HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, HEYDON, CRENNAN AND KIEFEL JJ

GOOGLE INC APPELLANT

AND

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION RESPONDENT

Google Inc v Australian Competition and Consumer Commission
[2013] HCA 1
6 February 2013
S175/2012

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Full Court of the Federal Court of Australia made on 3 April 2012 and the orders of the Federal Court of Australia made on 4 May 2012 and, in their place, order that the appeal to the Full Court be dismissed with costs.*

On appeal from the Federal Court of Australia

Representation

A J L Bannon SC with C Dimitriadis for the appellant (instructed by Gilbert + Tobin)

S T White SC with K C Morgan for the respondent (instructed by Corrs Chambers Westgarth)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Google Inc v Australian Competition and Consumer Commission

Trade practices – Misleading or deceptive conduct – Search engine operator displayed "sponsored links" on search results page – Sponsored links created by or at direction of advertisers – Sponsored links comprised advertising text which directed users to web sites of advertisers' choosing – Whether search engine operator engaged in misleading or deceptive conduct by publishing or displaying sponsored links which contained misleading representations made by advertisers – Whether search engine operator adopted or endorsed misleading representations.

Words and phrases – "adoption", "endorsement", "intermediary", "misleading or deceptive conduct", "misleading representation".

Trade Practices Act 1974 (Cth), ss 52, 85(3).

1 FRENCH CJ, CRENNAN AND KIEFEL JJ. The appellant, Google Inc ("Google"), operates the well-known internet search engine "Google" ("the Google search engine")[1]. The respondent, the Australian Competition and Consumer Commission ("the ACCC"), claims that particular search results displayed by the Google search engine between 2005 and 2008 conveyed misleading and deceptive representations, and that, by publishing or displaying those search results, Google engaged in conduct in contravention of s 52 of the *Trade Practices Act* 1974 (Cth) ("the Act")[2].

2 In July 2007, the ACCC initiated proceedings under Pt VI of the Act, seeking declarations and injunctive relief against Google and another party. At first instance in the Federal Court of Australia, the primary judge (Nicholas J) dismissed the ACCC's application to the extent that it related to Google on the basis that Google had not made the misleading and deceptive representations relied upon by the ACCC[3]. The Full Court of the Federal Court (Keane CJ, Jacobson and Lander JJ) allowed the ACCC's appeal, and made declarations to the effect that Google had contravened s 52 of the Act by publishing the search results[4]. By special leave, Google now appeals to this Court. The ACCC has filed a notice of contention concerning an aspect of the evidence it contends is relevant to conclusions about Google's conduct.

3 As explained below, the search results which are the subject of these proceedings are "sponsored links" – a form of advertisement created by, or at the direction of, advertisers willing to pay Google for advertising text which directs users to a web site of the advertiser's choosing. It is not now in contention that the sponsored links which are the subject of this appeal – referred to in these reasons as "the STA Travel advertisements", "the Carsales advertisements", "the Ausdog advertisement" and "the Trading Post advertisement" – conveyed misleading and deceptive representations. What the present appeal concerns is whether, in all the circumstances, Google (as distinct from the advertisers to whom the sponsored links belonged) engaged in misleading and deceptive conduct by publishing or displaying the sponsored links. In the reasons which

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1 The Google search engine is accessible to users in Australia through the web sites google.com and google.com.au.

2 Section 52 of the Act was replaced on 1 January 2011 by s 18 of the Australian Consumer Law, a schedule to the *Competition and Consumer Act* 2010 (Cth).

3 *Australian Competition and Consumer Commission v Trading Post Australia Pty Ltd* ("*ACCC v Trading Post*") (2011) 197 FCR 498.

4 *Australian Competition and Consumer Commission v Google Inc* ("*ACCC v Google*") (2012) 201 FCR 503.

follow, it will be explained that Google did not contravene s 52 of the Act. Google did not author the sponsored links; it merely published or displayed, without adoption or endorsement, misleading representations made by advertisers.

Relevant principles

4 At all times relevant to these proceedings, s 52(1) of the Act, found in Div 1 of Pt V[5], provided that "[a] corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive". The ACCC sought to establish that Google had contravened s 52 directly, and did not seek to rely on s 75B of the Act, which relevantly provided that a person who had "aided, abetted, counselled or procured the contravention" of a provision of Pt V would be a person "involved in [the] contravention" for the purpose of the enforcement and remedies provisions in Pt VI.

5 Google sought to rely on s 85(3) of the Act. Section 85[6], in Pt VI, was headed "Defences", and sub-s (3) provided:

> "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."

More will be said about s 85(3) later in these reasons.

6 A number of well-established propositions about s 52 may be stated briefly. First, the words "likely to mislead or deceive" in s 52 make it clear that it is not necessary to demonstrate actual deception to establish a contravention of s 52[7]. The ACCC did not call evidence to show that any user of the Google search engine was misled or deceived in any relevant respect[8].

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5 Part V was entitled "Consumer protection". Division 1 covered "Unfair practices".

6 See now Australian Consumer Law, s 251.

7 *Taco Company of Australia Inc v Taco Bell Pty Ltd* ("*Taco Bell*") (1982) 42 ALR 177 at 202 per Deane and Fitzgerald JJ.

8 *ACCC v Trading Post* (2011) 197 FCR 498 at 533 [152].

7 Second, where an issue in s 52 proceedings is the effect of conduct on a class of persons such as consumers who may range from the gullible to the astute, the court must consider whether "the 'ordinary' or 'reasonable' members of that class" would be misled or deceived[9]. The primary judge applied that test.

8 Third, conduct causing confusion and wonderment is not necessarily co-extensive with misleading or deceptive conduct[10].

9 Fourth, s 52 is not confined to conduct which is intended to mislead or deceive. A corporation could contravene s 52 even though it acted reasonably and honestly[11]. However, as Mason ACJ, Wilson, Deane and Dawson JJ observed in *Yorke v Lucas*[12]:

> "That does not ... 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."

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9 *Campomar Sociedad Limitada v Nike International Ltd* ("*Campomar*") (2000) 202 CLR 45 at 85 [102]; [2000] HCA 12. See also *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* ("*Puxu*") (1982) 149 CLR 191 at 199 per Gibbs CJ; [1982] HCA 44; *Campomar* (2000) 202 CLR 45 at 85 [103], 86-87 [105].

10 *Campomar* (2000) 202 CLR 45 at 87 [106], approving *Taco Bell* (1982) 42 ALR 177 at 201 per Deane and Fitzgerald JJ. See also *Puxu* (1982) 149 CLR 191 at 198 per Gibbs CJ.

11 *Puxu* (1982) 149 CLR 191 at 197 per Gibbs CJ. See also *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 228 per Stephen J; [1978] HCA 11; *Yorke v Lucas* (1985) 158 CLR 661 at 666 per Mason ACJ, Wilson, Deane and Dawson JJ; [1985] HCA 65.

12 (1985) 158 CLR 661 at 666. See also *Butcher v Lachlan Elder Realty Pty Ltd* ("*Butcher*") (2004) 218 CLR 592 at 605 [38] per Gleeson CJ, Hayne and Heydon JJ; [2004] HCA 60; *Australian Competition and Consumer Commission v Channel Seven Brisbane Pty Ltd* ("*ACCC v Channel Seven*") (2009) 239 CLR 305 at 321 [43] per French CJ and Kiefel JJ, 323-324 [57] per Gummow J; [2009] HCA 19.

10 In the courts below, there was some discussion of an early case, *Universal Telecasters (Qld) Ltd v Guthrie*[13]. *Guthrie* concerned the corporate proprietor of a television station which had been convicted on a charge under s 53(e) of the Act in connection with the broadcast of an advertisement, sourced from one of its customers, which contained a misleading statement concerning the price of certain motor vehicles. A majority of the Full Court of the Federal Court (Bowen CJ and Franki J; Nimmo J dissenting) found that the corporation had successfully established a defence under s 85(3) of the Act, and quashed the conviction. However, all members of the Full Court found that, by broadcasting the advertisement, the corporation had itself made the misleading statement – although, given the result, the opinions of Bowen CJ and Franki J on this issue were *obiter dicta*. On the question of whether an intermediary broadcasting a statement on behalf of another can be said to "make" the statement for the purposes of s 53(e), Bowen CJ said[14]:

> "where there are express words of adoption or exclusion, this may, perhaps, be a proper line to draw. If so, then logically it would seem difficult to distinguish the case where, by necessary implication the statement was made for or on behalf of another. These will be matters for decision when an appropriate case arises ...
>
> The fact that a statement is clearly an advertisement for a particular advertiser would not seem to constitute a sufficient basis in the circumstances to justify a holding that the statement was not made by the television station.
>
> ... Even if it be proper to distinguish statements, on the basis they are expressly or by necessary implication statements of the advertiser and not of the television station, the statement in this case is not seen to be such a statement."

11 In *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd*[15], the Full Court of the Federal Court (Bowen CJ, Lockhart and Fitzgerald JJ) considered *Guthrie* in the context of an alleged contravention of s 52 of the Act arising from the publication of several newspaper articles. The members of the Full Court recognised that a newspaper's publication of material encompasses both the

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13 ("*Guthrie*") (1978) 18 ALR 531.

14 (1978) 18 ALR 531 at 533.

15 ("*Global Sportsman*") (1984) 2 FCR 82.

making of representations and the *passing on* of the representations of others[16]. Their Honours found that the publication of an inaccurate statement of another conveys an essentially different meaning from that conveyed by the original statement (unless the original statement is adopted by the publisher), and that mere publication of the statement will not necessarily amount to adoption by the publisher[17]. This approach presaged the formulation of the principle established by this Court in *Yorke v Lucas*[18]. It also implicitly qualified the Full Court's apparent support in *Guthrie* for the proposition that the mere fact that a broadcaster is obviously not the source of a misleading advertisement may not be sufficient for the broadcaster to avoid a contravention of s 52. In any event, the Full Court in *Global Sportsman* noted that Bowen CJ had made it clear in *Guthrie* that it was necessary to refer to all the facts of a particular case, including the content of an advertisement, before deciding whether an intermediary broadcaster had made any misleading statements contained in the advertisement of another[19].

12 In a subsequent case, *Gardam v George Wills & Co Ltd*[20], which concerned a defendant who supplied goods with an anonymous label containing product information, French J said[21]:

> "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".

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16 (1984) 2 FCR 82 at 91-92.

17 (1984) 2 FCR 82 at 89-90. See also *Butcher* (2004) 218 CLR 592 at 605 [38]-[40] per Gleeson CJ, Hayne and Heydon JJ; *ACCC v Channel Seven* (2009) 239 CLR 305 at 321 [43] per French CJ and Kiefel J, 323-324 [57] per Gummow J.

18 (1985) 158 CLR 661 at 666 per Mason ACJ, Wilson, Deane and Dawson JJ.

19 (1984) 2 FCR 82 at 89.

20 (1988) 82 ALR 415.

21 (1988) 82 ALR 415 at 427.

13 Gleeson CJ, Hayne and Heydon JJ further explained the correct approach to intermediaries in *Butcher*[22]. *Butcher* concerned an alleged contravention of s 52 by a real estate agent who had incorporated an inaccurate survey diagram supplied by the vendor of a property into an advertising brochure, and provided that brochure to potential purchasers of the property. Gleeson CJ, Hayne and Heydon JJ found that the agent had not contravened s 52 because he had done no more than communicate the vendor's representation to purchasers without adopting or endorsing it[23]. Their Honours adopted the principles stated by Mason ACJ, Wilson, Deane and Dawson JJ in *Yorke v Lucas*[24], and said[25]:

> "In applying those principles, it is important that the agent's conduct be viewed as a whole. It is not right to characterise the problem as one of analysing the effect of its 'conduct' divorced from 'disclaimers' about that 'conduct' and divorced from other circumstances which might qualify its character."

14 Their Honours went on to say that the conclusion in *Butcher* flowed from the nature of the parties, the character of the transaction and the content of the brochure[26].

15 It has been established in relation to intermediaries or agents that the question whether a corporation which publishes, communicates or passes on the misleading representation of another has itself engaged in misleading or deceptive conduct will depend on whether it would appear to ordinary and reasonable members of the relevant class that the corporation has adopted or endorsed that representation[27]. It has also been established that, if that question

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22 (2004) 218 CLR 592.

23 (2004) 218 CLR 592 at 605 [40].

24 (1985) 158 CLR 661 at 666. See *Butcher* (2004) 218 CLR 592 at 605 [38].

25 (2004) 218 CLR 592 at 605 [39].

26 (2004) 218 CLR 592 at 605 [40].

27 *Yorke v Lucas* (1985) 158 CLR 661 at 666 per Mason ACJ, Wilson, Deane and Dawson JJ; *Butcher* (2004) 218 CLR 592 at 605 [39]-[40] per Gleeson CJ, Hayne and Heydon JJ; *ACCC v Channel Seven* (2009) 239 CLR 305 at 321 [43] per French CJ and Kiefel J, 323-324 [57] per Gummow J. See generally Heydon, *Trade Practices Law – Competition and Consumer Law*, (looseleaf service), vol 3 at [160.1490]-[160.1500].

arises, it will be a question of fact to be decided by reference to all the circumstances of a particular case[28].

