

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF
AUSTRALIA

BETWEEN:

GOOGLE INC.

Appellant

AUSTRALIAN COMPETITION AND
CONSUMER COMMISSION

Respondent



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APPELLANT'S SUBMISSIONS

Part I: Suitable for publication

1. The appellant certifies that this submission is in a form suitable for publication on the internet.

Part II: Issues presented by the appeal

2. This appeal presents the following issues in relation to the construction and operation of s 18 of the *Australian Consumer Law* (the **ACL**) (formerly s 52 of the *Trade Practices Act 1974* (Cth) (the **TPA**)):

- (a) What is the test for determining whether a person who displays or publishes a third party advertisement makes any express or implied representations contained in that advertisement?

- (b) In particular:

- (i) Does a person who displays or publishes an advertisement without adopting or endorsing its contents, and who makes it clear that it is an advertisement of a third party, itself make any express or implied representations contained in the advertisement?

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- (ii) Does the fact that such a person displays or publishes the advertisement in response to a query or inquiry of another mean that the person itself makes those representations?
 - (iii) Does the fact that such a person displays or publishes the advertisement by means of that person's online technology, in accordance with instructions provided by the advertiser, mean that the person itself makes those representations?
- (c) Did the appellant make any of the implied representations that were held to be contained in the advertisements in issue in this case?

10 **Part III: Judiciary Act 1903**

3. The appellant has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act* 1903 (Cth). In its view this is not necessary.

Part IV: Citations

4. The reasons for judgment of the trial judge are published as *Australian Competition and Consumer Commission v Trading Post Australia Pty Ltd* (2011) 197 FCR 498; (2011) 283 ALR 310; (2011) 93 IPR 358; [2011] FCA 1086.
5. The reasons for judgment of the Full Court are published as *Australian Competition and Consumer Commission v Google Inc* (2012) 201 FCR 503; [2012] FCAFC 49.

20 **Part V: Relevant facts**

Background to the proceedings

6. The appellant (**Google**) operates a free internet search engine accessible via the website at www.google.com.au. A user may conduct a search by entering a word-based query, in response to which the search engine displays a results page including a list of links to web pages that may be of interest to the user (often running into several pages or hundreds of pages). Such links are called "organic" search results.¹ Many millions of search queries are conducted per day at www.google.com.au, each search taking a fraction of a second.²
7. Google derives revenue by displaying advertisements on the results pages of its search engine. At the time of the trial, such advertisements were referred to as "sponsored links". They are generated by a system called "AdWords", a "self-serve" system for advertisers which is accessible online and allows advertisers to create their own advertisements and to bid to display them on the results

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¹ [2011] FCA 1086 at [46]-[48]. Dulitz 9.3.09 paras 11, 16.

² T807.01-03 (the precise number of searches per day is confidential). Dulitz 9.3.09 paras 12, 15.

pages of the search engine.³ Use of the system is subject to Google's terms and conditions, which provide that advertisers are responsible for the content of the advertisements and require them to abide by policies designed to ensure that the advertisements are clear and accurate.⁴ The AdWords system provides a low cost advertising platform which is readily accessible to businesses of all sizes and is used by hundreds of thousands of advertisers.⁵

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8. Advertisers select keywords that may trigger advertisements based on users' search queries. An advertisement will only be displayed, in circumstances determined by the advertiser, if the advertiser wins an auction process under which bids are assessed by price and other factors. Where an advertisement is displayed, it consists of three elements: a headline chosen by the advertiser with a link to the advertiser's website (the "*ad headline*"), an additional message chosen by the advertiser (referred to in the evidence as the "*ad text*"), and the web address or URL of a website chosen by the advertiser. When a user clicks on the link and is taken to the advertiser's website, the advertiser pays a fee to Google determined by the advertiser's bid.⁶ Google has policies allowing persons aggrieved by an advertiser's use of a trade mark or business name to ask Google to block automatically advertisements from appearing.⁷
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9. The respondent (the **ACCC**) alleged that Google had contravened s 52 of the TPA in two ways. First, it alleged that Google had failed to distinguish between organic search results and advertisements and thereby engaged in misleading conduct. That part of the case was rejected by the trial judge and was not the subject of any appeal.⁸ Secondly, the ACCC alleged that Google had made certain pleaded implied representations by displaying particular advertisements containing the names or trade marks of the advertisers' competitors. It is this part of the case that is the subject of the present appeal.

The impugned advertisements

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10. Four advertisements or groups of advertisements are now in issue. These are referred to in the judgments below as the Harvey World Travel advertisements, the Honda.com.au advertisement, the Alpha Dog Training advertisement and the Just 4x4s Magazine advertisement. Other advertisements were in issue at first instance but were not the subject of the appeal to the Full Court. Colour copies of the results pages on which the impugned advertisements appeared were in evidence and will be included in the appeal book.⁹

³ [2011] FCA 1086 at [52]-[53]. Barker 6.3.09 paras 6-14, 38-40, 69-76 and 94-95; Dulitz 9.3.09 paras 13, 35.

⁴ [2011] FCA 1086 at [62]-[68]. Barker 6.3.09 paras 18-37; Ex KJB1 pages 6-45.

⁵ [2011] FCA 1086 at [52]. Barker 6.3.09 para 12; Dulitz 9.3.09 para 35.

⁶ [2011] FCA 1086 at [52]-[60]. Barker 6.3.09 paras 42, 45-46, 48-50, 58-63, 65, 94-95; Ex KJB1 pages 58-61; Dulitz 9.3.09 paras 35-39, 51.

⁷ [2011] FCA 1086 at [69]-[74]. Fowler 9.3.09 paras 7-23, 26; Ex KNF1 pages 1-7 and 10.

⁸ [2011] FCA 1086 at [151]-[174].

⁹ Exhibit A, pages 5, 14, 15, 17, 40, 43, 49, 112.

