

GOOGLE INC v AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (2013) 294 ALR 404

I INTRODUCTION

In *Google Inc v Australian Competition and Consumer Commission*,¹ the High Court determined whether, in displaying misleading or deceptive advertisements, an online search engine company could itself be liable for ‘misleading or deceptive conduct’ under s 52 of the *Trade Practices Act*.² This case note examines the decision and its background, and assesses the different judgments’ responses to the somewhat deficient pleadings of the Australian Competition and Consumer Commission (‘ACCC’). Finally, it briefly considers the public policy implications of decisions which deny liability to service providers on the internet.

II FACTS

Google Inc (‘Google’) is the company operating the free search engine Google.³ Google makes most of its revenue through the sale of advertisements, known as ‘sponsored links’, which appear alongside search results.⁴ Advertisers use the Google product ‘AdWords’ to create and purchase this advertising, specifying the web address the link will lead to, the clickable headline, the body text, and their keywords. Sponsored links only appear when a Google user’s search term matches one of the advertiser’s keywords. When triggered, those keywords can also be dynamically inserted into the title or text of the sponsored link, allowing the text of one advertisement to be somewhat tailored to a number of different search terms.⁵

This case concerned four particularly cunning sponsored links. In these, the advertisers included the names of competing businesses in their keywords, and used the keyword insertion mechanism to insert those business names into the titles of their advertisements. Google users searching for a business were then presented with sponsored links that used that business’s name, but when clicked, linked to a competitor’s website (see Table 1).

* Law Student, Adelaide Law School, The University of Adelaide.

¹ (2013) 294 ALR 404 (‘*Google v ACCC*’).

² *Trade Practices Act 1974* (Cth) (‘*Trade Practices Act*’).

³ For a detailed, first principles elucidation of the Google search engine and the World Wide Web in general, see: *Google v ACCC* (2013) 294 ALR 404, 410 [18]–[23] (French CJ, Crennan and Kiefel JJ), 431 [126]–[128] (Heydon J).

⁴ \$43.7 billion in 2012: Google Inc, *2012 Financial Tables* <<http://investor.google.com/financial/2012/tables.html>>.

⁵ *Google v ACCC* (2013) 294 ALR 404, 411 [26] (French CJ, Crennan and Kiefel JJ).

| SEARCH TERM | SPONSORED LINK |
|-----------------------|---|
| 'Harvey World Travel' | Harvey Travel Unbeatable deals on flights, Hotel & Pkg's Search, Book & Pack Now! www.statravel.com.au |
| 'honda.com.au' | Honda.com.au www.carsales.com.au/Honda-Cars Buy/Sell Your Civic The Fast Way on Australia's No 1 Auto Website |
| 'Alpha Dog Training' | Alpha Dog Training DogTrainingAustralia.com.au All Breeds. We come to you. No dog that can't be trained. |
| 'Just 4x4s Magazine' | Just 4x4s Magazine www.tradingpost.com.au New & Used 4WD Cars — See 90,000+ Auto Ads Online. Great Finds Daily! |

Table 1⁶

III ISSUES

Section 52 of the *Trade Practices Act* provided that '[a] corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive'.⁷ Misleading and deceptive conduct has been described as a relatively simple action to make out, requiring neither proof of intention or knowledge, nor evidence that anyone has actually been misled or deceived.⁸ The provision protects competing businesses as well as consumers, and, perhaps due to its 'uncompromising terms', is a popular alternative to actions like passing-off.⁹

The ACCC originally raised two claims against Google, both relying on s 52 of the *Trade Practices Act*. The first claim was that Google had failed to adequately distinguish between ordinary search results and sponsored links. The second claim was that Google had engaged in misleading and deceptive conduct by displaying the particular sponsored links described above.¹⁰ The High Court was called upon, on appeal, to decide the second claim. The trial judge had found that all four sponsored links had made misleading and deceptive representations regarding the advertisers having commercial associations, or website content, which they did not.¹¹ This

⁶ Ibid 412 [34], 413 [40], 414 [45], 415 [49].

