

# Google Not Responsible for Third Party Search Advertisements

Andrew Walsh takes a look at the recent High Court decision and what it may mean for search advertising providers and businesses in the future.

## Introduction

In a much anticipated and recent judgment,<sup>1</sup> the High Court unanimously held that Google Inc (**Google**) did not engage in misleading or deceptive conduct contrary to s 52 of the *Trade Practices Act 1974* (Cth)<sup>2</sup> (the **Act**) through the publication or display of 'sponsored links', even though the sponsored links themselves were misleading or deceptive.

The decision has broad implications for providers and acquirers of search advertising, but also for trade mark owners and businesses the subject of misleading or deceptive search advertisements taken out by their competitors.

This article explores the key technical features of Google's sponsored links and its AdWords service. It then analyses the decisions of the High Court and the Courts below, and goes on to discuss the implications of these decisions.

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## Sponsored links and the Google AdWords service

Between 2005 and 2008, the period relevant to the Case, the Google search engine displayed two types of search results in response to a user's search query: 'organic search results' and 'sponsored links'. Organic search results were links to web pages that were ranked in order of relevance to the search query, determined by Google's proprietary algorithms. Sponsored links, on the other hand, were a form of advertisement, created by or at the direction of an advertiser. The advertiser would pay Google each time the sponsored link was 'clicked' by a user. Sponsored links were displayed as part of the search results when certain words or phrases chosen by the advertiser, known as 'keywords', were included in a search query. They were labelled 'sponsored links' and were distinguished from organic search results by shading and screen location.

Sponsored links were supplied by Google through its 'AdWords' service. A key feature of the AdWords service was the use of 'keyword insertion' coding. The coding enabled advertisers to include some of the words or phrases from a search query in the headline of the sponsored link itself. In effect, the user's own words would be played back to them in the search results, making the sponsored link appear more relevant to the user.

Today, Google's AdWords service continues to work in a similar way, except that sponsored links are now referred to as 'Ads' or 'AdWord advertisements' and are presented slightly differently on screen. Other search providers supply similar search advertising services, such as Bing and Yahoo! through the Yahoo! Bing Network.

## Claims of misleading or deceptive conduct

In 2007, the Australian Competition and Consumer Commission (the Commission) brought proceedings against Google in the Federal Court.<sup>3</sup>

The Commission claimed that Google had contravened s 52 of the Act by publishing or displaying 11 sponsored links that misrepresented associations or affiliations between businesses and misrepresented that the web pages to which the hyperlinks led would contain information concerning certain businesses.

One such sponsored link belonged to STA Travel, a well-known travel agent. A user of the Google search engine who searched the phrase 'harvey world travel' (a competitor of STA Travel) would be presented with search results including the following sponsored link, which hyperlinked to the STA Travel website:

*'Harvey Travel  
Unbeatable deals on flights, Hotel & Pkg's Search, Book & Pack Now!  
www.statravel.com.au'*

Interestingly, the Commission claimed that Google had contravened s 52 directly. It did not rely on s 75B of the Act<sup>4</sup>, which provided that a person who had 'aided, abetted, counselled or procured the contravention' of s 52 was 'involved in [the] contravention' for the purpose of the enforcement and remedies provisions of Part VI of the Act.

The Commission also claimed that Google had engaged in conduct contrary to s 52 by failing to sufficiently distinguish between organic search results and sponsored links. This claim was dismissed at first instance<sup>5</sup>, and is not considered further in this article.

## At first instance in the Federal Court

The primary judge, Justice Nicholas, held that the sponsored links were misleading or deceptive, or likely to mislead or deceive.<sup>6</sup> Significantly, however, Nicholas J said that Google did not 'make' those representations. It was acting 'merely as a conduit', passing on the advertisements of others without endorsing or adopting them.<sup>7</sup>

His Honour held that ordinary and reasonable members of the relevant class of consumers who might be affected by the alleged conduct (being people with basic knowledge and understanding of computers, the web and search engines) would have understood

1 *Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1 (6 February 2013) (the **Case**).

2 Now, s 18 of the *Australian Consumer Law*.

3 Claims were also brought against Trading Post (an advertiser), but these claims were settled and did not proceed to hearing.

4 Now, s 75B of the *Competition and Consumer Act 2010* (Cth).

5 *ACCC v Trading Post* (2011) 197 FCR 498 at 533-536.

6 *Ibid* 536-573.

7 *Ibid* 536-544.

that sponsored links were third party advertisements (as distinct from organic search results)<sup>8</sup> and that Google had not endorsed them and was not responsible in any meaningful way for their content.<sup>9</sup>

## Appeal to the Full Court

The Commission appealed to the Full Court in relation to the primary judge's finding that Google did not 'make' the representations contained in the sponsored links, but had acted 'merely as a conduit'. The finding, that the advertisements were themselves misleading or deceptive, was not challenged.