11. Each of the impugned advertisements appeared on a separate results page, along with organic search results and other advertisements not the subject of the ACCC's claim, which was displayed following a search conducted by a user of Google's search engine. The advertisements appeared at either the top left or the right side of the page. Each advertisement consisted of the three parts described above, being the ad headline, the ad text and the advertiser's URL, arranged in the following format or a similar format (using one of the Harvey World Travel advertisements as an example):¹⁰

Harvey Travel

Unbeatable deals on flights, Hotels & Pkg's Search, Book & Pack Now!
www.statravel.com.au

12. The ad headline (in this example, "Harvey Travel") appeared in blue, the ad text ("Unbeatable deals on flights, Hotels & Pkg's Search, Book & Pack Now!") appeared in black and the advertiser's URL ("www.statravel.com.au") appeared in green. By clicking on the ad headline, the user would be taken to the landing page represented by the advertiser's URL.¹¹
13. The results pages on which the impugned advertisements appeared were displayed following searches conducted by users who entered search queries corresponding to names or trade marks of the advertisers' competitors. In the above example, the competitor was Harvey World Travel and the advertiser was STA Travel (two businesses which offered travel-related services). In each of the impugned advertisements, the ad headline consisted of the keyword that triggered the advertisement. The ad headline is always determined by the advertiser, either by the selection of a fixed headline or through the use of a facility on the AdWords system known as "keyword insertion".¹²
14. The searches that gave rise to the impugned advertisements were conducted by officers or agents of the ACCC for the purposes of the case or, in one instance, by the competitor whose name appeared in the ad headline.¹³ Unsurprisingly, none of the searchers gave evidence that they were misled in any way by any of the advertisements. For some of the impugned advertisements, the text of the search query differed slightly from the keyword that triggered and appeared in the ad headline, due to the type of keyword matching which the advertiser had determined would be used ("exact match", "phrase match" or "broad match").¹⁴ Further, for some of the impugned advertisements, the search query used involved a deliberate misspelling of the

¹⁰ [2011] FCA 1086 at [211]; Exhibit A, p 15. The above example was an advertisement at the right side of the page. In the advertisements at the top left of the page, the ad text appeared next to the URL, rather than above it. The difference is not material for present purposes.

¹¹ [2011] FCA 1086 at [57].

¹² [2011] FCA 1086 at [102], [193]. Barker 9.3.09 paras 45, 66-67; Dulitz 9.3.09 para 51.

¹³ Hare 24.4.08 paras 8, 15, 18, 20 and 23; Hong 28.4.08 paras 24 and 25; Fontana 23.4.08 para 11.

¹⁴ [2011] FCA 1086 at [55]. See Exhibit A, pages 15 ("harvey world travel"/"Harvey Travel"), 40 ("Harvey World Travle"/"Hervey World Travel"). Dulitz 9.3.09 para 37; Barker 9.3.09 paras 58-65.

competitor's name.¹⁵ The effect of this was to circumvent the operation of Google's systems, which at the request of the competitor had blocked the keyword corresponding to the competitor's name from triggering or appearing in an advertisement.¹⁶

15. The ACCC alleged that by "*publishing*" the impugned advertisements, Google made a range of representations.¹⁷ Relevantly for present purposes, these included representations to the effect that there was an association or affiliation between the advertiser and a competitor whose name appeared in the advertisement or that information regarding the business of the competitor could be found at the advertiser's website. These representations were said to be implied from the contents of the advertisements themselves. The ACCC's case was that they were made by both the advertisers and by Google.¹⁸

The trial judgment

16. As the trial judge observed, the case pleaded by the ACCC was that Google had made the pleaded representations by publishing the advertisements in question.¹⁹ There was no allegation that any other conduct of Google gave rise or contributed to a contravention of the TPA. Further, the ACCC did not suggest that the subject matter of each publication relied upon consisted of anything other than the individual advertisement or sponsored link, and, for example, did not extend to a combination of the sponsored link and the other material on the results page.²⁰ The ACCC did not contend that Google was "*knowingly involved*" in any contravention within s 75B of the TPA.²¹ The ACCC conceded that any conduct engaged in by Google or its employees in relation to the advertisements was not engaged in with any intention to mislead or deceive or cause confusion.²² It follows that Google did not intend to make any of the implied representations found to have been conveyed by the individual third party advertisements.
17. The trial judge noted that the representations complained of "*were alleged to have been made to the general public or a section of the general public*".²³ His Honour therefore held, applying *Campomar Sociedad Limitada v Nike*

¹⁵ [2011] FCA 1086 at [209], [224]-[225]; Exhibit A, pages 17, 40 and 43 (Harvey World Travel advertisements).

¹⁶ See para 8 above.

¹⁷ Third further amended statement of claim, paras 44, 58, 66, 121.

¹⁸ This was explicitly reflected in the ACCC's pleading for the Kloster Ford and Charlestown Toyota advertisements, in relation to which the advertiser was a party to the proceeding (third further amended statement of claim, paras 24, 34), and was reflected more generally in the ACCC's approach to the case in relation to the other advertisements including those presently in issue.

¹⁹ [2011] FCA 1086 at [87], [93] and [197].

²⁰ [2011] FCA 1086 at [30] where the trial judge also noted that for the ACCC to assert otherwise would have been inconsistent with the way it pleaded the misleading advertisement part of its case.

²¹ [2011] FCA 1086 at [22].

²² [2011] FCA 1086 at [21], [240], [241].

²³ [2011] FCA 1086 at [39].

