

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY
ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

No. S175 of 2012

BETWEEN:

GOOGLE INC
Appellant

AND:

AUSTRALIAN COMPETITION AND
CONSUMER COMMISSION
Respondent

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SUBMISSIONS OF THE RESPONDENT

Filed on behalf of:	The Respondent	Dated: 17 August 2012
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I
INTERNET PUBLICATION

1 These submissions are in a form suitable for publication on the Internet.

II
ISSUE

2 Google Inc (**Google**) responded to users' search queries by displaying
advertisements in addition to organic search results. Each advertisement
included a clickable blue headline and the Uniform Resource Locator (**URL**) of
the advertiser's website. Using the "dynamic keyword insertion feature" of its
10 "AdWords" system, Google inserted keywords from users' search queries into
the clickable blue headline. The keywords so inserted were found by the
primary judge (**PJ**) to give rise to misrepresentations as displayed in collocation
with the URL. The issue is whether Google thereby engaged in conduct that
was misleading or deceptive.

3 Contrary to Google's submissions (**GS**) at [2], the appeal is not concerned
simply with "a person who displays or publishes a third party advertisement".

III
SECTION 78B NOTICES

4 No notice under s 78B *Judiciary Act 1903* (Cth) is required.

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**IV
FACTS**

Google search engine

5 Google operates an internet search engine which enables users to locate
websites (PJ [47]: 3 AB 922). The Google search engine allows a user to enter
a "query" (a request for information) using a "keyword" (a specific word or
combination of words) (2 AB 548).

- 6 The Google search engine responds to queries by displaying “organic” search results and by displaying advertisements (labelled “sponsored links” at the relevant time). The search engine uses different systems to display each kind of response. One system determines organic search results, displayed as a list of websites, ranked in order of relevance (PJ [47]: 3 AB 922; 1 AB 165 [11]; 1 AB 169-170 [29]-[33]; see also 2 AB 553). A different system – the AdWords system – displays advertisements above or to the right of the organic search results (PJ [52]: 3 AB 923; 1 AB 164 [8]; 1 AB 173 [46]-[47]; 1 AB 178-179 [9]-[10]).
- 10 7 Advertisements consist of three elements: a “headline”, the “ad text”, and a URL. The headline is the “top line of copy in an ad” (2 AB 583). It appears in large blue font and is “clickable” – that is, if the user clicks on the headline the user is taken to the website designated by the nominated URL. The ad text is “for [the advertiser’s] key message and call to action” (2 AB 582) and appears in black font. The URL appears in green and is the destination for a user who clicks on the clickable headline (2 AB 589).
- 8 The Adwords system allows an advertiser to nominate the content of the headline, the ad text and the URL in its advertisement as well as the keywords that will trigger the advertisement, the “match type”, and the amount it is prepared to pay to Google (typically either each time the advertisement is displayed or each time the headline is clicked) (1 AB 186 [38]; 2 AB 551).
- 20
- 9 The Adwords system offers advertisers three “match types”: “exact match” (which will trigger an advertisement only if the user’s query is an exact match for a keyword nominated by the advertiser); “phrase match” (which will trigger an advertisement based on any word in a phrase) and “broad match” (which will trigger an advertisement “based on known associations determined by Google’s proprietary algorithms” so as to display the advertisement in response to queries that “may not contain the exact keywords but that, in Google’s opinion, are sufficiently related that they would provide a good experience for the advertiser and the ... user”) (1 AB 171 [37]; 1 AB 123; 2 AB 569). By default, Google sets all keywords to “broad match” (2 AB 569).
- 30

- 10 In respect of the headline, the AdWords system offers an advertiser a choice between a fixed headline and a dynamic keyword insertion feature. The following is an example of a fixed headline (2 AB 800):

[Escape Travel Online](#)
Airlines, Accommodation, Car Hire
Save Time and Money - Escape Travel
www.EscapeTravel.com.au

10 In this example, an advertisement for Escape Travel not in issue in the appeal and not impugned in the proceeding in the Federal Court, a Google user has searched for “harvey world travel” (as is apparent from the query shown in the search box on Google’s search results page (2 AB 800)). Escape Travel has nominated a fixed headline of “[Escape Travel Online](#)”; the “ad text” of “Airlines, Accommodation, Car Hire Save Time and Money – Escape Travel”; and the URL: www.EscapeTravel.com.au. If the user clicked on the headline “[Escape Travel Online](#)” he or she would go to <www.escapetravel.com.au> and the advertiser, Escape Travel would pay Google for the user having clicked through to the website.