The Full Court (Keane CJ, Jacobson and Lander JJ) unanimously allowed the appeal, finding that Google had itself contravened s 52.<sup>10</sup> Their Honours held that the publishing or display of a sponsored link was, in fact, a response by Google to a search query.<sup>11</sup> Much emphasis was placed on this notion of 'response' in the Full Court's decision.

By publishing or displaying a sponsored link in response to a search query, the Full Court found that Google was making the representations in the sponsored links as a principal and not merely acting as a conduit passing on advertisements of third parties. The fact that the keywords and headlines were chosen by the advertiser did not, according to the Full Court, mean that the sponsored links were any less Google's response to the search queries.<sup>12</sup>

The notion of 'response' was also used by the Full Court to distinguish Google from traditional conduits or intermediaries, like newspaper publishers or television broadcasters who simply publish or display advertisements of others.<sup>13</sup>

## Appeal to the High Court

Google was granted special leave to appeal to the High Court. Google argued that all of the relevant aspects of the sponsored links – the headline, the advertising text, the URL, the keywords and the use of keyword insertion – were specified by the advertiser and Google was merely implementing the advertiser's instructions. The fact that the sponsored links were published or displayed in response to the user's search query was insufficient to establish Google's liability under s 52.

Google also argued that its technical facilities were not different, in principle, to the facilities provided to advertisers in other traditional mediums. It claimed that commercial associations or affiliations between an advertiser and third parties were something peculiar to the knowledge of the advertiser and not within Google's expertise.

The High Court unanimously allowed the appeal and set aside the Full Court's decision. A variety of specific reasons were given by the High Court, but they are best understood as illustrations of two main themes:

1. **Google did not 'make', in any authorial sense, the sponsored links that it published and displayed.** To this end, the High Court noted that Google did not control the search terms employed by the users of its search engine or the keywords chosen by its advertisers<sup>14</sup>; the content of sponsored

links and the keywords that trigger their publication or display were chosen by the advertiser,<sup>15</sup> (despite some evidence that Google employees had low level involvement in the selection of some keywords); and the Google search engine automatically produced search results based on its proprietary algorithms, which merely assemble information provided by its users and advertisers and this did not, therefore, distinguish Google from other traditional intermediaries, like newspaper publishers or television broadcasters who simply publish or display advertisements of others.<sup>16</sup>

2. **Ordinary and reasonable users would have understood that sponsored links were statements made by advertisers, which Google had not endorsed and was merely passing on for what they are worth.** To this end, it was noted that sponsored links were labelled 'Sponsored Links' and contained the URL of the advertiser, and that the primary judge's original findings in this regard were 'plainly correct'.<sup>17</sup>

## If the High Court had found that Google was more directly involved in the making of the sponsored links or had crossed the line into endorsing or adopting the sponsored links, the case may have been determined differently

The High Court clearly placed greater emphasis on the notion that sponsored links were the result of automated assembly of third party inputs, an algorithmic process triggered by the search query. This approach is distinct from the Full Court, which emphasised the notion that sponsored links were representations made in direct response to a search query. It is a reasonably subtle distinction.

Interestingly, the High Court also considered some of the practical implications of a finding against Google, which are reflective of the commercial realities and technological underpinnings of search businesses generally.

The majority (French CJ, Crennan and Kiefel JJ) considered the difficulties that would be encountered by Google if it were required to determine whether a sponsored link created by an advertiser might contravene s 52. The commercial associations or affiliations between advertisers and the web pages to which their sponsored links are directed, is not within Google's expertise.<sup>18</sup>

Heydon J, in a separate judgment, thought that it would be a 'very extreme conclusion' if in all cases Google was held to make the representations contained within the sponsored links of its advertisers. Such a finding would put Google (and others in the position of Google) at risk of committing numerous contraventions of the Act when producing search results.<sup>19</sup>

8 Ibid 533-534.

9 Ibid 540-542.

10 *ACCC v Google* (2012) 201 FCR 503, 521-522 and 524.

11 Ibid 521.

12 Ibid 520-521.

13 Ibid 522.

14 *Google Inc v ACCC* [2013] HCA 1, [67].

15 Ibid [68].

16 Ibid [69].

17 Ibid [70].

18 Ibid [72].

19 Ibid [143].

## For advertisers, the decision is a clear reminder of their responsibility to ensure their advertisements are not misleading or deceptive or likely to mislead or deceive

It is also interesting to consider the divergence in the High Court's decision in relation to liability for publication of misleading or deceptive advertisements.

