

Are YOU Being Misleading or Deceptive?

By Schon G Condon RFD & Irma Tedja

In business we all rely on a wide variety of communications to both receive and send information between parties or stakeholders with whom our business is associated. One of those most important links is categorically those communications with our customers or clients. It is through those communications that we both get and sustain our business. In this arena I have generally ended up dealing with two distinct groups of people, those who try hard to send honest communications and those that do not. Fortunately the latter is a minority but their impact can be catastrophic.

The name “Storm Financial” will be known to many and the impact that that failure has and is having is both wide felt and significantly costly. But it is not always the dodgy ones that get tangled up in such messes. Nonetheless it will no doubt be either costly or terminal.

In Court proceedings, that ultimately reached the High Court of Australia, initiated by the Australian Competition and Consumer Commission (“ACCC”) in 2007 against Google, and which has taken approximately five and a half years to reach finalisation. Certainly no doubt a very costly process for all party’s involved. This case was brought by ACCC claiming that Google had effectively displayed misleading and deceptive links on its Search Result pages when users had conducted searches.

It is probably first appropriate to consider some background on Google itself. Google Inc. was established in 1996 as a research project by a Larry Page and Sergey Brin of Stanford University in Stanford California initially as a means to simply search, locate and organise information on the internet, and it is now unequivocally considered to be the most powerful search engine available. Without doubt, Google has become an intrinsic part of everyday life. “Google it”, as one would say and you can confirm what we are saying!!! Further, the word “Google” itself has now become a transitive verb that can be found in both our day-to-day conversation and our dictionary’s.

In 2012, the Company had grown to more than 50,000 employees and reached an annual profit of more than \$US10 billion. However, this remarkable success, like many other successes, has come with the tackling of a number of obstacles along the way.

Reverting now to the ACCC case, the case emphasized that the ‘paid’ or ‘sponsored links’, as opposed to the organic links that are displayed according to their specific relevance to the search terms entered by the relevant user, were not genuine results. These ‘sponsored links’ had been introduced by Google as a part of the Google “AdWords” program in which subscribers would pay a fee to have their product, site, etc. favoured in the selection process of the search. Google was essentially introducing a new and very modern way of advertising.

The subscribers (advertisers) are able to decide how the advertisement will look as well as the search terms the advertisement will respond to. Unsurprisingly a number of businesses saw this as an opportunity for them to gain both consumer attention and hopefully ultimate sales, to the detriment of possibly better or more suitable competitors who had not advertised.

This case highlighted Section 52 (1) of the Trade Practices Act 1974 (now section 251 of the Australian Consumer Law) which states that: - **“A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive.”**

Google’s argument was that the sponsored links were merely displayed in a manner which corresponded or aligned with the subscribers (advertisers) desired prompts. Accordingly, Google held that they themselves should not be responsible for any allegation of any form of misleading and/or deceptive representations.

In response to this, the High Court’s ultimate decision held in Google’s favour. The Court determined that Google, as a web advertising intermediary, effectively plays the same role as any other advertising intermediaries such as newspaper publishers, magazine publishers and media broadcasters.

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The critical message that comes from this is in the modern litigious society we must be ever vigilant in what we do. Google fought this battle successfully through the initial proceedings, then unsuccessfully in an Appeal to the Federal Court by the ACCC and ultimately to victory in the High Court. Five and a half years of attention away from your core business, the same in legal costs, the same in time, the same in aggravation! Google was able to sustain this, could you?

Continual vigilance to all aspects of your business is critical; errors these days can and will wipe you out.