

FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Employsure Pty Ltd [2021] FCAFC 142

Appeal from: *Australian Competition and Consumer Commission v Employsure Pty Ltd* [2020] FCA 1409

File number: NSD 1183 of 2020

Judgment of: **RARES, MURPHY AND ABRAHAM JJ**

Date of judgment: 13 August 2021

Catchwords: **CONSUMER LAW** – misleading or deceptive conduct and making false or misleading representations by causing the publication of Google advertisements in contravention of ss 18(1), 29(1)(b) and 29(1)(h) of the Australian Consumer Law – use of keywords and dynamic keywords in relation to paid Google advertisements – relevant principles in relation to misleading or deceptive conduct and false or misleading representations – appropriate approach to appellate review in a case involving an evaluative decision – whether primary judge erred in the attribution of characteristics to the broad and diverse target audience of the advertisements – whether ordinary or reasonable class members taking care of their own interests were likely to have a range of reasonable reactions to the Google advertisements – whether the primary judge erred in conceiving of only one reasonable reaction – whether primary judge erred in finding the Google advertisements did not convey the alleged representations – whether primary judge erred in relying on the “not insignificant number” test – appeal upheld – declarations of contravention made and injunctive relief granted – matter remitted to primary judge on questions of pecuniary penalty and costs of the proceeding below

Legislation: *Competition and Consumer Act 2010* (Cth) Sch 2
(*Australian Consumer Law*) ss 18, 21, 23, 24, 29
Evidence Act 1995 (Cth) s 140
Trade Practices Act 1974 (Cth) ss 52, 53

Cases cited: *.au Domain Administration Ltd v Domain Names Australia Pty Ltd* [2004] FCA 424; (2004) 207 ALR 521
Aldi Foods Pty Ltd v Moroccanoil Israel Ltd [2018] FCAFC 93; (2018) 261 FCR 301

Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd [2014] FCA 634; (2014) 317 ALR 73

Australian Competition and Consumer Commission v Dukemaster Pty Ltd [2009] FCA 682

Australian Competition and Consumer Commission v Employsure Pty Ltd [2020] FCA 1409

Australian Competition and Consumer Commission v Google LLC (No 2) [2021] FCA 367

Australian Competition and Consumer Commission v Optell Pty Ltd [1998] FCA 602; (1998) ATPR 41-640

Australian Competition and Consumer Commission v TPG Internet Pty Ltd [2013] HCA 54; (2013) 250 CLR 640

Australian Competition and Consumer Commission v TPG Internet Pty Ltd [2011] FCA 1254; [2011] ATPR 42-383

Australian Competition and Consumer Commission v TPG Internet Pty Ltd [2020] FCAFC 130; (2020) 278 FCR 450

Australian Competition and Consumer Commissioner v Geowash Pty Ltd (Subject to a Deed of Company Arrangement) (No 3) [2019] FCA 72; (2019) 368 ALR 441

Branir Pty Ltd v Owston Nominees Pty Ltd (No 2) [2001] FCA 1833; (2001) 117 FCR 424

Campbell v Backoffice Investments Pty Ltd [2009] HCA 25; (2009) 238 CLR 304

Campomar Sociedad, Limitada v Nike International Limited [2000] HCA 12; (2000) 202 CLR 45

CRW Pty Ltd v Sneddon [1972] AR (NSW) 17

Darwin Bakery Pty Ltd v Sully [1981] FCA 134; (1981) 36 ALR 371

Domain Names Australia Pty Ltd v .au Domain Administration Ltd [2004] FCAFC 247; (2004) 139 FCR 215

Eagle Homes Pty Ltd v Austec Homes Pty Ltd [1999] FCA 138; (1999) 87 FCR 415

Fox v Percy [2003] HCA 22; (2003) 214 CLR 118

Given v C.V. Holland (Holdings) [1977] FCA 33; (1977) 29 FLR 212

Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd [1984] FCA 167; (1984) 2 FCR 82

Google Inc v Australian Competition and Consumer Commission [2013] HCA 1; (2013) 249 CLR 435

Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd [1978] HCA 11; (1978) 140 CLR 216

Insight Radiology Pty Ltd v Insight Clinical Imaging [2016]

FCA 1406; (2016) 122 IPR 232
James Hardie Industries NV v Australian Securities and Investment Commission [2010] NSWCA 332; (2010) 274 ALR 85
Johnson v Mackinnon [2021] NSWCA 152
National Exchange Pty Ltd v Australian Securities and Investments Commission [2004] FCAFC 90; (2004) 49 ACSR 369
Noone (Director of Consumer Affairs Victoria) v Operation Smile (Australia) Inc [2012] VSCA 91; (2012) 38 VR 569
Optical 88 Ltd v Optical 88 Pty Ltd [2011] FCAFC 130; (2011) 197 FCR 67
Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd [1982] HCA 44; (1982) 149 CLR 191
Singtel Optus Pty Ltd v Telstra [2004] FCA 859
Sporte Leisure v Paul's International (No. 3) [2010] FCA 1162; (2010) 275 ALR 258
State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq) and Others [1999] HCA 3; (1999) 160 ALR 588
Taco Co of Australia Inc v Taco Bell Pty Ltd [1982] FCA 170; (1982) 42 ALR 177
Telstra Corporation Limited v Cable and Wireless Optus Limited [2001] FCA 1478
Telstra Corporation v Optus Communications Pty Ltd [1996] FCA 1035; (1996) 36 IPR 515
Tobacco Institute of Australia v Australasian Federation of Consumer Organisations Inc [1992] FCA 962; (1992) 38 FCR 1
Trivago NV v Australian Competition and Consumer Commission [2020] FCAFC 185; (2020) 384 ALR 496
Unilever Australia Ltd v Beiersdorf Australia Ltd [2018] FCA 2076
Warren v Coombes [1979] HCA 9; (1979) 142 CLR 531

 R Miller, *Miller's Australian Competition and Consumer Law Annotated* (43rd ed, 2021)

Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection

Number of paragraphs: 190

Date of hearing: 11 May 2021

Counsel for the Applicant: Mr N Owens SC and Ms D Forrester

Solicitor for the Applicant: Corrs Chambers Westgarth

Counsel for the Respondent: Mr P Brereton SC and Mr C Bannan

Solicitor for the Respondent: Webb Henderson

ORDERS

NSD 1183 of 2020

BETWEEN: **AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION**
Applicant

AND: **EMPLOYSURE PTY LTD ACN 145 676 026**
Respondent

ORDER MADE BY: **RARES, MURPHY AND ABRAHAM JJ**

DATE OF ORDER: **13 AUGUST 2021**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders made on 1 and 23 October 2020 be set aside.
3. The parties confer and seek to agree the form of any declaration and injunction that ought be made in relation to the subject matter of the appeal, failing which they provide submissions limited to two pages on or before 20 August 2021.
4. The proceeding be remitted to the primary judge for hearing as to penalty and costs in respect of the proceedings at first instance.
5. The Respondent pay the Appellant's costs of the appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

INTRODUCTION

- 1 In this proceeding the appellant, the Australian Competition and Consumer Commission (ACCC), appeals from the judgment of a single judge of this Court in *Australian Competition and Consumer Commission v Employsure Pty Ltd* [2020] FCA 1409 (TJ). The respondent, **Employsure** Pty Ltd, is a specialist workplace relations consultancy which advises employers and business owners across Australia in relation to the requirements of workplace relations and workplace health and safety legislation. It is a private company which has no affiliation with, or endorsement by, any government agency.
- 2 Through Google LLC, Employsure arranged the publication of online advertisements promoting its free employment-related advice service (**Google Ads**), which appeared on the screens of computers, tablets or smartphones in response to Google searches made by persons over the period from 10 August 2016 to 31 August 2018 (the **relevant period**). Employsure was aware that search terms such as “fair work commission”, “fair work Australia”, “fair work”, “fwc” and “fair work ombudsman” were frequently used by consumers for visits to the websites of major government agencies, the Fair Work Ombudsman and the Fair Work Commission. It selected those search terms as “keywords” in its search engine marketing strategy. Its use of such keywords meant that when a person making a Google search used search terms such as “fair work ombudsman”, “fair work Australia”, “fair work commission”, “Australia government fair work” or “Australia fair pay”, some of those terms appeared in the headline of the Google Ad. For example, when a person made a Google search using the term, “fair work ombudsman”, the headline of the Google Ad which appeared as the first search result said “Fair Work Ombudsman Help - Free 24/7 Employer Advice”. If users clicked on the hypertext in the Google Ads they were taken to a landing webpage operated by Employsure, and if they telephoned the number provided in some of the Google Ads, they reached an Employsure representative. None of the Google Ads, however, made any mention of Employsure.
- 3 In the proceeding below, the ACCC claimed that by the publication of seven Google Ads in the relevant period Employsure represented that it was, or was affiliated with and/or endorsed by, a government agency (the **Government Affiliation Representations**), and thereby

engaged in misleading or deceptive conduct, or conduct which was likely to mislead or deceive, in contravention of s 18 of the Australian Consumer Law (ACL) in Schedule 2 of the *Competition and Consumer Act 2010* (Cth). It also claimed that by publication of the Google Ads EmploySURE made false or misleading representations that its services were of a particular standard or quality in contravention of s 29(1)(b) of the ACL, and that it had government sponsorship or approval in contravention of s 29(1)(h) of the ACL.

- 4 The primary judge found that none of the Google Ads conveyed the Government Affiliation Representations to the class of persons who were the target audience for the advertisements, being business owners who are employers and who search for employment-related advice on the internet. On that basis his Honour dismissed the ACCC's claims that EmploySURE's conduct was misleading or deceptive or likely to mislead or deceive in contravention of s 18, and that EmploySURE made false or misleading representations in contravention of ss 29(1)(b) and (h).
- 5 The ACCC now appeals against those findings in respect of six of the seven Google Ads considered below. The central issue in the appeal is whether the learned primary judge erred in finding that the six Google Ads were not misleading or deceptive or likely to be so, nor false or misleading. That finding was essentially based on his Honour's conclusion that, viewed through the prism of an ordinary or reasonable member of the target audience of the advertisements, none of the Google Ads conveyed the Government Affiliation Representations.
- 6 For the reasons we explain, we respectfully consider the learned primary judge erred in failing to find that by publication of the Google Ads, EmploySURE conveyed the Government Affiliation Representations to the ordinary or reasonable member of the relevant class, which constituted misleading or deceptive conduct or conduct which was likely to mislead or deceive in contravention of s 18, and the making of false and misleading representations in contravention of s 29(1)(b) and (h).
- 7 Accordingly we have set aside the orders of the primary judge to dismiss the originating application and for the ACCC to pay the costs of the proceeding below. We have declared that EmploySURE contravened ss 18 and 29(1)(b) and (h) of the ACL; granted an injunction to restrain EmploySURE against a repetition of similar conduct; ordered EmploySURE to pay the costs of the appeal; and remitted the matter to the primary judge for decision in relation to the application for pecuniary penalties for the contraventions of ss 29(1)(b) and (h) and the costs of the proceeding below.

THE FACTS

8 The following is drawn from the Statement of Agreed Facts filed by the parties in the proceeding below, from some of the unchallenged factual findings of the primary judge, and from some evidence which is uncontentious as between the parties.

The Google Search Engine

9 The Google search engine allows users to search for information on the internet by entering terms into a browser window and pressing “Enter” or clicking on a button marked “Google Search”.

10 From about 2000, in addition to “organic” search results, “paid” search results or “Google Ads” started to be displayed in Google search result lists. From at least early 2015, a Google search could produce both “organic” search results and “paid” search results.

Organic search results

11 “Organic” search results are links to webpages that do not require any payments to be made to Google.

12 Organic search results are ranked by Google using a number of proprietary algorithms, which are subject to regular modification by Google (**Google Organic Algorithms**). The Google Organic Algorithms are maintained and updated by Google and are not publicly available. The overall purpose of the ranking is to produce results that may be relevant to the search terms entered by the user.

13 Whether or not a webpage link is displayed as an organic search result in response to a user search is determined by the Google Organic Algorithms, which accounts for a range of factors, including, for example:

- (a) the extent to which there is a “match” between the search terms used and the content of a given website, as assessed by the Google Organic Algorithms; and
- (b) the number and types of other websites that are hyperlinked to the relevant webpage, as assessed by the Google Organic Algorithms.

14 Below is an example of an organic search result which appeared in response to a search conducted on 10 July 2019 using the search term “buy property melbourne”:



15 Organic search results typically include the following features, as demonstrated in the example set out above:

- (a) a *headline* that incorporates a link to a webpage (in blue hypertext);
- (b) an *address* (or URL) of the webpage to which the headline links (in green text); and
- (c) a *description* of what the page is about (in grey text).

Paid search results (Google Ads)

16 Sometimes, in addition to the display of organic search results, one or more paid search results may also appear on the search results page.

