Protecting the consumer by fighting fake and manipulated online reviews

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Online reviews have a significant impact on consumers and review authenticity must be safeguarded to avoid abuse of consumer trust in decision making. The fight against online reviews which mislead or deceive consumers becomes more difficult as the means of manipulation of the review process becomes more sophisticated. In ***ACCC v Meriton Property Services Pty Ltd*** *(2017) 350 ALR 494, the Australian Competition and Consumer Commission successfully prosecuted an accommodation provider for manipulating customer reviews on the Tripadvisor website. In 2019, the Commerce Commission in New Zealand achieved a significant result in* ***Commerce Commission v Bachcare Ltd*** *[2019] NZDC 25483 which also involved review manipulation. Bachcare Ltd had systematically removed poor guest reviews from its accommodation booking website. These cases show how the manipulation of reviews can be quite sophisticated and difficult to detect. Prosecuting authorities need all the weapons possible to fight fake or manipulated reviews. This article recommends expanding and strengthening the arsenal in New Zealand by encouraging a broad approach to the definition of 'conduct' in the Fair Trading Act 1986, similar to that taken by the Federal Court of Australia in Meriton, introducing a new offence of impersonating a consumer and imposing obligations on review website operators to incorporate robust fake review detection mechanisms into their websites.*

Introduction

The story of the Dulwich Shed restaurant is an excellent example of the impact of fake reviews. Fake reviews of a fake restaurant generated a top ranking on Tripadvisor for a non-existent business.[1] Evidence of the impact of fake reviews on consumers is demonstrated by the 2020 Which?[2] survey in which almost 10,000 consumers completed a hypothetical shopping task through an online survey, having access to reviews which they did not know were fake. The survey results showed that, 'fake reviews were highly effective at misleading consumers, causing them to choose poor quality products instead of better alternatives'.[3]

While one of the benefits of the online business environment, for consumers, is the ability to freely access reviews of goods and services prior to purchase, the consumer's heavy reliance on online reviews makes them

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1 'The Shed at Dulwich', *Wikipedia* (Web Page) <https://en.wikipedia.org/wiki/The_Shed_at_Dulwich>.

2 'Who we are', *Which?* (Web Page) <https://www.which.co.uk/about-which/who-we-are>. This is a not-for-profit consumer organisation situated in the United Kingdom.

3 Which?, *The Real Impact of Fake Reviews — A Behavioural Experiment on How Fake Reviews Influence Consumer Choices* (Report, May 2020) 2 <https://www.which.co.uk/policy/consumers/5860/realfakereviews> ('*The Real Impact of Fake Reviews*').

particularly vulnerable to fake or manipulated reviews. Fake reviews take advantage of the consumer's trust in the review process and impact decision making.[4] A benefit of online reviews, the reduction information asymmetry which often exists in consumer transactions,[5] is completely destroyed if the reviews are fake or manipulated and consumer trust is abused.[6] Abuse of online review systems has become more sophisticated than the simple posting of fake reviews, the practice of manipulating the review process to show a business in a more favourable light than is justified is also now prevalent. Detection is often only possible if an ex-employee or whistle blower contacts the relevant authority or the media and exposes the offending practice.[7]

Two cases, *Commerce Commission v Bachcare Ltd* ('*Bachcare*')[8] and *Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd* ('*Meriton*')[9] provide examples of manipulation of the online review process. In *Bachcare*, negative reviews for properties listed for rent on the Bachcare booking website were systematically removed. Prosecution by the Commerce Commission resulted in a fine of $117,000, on a guilty plea, for breaches of the *Fair Trading Act 1986* (NZ) ('*Fair Trading Act*'). In *Meriton*, the Tripadvisor review process was manipulated so that review invitations from Tripadvisor were not emailed to customers who may have had a negative accommodation experience while staying at a Meriton property. Prosecution by the Australian Competition and Consumer Commission ('ACCC') resulted in a fine of $3 million and other disciplinary orders.[10]

Consumer protection regulation must be rigorous enough to fight sophisticated and novel ways of falsifying and manipulating online reviews. This article reviews the legal actions available when the online review system is subject to abuse and suggests that the New Zealand courts should take a broader approach to the definition of 'conduct' in the *Fair Trading Act*, akin to that adopted by the Federal Court of Australia in *Meriton*. The article also recommends the adoption of a new criminal offence of falsely representing oneself to be a consumer, similar to that adopted in the United Kingdom and

4 M Huang and A D Pape, 'The Impact of Online Consumer Reviews on Online Sales: The Case-Based Decision Theory Approach' (2020) 43(3) *Journal of Consumer Policy* 463.