International Limited (2000) 202 CLR 45 at [102]-[103], that it was necessary to assess how users of the search engine would understand the advertisements in context, by reference to the knowledge, understanding and behaviour of ordinary and reasonable members of the relevant class. That class consisted of people with a basic understanding of computers, the web and search engines, including Google's search engine, most of whom would know that Google derives revenue through advertisements and who were unlikely to believe that the results pages were advertisement free.²⁴ The advertisements were identified on the results pages by the words "*sponsored links*".²⁵ There was no evidence that any user did not appreciate that they were advertisements.²⁶ Thus his Honour held that ordinary and reasonable users would understand that the advertisements were advertisements of third parties and not Google, and that advertisers had paid Google to cause them to appear on the results pages delivered in response to search queries in order to promote their businesses.²⁷

18. His Honour held that some of the pleaded representations were conveyed by some of the advertisements. In relation to the four advertisements or groups of advertisements now in issue, his Honour held that one or more representations to the following effect were conveyed:²⁸

- (a) that there was an association or affiliation between the advertiser and the competitor whose name appeared in the advertisement;
- (b) that information regarding the business or services of the competitor could be found at the website to which the advertisement linked;
- (c) that by clicking on the headline of the advertisement the user would be taken to the website of the competitor or a website associated with the competitor whose name appeared in the advertisement.

19. These were implied, not express, representations.²⁹ His Honour rejected a contention by the ACCC that by publishing the advertisements Google also represented that they were organic search results and were positioned on the results pages according to their relative relevance to the words searched.³⁰ That is to say, the only allegation that Google made any representation as to the relevance of an advertisement to a search query was one which was specifically rejected by the trial judge. The ACCC disavowed any case that users of

²⁴ [2011] FCA 1086 at [122], [155]-[157].

²⁵ [2011] FCA 1086 at [164].

²⁶ [2011] FCA 1086 at [152].

²⁷ [2011] FCA 1086 at [162], [166]-[167].

²⁸ [2011] FCA 1086 at [237], [251], [317]-[318], [341]-[342].

²⁹ [2011] FCA 1086 at [88]-[89], [91]-[92].

³⁰ [2011] FCA 1086 at [172]-[174], [227].

Google's search engine had any expectation that advertisements would be relevant or that they would be positioned according to relevance.³¹

20. As to whether Google had made any of the above representations, his Honour held that this "*should be addressed in the knowledge that ordinary and reasonable members of the class would have understood that*".³²

- *a sponsored link is an advertisement that includes a headline incorporating a link to a website address displayed beneath the headline;*
- *if a person clicks on the headline they will be taken to the website address displayed beneath the headline;*
- *the website address displayed beneath the headline will usually be the website address of the advertiser;*
- *the identity of the advertiser will usually be apparent from the website address displayed beneath the headline.*

21. It followed from these findings that ordinary and reasonable users would have understood who the advertiser was, including by reason of the appearance of its website address or URL; they would have understood that it was the advertiser who determined the content of an advertisement; and they would have understood that "*the message being conveyed to them by the publication of such an advertisement was one from the advertiser rather than the publisher*".³³

22. In light of these findings of fact, the trial judge held that the representations contained in the advertisements were made by the advertisers and not Google, applying the principle laid out in *Yorke v Lucas* (1985) 158 CLR 661 at 666, *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at [38]-[40] and *ACCC v Channel Seven Brisbane Pty Ltd* (2009) 239 CLR 305 at [43], [57]. In particular, his Honour held that ordinary and reasonable users of Google's search engine would not have understood that any information conveyed by the advertisements was endorsed or adopted by Google, and instead "*would have understood that the message conveyed was a message from the advertiser which Google was passing on for what it was worth*".³⁴ Google did no more than represent that the advertisements were advertisements.³⁵

23. His Honour made certain further findings as to the advertisers' role in creating the advertisements which are important having regard to the Full Court's reasons on appeal. These included: (a) the advertisements were "*created by advertisers*";³⁶ (b) the advertisements were "*received*" by Google for publication in the ordinary course of its business for the purposes of s 85(3) of the TPA;³⁷

³¹ Transcript of trial hearing before Nicholas J dated 29 March 2010 at T 1076.41-1077.40.

³² [2011] FCA 1086 at [187].

³³ [2011] FCA 1086 at [188].

³⁴ [2011] FCA 1086 at [194]; see [241], [251], [318] and [342] in relation to the advertisements in issue.

³⁵ [2011] FCA 1086 at [191].

³⁶ [2011] FCA 1086 at [53]. *Barker* 9.3.09 paras 14, 38 and 45; *Ex KJB1* pages 58-61; *Dulitz* 9.3.09 para 35.

³⁷ [2011] FCA 1086 at [198]-[202].

(c) while Google made available technical facilities that were used in creating the advertisements, including the “keyword insertion” facility, it was the advertisers, and not Google, who “chose to use these facilities to produce headlines containing [competitors’ names] in response to search queries including those words”;³⁸ and (d) the advertisers chose the keywords that would trigger the advertisements, the type of keyword matching to be used, and, if they so desired, the geographic locations in which the advertisements would be displayed.³⁹ None of these findings was overturned by the Full Court.

The Full Court judgment

- 10 24. On appeal, the ACCC did not challenge the trial judge’s finding that ordinary and reasonable users would recognise that the impugned advertisements were advertisements by third parties and not Google and paid for by advertisers to appear on results pages in response to search queries in order to promote the advertisers’ businesses; nor did the ACCC challenge the finding that Google had not represented that the advertisements were organic search results or that the advertisements were positioned on the results pages according to their relative relevance to the words searched.⁴⁰ The ACCC did not contend that Google adopted or endorsed the representations contained in the impugned advertisements and the Full Court did not make any such finding.
- 20 25. The Full Court relied on the decision of an earlier Full Court in *Universal Telecasters (Qld) Ltd v Guthrie* (1978) 18 ALR 531, in which a television station was held to have “made” false statements contained in an advertisement for the purposes of s 53(e) of the TPA as it then stood by reason of the fact that the television station had broadcast the advertisement.⁴¹ The present Full Court held that *Guthrie* had not been overtaken by subsequent authority and that, in particular, the reasoning of the earlier Full Court was not inconsistent with the views expressed by the High Court in *Butcher and Channel Seven*.⁴²
26. The Full Court said of Google’s reliance on *Butcher and Channel Seven*:⁴³
- 30 *It is no answer to the ACCC’s case to say that it is apparent that the sponsored links were advertisements for persons other than Google. The question is not whether the advertisement was an advertisement for Google or for a third party, but whether Google’s conduct in response to the user’s interaction with Google’s search engine was misleading.*
27. The Full Court held that “[a]s an issue of fact, that question reasonably admits of only one answer”.⁴⁴ Their Honours referred to two matters that were said to

³⁸ [2011] FCA 1086 at [117]; see also [192]-[193]. Barker 9.3.09 paras 66-67.

