

Submission to Australian Consumer Law Review Issues Paper

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Key points

1. An evidence-based approach to consumer harm should guide all regulatory action under the *Australian Consumer Law* ('ACL'). In particular, independently-conducted and rigorous empirical research on the conduct and knowledge-base of Australian consumers should guide this action.
2. We consider that the broad provisions of the ACL are sufficiently flexible to adapt to emerging issues in e-commerce, especially the prohibition on misleading and deceptive conduct in section 18 of the ACL.
3. Based on the empirical research we carried out on Australian consumers' understanding of Google's search results, including for comparison shopping services, we urge regulatory bodies to re-consider the extent to which Australian consumers are confused, or even misled and deceived, by the way information is presented to them by search engine services such as Google.
4. In order to determine whether consumers are indeed misled or confused as to the origin and nature of the search results generated by online search services, we recommend that further thorough independent research is carried out on Australian consumers' understanding of search engine results, but especially Google search results (as the most popular search engine in Australia) and other comparison shopping services.

Introduction

We welcome this opportunity to provide input into this review of the Australian Consumer Law. Our contribution relates to section 4.2 of the Issues Paper on Online Shopping, and in particular section 4.2.3 on Comparator (comparison shopping) websites.

General comments

Often, empirical evidence in ACL proceedings for misleading and deceptive conduct is not produced by the parties which are subject to the litigation and if it is, it is not relied upon by those adjudicating such matters. This is because the question of whether particular conduct is misleading or deceptive is a finding of fact for the judge to make and it is not customary for the judge to refer to survey evidence.¹ Furthermore, if empirical evidence of consumer behaviour is adduced during proceedings, it is often presented by one or the other party to the proceedings, and usually only presented if the evidence aids that party's case. This may reduce the judicial perception of the usefulness of such evidence in misleading and deceptive conduct cases more generally.

We contend that independent evidence of consumer behaviour should be afforded more weight in guiding judicial decision-making and the formation of new legislative and policy instruments in the area of consumer law. Accordingly, we strongly urge the Review to recommend an evidence-based approach to ascertaining consumer harm, which will lead to more accurate and targeted law reform than is the case currently.

Online Shopping

ACL provisions such as those prohibiting misleading and deceptive conduct, given their generalised character and broad interpretation, are well-suited to apply, in theory, to emerging and innovative areas such as e-commerce and online transactions. We propose that this broad approach be retained in order to provide a legal framework that is responsive to new technological developments in commerce and is not overly constrained by technology-specific language or practices.

However, we propose that the application of the ACL provision on misleading and deceptive conduct to e-commerce, and in particular online shopping, should be reviewed based on recent research that we conducted on Australian consumers' understanding of Google's search results.² We conducted this survey to provide the first empirical research on this issue in Australia, even though this was an issue implicated in the *Google v ACCC* case.³

¹ V Huang, K Weatherall, and E Webster, "The Use of Survey Evidence in Australian Trade Mark and Passing Off Cases". in AT Kenyon, M Richardson and WL Ng-Loy (eds), *The Law of Reputation and Brands in the Asia Pacific* (Cambridge University Press 2012), pp 181-202.

² A Scardamaglia and A Daly, 'Google, Online Search and Consumer Confusion in Australia' (2016) *International Journal of Law and Information Technology* (doi: 10.1093/ijlit/eaw004). Available at SSRN: <http://ssrn.com/abstract=2760730>.

³ *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435.

We received two internal grants from Swinburne University of Technology to fund the research, and received no funding from Google, any of its competitors or any other organisation, so we consider our research to be independent and unaligned.

We surveyed a demographically representative sample of 1000 Australian adults in November 2014, showing them two screenshots of Google search results for the search terms 'apple' and 'rolex'. We then asked the respondents questions about these results, with the aim of ascertaining the extent to which they could identify the different parts of the search results page (organic results, paid advertisements and results from Google's subsidiary services including Google Shopping and Google News).

Our main findings are:

- In general, Australian consumers exhibited a lack of understanding about the operation and origin of different parts of the search results page.
- They were best able to understand and identify paid advertisements, as compared to their understanding and identification of organic results and results from Google's subsidiary services.
- There was particular confusion in relation to the operation and origin of Google's Shopping service.

We consider that the confusion we found may indicate confusion that is actionable at law under the ACL's prohibition on misleading and deceptive conduct.

In light of these findings, we consider that further, more thorough independent research should be carried out on Australians' understanding of Google search results and other online shopping platforms in order to ascertain the extent to which these sites may be in breach of ACL provisions prohibiting misleading and deceptive conduct, and in order to make recommendations about how these sites could improve their offerings to ensure consumers understanding fully how the platforms operate and what they are clicking on or otherwise buying.