5 Justin Malbon, 'Taking Fake Online Consumer Reviews Seriously' (2013) 36(2) *Journal of Consumer Policy* 139, 141, 149.

6 Michael Luca and Georgios Zervas, 'Fake it Till You Make it: Reputation, Competition, and Yelp Review Fraud' (2016) 62(12) *Management Science* 1 <https://dash.harvard.edu/handle/1/22836596>.

7 See, eg, David Lewis, 'Meriton Allegedly Prevents Guests from Giving Negative Reviews, Bribes Them to Improve Ratings on TripAdvisor, *ABC News* (online, 21 October 2015) <https://www.abc.net.au/news/2015-10-21/meriton-apartments-allegedly-cheating-tripadvisor-system/6870256>

8 [2019] NZDC 25483 ('*Bachcare*').

9 (2017) 350 ALR 494 ('*Meriton*'). See also subsequent sentencing decision: *Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd [No 2]* [2018] FCA 1125 ('*Meriton [No 2]*').

10 *Meriton [No 2]* (n 9).

the imposition of obligations on review websites to monitor reviews and operate robust fake review detection mechanisms.

I Online Review Systems

An online review of a product or service is a statement or rating, which reflects the opinions and experiences of customers who have already purchased the product or used the service, that are published online. The occurrence of online reviews is prevalent across all areas of commerce. Traders frequently publish customer reviews on their own websites or third party review websites, including significant global review websites, publish customer reviews then rate and rank products or services according to those reviews.[11] It is acknowledged that easy access to online reviews balances the information asymmetry that often exists in consumer transactions and promotes informed consumer decision making.[12] However, the consumer's heavy reliance on online reviews and makes them particularly susceptible to fake or manipulated reviews.[13]

II Fake or manipulated reviews

There are many ways to fake or manipulate online reviews. Common examples include: positive reviews by those connected with a business; negative reviews posted by competitors; reviews posted by people paid to post reviews;[14] review sites which look independent but are created by a particular business to promote its own products or services;[15] and manipulation of review processes controlled by the trader[16] or operated by a third party.[17] There are serious issues with these practices for consumers. Fake or manipulated reviews have a powerful impact on consumers,[18] often misleading them and

11 Eg, Tripadvisor; Booking.com; Yelp; and Google.

12 Malbon (n 5); Kate Mathews Hunt, 'Gaming the System: Fake Online Reviews v. Consumer Law' (2014) 31(1) *Computer Law & Security Review* 3, 5; Madalena Narciso, 'The Regulation of Online Reviews in European Consumer Law' (2019) 27(3) *European Review of Private Law* 557, 560 <https://kluwerlawonline.com/journalarticle/European+Review+of+Private+Law/27.3/ERPL2019028>.

13 OECD, *Good Practice Guide on Online Consumer Ratings and Reviews* (Digital Economy Papers No 288, September 2019) <https://www.oecd-ilibrary.org/docserver/0f9362cf-en.pdf>.

14 UK consumer authority, Competition and Markets Authority actions: 'CMA Takes Enforcement Action Against Fake Online Reviews' (Press Release, 4 March 2016) <https://www.gov.uk/government/news/cma-takes-enforcement-action-against-fake-online-reviews>; 'CMA Expects Facebook and eBay to Tackle Sale of Fake Reviews (Press Release, 21 June 2019) <https://www.gov.uk/government/news/cma-expects-facebook-and-ebay-to-tackle-sale-of-fake-reviews>; 'CMA Intervention Leads to Further Facebook Action on Fake Reviews (Press Release, 9 April 2021) <https://www.gov.uk/government/news/cma-intervention-leads-to-further-facebook-action-on-fake-reviews>; Hannah Walsh, 'How a Thriving Fake Review Industry is Gaming Amazon marketplace', *Which*? (online, 16 February 2021) <https://www.which.co.uk/news/2021/02/how-a-thriving-fake-review-industry-is-gaming-amazon-marketplace>.