³⁹ [2011] FCA 1086 at [55], [61]. Barker 9.3.09 paras 14, 38, 42, 48-50 and 58-63, 65; Dulitz 9.3.09 paras 35 and 37-38.

⁴⁰ [2012] FCAFC 49 at [77].

⁴¹ [2012] FCAFC 49 at [80], [86].

⁴² [2012] FCAFC 49 at [86].

⁴³ [2012] FCAFC 49 at [96].

lead to the conclusion that Google had engaged in misleading conduct. The first was that the advertisements were displayed by Google in response to the user's search query. The second was that the advertisements were generated by Google's AdWords system. Their Honours allowed the appeal and made declarations to the effect that Google had made the specific representations the trial judge held to be conveyed by the advertisements. Their Honours' reasons for reaching that conclusion are considered further below.

Part VI: Argument

Introduction

- 10 28. The unchallenged findings of the trial judge were that Google made it clear to ordinary and reasonable users, and ordinary and reasonable users would have understood, that the impugned advertisements were third party advertisements made by and paid for by advertisers in order to promote their businesses. In those circumstances, any implied representations conveyed by those advertisements were plainly representations made by the advertisers. Google did not intend to make the implied representations conveyed by the advertisements. The trial judge found that Google did not adopt or endorse the representations and the Full Court did not find otherwise. It follows that Google ought not be regarded as the maker of such representations.
- 20 29. However one analyses the Full Court's judgment, it reduces to the following proposition: because Google displayed third party advertisements on the results pages of its search engine, which users of the search engine understood to be advertisements placed and paid for by third parties, Google itself made the implied representations contained in those advertisements. To say that Google did so in "*response*" to a search query, as the Full Court did, is to do no more than recognise that Google displays search results pages containing organic search results and advertisements in "*response*" to a query because Google operates a search engine. Everything that Google displays on a results page is consequent upon a user entering a search query. To say that in "*response*" to a search query, Google published what it indicated was, and what in fact was, and what was understood to be, a third party advertisement to promote a business, does not inform the argument as to whether Google itself made the representations contained in the third party advertisement.
- 30 30. Google respectfully submits that, beyond the assertion by the Full Court that the reasoning in *Guthrie* survives the statements of this Court in *Butcher* and *Channel Seven*, there is no process of reasoning provided by the Full Court which explains why Google made the representations in question.
31. In particular, the Full Court's reasons do not address three incontrovertible propositions. First, each advertisement consisted of three elements dictated by

⁴⁴ [2012] FCAFC 49 at [96]; see, generally, [87]-[97].

the advertiser, being the ad headline, ad text and the advertiser's URL, and would not have existed but for the creation and direction of the advertiser. Secondly, users understood that the advertisements were placed and paid for by the advertisers. Thirdly, the misleading conduct alleged was that, by reason of the content of the advertisement, particular implied representations, namely representations as to the existence of a commercial association or other relationship between two entities identified in each advertisement, were made.

The applicable principle

- 10 32. The applicable principle has its genesis in the discussion in *Yorke* of the fact that a corporation may contravene s 52 of the TPA despite acting honestly and reasonably. Mason ACJ, Wilson, Deane and Dawson JJ said:⁴⁵

That does not, however, mean that a corporation which purports to do no more than pass on information supplied by another must nevertheless be engaging in misleading or deceptive conduct if the information turns out to be false. If the circumstances are such as to make it apparent that the corporation is not the source of the information and that it expressly or impliedly disclaims any belief in its truth or falsity, merely passing it on for what it is worth, we very much doubt that the corporation can properly be said to be itself engaging in conduct that is misleading or deceptive.

- 20 33. This statement was subsequently applied in *Butcher*, a case in which a real estate agent had provided interested purchasers of a property with a brochure prepared by the agent containing information about the property. Gleeson CJ, Hayne and Heydon JJ, who formed the majority, said:⁴⁶

Whatever representations the vendor made to the purchasers by authorising the agent to issue the brochure, it was not made by the agent to the purchasers. The agent did no more than communicate what the vendor was representing, without adopting or endorsing it. That conclusion flows from the nature of the parties, the character of the transaction contemplated, and the contents of the brochure itself.

- 30 34. The Court in *Butcher* emphasised the need to consider all the circumstances, including the relationship between the parties. Considering those matters, the majority concluded that "*it would have been plain to a reasonable purchaser that the agent was not the source of the information which was said to be misleading*" and that the real estate agent "*did not purport to do anything more than pass on information supplied by another or others*".⁴⁷

35. *Channel Seven* involved the construction of s 65A of the TPA. In addressing that issue, some members of the Court commented on the principle in *Yorke*

⁴⁵ *Yorke v Lucas* (1985) 158 CLR 661 at 666.

⁴⁶ *Butcher v Lachlan Elder Realty Pty Limited* (2004) 218 CLR 592 at [40].

⁴⁷ *Butcher v Lachlan Elder Realty Pty Limited* (2004) 218 CLR 592 at [51]; see [39], [102], [109].

and *Butcher* in the context of its application to the case of an information provider. French CJ and Kiefel J said, citing *Butcher* as authority:⁴⁸

The publication, by an information provider, of third party statements about goods or services, does not, without more, amount to the adoption or making of those statements by the information provider.

