

# ANNOTATED

IN THE HIGH COURT OF AUSTRALIA  
SYDNEY REGISTRY

No S175 of 2012

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

BETWEEN:

GOOGLE INC.

Appellant



AUSTRALIAN COMPETITION AND  
CONSUMER COMMISSION

Respondent

APPELLANT'S REPLY

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## Part I: Suitable for publication

1. This submission is in a form suitable for publication on the internet.

## Part II: Reply to respondent's argument

2. Three key difficulties characterise the ACCC's submissions. First, they overlook the nature of the conduct about which complaint is made. Secondly, they invite this Court to find as a "*fact*" for the first time in the proceedings that Google "*created*" the advertisements. Thirdly, they endorse but do not elucidate or explain the reasoning process behind the "*Google's response*" theory of the case which finds its genesis in the Full Court's reasons.

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## *The relevant conduct*

3. The statute (s 52 TPA and now s 18 ACL) prohibits "*conduct*" that is misleading or deceptive. Although the statute's reach is not so confined, in this case the only conduct alleged to be misleading is the making of specific representations.<sup>1</sup> Specific implied representations were alleged to have been made by the publication of specific advertisements. The trial judge found that the impugned advertisements conveyed certain representations. The same representations

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<sup>1</sup> *Butcher v Lachlan Elder Realty Pty Limited* (2004) 218 CLR 592 at [32].

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were not conveyed in each case, and consideration of the specific content of each advertisement resulted in different findings in terms of the representations conveyed.<sup>2</sup> The trial judge's finding that the content of each advertisement was directed by the advertiser was not challenged or overturned on appeal.<sup>3</sup>

- 10 4. There is no doubt that the advertiser made each of the representations conveyed in the impugned advertisements. It was plainly the "maker" of the relevant impugned representations in addition to other representations which have not attracted criticism (eg "90,000 + auto ads online").<sup>4</sup> It is neither a necessary nor sufficient condition of liability that the person be the physical or electronic messenger of the relevant misleading conduct. The trial judge correctly found that the advertiser made the representations notwithstanding that it was Google who displayed the advertisements.<sup>5</sup>
- 20 5. In the case of each of the impugned advertisements, the ACCC alleged that Google had represented that each advertisement was a search result, that its position on the page was a result of its relative relevance to the words in the headline and that it was not an advertisement.<sup>6</sup> The ACCC failed in each of those endeavours.<sup>7</sup> The trial judge's findings that Google made it clear that each advertisement was an advertisement of a third party, paid for by a third party and for the purposes of promoting the third party's business, were not challenged or overturned on appeal.<sup>8</sup> The ACCC made no additional allegation that although Google made it clear that the advertisement was an advertisement, Google nevertheless represented that the advertisement had some other relevance to the searcher or to a viewer of the advertisement or that it represented "Google's response" to the search query.
- 30 6. Once it is accepted that Google made it clear that the advertisement was a paid advertisement of and for a third party, the legislative proscription on engaging in the relevant particular misleading conduct, namely the making of representations which flow from the content of the advertisement, is directed at the maker, in this case the advertiser, and not the "publisher".
7. Pleas to consider the "entire course of conduct" of Google<sup>9</sup> do not deflect attention from the allegation of "publication" as the relevant involvement of Google.<sup>10</sup> Thus, the trial judge held that the defence in s 85(3) was available to

<sup>2</sup> [2011] FCA 1086 at [228], [237], [251], [317], [340]-[341] (AB 3/975, 978, 982, 1001, 1008-1009).

<sup>3</sup> [2011] FCA 1086 at [53], [117], [188], [201] (AB 3/923, 946, 964, 967).

<sup>4</sup> See the Just 4x4s Magazine advertisement by Trading Post at Ex A p 5 (AB 2/794).

<sup>5</sup> [2011] FCA 1086 at [237], [340]-[341]; see also [251], [317] (AB 3/978, 982, 1001, 1008-1009).

<sup>6</sup> Third further amended statement of claim, paras 44, 58, 66, 121 (AB 1/32, 34, 37, 42, 45, 65).

<sup>7</sup> [2011] FCA 1086 at [171]-[174], [227] (AB 3/958, 975).