15 *Australian Competition and Consumer Commission v Aveling Homes Pty Ltd* [2017] FCA 1470.

16 *Bachcare* (n 8).

17 *Meriton* (n 9).

18 See Which?, *The Real Impact of Fake Reviews* (n 3); Laurie Fullerton, 'Online Reviews

allowing competitors gain an unfair advantage. A major barrier in implementing protection measures for consumers is that detection of many of these practices is difficult. It is easy to be dishonest when you are anonymous. Exposure often occurs as a result of whistleblower or ex-employee disclosure.[19] Computer programmes have been developed to detect fake reviews, such reviews often exhibit features such as: lack of detail; overuse use of pronouns such as 'I' and 'we'; and the use of more verbs than nouns.[20] However, the fake reviewers can react to these observations by adapting their reviews to avoid use of these features. Fakespot[21] is a new development in the fight against fake reviews. This is a free (currently) service which analyses reviews using artificial intelligence technology and detects fakes for specific websites which currently include: Amazon; BestBuy; Sephora; Steam; TripAdvisor; Yelp; and Walmart.[22] Whether this service, or similar services that might be developed, have a real impact on consumer deception is yet to be seen. It is important to note that the ability to spot fake reviews will have no impact on manipulation of the review process, for example where negative reviews are removed from a website.

III Current regulation of online reviews

A trader who promotes fake reviews or manipulates a review process to create a false or misleading impression will be engaging in misleading or deceptive conduct. The regulation of misleading and deceptive conduct in New Zealand and Australia is very similar. Most instances of fake reviews will breach the provisions of the *Fair Trading Act* in New Zealand and the *Australian Consumer Law* ('*ACL*').[23] Specifically, ss 9, 11 *Fair Trading Act*, which are equivalent to ss 18(1), 34 of the *ACL*, prohibit misleading or deceptive conduct in trade. Section 9 of the *Fair Trading Act* and s 18(1) of the *ACL* give rise to civil remedies while breaches of s 11 of the *Fair Trading Act* and s 34 of the *ACL* are criminal offences.

Impact Purchasing Decisions for over 93% of Consumers, Report Suggests, *The Drum* (online, 27 March 2017) <https://www.thedrum.com/news/2017/03/27/online-reviews-impact-purchasing-decisions-over-93-consumers-report-suggests>.

19 See Lewis (n 5).

20 Fake review detection programmes, see: 'How Does Tripadvisor Catch Fake Reviews?', *Tripadvisor* (Web Page, July 2018) <https://www.tripadvisor.com/TripAdvisorInsights/w3688>; 'Jail Time for Review Fraudsters: TripAdvisor Heralds Landmark Legal Ruling in the Fight Against Paid Review Fraud, *Tripadvisor* (Web Page, September 2018) <https://ir.tripadvisor.com/news-releases/news-release-details/jail-time-review-fraudsters-tripadvisor-heralds-landmark-legal>.

21 'Hi there, we're Fakespot', *Fakespot* (Web Page) <https://www.fakespot.com/about-us>.

22 'Supported Websites for Fakespot.com', *Support* (Web Page) <https://intercom.help/fakespot/en/articles/2700071-supported-websites-for-fakespot-com>.

23 *Competition and Consumer Act 2010* (Cth) sch 2.

In order to breach ss 9, 11 of the *Fair Trading Act*, a person must 'engage in conduct'. Section 2(2) makes it clear that engaging in conduct includes not only positive actions but also failure to take action:

> 2(2) In this Act, a reference to engaging in conduct shall be read as a reference to doing or refusing to do an act, and includes, —
>
> (a) Omitting to do an act; or
>
> (b) Making it known that an act will or, as the case may be, not be done.