- 10 36. In separate reasons for judgment, Gummow J said that it was “well established that, for the broadcasts in question here to give rise to contraventions of s 52 by Channel Seven, it was necessary at least for some ‘endorsement’ or ‘adoption’ of what was represented on the programs by the relevant third parties”.⁴⁹ His Honour also cited the statement by French J (as his Honour then was) in *Gardam v George Willis & Co* (1988) 82 ALR 415 at 427 that:

The innocent carriage of a false representation from one person to another in circumstances where the carrier is and is seen to be a mere conduit, does not involve him in making that representation ... When, however, a representation is conveyed in circumstances in which the carrier would be regarded by the relevant section of the public as adopting it, then he makes that representation. It will be a question of fact in each case.

- 20 37. This principle has been applied in a line of decisions at the intermediate appellate level.⁵⁰ Those decisions confirm that there is no need for the person passing on the representation to make any express disclaimer as to the truth of its contents. In *Borzi Smythe Pty Limited v Campbell Holdings (NSW) Pty Ltd* [2008] NSWCA 233, Beazley JA, with whom Handley A-JA agreed, said:⁵¹

30 *The question ... is whether information has been merely passed on for what it is worth, without adoption or endorsement of its truth or falsity. If, having regard to all the circumstances of the case, the source of the information is made known and it is apparent that there has been no such adoption, then there will have been a relevant disclaimer. In other words, the disclaimer can be, and in the case of an implied disclaimer, will be, found in the conduct of the representor, including the words actually used in the communication and all other relevant circumstances, including the nature of the parties, the character of the transaction and the contents of the communication.*

38. In the present case, given the findings made by the trial judge which were not challenged on appeal, his Honour was correct to hold that the case pleaded by the ACCC was governed by this principle. Once it is accepted that ordinary and reasonable users of Google’s search engine would understand that the

⁴⁸ *ACCC v Channel Seven Brisbane Pty Ltd* (2009) 239 CLR 305 at [43]; see also [38]-[40].

⁴⁹ *ACCC v Channel Seven Brisbane Pty Ltd* (2009) 239 CLR 305 at [57].

⁵⁰ *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82 at 90; *The Saints Gallery Pty Ltd v Plummer* (1988) 80 ALR 525 at 530-531; *Orix Australia Corp Ltd v Moody Kiddell & Partners Pty Ltd* [2006] NSWCA 257 at [70], [79]; *Borzi Smythe Pty Ltd v Campbell Holdings (NSW) Pty Ltd* [2008] NSWCA 233 at [51], [82]-[87]; *Eric Preston Pty Ltd v Euroz Securities Ltd* [2011] FCAFC 11 at [198]-[212]; *Dib Group Pty Ltd v Coolabah Tree Aust-Wide Pty Ltd* [2011] FCAFC 57 at [190]-[197].

⁵¹ *Borzi Smythe Pty Limited v Campbell Holdings (NSW) Pty Ltd* [2008] NSWCA 233 at [51]. See also *The Saints Gallery Pty Ltd v Plummer* (1988) 80 ALR 525 at 530.

advertisements in question were advertisements of third parties and not Google, the question whether Google made the representations conveyed by the advertisements must be analysed by reference to whether Google adopted or endorsed the contents of those advertisements. Neither the trial judge nor the Full Court found that Google did so as a matter of fact or would have been seen by users to be doing so. As submitted, in those circumstances, Google did not make the representations contained in the advertisements.

The Full Court's treatment of the authorities

- 10 39. The Full Court misinterpreted the authorities. First, their Honours said that the correct starting point for the analysis was the decision of the Full Court in *Guthrie*. The effect of *Guthrie* is that, without more, a television station would make every representation in every advertisement it broadcasts. A later Full Court (including Bowen CJ, who was also a member of the Court in *Guthrie*) in *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82 observed (correctly) that the holding in *Guthrie* was *obiter* and distinguished it in the context of an alleged contravention of s 52 by a newspaper publisher.⁵² Unlike the trial judge,⁵³ the Full Court did not refer to *Global*.
- 20 40. The suggestion that there is “*no tension*” between *Guthrie* and the principle in *Yorke, Butcher* and *Channel Seven* is erroneous.⁵⁴ This is apparent from the statement by French CJ and Kiefel J in *Channel Seven* that “[*t*]he publication, by an information provider, of third party statements about goods or services, does not, without more, amount to the adoption or making of those statements”, and Gummow J’s statement in the same case that it was necessary at least for there to be “some ‘endorsement’ or ‘adoption’ of what was represented on the programs by the relevant third parties”.⁵⁵ The Full Court was referred to these passages and cited but did not apply them.⁵⁶ The trial judge correctly held that the law relating to s 52 had developed since *Guthrie* to the point where it was hard to see how that case could provide any assistance.⁵⁷ Any attempt to rationalise *Guthrie* as being consistent with the later authorities completely
- 30 removes the basis for the Full Court’s conclusion in that case.
41. Indeed, maintenance of the authority of *Guthrie* would require the recognition of a special principle for advertisements. There is no such principle. The starting point is that the statement is and is understood to be a statement of a third party, as found here. Far from being liable to be treated differently, a third party advertisement is a quintessential example of a statement that is likely to be understood to be a statement of someone other than the publisher or

⁵² *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82 at 89.4.

⁵³ [2011] FCA 1086 at [183].

⁵⁴ [2012] FCAFC 49 at [81].

⁵⁵ *ACCC v Channel Seven Brisbane Pty Ltd* (2009) 239 CLR 305 at [43], [57].

⁵⁶ [2012] FCAFC 49 at [86].

⁵⁷ [2011] FCA 1086 at [185].

advertising platform. This being understood, the question is then whether the publisher or platform adopts or endorses that statement. A publisher or platform who does not do so “*merely passes it on for what it is worth*”.