⁷ A near identical provision can be found in the new consumer law: *Competition and Consumer Act 2010* (Cth) sch 2 s 18 ('*Australian Consumer Law*').

⁸ Grant Holley, 'Old Law Meets the New World of Cyberspace — *ACCC v Google* (Round 2)' (2012) 64(5) *Keeping Good Companies* 292.

⁹ Brenda Marshall, 'Liability for Unconscionable and Misleading Conduct in Commercial Dealings: Balancing Commercial Morality and Individual Responsibility' (1995) 7(2) *Bond Law Review* 42, 48, 52.

¹⁰ Ibid 15–16 [53].

¹¹ *Australian Competition and Consumer Commission v Trading Post Australia Pty Ltd* (2011) 197 FCR 498, 550–1 [236]–[238], 554 [251], 567 [317]–[318], 572–3 [342].

finding lay rightfully undisturbed, and the issue was therefore whether *Google* could be liable for *its* conduct with respect to the misleading advertisements.

IV DECISION

All three judgments absolved *Google* of any liability under the *Trade Practices Act*.¹²

A French CJ, Crennan and Kiefel JJ

The majority judgment of French CJ, Crennan and Kiefel JJ relied largely on a line of case law suggesting that, while honest conduct can still contravene s 52,¹³ if the defendant is merely passing on another's message (without 'adopting or endorsing it') they will not be held to have made the misleading or deceptive statement (the 'mere conduit' principle).¹⁴ The ACCC argued that the misrepresentations, appearing as they did in response to *Google's* algorithms, had been made or produced by *Google*, rather than merely passed on.¹⁵ The majority rejected this argument on a number of grounds, holding that all the relevant parts of the deceptive sponsored links (keywords, insertion points, and text) had been specified not by *Google*, but by the advertisers. *Google's* technological role in assembling those parts did not make it the creator, any more than the technical act of broadcast would make a television station a creator.¹⁶ The majority also cited, with approval, the trial judge's findings that 'ordinary and reasonable users' would have understood that the sponsored links were created by advertisers, and not by *Google*.¹⁷

B Hayne J

Hayne J agreed with the orders of the majority, viewing the trial judge's findings on the reasonable user's understanding of authorship as sufficient to allow the appeal.¹⁸ However, his Honour cautioned against extrapolating beyond the wording of the *Trade Practices Act* to a general rule with respect to intermediaries.¹⁹ Hayne J suggested that the meaning of 'conduct' under s 52 was wide, and that the bare act of publication, if likely to mislead or deceive, could nonetheless suffice.²⁰ His Honour interpreted the case law to mean that, while adoption or endorsement were relevant

¹² *Google v ACCC* (2013) 294 ALR 404, 404 (Orders).

¹³ *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 197 (Gibbs CJ).

¹⁴ *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592, 605 [40]. See also: *Yorke v Lucas* (1985) 158 CLR 661, 666.

¹⁵ *Google v ACCC* (2013) 294 ALR 404, 418 [63].

¹⁶ *Ibid* 419–20 [69].

¹⁷ *Ibid* 420 [70].

¹⁸ *Ibid* 422 [82].

¹⁹ *Ibid* 422–3 [83]–[84].

²⁰ *Ibid* 425 [97].

factors, they were not in themselves decisive.²¹ In this case, however, the ACCC argued only that Google's conduct made it the *creator* of the messages, not that its conduct in a wider sense was likely to mislead or deceive, so such a question did not fall to determination.²²

C Heydon J

Heydon J substantially concurred with the judgment of the majority, placing particular emphasis on rejecting the technological arguments advanced by the ACCC — that is, denying any distinction between online advertising and advertising in other media.²³