French CJ, Crennan, Kiefel and Heydon JJ said that a publisher of a misleading or deceptive advertisement would ordinarily only engage in conduct contrary to s 52 if the publisher has adopted or endorsed the representations.

Hayne J, on the other hand, considered that publication, by itself, may be sufficient to constitute conduct contrary to s 52 and that concepts of adoption or endorsement have no footing in the words of s 52 itself.<sup>20</sup>

The contention between the two approaches is interesting and it would not be surprising to see more made of this in later appropriate cases.

### Implications for search advertising providers

The decision is a significant win for Google and other search advertising providers.

In Google's case, the vast majority of its revenue is generated from advertising (more than USD 43 billion in 2012, with year on year growth of 20%)<sup>21</sup> and a loss in this case would have been a blow to its current business and growth potential in Australia (estimated to be in the order of AUD 1-1.5 billion annually).<sup>22</sup> A requirement for search advertising providers to compliance check every search advertisement they received would drive complexity into their operations and increase costs. It would also affect their competitiveness against more traditional mediums of advertising. In this regard, the decision effectively levels the playing field between providers of search and traditional advertising, at least in respect of liability under s 18 of the *Australian Consumer Law* for representations in the advertisements they publish or display.

The decision also means that search advertising providers have become smaller targets for trade mark owners and businesses suffering detriment from misleading or deceptive search advertisements taken out by their competitors, provided, of course, that search advertising providers do not cross the line into endorsing or adopting the representations. The Full Court's decision (now set aside by the High Court) supported the making of s 18 claims against search advertising providers by aggrieved trade mark owners and businesses.

In considering the implications of this judgment, it is important to remember that the High Court's decision was very much determined by the facts of the case, particularly the absence (or low levels) of Google's involvement in choosing keywords (which the High Court held was the domain of advertisers) and search terms (the domain of users). If the High Court had found that Google was more directly involved in the making of the sponsored links or had crossed the line into endorsing or adopting the sponsored links, the case may have been determined differently.

Whether the decision continues to provide cover for search advertising providers will depend on how their commercial offerings and search technologies evolve over time. They will need to take care to stay behind the lines set by the High Court's decision. User-friendly search features, like search term auto-complete (all the major search providers offer this) and functions like the 'push' of search results to mobile devices (for example, based on geo-location data, something which is becoming more prevalent), are some of the factors that need to be considered in this context.

### Implications for advertisers

For advertisers, the decision is a clear reminder of their responsibility to ensure their advertisements are not misleading or deceptive or likely to mislead or deceive. In the case of search advertisements, issues can arise from obvious matters, like using a competitors' name or trade marks (lawful comparative advertising aside), and less obvious matters, like combinations of keywords, ad headings, ad text and hyperlinks. In response to the decision, the Association for Data-Driven Marketing and Advertising has announced plans to release guidelines to assist advertisers in navigating these issues. The guidance is expected to be released in May 2013.<sup>23</sup>

## Google will no longer investigate or restrict the use of trade mark terms in keywords (as distinct from the text of AdWord advertisements), even if a trade mark complaint is received

### Implications for trade mark owners and businesses generally

The biggest losers from the decision are trade mark owners and businesses the subject of misleading or deceptive search advertisements taken out by their competitors. As noted previously, the decision effectively eliminates a course of action that might previously have been available to them.

Google's 'AdWords Trademark Policy' offers some relief. Under the policy, trade mark owners can make a complaint to Google regarding the use of their trade marks in the *text* of AdWord advertisements. Google promises to investigate these complaints and may restrict the use of that trade mark in the text of the AdWord advertisement.<sup>24</sup>

But, here too it seems trade mark owners have been dealt another blow. As of 23 April 2013, little more than two months after the High Court decision, Google changed its 'AdWords Trademark Policy'. Google will no longer investigate or restrict the use of trade mark terms in keywords (as distinct from the text of AdWord advertisements), even if a trade mark complaint is received.<sup>25</sup> While the change is part of a larger global initiative of Google to align its AdWords policies worldwide, it is a neat fit with the timing and substance of the decision.

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20 Ibid [99].

21 Google, *Investor Relations* <<http://investor.google.com/financial/tables.html>> (retrieved 1 May 2013).

22 Australian Financial Review, 'Google tax bill boost won't deter Gillard tax grab', 1 May 2013, p 6.

23 See further: ADMA, 'High Court Ruling Finds Google Not Guilty' (13 February 2013) <http://www.adma.com.au/connect/articles/high-court-ruling-finds-google-not-guilty/> (retrieved 1 May 2013).

24 Google, *Adwords Trademark Policy* <http://support.google.com/adwordspolicy/answer/6118?hl=en> (retrieved 1 May 2013).

25 Ibid.