

# GOOGLE V ACCC: THE HIGH COURT CONSIDERS MISLEADING AND DECEPTIVE CONDUCT

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## I INTRODUCTION

The first reported decision in 2013 from the High Court of Australia was delivered in the landmark case of *Google Inc v Australian Competition and Consumer Commission* ('*Google v ACCC*').<sup>1</sup> This unanimous decision is significant as it examined the liability of internet intermediaries for misleading and deceptive conduct under s 52 of the *Trade Practices Act 1974* (Cth) ('the Act')<sup>2</sup> and the defence available under s 85(3) of the Act.<sup>3</sup> As one commentator aptly described the case:

The decision deals with one of the most difficult areas in applying [s 52 of the Act] ... : whether an intermediary – such as a broadcaster, search engine operator, or provider of a social networking site – makes a misleading or deceptive statement by communicating a misleading or deceptive statement made by another person.<sup>4</sup>

In operating an internet search engine, Google Inc ('Google') provided sponsored links which directed internet users to websites chosen by its advertisers. In 2007, the Australian Competition and Consumer Commission ('ACCC') commenced proceedings against Google in the

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1 (2013) 294 ALR 404; [2013] HCA 1 (6 February 2013).

2 In this case note s 52 will be referred to as 's 52' or 's 52 of the Act'. Section 52 (1) *Trade Practices Act 1974* (Cth) provides: 'A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive'. Section 52(1) has since been superseded on 1 January 2011 by s 18(1) *Australian Consumer Law*, Schedule 2 to the *Competition and Consumer Act 2010* (Cth).

3 Section 85(3) *Trade Practices Act 1974* (Cth) provides: '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.' Section 85(3) has since been superseded on 1 January 2011 by s 251 *Australian Consumer Law*, Schedule 2 to the *Competition and Consumer Act 2010* (Cth).

4 Peter Leonard, 'Internet Intermediary Liability: A Landmark Decision by the High Court of Australia in *Google Inc v ACCC*' (2013) 15(9) *Internet Law Bulletin* 158, 158.

Federal Court of Australia,<sup>5</sup> alleging that the search results displayed by Google's search engine in relation to a number of sponsored links conveyed misleading or deceptive representations, with the consequence that Google contravened s 52 of the Act. At first instance, the primary judge, Nicholas J, dismissed the ACCC's claim against Google on the basis that Google, in merely acting as a conduit and passing on the misleading or deceptive representations, did not therefore make the misleading or deceptive representations. On appeal by the ACCC, the Full Court of the Federal Court allowed the appeal,<sup>6</sup> disagreeing with the primary judge and holding that Google made the misleading or deceptive representations. However on further appeal by Google, the High Court, in taking a similar approach to the primary judge, held unanimously that Google was merely acting as a conduit in passing on the misleading or deceptive representations and therefore did not make the misleading or deceptive representations.

## II BACKGROUND

Google operates a widely known internet search engine, commonly known as Google or the Google search engine.<sup>7</sup> Users type in a word or phrase and a search is launched across the internet for relevant webpages. The results appear as a list with hyperlinks for a user to navigate to and access a desired webpage. Two types of responses are generated in response to a search query entered into Google. One is a list of what are termed organic search results. Google has developed a complex algorithm to generate these results by ranking webpages according to their relevance and popularity. This is designed so that users search queries are matched with useful webpage results.

The second type of response is a list of what are termed sponsored links. It is generated by Google's AdWords program and appears in a shaded colour at the top and right hand side of the organic search results. The AdWords program is commercial in nature, as it promotes any advertiser's website that has an agreement to pay Google for preferential display whenever its business is selected in response to a search query.

This case arose from the AdWords program and the 'sponsored links' it generated. Four particular sponsored links came into question: STA

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5 *Australian Competition and Consumer Commission v Trading Post* (2011) 197 FCR 498 ('*ACCC v Trading Post*').