D Publisher's Defence

In cases where s 52 liability is otherwise made out, the *Trade Practices Act* provided a 'publisher's defence' in s 85(3), protecting a defendant whose business it is to publish advertisements, and who was unaware of (and had no reason to suspect) any contravention.²⁴ Though the initial conclusions made it unnecessary to determine, the majority judgment commented on the distinction between the aforementioned 'mere conduit' principle of *Yorke v Lucas*²⁵ and the statutory defence in s 85(3) of the *Trade Practices Act*. Their Honours stated that, whereas acting as a 'mere conduit' can be sufficient to exclude s 52 liability entirely, the s 85(3) defence operates where a publisher *does* adopt or endorse a misleading or deceptive representation, but 'without appreciating the capacity of that representation to mislead or deceive'.²⁶ Such an interpretation suggests that the statutory defence has little work to do. Furthermore, their Honours suggested that publishers might need to show they had 'appropriate systems' in place to catch potential contraventions.²⁷

V ANALYSIS

Google v ACCC is a case defined, and in some ways hamstrung, by the pleadings of the respondent. The ACCC declined to plead accessory liability, or that Google's conduct in displaying the sponsored links was misleading or deceptive in a wider sense. Instead, they narrowly alleged that Google had *made* the representations in the advertisements.

The majority's identification of a fairly narrow test based on the concepts of adoption and endorsement limits quite substantially the plain language of the *Trade Practices Act*. Hayne J correctly noted that 'to hold that publishing an advertisement

²¹ Ibid 425 [98].

²² Ibid 429 [117].

²³ Ibid 438–9 [151].

²⁴ See, now, *Australian Consumer Law* s 251.

²⁵ (1985) 158 CLR 661, 666.

²⁶ *Google v ACCC* (2013) 294 ALR 404, 421 [75].

²⁷ Ibid.

may mislead or deceive requires no extreme or strained reading of that section'.²⁸ Hayne J's interpretation would open up the possibility of a holistic fact-based inquiry giving effect to the words of the statute: was the conduct in publishing the advertisement, seen in its entirety, likely to mislead or deceive? This assessment would necessarily include adoption and endorsement, but extend to the full gamut of the defendant's conduct. Such an approach was not called for by the pleadings of the ACCC.

Two of the judgments here also noted the failure of the ACCC to raise accessorial liability under s 75B of the *Trade Practices Act*.²⁹ Under that section, Google could have been liable for being 'directly or indirectly, knowingly concerned in, or party to, the contravention' of the advertisers.³⁰ Heydon J rightly noted that the involvement of Google employees in creating the sponsored links would be relevant here.³¹ The evidence that those employees in some cases both proffered and commended the suspect keywords supports a genuine argument to be made along these lines.³² However, given its absence in the ACCC's submissions, it remains to be seen whether s 75B accessorial liability could apply in these, or similar, circumstances.

VI IMPLICATIONS

In 2010, the Court of Justice of the European Union decided a similar AdWords case involving Google France.³³ Brought by several French brands including Louis Vuitton, the action, like *Google v ACCC*, challenged the use of business names as AdWords keywords — but it did so under European Union trademark law, underlining the surrogate intellectual property role that misleading and deceptive conduct actions under the *Trade Practices Act* sometimes take in Australia. Despite the different causes of action, the outcome, at least in the abstract, was similar: while the AdWords service might have enabled infringing use of trademarks by advertisers, such practices did not, in and of themselves, constitute infringement by Google.³⁴ Like *Google v ACCC*, the *Google France* outcome was consistent with a fledgling legal trend towards a hands-off approach to service providers on the web who act in a third party or intermediary capacity.

The ACCC's key contention in this case was that the interactive nature of the Google search engine made it qualitatively different from other advertising mediums, like

²⁸ Ibid 430 [122].

²⁹ *Google v ACCC* (2013) 294 ALR 404, 406 [4] (French CJ, Crennan and Kiefel JJ), 433 [132] (Heydon J). It should be noted that s 75B of the *Trade Practices Act* only defines the term 'involved' — actual liability for involved parties is established under later remedies sections. The s 75B definition is replicated in the new consumer law: *Australian Consumer Law* s 2.

