



JONES DAY
COMMENTARY

AUSTRALIAN HIGH COURT FINDS GOOGLE NOT LIABLE FOR MISLEADING ADVERTISEMENTS GENERATED BY ITS SEARCH ENGINE

“A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive”

—Section 52 of the *Trade Practices Act* 1974 (Cth), now section 18 of the Australian Consumer Law¹

SUMMARY

Section 52 is “one of the most heavily litigated statutory provisions in Australian law”² because it is “expressed in wide terms”³ and “establishes a norm of conduct”.⁴ It has been described as the plaintiff’s exocet⁵ and a statutory comet⁶ because of its ability to be successfully applied to grievances in a wide range of circumstances. This adaptability saw section 52 enter the internet age in *Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1. Google was alleged to have engaged

in misleading conduct when its search engine generated a “sponsored link”, which is a form of advertisement, that was misleading.

The High Court of Australia unanimously found that Google did not itself contravene section 52 of the *Trade Practices Act* 1974 (Cth).⁷ This was because the technology which produced the sponsored link merely assembled information provided by others for the purpose of displaying advertisements to users of the Google search engine. In short, Google was an intermediary and was not the corporation that engaged in the misleading conduct.

FACTS

The Australian Competition and Consumer Commission (“ACCC”) claimed that particular search results displayed by the Google search engine between 2005 and 2008 conveyed misleading and

deceptive representations, and that, by publishing or displaying those search results, Google engaged in conduct in contravention of section 52 of the Trade Practices Act 1974 (Cth).⁸

The search results which were the subject of the proceedings were “sponsored links”—a form of advertisement created by, or at the direction of, advertisers willing to pay Google for advertising text which directs users to a web site of the advertiser’s choosing.

It was accepted that the sponsored links which were the subject of the appeal conveyed misleading and deceptive representations. The advertisements were found by the trial judge to misleadingly suggest a commercial association between the advertiser and the other entity (which in some cases was a competitor) or that information regarding the other entity could be found on the advertiser’s chosen web site.⁹ These findings were not challenged on appeal.

The High Court appeal addressed whether, in all the circumstances, Google (as distinct from the advertisers to whom the sponsored links belonged) engaged in misleading and deceptive conduct by publishing or displaying the sponsored links.

The plurality (French CJ, Crennan J and Kiefel J) explained the nature of the internet and the Google search engine. Of relevance, the Google search engine responded to search terms entered into the search field by displaying two types of search results: “organic search results” and “sponsored links”. The organic search results are ranked in order of relevance to the search terms entered as determined by a complex proprietary algorithm developed by Google. In contrast, a sponsored link is a form of advertisement. Each sponsored link is created by, or at the direction of, an advertiser through a Google-owned program called “Adwords”.¹⁰ The Adwords program is used by advertisers to specify:¹¹

- The headline,
- The address of the web page to which the headline links,
- The advertising text, within certain limits (such as word limits)
- “Keywords” which trigger the appearance of the sponsored link when entered as search terms by a user of the Google search engine.

In some cases advertisers may also specify that the “keywords” appear in the headline.

Advertisers use the Google system subject to Google’s terms and conditions. Those terms and conditions provide that advertisers are responsible for the content of their advertisements.¹² In particular, the AdWords Program Terms provide:

The Program. Customer is solely responsible for all: (a) ad targeting options and keywords (collectively ‘Targets’) and all ad content, ad information, and ad URLs (‘Creative’), whether generated by or for Customer; and (b) web sites, services and landing pages which Creative links or directs viewers to, and advertised services and products (collectively ‘Services’).

THE HIGH COURT’S REASONING

The High Court plurality recounted the principles that had developed around section 52, including that intent was irrelevant and that a corporation could contravene section 52 even though it acted reasonably and honestly. Further, the High Court had also previously observed that if it is apparent that the corporation was not the source of the information, that it expressly or impliedly disclaimed any belief in its truth or falsity, that it was merely passing it on for what it is worth, then it was doubtful that the corporation could be said to be itself engaging in conduct that was misleading or deceptive.¹³ Hayne J put the issue in the affirmative: “what did the alleged contravenor do (or not do)?” as it is necessary to identify the alleged conduct first and then secondly to ask whether that conduct was misleading.¹⁴

The plurality stated that in relation to traditional intermediaries, such as television channels or newspapers carrying advertisements:¹⁵

the question whether a corporation which publishes, communicates or passes on the misleading representation of another has itself engaged in misleading or deceptive conduct will depend on whether it would appear to ordinary and reasonable members of the relevant class that the corporation has

adopted or endorsed that representation.¹⁶ It has also been established that, if that question arises, it will be a question of fact to be decided by reference to all the circumstances of a particular case.¹⁷

The ACCC contended that Google and the Google search engine did not operate analogously to other intermediaries or agents, and that the principles established in relation to other intermediaries or agents were not controlling.¹⁸ Further, by publishing or displaying the misleading advertisements, Google had engaged in misleading and deceptive conduct as a principal, or as the maker or creator of the sponsored links. The ACCC relied on the fact that Google used its technology to display the sponsored links in response to search requests made by users of the Google search engine. In terms of the law set out by the High Court, it was said that Google had done more than merely pass on the sponsored links for what they were worth.¹⁹

