

# Major ACCC Win, Federal Court Rules Trivago Misled Customers

**Teresa Torcasio, Partner, Laura Young, Partner and Chantelle Radwan, Law Graduate, HWL Ebsworth,** comment on the Federal Court's judgment in *ACCC v Trivago*.

On Monday 20 January 2020, the Federal Court ruled that travel comparison website, Trivago N.V. (**Trivago**), misled consumers about cheap hotel deals on Trivago's website and in its television advertising. The decision sends a strong message to businesses to ensure that any comparison tools offered to consumers accurately and clearly depict the nature of the search results that can be obtained through the use of the tool and the benefit (if any) to consumers if they rely on such results, a pertinent issue given the increasing presence of online comparison websites and tools.

## Background

In August 2018, the Australian Consumer and Competition Commission (**ACCC**) instituted proceedings in the Federal Court against Trivago.

The ACCC claimed that from at least December 2013, Trivago ran television advertisements depicting its website as an impartial and objective medium for price comparisons. The advertisements represented that the Trivago website would assist consumers to identify the cheapest prices for hotel accommodation. However, according to the ACCC, Trivago's website instead prioritised advertisers who were willing to pay Trivago the highest cost per click fee.

The Federal Court agreed with the ACCC, finding that until at least 2 July 2018, Trivago misled consumers into believing that the Trivago website provided an impartial, objective and transparent price comparison for hotel room rates, when this was not the case, for the reasons outlined below.

## The Breaches

### Cheapest Price Representation

Section 18(1) of the Australian Consumer Law states that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

The Federal Court held that Trivago contravened section 18 of the Australian Consumer Law, as Trivago's website conveyed that it would quickly and easily identify the cheapest rates available for a hotel room responding to a consumer's search (referred to in the judgement as the "Cheapest Price Representation"), when in fact it did not. Justice Moshinsky stated at [203]<sup>1</sup>:

*"...in at least some cases, the cheapest offer for the hotel room did not appear on the Trivago website. This fact alone was sufficient to render the Cheapest Price Representation misleading or deceptive..."*

In making the Cheapest Price Representation, Trivago was also found to have contravened section 34 of the Australian Consumer Law, as it was determined that Trivago engaged in conduct that was likely to mislead the public as to the nature, characteristics and suitability for purpose of the accommodation search service provided through the Trivago website.

### Strike-Through Price Representation

The ACCC also alleged that Trivago's online "Strike-Through Price" comparisons were false or misleading as they compared offers for standard rooms with offers for

luxury rooms at the same hotel. This created a false impression of savings offered for the standard room (i.e., that the rooms were comparable and the price for the standard room was more competitive). Justice Moshinsky agreed. Critical to his finding was the depiction of standard rooms and luxury rooms online. His Honour stated at [207]<sup>2</sup>:

*"The Strike-Through Price appeared in red, Strike-through text, immediately above the Top Position Offer. It was a similar size to the Top Position Offer. The implicit representation that was conveyed was that the two offers that were juxtaposed, namely the Strike-Through Price and the Top Position Offer, were comparable offers apart from price; in other words, that the offers were, apart from price, 'like for like'. This is the natural inference from the presentation of the Trivago website."*

A consumer that hovered the cursor above the Strike-Through Price would see the following text:

*"The Strike-through price corresponds to the cheapest offer we received from the most expensive booking site on Trivago for this hotel and your stay dates."*

The presence of such text was not enough to prevent the court from concluding the Strike-Through Price representation amounted to a misleading representation and was a contravention of section 18 of the Australian Consumer Law.

Justice Moshinsky also held the representation amounted to a contravention of section 29(1)(i) of Australian Consumer Law, which prohibits the making of false or misleading representations in

<sup>1</sup> *Australian Competition and Consumer Commission v Trivago N.V.* [2020] FCA 16, [203].

<sup>2</sup> *Ibid*, at [207].

connection with the supply or possible supply of goods or services, or in connection with the promotion by any means of the supply or use of goods or services.

### Top Position Representation

The ACCC also alleged that Trivago misrepresented that the top position offers on its website were the cheapest available offers for an identified hotel, or had some other characteristic which made them more attractive than any other offer for that hotel. The Federal Court agreed, ruling the representation to be in contravention of section 18 and section 29(1)(i) of the Australian Consumer Law.

In support of this, Justice Moshinsky pointed to expert evidence which established that higher priced offers were selected as the top position offer over alternative lower priced offers in 66.8% of listings. Justice Moshinsky stated at [219]<sup>3</sup>:

*“Contrary to the Top Position Representation, in many cases the Top Position Offer was not the cheapest offer for the hotel, nor did it have some other characteristic that made it more attractive than any other offer for the hotel.”*

And further at [221]<sup>4</sup>:

*“The Top Position algorithm did not use non-price attributes of the offers to determine the composite score (and thus the Top Position Offer). As noted above, a very significant factor in the selection of the Top Position Offer is the CPC [i.e. ‘cost-per-click’], that is, the amount that Trivago will be paid by Online Booking Sites (rather than the quality of the hotel accommodation offer).”*

<sup>3</sup> Ibid, at [219].

<sup>4</sup> Ibid, at [221].

### Key Takeaways

The decision highlights the importance of ensuring that any comparison tools or representations offered for use by consumers accurately depict the nature of the search results and the benefit (if any) to consumers if they rely on such results. Such comparison tools are used widely in the market, both through increasingly popular comparison websites (as in the case of Trivago) but also by other businesses that wish to demonstrate that their product or offering is better than some other alternative or competitor. It is important for businesses that use price comparisons in their marketing or advertising to properly scrutinise their offering to ensure that they are not misleading consumers.

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