The *ACL* contains a similar definition of 'engaging in conduct',[24] however, there is inconsistency across New Zealand and Australia around whether 'engaging in conduct' requires a misrepresentation that is, communication of a false statement of fact. The *Fair Trading Act* prohibits conduct which misleads or deceives or is likely to mislead or deceive.[25] The definition of 'engaging in conduct' in both the *Fair Trading Act* and the *ACL* refers to 'doing or refusing to do an act ...' and does not mention the word 'misrepresentation'. However, the Australian Courts, when applying the original Australian equivalent of s 9 of the *Fair Trading Act*,[26] initially required the relevant 'conduct' to amount to a misrepresentation in the common law sense of that word, that is, a false statement of past or present fact.[27] The Australian Courts have subsequently rejected any need for a misrepresentation.[28]

In 1982, the misrepresentation requirement was initially laid down in *Taco Co of Australia v Taco Bell Pty Ltd* where Deane and Fitzgerald JJ state:

> Irrespective of whether conduct produces or is likely to produce confusion or misconception, it cannot, for the purposes of s 52 [original equivalent of s 18(1) ACL], be categorized as misleading or deceptive unless it contains or conveys, in all the circumstances of the case, a misrepresentation.[29]

In 1987, Pincus J in *10th Cantanae Pty Ltd v Shoshana Pty Ltd* expressed his reservation about this requirement:

> Since the doctrine of *Taco Company of Australia Inc. & Anor* v. *Taco Bell Pty. Ltd. & Ors* (1982) ATPR ¶40-303; (1982) 42 A.L.R. 177 that it is necessary to show a misrepresentation ... has been accepted, it may be that the task of an applicant for a relief under sec. 52 of the *Trade Practices Act* [original equivalent of s 18(1) ACL] has become harder than it would have otherwise have been.[30]

Eventually,[31] the High Court of Australia rejected the misrepresentation requirement in *Butcher v Lachlan Elder Realty Pty Ltd*[32] where McHugh J,

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24 Australian Consumer Law s 2(2) ('*ACL*').

25 *Fair Trading Act 1986* (NZ) ss 9, 11 ('*Fair Trading Act*').

26 *Trade Practices Act 1974* (Cth) s 52.

27 *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177, 182.

28 *10th Cantanae Pty Ltd v Shoshana Pty Ltd* (1987) 79 ALR 299 ('*10th Cantanae Pty Ltd*'); *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 ('*Butcher*'); *Meriton* (n 9).

29 (1982) 42 ALR 177.

30 *10th Cantanae Pty Ltd* (n 28) 308.

31 For a useful survey of the zig and zag history of the cases on the misrepresentation requirement see Debra Wilson, *The Fair Trading Act Handbook* (LexisNexis NZ, 2018) pp 67–75.

32 *Butcher* (n 28).

when referring to s 52 of the *Trade Practices Act 1974* (Cth) ('*Trade Practices Act*') which is the original Australian equivalent of s 18(1) of the *ACL* (and s 9 of the *Fair Trading Act*), stated:

> Section 52 applies to a wide range of conduct. Confining 'conduct' in s 52 to 'representations' is to ignore the ordinary meaning of 'conduct'. Furthermore, such a restricted reading of the section cannot be reconciled with the terms of other sections in Pt V that specifically refer to representations ...[33]

In 2017, the Federal Court of Australia, in *Meriton*,[34] confirmed the rejection of the need for a representation when applying the provisions of the *ACL* to facts concerning the manipulation of a third-party review website — Tripadvisor. Rejection of the misrepresentation requirement was a critical finding in this case as the offending business may have escaped liability but for this conclusion. The case is discussed fully below.

While abandoned in Australia, the New Zealand courts have struggled to let go of the notion that misleading or deceptive conduct, prohibited by the *Fair Trading Act*, must amount to a misrepresentation. After initially adopting the misrepresentation requirement in *Taylor Bros Ltd v Taylors Group Ltd*,[35] the New Zealand courts then waivered on whether 'conduct' covered by the *Fair Trading Act* requires a misrepresentation.[36] The misrepresentation requirement was re-affirmed in *Premium Real Estate Ltd v Stevens,*[37] *Niagara Sawmilling Co Ltd v Carter Holt Harvey Ltd*[38] and most recently in *National Mini Storage Ltd v National Storage Ltd* where Muir J said: 'a misrepresentation, either by words or conduct, is at the heart of an allegation of misleading or deceptive conduct under s 9'.[39]

If the New Zealand courts continue to take this restricted approach in the application of ss 9, 10, 11 of the *Fair Trading Act*, which all use the phrase 'engaging in conduct', it will be difficult to find that traders who manipulate third party review websites, to create misleading impressions of their products or services, without making any representation to consumers, have breached the *Fair Trading Act*. This is what happened in *Meriton*.[40]

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33 *Butcher* (n 28) 624. See also *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357.