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

7 For factual background, see in particular, *Google v ACCC* (2013) 294 ALR 404, 410-415 [17]-[52]; *ACCC v Google* (2012) 201 FCR 503, 506-508 [13]-[34]; *ACCC v Trading Post* (2011) 197 FCR 498, 502-505 [1]-[16].

Travel, Carsales, Ausdog and Trading Post. These were all businesses that had entered into agreements with Google to use the AdWords program for commercial purposes. Each business had the ability to enter in a list of keywords and submit them to a Google representative to be entered into the AdWords program. The keywords have the effect of triggering an advertisement to appear as a sponsored link when a search query contains any of the nominated keywords. The problem that occurred was due to the development of a common practice whereby businesses would nominate the names of rival businesses as keywords. When a sponsored link appears the keyword that triggered it also appears. For instance, a user query for Harvey World Travel produced the following result:<sup>8</sup>

Harvey Travel

Unbeatable deals on flights, Hotels & Pkg's Search, Book & Pack Now!  
www.statravel.com.au

Here, the third sponsored link on the right hand side appeared for STA Travel with the keyword 'Harvey Travel' and the website link to the rival STA Travel. This created a risk that a user searching Google for a particular business may be led to believe that there was a commercial relationship between the advertiser and the business or product he or she was seeking.

The ACCC commenced proceedings in 2007, alleging that Google users were misled to believe that the sponsored links were not advertisements, but part of the organic search results. The ACCC claimed that the advertisements were misleading because they featured headlines with the names of their competitors.

The ACCC argued that Google had contravened the misleading and deceptive conduct provisions under s 52 of the Act through involvement in the display of misleading third-party advertisements. This was for three reasons: the advertisements were Google's response to a search query; Google's software allowed for the advertisements to be displayed and for the keywords to be inserted automatically into the advertisement that appeared; and Google maintained control over the layout of the advertisements on their website. The ACCC asserted that Google's representatives, as personnel of the company, who advised or assisted in the selection of keywords was material to Google having engaged in misleading or deceptive conduct.

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8 *Australian Competition and Consumer Commission v Trading Post* (2011) 197 FCR 498, 545 [211] (emphasis in original omitted); see also sch 1: at 576.

### III DECISION AT FIRST INSTANCE

The primary judge, Nicholas J, at first instance was presented with two claims against Google by the ACCC.

Under the ACCC's first claim, the ACC alleged that:

Google had engaged in conduct that was misleading or deceptive or likely to mislead or deceive by failing to adequately distinguish on its search results pages between sponsored links and organic search results.<sup>9</sup>

In rejecting the ACCC's first claim, the primary judge made these comments:

In the result, I do not accept that ordinary and reasonable members of the class would be likely to be led to believe that either top left or right side sponsored links were not advertisements or that they were no different to organic search results.<sup>10</sup>

In relation to the ACCC's second claim, that Google had engaged in misleading and deceptive conduct by publishing or displaying the sponsored links of four advertisers, STA Travel, Carsales, Ausdog and Trading Post, the primary judge made three key findings:

- 1) That the advertisements all contained representations which were misleading or deceptive, or likely to mislead or deceive;<sup>11</sup>
- 2) That the representations in the advertisements were made by the advertisers only, and were not made by Google;<sup>12</sup> and
- 3) That, if Google was found to have made the representations conveyed in the advertisements, the publisher's defence afforded under s 85(3) of the Act would only be available if Google 'did not know and had no reason to suspect that their publication' would amount to a contravention of s 52.<sup>13</sup>

As regards the primary judge's second finding, that the advertisements were only made by the advertisers and not by Google, his Honour relied

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9 *ACCC v Trading Post* (2011) 197 FCR 498, 533 [151].

10 *Ibid* 536 [169].

11 *Ibid* 551 [238], 554 [251], 567 [317]-[318], 572-573 [342].

12 *Ibid* 540-542 [186]-[195], 551-552 [239]-[241], 554 [251], 567 [318], 572-573 [342].