17 “Paid” search results (or Google Ads) are advertisements that are created by, or at the direction of, advertisers using a platform provided by Google. Advertisers who use this platform are required to pay Google upon certain actions being taken by the internet user.

18 Paid search results are displayed in addition to the organic search results, generally above the organic results. Historically, paid search results were also displayed beside the organic results; however, starting in early 2016, Google commenced phasing out the display of paid search results on the right side of the page beside the organic search results.

19 The process of producing paid search results on a webpage is not determined by the Google Organic Algorithms. Rather, the display and location of a paid search result is determined by other algorithms used for Google’s advertising service (**Google Ads Algorithms**).

20 The table below sets out information about how paid search results may have been displayed from at least early 2015 to at least the end of 2018. However, the way a paid search result appears to a user can change depending on a number of factors including, for example, the browser (e.g. Internet Explorer, Firefox or Google Chrome) or device (e.g. personal computer, tablet or smart phone) that was used to conduct the search.

Period	Location of paid search result	Display of paid search result
At least 2015 and to around April 2016	Often, but not always, appeared on the top, bottom or on the right-hand side of the search results page	Typically marked by a yellow box underneath the headlines in which the word “Ad” appeared in white
Around April 2016 to around February 2017	Often, but not always, appeared on the top or bottom of the search results page	Typically marked by a green box underneath the headlines in which the word “Ad” appeared in white
Around February 2017 to at least the end of 2018	Often, but not always, appeared on the top or bottom of the search results page	Typically marked by a white box underneath the headlines, with a green border in which the word “Ad” appeared in green

- 21 From at least early 2015, a paid search result has consisted of three elements, as required by Google, and *which are populated by, or at the direction of, the advertiser* (emphasis added). These elements are demonstrated in the paid search result below (which appeared in response to a search on 10 July 2019 using the search term “buy property melbourne”) and comprise:
- (a) a “headline 1” (“Property Buyers Melbourne” in the example below) and a “headline 2” (“Independant [sic] Advice” in the example below), which incorporates a single link to a webpage (in blue hypertext);
 - (b) the display URL (or URL) of the webpage to which the headline links (in green text) (this is sometimes different to the actual URL for the webpage to which the paid search result links and not the full URL); and
 - (c) the description (in grey text – sometimes referred to as the “advertising text” or “ad copy”).



- 22 When the searcher clicks on a paid search result, he or she is taken to a website or “landing page”.
- 23 A “landing page” is the page of a website that a searcher “lands” on when they click on a Google search result (whether an organic search result or Google Ad). During the period from 2015 to 2018, Google recommended that a landing page featured what was advertised in the

Google Ad. Sometimes advertisers create bespoke “landing pages”, which exist separately from their website, and which feature the particular product or service presented in the Google Ad. “Landing pages” otherwise operate in the same way as other websites.

Google Ads service

- 24 Google provides advertisers with access to the Google Ads service by creating a Google Ads account.
- 25 An advertiser’s Google Ads account allows the advertiser to create and change their ad copy, and monitor the performance of their paid search results.
- 26 An advertiser using a Google Ads account to create a paid search result is able to request or propose the content of the headlines, the address of the webpage to which the headline links, and the advertising text.
- 27 A paid search result may display differently on a computer screen, as compared with how it displays on a smartphone.
- 28 Advertisers using Google Ads pay Google based on different measures (at the election of the advertiser), for example each time a user of the Google search engine clicks on the advertiser’s paid search result. This is known as “pay-per-click”.
- 29 Advertisers can set up “ad groups” and “campaigns” through their Google Ads account. An ad group contains a group of advertisements which target a shared set of keywords. For example, when marketing for a pet shop, there may be an ad group for “puppies” and another ad group for “kittens”. Each ad group will then contain a group of keywords (for example, in the case of “puppies” the keywords might be “buy puppy”, “puppies Sydney” and “pet shop puppy”).
- 30 Each campaign is made of one or more ad groups (in the example in the preceding paragraph the campaign would relate to the pet shop). The ad groups within a campaign generally share a budget, location and other parameter settings.
- 31 The default for a campaign is to run indefinitely. Campaigns can be ended at any time, and can be paused, resumed or removed. Advertisers can run multiple campaigns at the same time. By way of example, an advertiser (for example, a furniture retailer) may run different campaigns for different products (for example, one campaign for tables and another campaign for chairs).

Keywords for paid search results

- 32 An advertiser can specify one or more keywords corresponding to each of its paid search results in the advertiser's Google Ads account. This is the first step in creating ad copy, ad groups or campaigns. That is, when creating a paid search result, ad group or campaign in a Google Ads account, an advertiser will be prompted to select its keywords first, before creating ad copy.
- 33 A "keyword" is a word or series of words that are selected by an advertiser on the basis that they relate to the search terms used by an internet user. A paid search result is more likely to display when the keywords that are associated with the paid search result are more relevant to terms in fact used by the searcher. More than one advertiser can specify the same keyword in an ad group or campaign.
- 34 Keywords can also contain a series of words that represent longer, specific phrases for which a targeted audience might search.
- 35 Advertisers can add, remove or change the keywords in their ad groups and campaigns at any time. Google also recommends keywords to any advertiser who has a Google Ads account.
- 36 When keywords for a paid search result are entered into Google Ads, the advertiser can choose 5 types of keyword settings. These are known as "match type" settings.
- 37 Match type settings determine how the search term used by the searcher must "match" the keyword selected by the advertiser. The match types are:
- (a) ***exact match***: an exact match allows an advertisement to appear only when a search term is entered which matches or closely matches the keyword;
 - (b) ***phrase match***: a phrase match allows an advertisement to appear when the search term includes the exact phrase selected by the advertiser or close variations of it;
 - (c) ***broad match***: a broad match allows an advertisement to appear when a search term includes the keyword or a variation of the keyword, including synonyms and misspellings;
 - (d) ***broad match modifier***: a broad match modifier allows an advertisement to appear when the search term includes the keyword or a variation of it in any order, including synonyms; and
 - (e) ***negative match***: a negative match enables advertisers to prevent their advertisements being displayed when a particular search term is used.

The Google Auction

- 38 When a searcher enters search terms into the Google search engine that match the keyword or keywords included in an advertiser's keywords list, an "auction" is triggered. This involves the Google Ads Algorithms.
- 39 The Google Ads Algorithms make an almost instantaneous calculation that resolves the "auction" and determines which paid search results will appear in the search results, in which order they are shown, and how much Google will charge the advertiser whose paid search results are displayed (if and when the searcher clicks on them, if the advertiser has selected the pay-per-click payment method).
- 40 The "winners" of the auction are judged by Google's process of ranking advertisements. This is referred to by Google as "Ad Rank".
- 41 The exact formula that Google uses to determine top placement of paid search results is not publicly available. Ad Rank takes into account at least the following five features in determining whether a given Google Ad is eligible, whether it may appear in response to a particular search and, if so, where it may appear in the list of paid search results:
- (a) the maximum amount that the advertiser is willing to pay for a click on their paid search result;
 - (b) the quality of an advertiser's paid search advertisement and landing page, including how useful and relevant the advertisement, keywords and linked website are to the searcher (this is sometimes referred to as a "quality score");
 - (c) the Ad Rank thresholds, which are the minimum bids set by Google for an advertisement to show in a particular position;
 - (d) the context of the searcher's search, including the search terms used, the searcher's location, the type of device they are using, the time of the search, the nature of the search terms and the relative quality of other Google advertisements and search results that are bidding in that "auction"; and
 - (e) the expected impact from the advertisement extensions and the format of the advertisement (such as, the inclusion of phone numbers and other links to specific webpages).

- 42 The interaction between these factors will affect the Ad Rank of a given advertisement. For example, even if an advertiser is prepared to pay a large amount for a click on their advertisement, the Google Ad may not appear if it does not have a sufficient quality score (and whether the Google Ad will in fact appear, and if so where it appears, ultimately depends on all of the factors set out above).
- 43 During the period from 2015 to 2018, the higher the quality score for a keyword, the less an advertiser may have had to pay for a given ad position. Conversely, if a keyword had a poor quality score, the advertiser may have had to pay more for a given ad position.
- 44 Since the auction process is repeated for every search on Google, each auction can have potentially different results depending on the competition at that particular moment in time. That is, internet users may see search result lists with different Google Ads displayed, and in different orders, in response to the same search.
- 45 An advertiser can seek to improve the number of impressions of a given paid search result by:
- (a) adding negative keywords to an ad group keyword list;
 - (b) optimising the ad copy text (for example by including in the ad copy keywords that may have been used in the internet user's search terms) to attempt to improve the relevance of the paid search result; and
 - (c) amending or optimising the content and coding of the landing page (such as by including key terms that would be relevant to the target audience on both the webpage and in its URL) to attempt to improve the relevance of the paid search result and landing page.

Dynamic keyword insertion

- 46 An advertiser can further set up "dynamic keyword insertion", which is a feature of Google Ads that dynamically updates the displayed advertisement text to include one or more of the keywords that were included in a searcher's search terms.
- 47 To use this feature, the advertiser can include a code within their ad copy (for example, {Keyword: melbourne property}).
- 48 If a searcher uses one of the keywords in their search, Google Ads automatically replaces the code with the keyword that was included in the searcher's search terms. This means that the

paid search advertisement may appear differently to searchers depending on the search terms they use.

The impugned Google Ads

- 49 Each of the Google Ads is a paid search result, being an advertisement created by or at the direction of Employsure, using the platform provided by Google.

Google Ad 1

- 50 Google Ad 1 was published during the period from 27 August 2016 to 12 April 2018 when a person made a Google search using the search terms “fair work ombudsman” (at TJ [12]). An image of Google Ad 1 is set out below.



- 51 While the way in which Google Ad 1 appeared in relation to other search results may have been somewhat different on the screens of computers, tablets or smartphones, and might have differed somewhat as between different searches because of Google’s algorithms, it is uncontentious that during the relevant period it appeared as the first search result and in the context of a page of search results, an image of which is displayed in Schedule 1 to these reasons.

Google Ad 2

- 52 Google Ad 2 was published during the period from 10 August 2016 to 23 April 2018 when a person made a Google search using the search terms “fair work australia” (at TJ [13]). An image of Google Ad 2 is set out below.



- 53 With the same proviso as to the appearance of the advertisement on different devices and with different searches, it is uncontentious that during the relevant period Google Ad 2 appeared as the first search result and in the context of a page of search results, an image of which is displayed in Schedule 2.

Google Ad 3

- 54 Google Ad 3 was published during the period from 1 February 2017 to 30 April 2018 when a person made a Google search using the search terms “fair work commission” (at TJ [14]). An image of Google Ad 3 is set out below.



- 55 With the same proviso, it is uncontentious that during the relevant period Google Ad 3 appeared as the first search result and in the context of a page of search results, an image of which is displayed in Schedule 3.

Google Ad 4

- 56 Google Ad 4 was published during the period from 31 August 2017 to 31 August 2018 when a person made a Google search using the search terms “fair work ombudsman” (at TJ [15]). An image of Google Ad 4 is set out below.



- 57 With the same proviso, it is uncontentious that during the relevant period Google Ad 4 appeared as the first search result and in the context of a page of search results, an image of which is displayed in Schedule 4.

Google Ad 5

58 Google Ad 5 was published during the period from 2 January 2017 to 9 August 2018 when a person made a Google search using the search terms “australia government fair work” (at TJ [16]). An image of Google Ad 5 is set out below.



59 With the same proviso, it is uncontentious that during the relevant period Google Ad 5 appeared as the first search result and in the context of a page of search results, an image of which is displayed in Schedule 5.

Google Ad 6

60 Google Ad 6 was published during the period from 2 January 2017 to 9 April 2018 when a person made a Google search using the search terms “australia fair pay” (at TJ [17]). An image of Google Ad 6 is set out below.



61 With the same proviso, it is uncontentious that during the relevant period Google Ad 6 appeared as the first search result and in the context of a page of search results, an image of which is displayed in Schedule 6.

62 In the relevant period:

- (a) Employsure was aware of certain search terms (including “fair work commission”, “fair work Australia”, “fair work”, “fwc” and “fair work ombudsman”) being used frequently by consumers for on-line visits to the websites of the Fair Work Ombudsman and the

Fair Work Commission, each being a major government agency dealing with employment related matters; and

- (b) it selected those search terms as “keywords” in its search engine marketing strategy (at TJ [294]).

63 In doing so Employsure was not deliberately trying to lure people away from the services offered by government agencies such as the Fair Work Ombudsman or the Fair Work Commission, but instead was trying to have its Google Ads displayed to the people to whom it wished to direct its advertising, being prospective customers who were business owners who may have employment-related issues (at TJ [295]).

