Google's court loss: NZ advertisers, ad agencies and publishers at risk

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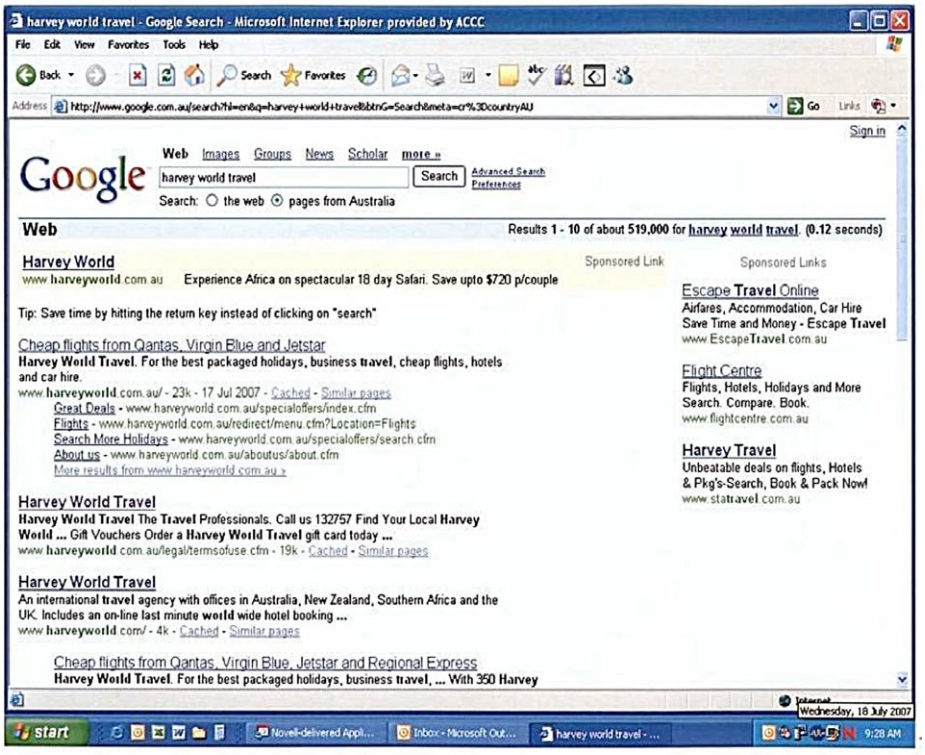
Earlier this month, the Australian regulator, ACCC, won an appeal against a judgment in favour of Google. The decision [1] shows that New Zealand websites, publishers and ad agencies can unexpectedly be liable under the Fair Trading Act, in relation to misleading and deceptive statements by advertisers in ads. Often they think that only the advertiser can be liable, but that's not always the case. Knowing the risk, they can take steps to minimise it.

The starting point is the various ways an advertiser gets it wrong and has misleading or deceptive statements in an ad, under s9 of the Fair Trading Act (FTA) and maybe other obligations in sections 10-14. The advertiser could have legal exposure ranging from prosecution to compensation liability.

When does the advertiser's exposure extend to others? The Google case provides pointers as our Fair Trading Act is similar to Australia's Trade Practices Act (now the Competition and Consumer Act 2010). Google ended up being held to be in breach in relation to advertisers' ads, on the sort of search result page that is so much part of our lives. It's just an example of the risks faced: problems can crop up in different ways.

What happened to Google

At issue were the ads that often appear at the top and right of the normal "organic" search results provided by Google. Here's one of the pages the court considered, based on a search for a travel agency, Harvey World Travel:



The ads for each search are chosen via Google's Adwords service, by way of an auction system that prioritises placement of ads. The auction takes into account factors such as the user's search request ("harvey world travel", in the example above), the selected Adword parameters and the keywords chosen by the advertiser that trigger ad placement.

STA is one of Harvey World Travel's competitors. The ad results in the right hand side of the page include this STA ad:

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

So there's a bold heading in the ad referring to Harvey World Travel, but the reference to STA is only in the last line in the website link.

Before turning to Google's position, it is necessary to consider if such an ad is misleading or deceptive. The Australian equivalent of the FTA, like the FTA, prohibits the making of misleading and deceptive statements.

The Appeal Court decided the ad was misleading, with its focus on Harvey in the bold heading when, in smaller print, there is a reference to the advertiser, STA. Using a Harvey World Travel brand variant, the ad wrongly pulled the reader to the competitor's website. It indicated that STA was somehow tied up with or was approved by Harvey World Travel and that Harvey World Travel information could be found on the website of its competitor, STA.