13 *Ibid* 543 [203].

upon *Butcher v Lachlan Elder Realty Pty Ltd*,<sup>14</sup> *ACCC v Channel Seven Brisbane Pty Ltd*<sup>15</sup> and *Universal Telecasters (Qld) Ltd v Guthrie*,<sup>16</sup> to conclude that 'Google merely communicated what [the advertiser] ... represented without adopting or endorsing any of it'.<sup>17</sup> He reasoned that the ordinary and reasonable persons of the affected class would have understood that the sponsored links were advertisements, and therefore messages from the advertisers which Google had merely passed on for what they were worth, without assuming any responsibility for their content or endorsing them.<sup>18</sup> As His Honour explained:

Once it is accepted that the ordinary and reasonable members of the class would have understood, as was the fact, that the ... [relevant] advertisement were advertisements, then it seems to me to follow that they would be most unlikely to have understood that any information conveyed by those advertisements was endorsed or adopted by Google. They would have understood that the message conveyed was a message from the advertiser which Google was passing on for what it was worth.<sup>19</sup>

Notwithstanding that the primary judge noted that the question whether Google has a defence under s 85(2) of the Act need not be considered given his previous findings, he went on to make these pertinent obiter remarks regarding its application:<sup>20</sup>

In my opinion the defence may be relied upon by a publisher which has published an advertisement in the ordinary course of business even if the publisher has had a substantial involvement in its compilation. This is because the advertisement need only be received in the sense of having been accepted for publication. Of course the other elements of s 85(3) must also be satisfied.<sup>21</sup>

The ACCC appealed to the Full Federal Court on the second finding of the primary judge.

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14 (2004) 218 CLR 592, 605 [38]-[40], 609 [51]. In this case the vendor of a property provided the agent with a survey diagram of the property. The agent included the diagram in a brochure of the property. The purchaser of the property claimed that the agent had misled and deceived them as the contents of the diagram provided by the vendor were incorrect. The majority of the High Court found that a reasonable reader would have seen the agent as only a messenger, rather than an endorser, of the information contained in the diagram, which was clearly not produced by the agent.

15 (2009) 239 CLR 305, 323-324 [57]. The High Court held in this case that endorsement or adoption is required before an intermediary, such as a television station, can be held to have contravened s 52 of the Act.

16 (1978) 18 ALR 531, 532-547. The Full Court of the Federal Court held in this case that a television station makes a statement when it broadcasts a spoken advertisement.

17 *ACCC v Trading Post* [2011] 197 FCR 498, 542 [195].

18 *Ibid* 542 [194].

19 *Ibid*.

20 *Ibid* 542 [196].

21 *Ibid* 543 [200].

#### IV DECISION OF FULL FEDERAL COURT

The ACCC's appeal was unanimously upheld by the Full Federal Court (Keane CJ, Jacobson and Lander JJ) upon its finding that Google had engaged in misleading and deceptive conduct.

The Full Court of the Federal Court framed the principal issue under the appeal as follows:

[W]hether Google has engaged in misleading and deceptive conduct as a result of displaying an advertiser's web address in the sponsored link which appears in response to an enquiry made of the Google search engine by search terms which consist of or include the name of a competitor of the advertiser. This conduct is said to amount to a misrepresentation of a commercial affiliation between the advertiser and its competitor by displaying the advertiser's web address in collocation with information concerning the competitor.<sup>22</sup>

Google denied that it contravened s 52, contending that it was not responsible for the misleading effect of the displayed response, as it would be apparent to users that Google was no more than a conduit for the advertiser.<sup>23</sup> It argued that its position is analogous to that of an owner of a billboard or telephone network, where such advertisements are readily understood by the audience as a statement by the advertiser and not the publisher.<sup>24</sup> Google also submitted that it was entitled to rely on the defence contained in s 85(3) of the Act.<sup>25</sup>

The Full Federal Court reversed the decision of the primary judge, on the ground that the primary judge had asked the wrong question:

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.<sup>26</sup>

The Full Court's reasoning relied on the following: firstly, that Google displayed the advertisements in response to the users' search queries;<sup>27</sup> second, that it was Google's AdWords system that generated the advertisements;<sup>28</sup> and third, that later decisions had not affected the reasoning in *Universal Telecasters (Qld) Ltd v Guthrie*<sup>29</sup> which held that a television station made a statement when it broadcast a spoken

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22 *ACCC v Google* (2012) 201 FCR 503, 504 [2].