THE PRIMARY JUDGMENT

The claims in the proceeding

64 Before the primary judge the ACCC advanced five claims. It alleged that Employsure:

- (a) through the publication of seven Google Ads over the relevant period that conveyed the Government Affiliation Representations:
 - (i) engaged in misleading or deceptive conduct or conduct which was likely to mislead or deceive in contravention of s 18 of the ACL; and
 - (ii) made false or misleading representations that its services were of a particular standard or quality in contravention of s 29(1)(b) of the ACL, and that it had government sponsorship or approval in contravention of s 29(1)(h).
- (b) engaged in misleading conduct or conduct which was liable to mislead in contravention of ss 18(1) and 34 of the ACL by using keywords associated with government agencies as part of the design of its Google Ads campaign (the **Keywords Design case**);
- (c) engaged in misleading or deceptive conduct or conduct which was liable to mislead and/or made false or misleading representations in contravention of ss 18(1), 29(1)(b) and 34 of the ACL by representing that Employsure provided a free advice helpline, which consumers could call to receive advice free of charge, where the primary purpose of the free advice telephone line was to secure marketing leads and book face to face meetings to sell its advisory services;
- (d) engaged in unconscionable conduct in contravention of s 21 of the ACL in its dealings with three of its customers; and

(e) included unfair contract terms in three versions of its standard form contract in contravention of ss 23 and 24 of the ACL.

65 The primary judge dismissed each of the ACCC's claims. Only the first claim is the subject of appeal, and then in respect of six of the seven Google Ads impugned below.

66 It is therefore unnecessary to consider the primary judgment insofar as it deals with the other four dismissed claims or with the seventh Google Ad in the first claim.

Employsure's business

67 The primary judge found that Employsure is a specialist workplace relations consultancy which advises employers and business owners regarding the requirements of workplace relations and work health and safety legislation and provides products and services to over 20,000 employers across Australia. Those services included reviewing client documentation relating to workplace relations and work health and safety compliance, providing a 24 hour advice helpline and representing clients in courts and tribunals if they became involved in formal proceedings (at TJ [1]). Its business model is to require employers to pay a fixed fee subscription, as opposed to paying a fee for service, and then be entitled to access Employsure's products and services as required. The subscription fee is not affected by the volume of work which, as it eventuates, a particular employer requires from Employsure (at TJ [2]).

68 The majority of Employsure's client base are small business owners who employ staff, although Employsure also has several large clients (at TJ [3]).

69 Employsure offers on-site consultancy services as required, including staff training, management of disciplinary processes and risk reviews, as well as an initial review of a client's work health and safety practices (which Employsure calls a "Safe Check Review") and a review of a client's workplace relations practices (which Employsure calls a "Wage Check and Contract Check"). These particular services are generally offered by Employsure to its clients on payment of an additional fee, although sometimes they may be provided gratuitously as part of the negotiations of the total subscription fee (at TJ [4]).

70 Where a prospective client or interested person telephones Employsure, the calls are received by Employsure's business sales consultants. Sometimes these calls involve the sales consultant providing free advice to the caller. If the caller is, or may be, interested in acquiring Employsure's services, there is a procedure whereby the sales consultant offers to arrange a

face-to-face meeting with one of Employsure’s business development managers. Where that opportunity is taken up, the business development manager normally provides the person with additional advice, as well as explaining Employsure’s services and providing an obligation free quote. Some clients enter into a formal agreement with Employsure at this initial meeting or shortly thereafter (at TJ [5]).

The Google Ads

71 The primary judge set out the relevant facts showing the publication of each of the impugned Google Ads together with images of each advertisement (at TJ [12]-[17]). The fact that Employsure arranged the publication of the Google Ads, the contents of the advertisements, and the context in which the advertisements appeared on the pages of search results, is not contentious in the appeal. We have already set out images of the Google Ads, together with the context in which they appeared, and need not do so again.

The relevant principles

72 His Honour set out the applicable principles in relation to conduct which is misleading or deceptive or likely to mislead or deceive in contravention of s 18 of the ACL (at TJ [236]-[244]) and in relation to false or misleading representations in contravention of s 29(1)(b) and (h) of the ACL (at TJ [245]-[249]).

73 The ACCC does not contend that the primary judge misstated the principles except to the extent that his Honour said (at TJ [282]) that it was necessary for the ACCC to establish that each of the Google Ads conveyed the Government Affiliation Representations to a “not insignificant number” of ordinary or reasonable members of the class. We later deal with the primary judge’s reference to that purported test, but otherwise need not reiterate his Honour’s statement of the relevant principles.

The relevant class or target audience of the Google Ads

74 The ACCC submitted before the primary judge that the Google Ads were directed at members of the public who search for employment-related advice on the internet; this class included business owners but was not confined to them. His Honour found that the relevant class was a narrower one, being “business owners who are employers and who search for employment-related advice on the internet” (at TJ [259]). That finding is not challenged in the appeal. For ease of reference we will call the members of the class “business owners”.

Whether the Google Ads are misleading or deceptive

75 The primary judge accepted, and it is uncontentious, that the relevant context in which a statement is to be viewed in assessing whether it is misleading or deceptive, or likely to mislead or deceive, includes both internal and external factors operative at the time the representation was made, citing the observations of Wigney J in *Unilever Australia Ltd v Beiersdorf Australia Ltd* [2018] FCA 2076 at [20]-[22] (at TJ [260]).

76 His Honour summarised the ACCC’s contentions in relation to the allegedly misleading nature of the Google Ads (at TJ [19]-[20]) as follows:

19 The ACCC contended that the Government Affiliation Representations are conveyed by the headline and other words and phrases in the Google Ads and the URLs. Those phrases included “Fair Work Ombudsman” (FWO), “Fair Work Australia” or “Fair Work Commission” (FWC), which are major government agencies dealing with workplace relations. It contended that, by using those words in the Google Ads, the advertisements took on an “official” or “authoritative air”. The ACCC emphasised that the term EmploySure did not appear in the advertisements. The ACCC contended that the Government Affiliation Representations were further conveyed by:

- (a) the URL www.fairworkhelp.com.au/Fair-Work/Australia being displayed in the first six of the seven Google Ads immediately under the headline;
- (b) the references to “free” advice, which appeared in all seven Google Ads, and to which particular emphasis was given in the first four ads by being expressed as “Free 24/7 Employer Advice”; and
- (c) referring to its helpline as “the” advice service (or “the” free advice service) with the definitive article being used to reinforce the association of the service, or its resemblance, to the FWO helpline.

20 Finally, the ACCC relied upon the context in which the relevant representations were made. In particular, it emphasised that the seven Google Ads appeared following an internet search for the terms “fair work ombudsman” (Google Ads 1, 4 and 7), “fair work australia” (Google Ad 2), “fair work commission” (Google Ad 3), “australian government fair work” (Google Ad 5) and “australia fair pay” (Google Ad 6). It emphasised that EmploySure knew that those search terms were commonly used by consumers searching for the FWO or the FWC. Another matter of context relied upon by the ACCC was the fact that several of the Google Ads (1, 3, 4, 5 and 6) displayed a phone number which allowed Google searchers to call simply by linking through to EmploySure.

(Emphasis omitted from original).

77 His Honour noted the ACCC’s submission that the alleged representations were made in the course of advertising and that “much advertising is given little attention by consumers”. The ACCC submitted that was particularly so when the Google Ads which appeared when a person used a search term such as “fair work ombudsman”, actually contained that term in the headline

as hypertext, which could then be clicked on immediately and the user would be taken through to the “Fair Work Help” landing page of Employsure. The ACCC said that in other cases the Google Ad displayed a telephone number which enabled the consumer to call immediately without reference to a landing page. His Honour noted the ACCC’s contention that in such circumstances the time and effort and concentration that a member of the relevant class might have applied to these ads was probably not as significant or as great as the person might have applied in other circumstances where there were significant implications arising from the material that the person was reading and digesting (at TJ [262]).

78 His Honour also noted the ACCC’s submissions that the Google Ads conveyed the alleged representations:

- (a) by the headline, and other words and phrases in the Google Ads and the URL which included “Fair Work Ombudsman”, “Fair Work Australia” or “Fair Work Commission” being key government agencies which deal with workplace relations. The ACCC said that use of these words, including the names of government agencies, meant that the Google Ads took on an “official” or “authoritative air”. That was said to be reinforced by the use of these terms in their capitalised form because it suggested a government agency, rather than merely a reference to the subject matter that the agency regulates (at TJ [263]);
- (b) by the absence of any mention of Employsure in the headline of the Google Ads, or at all, and the fact that each of Google Ads 1-6 contains the name of a government agency as prominent words at the beginning of the headline (at TJ [264]); and
- (c) by:
 - (i) the URL www.fairworkhelp.com.au/Fair-Work/ being displayed in each of the Google Ads immediately under the headline;
 - (ii) the references to “free” advice, which appeared in each of the Google Ads, and which was expressed as “Free 24/7 Employer Advice” in Google Ads 1 and 4 in particular; and
 - (iii) the reference to Employsure’s hotline as “the” advice service, or “the” free advice service, using the definitive article, reinforced the association or resemblance of the services to the Fair Work Ombudsman helpline (at TJ [265]).

79 The primary judge noted the ACCC’s contentions as to the context in which the Google Ads were published (at TJ [266]-[270]). The ACCC submitted that in addition to the statements in the Google Ads themselves, the context in which the representations were made was also relevant in that:

- (a) each of the Google Ads was generated following an internet search using the search terms “fair work ombudsman” (Google Ads 1, 4 and 7), “fair work Australia” (Google Ad 2), “fair work commission” (Google Ad 3), “Australia government fair work” (Google Ad 5) or “Australia fair pay” (Google Ad 6). The ACCC submitted that Employsure knew that “fair work ombudsman”, “fair work Australia” and “fair work commission” were search terms commonly used by consumers searching for the Fair Work Ombudsman (at TJ [266]);
- (b) some of the Google Ads (Google Ads 1, 3, 4, 5 and 6) displayed a phone number which allowed consumers to call directly from the Google Ad, including by clicking on the link if using a smartphone. The ACCC said that in such cases consumers only had before them the search terms they had used and the information displayed in the Google Ad before speaking with an Employsure representative (at TJ [267]);
- (c) some persons searching for employment-related advice on the internet and to whom Employsure’s Google Ads were presented were likely to have an immediate problem for which they required advice and assistance. Employsure’s Managing Director, Mr Mallett, gave evidence that a number of “Premier 1 leads” (being small businesses with 1-5 employees) who contacted Employsure fell into “what might be described as the urgent category”, who may have “need[ed] immediate help”(at TJ [268]);
- (d) there was little force in Employsure’s claim that the presence of “.com” in the URL (and the absence of “.gov”) and the presence of the word “[Ad]” detracted from or dispelled the Government Affiliation Representations (at TJ [269]). Instead the misleading impression created by the Google Ads was a product of the following contextual matters:
 - (i) the search terms that generate the Google Ads, being the context in which they were published in response to a search term used by the consumer;
 - (ii) the text of the Google Ads themselves in what is said there and what is not said (particularly that none of the ads referred to “Emloysure” and Google Ads 1 to

6 contain the name of a government agency prominently at the beginning of the headline); and

- (iii) the fact that the Fair Work Ombudsman provides a similar business helpline that provides free advice; and
- (e) each Google Ad was published at the top of the page, because such positioning gets attention, and once a user identifies the result that responds to their query there is no need for them to keep searching (at TJ [270]).

80 His Honour also noted the ACCC’s submissions that while it was unnecessary to show actual deception to establish a contravention of s 18 of the ACL, it was not “wholly irrelevant” that some consumers were in fact misled into thinking that Employsure was affiliated with government (at TJ [272]). In this regard the ACCC relied on:

- (a) the evidence of representatives of three small business owners who gave evidence that after using a Google search to find employment-related advice they thought they were communicating with a government entity (variously and interchangeably characterised as “Fair Work”, “Work Safe” or the “Department of Fair Trading”) when in fact they were communicating with Employsure;
- (b) Employsure’s own documents, which the ACCC said demonstrated the frequency with which employees (as distinct from employers) clicked on the Google Ads and called through to Employsure;
- (c) Mr Mallett’s evidence that many employees called Employsure each day. The ACCC submitted that the primary judge should infer that the reason why a not insignificant number of employees contacted Employsure was that they, like employers, believed that the Google Ads had been published by a government agency; and
- (d) the complaints received by the Fair Work Ombudsman which caused it to issue a media release, which the ACCC said demonstrated the scale on which members of the public were misled or deceived by Employsure’s Google Ads campaign.