16 As will be explained below, the ACCC contends that Google and the Google search engine do not operate analogously to other intermediaries or agents, and that the principles established in relation to intermediaries or agents do not apply to the facts of this case.

Factual background

17 In order to explain the conduct by Google which the ACCC says contravenes s 52 of the Act, it is necessary to say something about the operation of the Google search engine, its interaction with Google's AdWords program, and how each of the STA Travel advertisements, the Carsales advertisements, the Ausdog advertisement and the Trading Post advertisement came to be created using the AdWords program and displayed using the Google search engine.

The internet and the Google search engine

18 The internet is a global network of networks of computers. Computers connected to the internet communicate with each other – requesting and receiving data – by means of a common language, the Internet Protocol[29]. The World Wide Web is a vast system of interlinked documents ("web pages") which can be accessed by computers connected to the internet. Each web page has a unique address, or URL[30]. An internet user who wishes to access a web page at a known address can access that web page by entering the address into the web browser on his or her computer.

19 An internet user who wishes to access a web page but does not know its address, or wishes to locate a selection of web pages relevant to a particular topic, is likely to use an internet search engine, like the Google search engine, in much the same way that a person who does not know the telephone number of a

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28 *Yorke v Lucas* (1985) 158 CLR 661 at 666 per Mason ACJ, Wilson, Deane and Dawson JJ; *Butcher* (2004) 218 CLR 592 at 605 [39]-[40] per Gleeson CJ, Hayne and Heydon JJ. See also *Global Sportsman* (1984) 2 FCR 82 at 89.

29 See *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 86 ALJR 494 at 498-499 [15] per French CJ, Crennan and Kiefel JJ; 286 ALR 466 at 470; [2012] HCA 16.

30 The acronym "URL", for uniform resource locator, is used to refer to the address of a web page.

particular business, or wishes to contact a local provider of a particular product or service, might once have been likely to use a telephone directory.

20 The Google search engine allows internet users to search for web pages by entering search terms into a search field and clicking on a button marked "Google Search" ("the search button"). Google keeps and constantly updates an index of billions of web pages which enables it to respond to users' search requests. Google does not control the search terms entered by users of the Google search engine, or the material available on the internet.

21 During the period relevant to these proceedings, if a user of the Google search engine entered search terms into the search field and clicked on the search button, the Google search engine would display two types of search results: "organic search results" and "sponsored links".

22 Organic search results are links to web pages, which are ranked in order of relevance to the search terms entered by the user. The Google search engine always displays organic search results, and organic search results are always displayed free of charge. Google does not sell placement in its organic search results. Instead, the order of relevance of organic search results is determined by a complex proprietary algorithm developed by Google which is a function of many factors, including the content of each web page which Google has indexed, and the number and type of links between each of those web pages.

23 As mentioned above, a sponsored link is a form of advertisement. Each sponsored link is created by, or at the direction of, an advertiser who typically pays Google each time a user of the Google search engine clicks on the sponsored link. Not all search terms entered into the Google search engine result in the display of sponsored links. When the Google search engine does display sponsored links, they are listed separately from organic search results. They appear either above the organic search results in a shaded box marked "Sponsored Links" ("top left sponsored links"), or to the far right of the organic search results in a box marked "Sponsored Links" ("right side sponsored links"). Whether the Google search engine displays sponsored links, and the order and position in which such links appear if they are displayed, is not determined by the algorithm which determines the order of relevance of organic search results, but by the AdWords program, described below.

24 An example of a search results page which includes organic search results, top left sponsored links and right side sponsored links was included in the primary judge's reasons[31].

Sponsored links and the AdWords program

25 The AdWords program is a program which allows advertisers to create, change and monitor the performance of sponsored links. Google provides advertisers with access to the AdWords program through AdWords accounts. Worldwide, hundreds of thousands of advertisers use the AdWords program. Google derives most of its revenue from its online advertising business, which involves publishing or displaying advertisements as sponsored links on its search results pages.

26 A sponsored link consists of three elements: a headline which incorporates a link to a web page (in blue text); the address of the web page to which the headline links (in green text); and some brief advertising text (in black text). An advertiser using the AdWords program to create a sponsored link will specify the headline, the address of the web page to which the headline links, and the advertising text, within certain limits (such as word limits) set by Google. The advertiser will also specify "keywords" which trigger the appearance of the sponsored link when entered as search terms by a user of the Google search engine. In some cases, the advertiser may specify that the headline to the sponsored link will consist of the search terms entered by the user of the Google search engine that correspond with the keywords selected by the advertiser – a facility referred to as "keyword insertion".

27 Participation in the AdWords program is subject to Google's Terms of Service, the AdWords Program Terms, and applicable Google policies. Google's Terms of Service relevantly provide as follows:

> "8.5 You agree that you are solely responsible for (and that Google has no responsibility to you or to any third party for) any Content that you create, transmit or display while using the Services and for the consequences of your actions (including any loss or damage which Google may suffer) by doing so.
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> ...
>
> 9.6 Unless you have been expressly authorized to do so in writing by Google, you agree that in using the Services, you will not use any

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31 *ACCC v Trading Post* (2011) 197 FCR 498 at 503 [6].

trade mark, service mark, trade name, logo of any company or organization in a way that is likely or intended to cause confusion about the owner or authorized user of such marks, names or logos."

28 The AdWords Program Terms relevantly provide:

"2. **The Program.** Customer is solely responsible for all: (a) ad targeting options and keywords (collectively 'Targets') and all ad content, ad information, and ad URLs ('Creative'), whether generated by or for Customer; and (b) web sites, services and landing pages which Creative links or directs viewers to, and advertised services and products (collectively 'Services').

...

5. **('Use').** Customer represents and warrants that (y) all Customer information is complete, correct and current; and (z) any Use hereunder and Customer's Creative, Targets and Customer's Services will not violate or encourage violation of any applicable laws, regulations, code of conduct, or third party rights (including, without limitation, intellectual property rights)."

29 Google's Advertising Policies include a statement that an advertiser's "ads and keywords must directly relate to the content on the landing page for [the advertiser's] ad", and that "[p]roducts or services promoted in [the advertiser's] ad must be reflected on [the advertiser's] landing page". Google's Advertising Policies also include a policy entitled "Deceptive use of business names", which advises advertisers that they "may not imply an affiliation, partnership or any special relationship with any unrelated third party". Provision is made for owners of business names to notify Google of any complaint of misuse. Google has a similar policy and complaints procedure in relation to trade marks.

30 When a user enters search terms into the Google search engine, an "auction" is triggered that determines which sponsored links to show, in which order to show them, and how much Google will charge the advertisers whose sponsored links are displayed when the user clicks on them.

31 An advertiser using the AdWords program may elect to trigger a sponsored link (or participate in an "auction" that will determine whether to display a sponsored link) by choosing three different types of keyword: exact match, phrase match or broad match. Exact match will trigger a sponsored link only if the search term entered by the user is the exact keyword chosen by the advertiser. Phrase match will trigger a sponsored link if the user enters any word in the phrase chosen by the advertiser. Broad match triggers sponsored links

based on known associations determined by Google's algorithms. The advertisers whose sponsored links are relevant to this appeal each selected exact match.

32 The term "auction" has a particular meaning in this context. The "auction" which determines whether a particular sponsored link will be displayed takes into account: the relevant advertiser's advertising budget for the day; how much the advertiser is willing to pay each time a user clicks on the sponsored link; whether the advertiser has selected exact match, phrase match or broad match for the keywords it has specified in relation to the sponsored link; and the "quality score" of the sponsored link, which depends in part on the content of the sponsored link, as determined by the advertiser.

33 A keyword which has been disapproved will not trigger a sponsored link until any problem with its use has been corrected. Disapproved keywords can include business names or trade marks which have been the subject of a complaint by their respective owners to Google.

The STA Travel advertisements

34 The first group of sponsored links relevant to this appeal belonged to STA Travel, a business operating in the travel industry. These sponsored links appeared on 29 May 2007, 18 July 2007, 24 October 2007 and 17 April 2008.

35 The sponsored link which appeared on 18 July 2007 was generated in response to a search conducted on the Google search engine using the search terms "harvey world travel". This search generated a search results page consisting of organic search results, a single top left sponsored link and three right side sponsored links. The top left sponsored link and the first two organic search results linked to the web site of Harvey World Travel, a significant competitor of STA Travel. The sponsored link relevant to these proceedings was a right side sponsored link which linked to the web site of STA Travel, and was in the following terms:

"**Harvey Travel**

Unbeatable deals on flights, Hotel & Pkg's Search, Book & Pack Now!

www.statravel.com.au"

The relevant sponsored links which appeared on other dates also featured the headlines "Harvey Travel" or "Harvey World Travel", and linked to the web site of STA Travel.

36 The primary judge found that, by the publication of the STA Travel advertisements, STA Travel represented to ordinary and reasonable members of the relevant class that it had a commercial association with Harvey World Travel, and that information regarding Harvey World Travel and its products or services could be found at the web site of STA Travel[32]. His Honour found that these representations were misleading and deceptive[33].

37 Both Harvey World Travel and STA Travel had AdWords accounts which enabled them to create sponsored links using the AdWords program, and to specify keywords for those sponsored links.

38 Ms Alice Wood, an account manager at Google, was involved with STA Travel's AdWords account between about March 2006 and March 2007. The evidence before the primary judge showed that the keyword "Harvey World Travel" had been added to STA Travel's AdWords account before Ms Wood became involved with the account. On 7 June 2006, Mr Arjan Goudsblom of STA Travel emailed Ms Wood a document containing keywords including "Harvey World Travel" and "Harvey Travel". On 3 July 2006, Mr Goudsblom emailed Ms Wood another document containing keywords including those terms, and requested that Ms Wood "adjust our categories to contain all these phrases". On 10 August 2006, following a further exchange of emails between Ms Wood and Mr Goudsblom, Ms Wood applied those keywords to certain sponsored links in STA Travel's AdWords account.

The Carsales advertisements

39 The second group of sponsored links relevant to this appeal belonged to a classified advertising business called Carsales, which operates the web site carsales.com.au. The relevant sponsored links appeared on 28 May 2007, and at various other times between March 2006 and July 2007.

40 The sponsored link which appeared on 28 May 2007 was generated in response to a search conducted on the Google search engine using the search terms "honda .com.au". This search generated a search results page consisting of organic search results, a single top left sponsored link and a single right side sponsored link. The first two organic search results linked to the web site of Honda Australia Pty Ltd, a subsidiary of the well-known car manufacturer. The relevant sponsored link was the top left sponsored link, which linked to the web site of Carsales, and was in the following terms:

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32 *ACCC v Trading Post* (2011) 197 FCR 498 at 550-551 [236]-[237].

33 *ACCC v Trading Post* (2011) 197 FCR 498 at 551 [238].

"**Honda .com.au**

www.Carsales.com.au/Honda-Cars Buy/Sell Your Civic The Fast Way on Australia's No.1 Auto Website"

41 The primary judge found that, by the publication of the Carsales advertisements, Carsales represented that users who clicked on the headlines to the sponsored links would be taken to the web site of Honda Australia. His Honour went on to find that this representation was likely to mislead or deceive ordinary and reasonable members of the relevant class[34].

42 Like STA Travel, Carsales had an AdWords account. At various times, both Mr Chris Bayley, a customer service representative at Google, and Ms Wood were involved with Carsales' AdWords account. The evidence before the primary judge indicated that Mr Bayley was also involved with a separate AdWords account belonging to a classified advertising business called Carpoint, which operates the web site carpoint.com.au, and is ultimately part of the same organisation as Carsales. The evidence indicated that the keyword "Honda .com.au" had been added to Carpoint's AdWords account prior to March 2006, although it is not clear by whom.

43 On 7 March 2006, Mr Bayley sent an email to Mr Daniel Johnson of Carsales recommending that keywords used in Carpoint's AdWords account be added to Carsales' AdWords account, and that Carsales use keyword insertion in all of its sponsored links. On 15 March 2006, Mr Bayley sent an email to Mr Johnson attaching a spreadsheet containing a list of keywords for Mr Johnson's approval, including the keyword "Honda .com.au". On 17 March 2006, Mr Bayley added a number of keywords to Carsales' AdWords account, including "honda" and "Honda .com.au". On 6 December 2006, Ms Wood sent an email to Mr Johnson which included her suggestions for "maximising" Carsales' AdWords account. Attached to that email was a spreadsheet in which Ms Wood highlighted certain existing keywords which she described as "the best converting terms for [Carsales]". These keywords included the keyword "Honda .com.au".

The Ausdog advertisement

44 Alpha Dog Training is a dog training business owned by Mr Gregory Fontana. It operates the web site alphadogtraining.com.au. The Dog Trainer Pty Ltd ("Ausdog") is a competitor of Alpha Dog Training. It operates the web site DogTrainingAustralia.com.au.

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34 *ACCC v Trading Post* (2011) 197 FCR 498 at 554 [251].