Although not yet clear, the same decision is likely here: this is a variation on the ads where qualifications on a headline offer are put in the small print. Often the courts will say this is misleading conduct under the legislation [2].

Many readers of this article wouldn't be confused or misled by the ad, as they would pick that Harvey World Travel and STA were competitors and separate from each other. But this is consumer legislation. Those involved in making statements must take account of the impact on the gullible, the not so intelligent, and the poorly educated [3]. Plus, this is not the place for a nit-picking approach (e.g. looking carefully and over time, is the ad clear?). It's a real-life analysis based on what readers would do normally, that is, in a few seconds' reading.

The court didn't have to decide whether STA breached the legislation, although that does seem likely to be so, based on the decision. The real issue was: is Google liable too as publisher of the ad?

Google argued that it is just a conduit, like a billboard or a telephone network. So it cannot be liable for what the advertiser has done [5]. The court didn't agree [6]. Under the legislation, parties in addition to advertisers can be liable. Although there is more detail in the approach, which does need to be looked at closely by those assessing their positions, in broad terms someone going beyond being a conduit is exposed. And it doesn't take much to do that. It all depends on the facts as a whole (so, for example, an online or hardcopy publisher could go over the line based on emails to or from its staff and advertisers) [7].

Here, said the court, Google had a proactive role in the selection of the ads for the search result page (for example, its Adwords service, and the relevant software, played a key part). Therefore, said the court, it wasn't just a conduit, and it could be liable for misleading and deceptive statements by advertisers. So the appeal court said it was in breach.

The Australian [8] has reported that Google may seek leave to appeal to the High Court of Australia.

Implications for New Zealand

How would a cross-section of readers understand the following New Zealand search result, downloaded earlier this month?

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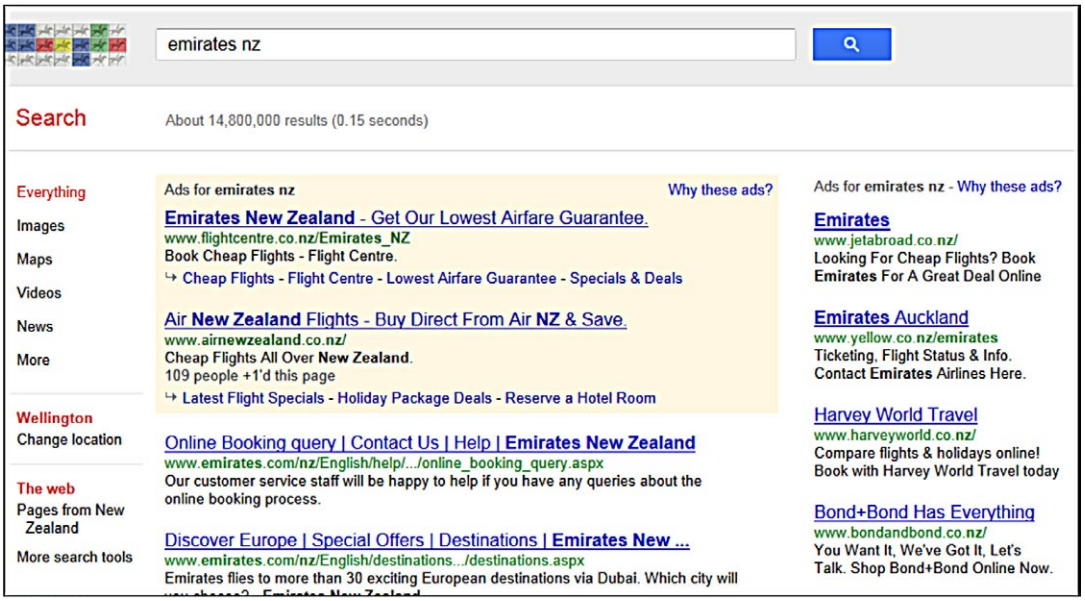

There's a change since the "sponsored links" in the search results considered by the Australian court. Now the ad sections of the page are headed up "Ads for emirates nz". While that picks up the search terms, this comes across as ads for Emirates the airline (this would be common for other searches too). And it is how this comes across that counts, not why the words are there in the first place. Yet none of the ads are for Emirates in that sense (e.g. one is for Air New Zealand).

The top ad is a FlightCentre ad. It is headlined "**Emirates New Zealand** – Get Our Lowest Airfare Guarantee". The headline implies that clicking on the link will produce Emirates' "Lowest Airfare Guarantee" not such a fare available from FlightCentre. While the small print refers instead to Flightcentre, if the Australian case is applied this might be a misleading statement under the Act.