- 11 The dynamic keyword insertion feature allows an advertiser to nominate keywords which, when they “match” the user’s search query, are automatically inserted into the headline of the advertisement (1 AB 194 [66]) so that “the headline replicates the whole or a part of the relevant search query” (PJ [102]: 3 AB 942-943), with the result that the advertisement is “even more relevant to every search” (2 AB 580). The following is an example of dynamic keyword insertion (2 AB 799):

20 [Harvey World Travel](#)
www.statravel.com.au Unbeatable deals on flights, Hotels & Pkg's-Search, Book & Pack Now!

This example is illustrative of the kind of advertisement in issue in the appeal. The advertiser is STA Travel, but the blue clickable headline in its advertisement reads “[Harvey World Travel](#)” and has been dynamically inserted into the advertisement by the AdWords system because the user’s search query comprised the keywords “Harvey World Travel”.

12 “Whether, how and in what order” advertisements are displayed by the Adwords system “is the product of a complex process that is Google’s proprietary design” (1 AB 164 [8], 171 [39]-[40]). This complex process, described as an “auction”, is triggered every time a user enters a query. Eligibility to participate in an auction is determined by an advertisement’s “Quality Score”. The Quality Score is a function of several factors, one of which is the relevance of the advertisement to the query (1 AB 202-204). Advertisements eligible according to their Quality Score are then ranked by the auction process (PJ [56]: 3 AB 924; 1 AB 171 [39]-[40]; 1 AB 179-180 [15]; 1 AB 202-204).

10 13 Google’s submissions describe its AdWords system as “self-serve”, and as one in which advertisers “create their own advertisements”: GS [7]. They say that advertisers determine the circumstances in which their advertisement will be displayed: GS [8]. In fact, it is Google’s AdWords system that takes a user’s keyword, entered as a search query, and dynamically inserts it into the advertisement. And it is Google’s Adwords system which determines “whether, how and in what order” an advertisement is published in response to a user’s query.

Advertisements in issue

14 The four groups of advertisements in issue in the appeal are identified in Order
20 2(i)-(iv) of the orders of the Full Court: 3 AB 1082-1084.

15 The advertisements in each of the four groups, displayed in response to users’ search queries, all had headlines into which the users’ keywords were dynamically inserted by the AdWords system. In relation to advertisements in two of those groups – the “Harvey World Travel” advertisements and the “Honda .com.au” advertisements – Google employees assisted the advertisers to “maximise” the effectiveness of their sponsored link campaigns in ways that are material, and explained further below.

16 The primary judge found, and it is now common ground, that an ordinary and
30 reasonable user would have understood that, if the user clicked on the headline of each advertisement, the user would go to the webpage designated by the URL displayed beneath the headline which would usually be the website of the

advertiser whose identity would be apparent from the URL (PJ [187]: 3 AB 964). Against that background, the primary judge found, and it is now common ground, that one or more misrepresentations arose from the collocation in each advertisement of the URL of the advertiser with the headline into which keywords entered by the user had been dynamically inserted.

17 In the case of each of the “Harvey World Travel” advertisements (referred to in Order 2(i) and reproduced at 2 AB, 799-800, 801, 809-810 and 812): the user’s query was one of; “Harvey World Travel”, “harveyworld travel”, “Harvey World Travle”, or “Hervey World Travel”; the headline was “Harvey World Travel” or
10 “Harvey Travel” and the URL was that of STA Travel. His Honour found that the advertisements represented, contrary to the fact, that: there was an association between STA Travel and Harvey World Travel businesses; there was an affiliation between STA Travel and Harvey World Travel businesses; information regarding the Harvey World Travel businesses could be found at STA Travel’s website; and information regarding the travel services provided by the businesses associated with the name “Harvey World Travel” could be found at STA Travel’s website (PJ [228], [237]; 3 AB 975-976, 978).

18 “Harvey World Travel” and “harvey travel” were added as dynamic keywords by Ms Wood, a “creative maximiser” who worked for Google and who
20 “implemented” STA Travel’s “campaign”: (PJ [214], [216(a)], [221]: 3 AB 971-973; 1 AB 348-349 [28]-[29]). Earlier Ms Wood had restructured STA Travel’s campaign by grouping some of the keywords, including “Harvey World Travel” and “harvey travel” into a new “group” labelled “competitors” (1 AB 344 at [13b]; 1 AB 390-391, 408-412).

