

Do you mean sponsored links?

Louise Jackson reports on *Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1

The High Court unanimously held that Google Inc (Google) was not responsible for contraventions of s 52 of the *Trade Practices Act 1974* (Cth) (the Act) when it displayed or published on its web pages advertisements called 'sponsored links' which contained misleading representations.

The web pages in question were 'search results' pages, generated in response to words or phrases entered by members of the public. These pages consisted of 'organic search results', meaning a list of links to other web pages, ranked in order of relevance to the search terms entered by the user (relevance being determined by an algorithm); and 'sponsored links', which were not displayed according to relevance, but were dynamically generated in response to a user's search terms. The content of the sponsored links was pre-determined and monitored via a self-service program, 'AdWords', offered by Google to advertisers for a fee and subject to terms and conditions.

Background

At first instance in the Federal Court of Australia, the Australian Competition and Consumer Commission (the ACCC) alleged that the display of certain sponsored links was misleading or deceptive or likely to mislead or deceive because the sponsored link reproduced the keywords a user had entered into Google's search engine and consisted of a headline that included the name of the advertiser's competitor but which linked to the advertiser's website, implying an association between the user's keywords and the advertiser that did not exist.¹ The ACCC alleged Google was strictly liable for any contravention of s 52 by failing to sufficiently distinguish the organic search results from the sponsored links on its search results pages and by publishing or displaying the relevant sponsored links.

There was no allegation that Google was liable for aiding and abetting, or that it was knowingly concerned within the meaning of s 75B of the Act in any contravention of s 52. Google relied upon the 'publisher's defence' provided by s 85(3) of the Act, that it did not know and had no reason to suspect, that

publication of the sponsored links was misleading or deceptive or likely to mislead or deceive.

At first instance, Nicholas J found the advertisements were misleading or deceptive or likely to mislead or deceive, but rejected the ACCC's claim against Google, holding that Google had not made the representations conveyed by the advertisements, it was merely passing on them for what they were worth and ordinary and reasonable members of the relevant class would have understood that the way the advertisements were displayed excluded the possibility that Google made the representations.

The Full Federal Court (Keane CJ, Jacobson and Lander JJ) allowed the ACCC's appeal.² The full court considered that Google, via its AdWords system, made the misleading representation by displaying the advertisements 'in response' to the entry of the user's search term and that Google had not made out the publisher's defence. The full court also held that the reasoning in *Universal Telecasters (Qld) Ltd v Guthrie*,³ relied upon by the ACCC, was not affected by later decisions. The full court of the Federal Court in *Guthrie* held that when a television station broadcast an advertisement containing spoken words it made a statement.⁴

The case in the High Court

In Google's appeal to the High Court, the ACCC submitted that the question was not whether Google had adopted the advertisers' misleading representations, but whether Google itself had made the misleading representations. This conclusion was said to arise because it was Google which decided whether and in what form the advertisements would be published, and, by making its AdWords functionality available to advertisers, Google was responsible for the collocation of a competitor's details with the advertiser's URL. In the ACCC's submission, Google had therefore done more than merely pass on the representations for what they were worth. It was further contended by the ACCC that Google and its search engine did not operate analogously to other intermediaries or agents and that the principles established in relation to

intermediaries or agents did not apply to the facts of this case.

Google relied upon the primary judge's findings that the ordinary and reasonable users of Google would have understood the sponsored links to be advertisements paid for by advertisers and that it was merely passing them on for what it was worth. It submitted that the AdWords program was not different in principle from facilities provided to advertisers by other intermediaries and it contended that any commercial association or affiliation between an advertiser and another trader was something peculiarly within the knowledge of the advertiser. Further, Google contended that each advertiser specified the relevant parts of a sponsored link – it had merely implemented the advertisers' instructions.⁵

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Adoption or endorsement by intermediaries

The ACCC's case against Google was framed and pursued partly on the premise that previous decisions had established a principle that a defendant which passes on a representation made by another engages in misleading or deceptive conduct only if the defendant endorsed or adopted the representation.⁶