FlightCentre is a competitor of Emirates, as Emirates also sells its tickets direct to the public, as does Flightcentre. Additionally, the link doesn't take the user to an Emirates-focussed page on the Flightcentre website: the link goes to a page dealing with all airlines it sells for, so Emirates may not get the sale via Flightcentre.

We're not saying the ad is in breach (nor that FlightCentre or Google are in breach) as we may not have all the information. Rather, issues to consider are raised.

If Emirates has agreed to allow Flightcentre to do this, that probably makes little difference, as the Australian decision indicates [9]. What is most important is the impact on consumers as that is the focus of the legislation. Behind-the-ads arrangements are largely irrelevant to that issue (they might help deal with issues as to endorsements and affiliations [10], but that's about as far as it goes).

So, where would that leave Google? Unless the "publisher's defence" noted below applies, if the Australian Google decision is relevant here, it may be that Google in New Zealand would be found to have made a misleading statement by way of publishing the ad.

Although there are some differences in approach, the legislation and the cases in New Zealand indicate that a similar result may apply here, as to both an advertiser and a provider such as Google (plus a wide array of websites hosting ads).

We may not have all the facts, so it's not being said Google is liable: there are just questions raised.

Solicitors' liability points the way

How easily organisations can trip up, and move from a safe conduit role, is highlighted by the first major New Zealand decision on this point, namely, the Court of Appeal judgment in *Goldsboro v Walker* [1993] 1 NZLR 394.

In that case, a Mr Oborn fraudulently informed the defendant solicitors that a purchase of land was being made by his mother-in-law. The Solicitors had acted previously for the mother-in-law. Those solicitors represented to the vendor's solicitors that they acted for the mother-in-law on the purchase. They also sent the agreement documents to the vendor's solicitors, executed, unknown to them, fraudulently by Oborn in the name of the mother-in-law. The Court of Appeal found the solicitors liable under s9.

As the judgment notes:

> "an innocent agent who acts merely as a conduit and purports to do no more than pass on instructions from his principal does not thereby become responsible for anything misleading in the information so passed on....On the other hand, an agent who does not merely purport to pass on what he has been told, or who passes it on inaccurately or in some way adopts it as his own or adds to it, may himself thereby engage in misleading conduct."

The Court of Appeal concluded:

> "Here the conduct of the solicitors fell within the second category. They did not purport to be merely passing on what Mr Oborn told them. They represented that they were acting for Mrs Walker, that she was financially involved and that she had countersigned the agreement. That they believed these representations to be true, because of what Mr Oborn told them, does not make their conduct any less misleading."

It doesn't take much to convert a conduit into a liable party. Before that Court of Appeal decision, many lawyers wouldn't have thought they would be personally liable if they acted on the say-so of a son-in-law.

From a policy perspective, which the courts do consider [11], it is one thing to have reliable comparative advertising and market information for consumers: that can be pro-competitive and in the interests of the market. Perhaps that justifies having ads for competitors of the company searched, where they are clearly delineated. It is another thing to have ads like the STA ad in Australia, or the Flightcentre ad in New Zealand, that are not so clear and have the effect noted by the Australian court.

This highlights that the issue is not so much about whether there can be ads in the format on the Google page (at least in Australia, Google has won on that point). Rather it is about the detail within the ads, although the overall format and context is relevant (for example the addition of the heading "Ads for emirates nz" in the second screen shot). Google's revenue from ads means the public get the excellent organic search results for free: in terms of market outcomes for consumers, it's great to have free organic searches as a trade-off for having ads.

This also highlights the approach to risk assessments and risk minimisation. There are major commercial benefits for Google and consumer benefits arising out of Google search results including ads. The objective should be to minimise legal (and reputational) risk while achieving those consumer and commercial benefits. Google, other publishers and website operators, don't have to ditch baby and bathwater.

The "publisher defence"

A publisher of ads (this probably applies widely, to include website operators hosting ads) has a total out if the "publisher defence" applies (this is s44(4) in New Zealand [12]). That happens if the publisher received the ad (or the information in the ad) in the ordinary course of business, where the publisher does not know or has no reason to suspect that publication of the ad would breach the legislation. The law is similar in both countries

In the Google case, the appeal court said the defence was not available, largely because of Google staff's direct involvement in relation to setting up the search

keywords [13]. As a result, said the court, Google knew or had reason to suspect that publication of the ads would breach the legislation.

But often there is no such direct involvement in the ad process. What if an NZ advertiser buys the ad service online from Google but doesn't communicate with Google people? At least in Australia (the point is not resolved here), the publisher isn't required to operate a proactive monitoring system to take advantage of the defence [14]. Whether Google has a publisher's defence may boil down to questions such as whether wider knowledge about the issues with ads needs to be considered when dealing with specific ads. For example, does Google have "reason to suspect" there is breach as to particular ads based on information such as in the Australian Google judgment, as to what is happening beyond the specific ads? This is the sort of issue the courts may deal with in the future [15].