81 The primary judge did not accept the ACCC’s submissions. His Honour considered that, viewed as a whole and taking into account both internal and external contextual features, the Google Ads were not misleading or deceptive, or likely to be so, when looked at through the prism of a hypothetical reasonable member of the relevant class (at TJ [273]). His Honour referred to seven matters as significant to that conclusion (at TJ [274]-[281]):

- [274] First, it is made clear on the face of each of the seven Google Ads that they are advertisements, as is indicated by the word “Ad” which appears at the top of the advertisement adjacent to the hyperlink. An ordinary reasonable business owner, to whom should be attributed some knowledge of basic features of the internet and the Google search engine and its operations, would understand that this symbol demonstrated that the search result was a paid advertisement.
- [275] As previously mentioned, the ACCC placed great emphasis on the fact that the word “Employsure” did not appear in the Google Ads. In my view, the significance of that omission is overstated, particularly when reference is made to Mr Mallett’s evidence that even when the term “Employsure” was added in 2019, there was no material change in the number of employees contacting the business. The following matters are also important in assessing the significance of the omission.
- [276] Secondly, there are significant differences between the Google Ads and the organic search results linked to government agencies. The Google Ads are coloured differently from the government websites, which appear immediately below them. Moreover, the language used is quite different. For example, the government search results include language such as:
- (a) “Welcome to the Fair Work Ombudsman website. Information and advice about Australia’s workplace rights and rules”;
 - (b) “The Fair Work Ombudsman promotes harmonious, productive and cooperative workplaces. They help employees, employers, contractors and the community to ...”;
 - (c) “News & media · Fair Work Commission logo ... Coverage · National employment standards · The Commission & the Fair Work Ombudsman”;
 - (d) “Fair Work Commission. Australia’s national workplace relations tribunal”;
 - (e) “Fair Work Commission is the national workplace relations tribunal. It is an independent body with power to carry out a range of functions relating to: the safety net ...”;
 - (f) “Visit the Fair Work Ombudsman’s Consultation & cooperation page for detailed information about best practice consultation in the workplace”; and
 - (g) “The Fair Work Ombudsman and Fair Work Commission (the Commission) (previously called Fair Work Australia) are independent government organisations”.
- [277] Thirdly, the domain description “.gov” appears prominently in both the FWO and FWC websites, clearly identifying them as government agencies, which is to be contrasted with Employsure’s Google Ads, which use the “.com” domain. I accept Employsure’s submission that ordinary reasonable business owners would understand the distinction between a “.gov” domain and a “.com” domain, which indicates the domain of a commercial organisation.
- [278] Fourthly, the Google Ads are, in their terms, directed to employers. This is reflected in the terminology used, such as “The Free Advice Service for Employers”; “The Advice Service Line for Employers”; “Free 24/7 Employer

Advice”; “Business Owner HR Advice” and “Pay Rates for Your Staff”.

[279] Fifthly, the words “fair work” have a broad descriptive meaning, which is not limited to particular government agencies such as the FWO or the FWC. Indeed, the expression reflects the name of the *Fair Work Act 2009* (Cth). I also accept Employsure’s submission that the expression “fairworkhelp” is descriptive and advertises a place where advice may be obtained as to the meaning and operation of that legislation and other employment related matters. Furthermore, as indicated above, I accept Mr Mallett’s explanation as to how the use of the words “fair work” increases the Quality Score and accordingly reduces the cost of Employsure’s Google advertising.

[280] Sixthly, although there is evidence that three witnesses who were associated with the three relevant small business owners mistakenly believed that they were dealing with a government agency when they used particular search words which took them to Employsure’s Google Ads or landing pages, the weight to be accorded to this evidence should not be overstated. As Employsure pointed out, there is no evidence to establish that each of the three relevant representatives was misled by one of the impugned representations. Mr Ottes’ evidence was that he could not recall whether he performed the Google search or whether it was someone else in the office that did it (see [413] below). Ms Richardson could not say precisely what search terms she entered or what she saw (see [374] below). Similarly, Ms Martindale was not entirely certain what search terms she entered and in any event it was not clear what results she was presented with (see [392] below). Further, Ms Richardson and Ms Martindale gave some evidence relating to Google Ads which falls outside the pleaded period. To my mind, of more evidentiary significance is the material which suggests that the vast majority of consumers who were presented with the Google Ads did not click on them. Presumably they were not led into error.

[281] Seventhly, I accept Employsure’s submission that a reasonable business owner who wished to contact the FWO or FWC or other similar government agency would be expected to take reasonable steps to verify that they are calling the correct number. The point is well illustrated by *Puxu* and the observations of Mason J which are set out at [240] above. The object of the consumer protection provisions is not to protect persons who do not take reasonable steps in their own self-interest. As already highlighted, the Google Ads indicate on their face that they are an advertisement and from a body which, at the very least, does not clearly identify itself as a government agency. Moreover, it is notable that the Google Ads are closely followed by organic search results which explicitly relate to specific government agencies, such as the FWO or FWC.

82 The primary judge concluded (at TJ [282]) as follows:

For these reasons, I find that the ACCC has failed to establish that a not insignificant number of ordinary or reasonable members of the relevant class would infer that Employsure was, or was affiliated with and/or endorsed by government. Accordingly, the Government Affiliation Representations were not likely to mislead or deceive, nor were they false or misleading.

THE APPEAL

83 The Notice of Appeal alleges:

The learned trial judge erred in failing to find:

- (a) that the publication of each of Google Ads 1 to 6 as set out at TJ[12]-[17] conveyed the Government Affiliation Representations as defined in the Amended Concise Statement filed on 16 September 2019; and
- (b) that the Respondent therefore engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18 of the Australian Consumer Law (**ACL**) and/or made false or misleading representations about its services, including as to an affiliation with or endorsement by a government agency, or status as a government agency, in contravention of s 29 of the ACL.

LEGISLATION AND RELEVANT PRINCIPLES

84 Section 18 of the ACL provides:

Misleading or deceptive conduct

- (1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
- (2) Nothing in Part 3-1 (which is about unfair practices) limits by implication subsection (1).

85 Sub-sections 29(1)(b) and (h) of the ACL provide:

False or misleading representations about goods or services

- (1) A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:
 - ...
 - (b) make a false or misleading representation that services are of a particular standard, quality, value or grade; or
 - ...
 - (h) make a false or misleading representation that the person making the representation has a sponsorship, approval or affiliation; or...

86 The parties were essentially in agreement as to the applicable principles concerning the prohibition on misleading or deceptive conduct under s 18 and on false or misleading representations under s 29, and their areas of disagreement largely concerned the application of those principles to the facts of the present case.

87 Section 18 of the ACL is based on s 52 of the *Trade Practices Act 1974* (Cth) (**TPA**) whereas s 29 is based on s 53 of the TPA. Section 29 is concerned with “representations” while s 18 is concerned with “conduct”, but in the present case, as in many cases, that makes no difference as it is uncontentious that conduct such as publication of the Google Ads can convey

representations. The purpose of s 29 (and its predecessor provision in the TPA) has been described as being to “[support] ACL s 18 by enumerating specific types of conduct which, if engaged in trade or commerce in connection with the promotion or supply of goods or services, will give rise to a breach of the Act”: R Miller, *Miller’s Australian Competition and Consumer Law Annotated* (43rd ed, 2021), [ACL 29.20] p 1510.

88 There is no meaningful difference between the expressions “misleading or deceptive” in s 18 and “false or misleading” in s 29: *Australian Competition and Consumer Commission v Dukemaster Pty Ltd* [2009] FCA 682 at [14] (Gordon J) (in respect of the analogous provisions in the TPA); *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 634; (2014) 317 ALR 73 at [40] (Allsop CJ) (***Coles Fresh Bread***); *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2020] FCAFC 130; (2020) 278 FCR 450 (***TPG FFC***) at [21] (Wigney, O’Byrne and Jackson JJ). The prohibitions under the provisions are similar in nature.

89 There is, though, one significant difference between ss 18 and 29. The inclusion of the phrase “likely to mislead or deceive” in s 18 means that a contravention may be established if there is a real or not remote chance or possibility that a person exposed to impugned conduct would be misled. It is not necessary to demonstrate that the impugned conduct was actually misleading; it is enough if it was likely to be so: ***Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd*** [1984] FCA 167; (1984) 2 FCR 82 at 87 (Bowen CJ, Lockhart and Fitzgerald JJ); *Noone (Director of Consumer Affairs Victoria) v Operation Smile (Australia) Inc* [2012] VSCA 91; (2012) 38 VR 569 at [60] (Nettle JA (as his Honour then was), Warren CJ and Cavanough AJA agreeing at [33]); ***Google Inc v Australian Competition and Consumer Commission*** [2013] HCA 1; (2013) 249 CLR 435 at [6] (French CJ and Crennan and Kiefel (as her Honour then was) JJ). In contrast, the absence of that phrase in s 29 means that the applicant must prove to the requisite standard that the respondent made representations that were actually false or misleading. It is not sufficient for the applicant to prove only that it was likely that they were such: *Australian Competition and Consumer Commission v Google LLC (No 2)* [2021] FCA 367 at [110] (Thawley J).

90 Because s 18 is focussed on “conduct” that is misleading or deceptive or is likely to mislead or deceive, the necessary consideration must begin by identifying the impugned conduct with precision: ***Campbell v Backoffice Investments Pty Ltd*** [2009] HCA 25; (2009) 238 CLR 304 at [32] (French CJ); *Google Inc* at [89] (Hayne J). Section 29 is focussed on the alleged

representation and that must be identified with precision. The impugned conduct and representations have been identified in the present case.

91 It is then necessary to consider whether the identified conduct was conduct “in trade or commerce”. In the present case it is uncontentious that it was.

92 The central question is whether the impugned conduct (under s 18) or the alleged representations (under s 29), viewed as a whole and in context, have a sufficient tendency to lead a person exposed to the conduct into error (that is, to form an erroneous assumption or conclusion about some fact or matter): *Taco Co of Australia Inc v Taco Bell Pty Ltd* [1982] FCA 170; (1982) 42 ALR 177 at 200 (Deane and Fitzgerald JJ); *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* [1982] HCA 44; (1982) 149 CLR 191 at 198 (Gibbs CJ); *Campomar Sociedad, Limitada v Nike International Limited* [2000] HCA 12; (2000) 202 CLR 45 at [98] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ); *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; (2013) 250 CLR 640 (*TPG HCA*) at [39] (French CJ, Crennan, Bell and Keane JJ); *Campbell* at [25] (French CJ).

93 Where, as in the present case, the impugned conduct or representation is directed to the public generally or a section of the public, the question as to whether the impugned conduct or representation is misleading (or in relation to s 18, is at least likely to mislead) must be approached at a level of abstraction where the Court must consider the likely characteristics of the persons who comprise the relevant class to whom the conduct or representation is directed, and consider the likely effect of the conduct on hypothetical ordinary or reasonable members of the class, disregarding reactions that might be regarded as extreme or fanciful: *Puxu* at 199; *Campomar* at [102]; *Google Inc* at [7] and *TPG FFC* at [22].

94 Section 18 and 29 are not intended to protect people who fail to take reasonable care to protect their own interests: *Puxu* at 101, *Campomar* at [102].

95 It is unnecessary to prove that any person was actually misled by the conduct or representations in question. Evidence that a person has in fact formed an erroneous conclusion is admissible, and may be persuasive, but is not essential. Indeed, such evidence does not of itself establish that conduct or a representation is misleading. The question as to whether conduct is misleading or deceptive or a representation is false or misleading is an objective one and the

Court must determine the question for itself: *Taco Bell* at 202; *Puxu* at 198; *Google Inc* at [6] and *TPG FFC* at [22].

96 Conduct or a representation that merely causes confusion and wonderment is not necessarily misleading or deceptive, or false or misleading: *Google Inc* at [8]; *Campomar* at [106]; *Taco Bell* at 201; *Coles Fresh Bread* at [39].

97 It is not necessary to prove an intention to mislead or deceive or to make a false or misleading representation to show a contravention of s 18 or s 29:

- in relation to s 18: *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* [1978] HCA 11; (1978) 140 CLR 216 at 228 (Stephen J with whom Barwick CJ and Jacobs J agreed, and at 234 per Murphy J); *Puxu* at 197; *Google Inc* at [9];
- in relation to s 29: *Given v C.V. Holland (Holdings)* [1977] FCA 33; (1977) 29 FLR 212 at 217 (Franki J), *Darwin Bakery Pty Ltd v Sully* [1981] FCA 134; (1981) 36 ALR 371 at 376 (Keely, Toohey and Fisher JJ); *Sporte Leisure v Paul's International (No. 3)* [2010] FCA 1162; (2010) 275 ALR 258 at [125] (Nicholas J).

