision with Meriton is notably distinguishable, as Meriton did not fabricate any false or misleading statements, rather it prevented publication of potentially damaging reviews by omitting to forward the email addresses to TripAdvisor. In other words, it was not something *misleading* that Meriton actually did that got them in trouble here, but something they did not do.

By imposing filters and incorrectly spelling emails, certain guests did not receive a request to review on Trip Advisor. As a consequence, consumers were led to believe that the reviews they did see on TripAdvisor were from a fair cross section of guests and that they were not skewed in a certain way by Meriton. Despite all this, no *direct* representation was made by Meriton, and therefore this conduct falls outside of the false testimonials provisions. Instead, the Federal Court found that by engaging in masking and withholding practices, Meriton engaged in conduct that was likely to mislead or deceive and its conduct was liable to mislead the public as to characteristics and quality of the accommodation services it provided.

There was a recent Federal Court matter in 2017 where the Court held *Aveling Homes Pty Ltd* had engaged in conduct liable to mislead the public, by holding back bad reviews from its review website to give a more favourable impression of its services. Despite the similarities in the cases, the Aveling penalties totalled \$380,000, comparably less than the \$3 million fined to Merton just one year later, perhaps highlighting the growing significance of reviews for the consumer and the Court's desire to set a strong deterrence message.

Final thoughts

Online reviews are serious business.

Direct customer feedback is now in the public domain and available at the click of a button, as social media and third-party review websites attract an increasing audience. Managed correctly, they can be a great marketing tool, and used to generate customer loyalty and sales. However, in light of the recent scrutiny of review platforms by the ACCC, and the escalating penalties, caution should be taken to ensure you are monitoring and managing your feedback correctly, and not engaging in misleading conduct by unduly manipulating what the outside world sees.

If you would like further information on how to manage your business review platforms and online reviews, please contact one of our experts below.

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