23 *Ibid* 505 [3].

24 *Ibid* 518-19 [76].

25 *Ibid* 519 [78].

26 *Ibid* 522 [96].

27 *Ibid* 521 [88].

28 *Ibid*.

29 (1978) 18 ALR 531.

advertisement.<sup>30</sup> In other words, Google created the advertisements and thereby acted as a principal. The Full Court reasoned and found that Google's AdWords program manipulated the response to a search query in a way that a mere conduit (consistent with *Butcher v Lachlan Elder Realty Pty Ltd*) was incapable of doing.<sup>31</sup> The Full Court explained:

Google's conduct consists relevantly of the display of the sponsored link in response to the entry of the user's search term in collocation with the advertiser's URL [Uniform Resource Locator]. The display of the sponsored link is effected by Google's engine as Google's response to a user's search. That which is displayed by Google is called up by Google's facility as Google's response to the user's search. The clickable link, when clicked, takes the user directly to the advertiser's URL.<sup>32</sup>

The Full Court acknowledged that the extent of Google's involvement and manipulation in search results processes may be unappreciated by the ordinary and reasonable user, and so it may appear to be no more than a mere conduit.<sup>33</sup> However, this should not be considered the determinative issue. Rather the reality of Google's actual conduct should be scrutinised:<sup>34</sup>

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.<sup>35</sup>

The Full Court held that the sponsored links were misleading. Users were given incorrect information and links were prioritised that did not directly relate to their search query. Factually it was held that Google solely determined the ranking of sponsored links<sup>36</sup> and incorrect information was provided through a process regulated and controlled by Google acting as a principal.<sup>37</sup> As the Full Court explained:

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

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30 Ibid 533, 547.

31 *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CR 592; See footnote 17 that the agent merely passed on the information from the vendor without endorsing it and so could not be said to be the publisher of that information.

32 *ACCC v Google* (2012) 201 FCR 503, 521 [88].

33 Ibid, 521 [89].

34 Ibid.

35 Ibid 521 [92].

36 Ibid 524 [103].

37 Ibid 522 [94].

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.<sup>38</sup>

The Full Court held that the defence under s 85(3) of the Act would not be available to Google, as it had engaged in conduct as a principal and not as an intermediary, thereby falling outside of the availability of the defence.<sup>39</sup>

## V DECISION OF HIGH COURT

Google appealed the decision of the Full Court to the High Court of Australia. Upon hearing the appeal, the High Court reversed the decision of the Full Court. The High Court unanimously held that Google did not make the representations within the sponsored links relating to the STA Travel, Carsales, Ausdog and Trading Post advertisements. Consequently, Google did not engage in misleading or deceptive conduct. French CJ, Crennan and Kiefel JJ delivered a joint judgment, with Hayne and Heydon JJ delivering separate judgments.

### A *Joint Judgment of French CJ, Crennan and Kiefel JJ*

In dealing with the question whether Google contravened s 52 of the Act, the joint judgment of French CJ, Crennan and Kiefel JJ ('the majority judgment' or 'the majority') concluded that 'Google did not itself engage in misleading or deceptive conduct, or endorse or adopt the representations which it displayed on behalf of advertisers.'<sup>40</sup> In reaching this conclusion, the majority relied on the factual matrix that Google had no control over the search terms a user selects for the purpose of generating organic search results, nor did Google have control over advertisers' choice of keywords.<sup>41</sup> The majority rejected the ACCC's submission that Google created in an authorial sense the sponsored links, rather than the advertisers themselves:

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.<sup>42</sup>

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38 Ibid 522 [95].