42. Secondly, the Full Court in the present case quoted in part and purported to apply the statement of French J in *Gardam*, cited by Gummow J in *Channel Seven* and extracted above.⁵⁸ Critically, however, their Honours omitted the words: “*When, however, a representation is conveyed in circumstances in which the carrier would be regarded by the relevant section of the public as adopting it, then he makes that representation*”.⁵⁹ That aspect of the principle is crucial to its application here, given the unchallenged finding that the advertisements would be seen as advertisements of third parties and not Google.
43. Thirdly, the Full Court characterised the relevant statements of principle in *Yorke* and *Butcher* in the following way (emphasis added):⁶⁰

In Yorke v Lucas and in Butcher, their Honours were endeavouring to explain that a party whose conduct consists of the repetition of a misleading statement is not conduct which is misleading and deceptive on the part of the intermediary if it sufficiently appears that the intermediary is merely passing on the fact that the statement has been made by another.

44. The purported limitation to “*repetition of a misleading statement*” reflects a gloss not supported by *Yorke* or *Butcher*. It appears to involve a mechanical requirement that the form of the advertisement be provided to the search engine in a preconfigured physical or electronic form. In fact, as the reasons in *Butcher* indicate, the brochure in issue in that case had been prepared by the real estate agent who provided it to the purchasers.⁶¹ Further, as submitted below, the brochure was provided by the agent in response to an inquiry by the purchasers and so the case cannot be put aside on that basis either.

The fact of Google’s “response”

45. The central element of the Full Court’s reasoning appears to be that the advertisements were “*Google’s response to the user’s query*”.⁶² Their Honours appeared to consider that the fact that Google’s systems displayed particular advertisements to particular users following their search queries, coupled with the assertion that Google would be seen to be making an assessment of which advertisements to display, made it responsible for the representations contained in the advertisements. That approach was in error for the following reasons.

⁵⁸ [2012] FCAFC 49 at [82]. See para 36 above.

⁵⁹ *ACCC v Channel Seven Brisbane Pty Ltd* (2009) 239 CLR 305 at [57].

⁶⁰ [2012] FCAFC 49 at [85].

⁶¹ *Butcher v Lachlan Elder Realty Pty Limited* (2004) 218 CLR 592 at [59], [75], [81], [89]; see also *Harkins v Butcher* (2002) 55 NSWLR 558 at [1]; *Butcher v Harkins* [2001] NSWSC 15 at [5], [129].

⁶² [2012] FCAFC 49 at [87]; see also [88], [90]-[93], [95]-[96].

46. There is no analysis in the Full Court's reasons as to what that "response" allegedly conveys. There was no allegation in the pleading to which the Full Court could point to assist that exercise. The Full Court did not find that the "response" conveyed adoption or endorsement. Yet the fact of "response" was sufficient without more for the Full Court to conclude that Google made the representations. If it be assumed that it was permissible for the Full Court to proceed down this path of "response", and attempting to speculate as to the putative implied content of the so called "response", there is no logical connection between a search engine saying to a user, for example, this advertisement is or might be relevant to you, and the search engine adopting or endorsing every or any representation contained in the advertisement.
47. In *Butcher*, the brochure was provided by the real estate agent in response to an inquiry by the purchasers who were interested in purchasing a property. The agent told them that the brochure contained "all the details for the property" and was "everything you need to know". This conveyed a representation that the brochure "was a very helpful document which conveniently put together in a single place the answer to some questions that purchasers typically asked".⁶³ But the fact of that additional representation did not mean that the agent made the pleaded representation in the brochure, which was held to be misleading, regarding the position of the mean high water mark on the property.
48. As the majority in *Butcher* observed, acceptance of the purchasers' arguments for a contrary result would have led to "extreme consequences".⁶⁴

It was accepted that if their arguments were sound, it must follow that when a real estate agent produces a brochure offering land for sale by a vendor, the real estate agent is representing that the vendor had good title. That would be so radical a conclusion as to suggest that even the wide words of s 52 could not bring it about; that in turn suggests that the principles that supposedly lead to that radical conclusion are unsound.

49. The same point can be made in this case, where the ramifications of the Full Court's reasoning go well beyond the present facts. If correct, it would mean that any person, whether service provider or otherwise, who determines to show advertising material on the basis of an assessment that the material might be of interest to a customer, could be held responsible for the content of that material. This could apply, for example, to a travel agent who responds to an inquiry regarding travel arrangements by providing third party brochures for services or accommodation. It could apply to a television station who seeks the advertising custom of particular advertisers for the display of advertisements to audiences of particular shows based on the audiences' perceived interests.
50. The extremity of such consequences is exacerbated where, as here, the representations are not express but implied. As the trial judge noted,⁶⁵ ordinary

⁶³ *Butcher v Lachlan Elder Realty Pty Limited* (2004) 218 CLR 592 at [6].

⁶⁴ *Butcher v Lachlan Elder Realty Pty Limited* (2004) 218 CLR 592 at [59].

and reasonable users would not understand Google to be making the express representations contained in the advertisements (eg, “*Unbeatable deals on flights, Hotels & Pkg’s Search, Book & Pack Now!*”). Even less so would they understand Google to be making the implied representations.

The role of Google’s technology

51. The Full Court also reasoned that, however it would be seen by users, Google was “*in fact, much more than a mere conduit*”.⁶⁶ In this regard, the Full Court referred to the fact that the advertisements were generated by the AdWords system so that it was “*Google’s technology which creates that which is displayed*”. From this it was said to follow that “*Google did not merely repeat or pass on a statement by the advertiser*” (emphasis added).⁶⁷
52. This is also not supported by the authorities. The principle in *Yorke and Butcher* is not limited to the “*repetition*” of a misleading statement in the sense of a mechanical passing on of a piece of paper or electronic equivalent; the facts in *Butcher* demonstrate this. It is sufficient that the statement is seen to be a statement of a third party for the principle to be applied. Further, the Full Court relied on the statement of French J in *Gardam*, quoted by Gummow J in *Channel Seven*, for the proposition that “*the question is whether the ‘carrier is and is seen to be a mere conduit’*”.⁶⁸ As submitted, however, the Full Court omitted the reference in the next sentence of the passage to whether “*the carrier would be regarded by the relevant section of the public as adopting*” the representation.⁶⁹
53. As to the suggestion that Google “*created*” the advertisements, this must be a reference to the role of Google’s technology in displaying the advertisements, because the Full Court did not overturn the trial judge’s findings that the advertisements were “*created by advertisers*” and that Google had “*received*” them for publication in the ordinary course of its business.⁷⁰ It may be noted that the ACCC did not ask the Full Court to overturn the finding that Google had “*received*” the advertisements for publication in the ordinary course of its business, and indeed relied on that finding in support of the proposition that Google had the benefit of the defence in s 85(3) of the TPA. Further, while concluding that the technical operation of the AdWords system should be taken into account, the Full Court appears to have put aside the advertisers’ contractual agreement that they took responsibility for the advertisements. Their Honours correctly did not rely on the activities of the Google personnel