So, one of the strategies for publishers and web site operators may be to have no system at all as the publisher defence does not expressly require a proactive monitoring system. While at one level that reduces legal risk ("you don't know what you don't know"), it does mean that potential problems are not triaged out. So, for many, it could be better on balance to have a proactive system to reduce legal and reputational risk. This may work in a way that does not erode revenues unduly.

Another option is to do what Google does: have a system that allows people to complain about misleading ads breaching trademarks [16]. Google may then withdraw affected ads. While that in itself may not be enough to take away the legal risk arising out of situations such as in the Australian case noted above, it does provide a mechanism to reduce the risk.

Other grounds

The Australian court noted that there may be other grounds, not before the court in that case, which might expose search engines: parties to breaches can be liable. In Australasia, this applies, for example, as to accessory liability: aiding and abetting the actions of the advertiser, or for knowingly being indirectly or directly concerned in the advertiser's breach [17]. There are other potential claims outside the consumer legislation, such as trademark and passing off law.

Ad agencies and others

The accessory liability noted in the last paragraph can apply to ad agencies too. They can end up being liable, along with advertiser clients, arising out of their involvement in the ads. But in our view, they also can rely upon the "publishers' defence" [18].

So can other publishers (including broadcasters, newspapers, etc), be liable as accessories, especially if they go beyond the role of simply publishing ads as a "conduit". This could happen for example if the publisher's own creative people get involved in developing ads: handled sub optimally, that could lead to an outcome where the organisation is liable as (a) it is not a "conduit" and (b) it cannot rely on the publisher's defence.

Reducing risk

Picking up on the points above:

- Understand how these issues apply to the organisation both generally and when staff get involved: there are some complexities and things vary from organisation to organisation so that needs a close review;
- Guidance and training for staff;
- Choose the level to which the organisation has proactive systems to be legally compliant and/or to triage out problems, and how they are structured.

1. ACCC v Google Inc [2012] FCAFC 49, on appeal from ACCC v Trading Post Australia Pty Ltd [2011] FCA 10862.

2 See our article summarising the position: $189 airfares to Sydney: Yeah right http://www.wigleylaw.com/assets/pdfs/2006/-fares-to-sydney-yeah-right.pdf

3 See the authorities (including Australian authority) noted in Para 28 of the leading Supreme Court decision on the FTA, Red Eagle v Ellis [2010] 2 NZLR 492. The Australian Court did not expressly refer to the authorities dealing with the width of the class of relevant people, but the approach is well established, in relation to statements made generally to the public. The position is different where the class is narrower (e.g. a statement made to a business person).

4. In the first instance decision under appeal in ACCC v Google, the court concluded that another company (Trading Post) had breached the legislation in circumstances similar to those applying to STA.

5. Paras 80-82 in ACCC v Google

6. Paras 88-97 in ACCC v Google

7. See the commentaries in Trotman and Wilson, Fair Trading Act: Misleading or Deceptive Conduct (Lexis Nexis) and in Gault on Commercial Law (Thomson)

8. http://www.theaustralian.com.au/media/monday-section/google-to-challenge-courts-ad-ruling/story-fna1k390-1226321664247

9. At Para 97 in ACCC v Google

10. Which were at stake in the ACCC v Google case. Emirates and FlightCentre will have a contractual relationship because the latter sells bookings for the former. While a lack of relationship between STA and Harvey World Travel was one of the grounds on which the statement was misleading in the Australian case, we consider it likely that a court, if applying the Australian approach, would define a misstatement in a more granular way in relation to the Emirates/FlightCentre scenario.

11. See for example Para 9.14(3) in Gault on Commercial Law

12. They may be able to rely on the s44(1) defence too, but only as to prosecution, not as to civil proceedings

13. And in one instance because Google had notice by way of the pleadings

14. The court on appeal adopted the first instance judge's reasoning in this regard.

15. For an overview of the issues, see Gault on Commercial Law, in the annotations on s44(4) of the Fair Trading Act

16. See an overview of the Google policy at: http://support.google.com/adwordspolicy/bin/answer.py?hl=en&answer=6118

17. See for example sections 40 and 43 of the Fair Trading Act

18. The Gault on Commercial Law annotation of s44 of the Fair Trading Act concludes that ad agencies cannot benefit from the publishers' defence but the reason does not seem to fit with the wording on s44(4) which appears to be specifically drafted to capture ad agency liability.

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