In contrast, Google accepted that it published or displayed the advertisements, but argued that the content of the sponsored link was specified by the advertiser with Google merely implementing the advertiser's instructions. Google submitted that the technical facilities it provided through the AdWords program were different in kind, but not in principle, from facilities provided to advertisers by other intermediaries such as publishers and broadcasters.²⁰

The plurality found that Google did not control an advertiser's choice of keywords or the content of the advertisement. The plurality concluded:²¹

That the display of sponsored links (together with organic search results) can be described as Google's response to a user's request for information does not render Google the maker, author, creator or originator of the information in a sponsored link. The technology which lies behind the display of a sponsored link merely assembles information provided by others for the purpose of displaying advertisements directed to users of the Google search engine in their capacity as consumers of products and services. In this sense, Google is not relevantly different from other intermediaries, such as newspaper publishers (whether

in print or online) or broadcasters (whether radio, television or online), who publish, display or broadcast the advertisements of others. The fact that the provision of information via the internet will—because of the nature of the internet—necessarily involve a response to a request made by an internet user does not, without more, disturb the analogy between Google and other intermediaries. To the extent that it displays sponsored links, the Google search engine is only a means of communication between advertisers and consumers.

Heydon J in a concurring judgment explained the key facts supporting the outcome as follows:²²

The first is that the misleading conduct lay entirely within the text of the advertisements. The second is that each advertisement consisted of three elements dictated by the advertiser—the ad headline, the ad text, and the advertiser's URL. The third is that the impugned material was what users understood to be an advertisement paid for by a third party, what Google intended to be an advertisement paid for by a third party, and what was in fact an advertisement paid for by a third party.

Heydon J also addressed the ramifications of the High Court's possible approaches and observed that if Google were held liable this would create "an exceptionally wide form of absolute liability for those who publish information in the media, or there would be a distinction between advertising in online media and advertising in traditional media".²³

In short, Google's search engine placed it in the role of an intermediary, Google did not itself engage in misleading or deceptive conduct, nor did it endorse or adopt the representations which it displayed on behalf of advertisers.

It should be noted that the ACCC did not rely on the accessory liability provision, section 75B (now contained in the *Competition and Consumer Act 2010* (Cth)), that created liability for a person who had "aided, abetted, counselled or procured the contravention" of section 52. Google sought to rely on section 85(3) (now section 251 of the Australian Consumer Law) which provided a defence for

the publishers of advertisements who are found to have contravened section 52, but the defence did not need to be considered by the Court.

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ENDNOTES

- 1 Section 52 of the Act was replaced on 1 January 2011 by section 18 of the Australian Consumer Law, schedule 2 to the *Competition and Consumer Act 2010* (Cth).
- 2 See Allan Asher, ‘A “Theory of Everything” for Consumer Protection?’ (2006) 14 *Trade Practices Law Journal* 110 at 110. Allan Asher was a former Deputy Chairperson of the Australian Competition and Consumer Commission.
- 3 *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1977) 140 CLR 216 at 223.
- 4 *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) 114 ALR 355 at 389.
- 5 Warren Pengilly, ‘Section 52 of the Trade Practices Act: A Plaintiff’s New Exocet’ (1987) 15 *Australian Business Law Review* 247. The exocet reference comes from the Falklands war where Argentinian warplanes used exocet missiles to sink the Royal Navy’s HMS Sheffield.
- 6 Justice Robert French, ‘A Lawyers Guide to Misleading or Deceptive Conduct’ (1989) 63 *Australian Law Journal* 250 at 250 (“Resorting to florid metaphor, the dedicated legal modernist may depict the common law and its causes of action as primeval broadacres grazed by slow-growing sauropods. Upon this landscape the action for misleading or deceptive conduct falls as a kind of statutory comet threatening significant reductions in the species

numbers of fraud, negligent misstatement, passing off, defamation, contractual warranty and contractual representation.”). Justice French is now Chief Justice French of the High Court of Australia.

- 7 Three judgments were delivered: the plurality (French CJ, Crennan J and Kiefel J), Hayne J and Heydon J.
- 8 *Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1 at [4].
- 9 *Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1 at [36], [41], [46], [51]. See also *ACCC v Trading Post Australia Pty Ltd* (2011) 197 FCR 498; [2011] FCA 1086.
- 10 *Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1 at [20]-[23]. See also [126]-[129] (Heydon J).
- 11 *Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1 at [26]. See also [129]-[130] (Heydon J).
- 12 *Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1 at [27]-[29]. See also [129] (Heydon J).
- 13 *Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1 at [9] citing *Yorke v Lucas* (1985) 158 CLR 661. See also [97] (Hayne J).
- 14 *Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1 at [89].
- 15 *Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1 at [15]. Hayne J preferred not to use terms such as “adoption” or “endorsement” as they may displace the text of the Act: [96], [98].
- 16 *Yorke v Lucas* (1985) 158 CLR 661 at 666; *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at [39]-[40]; *ACCC v Channel Seven Brisbane Pty Ltd* (2009) 239 CLR 305 at [43], [57].
- 17 *Yorke v Lucas* (1985) 158 CLR 661 at 666; *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at [39]-[40]. See also *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82 at 89.
- 18 *Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1 at [16].
- 19 *Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1 at [63]-[64].
- 20 *Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1 at [65]-[66].
- 21 *Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1 at [69].
- 22 *Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1 at [143].
- 23 *Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1 at [151].

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