34 *Meriton* (n 9).

35 [1988] 2 NZLR 1, 28. See also *Mills v United Building Society* [1988] 2 NZLR 392, 409; *Neumegen v Neumegen & Co* [1998] 3 NZLR 310, 317; *Trust Bank Auckland Ltd v ASB Bank Ltd* [1989] 3 NZLR 385.

36 Cases which suggest that there is no need to impose the 'misrepresentation' requirement include: *Prudential Building & Investment Society of Canterbury v Prudential Assurance Co of NZ Ltd* [1988] 2 NZLR 653, 658 ('*Prudential Building & Investment Society of Canterbury*'); *Marcol Manufacturers Ltd v Commerce Commission* [1991] 2 NZLR 502, 508. See also Wilson (n 31).

37 [2009] 1 NZLR 148.

38 [2012] NZHC 441.

39 [2017] NZHC 1775.

40 *Meriton* (n 9).

IV *ACCC v Meriton Property Services Pty Ltd* (2017) 350 ALR 494

A Manipulation of the online review process

The Federal Court of Australia's decision, in *Meriton*[41] provides helpful guidance in cases concerning representations made to third party review websites which ultimately mislead or deceive consumers. In *Meriton*, the representation to the public was made by Tripadvisor via its website but the conduct which caused the misleading impression was that of Meriton when it took action to restrict the emails sent to its customers inviting them to post reviews on the Tripadvisor website. Meriton Property Services Pty Ltd ('Meriton') made no representations to the public. The representation, which ultimately misled or deceived the public, was made by Tripadvisor, through its rating and ranking systems, while the manipulation of the review system was carried out by Meriton who effectively 'gamed' the review process.

B The 'express review' service

Meriton operated an apartment accommodation business in Queensland and New South Wales and made use of Tripadvisor's 'express review' service to promote its business on the Tripadvisor website. The 'express review' process allowed Meriton to send the email addresses, of guests who had recently stayed at a Meriton property to Tripadvisor, if the guests consented to their email addresses being forwarded. Tripadvisor then sent an email to the guests inviting then to post a review of their accommodation experience on the Tripadvisor website using an easily accessible link in the message. While use of the 'express review' service substantially increased the number of reviews for an accommodation provider, any guest could post a review on the Tripadvisor website independent of the email invitation to post a review.

C What Meriton did using the 'express review' service to 'game' the system

When forwarding guest email addresses to Tripadvisor, as required by the 'express review' process, Meriton engaged in two practices from November 2014 through to October 2015:

1. The Masking Practice — when forwarding guest email addresses to Tripadvisor, *Meriton* 'doctored' email addresses of guests who made a complaint during their stay or who were considered to have had a negative experience during their stay, by adding the letters *MSA* to their email addresses — making them invalid; and
2. The Withholding Practice — Meriton withheld email addresses of guests who stayed during periods of disruption at the accommodation address, for example if there was a problem with the hot water supply, building noise, or if the lifts were not operating.

41 Ibid.

These practices were deliberate, systematic and sanctioned by senior management. Staff were instructed to mask email addresses on checkout when the guest experience criteria were met, and managers (local and state) would decide which particular time periods emails should be withheld for. The practices were contrary to Tripadvisor's guidelines on using the 'express review' service. Tripadvisor suspended Meriton from using the 'express review' service when the manipulation practices were disclosed in the media.[42]

D ACCC Prosecution

The ACCC alleged that both the masking and the withholding practices which manipulated the review process breached:

1. Section 18(1) of the *ACL*: '*engaging in conduct that is misleading or deceptive or is likely to mislead or deceive*' which gives rise to civil remedies (equivalent s 9 *Fair Trading Act* (NZ)); and
2. Section 34 of the *ACL*: '*engaging in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose ... of any services*' which is a criminal offence (equivalent s 11 of the *Fair Trading Act* (NZ)).