45 The next sponsored link relevant to this appeal belonged to Ausdog. It appeared on 12 March 2008, and was generated in response to a search conducted on the Google search engine using the search terms "Alpha Dog Training". The first of the organic search results linked to the web site of Alpha Dog Training. One of the top left sponsored links linked to the web site of Ausdog, and was in the following terms:

> "**Alpha Dog Training**
>
> DogTrainingAustralia.com.au All Breeds. We come to you. No **dog** that can't be trained."

46 The primary judge found that, by the publication of the Ausdog advertisement, Ausdog represented that it had a commercial association with Alpha Dog Training, and that information regarding Alpha Dog Training and its products or services could be found at the web site of Ausdog[35]. His Honour found that these representations were misleading and deceptive or likely to mislead or deceive ordinary members of the relevant class[36].

47 Both Ausdog and Alpha Dog Training had AdWords accounts. Ausdog's AdWords account was operated on its behalf by an advertising agency, Agency XYZ. On 16 December 2007, Agency XYZ added 239 keywords to Ausdog's AdWords account, including 15 keywords containing the phrase "alpha dog" or "alphadog".

48 On 13 March 2008, Mr Fontana sent an email to Google making a complaint about the "[f]raudulent use of our business name". The following day, Ms Casey-Lee Atherton of Google responded, recommending that Mr Fontana take up the matter with Ausdog. On 1 April 2008, Mr Fontana complained to Ausdog. On 12 April 2008, Agency XYZ removed all of the "alpha dog" or "alphadog" keywords from Ausdog's AdWords account.

The Trading Post advertisement

49 The final sponsored link relevant to this appeal belonged to Trading Post Australia Pty Ltd ("Trading Post"), a classified advertising business which operates the web site tradingpost.com.au. It appeared on 29 May 2007, and was generated in response to a search conducted on the Google search engine using the search terms "just 4x4s magazine". This search generated a search results

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35 *ACCC v Trading Post* (2011) 197 FCR 498 at 567 [317].

36 *ACCC v Trading Post* (2011) 197 FCR 498 at 567 [317]-[318].

page consisting of organic search results, two top left sponsored links and a number of right side sponsored links. The sponsored link relevant to this appeal was a top left sponsored link which linked to the web site of Trading Post, and was in the following terms:

> "**Just 4x4s Magazine**
>
> www.tradingpost.com.au New & Used 4WD Cars – See 90,000+ Auto Ads Online. Great Finds Daily!"

50 Just Magazines Pty Ltd is a competitor of Trading Post. It publishes a number of magazines throughout Australia, including one titled "Just 4x4s". Among other things, the Just 4x4s magazine contains classified advertisements for four-wheel drive vehicles.

51 The primary judge found that, by the publication of the Trading Post advertisement, Trading Post represented that it had a commercial association with the Just 4x4s magazine, and that information regarding the Just 4x4s magazine could be found at the web site of Trading Post[37]. His Honour found that these representations were misleading and deceptive or likely to mislead or deceive[38].

52 Trading Post had an AdWords account which was operated on its behalf by an advertising agency, Sensis. On 26 December 2006, Mr Eric Wan of Sensis uploaded the keyword "just 4x4s magazine" to Trading Post's AdWords account, as part of a batch of 246 keywords.

Proceedings below

Primary judge

53 The ACCC made two claims against Google before the primary judge. First, the ACCC alleged that Google had engaged in conduct contrary to s 52 of the Act by failing sufficiently to distinguish between organic search results and sponsored links. The primary judge rejected this claim[39]. Second, the ACCC alleged that Google engaged in conduct contrary to s 52 of the Act by publishing or displaying particular sponsored links, including the STA Travel

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37 *ACCC v Trading Post* (2011) 197 FCR 498 at 572 [341].

38 *ACCC v Trading Post* (2011) 197 FCR 498 at 572-573 [342], [345].

39 *ACCC v Trading Post* (2011) 197 FCR 498 at 515-520 [76]-[84].

advertisements, the Carsales advertisements, the Ausdog advertisement and the Trading Post advertisement. The primary judge made three significant findings in relation to this claim.

54 First, as described above, the primary judge found that each of the STA Travel advertisements, the Carsales advertisements, the Ausdog advertisement and the Trading Post advertisement contained representations which were misleading or deceptive or likely to mislead or deceive[40].

55 Second, the primary judge found that Google had not made the representations conveyed by the advertisements[41]. Relying on and applying the decisions of the High Court in *Butcher*[42] and *ACCC v Channel Seven*[43], which his Honour treated as developments in the law clarifying the reasoning of the Full Court of the Federal Court in *Guthrie*[44], the primary judge found that Google had acted merely as a conduit, passing on the advertisements of others without endorsing or approving them[45].

56 The primary judge described the ordinary and reasonable members of the relevant class of consumers who might be affected by the alleged conduct as follows[46]:

> "The relevant class will consist of people who have access to a computer connected to the internet. They will also have some basic knowledge and understanding of computers, the web and search engines including the Google search engine. They will not necessarily have a detailed familiarity with the Google search engine but they should be taken to have at least some elementary understanding of how it works. It

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40 *ACCC v Trading Post* (2011) 197 FCR 498 at 551 [238], 554 [251], 567 [317]-[318], 572-573 [342].

41 *ACCC v Trading Post* (2011) 197 FCR 498 at 540-542 [186]-[195], 551-552 [239]-[241], 554 [251], 567 [318], 572-573 [342].

42 (2004) 218 CLR 592.

43 (2009) 239 CLR 305.

44 (1978) 18 ALR 531.

45 *ACCC v Trading Post* (2011) 197 FCR 498 at 536-540 [176]-[185].

46 *ACCC v Trading Post* (2011) 197 FCR 498 at 528 [122].

is not possible to use a search engine in any meaningful way without knowing something about how it operates."

57 His Honour found that ordinary and reasonable members of this class would have understood that sponsored links were advertisements, and were different from organic search results[47]. His Honour also found that ordinary and reasonable members of the relevant class would not have understood Google to have endorsed or to have been responsible in any meaningful way for the content of the advertisements; rather, they would have understood that the advertisements were messages from the advertisers which Google was passing on for what they were worth[48]. Drawing an analogy with other publishers or broadcasters of advertisements who provide technical facilities which permit advertisements to be seen or heard, the primary judge specifically rejected the ACCC's argument based on the keyword insertion facility[49], about which more will be said below.

58 Third, the primary judge found that, if Google had made the representations conveyed by the advertisements, then the defence afforded by s 85(3) of the Act would not have been available to Google in respect of any of the STA Travel advertisements, the Carsales advertisements, the Ausdog advertisement or the Trading Post advertisement[50].

Full Court

59 The ACCC's appeal to the Full Court focused on the primary judge's finding that Google had not made the representations relied upon by the ACCC, but had acted as a mere conduit. The Full Court unanimously found that Google had itself engaged in misleading and deceptive conduct, and therefore allowed the appeal[51].

60 The members of the Full Court differed from the primary judge in their treatment of *Guthrie* and *Butcher*. The Full Court relied on the reasoning in *Guthrie*, and held that *Butcher* did not stipulate that an intermediary must

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47 *ACCC v Trading Post* (2011) 197 FCR 498 at 533-536 [155]-[169].

48 *ACCC v Trading Post* (2011) 197 FCR 498 at 540-542 [186]-[194].

49 *ACCC v Trading Post* (2011) 197 FCR 498 at 541-542 [192]-[193].

50 *ACCC v Trading Post* (2011) 197 FCR 498 at 552 [242], 554-555 [252]-[257], 567 [319], 573 [343]-[345].

51 *ACCC v Google* (2012) 201 FCR 503 at 521-522 [92]-[95], 524 [104].

expressly adopt or endorse a statement for the intermediary to be liable under s 52[52]. Further, and critically, the Full Court construed the sponsored links as being "Google's response to a user's insertion of a search term into Google's search engine"[53] and "Google's conduct in response to the user's interaction with Google's search engine"[54]. Relying in part on the fact that Google's technology was involved in applying the "broad match" feature of the AdWords program, the Full Court found that what was in issue was "Google's conduct as a principal, not merely as a conduit"[55], and went on to say[56]:

> "The circumstance that the sponsored link is displayed as Google's response to a user's insertion of a search term into Google's search engine prevents any analogy between this case and the case of the bill-board owner or the owner of a telephone network or the publisher of a newspaper or a telecaster who simply displays an advertisement of another. In those cases the medium is not concerned with the content of the advertiser's message: in the four instances in question here Google created the message which it presents. Google's search engine calls up and displays the response to the user's enquiry. It is Google's technology which creates that which is displayed. Google did not merely repeat or pass on a statement by the advertiser: what is displayed in response to the user's search query is not the equivalent of Google saying here is a statement by an advertiser which is passed on for what it is worth."

61 Their Honours found that, even if ordinary and reasonable members of the relevant class perceived Google as a mere conduit, "[t]he reaction of the ordinary and reasonable member of the class is not solely determinative of the issue" because the circumstances showed that in fact Google was more than a mere conduit[57].

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52 *ACCC v Google* (2012) 201 FCR 503 at 520 [85]-[86].

53 *ACCC v Google* (2012) 201 FCR 503 at 522 [95].

54 *ACCC v Google* (2012) 201 FCR 503 at 522 [96].

55 *ACCC v Google* (2012) 201 FCR 503 at 522 [94].

56 *ACCC v Google* (2012) 201 FCR 503 at 522 [95].

57 *ACCC v Google* (2012) 201 FCR 503 at 521 [89].

62 The Full Court rejected Google's argument that it was entitled to the defence afforded by s 85(3) of the Act in relation to the STA Travel advertisements and the Trading Post advertisement[58].

Submissions in this appeal

ACCC

63 The ACCC contended that, by publishing or displaying the STA Travel advertisements, the Carsales advertisements, the Ausdog advertisement and the Trading Post advertisement, Google had engaged in misleading and deceptive conduct as a principal. In terms of the relevant law discussed above, the central proposition advanced by the ACCC was that Google was the maker or creator of the sponsored links. The ACCC relied on the fact that Google used its technology to display the sponsored links in response to search requests made by users of the Google search engine. This, it was said, established Google's liability under s 52, notwithstanding that the advertisers were the source of the sponsored links, and notwithstanding the fact that Google did not endorse or adopt the contents of any of the sponsored links. Employing the language of *Yorke v Lucas*[59], the ACCC contended that, in the light of the relevant facts and circumstances, Google had done more than merely pass on the sponsored links for what they were worth.

64 The starting point for the ACCC's arguments was that the clickable headline in each of the sponsored links contained the name of a trader (and, in one case, the URL of a trader) different from that of the relevant advertiser. Referring to the keyword insertion facility, the ACCC argued that Google had inserted search terms chosen by users of the Google search engine as headlines in the sponsored links, and was therefore responsible for the collocation of the clickable headline containing the name (and, in one case, the URL) of another trader and the advertiser's URL. The ACCC also emphasised that Google had provided the functionality of the clickable headline (that is, the ability for users of the Google search engine to click on the headline of a sponsored link and be taken to the advertiser's web site). In addition, the ACCC submitted that, by displaying the sponsored links, Google had informed users of the Google search engine that the sponsored links were responsive to the users' search requests.

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58 *ACCC v Google* (2012) 201 FCR 503 at 525-526 [111]-[115].

59 (1985) 158 CLR 661.

Google

65 Google always admitted that it published or displayed the STA Travel advertisements, the Carsales advertisements, the Ausdog advertisement and the Trading Post advertisement. However, Google contended that the fact that it displayed the sponsored links in response to users' search requests was not sufficient to justify a finding that Google had itself made the misleading representations conveyed by the sponsored links, or otherwise engaged in misleading and deceptive conduct.

66 Google emphasised that each relevant aspect of a sponsored link – the headline, the advertising text, the advertiser's URL, the keywords and the use of keyword insertion – was specified by the advertiser, and that Google merely implemented the advertiser's instructions. Google submitted that the technical facilities it provided through the AdWords program were different in kind, but not in principle, from facilities provided to advertisers by other intermediaries such as publishers and broadcasters. Google further contended that any commercial association or affiliation between an advertiser and another trader was something peculiarly within the knowledge of the advertiser, and was not a matter within Google's expertise. Google also relied on the primary judge's findings that ordinary and reasonable users of the Google search engine would have understood that the sponsored links were advertisements paid for by advertisers to promote their products and businesses, and that Google was merely passing them on for what they were worth.

Did Google contravene s 52?

67 It is axiomatic that the Google search engine operates by the mechanism that users' search requests are framed as search terms chosen by the user for the purpose of generating organic search results. What every advertiser seeks to achieve by use of the AdWords program is that its sponsored links will be triggered by search terms entered by a user (corresponding to keywords chosen by the advertiser) which indicate that the user may have an interest in the advertiser's products or services. Google has no control over a user's choice of search terms or an advertiser's choice of keywords[60].