98 In relation to allegedly misleading representations in advertisements it should be borne in mind that many readers will not study an advertisement closely, instead reading it fleetingly and absorbing only its general thrust. It is the impression or thrust conveyed to a viewer, particularly the first impression, that will often be determinative of the representation conveyed: *Tobacco Institute of Australia v Australasian Federation of Consumer Organisations Inc* [1992] FCA 962; (1992) 38 FCR 1 at 4 (Sheppard J); *Telstra Corporation v Optus Communications Pty Ltd* [1996] FCA 1035; (1996) 36 IPR 515 at 523-524 (Merkel J) (*Telstra v Optus*); *Singtel Optus Pty Ltd v Telstra* [2004] FCA 859 at [38] (Jacobson J); *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2011] FCA 1254; [2011] ATPR 42-383 at [38] (*TPG first instance*), approved in *TPG HCA* at [47]. In deciding whether or not an advertisement is misleading the Court must put itself in the position of the relevant consumer. It should be kept in mind that the relevant consumers would have read the advertisement in a quite different context and way to that in which the judge considers them in a court environment and in the quiet of chambers. As Thawley J said in *Google LLC (No 2)* at [86]:

There is no question that the more one pores over the relevant screens, the more one notices matters of detail, the more one appreciates the literal meaning rather than what

might first have been understood and the more one sees nuances and subtleties which might have been overlooked by the consumer.

EMPLOYSURE'S SUBMISSIONS

- 99 Employsure submits (as is common ground in the appeal) that the Google Ads were directed to a target audience comprising “business owners who employed staff and who used the internet to search for employment related advice”. It did not dispute that, depending on the operation of Google’s algorithms, by Employsure’s specification of and payment for various “keywords” to be associated with its Google Ads in the relevant period, advertisements were presented in the results of searches conducted by business owners that included headings with the terms “fair work ombudsman”, “fair work commission” and/or “fair work Australia”, which related to the terms in fact used by the searcher.
- 100 Employsure notes that none of the Google Ads are said by the ACCC to have expressly represented that Employsure was, or was affiliated with and/or endorsed by, a government agency. Rather the ACCC’s case depends upon it establishing that an ordinary or reasonable member of the class of business owners, reading each of the Google Ads in the context in which they appeared, would infer that Employsure was, or was affiliated with and/or endorsed by, a government agency.
- 101 Employsure says, and it is uncontentious, that it is necessary to consider each of the Google Ads in the context in which they appeared on the screen of a computer, tablet or smart phone in response to a Google search. That context includes the adjacent organic (or unpaid) search results that were displayed on the screen. Employsure argues that when the six Google Ads are seen in that context, even on a perfunctory or cursory review, the ordinary or reasonable business owner would have seen a clear contrast between the paid Google Ads and the adjacent organic search results linked with various government agencies.
- 102 Employsure submits that the relevant context includes the features of the Google Ads, as found by the primary judge, being that:
- (a) they were identified as advertisements (at TJ [274]);
 - (b) they are in a different colour to the adjacent government related organic search results (at TJ [276]);
 - (c) the language they used is quite different to the more formal language of the adjacent government related organic search results (at TJ [263] and [276]);


- (d) they were directed exclusively to employers (at TJ [278]);
- (e) the words “fair work” have a descriptive meaning which is not limited to government agencies, and reflect the name of the relevant legislation (at TJ [279]); and
- (f) the evidence suggests that the vast majority of consumers presented with the Google Ads did not click on them (at TJ [280]).

103 Employsure contends that the present case is unlike the advertisements considered in *TPG HCA* as there is no express statement or dominant message in the impugned Google Ads, and no question arises about whether qualifications in the advertisements are sufficiently prominent to dispel the express statement or dominant message.

104 It submits that the ACCC is wrong in arguing that the primary judge attributed an excessive degree of technological and commercial sophistication and awareness to the relevant class. It argues that the degree of technological and commercial sophistication, and awareness that the primary judge attributed to class members was modest, as his Honour only attributed to class members “some knowledge of basic features of the internet and the Google search engine and its operation” (at TJ [274]). It contends that it would be wrong not to attribute at least that degree of knowledge to the relevant class of business owners who, by reason of their having the capacity to own and operate a business with employees, should reasonably be attributed with greater acumen than the public at large.

105 Employsure’s submissions as to the relevant principles broadly accorded with the applicable principles we have set out above. It accepts that in relation to representations allegedly made to the public or to a section of the public, it is necessary to isolate by some criterion a hypothetical ordinary or reasonable member and then to inquire with respect to that hypothetical individual whether the alleged misconception or deception arose or is likely to arise, excluding those reactions which are extreme or fanciful: *Campomar* at [103] and [105].

106 Employsure argues that the primary judge was correct (at TJ [273]) in stating that “the relevant question is whether an ordinary reasonable business owner would infer that such an affiliation [with a government agency] existed, when all relevant circumstances are taken into account.” Employsure argues that the primary judge then proceeded, correctly, to identify seven features of the Google Ads and their context which explained his conclusion that an ordinary or reasonable business owner would not infer that Employsure was, or was affiliated with and/or endorsed by, a government agency (at TJ [273]-[282]).

107 Employsure says that it was open to the primary judge to conclude that an ordinary or reasonable member of the class would understand that the  symbol (**Ad Symbol**) which appeared in each Google Ad signified that they were paid advertisements (at TJ [274]). It submits that the ordinary and reasonable member of the class would understand the distinction between the “.gov” domain name that appeared in the organic search results relating to government agencies such as the Fair Work Ombudsman and the Fair Work Commission, which appeared on the same search results page; and the “.com” domain name that appeared in each Google Ad and which indicated the domain related to a commercial organisation (at TJ [277]). On its argument, the primary judge asked himself the correct question and then answered it in a way that was open to him.

108 Employsure accepts that the primary judge incorrectly stated the applicable test in expressing his ultimate conclusion that “the ACCC has failed to establish that a not insignificant number of ordinary or reasonable members of the relevant class would infer that Employsure was, or was affiliated with and/or endorsed by government” (at TJ [282]). It concedes that the Full Court decisions in *TPG FFC* and *Trivago NV v Australian Competition and Consumer Commission* [2020] FCAFC 185; (2020) 384 ALR 496 (Middleton, McKerracher and Jackson JJ), both handed down after the close of argument before the primary judge, are authority for the proposition that there is no requirement for the ACCC to show that a “not insignificant number” of ordinary or reasonable class members were or were likely to be misled by the advertisements.

109 Employsure argues, however, that the primary judge’s reference to the “not insignificant number” test should properly be regarded as “superfluity” given that:

- (a) his Honour identified the correct question (at TJ [273]); and
- (b) his Honour’s substantive reasons (at TJ [260]-[281]) leading to the conclusion (at TJ [282]) were not expressed in terms that suggested that the ACCC was required to establish, on a qualitative basis, that some proportion of the ordinary and reasonable members of the class would have to be misled, or be likely to be misled.

110 Employsure argues that the primary judge’s expression of the ultimate conclusion in terms that the authorities now show to be incorrect does not mean that he did not address the correct question, nor that his Honour would have reached a different conclusion had he done so. It

notes that in both *TPG FFC* at [24] and *Trivago* at [193] the Full Court held that the application of the wrong test in those cases made no difference to the result.

111 Employsure also rejects the ACCC’s contention that the primary judge mistakenly narrowed the representations alleged (at TJ [248]-[249]), by omitting the representation that the Google Ads conveyed that Employsure *was* a government agency (as compared to a private service affiliated with or endorsed by a government agency). It contends that when careful attention is given to those paragraphs, the omission was appropriate as the primary judge was considering the alleged breach of s 29(1)(h) of the ACL which concerns false or misleading representations that a person has a sponsorship, approval or affiliation. The primary judge observed that in *Australian Competition and Consumer Commission v Optell Pty Ltd* [1998] FCA 602; (1998) ATPR 41-640, O’Loughlin J held that s 53(d) of the TPA, the predecessor to s 29(1)(h) of the ACL, did not apply where the private organisation represented that it *was* the government. It says that the primary judge drew an appropriate contrast on the basis that in the present case, unlike in *Optell*, the ACCC alleged that Employsure represented that it is a government agency and *also* that it is affiliated with, or is endorsed by, a government agency.

112 Employsure says that the ACCC’s contention that the trial judge considered the Google Ads as a “job lot”, rather than individually, is unfair and contends that the primary judge considered each of the impugned Google Ads. It notes that the primary judge set out each of the Google Ads (at TJ [12]-[17]) and referred to the various aspects of the advertisements upon which the ACCC relied (at [TJ [263]-[265]). On its argument, the primary judge having concluded that there were a series of matters that were common to all of the Google Ads, it was unnecessary for his Honour to repeat himself five times by saying the same thing about each of the advertisements.

113 It submits that the primary judge took into account and weighed the contextual matters which the ACCC alleges show that the Google Ads conveyed the Government Affiliation Representations. For example, the primary judge:

- (a) considered the absence of the name Employsure in the search results to be “a relevant factor” (at TJ [264] and [275]);
- (b) took into account that the Google Ads were generated upon an internet search for the terms “fair work ombudsman”, “fair work Australia”, “fair work commission”, “Australia government fair work” and “Australia fair pay” (at TJ [266]);

- (c) did not expect that the ordinary or reasonable business owner would engage in “careful scrutiny” of the Google Ads or undertake a “careful comparison” of those ads with the organic search results for government agencies. The primary judge considered that a reasonable business owner who wished to contact a relevant government agency would be expected to take reasonable steps to verify that they were calling the correct number (at TJ [281]); and
- (d) took into account that some of the Google Ads included a telephone number (at TJ [262] and [273]).

114 Employsure also rejects the ACCC’s contention that the fact that each of the Google Ads referred to “free” advice, which was similar to the free helpline offered by the Fair Work Ombudsman, acted in support of the alleged representation. It says that does not alter the balance in terms of whether the alleged representations were conveyed.

115 Employsure notes that the primary judge found (at TJ [280]) that there is no evidence to establish that any of the small business owners called by the ACCC were misled by one of the impugned Google Ads. This finding is not challenged in the appeal.

116 It submits that the ACCC has failed to demonstrate why, what it describes as the primary judge’s “layered and careful analysis” of the circumstances relevant to publication of the impugned advertisements, shows appellable error. It contends that the primary judge’s conclusions were open to him and that the appeal should be dismissed.

CONSIDERATION

The nature of the appeal

117 Appeals to this Court from the decision of a single judge of the Court are by way of a rehearing, which involves correction of error. How the primary judge’s reasoning may be shown to be wrong depends on what the reasoning is about, and error is not demonstrated merely because the appellate court disagrees with the primary judge: *Branir Pty Ltd v Owston Nominees Pty Ltd (No 2)* [2001] FCA 1833; (2001) 117 FCR 424 at [20]-[24] (Allsop J (as his Honour then was) with Drummond and Mansfield JJ agreeing).

118 As Perram J (with whom Allsop CJ and Markovic J agreed) pellucidly explained in *Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* [2018] FCAFC 93; (2018) 261 FCR 301 at [45]-[54], at one extreme lies a trial judge’s conclusions as to the law, where the appellate court will show no

deference at all to such conclusions. If the appeal court considers the trial judge has made an error of law it must substitute its view. At the other extreme lies a trial judge's findings of fact where the reliability or credit of a witness is involved. In such cases it is accepted that the trial judge enjoys very considerable advantages over an appellate court and the court on appeal will not depart from such findings unless they are shown to be wrong by reference to "incontrovertible fact or uncontested testimony" or otherwise are "contrary to compelling inferences": *Moroccanoil* at [46] citing *Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118 at [28]-[29].

119 Between those extremes lies a "grey area" in which the amount of deference shown to a trial judge's conclusions is a function of the nature of the issues before the trial judge and the relative advantage enjoyed by the trial judge over the appellate court: *Moroccanoil* at [47]. One type of finding that falls within this grey area is the drawing of inferences by an appellate court from facts already found. Speaking of that question, in *Warren v Coombes* [1979] HCA 9; (1979) 142 CLR 531 at 551, Gibbs ACJ, Jacobs and Murphy JJ explained:

...[I]n general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge, but, once having reached its own conclusion, will not shrink from giving effect to it.

120 Other types of findings within this grey area, include conclusions as to whether certain packaging conveyed the alleged representation, whether a word or phrase is capable of distinguishing one trader's goods from another, and whether the facts show conduct within or outside standards such as unconscionability or oppressive conduct. Such questions and the application of such standards involve an element of evaluation. In such cases the appeal court must be guided not by whether it disagrees with the finding but whether it detects error in it. Error may appear syllogistically where it is apparent that the conclusion reached involves some false step, for example overlooking some relevant matter. Error may, on the other hand, also appear without any explicitly erroneous reasoning as the result may be such as simply to bespeak error. In such cases as Allsop J (as his Honour then was) said in *Branir* at [29] an error may be manifest where the appellate court has a "sufficiently clear difference of opinion": *Moroccanoil* at [49].