⁶⁵ [2011] FCA 1086 at [189]-[190].

⁶⁶ [2012] FCAFC 49 at [89]; see also [87], [94]-[95].

⁶⁷ [2012] FCAFC 49 at [95].

⁶⁸ [2012] FCAFC 49 at [89].

⁶⁹ *ACCC v Channel Seven Brisbane Pty Ltd* (2009) 239 CLR 305 at [57].

⁷⁰ See paragraph 23 above.

who took part in the operation of the AdWords system, there being no contention that Google was “*knowingly involved*” in any contravention.⁷¹

54. Insofar as the advertisements were displayed by Google’s technology, Google is no different to a publisher of any advertisement whose facilities cause the advertisement to come into being. Thus a television advertisement is “*created*” by the television broadcaster who sends out the visual images and sounds constituting the broadcast.⁷² A newspaper advertisement is “*created*” by the publisher who prints and distributes the newspaper or typesets and publishes a classified (which it receives over the phone or online). A paid announcement is “*created*” by the radio presenter who reads the announcement on air and the radio station that broadcasts the signal conveying those words.
55. The Full Court’s emphasis on the technology of the AdWords system risks erecting an arbitrary and mechanical distinction between advertising in online and traditional media. As the trial judge observed, while the technology differs in each case, “*the publisher or broadcaster of such advertisements always provides at least some of the technical facilities that permit the relevant advertisement to be seen or heard. It does not follow that these publishers or broadcasters have thereby endorsed or adopted any information conveyed by the advertisement or that they have done anything more than pass it on for what it is worth.*”⁷³ If involvement of that kind were sufficient, the threshold for primary liability would be even lower than that for ancillary liability under s 75B of the TPA (there being no mental element for primary liability).

The nature of the contravention

56. The Full Court’s reasons disregard the fact that the misleading conduct alleged by the ACCC, and indeed declared by the Full Court to have been engaged in by Google, was the making of the specific implied representations contained in the advertisements themselves. For example, the Full Court said:⁷⁴

It is necessary to be clear as to what it is about Google’s conduct that is said to be misleading or deceptive on its part. Google’s conduct consists relevantly of the display of the sponsored link in response to the entry of the user’s search term in collocation with the advertiser’s URL.

57. The Full Court went on to state that an ordinary and reasonable user “*would conclude from these circumstances that it was Google who was displaying the sponsored link in collocation with the sponsor’s URL in response to the user’s search*”.⁷⁵ This suggests that the Full Court here regarded the advertiser’s URL as something separate from the advertisement, when in fact (as recognised

⁷¹ [2012] FCAFC 49 at [97]-[98].

⁷² See *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 218 CLR 273 at [37].

⁷³ [2011] FCA 1086 at [193].

⁷⁴ [2012] FCAFC 49 at [88].

⁷⁵ [2012] FCAFC 49 at [89].

earlier in the Full Court's reasons⁷⁶) it was part of the advertisement itself and would be understood as such. As the trial judge held, ordinary and reasonable users "would have understood that ... the website address displayed beneath the headline will usually be the website address of the advertiser".⁷⁷

58. There are other aspects of the Full Court's reasons which suggest that it regarded Google's conduct in providing "responsive" advertisements as itself constituting the contravention of s 52. This was not the case pleaded by the ACCC or addressed by the trial judge. The Full Court said:⁷⁸

The falsity of the conduct involved in the four responses in the present case is that the advertiser's URL misrepresents a connection between the searched term identifying the competitor and the URL of the advertiser ... The conduct is Google's because Google is responding to the query and providing the URL. It is not merely passing on the URL as a statement made by the advertiser for what the statement is worth. Rather, Google informs the user, by its response to the query, that the content of the sponsored link is responsive to the user's query about the subject matter of the keyword.

59. See also their Honours' discussion of the Harvey World Travel advertisements, which appears to attribute the "falsity of the response" in that case to the fact that "the user is seeking information about Harvey World Travel" but is instead "given the URL of one of Harvey World Travel's competitors".⁷⁹

60. The ACCC's case was not that Google made some independent or anterior representation to the effect that the advertisements were relevant or responsive to users' search queries. Any argument to that effect would have faced insuperable difficulties, including: (a) the absence of any pleading of such an allegation; (b) the trial judge's unchallenged finding that Google had not represented that the advertisements were organic search results or positioned according to relevance;⁸⁰ (c) the fact the results pages included other advertisements "responsive" to the search queries, which the ACCC disavowed as being misleading,⁸¹ but which had no connection with the businesses of the companies whose names were reflected in the search terms;⁸² (d) an evidentiary inquiry unexplored at trial as to whether ordinary and reasonable

⁷⁶ [2012] FCAFC 49 at [16]-[17].

⁷⁷ [2011] FCA 1086 at [187].

⁷⁸ [2012] FCAFC 49 at [91]-[92].

⁷⁹ [2012] FCAFC 49 at [93]. See also [96].

⁸⁰ [2011] FCA 1086 at [172]-[174], [227].