<sup>8</sup> [2011] FCA 1086 at [162], [166]-[167], [170]-[174], [187] (AB 3/956, 957, 958, 964).

<sup>9</sup> ACCC's submissions, paras 28, 33.

<sup>10</sup> Third further amended statement of claim, paras 44, 46, 58, 60, 66, 68, 121, 123 (AB 1/37-38, 42-43, 45-46, 65-66).

Google because it was “clear that the proceeding brought against Google ... relates to an alleged contravention of Part V of the Act committed by the publication of an advertisement”.<sup>11</sup> That finding is not challenged.

### **Creation of advertisements**

8. The trial judge found that the impugned advertisements were “created by advertisers” and “received” by Google for publication, and that it was the advertisers who “chose to use [Google’s] facilities to produce headlines containing [competitors’ names] in response to search queries including those words”.<sup>12</sup> The advertisers selected the keywords and the type of keyword matching to be used, and could nominate other matters such as the position of an advertisement on a results page and the geographical locations in which it would be displayed.<sup>13</sup> In its pleading, the ACCC alleged that “advertisers ... create[d] advertisements for display on the Google Inc websites”.<sup>14</sup>
9. Contrary to the ACCC’s assertion, it was not Google who “inserted keywords” into the impugned advertisements.<sup>15</sup> As the trial judge held, “it is the advertiser who determines whether or not keyword insertion will be used and what particular headlines will appear”; it was a “technical facility” which is no different in principle to the facilities provided by other publishers or broadcasters.<sup>16</sup>
10. The keyword insertion facility does not insert a user’s search query into an advertisement; rather, it inserts a keyword chosen by the advertiser for inclusion in or as the ad headline if that keyword triggers the advertisement.<sup>17</sup> The keyword may or may not be the same as the search query. In addition, the use of the facility does not achieve any special result: the same advertisement with the same ad headline can be displayed following the same search query using a “fixed” ad headline. All that keyword insertion does is save the advertiser from entering multiple fixed ad headlines to reflect different keywords. Every advertisement is predetermined by the advertiser. The ACCC’s description of the facility as “dynamic”<sup>18</sup> should not be allowed to obscure this.
11. The “choice”<sup>19</sup> between a fixed ad headline and keyword insertion is therefore irrelevant. Neither the trial judge nor the Full Court found that this had any bearing upon the nature of the representations or whether Google had made

<sup>11</sup> [2011] FCA 1086 at [197] (AB 3/966). The same applied to the other advertisements.

<sup>12</sup> [2011] FCA 1086 at [53], [117], [193], [202] (AB 3/923, 965-966, 968).

<sup>13</sup> [2011] FCA 1086 at [5], [10], [55], [56], [61], [102] (AB 3/911, 913, 924-925, 942-943, 946, 973-974); see also Google AdWords Learning Centre document “Optimising Ad Position – Position Preference” tendered at trial (CB tab 228; not reproduced in AB).

<sup>14</sup> Third further amended statement of claim, para 124(b)(ii) (AB 1/67).

<sup>15</sup> ACCC’s submissions, para 33; see also paras 2, 11, 13, 15, 16, 32.

<sup>16</sup> [2011] FCA 1086 at [193], [201] (AB 3/965, 967).

<sup>17</sup> Google AdWords Learning Centre document titled “How do I use Keyword Insertion” (AB 2/771).

<sup>18</sup> ACCC’s submissions, paras 2, 10, 11, 13, 15, 16, 18, 20, 23.

<sup>19</sup> ACCC’s submissions, para 10.

them. It should be noted that there is no basis in the evidence for the assertion that the Escape Travel Online advertisement at AB 2/800, upon which the ACCC did not sue, had a fixed ad headline. And not all of the advertisements upon which the ACCC did sue were created using keyword insertion.<sup>20</sup>

12. The ACCC's asserted "*special functionality*"<sup>21</sup> embodied in the ad headline is merely a hyperlink, which is ubiquitous across the internet. It has no relevance to the question whether Google made the representations.