68 The ACCC contended that Google, rather than the advertisers, "produced" (in the sense of making or creating) the sponsored links which are the subject of

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60 However, where a keyword chosen by an advertiser has been disallowed following a complaint by the owner of a business name or trade mark, that keyword will not trigger a sponsored link.

this appeal. That submission must be rejected. It is critical to appreciate that, even with the facility of keyword insertion, the advertiser is the author of the sponsored link. As Google correctly submitted, each relevant aspect of a sponsored link is determined by the advertiser. The automated response which the Google search engine makes to a user's search request by displaying a sponsored link is wholly determined by the keywords and other content of the sponsored link which the advertiser has chosen. Google does not create, in any authorial sense, the sponsored links that it publishes or displays.

69 That the display of sponsored links (together with organic search results) can be described as Google's response to a user's request for information does not render Google the maker, author, creator or originator of the information in a sponsored link. The technology which lies behind the display of a sponsored link merely assembles information provided by others for the purpose of displaying advertisements directed to users of the Google search engine in their capacity as consumers of products and services. In this sense, Google is not relevantly different from other intermediaries, such as newspaper publishers (whether in print or online) or broadcasters (whether radio, television or online), who publish, display or broadcast the advertisements of others. The fact that the provision of information via the internet will – because of the nature of the internet – necessarily involve a response to a request made by an internet user does not, without more, disturb the analogy between Google and other intermediaries. To the extent that it displays sponsored links, the Google search engine is only a means of communication between advertisers and consumers.

70 The primary judge's findings about the way in which ordinary and reasonable users of the Google search engine would understand the sponsored links were not disturbed in the Full Court. These findings – that ordinary and reasonable users would have understood the sponsored links to be statements made by advertisers which Google had not endorsed, and was merely passing on for what they were worth – were plainly correct. They also support the conclusion reached above. On its face, each sponsored link indicates that its source is not Google, but an advertiser. The heading "Sponsored Links" appears above both top left sponsored links and right side sponsored links, and the URL of the advertiser, appearing within each sponsored link, clearly indicates its source. Ordinary and reasonable users of the Google search engine would have understood that the sponsored links were created by advertisers. Such users would also have understood that representations made by the sponsored links were those of the advertisers, and were not adopted or endorsed by Google.

71 In its notice of contention, the ACCC asserted that the role of Google personnel advising or assisting advertisers in the selection of keywords (described above in relation to both the STA Travel advertisements and the Carsales advertisements) was relevant in determining whether Google had

engaged in misleading or deceptive conduct. The evidence of the role of Google's personnel in relation to the STA Travel advertisements and the Carsales advertisements was not irrelevant. However, while it showed correspondence between Google personnel and the advertisers concerned, it never rose so high as to prove that Google personnel, as distinct from the advertisers, had chosen the relevant keywords, or otherwise created, endorsed or adopted the sponsored links.

72 It is true that Google has a system in place which will preclude use of certain keywords as triggers for advertisements when Google is on notice of a possible misrepresentation to which an advertiser's choice of keywords may give rise. However, the facts in respect of the Ausdog advertisement show the difficulty that Google might have, in the absence of notification, in determining whether a trader whose name (or name and URL) appears in the headline of an advertiser's sponsored link is a competitor or associate of the advertiser.

73 Taken together, the facts and circumstances considered above show that Google did not itself engage in misleading or deceptive conduct, or endorse or adopt the representations which it displayed on behalf of advertisers.

Section 85(3)

74 While the conclusions reached above make it unnecessary to determine the issues raised under s 85(3), a possible question about the scope of s 85(3) may arise given the line of authority in this Court commencing with *Yorke v Lucas*[61]. That line of authority identifies a process of enquiry to be followed when determining, as a question of fact, whether an intermediary can be said to have itself made the misleading representation of another which it has communicated to a third party. Section 85(3) provided a defence in proceedings in relation to a contravention of Pt V or VC of the Act which was limited to publishers of advertisements.

75 If an intermediary publisher has not endorsed or adopted a published representation of an advertiser, that circumstance may be sufficient, in the context of a particular case, to justify a finding that the intermediary has not contravened s 52. By way of contrast, an intermediary publisher who has endorsed or adopted a published representation of an advertiser without appreciating the capacity of that representation to mislead or deceive may have resort to the statutory defence. In those circumstances, recognising that its business carried a risk of unwitting contravention, an intermediary publisher may

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61 (1985) 158 CLR 661.

need to show that it had some appropriate system in place to succeed in the defence that it did not know and had no reason to suspect that the publication of that representation would amount to a contravention. It is sufficient for present purposes to state that the recognisable distinctions between these different scenarios illustrate the different spheres of operation of the line of authority in this Court commencing with *Yorke v Lucas* and the statutory defence in s 85(3).

Orders

76 Orders should be made as follows:

1. Appeal allowed with costs.

2. Set aside the orders of the Full Court of the Federal Court of Australia made on 3 April 2012 and the orders of the Federal Court of Australia made on 4 May 2012 and, in their place, order that the appeal to the Full Court be dismissed with costs.

HAYNE J.

The critical facts and allegations

77 At the relevant times, the appellant ("Google") provided a well-known internet search engine. In response to searches entered into that search engine by users, Google displayed search results and "sponsored links": advertisements created by advertisers for display on a Google search results page when the user of the search engine entered in the search request words chosen by the advertiser.

78 This appeal concerns four advertisements. The respondent ("the ACCC") alleged that, by publishing those advertisements, Google made a number of false representations and thereby engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, contrary to what was, at the relevant times, s 52 of the *Trade Practices Act* 1974 (Cth) ("the Act")[62]. The ACCC had made other allegations of contravention by Google but these were not in issue in the appeal to this Court.

79 By its statement of claim, the ACCC alleged contravention in relation to each of the four advertisements by the following sequence of allegations: (a) Google published the advertisement; (b) by publishing the advertisement, Google made certain representations; (c) each of those representations was made in trade or commerce; and (d) "[b]y making each or any" of those representations, Google engaged in conduct that was misleading or deceptive or likely to mislead or deceive "in that" each representation was false. In relation to each of the four advertisements, the determinative issue at trial was whether, as the ACCC had alleged, Google made the alleged representations. That issue lay at the heart of the arguments in the ACCC's appeal to the Full Court of the Federal Court and in Google's appeal to this Court.

Determination of this appeal

80 The trial judge concluded[63] that Google had not made any of the alleged representations. The trial judge found[64] that the advertisements conveyed one or both of two false representations: first, that there was a commercial association between the advertiser and a particular business for which the user of the search

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62 See now *Competition and Consumer Act* 2010 (Cth), Sched 2, s 18; cf *Australian Securities and Investments Commission Act* 2001 (Cth), s 12DA; *Corporations Act* 2001 (Cth), s 1041H.

63 *Australian Competition and Consumer Commission v Trading Post Australia Pty Ltd* (2011) 197 FCR 498 at 551-552 [241], 554 [251], 567 [318], 572-573 [342].

64 (2011) 197 FCR 498 at 550-551 [237], 554 [251], 567 [317], 572 [341].

engine had searched (when there was none); and second, that, by clicking on the sponsored link, the user would be taken to a website of the business for which the user had searched (when, in fact, the user would be taken to the advertiser's website). The trial judge further found[65] that ordinary and reasonable members of the class of persons using Google's search engine would have understood the sponsored links to be advertisements made and paid for by the advertisers, and that Google had not adopted or endorsed the representations made in them.

81 In the Full Court of the Federal Court and in this Court, no party sought to challenge the findings the trial judge made about what the advertisements represented or what ordinary and reasonable users of Google's search engine would have understood. Instead, in both the Full Court of the Federal Court and in this Court, the ACCC sought to make good the proposition that, given all of Google's conduct, Google made the representations which the trial judge found to be misleading or deceptive or likely to mislead or deceive. The ACCC advanced arguments which fastened upon Google's provision of the means for advertisers to prepare advertisements that may be displayed when certain search terms were entered by a user of the search engine and the fact that Google's search engine determined what advertisements would be displayed in response to the user's search terms.

82 These facts about the preparation and display of the advertisements do not, and were not said to, challenge the trial judge's findings that the ordinary and reasonable user would have understood that the sponsored links were advertisements made and paid for by the advertisers and that the representations made in them were not endorsed or adopted by Google. Because the user would not understand Google to be making the representations which the trial judge found to be misleading or deceptive, the ACCC failed to make good the central allegation upon which its case in relation to the four advertisements depended: that Google made the representations conveyed by the advertisements. For this reason alone, Google's appeal to this Court must be allowed.

83 This conclusion depends wholly upon the particular way in which the ACCC framed its case against Google and the unchallenged findings of fact that the trial judge made. These reasons do not depend upon the application of any general rule about the liability of publishers for publishing misleading or deceptive advertisements made and paid for by another. Neither the text of the Act nor the decisions that have been reached about the application of s 52 permit the statement of a general rule to the effect that a corporation can contravene s 52 by publishing an advertisement, made and paid for by another and containing statements that would (or would be likely to) mislead or deceive, *only*

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65 (2011) 197 FCR 498 at 536 [169]-[173], 540-542 [187]-[195], 551-552 [241].

if that corporation endorsed or adopted (or would be understood to have endorsed or adopted) the content of the advertisement.

84 A general rule expressed in those terms would pay insufficient regard to the text of s 52. Notions of endorsement and adoption may be relevant to the application of s 52 if, and only if, the contravening conduct is identified as making a representation. Even in cases where the contravening conduct is identified as making a representation, notions of endorsement and adoption are not always relevant to, let alone determinative of, the application of s 52. But they are notions that have no role to play if it is alleged that publishing a misleading or deceptive advertisement contravened s 52. To explain why that is so, it is necessary to consider the Act. Every allegation of contravention of s 52 turns ultimately upon the proper construction of the Act.

Relevant provisions of the Act

85 The text of s 52 is well-known but it is important to set it out. Section 52 provided:

> "(1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
>
> (2) Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of subsection (1)."

86 It is also necessary to notice s 85(3)[66] when considering whether publication of a paid advertisement contravened s 52. The provisions of s 85(3) bear directly upon the proper understanding and application of s 52 because s 52 must be read in the context of the whole Act. At the times relevant to this appeal, s 85(3) provided:

> "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."

87 Three features of s 85(3) must be noted. First, the relevant premise for engaging s 85(3) was identified as "a contravention of a provision of Part V ... committed by the publication of an advertisement". Second, s 85(3) provided a defence to a proceeding for contravention. It did *not* provide that publication of

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66 See now *Competition and Consumer Act* 2010, Sched 2, s 251.

an advertisement was to be taken not to be a contravention of Pt V or Pt VC or that it was to be taken not to be a contravention unless the alleged contravener was shown to have endorsed or adopted the content of the advertisement. And third, the defence for which s 85(3) provided was available *only* if certain conditions were met.

88 It will be necessary to say more about s 85(3) but, before doing so, there are some features of s 52 to which attention must be drawn.

Section 52 and the identification of impugned conduct

89 The generality with which s 52 was expressed should not obscure one fundamental point. The section prohibited engaging in *conduct* that is misleading or deceptive or is likely to mislead or deceive. It is, therefore, always necessary to begin consideration of the application of the section by identifying the conduct that is said to meet the statutory description "misleading or deceptive or ... likely to mislead or deceive". The first question for consideration is always: "What did the alleged contravener do (or not do)?" It is only after identifying the conduct that is impugned that one can go on to consider separately whether that conduct is misleading or deceptive or likely to be so.

90 In some s 52 cases, in identifying conduct that is said to be misleading or deceptive or likely to be so, it may be necessary to recognise that the Act amplified[67] the way in which a reference to "engaging in conduct" should be read. No question of that kind arose in this appeal and the extended definition may be put aside.

91 In some s 52 cases, it may be necessary to recognise that a publisher of an advertisement made and paid for by another may be a secondary party to some other person's contravention of s 52. Whether that issue arises depends, of course, on the way in which the case is framed. In this matter, the ACCC did not allege that Google was a secondary party to a contravention of the Act, whether by the advertiser or any other person, and so questions of secondary liability may be put aside.

92 Much more often than not, the simpler the description of the conduct that is said to be misleading or deceptive or likely to be so, the easier it will be to focus upon whether that conduct has the requisite character. It will often be possible to identify the relevant conduct as the making of one or more representations, but it is necessary to bear in mind that s 52 was not confined[68] to

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67 s 4(2)(a).

68 See, for example, *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at 623 [103]; [2004] HCA 60; *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at 341 [102]; [2009] HCA 25; *Miller & Associates Insurance Broking Pty*

(Footnote continues on next page)

the prohibition of misrepresentations. It follows that a claim of contravention of s 52 need not be pleaded or argued by reference to the making of some representation. "It suffices that [the conduct] leads or is likely to lead into error."[69]

93 Melding the two issues of conduct and characterisation is apt to distract and confuse. Especially is that so if the melding is achieved by using the language of misrepresentation to give a single composite description of both the conduct and its character. Describing the alleged misleading or deceptive conduct as "making a misrepresentation" is distracting and confusing for at least three reasons.

94 First, it paraphrases the statutory words in language redolent of a body of legal principle which is not engaged. The dangers of doing that are self-evident[70].