39 Ibid 523 [98].

40 *Google v ACCC* 294 ALR 404, 420 [73].

41 Ibid 419 [67] However, where a keyword has been removed following a complaint by the owner of a business name or trade mark, that keyword will not trigger a sponsored link: at 415 [48].

42 Ibid 419 [68].



The majority observed that the primary judge's findings as to the perception of the ordinary and reasonable user of the Google search engine remained undisturbed by the Full Court and they held that:

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.<sup>43</sup>

As to the ACCC's allegation that Google's personnel had been involved in the selection of keywords, the majority reasoned that the evidence '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.'<sup>44</sup>

The majority judgment also discussed the publisher's defence under s 85(3) of the Act which Google submitted was available to it. The majority judgment asserted that the defence operated as a last resort when an intermediary publisher unwittingly adopts a misleading statement of an advertiser and so engages in misleading conduct. The majority explained as follows:

[A]n 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 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.<sup>45</sup>

### B *Judgment of Hayne J*

In his judgment Hayne J noted that what was required was a return to the Act and that '[e]very allegation of contravention of s 52 turns ultimately upon the proper construction of the Act.'<sup>46</sup> He elaborated:

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.<sup>47</sup>

Hayne J asserted that the relevant conduct was that of the advertiser selecting a relevant keyword and using it misleadingly together with the

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43 Ibid 420 [70].

44 Ibid 420 [71].

45 Ibid 421 [75].

46 Ibid 423 [84].

47 Ibid 424-425 [95] (emphasis in italics in original).

advertiser's material. Hence, it was the conduct of the advertiser and not Google that gave rise to the misleading or deceptive quality of the sponsored links displayed.<sup>48</sup> Put another way, the act of publishing the advertisement is not relevant conduct, until the publisher itself takes part by endorsing or adopting the misleading or deceptive conduct.<sup>49</sup> Justice Hayne also agreed with the majority that the defence contained in s 85(3) of the Act would only be in issue if the contravention of s 52 of the Act was first established on the part of the publisher publishing the advertisement.<sup>50</sup> He reasoned:

[T]o 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.<sup>51</sup>

### C *Judgment of Heydon J*

Heydon J disagreed with the reasoning of the Full Court. Firstly, on the ground that Google could not be said to have adopted or endorsed the advertisements, because it had represented that the advertisements may be revealed through use of its search engine.<sup>52</sup> Secondly, on the basis that Google's situation was analogous to the estate agent's situation in *Butcher v Lachlan Elder Realty Pty Ltd*<sup>53</sup> where the estate agent provided representations that the brochure would be helpful and contained all necessary details of the property.<sup>54</sup> However, Heydon J noted that it did not then follow from the additional representations of the estate agent that it was the estate agent who made the misleading representation appearing in the brochure itself.<sup>55</sup>

Heydon J held that the reasoning of the Full Federal Court on Google's AdWords system to support its conclusions<sup>56</sup> was both an error of law and fact.<sup>57</sup> As regards the error of law, Heydon J explained as follows:

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48 Peter Leonard, 'Internet intermediary liability: a landmark decision by the High Court of Australia in *Google Inc v ACCC* (2013) 15(9) *Internet Law Bulletin* 158, 160.

49 *Ibid.*

50 *Google v ACCC* 294 ALR 404, 430 [120].

51 *Ibid* 430-431 [123] (emphasis in italics in original).

52 *Ibid* 436 [146].

53 (2004) 218 CLR 592.

54 *Ibid* 596 [6].

55 *Google v ACCC* 294 ALR 404, 436 [146].

56 See *ACCC v Google* (2012) 201 FCR 503, 522 [94]-[95].

57 *Google v ACCC* 294 ALR 404, 437 [147].

