

Google win is little comfort for Google, media and content carriers

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Those carrying statements of others should check out their risk profile and minimise it where possible

A party, D, that carries or provides the content or statement of another party, B, can end up being liable if that content is misleading and deceptive. At risk is a wide range of parties, including media carrying other people’s material such as ads, professional advisers passing on what they have been told, etc. This is Fair Trading Act (FTA) liability.

The dividing line between when D is liable and when it is not can be hard to draw. Is D just a conduit (not liable) or more closely involved (liable)?

In an Australian appeal last year on comparable legislation, Google ended up on the wrong side of the line, in relation to the ads that typically appear at the top and to the right of the normal Google search results page. We outlined this in a 2012 article *Google’s court loss: NZ advertisers, ad agencies and publishers at risk*¹.

One example of what was reviewed in that case is this screen shot:

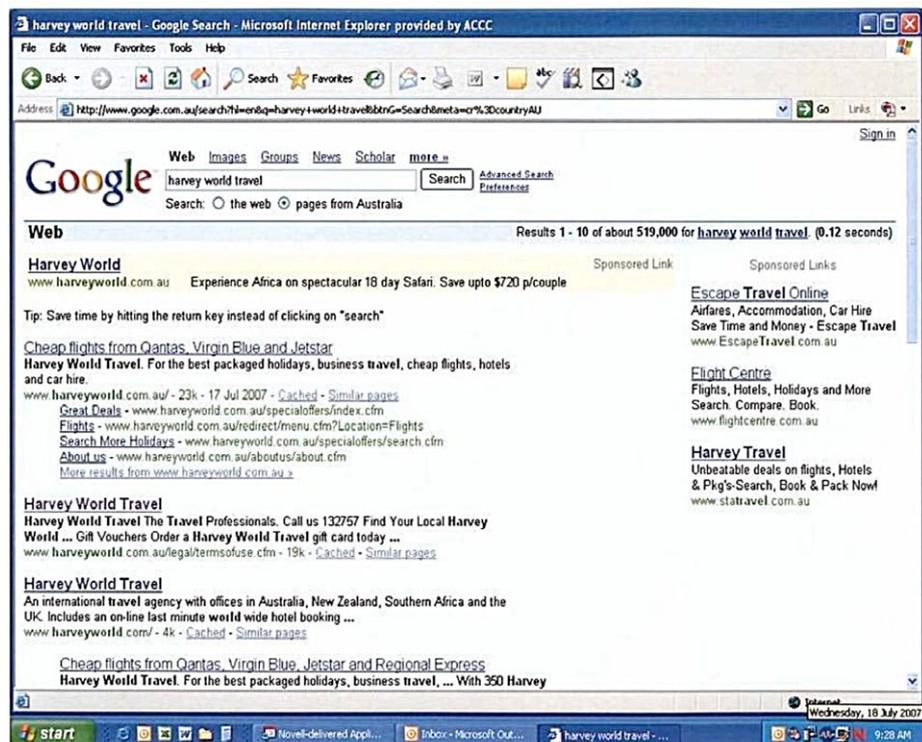
The words at the bottom right are headlined “Harvey Travel” (the travel agency searched for) but the ad and the link was for rival travel agency, STA.

The link was derived using Google’s algorithms and its Adwords service, described in our earlier article.

The Court said, in a well-reasoned and sensible judgment, that this constituted Google being more than a conduit and so it had engaged in misleading and deceptive conduct.

But the High Court of Australia has just overturned that decision, again based on careful reasoning.

This is not likely to be the last word, nor does it follow that the Australian final appeal decision will be applied in New Zealand, despite the NZ court’s frequent reliance on Australian decisions relevant to the FTA.

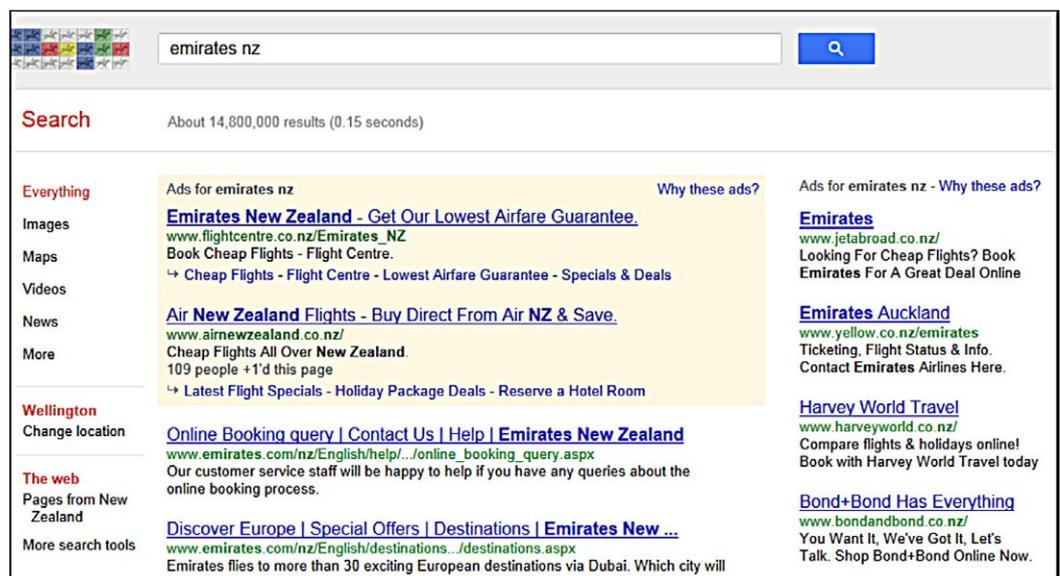


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One thing that is important is the range of factual variations for all parties potentially affected by this (we summarise implicated parties in our earlier article). That's so even for Google. Take the following screen shot from New Zealand from 2012²:

in response to the search parameters). Given the pivotal role that Google has in creating the combination appearing on the page below, arguably it is more than a mere conduit.

Additionally, and as the initial appeal court noted, the equivalent of the wide accessory



This time, a search for "Emirates NZ" produces a box at the top saying "ads for emirates nz". But the 2 listed ads are not for Emirates: they are for Flight Centre (as Emirates sells their tickets directly they are also a competitor) and Air New Zealand. These are not "ads for emirates nz". The heading for the first ad is "Emirates New Zealand – Get our Lowest Airfare Guarantee". That implies that clicking on the link will produce Emirates' lowest airfare. But in reality, in the small print, this is a Flight Centre site not specific to Emirates. The High Court of Australia case does not answer the question of whether in this situation, in NZ, Google would just be a conduit (not liable) or liable (in part due to its role via Adwords in getting the ad onto the search page

liability in s43(1) FTA was not canvassed. It is possible that Google could be liable under those provisions if the point was pleaded.

What all this says is that those carrying statements of others should check out their risk profile and minimise it where possible.

1. <http://www.wigleylaw.com/assets/Uploads/Googles-court-loss-NZ-advertisers-ad-agencies-and-publishers-at-risk.pdf>

2. Since this screenshot was taken last year, the link has been remedied but still appears to link to a general page not a specific Emirates page on the Flight Centre site.

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