95 Second, in cases like the present, the description assumes that there has been misleading or deceptive conduct and then seeks to identify who should be held responsible for it. An inquiry of that kind, at least in a case like the present, would tend to present a binary choice: did A or did B make the misrepresentation? But again, this is not a question that is presented by the text of the Act. The question presented by the Act is not: "Who misled or deceived a third party?" The question is not: "Did A mislead or deceive B?" The statutory question is whether the defendant's *conduct* was misleading or deceptive or likely to be so.

96 Third, the description is one that inevitably directs attention to whether the alleged contravener "made" any misrepresentation, and in turn whether the alleged contravener "endorsed" or "adopted" the accuracy of some representation. Those are notions that have no footing in the text of the Act. They may be apt descriptions of the facts of a particular case but they must not be allowed to take on a life of their own as substitutes for the statutory text.

Ltd v BMW Australia Finance Ltd (2010) 241 CLR 357 at 368 [15]; [2010] HCA 31; *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1)* (1988) 39 FCR 546 at 555.

69 *Miller & Associates* (2010) 241 CLR 357 at 368 [15] per French CJ and Kiefel J, citing *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2000) 104 FCR 564 at 589 [63]. See also *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 198 per Gibbs CJ; [1982] HCA 44.

70 See *Campbell* (2009) 238 CLR 304 at 341 [102].

97 This last point about endorsement and adoption is important and should be amplified. On their face, these expressions might be taken to suggest that the corporation which is found to have endorsed or adopted what was published either had some knowledge of or opinion about the truth of what was said, or was at least reckless as to its truth. Yet, from the earliest days of the Act, it was established[71] that a corporation could contravene s 52 even if it had acted honestly and reasonably. Neither knowledge of contravention nor intention to contravene was an element of s 52. As McHugh J correctly observed[72], in his dissenting reasons in *Butcher v Lachlan Elder Realty Pty Ltd*, s 52 "looks at the conduct of a corporation and is concerned *only* with whether that conduct misled or was likely to mislead a consumer. It is not concerned with the mental state of the corporation." (emphasis added) In so far as notions of endorsement and adoption direct attention to whether the alleged contravener had some specific intention or knowledge, or was reckless as to some matter, they are notions that collide with this fundamental proposition.

98 It is ultimately not profitable to pursue what content might be given to either "endorsement" or "adoption". They are terms that *may* (but not always) have some role to play in cases where the impugned conduct is alleged to be the making of some representation. For present purposes, the crucial observation to make is that the *absence* of "endorsement" or "adoption" does not provide a criterion of determinative significance for the application of s 52.

Extrapolating from decided cases

99 The text of s 52 does not require a corporation to have "endorsed" or "adopted" the content of an advertisement made and paid for by another before that corporation can be found to have engaged in misleading or deceptive conduct. Much of the argument in the present appeal proceeded not by reference to the statutory text but by reference to decided cases and the rule or rules said to underpin them. In particular, and reflecting the way in which the case against Google was framed and pursued, it was said that previous decisions of this Court and other courts establish a principle that a defendant which passes on a representation made by another engages in misleading or deceptive conduct only if the defendant endorsed or adopted the representation. Before considering the particular cases relied on, some observations must be made about the use of decided cases in considering and applying s 52 of the Act.

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71 *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216; [1978] HCA 11; *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191.

72 (2004) 218 CLR 592 at 634 [139].

100 In *Butcher*, McHugh J was right to observe[73] that that case was "concerned with the application of a statutory text, expressed in general terms, to particular facts". The observation applies equally to this case and to all s 52 cases. Because it is the statutory text which controls, there is no little danger in attempting to extrapolate from the decided cases to a rule of general application. No such rule can stand in the place of the statutory text.

101 This is not to say that the decided cases are unimportant or that they do not contribute to the proper understanding of how the Act operates. But each case must be understood by reference to the statutory text and the particular facts that were identified as relevant to the application of that text. When considering what was said in the reasons for decision in a s 52 case, the description of the relevant conduct is as important as are the facts and circumstances identified as bearing upon whether that conduct was misleading or deceptive.

102 Analysis of the decided cases is not to be glossed over and obscured by attempting to identify particular species of misleading or deceptive conduct, attaching some general description to each (such as a "misrepresentation" case, an "advertisement" case or a "mere conduit" case) and then applying s 52 by fitting the case into one of those constructed categories. Analogical reasoning is important but analogies can be drawn only after understanding the full factual context in which it was held that s 52 did or did not apply.

103 Against this background, it is convenient to turn now to the particular authorities relied on in this appeal. It is necessary to consider three decisions of this Court – *Yorke v Lucas*[74], *Butcher*[75] and *Australian Competition and Consumer Commission v Channel Seven Brisbane Pty Ltd*[76] – and, more briefly, two earlier decisions of the Full Court of the Federal Court – *Universal Telecasters (Qld) Ltd v Guthrie*[77] and *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd*[78].

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73 (2004) 218 CLR 592 at 616 [80].

74 (1985) 158 CLR 661; [1985] HCA 65.

75 (2004) 218 CLR 592.

76 (2009) 239 CLR 305; [2009] HCA 19.

77 (1978) 18 ALR 531.

78 (1984) 2 FCR 82.

The decided cases

104 In *Yorke v Lucas*, the alleged contraventions arose out of the sale of a business. It was alleged that the vendor company had misrepresented the turnover and profit of the business, that the vendor's agent (another company) had contravened s 52 by passing on to the purchaser the vendor's instructions about the turnover and profit of the business, and that the directors of each of those companies were involved in the contraventions alleged against their respective companies. The trial judge found[79] that the turnover and profit had been misrepresented and that both companies (the vendor and the vendor's agent) had contravened the Act. As to the agent company, the trial judge concluded[80] that it had "unwittingly contravened s 52 by engaging in conduct which was at least likely to mislead". And as to the director of the agent, the trial judge found[81] that he had acted conscientiously and carefully by checking (more than once) the vendor's instructions about these matters and that he was therefore not involved in his company's contravention.

105 Neither the Full Court of the Federal Court nor this Court had to decide whether the agent company had contravened s 52. Both appeals concerned only the liability of the director of the agent company. Nonetheless, the plurality in this Court said[82] that:

> "even though a corporation acts honestly and reasonably, it may nonetheless engage in conduct that is misleading or deceptive or is likely to mislead or deceive ... 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." (emphasis added)

106 What was said by the plurality cannot be understood without an appreciation of what the conduct of the agent company was said to have been.

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79 *Yorke v Ross Lucas Pty Ltd* (1982) 45 ALR 299 at 313-314.

80 (1982) 45 ALR 299 at 314.

81 (1982) 45 ALR 299 at 307-308; *Yorke v Ross Lucas Pty Ltd (No 2)* (1983) 46 ALR 319.

82 (1985) 158 CLR 661 at 666 per Mason ACJ, Wilson, Deane and Dawson JJ.

The evidence[83] of the agent company's director, whose conduct founded the contravention by the agent company, was that he had told the purchaser that he (the director) "had no figure work to confirm" the profit and turnover amounts and had no statement prepared by an accountant. He told the purchaser that he "only had answers to questions [he had] asked" the vendor company's director and that he (the director of the agent company) had not verified the profit and turnover amounts. This evidence was accepted[84] at trial and not disturbed on appeal to the Full Court[85] or to this Court.

107 In these circumstances, it is evident why the plurality in this Court said what has been set out above. The agent company did not represent that the profit and turnover of the business was any particular amount. The director of the agent company told the purchaser that the figures he provided were what he had been told by the vendor. That is, all that the director of the agent company did (or said) was to represent to the purchaser that the vendor had told him certain profit and turnover figures.

108 In *Butcher*, the real estate agent gave a prospective purchaser a brochure which reproduced a survey diagram of waterfront land that was to be auctioned. The diagram was wrong. The brochure said that the information within it had been gathered from sources which the agent believed to be reliable but that its accuracy could not be guaranteed and that interested persons should rely on their own enquiries. The majority referred[86] to *Yorke v Lucas* and said[87] that, in applying those principles, "it is important that the agent's conduct be viewed as a whole". The majority engaged in a detailed review of all of the circumstances and concluded[88] that:

> "The agent did not purport to do anything more than pass on information supplied by another or others. It both expressly and implicitly disclaimed any belief in the truth or falsity of that information. It did no more than state a belief in the reliability of the sources."

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83 (1982) 45 ALR 299 at 308.

84 (1982) 45 ALR 299 at 303, 308.

85 *Yorke v Lucas* (1983) 49 ALR 672 at 674.

86 (2004) 218 CLR 592 at 605 [38].

87 (2004) 218 CLR 592 at 605 [39].

88 (2004) 218 CLR 592 at 609 [51].

109 While the majority in *Butcher* said[89] that "[t]he agent did no more than communicate what the vendor was representing, *without adopting it or endorsing it*" (emphasis added), that statement should not be divorced from its context. It was, of course, an accurate description of the agent's conduct, but *absence* of adoption or endorsement was not taken as concluding in every case the question of contravention of s 52.

110 *Channel Seven* concerned, and concerned only, the application of s 65A of the Act. Section 65A(1) provided that s 52 (and some other provisions of the Act) did not apply to "a prescribed publication of matter by a prescribed information provider". The trial judge had found that certain television stations had made representations that were misleading or deceptive and those findings were not in issue in this Court.

111 In their joint reasons, French CJ and Kiefel J referred[90] briefly to the "conditions that must be satisfied before an information provider is liable in respect of misleading or deceptive representations made by a third party and published by the information provider". Their Honours said[91] 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 by the information provider" and referred, in support of the proposition, to the majority reasons in *Butcher*[92]. Likewise, Gummow J said[93] that "it has become well established that, for the broadcasts ... to give rise to contraventions of s 52 by [the television stations], it was necessary at least for some 'endorsement' or 'adoption' of what was represented on the programs by the relevant third parties".

112 These passages cannot be divorced from their context and treated as an exhaustive statement of the applicable principles. As the reference to *Butcher* in the joint reasons of French CJ and Kiefel J made plain, they intended no variation of or qualification to what was said in *Butcher* (or, it may be added, in *Yorke v Lucas*). And, because there was no occasion to do so, Gummow J left unexplained what would constitute "some 'endorsement' or 'adoption' of what was represented". Gummow J did go on to observe[94] that "[t]he evidence

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89 (2004) 218 CLR 592 at 605 [40].

90 (2009) 239 CLR 305 at 321 [43].

91 (2009) 239 CLR 305 at 321 [43].

92 (2004) 218 CLR 592 at 605 [38]-[40].

93 (2009) 239 CLR 305 at 324 [57].

94 (2009) 239 CLR 305 at 324 [58].

demonstrated that ... there was at least the necessary endorsement or adoption" in relation to certain of the representations in that case. But these references to endorsement and adoption followed from the way the case had been argued at trial and from the findings of fact which the trial judge had made in response to those arguments. Those findings were not in dispute in the appeal to this Court and no consideration was given in this Court to what "endorsement" or "adoption" might mean in this context.

113 Argument of the present appeal also directed attention to the decisions of the Full Court of the Federal Court in *Universal Telecasters*[95] and *Global Sportsman*[96], in both of which a media corporation published the statement of another. The references made[97] in those cases to what then were perceived to be difficulties in deciding whether a corporation's conduct in publishing a misleading statement made by another was conduct that was misleading or deceptive or likely to be so must be read in the light of the later statements made in this Court in *Yorke v Lucas* and *Butcher*.

114 One point emerges from both *Yorke v Lucas* and *Butcher*. Both point to the importance of identifying the relevant "conduct", having regard to all of the circumstances of the case. In both, the relevant inquiry did *not* stop short at asking whether it was apparent that the defendant was passing on information supplied by another. In neither was the relevant question posed as whether it was the original supplier of the information or the alleged contravener who made a misrepresentation or whether the defendant "endorsed" or "adopted" any misrepresentation. In both, attention was given to whether, in all of the circumstances of the case, it was clear that the defendant expressly or impliedly disclaimed belief in the truth or falsity of the information. And in both, the defendant's express or implied disclaimer of belief in the truth or falsity of the information communicated was an important element of the facts.

115 It by no means follows from there being in both a disclaimer of belief in the truth of what was represented that the presence or absence of a disclaimer is determinative of the application of s 52. And it is not possible to extrapolate from either or both of *Yorke v Lucas* and *Butcher* to some general rule to the effect that, when a corporation was known to be passing on information supplied by another, the corporation could contravene s 52 *only* if that corporation would have appeared to ordinary or reasonable members of the relevant class to have endorsed or adopted the information. Nor is it possible to extrapolate from either

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95 (1978) 18 ALR 531.

96 (1984) 2 FCR 82.

97 *Universal Telecasters* (1978) 18 ALR 531 at 533-534 per Bowen CJ; *Global Sportsman* (1984) 2 FCR 82 at 89-90 per Bowen CJ, Lockhart and Fitzgerald JJ.

or both of them to some general rule that would hold publishers of paid advertising that is misleading or deceptive not liable for contravention of s 52 *unless* the publisher endorsed or adopted the content of the advertisement.