19 In the case of the “Honda.com.au” advertisements (referred to in order 2(ii) and reproduced at 2 AB 815-816): the user’s query was “honda.com.au”, the headline was “Honda .com.au” and the URL was that of CarSales. His Honour found that the advertisements represented, contrary to the fact, that by clicking on the headline users would be taken to the Honda Australia website (PJ [246],
30 [251]: 3 AB 981, 982).

20 The nomination of “honda .com.au” for the purposes of the dynamic keyword insertion feature of the AdWords system was suggested to CarSales by

Mr Bayley, a Google employee, who worked on the account for CarSales (PJ [255]: 3 AB 983-984). Mr Bayley recommended that CarSales use keyword insertion for every advertisement and “create broad match versions of phrase/exact matched keywords” (1 AB 434) (i.e. to convert keywords from phrase/exact match to broad match). He also recommended “Honda .com.au” as a keyword (1 AB 437-438). The last line of the Keyword Report (1 AB 370 [154]; 2 AB 659) indicates that the impugned advertisement utilised key word insertion and broad match.

10 21 In the case of the “Alpha Dog Training” advertisement (referred to in order (2)(iii) and reproduced at 2 AB 823-825), the user’s query was; “Alpha dog Training” and “Alpha Dog Training”, the headline was “Alpha Dog Training” and the URL was that of The Dog Trainer Pty Ltd (**Ausdog**). His Honour found that the advertisement represented, contrary to the fact, that there was an association between Ausdog and Alpha Dog Training’s business, and that by clicking on the headline users of the website would be taken to a website associated with the business carried on under the name Alpha Dog Training or a website at which they could find information concerning that business (PJ [317]: 3 AB 1001).

20 22 In the case of the “Just 4x4s Magazine” advertisement (referred to in order 2(iv) and reproduced at 2 AB 794), the user’s query was “just 4x4s magazine”, the headline was “Just 4x4s Magazine” and the URL was that of “The Trading Post”. His Honour found that the advertisement represented, contrary to the fact, that there was a commercial association between The Trading Post and Just 4x4s Magazine and that information regarding the Just 4x4s Magazine could be found at the Trading Post website (PJ [341]: 3 AB 1009).

Primary Judgment

30 23 Contrary to Google’s submissions at [15], [16], [19] and [65], the ACCC’s case before the primary judge was not confined to an allegation that Google engaged in misleading and deceptive conduct only by “publishing” the advertisements in issue. The Full Court (**FC**) correctly rejected Google’s submission in that regard as being “without substance” (FC [99]-[103]: 3 AB 1078-1079). Google’s conduct in and in relation to the operation of the dynamic keyword insertion

feature of its AdWords program to generate the relevant headlines in response to users' queries was squarely pleaded in the Third Further Amended Statement of Claim at [10], [124]-[127], [131] (1 AB 25, 67-69) and was squarely put by senior counsel for the ACCC in closing submissions before the primary judge (PJ [192] and [226]: 3 AB 965, 975).

24 In finding that Google (as distinct from the advertiser) had not engaged in misleading and deceptive conduct, the primary judge reasoned that, because a reasonable user would have understood the advertisements to be advertisements of the advertiser, the "key question" was whether the representations made in the advertisements had been "endorsed or adopted" by Google and that the answer to that "key question" was that they had not (PJ [191], [194], [241], [251], [318], [342]: 3 AB 965, 996, 979, 982, 1001, 1009).

Full Court Judgment

25 The Full Court did not ask whether or not the representations made in the advertisements of advertisers had been "endorsed or adopted" by Google (FC [87]: 3 AB 1074-1075). The Full Court characterised the relevant question differently (FC [96]: 3 AB 1077):

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. As an issue of fact, that question reasonably admits of only one answer.

26 The Full Court found that "Google's conduct consists relevantly of the display of the sponsored link [relevantly, the heading within the advertisement] in response to the entry of the user's search term in collocation with the advertiser's URL" as "effected by Google's [search] engine in response to a user's search" (FC [88]: 3 AB 1075). It was Google that thereby "inform[ed] 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" (FC [92]: 3 AB 1076).

V

APPLICABLE STATUTES

27 The ACCC accepts Google's statement of applicable statutes at GS [67].

VI

ARGUMENT

28 The appeal presents a question about the proper characterisation of the facts and about the proper identification of the facts to be characterised.