121 Even so, as Allsop CJ (with whom Markovic J agreed) said in *Moroccanoil* at [7], the Full Court in *Optical 88 Ltd v Optical 88 Pty Ltd* [2011] FCAFC 130; (2011) 197 FCR 67 at [33]

(Cowdroy, Middleton and Jagot JJ) correctly eschewed the use of “sound bites” such as “plainly or [sic: and] obviously wrong” (taken from *Eagle Homes Pty Ltd v Austec Homes Pty Ltd* [1999] FCA 138; (1999) 87 FCR 415) or “sufficiently clear difference of opinion” (taken from *Branir*). The Full Court in *Optical* 88 explained that the task of this appellate Court is complex; it cannot be captured by such sound bites and approved the principles explained in *Branir* at [28]-[29].

122 We have reached our view on the appeal by application of the principles explained in *Branir* and *Moroccanoil*. First, we have made up our own mind as to the facts, doing so in the context that there is now no factual dispute between the parties. In particular there is no dispute in relation to the primary judge’s findings as to the publication and contents of the Google Ads and the context in which they appeared in relation to other search results on the screens of computers, tablets and smartphones. Our view that the primary judge fell into error is not based on any difference of view in relation to those matters.

123 Second, we have given appropriate respect and weight to the views of the primary judge, in the context that there is no challenge to the primary judge’s acceptance of the evidence of Employsure’s witnesses, nor to his Honour’s finding that the evidence of the three small business owners called by the ACCC does not establish that any of them was misled by one of the Google Ads. This is not an appeal which involves application of the principles relating to appellate review of findings as to the reliability and credit of witnesses.

124 Third, the primary judge’s conclusions that the advertisements were not misleading or likely to be so were based on his Honour’s enunciation of the matters significant to that conclusion (at TJ [274]-[281]), being an evaluation of the relative significance of the features of the Google Ads and the context in which they appeared, in terms of the impression conveyed to an ordinary or reasonable business owner. Like the primary judge, we have the Google Ads and how they appeared in context before us. We are in as good a position as his Honour to decide whether the Google Ads conveyed the alleged representations to an ordinary or reasonable business owner.

125 Fourth, this is not a case of the type described in *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq) and Others* [1999] HCA 3; (1999) 160 ALR 588 at [90] (Kirby J), approved in *Fox v Percy* (Gleeson CJ, Gummow and Kirby JJ), in which the primary judge had an advantage through hearing the evidence in its entirety and had the

opportunity for reflection and mature contemporaneous consideration over the course of a lengthy and complex hearing and adjournments. The claim in relation to the Government Affiliation Representations was not lengthy or complex, and the witness evidence is not central to our conclusion. Again, we are in as good a position as the primary judge.

126 It can be accepted that the primary judge’s conclusion that the advertisements did not convey the Government Affiliation Representations involved weighing and evaluating the features of the advertisements and the context in which they appeared; but in our view EmploySURE’s contention that the conclusion was “open” to his Honour eludes the point. The proper question is whether the primary judge’s reasoning and conclusion reveals error. In our view they do.

The relevant class and the likely characteristics of persons comprising it

127 Where, as in the present case, the impugned conduct or representation is directed to the public generally or a section of the public, the question as to whether the conduct is misleading or deceptive or likely to mislead or deceive, or the representation false and misleading, must be approached by the Court considering the likely characteristics of the persons who comprise the class to whom the conduct or representation is directed, and the likely effect of the conduct or representation on a hypothetical ordinary or reasonable member of the class, disregarding reactions that might be regarded as extreme or fanciful: *Puxu* at 199; *Campomar* at [102]; *Google Inc* at [7]; *TPG FFC* at [22].

128 Identifying an ordinary or reasonable member of the class of business owners involves “an objective attribution of certain characteristics” against the background of the membership of the class: *Campomar* at [102]. It is necessary to “isolate by some criterion a representative member of that class” and determine whether the misconceptions or deceptions alleged to arise, or to be likely to arise “are properly to be attributed to the ordinary member of the [class]”: *Campomar* at [103] and [105].

129 In the present case the target audience of the impugned advertisements, and thus the relevant class for the purpose of identifying a hypothetical ordinary and reasonable class member, is business owners who are employers and who search for employment-related advice on the internet.

130 The primary judge recognised (at TJ [273]) that the alleged representations must be viewed through the prism of an ordinary or reasonable member of the class of business owners. It is clear from that and other passages that his Honour understood that it was necessary to

determine and attribute to the ordinary or reasonable class member the likely characteristics of the persons comprising the class. For example, his Honour found (at TJ [274]) that an ordinary or reasonable business owner should be attributed with “some knowledge of basic features of the internet and the Google search engine and its operations...”

131 However, as we later explain, we consider the primary judge erred by attributing to the ordinary or reasonable business owner too high a level of shrewdness or wariness, digital literacy, and/or commercial sophistication; and also erred in the view he reached as to the level of attention or scrutiny that the ordinary or reasonable business owner was likely to give to the advertisements. Then, having done so, the primary judge appeared to conceive that there was only one “reasonable” reaction to the Google Ads; being that an ordinary or reasonable business owner taking reasonable care of his or her own interests would have discerned that each of the Google Ads was an advertisement for privately provided employment-related advice which was not associated with any government agency. In our respectful view the primary judge erred in that reasoning and that conclusion.

132 *First*, we have no difficulty in accepting Employsure’s contention that the ordinary or reasonable business owner should be attributed a higher level of shrewdness, acumen, digital literacy and/or commercial sophistication than that of the public at large. That is so because the class comprises persons with sufficient acumen to own and operate a business with employees. But that does not take things very far in regard to the level of such characteristics that should properly be attributed to the ordinary or reasonable business owner.

133 The class of persons who own businesses and have at least some employees encompasses a wide cross-section of the public, which includes a broad range of individuals running a vast range of businesses. The class is inherently heterogeneous and the characteristics of an ordinary or reasonable class member must take into account its diversity.

134 The evidence also shows that: (a) the majority of Employsure’s customer base were small businesses; (b) Employsure’s “Tier 1” service was expressly designed for businesses with five or less employees; (c) Employsure had been informed by one of its consultants that, based on ABS data, English may not be the first language of about 30% of business owners and operators (although the evidence does not establish the truth of that); and (d) Mr Mallett said that Employsure was established on the premise that small to medium enterprises can require external employment relations support. Finally, we would infer from the fact that the person

is seeking employment-related advice on the internet that the business of the ordinary or reasonable class member is not large enough to have its own human resources expertise. In our view it is likely that the class includes many quite small businesses.

135 Small businesses with five or less employees will include, for example, tradesmen and women, corner stores, small hairdressing salons and barbershops, small shops and cafes, and small courier businesses. We do not accept that running such a business necessarily requires that the owner be intelligent or shrewd, have a high level of acumen, be digitally literate or commercially sophisticated, or have any amount of experience in running a business, particularly when one keeps in mind that the Google Ads were not published only to business owners who ran their businesses well. Some small businesses are the first attempt by the owner to begin trading and he or she may have no or limited exposure to employment issues. In addition, the owners of some small businesses will not have English as his or her first language.

136 The authorities provide that advertisements published to a broad cross-section of the community must be considered through the eyes of an ordinary or reasonable member of the target audience. The consideration must take into account that the advertisements were intended to be seen and read by a wide range of business owners, including those who are intelligent or shrewd and those who are gullible; the wary and the unwary; those who are well educated and those who are not; those who have a good facility in English and those who do not; those who are experienced in running business and those who have less or no prior experience; and those who are digitally competent or commercially sophisticated and those who are not. An advertisement may be misleading even if it fails to deceive the intelligent, the shrewd, the wary, the well-educated, the experienced, the digitally competent or commercially sophisticated: *CRW Pty Ltd v Sneddon* [1972] AR (NSW) 17 at 28 (Sheldon and Sheppard JJ) cited with approval in *Coles Fresh Bread* at [46]; *Tobacco Institute* at [49]-[50] (Hill J); *Telstra Corporation Limited v Cable and Wireless Optus Limited* [2001] FCA 1478 at [21]-[25] (Goldberg J).

137 What constitutes an extreme, fanciful or unreasonable reaction to an advertisement must be informed by the characteristics of the relevant class, and is specific to the particular facts of the case. What is a “reasonable” reaction will depend upon all the circumstances: *Puxu* at 199 (Gibbs CJ). In *National Exchange Pty Ltd v Australian Securities and Investments Commission* [2004] FCAFC 90; (2004) 49 ACSR 369 at [24], cited with approval by the Full

Court in *TPG FFC* at [23(f)], Dowsett J (with whom Jacobson and Bennett JJ generally agreed) explained:

Whilst it is true that members of a class may differ in personal capacity and experience, that is usually the case whenever a test of reasonableness is applied. Such a test does not necessarily postulate only one reasonable response in the particular circumstances. Frequently, different persons, acting reasonably, will respond in different ways to the same objective circumstances. The test of reasonableness involves the recognition of the boundaries within which reasonable responses will fall, not the identification of a finite number of acceptable reasonable responses.

138 To similar effect, in *National Exchange* (at [67]-[68]) Jacobson and Bennett JJ approved the well-known passage in *Taco Bell* at 202 where their Honours referred (at [67]) to “the need to consider the question of whether conduct is misleading by reference to all those who come within the class including the astute and the gullible”. Their Honours noted (at [68]) that in *Campomar* at [102]-[103] the High Court:

...referred to the attribution of characteristics to the ordinary or reasonable members of the class and to the need to isolate the hypothetical member of the class who has those characteristics. The attribution is to be objective in order to allow for the wide range of persons who would, in fact, make up the class. It is also to allow for unreasonable reactions of members at either end of the spectrum which makes up the class.

139 In *Domain Names Australia Pty Ltd v .au Domain Administration Ltd* [2004] FCAFC 247; (2004) 139 FCR 215 at [26] (Wilcox, Heerey and RD Nicholson JJ), cited with approval in *James Hardie Industries NV v Australian Securities and Investment Commission* [2010] NSWCA 332; (2010) 274 ALR 85 at [88] (Spigelman CJ, Beazley and Giles JJA)), where the Full Court said:

The attribution of characteristics to the ordinary and reasonable members of the class must be objective in order to allow for the wide range of persons who would in fact ~~not~~ make up the class: *National Exchange* at [68]. Within a large class there may be a number of subclasses of ordinary and reasonable people. Thus in the present case there may be ordinary and reasonable persons who were well informed about the Internet and the domain name registration system and other persons, equally ordinary and reasonable, who were not.

140 In relation to the approach to be taken in s 18 cases when gullibility of class members is relevant, the primary judge referred with approval (at TJ [242]) to the observations of Colvin J in *Australian Competition and Consumer Commissioner v Geowash Pty Ltd (Subject to a Deed of Company Arrangement) (No 3)* [2019] FCA 72; (2019) 368 ALR 441 at [622]-[623]. In our respectful view the primary judge did not, however, apply that approach. We say that because Colvin J said (at [623]):

If the audience for the conduct in issue comprises the less educated, the gullible or those prone to misconceptions then a determination as to whether the conduct is misleading or deceptive is to be undertaken in that context. The legislation does not afford protection for a member of the audience who responds unreasonably, but unreasonableness is to be evaluated having regard to the characteristics of the audience members in the particular case.

141 We consider the primary judge’s consideration of whether the Google Ads conveyed the Government Affiliation Representations failed to properly take into account the broad range of persons in the target audience of the advertisements and their diversity, and that with such a broad and diverse class a range of responses may be “reasonable”.

142 *Second*, the primary judge erred in the view he reached as to the level of attention and scrutiny that an ordinary and reasonable business owner taking reasonable care of his or her own interests would give to the advertisements.

143 The primary judge’s erroneous approach can be seen (at TJ [240]) in his reference to the observations in *Puxu* by Gibbs CJ (at 199) and Mason J (as his Honour then was) (at 209-211). Gibbs CJ observed that the burden imposed by s 52 of the TPA (and now s 18 of the ACL) “cannot have been intended to be imposed for the benefit of persons who fail to take reasonable care of their own interests”. Mason J reasoned (at 210-211) that whilst it was unlikely that an ordinary purchaser of domestic furniture would notice the very slight differences in the appearance of the two relevant items of furniture in that case, nevertheless such a prospective purchaser could reasonably be expected to attempt to ascertain the brand name of the particular type of furniture on offer. His Honour said (at 209) that with “furniture of this price range in the order of \$1,500 for a three-piece lounge suite one would in the ordinary course expect persons within the admittedly wide range of potential purchasers to exercise somewhat more vigilance than may be the case for the purchase of items of less financial significance having less impact on the appearance of the home”.

144 In reference to those observations the primary judge said:

(a) (at TJ [240]):

...I consider that **these observations are particularly apposite (by way of analogy) with the facts and circumstances in the present proceeding** where the relevant class of consumers is business owners, including small business owners, who use the internet to seek employment related advice.

(Emphasis added.)