116 That the defendant publishes electronically does not require different principles to be applied in a s 52 case from those explained in *Yorke v Lucas* and *Butcher*. But it is necessary to say something more about paid advertising and s 85(3) of the Act.

Paid advertising

117 As has been explained, the ACCC alleged that the relevant conduct in this matter was Google making certain representations. That way of putting the case should not be permitted to obscure the fact that displaying search results with sponsored links was itself a form of conduct. (The ACCC alleged that in respect of each of the four advertisements in issue in this case, Google had published the relevant sponsored link but it did not allege that *this* conduct itself contravened the Act, instead identifying the contravening conduct as making representations.)

118 The act of displaying an advertisement to people who otherwise would not see or hear it is clearly "conduct" capable of misleading or deceiving those who see or hear it. Displaying the advertisement to those people may lead them into error. Whether it is likely to mislead or deceive depends upon how the ordinary or reasonable member of the class of persons to whom the publication was directed would understand what was published.

119 When a print or electronic media corporation publishes a paid advertisement, the reader or viewer of the advertisement will very often recognise readily that what is seen or heard was devised and paid for by the advertiser. The reader or viewer will usually be given no reason not to take the advertisement at its face value. If the advertisement is misleading or deceptive, the reader or viewer will likely be misled or deceived. The conduct of publishing the advertisement has made it available to the reader or viewer. If no more is shown, there seems much to be said for the view that publishing the advertisement is conduct of the kind prohibited by s 52. When ss 52 and 85(3) are read together, it is evident that the Act assumed that the conduct of publishing an advertisement made and paid for by a third party may contravene s 52.

120 Provision of the defence suggests strongly that, but for the defence, the publisher of the advertisement would be liable for a contravention. The defence was only in issue if contravention was first established. The relevant premise for engaging s 85(3) was "a contravention of a provision of Part V ... committed by the publication of an advertisement".

121 Identifying the premise for engagement of s 85(3) in this way might be consistent with including the provision in the Act out of an abundance of caution:

against the possibility that the publication of an advertisement *might* be held to be a contravention of Pt V. But if the purpose of providing a defence was to deny the possibility that bare publication of an advertisement might be held to contravene Pt V, it is difficult to see why *contravention* was taken as the premise for its operation. And more tellingly, the defence would have been made available without limitation. The prescription of conditions for engaging the s 85(3) defence is inconsistent with its being treated as no more than a piece of legislative caution. Rather, the prescription of conditions demonstrates that the Act assumed that publication of an advertisement could be conduct that is misleading or deceptive or likely to be so. And more than that, the prescription of conditions for engaging the defence identified the only relevant circumstances in which liability for contravention of the norm of conduct provided by s 52 was to be answered or excused.

122 The statutory assumption that publication of an advertisement could be conduct that contravened s 52 is consistent with an understanding of s 52 that focuses only upon whether conduct is likely to lead another or others into error. To hold that publishing an advertisement may mislead or deceive requires no extreme or strained reading of that section. Describing the result that follows from applying the section to such circumstances as harsh or unintended necessarily assumes, wrongly, that s 52 applied only if the contravener knew that the conduct would (or was likely to) mislead or deceive.

123 Of course, as already noted, s 85(3) could be engaged only where a contravention of s 52 was alleged and would otherwise have been established. But to read s 52 as contravened by the publisher of a third party's advertisement *only* when the publisher has endorsed or adopted the content of the advertisement would strip s 85(3) of its content. Requiring positive demonstration of endorsement or adoption would strip s 85(3) of its content because, whatever meaning is given to those expressions, they necessarily direct attention to questions different from the issues about knowledge of and reason to suspect a contravention that are posed by s 85(3). Such a construction of the Act should not be adopted.

Conclusion

124 For these reasons, I agree with the orders proposed by French CJ, Crennan and Kiefel JJ but do so on the footing that has been described.

125 HEYDON J. This appeal raises questions about two important provisions of the *Trade Practices Act* 1974 (Cth) ("the TPA"). Section 52(1) provided: "A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."[98] Section 52(1) appeared in Pt V Div 1 of the TPA. Section 85(3) of the TPA provided:

> "In a proceeding in relation to a contravention of a provision of Part V … 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."[99]

Factual background

126 This appeal concerns the business of the appellant, Google Inc ("Google"). That business depends on the World Wide Web ("the web"). The web is a vast system of linked documents to which access may be gained via the internet. Google may be described as a "website operator". Access to the web is obtained by using a "browser". That expression refers to the software used to navigate the web. A person wishing to make documents available on the web specifies an address known as a "Uniform Resource Locator" ("URL"). The URL appears in the address bar at the top of the screen which conveys the information contained on the web. The browser processes the URL to locate the information made available by a website operator. It then translates an underlying code into a webpage visible to an end user.

127 Google operates a free internet search engine. It is accessible on the internet at, among other places, www.google.com.au. Google's business reflects a relationship between Google, end users who conduct searches, and advertisers. Members of the public may conduct a search by entering a word-based query. In response, the search engine displays a results page. Two features of the results page are relevant to this appeal.

128 The first relevant feature of the results page is that it provides a list of links to webpages that may be of interest to the user. The list often runs into several pages. It may run into hundreds of pages. These links are called "organic search results". Each day many millions of search queries are conducted at www.google.com.au, each search taking a fraction of a second.

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98 See now s 18(1) of the Australian Consumer Law – Sched 2 to the *Competition and Consumer Act* 2010 (Cth) ("the Australian Consumer Law").

99 See now s 251 of the Australian Consumer Law.

129 The other relevant feature of the results page is that Google displays advertisements on it. From that display Google derives revenue. That revenue is the primary source of Google's income. The advertisements were described by the trial judge as "sponsored links". A program called "AdWords" generates the sponsored links. "AdWords" is a "self-serve" system for advertisers. It is owned by Google. It is accessible online. It allows advertisers to create their own advertisements. And it allows advertisers to bid to display the advertisements on Google's results pages. Advertisers use the system subject to Google's terms and conditions. Those terms and conditions provide that advertisers are responsible for the content of their advertisements. The terms and conditions require advertisers to abide by policies designed to ensure that their advertisements are clear and accurate. The "AdWords" system thus provides a low cost advertising platform which is readily accessible to businesses of all sizes. It is used by hundreds of thousands of advertisers.

130 Via "AdWords", advertisers select keywords to trigger their advertisements. These keywords are based on the search queries of Google users. An advertisement will only be displayed on the results page for a Google search containing the selected keywords if the advertiser wins an online auction. Bids in that auction are assessed by price and other factors. Where an advertisement is displayed, it consists of three elements. The first is a headline chosen by the advertiser, "the ad headline". It is accompanied by a link to the advertiser's website. The second is an additional message chosen by the advertiser, which was referred to in the evidence as "the ad text". The third is the web address of a website chosen by the advertiser, the URL. When a user clicks on the link and is taken to the advertiser's chosen website, the advertiser pays a fee to Google determined by the advertiser's bid. Google has policies through which persons aggrieved by an advertiser's use of a trademark or business name can request that Google block the offending advertisements.

The issue

131 The controversy in this appeal is narrower than the controversy at the trial. The controversy in this appeal springs from a particular allegation of the respondent, the Australian Competition and Consumer Commission ("the ACCC"). The allegation is that certain advertisements which appeared on Google's results pages were misleading and deceptive. Those advertisements were devised by the advertisers, not Google. Google does not now dispute the ACCC's allegation. A representative example of the advertisements that the ACCC complains of was composed thus. The ad headline and the ad text referred to "Just 4x4s Magazine". That magazine contains advertisements for the sale of certain motor vehicles. The web address, however, directed users to www.tradingpost.com.au. The Trading Post also contains advertisements for certain motor vehicles. The advertisement falsely suggested an affiliation between the two publications. After a trial in the Federal Court of Australia, Nicholas J found that Google had not breached s 52(1) of the TPA. The

Full Court of the Federal Court of Australia (Keane CJ, Jacobson and Lander JJ) reversed that decision. The Full Court made the following declaration, inter alia:

> "[T]hat Google … by publishing, or causing to be published, on results pages on the Google Australia website on 29 May 2007, results which were advertisements for The Trading Post's business and website with the headline being 'Just 4x4s Magazine', in trade or commerce represented, contrary to the fact, that:
>
> a. there was a commercial association between Trading Post and Just 4x4s Magazine;
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> …
>
> and thereby engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of s 52 of the TPA."

That is, the Full Court found that Google had made an implied representation as to the existence of a commercial association between the Trading Post and Just 4x4s Magazine.

The case before the trial judge

132 So far as relevant to this appeal, the ACCC's case at trial, as perceived by the trial judge, was that Google had made the pleaded misrepresentations by publishing the advertisements. The trial judge saw the ACCC's case as being that each of the advertisements conveyed a misrepresentation because of its content considered in isolation. That is, his Honour did not perceive the ACCC's case as relying on the content of the advertisements in combination with any other material on the results page. The ACCC specifically abjured any contention that Google intended to mislead or deceive. Hence the ACCC did not contend that Google was "knowingly concerned" in a contravention by any advertiser within the meaning of s 75B(1)(c) of the TPA. The liability which the ACCC alleged was entirely strict. The ACCC did not allege that Google intended to make any of the implied representations found by the Full Court.

The trial judge's reasoning

133 The trial judge's reasoning was as follows.

134 First, the trial judge found that the class of people to which the impugned advertisements were directed comprised people with three characteristics. They had access to a computer connected to the internet. They had a basic understanding of computers, the web and search engines. And they had an elementary understanding of how the Google search engine worked.

135 Secondly, the trial judge found that the impugned advertisements were all described on the Google results page as "Sponsored Links" in a clear way which was not likely to go unnoticed.

136 Thirdly, the trial judge found that ordinary reasonable members of the class in question would appreciate that a "sponsored link" is a type of advertisement. Those persons knew that Google was a commercial enterprise. They knew that Google did not charge users to use its search engine. Hence they would have understood that Google had to generate revenue by other methods. One method was causing advertisements to appear on its results pages. The trial judge said that there was no evidence to suggest that any ordinary or reasonable person within the relevant class believed Google to be free of advertisements. And his Honour inferred that there were not likely to be any such persons in future. The trial judge found that ordinary and reasonable users in the relevant class would infer that "sponsored links" were links for which businesses seeking to promote their goods and services made payments to Google – that is, that they were advertisements. The trial judge said that there was no evidence that any person had been misled into thinking that the impugned advertisements were not advertisements. Nor did any survey or other evidence based on observation or experiment support the view that this was likely.

137 Fourthly, the trial judge found[100]:

> "ordinary and reasonable members of the class would have understood that:
>
> - 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 [sic] 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."

138 Fifthly, the trial judge found that ordinary and reasonable members of the relevant class would have understood that it is the advertiser who usually determines the content of an advertisement. Thus they would have understood

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100 *Australian Competition and Consumer Commission v Trading Post Australia Pty Ltd* (2011) 197 FCR 498 at 540 [187].

that the message which an advertisement conveyed was a message from the advertiser rather than from the publisher. The trial judge found that ordinary and reasonable members of the relevant class would be most unlikely to have understood any information that the impugned advertisements conveyed as being endorsed or adopted by Google. Rather, those members would have understood that the message conveyed was a message from the advertiser which Google was passing on for what it was worth. Google did no more than represent that the advertisements were advertisements. In short, the trial judge found that although Google did not expressly disclaim making the misrepresentations, the way the advertisements were presented excluded that possibility.

The Full Court's reasoning

139 The trial judge analysed the question "Did Google make the misrepresentations?" from the point of view of ordinary and reasonable members of the relevant class. The ACCC did not contend, and the Full Court did not conclude, that his Honour was wrong to do so. And the ACCC did not contend, and the Full Court did not conclude, that any of the findings of fact summarised above were wrong. Why, then, did the Full Court disagree with the trial judge's conclusion that the representations had not been made by Google?

140 It disagreed because it considered that the trial judge had posed the wrong question. It said[101]:

> "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."

141 The ACCC defended that reasoning in this Court. It submitted that the case was about whether Google itself had made the misleading or deceptive representations, not about whether Google had adopted representations made by the advertisers. The ACCC argued that it was Google that decided whether the advertisements would be published, and in what form. The ACCC pointed out that Google displayed the blue clickable headline containing the relevant search term in collocation with the advertiser's URL as part of its response to a given inquiry. ACCC accepted that the advertiser provided the keywords. It accepted that the advertiser selected the keywords for the purposes of having the advertiser's advertisement published when those keywords were searched on the Google search engine. But the ACCC submitted that it was only Google that

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101 *Australian Competition and Consumer Commission v Google Inc* (2012) 201 FCR 503 at 522 [96].

"[made] available the functionality, being the clickable blue headline, which [was] the basis for the making of the representation."

142 The Full Court's reasoning rested on three propositions. First, that Google displayed the advertisements "in response to the entry of the user's search term"[102]. Secondly, that the advertisements were generated by Google's AdWords system. Thirdly, that the reasoning in *Universal Telecasters (Qld) Ltd v Guthrie*[103] had not been affected by later decisions. That case held that when a television station broadcast an advertisement containing spoken words it made a statement.