⁸¹ See transcript of appeal hearing before Full Court dated 28 February 2012 at T 147.23-148.13 and T 151.34-154.4; transcript of trial hearing before Nicholas J dated 29 March 2010 at T 1076.29-1078.30; paragraphs 73 and 74 of the ACCC's final submissions at trial; and transcript of interlocutory hearing before Allsop J dated 10 September 2007 at T 36.42-38.33.

⁸² See for example the right side Flight Centre and Escape Travel advertisements displayed on the same page as an impugned "Harvey Travel" advertisement reproduced in Schedule 1 to the trial judge's reasons [2011] FCA 1086; and see also Exhibit A, p 15.

users or, more likely, particular users,⁸³ expected third party advertisements to be relevant to their search queries at all, and if so how; (e) an evidentiary inquiry unexplored at trial as to the motivation or intention of particular users in entering particular search queries in order to assess whether such users would understand particular advertisements to be relevant or responsive to their queries; and (f) the fact that the only evidence of searches actually conducted was of searches by undeceived officers or agents of the ACCC, including deliberate misspellings of “*Harvey World Trave*” to circumvent the operation of Google’s systems which had blocked that keyword from triggering or appearing in an advertisement,⁸⁴ or by undeceived competitors of the advertisers.

61. The basis on which the trial proceeded at the urging of the ACCC, namely the relevance of the understanding of ordinary and reasonable users, has some logic on the assumption that the case is one based on the publication of advertisements. That logic disappears entirely if one purports to divine the intentions or motivations of individual users, which is an essential ingredient of the Full Court’s “*response*” approach. There was no evidence to support such an approach, nor any findings by the trial judge, and no basis on which the Full Court could have made any relevant findings in that regard.

Interrelationship with s 85(3) of the TPA

62. The ACCC has previously suggested that the defence in s 85(3) of the TPA would be otiose on Google’s approach.⁸⁵ That section provides that it is a defence to a contravention committed by the publication of an advertisement if the defendant establishes “*that he or she is a person whose business it is to publish or arrange for the publication of advertisements and that he or she received the advertisement for publication in the ordinary course of business and did not know and had no reason to suspect that its publication would amount to a contravention*”. Google relied on the s 85(3) defence below, successfully for some advertisements and not for others.

63. Section 85(3) is not otiose. On the correct application of the principle in *Yorke, Butcher and Channel Seven* to cases involving alleged contraventions by the publication of advertisements, it is clear that the section can still have work to do. Thus the defence could apply where a publisher or advertising platform conveys adoption or endorsement of a third party advertisement, but does not know and has no reason to suspect that the advertisement is misleading – for example, because a representation contained in it turns out to be false. The defence may also have work to do in cases of ancillary liability.

64. There are other reasons why s 85(3) does not warrant any departure from the principle in *Yorke, Butcher and Channel Seven*. In particular, the defence is not

⁸³ See *Butcher v Lachlan Elder Realty Pty Limited* (2004) 218 CLR 592 at [36], referring to *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45 at [102]-[103].

⁸⁴ [2011] FCA 1086 at [209], [224]-[225]; Exhibit A, pages 17, 40 and 43.

⁸⁵ ACCC’s summary of argument on special leave application, para 29.

one of general application; it is limited to the publication of advertisements as opposed to other kinds of third party statements, and it is available only to “a person whose business it is to publish or arrange for the publication of advertisements”. There are many persons who would not qualify given the nature of their activities. The existence of the defence does not justify treating advertisements any differently to other third party statements.

Involvement of Google personnel

65. By its notice of contention, the ACCC challenges the Full Court’s finding that the activities of the Google personnel who took part in the operation of the AdWords system were not relevant in determining whether Google made the representations in question.⁸⁶ That finding was plainly correct in circumstances where the case pleaded was that Google had made the representations by “publishing” the impugned advertisements. As the Full Court observed, the involvement of Google personnel was relevant to the s 85(3) defence, and could have been relevant to the question whether Google was “knowingly involved” in any contravention had such a case been put.⁸⁷ Similarly, the trial judge did not regard the activities of Google personnel as impacting on the question whether Google made the representations, given that, as his Honour observed, the ACCC had disavowed any suggestion that Google or its employees intended to mislead users and did not seek any finding to that effect.⁸⁸

Conclusion

66. The trial judge’s reasons on the principal issue were correct, and those of the Full Court were in error. Google did not make the implied representations contained in the impugned advertisements. The Full Court’s orders should be set aside and the orders made by the trial judge should be restored.

Part VII: Applicable provisions

67. The applicable provisions of the TPA as they existed at the relevant time (at the hearing at first instance in March 2010) were as follows:

52(1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

85(3) In a proceeding in relation to a contravention of a provision of Part V or VC committed by the publication of an advertisement, it is a defence if the defendant establishes that he or she is a person whose business it is to publish or arrange for the publication of advertisements and that he or she received the advertisement for publication in the ordinary course of business and did not know and had no reason to suspect that its publication would amount to a contravention of a provision of that Part.

⁸⁶ Notice of contention filed 5 July 2012, para 3.

⁸⁷ [2012] FCAFC 49 at [97]-[98].

⁸⁸ [2011] FCA 1086 at [240]-[241].

68. These provisions are now reflected in ss 18(1) and 251 of the ACL, respectively.

Part VIII: Orders sought

69. The appellant seeks the following orders:

- (a) The appeal be allowed.
- (b) The respondent pay the appellant's costs of the appeal and the application for special leave to appeal.
- (c) Orders 1 to 5 (inclusive) made by the Full Court of the Federal Court of Australia on 3 April 2012 and orders 1 to 3 (inclusive) made by the Full Court of the Federal Court of Australia on 4 May 2012 be set aside and in lieu thereof the appeal to the Full Court be dismissed with costs.
- (d) Such further or other orders or relief as the Court thinks fit.

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Part IX: Oral argument

70. The appellant estimates that approximately 2 hours (including reply) will be required for the presentation of its oral argument.

DATED: 27 July 2012



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