(b) (at TJ [281]):

...a reasonable business owner who wished to contact the FWO or FWC or other similar government agency would be expected to take reasonable steps to verify that they are calling the correct number. **The point is well illustrated by *Puxu* and the observations of Mason J which are set out at [240] above. The object of the consumer protection provisions is not to protect persons who do not take reasonable steps in their own self-interest.** As already highlighted, the Google Ads indicate on their face that they are an advertisement and from a body which, at the very least, does not clearly identify itself as a government agency.

(Emphasis added.)

145 The facts of the present case are, however, starkly different to those in *Puxu* and we consider the primary judge erred in treating *Puxu* as particularly apposite to or analogous to the present case. As French CJ, Crennan, Bell, and Keane JJ said in *TPG HCA* (at [46]):

Puxu was a case in which the claim of misleading conduct rested “solely on the fact that the appellant sold goods which were virtually identical in appearance to those sold by the respondent.” The case was determined on the basis that potential purchasers of furniture costing substantial sums of money were able to inspect the furniture which was on display in the retailer’s showroom. The majority of the Court took the view that purchasers would, acting reasonably, pay attention to the label, brand or mark of the suite they were minded to buy and, as a result, would not be misled by similarities in the getup of rival products.

The plurality said that it was in that particular context that the observations of Gibbs CJ, that the section was not intended for the protection of people who “fail to take reasonable care of their own interests”, should be understood.

146 The purpose of each Google Ad, placed as it was at the top of the list of search results, was to arrest the attention of a business owner conducting an employment-related internet search and to have them contact EmploySURE by clicking on the hypertext or calling the telephone number (in relation to those advertisements in which a telephone number was provided). We accept that this case is not the same as *TPG HCA* as there is no question about whether qualifications in the advertisements are sufficiently prominent to dispel an express statement or dominant message. But what the plurality in *TPG HCA* said about the level of attention and scrutiny a consumer is likely to give to advertisements remains relevant. As in *TPG HCA* (at [47]), the audience of business owners in the present case who made a Google search in response to which one of the Google Ads appeared “did not consist of potential purchasers focused on the subject matter of their purchase in the calm of the showroom to which they had come with a substantial purchase in mind”. The Google Ads also appeared in circumstances where Mr Mallett accepted that many small business owners who contacted EmploySURE fell into “what

might be described as the urgent category”, who may have “need[ed] immediate help” (at TJ [268]).

147 To adopt the words of the plurality in *TPG HCA* at [47]:

...while the attention of the audience might have been arrested [by the advertisement], it cannot have been expected to pay close attention to the advertisement; certainly not the attention focused on viewing and listening to the advertisements by the judges obliged to scrutinise them for the purposes of these proceedings. In such circumstances, the Full Court rightly recognised that “many persons will only absorb the general thrust.” That being so, the attention given to the advertisement by an ordinary and reasonable person may well be “perfunctory”, without being equated with a failure on the part of the members of the target audience to take reasonable care of their own interests.

(footnote omitted)

It is the impression or thrust conveyed to a viewer, particularly the first impression, that will often be determinative of the representation conveyed: *Tobacco Institute* at 4; *Telstra v Optus* at 523-524; *Singtel Optus* at [38]; *TPG first instance* at [38] approved in *TPG HCA* at [47].

148 In our view the ordinary or reasonable business owner presented with the Google Ads was unlikely to have noticed or paid much attention to those features of the advertisements and their context that EmploySURE sought to rely upon to argue that they did not convey the Government Affiliation Representations. An ordinary or reasonable business owner taking reasonable care of his or her own interests may have given only perfunctory attention to the advertisement and, if interested in receiving free advice, may have immediately responded to the “call to action” by clicking on the hypertext or calling the telephone number, rather than carefully scrutinising the advertisement so as to pick up and attach significance to those parts.

149 We consider the primary judge erred by equating the level of attention and scrutiny required of an ordinary or reasonable business owner in relation to the Google Ads to be seen as having taken reasonable care of his or her own interests, with that of a prospective purchaser of expensive furniture (as in *Puxu*).

150 Nor did the tendency of Google Ads to lead the ordinary or reasonable business owner into error arise because he or she might be disposed, independently of EmploySURE’s conduct, to attend closely to some words of the advertisement and to ignore others. In large part it arose because:

- (a) Employsure’s use of “keywords” meant that the advertisements’ headlines said either “Fair Work Ombudsman Help - Free 24/7 Employer Advice”, “Fair Work Australia - Free Fair Work Advice – fairworkhelp.com.au” or “Fair Work Commission Advice - Free Employer Advice”, in blue font, in the largest and most prominent typeface in the advertisement; and
- (b) the advertisements omitted any reference whatsoever to Employsure. They did not state anywhere that the free help or advice offered in the headline was, in fact, not to be provided by the named government agency but by some (unnamed) private entity.

151 To again use the words of the plurality in *TPG HCA* (at [52]), the impression conveyed to ordinary or reasonable business owners that the free advice was to be provided by the named government agency, or by some other entity affiliated with that agency, was not “a consequence of selective attention or an unexpected want of sceptical vigilance on their part; rather, it was an unremarkable consequence of [Employsure’s] advertising strategy”. In our view the primary judge erred in failing to recognise the effectiveness of Employsure’s marketing strategy in relation to the presentation of information in the Google Ads.

Salient features of the advertisements and the context in which they appeared

152 When analysed through the prism of an ordinary or reasonable business owner, having regard to the features of each Google Ad and the surrounding context, we are well-satisfied that each of the advertisements conveyed the Government Affiliation Representations. In our view the primary judge erred in concluding otherwise. The salient matters include the following.

153 *First*, it was not unreasonable for an ordinary or reasonable business owner not to have read the advertisements closely. In our view an ordinary or reasonable business owner taking reasonable care of his or her own interests may not have studied the Google Ads closely, instead reading the advertisement fleetingly and absorbing only its general thrust. The authorities hold that to be true of the general approach ordinary consumers take to advertisements, but it is even more likely when what is advertised is free advice. The degree of attention and scrutiny likely to be paid to an advertisement will in part be a reflection of the cost of the goods or services to which it relates: *.au Domain Administration Ltd v Domain Names Australia Pty Ltd* [2004] FCA 424; (2004) 207 ALR 521 at [37] (Finkelstein J). The level of attention and scrutiny an ordinary or reasonable business owner may have given to the advertisements may also reflect that the “call to action” in the advertisements sought to persuade business owners to just click

on the hypertext or call the telephone number provided (in Google Ads 1, 3, 4, 5, and 6) so as to obtain free advice. It was not unreasonable for business owners interested in receiving free advice to respond to the call for immediate action rather than more carefully study the advertisement.

154 The degree of attention an ordinary or reasonable business owner may have given to the Google Ads may also reflect, as Mr Mallett accepted, that many business owners would have been presented with the advertisements when they were in a situation of urgency and needed immediate help. In such circumstances it is unlikely that an ordinary or reasonable business owner would have looked closely at the advertisements or the other search results on the page.

155 *Second*, as we have said, the characteristics of the ordinary or reasonable business owner must take into account that many of them would not be shrewd and may be somewhat gullible, would not be wary, well educated, have a good facility in English, be digitally literate, experienced or commercially sophisticated. As the New South Wales Court of Appeal recently said in *Johnson v Mackinnon* [2021] NSWCA 152 at [72] (Brereton JA, with Macfarlan JA and Simpson AJA agreeing), “[t]he gullible are not disentitled to protection against misleading and deceptive conduct; indeed, it is for the protection of those who believe and trust what they hear and see that the cause of action exists”.

156 *Third*, the headline of each Google Ad advertised free “help” or “advice” that it associated with a named major government agency which deals with employment-related matters, by stating that in the headline, in blue font, in the largest typeface and in the most prominent place in the advertisement. The impression created by the headline was furthered because none of the Google Ads made any mention whatsoever of Employsure or that the advertised free advice was, in fact, not to be provided by the government agency named in the headline, but by an (unnamed) private company.

157 *Fourth*, Google Ads 1, 2, 3 and 4 appeared on the screen of a business owner’s computer, tablet or smartphone in response to search terms entered by the business owner, being either “Fair Work Ombudsman”, “Fair Work Australia” or “Fair Work Commission”. We infer that by using those search terms an ordinary or reasonable business owner may be seeking to get information from that government agency. Employsure’s use of Google’s “dynamic keyword insertion” service and its selection of keywords such as “Fair Work Ombudsman”, “Fair Work Commission”, and “Fair Work Australia” meant that the headline of each Google Ad gave the

impression that the help or advice would be provided by that agency. The search result would appear to match what the searcher was looking for and lead him or her to have greater confidence in clicking on the link, based on that first impression, rather than engaging in a careful analysis of the features of that result or others on the web page.

158 *Fifth*, the fact that the “help” or “advice” advertised in each Google Ad was free was likely to support the impression that the advice was to be provided by the government agency named in the headline. It would not be an unreasonable or extreme reaction for an ordinary or reasonable business owner to have understood that commercial organisations mostly do not offer free help or advice whereas government agencies regularly do so.

159 *Sixth*, the URL:

- (a) “www.fairworkhelp.com.au/Fair-Work/Australia”, in Google Ads 1, 2, 4, 5 and 6; and
- (b) “www.fairworkhelp.com.au/Fair-Work/Commission”, in Google Ad 3;

which appeared immediately under the headline, in the next most prominent part of the advertisement, operated in support of the impression that the free advice would be provided by the government agency named in the headline. An ordinary or reasonable business owner taking reasonable care of his or her own interests who noticed the URL and gave thought to the question may have understood that to be a link to the websites of Fair Work Australia or the Fair Work Commission, being the entity providing the free advice, not a link to some private entity.

160 *Seventh*, the primary judge relied on seven matters in support of his conclusion that the advertisements did not convey the alleged representations. Employsure relies on these findings in the appeal. In our view the primary judge gave disproportionate significance to these matters in evaluating whether the Google Ads conveyed the Government Affiliation Representations to the ordinary or reasonable business owner. We now turn to deal with those matters.

The matters upon which the primary judge relied

161 *First*, the primary judge said (at TJ [274]) that it is “clear on the face” of the Google Ads that they are paid advertisements, as indicated by the Ad Symbol which his Honour said appeared “at the top of the advertisement adjacent to the hyperlink.” His Honour said that an ordinary or reasonable business owner, “to whom should be attributed some knowledge of the basic

features of the internet and the Google search engine and its operation, would understand that this symbol demonstrated that the search result was a paid advertisement.”

162 The primary judge was incorrect in stating that the Ad Symbol appeared at the top of the advertisement. It appeared in the second line of the advertisement underneath the much more prominent headline, being either “Fair Work Ombudsman Help - Free 24/7 Employer Advice”, “Fair Work Australia - Free Fair Work Advice – fairworkhelp.com.au” or “Fair Work Commission Advice - Free Employer Advice”.

163 His Honour failed to recognise, as we have said, that an ordinary and reasonable business owner taking reasonable care of his or her own interests may give only perfunctory attention to an advertisement for a free advice service, and may absorb only its general thrust. For the reasons we have said, it was wrong for his Honour to equate a failure by ordinary or reasonable business owners to notice such less prominent indicia with a failure to take reasonable care of their own interests (at TJ [291]).

164 Further, even if (contrary to our view) it is accepted that an ordinary or reasonable business owner taking reasonable care of his or her own interests would have noticed the Ad Symbol, and understood that it showed that the Google Ad was a paid advertisement, that has little significance in terms of whether the advertisement conveyed the Government Affiliation Representations. In contemporary Australian society, governments and government agencies regularly advertise on television, on radio, in newspapers and on social media. Some advertisements by government agencies have real similarities with those of private organisations. It is not clear why the fact that the Google Ads could have the appearance of being a paid advertisement would, or would be likely to, reveal to the ordinary or reasonable business person that the search result was not what it appeared to be, namely that the government agency for which he or she was searching had placed the advertisement. In circumstances where the Google Ads carried the prominent headlines that they did, an ordinary or reasonable business owner may have understood the Ad Symbol as merely indicating it was a paid advertisement by the named government agency.

165 *Second*, the primary judge found (at TJ [275]) that the ACCC overemphasised the fact that the name “Employsure” did not appear in any of the advertisements. His Honour relied on Mr Mallett’s evidence that when the name “Employsure” was added to the Google Ads in 2019, there was no material change in the number of *employees* contacting the business. But the fact

that there was no increase in the number of employees who mistook the free advice service as being offered to them (rather than only to employers) throws little light on whether the advertisements conveyed the Government Affiliation Representations to the ordinary or reasonable business owner.