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.<sup>58</sup>

As for the error of fact Heydon J elaborated as follows:

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.<sup>59</sup>

Justice Heydon reasoned further:

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.<sup>60</sup>

Justice Heydon also agreed with the majority and Hayne J on the role of s 85(3) of the Act, that it operates as 'a backstop' when an intermediary publisher makes a misleading statement by unwittingly endorsing or adopting a misleading statement of a third party.<sup>61</sup>

Heydon J considered the ACCC's submission 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.'<sup>62</sup> He held that these submissions were 'unacceptably extreme' as they would mean that Google would be liable for the misrepresentation unless it could be shown that it had no reason to suspect an advertisement existed in contravention of the Act.<sup>63</sup>

## VI COMMENTARY

The High Court of Australia's unanimous decision authoritatively declared that Google as an online publisher did not engage in misleading or deceptive conduct, by merely publishing or displaying the sponsored links. This was because 'Google did not author the sponsored links; it merely published or displayed, without adoption or endorsement, misleading representations made by advertisers.'<sup>64</sup> Importantly, the High

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58 Ibid 437-438 [148].

59 Ibid 438 [149].

60 Ibid 438-439 [151]. Justice Heydon by this explanation affirms the trial judge's position in *ACCC v Trading Post* [2011] 197 FCR 498, 541-542 [193].

61 Ibid 443 [162].

62 Ibid 443 [164].

63 Ibid.

64 Ibid 406 [3].

Court was of the view that Google should not be treated differently from other intermediaries, such as newspaper publishers (whether print or online) or broadcasters (whether radio, television or online) who publish, display or broadcast the advertisements of others.<sup>65</sup>

Although the High Court decision is a welcome outcome for internet intermediaries it must be noted that the High Court remained emphatic that each case ultimately turns on its own facts.<sup>66</sup> Hence, all publishers, including all Australian businesses that operate through the online publication of advertisements and content generated by third parties<sup>67</sup> still need to take care to act as no more than a mere conduit in passing on third party advertisements.

In addition Australian businesses that allow for the postings of third parties to occur, should also take measures to ensure 'that acceptable use policies, terms of use, and other notices as to the use of internet services include appropriate warnings as to illegal postings by others, including misleading statements by them.'<sup>68</sup> These businesses should endeavour to expressly provide on their websites or services, exclusions for other entities posting misleading statements on their website.<sup>69</sup>

The practical implications of the High Court's decision also extends to ensuring that Australian businesses that allow third party postings have a demonstrable system to consider upon notification, the misleading and deceptive statements of those third parties. Records of complaints and actions taken should be kept. Caution should be taken towards any action or inaction that occurs following knowledge of a misleading and deceptive posting by a third party, as this may amount to having reasonably endorsed or adopted the misleading statement of another person, posted on the site or service.<sup>70</sup>

The High Court's decision properly places a heavy burden on advertisers. As advertisers must bear the responsibility for all authorial aspects of their representations, liability for misleading and deceptive conduct should therefore rest with them.<sup>71</sup>

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65 Ibid 419-420 [69].

66 Ibid 442-443 [162], 443 [163].

67 YouTube is an example of a business of this nature. YouTube operates as an intermediary which passes on the advertisements of third party businesses for value. Further examples include Facebook pages, Twitter hashtags and blogs.

68 Peter Leonard, 'Internet intermediary liability: a landmark decision by the High Court of Australia in *Google Inc v ACCC*' (2013) 15(9) *Internet Law Bulletin* 158, 158.

69 Ibid.

70 Ibid.

71 *Google v ACCC* 294 ALR 404, 419-420 [69].

This case should serve as a reminder to online advertisers to exercise caution when using other companies' names and trademarks as keywords, as this can expose them to liability. The advertisements relevant to the dispute in this case were each found to be misleading or deceptive, or at least likely to mislead and deceive. The important point to note is that companies that have been infringed will not be able to pursue Google, given that Google is not responsible for the content of the advertisements. They will therefore have to pursue only the direct infringer, the advertiser.