³⁰ *Trade Practices Act* s 75B.

³¹ *Google v ACCC* (2013) 294 ALR 404, 439 [153].

³² Ibid 414 [43].

³³ *Google France SARL v Louis Vuitton Malletier SA* (C236/08–238/08) [2010] ECR I-02417 ('*Google France*').

³⁴ Ibid 416 [55]–[57].

television and print — a contention that succeeded in the Full Court, but was ultimately rejected here. The majority held that Google’s role in managing AdWords was no different to other broadcasters. The fact that Google had developed the technical features of the system that the misleading advertisements exploited was ‘implicit in the fact that Google operates a search engine business’, and imposed no greater responsibility.³⁵ An analogy may be drawn between this case and *Roadshow Films Pty Ltd v iiNet Ltd*,³⁶ in that both cases concern whether internet facilities providers should be responsible for the actions of their customers. Some have discussed such examinations from a broad public policy standpoint — the question being essentially what burden of oversight and enforcement should rest on those in charge of largely automated web services. Megan Richardson, for example, views the Australian AdWords dispute from the principle of the ‘cheapest cost avoider’.³⁷ She argues that the Federal Court’s ruling was sound from this perspective, and submits that a broad intermediary liability under s 52 is appropriate for large enterprises, and ‘akin to the liability for defective products that the *Trade Practices Act* also created’.³⁸ The judgments in this case (other than that of Hayne J) run counter to that view, finding the imposition of such liability to be burdensome.³⁹ Certainly, the size and automatism of Google’s services would make such policing difficult — though they have always set standards of conduct to some extent.

VII CONCLUSION

Google’s AdWords policies have changed in a number of ways since the events in this case — in 2010, ‘sponsored links’ were renamed simply ‘ads’,⁴⁰ and in 2011, an icon was added to advertisements which, when clicked, explains that they are tailored to the user’s search terms.⁴¹ Such measures certainly help prevent any confusion regarding which content on the results page is Google’s, and which is provided by advertisers. On the other hand, perhaps emboldened by this decision, Google, since April 2013, no longer restricts the use of trademarks as keywords, even when a complaint is received.⁴² This particular change is couched in the language

³⁵ *Google v ACCC* (2013) 294 ALR 404, 435 [143].

³⁶ (2012) 286 ALR 466 (*iiNet*).

³⁷ Megan Richardson, ‘Before the High Court — Why Policy Matters: *Google Inc v Australian Competition and Consumer Commission*’ (2012) 34 *Sydney Law Review* 587, 592.

³⁸ *Ibid* 594.

³⁹ *Google v ACCC* (2013) 294 ALR 404, 443 [164].

⁴⁰ Danny Goodwin, ‘Google’s “Sponsored Links” Renamed “Ads”’ on *Search Engine Watch* (5 November 2010) <<http://searchenginewatch.com/article/2050426/Googles-Sponsored-Links-Renamed-Ads>>.

⁴¹ Drew Olanoff, ‘Google Launches “Why These Ads” to Educate Consumers on Ad Targeting’ on *The Next Web* (1 November 2011) <<http://thenextweb.com/google/2011/11/01/google-launches-why-these-ads-to-educate-consumers-on-ad-targeting/>>.

⁴² Google Inc, *AdWords Trademark Policy* (7 May 2013) Google Support <<https://support.google.com/adwordspolicy/answer/6118>>. The use of trademarks in the *text* of an advertisement is still reviewable, however.

of consumer choice — that ‘people searching for one brand of product should be able to easily find information about products from similar brands to make informed decisions’.⁴³ While consumers may indeed benefit, Google’s advertising customers will also, no doubt, be pleased.

⁴³ Google Inc, *Trademarks — Country Requirements* (27 March 2013) Google Support <<https://support.google.com/adwordspolicy/answer/3041059>>.