The High Court considered that the correct approach to intermediaries was explained by the plurality in *Yorke v Lucas*,⁷ that is, the possibility that a corporation could contravene s 52 even though it acted reasonably and honestly does not necessarily mean that a corporation, which purports to do no more than pass on information for what it is worth, is engaging in misleading or deceptive conduct. Gleeson CJ, Hayne and Heydon JJ in *Butcher v Lachlan Elder Realty Pty Ltd*⁸ adopted this

approach. In the present case, Hayne J⁹ affirmed the proposition put by McHugh (in dissent) in *Butcher* that s 52 '... is not concerned with the mental state of the corporation'.¹⁰

The ordinary and reasonable user of Google

The question whether a corporation which publishes, communicates or passes on a 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.¹¹

The primary judge's findings that ordinary and reasonable users would have understood the sponsored links to be statements made by advertisers which Google had not endorsed and was merely passing on for what they were worth were held to be clearly correct¹² and those findings were unchallenged by the ACCC.

In this case the misleading conduct was said to be entirely within the text of the advertisements. The advertiser dictated the relevant elements of the advertisement and paid for it to be displayed.¹³ Heydon J found that it was an error of fact to consider that Google created the 'message' sent by its technology because that finding incorrectly identified the misleading conduct as being a misrepresentation 'that the impugned advertisements ... would be responsive to the search queries made by users'¹⁴ which placed the misrepresentation outside the impugned advertisements.

In circumstances where the primary judge's findings remained unchallenged as to the fact that the ordinary and reasonable user of Google would have understood the sponsored links to be statements made by advertisers which Google had not endorsed, taken together with the fact that the ACCC had failed to show that Google, as distinct from advertisers, made the representations conveyed by the advertisements, Google's appeal was allowed.¹⁵

The publisher's defence

In *obiter* comments the High Court considered the

scope of s 85(3), holding that the statutory defence operates according to the circumstances of each case.

The court, *per curiam*, appeared to accept the general proposition that express words of adoption could result in liability wherever the s 85(3) defence could not be made out and express words of exclusion, or a 'necessary implication' to that effect, could result in immunity from liability.¹⁶ It is therefore possible to pass on or report a misleading statement by another person without being liable. The High Court was unanimous in considering there should be no distinction between the principles to be applied to Google's online publication of the sponsored links and earlier precedent in relation to more traditional forms of media.¹⁷

Justice Hayne's approach differed somewhat from that taken by the other members of the High Court in that his Honour held that when s 52 and 85(3) are read together, it is evident that the Act assumed that the conduct of publishing an advertisement made and paid for by a third party may contravene s 52. In some respects Hayne J's reasoning process is more transparent and the test is clearer. It may be summarised as follows:

Fundamental to s 52 is the identification of the impugned conduct: 'what did the alleged contravener do (or not do)?'¹⁸ The conduct may not necessarily be a representation.¹⁹

Was that conduct misleading or deceptive, or likely to be so?²⁰ The act of displaying an advertisement to people who would not otherwise see or hear it is 'conduct' capable of misleading or deceiving those who see or hear it.²¹

The test depends upon how the relevant class of persons would understand what was published.²²

The relevant premise for engaging s 85(3) was a contravention of a provision of Part V committed by the publication of an advertisement.²³ The issues that are posed by s 85(3) concern knowledge of and reason to suspect a contravention.²⁴

But for the defence, the publisher of the (misleading) advertisement would be liable for a contravention.²⁵

Notions of endorsement and adoption have no role to play in an allegation that the publication of a misleading or deceptive advertisement contravened s 52.²⁶ Such notions are only relevant only if the conduct is identified as the making of a representation.²⁷

His Honour considered that s 85(3) did not provide that publication of an advertisement was to be taken not to be a contravention of Pt V or Pt VC or unless the alleged contravener was shown to have endorsed or adopted the content of the advertisement.²⁸

In contrast, French CJ, Crennan, Kiefel and Heydon JJ considered s 85(3) to operate as a kind of 'backstop' in cases where a defendant did make a misleading statement or unwittingly endorsed or adopted such a representation, but where the criteria for immunity in s 85(3) are made out.²⁹ In such circumstances, an intermediary publisher may need to show it had some appropriate system in place to succeed with the defence that it did not know and had no reason to suspect that the publication of the representation would amount to a contravention.