The ACCC alleged that both practices had the effect or likely effect of reducing the number of negative reviews thereby improving the number of favourable reviews compared to negative reviews which created, or was likely to create, a more positive or favourable impression of the standard, quality or suitability of its accommodation services on the Tripadvisor website.[43]

E The FCA decision

Moshinski J delivered the decision of the FCA. The Court agreed with the ACCC's allegation that both practices (masking and withholding) created or were likely to create a more positive or favourable impression of the quality or amenity of the *Meriton* properties on the Tripadvisor website. After careful consideration of expert evidence, the Court found the practices affected Meriton's ranking (hierarchical placement in relation to other accommodation providers) in some cases, but not its rating (number of Tripadviser stars attributed to Meriton) on the Tripadvisor website and held that both ss 18, 34 of the *ACL* had been breached. In the subsequent sentencing decision,[44] the FCA imposed $3 million fine on Meriton and other sanctions including an injunction prohibiting further filtering of email addresses sent to Tripadvisor and an order requiring a compliance program to be established.

Critically, the FCA confirmed that there no need for 'a representation' when considering the meaning of 'conduct' and noted that it is important not to over

42 See Lewis (n 5).
43 *Meriton* (n 9) 498 [12].
44 *Meriton [No 2]* (n 9).

define the word as used in ss 18, 34 of the *ACL* so as to read in extra restrictions. Moshinsky J stated:

> it is important to emphasise that the section is framed in terms of conduct rather than the making of a representation. ... Each provision is drafted in elegant and simple language capable of potential application to new circumstances that arise through the development of new technology.[45]

The FCA took a broad approach to the definition of 'conduct' when applying the Australian equivalent of the New Zealand *Fair Trading Act* definition of 'engage in conduct' and confirmed that there is no need to point to a misrepresentation when determining if 'conduct' is misleading or deceptive. The FCA is to be commended for taking this approach and refusing to impose unnecessary limitation on the application the sections. This approach is consistent with recognised principles of statutory interpretation[46] and does not impose common law misrepresentation principles on to statutory provisions. Any misrepresentation made by Meriton was to Tripadvisor not the ultimate consumers, this point is well noted by Peter Sise in his commentary on the *Meriton* case:

> The alleged misrepresentation would have been providing incorrect email addresses to TripAdvisor while knowing that TripAdvisor believed them to be correct. If that case were run [by ACCC], the person who was misled by the representation was TripAdvisor and not the consumers. Establishing that a single business was misled does much less to promote consumer protection than establishing that many consumers using a popular website were misled.[47]

If a case similar to the *Meriton* facts was to come before a New Zealand court presently, a defence of absence of misrepresentation of consumers could succeed and prevent a conviction for breaches of ss 9, 11 of the *Fair Trading Act*. Unnecessary restriction of these provisions by imposing a misrepresentation requirement needs to be abandoned in New Zealand.

V Common law concept of misrepresentation

Common law concepts of misrepresentation developed from the principles of pre-contract negotiation, the tort of passing off[48] and negligent misstatement. These common law principles do not need to be overlaid on the *Fair Trading Act* provisions. R S French made this point clearly back in 1988 when he delivered a conference paper which reviewed the application of s 52 of the

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45 *Meriton* (n 9) 547 [202].

46 See *Legislation Act 2019* (NZ) s 10 and the plain meaning principle.

47 Peter Sise, 'ACCC v Meriton Property Services Ltd: "Gaming" the TripAdvisor Website is a Breach of the Australian Consumer Law' (2018) 34(1) *Competition and Consumer Law News* 11.

48 In *Prudential Building and Investment Society of Canterbury* (n 36), Bisson J rejected the suggestion that both the tort of passing off and breach of the FTA require a misrepresentation — noting that:

> While the tort of passing off involves proof of a misrepresentation ... the provisions of s 9 of the Fair trading Act require no more than conduct, in trade, which is 'misleading or deceptive or is likely to mislead or deceive'. In the tort of passing off misrepresentation ... is an essential element. ... This is not the case where an injunction is sought under section 41 of the Fair Trading Act.