Google's "response"

143 The Full Court's reasoning depends heavily on the idea that Google "respond[ed] to the entry of the user's search term". But that is implicit in the fact that Google operates a search engine business. Everything on the results page appears there because a user has entered a search query. If the Full Court's reasoning leads to the conclusion that a trader in Google's position *always* "makes" the representations in the third party advertisements, it is a very extreme conclusion. It would put traders in Google's position at risk of committing numerous contraventions of the TPA unless the s 85(3) defences were available. That conclusion is not lightly to be accepted. If it is not accepted, in each case there will be a factual choice available. In some circumstances a trader in Google's position might "make" the representations in the third party advertisement. In others it might not. Whether the trader "makes" the representations must turn on considerations different from and additional to whether the trader responded to the entry of the user's search term. Save in one aspect, the ACCC's submissions which the Full Court accepted did not isolate what those considerations are. The submissions did not face up to three facts. The first is that the misleading conduct lay entirely within the text of the advertisements. The second is that each advertisement consisted of three elements dictated by the advertiser – the ad headline, the ad text, and the advertiser's URL. The third is that the impugned material was what users understood to be an advertisement paid for by a third party, what Google intended to be an advertisement paid for by a third party, and what was in fact an advertisement paid for by a third party.

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102 *Australian Competition and Consumer Commission v Google Inc* (2012) 201 FCR 503 at 521 [88] per Keane CJ, Jacobson and Lander JJ.

103 (1978) 18 ALR 531 at 533 and 547.

144 The aspect of the Full Court's reasoning which does isolate a crucial consideration was put thus[104]:

> "What the user is … told is that the advertiser's message and the advertiser's URL are an answer to the user's query about the subject matter of the keyword which includes the identification of a competitor 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."

The Full Court then gave an example[105]:

> "The most obvious example of the falsity of the response and of the fact that it is Google's conduct, is the Harvey World Travel sponsored link. The user enters that keyword because the user is seeking information about Harvey World Travel. Instead, the user is given the URL of one of Harvey World Travel's competitors. In this example, the user is not told merely that the advertiser has provided Google with this URL. Rather, Google tells the user that the URL provided below is the contact address for information about Harvey World Travel. The whole purpose of the user's inquiry, to which Google responds by providing organic links and sponsored links, is to answer the user's query. The enquiry is made of Google and it is Google's response which is misleading."

This reasoning locates the misleading conduct outside the advertisement itself. It treats the misleading conduct as resting on a misrepresentation that the impugned advertisements, even if not in themselves misleading, would be responsive to the search queries made by users.

145 This reasoning was impermissible for the following reasons. First, the ACCC did not successfully demonstrate that the allegation on which its arguments rested was pleaded. Secondly, the trial judge found that, though material on the results page which did not consist of advertisements – ie the organic search results – was positioned according to relevance, Google had not

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104 *Australian Competition and Consumer Commission v Google Inc* (2012) 201 FCR 503 at 521 [91]-[92] per Keane CJ, Jacobson and Lander JJ.

105 *Australian Competition and Consumer Commission v Google Inc* (2012) 201 FCR 503 at 521-522 [93] per Keane CJ, Jacobson and Lander JJ.

represented that the material which did consist of advertisements were organic search results or positioned according to relevance. In other words, the advertisements might be for goods or services quite different from the material in organic search results. The ACCC did not challenge that finding of the trial judge. Indeed, it had admitted it was accurate at trial. Thirdly, there was no evidentiary inquiry at the trial as to whether ordinary and reasonable users of the Google search engine expected or were motivated by a desire that third party advertisements would be relevant to their search queries, and, if so, how they would be relevant and how that expectation or motivation arose. The Full Court's reasoning assumes what it is that users want to find out when they make a query of Google's search engine. There was no evidence to support that assumption and no finding about it at trial.

146 Even if Google had represented to users that use of its search engine might reveal advertisements relevant to them, it does not follow that Google was adopting or endorsing what the advertisements said. In *Butcher v Lachlan Elder Realty Pty Ltd*[106], an estate agent represented to a potential purchaser of property that a brochure about that property contained "all the details for the property" and "everything you need to know". That representation was held to make an additional 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"[107]. But it did not follow from the fact that the estate agent made that additional representation that he had personally made a misleading statement which appeared in the brochure itself.

AdWords

147 The Full Court relied on Google's AdWords system to support its conclusions in the following way[108]:

> "Google's search engine is the information retrieval system which the user employs to navigate his or her way through the web using keywords that deliver links to other locations on the web. Google supplies its advertising customers with the ability to select keywords which are expected to be used by persons making enquiries through Google's search engine. The ability of advertisers to select 'broad match' keywords enables them to trigger sponsored links through Google's search engine based on known associations which are determined by Google's proprietary algorithms.

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106 (2004) 218 CLR 592; [2004] HCA 60.

107 *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at 596 [6].

108 *Australian Competition and Consumer Commission v Google Inc* (2012) 201 FCR 503 at 522 [94]-[95].

> Although the keywords are selected by the advertiser, perhaps with input from Google, what is critical to the process is the triggering of the link by Google using its algorithms. That is a further reason to conclude that it is Google's conduct as a principal, not merely as a conduit, which is involved in each of the four instances that form the subject matter of this appeal.
>
> The circumstance that the sponsored link is displayed as Google's response to a user's insertion of a search term into Google's search engine prevents any analogy between this case and the case of the bill-board owner or the owner of a telephone network or the publisher of a newspaper or a telecaster who simply displays an advertisement of another. In those cases the medium is not concerned with the content of the advertiser's message: in the four instances in question here Google *created the message which it presents*. Google's search engine calls up and displays the response to the user's enquiry. It is Google's technology which creates that which is displayed. Google did not merely *repeat or pass on* a statement by the advertiser: what is displayed in response to the user's search query is not the equivalent of Google saying here is a statement by an advertiser which is passed on for what it is worth." (emphasis added)

This reasoning contains an error of law and an error of fact.

148 Is it the case that traders in Google's position will necessarily have contravened s 52(1) of the TPA if they do anything more than "repeat or pass on" material? No. That limited view is an error of law. For example, the brochure which the estate agent passed on in *Butcher v Lachlan Elder Realty Pty Ltd* had not been prepared by the vendor and given to the estate agent. The estate agent had prepared it from information given by the vendor[109]. A related difficulty is the Full Court's treatment of what French J said in *Gardam v George Wills & Co Ltd*[110]:

> "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*

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109 (2004) 218 CLR 592 at 593 and 596-598 [7]-[11].

110 (1988) 82 ALR 415 at 427, quoted with approval by Gummow J in *Australian Competition and Consumer Commission v Channel Seven Brisbane Pty Ltd* (2009) 239 CLR 305 at 324 [57]; [2009] HCA 19.

> *adopting it, then he makes that representation*. It will be a question of fact in each case." (emphasis added)

The Full Court quoted the first and third sentences, but not the italicised sentence. The Full Court said that the "reaction of the ordinary and reasonable member of the class is not solely determinative of" whether Google was a mere conduit. Yet the italicised sentence suggests that the liability depends on whether the relevant section of the class regards the "carrier" as having adopted the representation. Concentration on how a representation would be perceived by ordinary and reasonable members of the relevant section of the class is supported by other authority. Thus in *Butcher v Lachlan Elder Realty Pty Ltd*[111] the test for assessing the "conduct" of the agent was "what a reasonable person in the position of the purchasers, taking into account what they knew, would make of the agent's behaviour". Here, there is no basis on which it could be concluded that ordinary and reasonable members of the relevant class would have regarded Google as adopting the advertisements. Neither the trial judge nor the Full Court reached that conclusion.

149 This leads to the error of fact in the passage from the Full Court's reasons quoted above. It is true that Google created the picture which the user saw on the screen. It put in place the technology which enabled the advertisements to be displayed. But it did not create "the message" sent by means of that technology. The trial judge found that the advertisements were "created by advertisers"[112]. His Honour found that Google "received" them for publication[113]. His Honour said that while "Google made available to … advertisers the technical facility that enabled keywords to be uploaded which, if made the subject of a search by a user of the Google search engine, might then generate … sponsored links [and] … the technical facility which allowed for keyword insertion to occur …, it was [the advertisers], not Google, that chose to use these facilities to produce headlines … in response to search queries"[114]. And the trial judge found that advertisers created sponsored links by selecting keywords which, if entered by users, triggered advertisements (whether by exact match, phrase match or broad

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111 (2004) 218 CLR 592 at 608 [50] per Gleeson CJ, Hayne and Heydon JJ.

112 *Australian Competition and Consumer Commission v Trading Post Australia Pty Ltd* (2011) 197 FCR 498 at 511 [53].

113 *Australian Competition and Consumer Commission v Trading Post Australia Pty Ltd* (2011) 197 FCR 498 at 543 [200] (a finding made in relation to s 85(3) of the TPA, but relevant on this issue as well).

114 *Australian Competition and Consumer Commission v Trading Post Australia Pty Ltd* (2011) 197 FCR 498 at 527 [117].

match) in particular geographic locations selected by the advertisers. None of these findings were overturned by the Full Court.

150 In this Court, the ACCC advanced the following submission:

> "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 Ad[W]ords system which determines 'whether, how and in what order' an advertisement is published in response to a user's query."

The ACCC also submitted:

> "What was misleading or deceptive about the … 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 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."

The ACCC repeatedly stressed the word "dynamic" in what Google called its "dynamic keyword insertion feature". But these submissions do not invalidate the trial judge's conclusions.

151 If Google's provision of its technological facilities to display the advertisements caused it to be the maker of the advertisements, one of two conclusions would follow. Either there would be an exceptionally wide form of absolute liability for those who publish information in the media, or there would be a distinction between advertising in online media and advertising in traditional media. Neither conclusion should be reached. The ACCC repeatedly said that Google "inserted keywords" into the advertisements. It is more accurate to say, as the ACCC did at another point, that 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 … so that 'the headline replicates the whole or a part of the relevant search query'." That quotation is from the trial judge's reasons[115]. The trial judge correctly said[116]:

> "Keyword insertion is a technical facility the availability of which enables the publication of an advertisement in a particular form. While

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115 *Australian Competition and Consumer Commission v Trading Post Australia Pty Ltd* (2011) 197 FCR 498 at 525 [102].

116 *Australian Competition and Consumer Commission v Trading Post Australia Pty Ltd* (2011) 197 FCR 498 at 541-542 [193].

> the technology employed in online advertising may be quite different to [sic] that associated with the publication of advertisements in newspapers or magazines or the broadcasting of television or radio advertisements, it is nevertheless clear that 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."

152 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. The keyword may or may not be the same as the search query. 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, whether called up by the keyword insertion facility or by the fixed ad headline mechanism, is predetermined by the advertiser.

153 The ACCC submitted that "Google employees assisted … advertisers to 'maximise' the effectiveness of their sponsored link campaigns". This submission was raised by notice of contention. It criticised the Full Court's view that the assistance which Google employees provided to advertisers was irrelevant. One problem with that submission is that Google employees were not involved in some of the impugned advertisements at all. A further problem is that no analysis of the evidence showed that Google personnel had made the remaining advertisements. An additional problem is that the ACCC did not explain how the conclusion that an ordinary and reasonable member of the relevant class would not understand Google to be making the misleading statements could be undercut by a finding that Google employees assisted advertisers in composing their advertisements. As the Full Court correctly said, that finding might be relevant to an allegation that Google was liable as a secondary participant under s 75B of the TPA, but no such allegation was made.

Universal Telecasters (Qld) Ltd v Guthrie

154 Google strongly attacked the correctness of dicta by Bowen CJ, Nimmo and Franki JJ in *Universal Telecasters (Qld) Ltd v Guthrie*[117]. That is a decision which the ACCC did not cite in either its written or its oral submissions to this Court. In contrast, the ACCC relied on the case in the Full Court. The first

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117 (1978) 18 ALR 531.

ground of its notice of appeal complained that the trial judge had erred in holding that it did not apply. The Full Court held that later case law "has not altered the legal operation of s 52 of the [TPA] as it was explained by Bowen CJ"[118]. In *Guthrie's* case, a television broadcaster broadcast an advertisement for cars. The advertisement made false or misleading statements concerning the existence or amount of future price rises of the advertised cars once sales tax relief ceased. The television broadcaster was charged under s 53(e) of the TPA with making those statements. The prosecution failed because Bowen CJ and Franki J decided, over Nimmo J's dissent, that s 85(3) of the TPA applied. For that reason, the propositions enunciated by the majority on the issue whether the defendant had itself made the statements were obiter dicta. On that issue, all three members of the Court considered that the defendant had made a statement under s 53(e) of the TPA even though the advertisement had been prepared by an advertising agency on the instructions of the advertiser.