In relation to identification of the relevant conduct, French CJ, Crennan and Kiefel JJ seem to have focused on the difference between an intermediary 'making' or 'passing on' a misleading statement, the former being contravening conduct that is determined by an express or implied adoption or endorsement of the statement, which in turn misleads the appropriate class of persons. Thus, in the absence of endorsement or adoption by Google of the advertisements, Google did not make or create the representations contained in the sponsored links.³⁰

Justice Heydon characterised Google's response to a user's search query as a representation (that Google had responded to the user's search query) and considered that Google did not create the message contained in the sponsored links.³¹ His Honour held that it would be extreme to conclude that a trader in Google's position always 'makes' the representations in a third party advertisement, as it would put such traders in risk of numerous contraventions of the

Act unless s 85(3) defences were available or unless there was a distinction between advertising in online media and advertising in traditional media.³² Liability depended on whether the relevant section of the class regarded the 'carrier' as having adopted the representation.³³

Arguably, Hayne J's approach avoids such extreme results through a primary and careful analysis of the impugned conduct with each case dependent on its own facts and circumstances.

Endnotes

1. *Australian Competition and Consumer Commission v Trading Post Australia Pty Ltd* [2011] FCA 1086 at [13].
2. *Australian Competition and Consumer Commission v Google Inc* [2012] FCAFC 49.
3. *Universal Telecasters (Qld) Ltd v Guthrie* (1978) 18 ALR 531; (1978) 32 FLR 360.
4. *Universal Telecasters (Qld) Ltd v Guthrie* (1978) 18 ALR 531; (1978) 32 FLR 360 at 362, 368, 377.
5. Per French CJ, Crennan and Kiefel JJ at [66].
6. Per Hayne J at [99].
7. *Yorke v Lucas* (1985) 158 CLR 661 at 666; 59 ALJR 776 per Mason ACJ, Wilson, Deane and Dawson JJ at [7].
8. *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592; 79 ALJR 308 per by Gleeson CJ, Hayne and Heydon JJ.
9. Per Hayne J at [97] to [102].
10. *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at [139]; 79 ALJR 308.
11. Per French CJ, Crennan and Keifel JJ at [15], per Heydon J at [162].
12. Per French CJ, Crennan and Keifel JJ at [70].
13. Per Heydon J at [143].
14. Per Heydon J at [144].
15. Per French CJ, Crennan and Kiefel JJ at [70], [73], per Hayne J at [82] to [83] and per Heydon J at [145], [148] to [149], [153].
16. Per French CJ, Crennan and Kiefel JJ at [75], per Hayne J at [84], [97] to [98], [111] to [112] and per Heydon J at [162].
17. Per French CJ, Crennan and Kiefel JJ at [69], per Hayne J at [116] and per Heydon J at [151].
18. Per Hayne J at [89].
19. Per Hayne J at [89] to [92].
20. Per Hayne J at [89].
21. Per Hayne J at [118].
22. Per Hayne J at [118] to [119].
23. Per Hayne J at [87].
24. Per Hayne J at [123].
25. Per Hayne J at [119] to [120].
26. Per Hayne J at [84].
27. Per Hayne J at [98].
28. Per Hayne J at [87].
29. Per French CJ, Crennan and Kiefel JJ at [75] and per Heydon J at [162].
30. Per French, Crennan and Kiefel JJ at [68] to [73].
31. Per Heydon J at [149].
32. Per Heydon J at [143].
33. Per Heydon J at [148].