166 *Third*, the primary judge found (at TJ [276]) that there were significant differences between the Google Ads and the organic search results linked to government agencies which appeared immediately below (and, in relation to Google Ad 4, also alongside) them. His Honour said that the language in the organic search results that linked to government agencies was different to the language used in the Google Ads. Similarly, his Honour said (at TJ [277]) that the domain description “.gov” appeared prominently in both the Fair Work Ombudsman and Fair Work Commission websites which appeared below (and in relation to Google Ad 4 also alongside) the Google Ads, and clearly identified them as government agencies. His Honour found that stood in contrast to the Google Ads which used a “.com” domain description. In his Honour’s view, an ordinary or reasonable business owner would have understood the distinction between a “.gov” domain, and a “.com” domain which indicates the domain of a commercial organisation.

167 Again, we consider the primary judge failed to recognise that an ordinary or reasonable business owner taking reasonable care of his or her own interests may have given only perfunctory attention to the Google Ad and may have taken in only its general thrust. That is particularly so when many business owners were reading the advertisement in a situation of urgency, and in circumstances where answering the call to action by clicking on the hypertext or calling the telephone number only required them to decide whether to take up a free offer. They were not being asked to decide whether to acquire an expensive product or service, and in such it is unrealistic to expect that an ordinary or reasonable business owner would have undertaken a careful comparison of the Google Ad with the other search results on the page so as to notice and take in the significance of the matters to which the primary judge referred.

168 In our view the primary judge also failed to take sufficient account of Mr Mallett’s evidence that “the higher a website features in the search result, the more likely it is that it will be selected by consumer”. Each Google Ad appeared as the first result on the page of search results, and an ordinary or reasonable business owner may have just clicked on the first result that responded to the search terms used and looked no further, which is the reaction we infer the advertisements were likely to generate.

- 169 Further, even if (contrary to our view) it is accepted that an ordinary or reasonable business owner taking reasonable care of his or her own interests would have noticed the different language and different domain names, that has limited significance in terms of whether the advertisement conveyed the Government Affiliation Representations. In circumstances where the Google Ads carried the prominent headlines that they did, an ordinary or reasonable business owner may have understood that the “.com” domain signified the advice was to be provided by a private entity affiliated with, in the sense of contracted by, the named government agency.
- 170 *Fourth*, the primary judge said (at TJ [278]) that the Google Ads were, in terms, directed to employers. We accept that but it throws little light on whether the advertisements conveyed the Government Affiliation Representations.
- 171 *Fifth*, the primary judge found (at TJ [279]) that the words “fair work” have a broad descriptive meaning which is not limited to particular government agencies such as the Fair Work Ombudsman or the Fair Work Commission, and that the expression “fairworkhelp” is descriptive and advertises a place where advice may be obtained as to the meaning and operation of that legislation and other employment-related matters. We accept that too, but that is insufficient to outweigh the other matters which conveyed the Government Affiliation Representations.
- 172 *Sixth*, the primary judge found (at TJ [280]) there is no evidence to establish that any of the three small business owners who gave evidence for the ACCC was misled by one of the alleged representations. That too can be accepted. As the primary judge noted, one of them could not recall whether he performed the Google search or whether it was someone else in the office that did it; another could not say precisely what search terms she entered or what she saw; and the third witness was not entirely certain what search terms she entered and it was not clear what results she was presented with. That evidence was unremarkable when the witness was being asked to recall something as unexceptional as making a Google search.
- 173 The finding (at TJ [280]) is, however, far from determinative. The ACCC was not required to establish that any person was actually misled by the conduct or representation in question. Evidence that a person has in fact formed an erroneous conclusion is admissible and may be persuasive but it is not essential. The question as to whether conduct is misleading or deceptive, or a representation is false or misleading, is objective and the Court must determine the question

for itself: *Global Sportsman* at 87; *Taco Bell* at 202; *Puxu* at 198; *Google Inc* at [6]; *TPG FFC* at [22(a)].

174 *Seventh*, in reliance on the reasoning in *Puxu* the primary judge found that an ordinary or reasonable business owner who wished to contact the Fair Work Ombudsman or the Fair Work Commission or other similar government agency would be expected to take reasonable steps to verify that they were calling the correct number (at TJ [281]). His Honour said that a failure to do so showed a failure to take reasonable steps to take care of his or her own interests. For the reasons previously explained we consider the primary judge was wrong to equate the level of care required of an ordinary or reasonable business owner in the context of the present case to be analogous with the level of care required of a prospective purchaser of expensive furniture in *Puxu*. In addition, his Honour's reasoning presupposes that the searcher, having found a number by entering search terms that were likely to generate one of the Google Ads, would then have some reason not to take the number at face value, that is, as being associated with the named government agency.

Contravention of s 18 and s 29

175 In relation to the alleged contravention of s 18 of the ACL, we are satisfied that the publication of each Google Ad conveyed the Government Affiliation Representations to the ordinary or reasonable business owner, or at least were likely to. In fact, the advice was to be provided by Employsure which is a private company which is not affiliated or endorsed by any government agency. Employsure's conduct in causing the Google Ads to be published was misleading or deceptive or likely to be so in contravention of s 18.

176 In relation to the alleged contraventions of s 29(1)(b) and (h) of the ACL, the absence of the phrase "likely to mislead" means that the ACCC is required to prove to the requisite standard that Employsure actually made representations that were false or misleading. It is insufficient for the ACCC to prove only that it was likely that they made such false representations: *Google LLC (No 2)* at [110]. Satisfaction to the requisite standard in relation to those alleged contraventions includes the requirement under s 140(2) of the *Evidence Act 1995* (Cth) to take into account the gravity of the matters alleged and the nature of the subject matter of the proceeding, which seeks imposition of a civil penalty.

177 In relation to s 29(1)(b), we are satisfied that publication of each Google Ad represented to ordinary or reasonable business owners that the advertised free advice was to be provided by

the government agency named in the headline, and thus that it would be of the standard or quality to be expected from a government agency. Each advertisement thus represented that the service would be “of a particular standard, quality, value or grade” as required under s 29(1)(b). As the advice was, in fact, to be provided by Employsure which is a private company, the service was not of the represented standard or quality. Each Google Ad conveyed a representation which was false or misleading in contravention of s 29(1)(b): *Optell* at 67.

178 In relation to s 29(1)(h), we are satisfied that publication of each Google Ad represented to ordinary or reasonable business owners that (if the advertised free service was not to be provided by the government agency named in the headline) it was to be provided by some other entity affiliated with, in the sense of contracted by, the named government agency. Each advertisement thus represented that the person making the representation had an “approval or affiliation” by or with the government agency as required under s 29(1)(h). As Employsure had no such approval or affiliation, each Google Ad conveyed a representation which was false or misleading in contravention of s 29(1)(h).

179 We respectfully consider the primary judge erred in failing to so find.

The primary judge’s application of the “not insignificant number” test

180 After setting out the seven matters material to his conclusion that the Google Ads were not misleading or deceptive (or likely to be so) when viewed through the prism of a reasonable member of the relevant class, the primary judge said (at TJ [282]):

For these reasons, I find that the ACCC has failed to establish that a not insignificant number of ordinary or reasonable members of the relevant class would infer that Employsure was, or was affiliated with and/or endorsed by government. Accordingly, the Government Affiliation Representations were not likely to mislead or deceive, nor were they false or misleading.

181 The ACCC alleges that, in requiring it to establish that a “not insignificant number” of ordinary or reasonable business owners would have inferred from the advertisements that Employsure was, or was affiliated with and/or endorsed by government, the primary judge placed an impermissible gloss on the statutory test, which does not include any such requirement.

182 It is common ground between the parties that neither ss 18 or 29 of the ACL require the ACCC to satisfy the “not insignificant number” test, and that his Honour was wrong to express his ultimate conclusion in such terms.

183 We note that his Honour’s reference to the “not insignificant number” test reflected a line of authorities at both single judge and intermediate appellate levels which endorsed that approach. However, after close of argument in the hearing below, the position changed. The Full Court in *TPG FFC* at [23]-[24] said, in obiter, that the “not insignificant number” test was “at best, superfluous to the principles stated by the High Court in *Puxu, Campomar* and *Google Inc* and, at worst, an erroneous gloss on the statutory provision.” Then, after delivery of judgement in the present case, the Full Court in *Trivago* (at [192]-[193]) agreed with the obiter remarks in *TPG FFC*.

184 The ACCC submits that it is plain (at TJ [282]) that the primary judge applied the wrong test in reaching his ultimate conclusion that the ACCC had failed to establish that the Google Ads conveyed the Government Affiliation Representations. It says that his Honour’s misunderstanding of the applicable test can also be seen (at TJ [246]) where his Honour said, referring to *Insight Radiology Pty Ltd v Insight Clinical Imaging* [2016] FCA 1406; (2016) 122 IPR 232 at [143] (Davies J), that “the issue is whether a ‘not insignificant number’ of ‘reasonable’ or ‘ordinary’ members of that class of the public would, or are likely to, be misled or deceived”. On the ACCC’s argument the asserted error can also be seen (at TJ [280]), where the primary judge found significance in the fact that “the vast majority of consumers who were presented with the Google Ads did not click on them”, concluding that “[p]resumably they were not led into error”. It submits that the primary judge’s reliance on the “not insignificant number” test reveals error, which on a fair reading of the reasons for judgment was material to the outcome below.

185 Nothing turns on this issue having regard to our view that each Google Ad conveyed the Government Affiliation Representations to the ordinary or reasonable business owner in breach of ss 18 and 29(1)(b) and (h). But we consider his Honour’s misstatement of the relevant test to be superfluous as it did not reflect his substantive reasoning, and it was not material to his (erroneous) decision to dismiss the ACCC’s case.

186 *First*, we say that because the primary judge earlier identified the correct question, and stated the ultimate conclusion by reference to the correct test (at TJ [273]):

Viewing the seven Google Ads as a whole and taking into account both internal and external contextual features, I consider that the representations were not misleading or deceptive (or likely to be so) when viewed through the prism of a reasonable member of the relevant class.

That shows no erroneous reliance on the “not insignificant number” test.

187 *Second*, the primary judge’s substantive reasons (at TJ [260]-[281]) leading up to the conclusion (at TJ [282]) that the impugned advertisements were not misleading were not expressed in terms that suggested that the ACCC was required to establish, on a quantitative basis, that some proportion of the ordinary and reasonable class members would have to be misled, or be likely to be misled. Rather, they indicate that his Honour understood that his task was to decide, through the prism of the ordinary or reasonable business owner, whether the impugned advertisements conveyed (or in relation to s 18 were likely to convey) the alleged representations.

188 We are not persuaded that his Honour’s reference to the incorrect test was material to the result below. It is apparent from his Honour’s statement at TJ [273] and his reasoning that he would have reached the same result had he applied the correct approach. As in *TPG FFC* at [24] and *Trivago* at [193], we consider the primary judge’s reference to the wrong test was superfluous.

CONCLUSION

189 Having regard to our findings it is appropriate to set aside the orders of the primary judge to dismiss the originating application and to award costs of the proceeding at first instance to Employsure. In lieu of those orders, it is appropriate to make the declarations and grant an injunction to the effect sought by the ACCC. The proceeding shall be remitted to the Court below for hearing as to penalty and the costs in respect of the proceeding below.

190 Neither party advanced any reason as to why the costs of the appeal should not follow the event, and it is appropriate to order Employsure to pay the ACCC’s costs.


I certify that the preceding one hundred and ninety (190) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Rares, Murphy and Abraham.




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Authorized by: Fair Work Act 2009

Motto: Australia's national workplace relations tribunal

Since: 2012

Composition method: Appointed by the Governor-General of Australia on the recommendation of the Australian Government

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Number of employees: 800

Founded: 1 July 2009

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Fair Work Ombudsman
Government agency

 **Fair Work OMBUDSMAN**

The Office of the Fair Work Ombudsman, or more commonly, the Fair Work Ombudsman, is an independent statutory agency of the Government of Australia that serves as the central point of contact for free ... Wikipedia

Number of employees: 800
Founded: 1 July 2009
Minister responsible: Michaelia Cash, Minister for Employment
Agency executive: Natalie James, Fair Work Ombudsman
Employees: 800+



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Australian Fair Pay Commission - Wikipedia
https://en.wikipedia.org/wiki/Australian_Fair_Pay_Commission

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 Minimum wages in Australia depend on the industry or job a person works in. ... the Fair Work Commission reviews the national minimum wage and pay rates ...
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Pay - Fair Work Ombudsman
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 Find all you need to know about pay and minimum wages, including some useful tools ... An employee's minimum pay rate can come from an award, enterprise ...

Australian Fair Pay and Conditions Standard - Wikipedia
https://en.wikipedia.org/wiki/Australian_Fair_Pay_and_Conditions_Standard
 The first decision of the AFPC raised the minimum wage to \$13.47 per hour as of 1 December 2006 [1]. It was subsequently raised to \$13.74 in July 2007 [2] and \$14.31 in July 2008 [3]. The AFPC decided not to increase the FMW in 2009 [4].

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The Australian Fair Pay Commission: Rationale, Operation ... - AustLII
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