155 The reasons for judgment of Nimmo and Franki JJ can be dealt with briefly.

156 Nimmo J stated the defendant's argument[119]: "it was the advertising agency that made the statements and all that the [defendant] did was provide the means by which they were published." His Honour rejected the argument because of an inference from s 85(3)[120]:

> "[T]he text of the advertisement was disseminated to potential consumers by the [defendant] in its telecast which made no reference to the advertising agency. In my view the making and publishing of the statements in this case were contemporaneous and mutually inclusive. Such a state of affairs appears to me to have been contemplated by the legislature for s 85(3) provides a defence to a person whose business is to publish or arrange for the publication of advertisements and who received an advertisement for publication in the ordinary course of business but did not know and had no reason to suspect that its publication would amount to a contravention of Pt V of the [TPA]."

157 Franki J too relied solely on an inference from s 85(3). His Honour said[121]:

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118 *Australian Competition and Consumer Commission v Google Inc* (2012) 201 FCR 503 at 519 [80] per Keane CJ, Jacobson and Lander JJ.

119 *Universal Telecasters (Qld) Ltd v Guthrie* (1978) 18 ALR 531 at 538.

120 *Universal Telecasters (Qld) Ltd v Guthrie* (1978) 18 ALR 531 at 539.

121 *Universal Telecasters (Qld) Ltd v Guthrie* (1978) 18 ALR 531 at 547.

> "in general, where a television station telecasts an advertisement that contains certain spoken words, it is proper to hold that the television station has made a statement. Section 85(3) of the Act also points in the same direction. I consider that by telecasting the advertisement the [defendant] made the statement as alleged. Similar legislation elsewhere often contains some provision either excluding a television station or newspaper from its operation or providing a defence in one way or another, often somewhat comparable with the defence provided by s 85(3) of the [TPA]."

It will be necessary to return to the significance of s 85(3).

158 Bowen CJ's reasons are significant because the Full Court saw them as stating the law. His Honour said of the defendant's argument[122]:

> "The argument was illustrated by supposing a case where the television station broadcast a statement by an individual along the following lines: 'Today the Federal Treasurer said — "Sales tax on all motor vehicles will be reduced by 25 per cent as from 1 July next".' It was argued that the television station in this instance should be held to make the statement about the Treasurer and his announcement but should not be held to make the statement regarding sales tax. Where there are express words such as those in the illustration or where there are express words of adoption or exclusion, this may, perhaps, be a proper line to draw. If so, then logically it would seem difficult to distinguish the case where, by necessary implication the statement was made for or on behalf of another. These will be matters for decision when an appropriate case arises. In the fields of consumer protection legislation and television broadcasting, it appears to me that any doctrine of necessary implication, if it is proper to import it at all, will have to be closely confined.
>
> *No evidence was tendered as to what would be the reaction of particular viewers. Obviously one difficulty would be to lay down a rule for determining when such an implication should be made. Would the mere fact that it was an advertisement which, in the nature of things, featured the name of the advertiser be sufficient? The television medium is such that the impact is immediate and ephemeral. A viewer cannot go back over the broadcast. For him it is necessarily a matter of impression.* If one sought to find a test by which one might determine whether the implication should or should not be made, should one test it by asking whether the judge would make that implication if he were the viewer or, leaving the judge on one side, whether an ordinary reasonable person

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122 *Universal Telecasters (Qld) Ltd v Guthrie* (1978) 18 ALR 531 at 533.

> viewing it would make that implication or whether some less sophisticated or less perceptive viewer would do so. None of these tests would appear to me to be satisfactory. The relevant provisions of the Trade Practices Act are directed to protecting all viewers including those who are particularly susceptible to the influence of persuasion by advertisement. The fact that a statement is clearly an advertisement for a particular advertiser would not seem to constitute a sufficient basis in the circumstances to justify a holding that the statement was not made by the television station.
>
> While the terms of the advertisement in the present case may fairly raise the inference that the statement in it is the statement of Metro Ford, there is insufficient material in it to raise the inference that it is not also the statement of Universal Telecasters. Even if it be proper to distinguish statements, on the basis they are expressly or by necessary implication statements of the advertiser and not of the television station, the statement in this case is not seen to be such a statement.
>
> It may be suggested that this interpretation places a heavy burden upon television stations. However, it is no doubt because of this burden that the defences in s 85 are provided." (emphasis added)

These passages, apart from the emphasised words, were quoted by the Full Court[123].

159 It is possible to distinguish what Bowen CJ said from the present problem. He was discussing television viewers, who cannot go back over the broadcast. This case concerns users of search engines, who can study the relevant results page in a close and leisurely fashion. But it is undesirable to rest the outcome of the present appeal merely on that point of distinction.

160 The common factor in the Full Court's reasoning in *Guthrie's* case is s 85(3). There is an available argument, though it is a very extreme one, that unless the defence under s 85(3) is made out, any publication by one person of a misleading message created by another contravenes the misleading and deceptive conduct provisions. The ACCC did not put that argument in terms. One weakness in the argument is that while it might have force in relation to the relatively narrow field with which s 85(3) deals – the publication of advertisements by persons whose business it is to publish or arrange for the publication of advertisements – the problems that very wide absolute liability for

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123 *Australian Competition and Consumer Commission v Google Inc* (2012) 201 FCR 503 at 509 [39].

misleading and deceptive conduct create can arise in fields outside advertising[124]. For example, in *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd*, Bowen CJ, Lockhart and Fitzgerald JJ pointed out the problems that arise in relation to national newspapers[125]:

> "the contents of a [national] newspaper … cover an extremely broad range, with wide variations both in form and subject matter. Law lists, weather forecasts, stock exchange reports, reviews, articles on special subjects by identified experts, photographs, cartoons, etc. all accompany what might be more narrowly considered 'news', which commonly relates both to local and foreign events. Some articles would more readily be taken as statements by the newspaper than others. For example, an item of local news, such as a statement that a local company had failed, particularly if unaccompanied by a by-line, might often fit readily into that category. On the other hand, foreign news such as the report of the commencement of a war in another part of the world might, of its very nature, often suggest that the newspaper was doing no more than retailing information which had been supplied to it."

161 The ameliorative effect of s 85(3) – its role in lightening the "heavy burden" to which Bowen CJ referred in *Guthrie's* case – exists in relation to advertisements, but not in relation to other fields. That leaves open the possibility of universal absolute liability in those other fields. That is a factor pointing against the correctness of reasoning that leads to that result. By the expression "heavy burden", Bowen CJ was referring to the "absolute" nature of liability under s 52. It is absolute rather than strict, because no defence of honest and reasonable mistake has been expressly granted by the TPA or identified as a

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124 Among the leading cases not involving advertising are *Yorke v Lucas* (1985) 158 CLR 661 at 666; [1985] HCA 65; *Australian Ocean Line Pty Ltd v West Australian Newspapers Ltd* (1985) 58 ALR 549 at 586-587; *The Saints Gallery Pty Ltd v Plummer* (1988) 80 ALR 525 at 530-531; *Amadio Pty Ltd v Henderson* (1998) 81 FCR 149 at 257. See also *Gardam v George Wills & Co Ltd* (1988) 82 ALR 415 at 427 per French J ("Nobody would expect that the postman who bears a misleading message in a postal article has any concern about its content or is in any sense adopting it. The same is true of the messenger boy or courier service"); *Lake Koala Pty Ltd v Walker* [1991] 2 Qd R 49 at 58; *Gurr & Gurr v Forbes* (1996) ATPR ¶41-491 at 42,144-42,145; *Harkins v Butcher* (2002) 55 NSWLR 558 at 568 [45] (in its approval of *Dean v Allin & Watts* [2001] 2 Lloyd's Rep 249 at 257-258); *Charben Haulage Pty Ltd v Environmental & Earth Sciences Pty Ltd* (2004) ATPR (Digest) ¶46-252; *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd (No 2)* (2009) 74 ACSR 373 at 380-381 [28]-[33].

125 (1984) 2 FCR 82 at 91-92.

matter of implication[126]. All that the TPA offered in addition to s 85(3) was the defence that s 65A provided[127]. But this defence has limited application only. It is probably unavailable to Google in this case. In addition, s 85(6) provided a defence for persons who acted honestly and reasonably and ought fairly to be excused, but only if they were natural persons[128].

162 In *Guthrie's* case, Bowen CJ and Franki J did not go so far as to infer absolute and universal liability wherever the s 85(3) defence could not be made out. Franki J qualified his remarks with the words "in general", an expression permitting exceptions to any supposed rule of absolute and universal liability. Bowen CJ accepted that express words of adoption could result in liability and express words of exclusion could result in immunity from liability. He also accepted, though with caution, the idea that if express words of exclusion suffice for immunity, a necessary implication that the defendant only made the statement for or on behalf of someone else could also lead to immunity. The proposition that express words of adoption or exclusion, or necessary implications to that effect, are relevant is not inconsistent with later authority. The Full Court in the present appeal was probably correct to say that the only difference between what Bowen CJ said and what later cases have held is that the latter gave what Bowen CJ called "necessary implication[s]" a wider role in conferring immunity. On the other hand, the trial judge was also probably correct to say that the law has developed since *Guthrie's* case to the point that it is hard to see how *Guthrie's* case can provide assistance[129]. There is certainly a significant line of authority in this Court[130], in the Full Court of the Federal Court of Australia[131],

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126 Gillies, "Misleading and deceptive conduct: Immunising the intermediary – the conduit defence", (2006) 14 *Trade Practices Law Journal* 209 at 210, 219 (referring to *Proudman v Dayman* (1941) 67 CLR 536; [1941] HCA 28).

127 See now s 19 of the Australian Consumer Law.

128 See now s 85 of the *Competition and Consumer Act* 2010 (Cth).

129 *Australian Competition and Consumer Commission v Trading Post Australia Pty Ltd* (2011) 197 FCR 498 at 540 [185].

130 *Yorke v Lucas* (1985) 158 CLR 661 at 666; *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at 605 [38]-[40]; *Australian Competition and Consumer Commission v Channel Seven Brisbane Pty Ltd* (2009) 239 CLR 305 at 319-320 [38]-[40], 321 [43] and 323-324 [57].

131 *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82 at 89 (stressing the factual nature of the inquiry); *Australian Ocean Line Pty Ltd v West Australian Newspapers Ltd* (1985) 58 ALR 549 at 586-587; *The Saints Gallery Pty Ltd v Plummer* (1988) 80 ALR 525 at 530-531; *Gardam v George Wills & Co Ltd* (1988) 82 ALR 415 at 427; *Dalton v Lawson Hill Estate Pty Ltd* (2005) 66 IPR 525

(Footnote continues on next page)

and in the Court of Appeal of the Supreme Court of New South Wales[132], for the proposition that it is possible for the defendant to pass on or report a misleading statement by another person without being liable. The appellant cited this line of authority for that proposition. The respondent did not deny that the authorities stood for that proposition and did not attack either the authorities or the proposition. At no stage in oral argument was any attack suggested. The respondent's position was simply that the facts in this appeal extended beyond the proposition. In consequence the outcome of this appeal turns almost entirely on the facts. The reasoning underpinning those authorities rests on the fundamental idea that if a person repeats what someone else has said accurately, and does not adopt it, there is nothing misleading in that person's conduct. What, then, is the role of s 85(3)? It operates as a backstop in cases where the defendant did make the misleading statement, but the fairly rigorous criteria for immunity stated in s 85(3) are made out.

163 The ACCC correctly submitted that this case turns on its facts. So did *Guthrie's* case. The correctness of *Guthrie's* case on its own facts may or may not be doubted. But the result does not influence this Court to any particular outcome in the present appeal.

164 The ACCC's submission boiled down to the proposition that Google had made misrepresentations in the impugned sponsored links because the content of those sponsored links was responsive to the user's query through Google's AdWords program. If that proposition were sound, that submission would mean that Google would be liable unless it could discharge the burden of proving that it had no reason to suspect that an advertisement was in contravention of the TPA within the meaning of s 85(3). That is an unacceptably extreme submission.

165 The ACCC did not attack the proposition that if Google had expressly indicated that it was not making any representation inherent in the advertisements it would not have been liable under s 52. If that is so, then an exclusion by what Bowen CJ called a necessary implication must have the same result.

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at 543 [82], 544 [88] and 545 [94]; *Eric Preston Pty Ltd v Euroz Securities Ltd* (2011) 274 ALR 705 at 727-728 [198]-[212]; *Dib Group Pty Ltd v Coolabah Tree Aust-Wide Pty Ltd* [2011] FCAFC 57 at [190]-[197].

132 *Abigroup Contractors Pty Ltd v Sydney Catchment Authority* (2004) 208 ALR 630 at 648-649 [89]-[95]; *Orix Australia Corp Ltd v Moody Kiddell & Partners Pty Ltd* [2006] NSWCA 257 at [70] and [79]; *Borzi Smythe Pty Ltd v Campbell Holdings (NSW) Pty Ltd* [2008] NSWCA 233 at [51] and [82]-[87].

Orders

166 The appeal should be allowed with costs. Orders 1-5 made by the Full Court of the Federal Court of Australia on 3 April 2012 and orders 1-3 made by the Federal Court on 4 May 2012 should be set aside. In lieu thereof, the appeal to the Full Court of the Federal Court of Australia should be dismissed with costs.