### **Google's "response" to the query**

- 10 13. The ACCC's repetition of the assertion that the advertisements were "Google's response" to particular search queries and that Google used its "*proprietary algorithms*" to display the advertisements<sup>22</sup> does not explain by any process of reasoning how these matters can be said to bear upon the question whether Google made the particular, pleaded representations.
14. In *Butcher*, which involved a "response", the case was decided by reference to the absence of any adoption or endorsement.<sup>23</sup> Google's "*proprietary algorithms*" are similarly irrelevant. They apply in relation to every advertisement displayed by Google on its results pages, not just those which the ACCC asserts contained representations made by Google.
- 20 15. The ACCC does not challenge the basis upon which the trial judge proceeded, at its urging, in assessing the case as one of the making of representations to a class of persons, being ordinary and reasonable users of the search engine, as opposed to the making of representations to particular users.<sup>24</sup> Its reliance on the advertisements being Google's "response" to particular search queries is incompatible with this. There was no inquiry at trial into the intentions or motivations of particular users and no pleading or evidence to support such an approach, which in any event is flawed for reasons already addressed.<sup>25</sup>

### **The notice of contention**

- 30 16. For the reasons previously articulated, both the trial judge and the Full Court were correct to hold that the involvement of Google personnel was irrelevant to the question whether Google made the representations.<sup>26</sup>

<sup>20</sup> The Nilsen advertisement discussed by the trial judge at [2011] FCA 1086 at [320]-[331] (*AB 3/1002-1006*). See keyword report at Fowler 9.3.09, Ex KNF1 p 15 (*not reproduced in AB*) and Google AdWords Learning Centre document titled "How do I use Keyword Insertion" (*AB 2/771*).

<sup>21</sup> ACCC's submissions, para 32; see also paras 2, 7, 11, 33.

<sup>22</sup> ACCC's submissions, para 33.

<sup>23</sup> *Butcher v Lachlan Elder Realty Pty Limited* (2004) 218 CLR 592 at [40].

<sup>24</sup> ACCC's submissions, para 16.

<sup>25</sup> Google's submissions in chief, paras 17, 60-61.

<sup>26</sup> Google's submissions in chief, para 65; [2011] FCA 1086 at [240]-[241] (*AB 3/979*); [2012] FCAFC 49 at [97]-[98] (*AB 3/1077-1078*).

17. In addition, the ACCC mischaracterises the facts relating to the Harvey World Travel advertisements.<sup>27</sup> In this regard, the ad headlines were not limited to those referred to by the ACCC but also included "*Harveyworld Travel*" and "*Hervey World Travel*".<sup>28</sup> These were created by the advertiser's agent who added variations and misspellings of "*Harvey World Travel*" as keywords in the account and applied keyword insertion. This occurred without the involvement of Ms Wood or any other Google employee.<sup>29</sup> These advertisements could have been blocked had the advertiser taken up an invitation from Google to register such variations under Google's trade mark policy.<sup>30</sup> Further, Ms Wood did not add the keywords "*Harvey World Travel*" or "*Harvey Travel*" to the account; they were added prior to her involvement in relation to the account by an employee of the advertiser.<sup>31</sup> She subsequently performed a bulk upload of keywords across the advertiser's campaigns at the advertiser's direction.<sup>32</sup>
18. The chronology provided with the ACCC's submissions is incomplete. It makes no reference to various steps undertaken by the advertisers in relation to the impugned advertisements. Google will provide a more complete chronology at the hearing. For present purposes it will be noted that Google personnel had no involvement at all in relation to two of the four groups of advertisements, being the Alpha Dog Training and Just 4x4s Magazine advertisements, or in relation to three of the five Harvey World Travel advertisements.<sup>33</sup>

**DATED:** 31 August 2012



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<sup>27</sup> ACCC's submissions, paras 17-18.

<sup>28</sup> Ex A, pp 17, 40, 43-45 (AB 2/801, 809, 812-814).

<sup>29</sup> [2011] FCA 1086 at [216], [223], [225] (AB 3/971, 974).

<sup>30</sup> [2011] FCA 1086 at [224]-[225] (AB 3/974).

<sup>31</sup> [2011] FCA 1086 at [217] (AB 3/972).

<sup>32</sup> [2011] FCA 1086 at [219]-[221] (AB 3/973).

<sup>33</sup> [2011] FCA 1086 at [216], [223], [225], [309], [334] (AB 3/971, 974, 999, 1006).