29 To make - as does Google - the obvious point that the four groups of advertisements in issue were advertisements of advertisers and to ask only
10 whether Google "adopted or endorsed" representations conveyed by the advertisements is to ask the wrong question. It is to examine Google's conduct as though that conduct consisted simply of publishing (in the sense of "passing on") an advertisement created by someone else and to treat the case as one simply about "who made" some representation that would be misleading or deceptive independently of the way in which it came to be published: see GS [2], [28], [32]-[38].

30 The applicable legal principles rather require that Google's course of conduct be examined as a whole and in light of the facts and circumstances that made the representations conveyed by the advertisements misleading or deceptive.
20 "Everything relevant" Google did to bring about that which was misleading or deceptive in the four groups of advertisements "must be taken into account".¹ It "invites error to look at isolated parts" of Google's conduct.² It also invites error to fail to link that conduct to the particular representations conveyed by the advertisements that were misleading or deceptive. Indeed, in *Butcher*, the plurality examined "the nature of the parties, the character of the transaction contemplated, and the contents of the brochure itself" to conclude that the agent was not making the relevant representation.³

¹ *Butcher v Lachlan Elder Realty Pty Limited* (2004) 218 CLR 592 (*Butcher*) at 605 [39] (Gleeson CJ, Hayne and Heydon JJ, 625 [109] (McHugh J)).

² *Butcher* (2004) 218 CLR 592 at 625 [109] (McHugh J).

³ *Butcher* (2004) 218 CLR 592 at 605-609 [39]-[51].

31 To determine whether or not Google engaged in conduct that was misleading or deceptive, it is therefore necessary to identify with some precision the features of the four groups of advertisements that made them misleading or deceptive so as to go on to determine what, if any, conduct in which Google engaged resulted in the four groups of advertisements having those misleading or deceptive features.

32 What was misleading or deceptive about the four groups of advertisements was the particular collocation of the advertiser's URL with a headline consisting of keywords that Google's AdWords system had inserted into the advertisements
10 against the background of the special functionality of the headline enabling a user to click on it and be taken to the advertiser's website.

33 What, then, did Google relevantly do to display the headlines in collocation with the URLs in the four groups of advertisements? That Google can be seen to have displayed advertisements of advertisers is but one aspect of an entire course of conduct which involved much more than that. Google displayed the advertisements in response to users' search queries: the users asked questions of Google in the form of queries using particular keywords and Google responded to those queries with the particular advertisements. Google used its proprietary algorithms to determine which particular advertisements
20 would be eligible for display in response to a given query and determined which from amongst those eligible advertisements would be published, in response to a user's query. Google inserted the keywords from the users' queries into the headlines of the advertisements. Google collocated the headline with the advertiser's URL and gave the headline the functional feature that "if a person clicks on the headline they will be taken to the website address displayed beneath the headline" (PJ [187]; 3 AB 964).

34 In light of Google's *entire* course of conduct, and in light of *all* the surrounding facts and circumstances, the Full Court was correct to hold that (3 AB 1076 [92]):

30 *[Google was] not merely passing on the URL as a statement made by the advertiser for what the statement is worth. Rather, Google inform[ed] the user, by its response to the query, that the content of the sponsored*

link [was] responsive to the user's query about the subject matter of the keyword.

VII

NOTICE OF CONTENTION

- 35 As set out at [18] and [20] of these submissions, Google employees assisted AdWords customers to "maximise" the effectiveness of their sponsored link campaigns. Google employees grouped certain of STA's keywords, including "Harvey World Travel", into one group identified as "Competitors" (PJ [217]: 3 AB 972-3). Google employees suggested keywords to its AdWords customers, including "Honda .com.au", the relevant keyword that triggered the advertisement (1 AB 370 [154], 372-5 [168]-[171], 439-442; 2 AB 832).
- 10
- 36 This conduct is relevant to the assessment of Google's conduct as a whole and of whether, in light of the relevant surrounding facts and circumstances, that conduct was misleading or deceptive or likely to mislead or deceive. The Full Court erred by regarding this conduct as irrelevant, and by failing to take it into account in relation to the advertisements created by the search terms "harvey world travel" and "honda.com.au" (or variations thereof) (FC at [98]: 3 AB 1078).

VIII

ESTIMATE OF TIME

- 20 37 The Respondent estimates that it requires 1 hour to present its oral argument.

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