Interestingly, the issue of liability for misleading and deceptive conduct can be compared with the issue of liability for publishing defamatory material. The question in defamation cases is of the publisher's intention rather than the publisher's control over the actual material.<sup>72</sup> In *Trkulja v Google (No 5)*<sup>73</sup> (decided prior to the High Court case under discussion) Beach J found Google as publisher liable for defamatory material posted on Google's webpage.<sup>74</sup> In the English case of *Tamiz v Google*<sup>75</sup> (decided subsequent to the High Court case under discussion) the England and Wales Court of Appeal held that Google was liable for a blog it hosted containing defamatory comments. It followed the English decision of *Byrne v Deane*,<sup>76</sup> that once Google was put on notice about the defamatory comments and given reasonable time to remove them, they were arguably liable as the publisher of the defamatory comments.<sup>77</sup> It, however, held that because Google had removed the defamatory comments a few weeks after being notified, that any damages awarded would be minimal and that 'the game would not be worth the candle.'<sup>78</sup>

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72 Minna Paltiel, 'Navigating Cyberspace - Australian Precedent Regarding Internet Liability' (2013) 16(2) *Internet Law Bulletin* 26, 27.

73 [2012] VSC 533 (12 November 2012).

74 Ibid Google could not rely on the defence of innocent dissemination pursuant to s 32(1) of the *Defamation Act 2005* (Cth), because they had been notified of the defamatory material but had failed to remove it.

75 [2013] EWCA Civ 68 (14 February 2013) This case before the England and Wales Court of Appeal Civil Division reversed the decision of the High Court of Justice (Queen's Bench Division) in *Google v Tamiz* [2012] EWHC 449 (QB) in which Eady J held that the case was unarguable.

76 [1937] 1 KB 818. In this case a defamatory comment posted on the wall of a golf club by a member, which the proprietors knew of and once notified of the defamatory material did not remove it within reasonable time, were held liable as publishers of the material.

77 [2013] EWCA Civ 68 (14 February 2013) [34]-[36]. Similar to *Trkulja v Google Inc* [2012] VSC 533 where Google could not rely on the defence of innocent dissemination because it had been put on notice about the defamatory material on the blog.

78 Ibid [48]-[50] citing *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946 Leave to serve Google outside Britain's jurisdiction in the US was also refused on this ground.

## VII CONCLUSION

The High Court's decision extends to all types of intermediaries, including broadcasters, search engine operators and providers of social networking sites. It would therefore affect any business that allows postings by third parties or other user-generated content within an electronic space under its control, including Facebook pages, Twitter hashtags and blogs.

On a final note it can be said that the High Court's decision is one of common sense and practicality.<sup>79</sup> It strikes a fair balance as to the assumptions of users, third party advertisers and online publishers as to where liability should rest. It balances the concept of protecting the reasonable consumer, who would understand that the sponsored links were separate to the organic search results and that Google did not stand behind anything stated by advertisers within the sponsored link advertisements, against placing unreasonable expectations on businesses. If Google was found liable it would face practical difficulties in 'determining whether a trader whose name appears in the headline of an advertiser's sponsored link is a competitor or associate of the advertiser.'<sup>80</sup> As Heydon J put it, this could lead to an exceptionally wide form of absolute liability for those who publish information in the media.<sup>81</sup>

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79 Michael Pelly, 'The ACCC Gets a Lesson in Practicality' *The Australian* (online), 8 February 2013 <<http://www.theaustralian.com.au/business/accc-gets-a-lesson-in-practicality/story-e6frg8zx-1226573042566>>.

80 Michael Sutton, *Google AdWords: Victory for Google against the ACCC in the High Court of Australia* (7 February 2013) Dibbs Barker. <[http://www.dibbsbarker.com/publication/Google\\_AdWords\\_\\_Victory\\_for\\_Google\\_against\\_the\\_ACCC\\_in\\_the\\_High\\_Court\\_of\\_Australia.aspx](http://www.dibbsbarker.com/publication/Google_AdWords__Victory_for_Google_against_the_ACCC_in_the_High_Court_of_Australia.aspx)>.

81 *Google v ACCC* 294 ALR 404, 438-439 [151].