Trade Practices Act.[49] His comments continue to be relevant today. He expressed approval of the approach in *Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd*[50] where Lockhart J said that, 'conduct under s 52, generally though not always consists of misrepresentations but common law misrepresentations do not necessarily define in an exhaustive sense the class of misrepresentations to which section 52 is directed'. R S French continued by noting that, with respect to s 52: 'In the end there is much to be said for the view that any act or omission or combination thereof, including silence, maybe conduct for the purposes of the section.'[51]

The concept of misrepresentation in contract law[52] has been in statutory form in the United Kingdom since the *Misrepresentation Act 1967* and in New Zealand since the *Contractual Remedies Act 1979* were enacted. The New Zealand provisions are now contained in the *Contract and Commercial Law Act 2017*. These statutes use the word 'misrepresentation' in the context of pre-contractual negotiations and a successful claimant must show reliance and inducement. The *Fair Trading Act* provisions extend well beyond pre-contractual negotiations. Reliance and inducement are not elements required for prosecution under the *Fair Trading Act* provisions.[53] Generally statements of opinion or about the future are not caught by the contractual misrepresentation statutory provisions. Whereas statements of opinion and of future intention, for example, may well be covered by ss 9, 11 of the *Fair Trading Act.* These provisions create a much wider catch all regime for conduct 'in trade' and should not be hindered with an overlay of the misrepresentation requirement.

Statutory interpretation principles support an argument that there is no need to impose common law misrepresentation concepts onto the word 'conduct' as used in the *Fair Trading Act*. The plain meaning rule has long been recognised as the starting point to interpreting legislation. The rule is clearly expressed by the Court of Appeal in *McKenzie v Attorney-General*:[54] 'Where the meaning of the legislation is clear, that is the meaning that must be given to the legislation and no other.' In applying this principle, words should be given their ordinary meaning[55] and unnecessary restriction should not be imposed unless that meaning is unclear. The word 'conduct' which is used in sections 9–12 of the *Fair Trading Aact* is not defined in the Act so it should take its ordinary meaning, in the sense of referring to behaviour or action.[56] The definition of 'engage in conduct' in s 2(2) of the *Fair Trading Act* makes no reference to a representation or misrepresentation requirement. Application of the plain meaning rule does not permit imposition of a misrepresentation

49 R S French, 'A Lawyer's Guide to Misleading or Deceptive Conduct' (1989) 63 *Australian Law Journal* 250, 256.

50 (1986) 12 FCR 477.

51 French (n 49).

52 For early development of contractual misrepresentation under the common law see *R v Kylsant* [1932] 1 KB 442.

53 See Jeremy Finn, Stephen Todd and Matthew Barber, *Burrows, Finn and Todd on the Law of Contract in New Zealand* (LexisNexis, 6th ed, 2018) [11.3.6].

54 [1992] 2 NZLR 14.

55 *Hopkinson v Police* [2004] 3 NZLR 704.

56 See *Oxford English Dictionary* (online at 21 April 2022) 'conduct' <https://www.oed.com/view/Entry/38617?rskey=OYNNOz&result=1#eid>.

restriction on the meaning of the word 'conduct' as used in the Act. If the New Zealand courts continue to impose unnecessary restriction on the application of the misleading and deceptive conduct provisions in the *Fair Trading Act*, there is a risk that manipulation of online reviews processes which do not amount to misrepresentations may escape liability under the Act.

VI Other mechanisms for protecting consumers from fake and manipulated reviews

A False representation as a consumer

New Zealand and Australia should consider introducing a specific offence of 'falsely representing oneself as a consumer' similar to that adopted in the United Kingdom following the EU[57] *Unfair Practices Directive 2005/29* known as the Unfair Commercial Practices Directive ('UCPD').[58] The *Consumer Protection from Unfair Trading Regulations 2008* (UK) ('*Consumer Protection from Unfair Trading Regulations*') prohibit certain unfair commercial practices[59] and list some specific types of conduct which are deemed to be unfair commercial practices including: 'Falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer.'[60]

A trader commits an offence if he or she falsely represents that he or he is a consumer[61] and is liable to an unlimited fine or imprisonment for a term not exceeding two years or both.[62] This offence would be a useful addition to the actions available for fighting fake reviews in both New Zealand and Australia. Consideration should also be given to including an offence of aiding and abetting the offence of falsely representing that a person is a consumer. An aiding and abetting offence would catch persons who advertise for fake reviewers or offer incentives, such as free products or services, to fake reviewers. An aiding or abetting offence would be similar to the EU UCPD which deems the following conduct to an 'unfair commercial practice', '*Submitting or commissioning another legal or natural person to submit false consumer reviews or endorsements, or misrepresenting consumer reviews or social endorsements, in order to promote products*.'[63]

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57 For a thorough review of EU law on online reviews, see Mateja Durovic and Tim Kniepkamp, 'Good Advice is Expensive — Bad Advice Even More: The Regulation of Online Reviews' (2022) 14(1) *Law, Innovation and Technology* 128. This is a conference paper presented at 7th Petar Šarčević Conference — Consumer Protection in Transition: Digital Transformation and Better Enforcement, University of Rijeka, Croatia, 23–5 September 2021.

58 See *Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market* [2005] OJ L 149/22, annex 1 art 22 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32005L0029>.

59 *Consumer Protection from Unfair Trading Regulations 2008* (UK) reg 3.

60 Ibid sch 1 cl 22.

61 Ibid reg 12.

62 Ibid reg 13.

63 See *Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC,*

B Obligations on persons who operate review websites

The latest EU Directive[64] known as the Omnibus Directive ('Directive') requires traders to take reasonable and proportionate steps to verify user reviews before claiming that they are genuine.[65] Member states are required to fully implement the Directive into their national laws by 28 May 2022. As the United Kingdom is no longer a member of the EU implementation is not required there. This Directive puts a clear onus on traders to ensure reviews are legitimate and to hold verifiable evidence of review authenticity. This regulation places obligations on review websites to operate fake or manipulated review detection systems and monitor reviews for authenticity. The imposition of stringent obligations on major review websites to ensure robust review processes which include fake review detection mechanisms, is at the heart of regulation which ensures the authenticity of online reviews.[66] It would be useful to develop similar regulation in New Zealand and Australia.

VII Conclusion

A robust approach must be taken by the courts, to aid the fight against fake and manipulated reviews. The *Meriton* decision provides useful guidance on applying the *Fair Trading Act* to manipulated online reviews. The New Zealand courts have struggled to let go of the notion that misleading or deceptive conduct prohibited by the *Fair Trading Act* must amount to a misrepresentation. The Australian decision can be promoted to encourage the New Zealand courts to abandon the misrepresentation requirement completely. Otherwise, statutory intervention may be required to specifically exclude the requirement for a misrepresentation when applying the misleading and deceptive conduct provisions of the *Fair Trading Act*.

2005/29/EC and 2011/83/EU of the European Parliament and of the Council as Regards the Better Enforcement and Modernisation of Union Consumer Protection Rules [2019] OJ L 328/7, art 3(7)(b) points 23b, 23c <https://eur-lex.europa.eu/eli/dir/2019/2161/oj> ('*Directive (EU) 2019/2161*'). See the consolidated version of UCDP <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1585324585932&uri=CELEX%3A02005L0029-20220528>.

64 *Directive (EU) 2019/2161* (n 63). For a review of the Directive see Caroline Cauffman, 'New EU Rules on Business-to-Consumer and Platform-to-Business Relationships' (2019) 26(4) *Maastricht Journal of European and Comparative Law* 469.

65 Art 7(6) of the *Unfair Commercial Practices Directive* ('*UCPD*') states that: 'Where a trader provides access to consumer reviews of products, information about whether and how the trader ensures that the published reviews originate from consumers who have actually used or purchased the product shall be regarded as "material"'. Under art 7(1) of the *UCPD*, a commercial practice is misleading if the trader omits to disclose it omits 'material' information that the average consumer needs to take an informed decision and causes or is likely to cause the average consumer to make a transactional decision that he or she would not have taken otherwise.

66 For an analysis of current practices, see Pleuni, 'Majority of Platforms Violate EU Law with Fake Reviews, *Ecommerce News* (online, 21 January 2022) <https://ecommercenews.eu/majority-of-platforms-violate-eu-law-with-fake-reviews/>; European Commission, 'Protecting Consumers from Misleading Reviews: 55% of Screened Websites Violate EU Law' (Press Release, 20 January 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_394>.

The arsenal for fighting fake and manipulated reviews in New Zealand and Australia would be bolstered through the introduction a specific offence of 'falsely representing oneself as a consumer' similar to that adopted by the United Kingdom in the *Consumer Protection from Unfair Trading Regulations*. An offence of aiding and abetting such false representation would also be useful. Consideration should be given to developing regulation which imposes obligations, on those traders and website operators who post online reviews, to ensure authenticity by operating robust review monitoring and fake review detection mechanisms.