

Content Writing Sample 0001

Title Tag: Employsure Found to Have Misled Businesses With Google Ads

Meta-Description: A top advisory firm misled consumers with its ads. Here's why business owners should pay attention.

URL Slug: /employsure-misled-businesses-with-google-ads/

Content:

Employsure Found to Have Misled Businesses With Google Ads

A recent appeal by the Australian Competition and Consumer Commission (ACCC) has seen the Federal Court of Australia overturn the decision handed down in a 2020 case against workplace advisory firm Employsure Pty Ltd (Employsure) [1].

The ACCC instituted proceedings in 2018 alleging that Employsure had falsely represented itself as being or being affiliated with a government agency, when it is, in fact, a private company. The proceedings were sparked by Employsure's [Google Ads search ads](#), which targeted searches like 'Fair Work Commission' and 'Fair Work Ombudsmen' and used similar terms in the ad copy while omitting any mention of Employsure itself.

The success of the ACCC's appeal means that businesses and marketers will need to be increasingly wary of misleading advertising. In this article, we'll explore exactly what led to the ACCC's case, as well as what marketers need to do differently in the future.

What is Google Ads?

To understand exactly how Employsure wound up in the Federal Court, we first need to know what Google Ads is.

Search engines like Google have two main ways of connecting users to websites: through organic search and through paid advertising. Organic search results are selected using Google's extremely complex algorithms, which attempt to match users with websites that best fulfil their searches.

Paid advertising works differently. Google's paid ad service, Google Ads, allows websites to pay to essentially 'jump the queue' through search ads. These search ads are placed *above* organic results,

making it more likely that people will click on them. Normally, Google Ads results have a small 'Ad' indicator next to the title to let users know that they aren't organic results.

There are a few ways that businesses can create Google Ads. They can create [expanded text ads](#), [responsive search ads](#), or [dynamic search ads](#).

Dynamic search ads use specific pieces of code – for example, {Keyword: Fair Work} – which Google's algorithm updates with users' search terms when those search terms involve any of the words in the code (known as 'dynamic keyword insertion'). In the above example, 'fair work' might be replaced by 'Fair Work Australia' if a user searched for 'fair work australia'.

Employsure's case involved the use of dynamic search ads.

Original Case

In the initial case, the ACCC alleged that Employsure published seven Google Ads that represented the company as being affiliated with or endorsed by a government agency. An example of the second Google Ad published by Employsure is [2]:

Fair Work Australia - Free Fair Work Advice - fairworkhelp.com.au
Ad www.fairworkhelp.com.au/Fair-Work/Australia ▼
The Advice Service Line For Employers On The Fair Work Act. Call Us Now!
Confidential - Employee Agreement Advice - Advice Over The Phone - Free Specialist Advice
"Very informative and helpful" – Feefo.com
Pay Rates for Your Staff Redundancy Procedure
Unfair Dismissal Claims Workplace Discrimination

The ACCC contended that Employsure's use of phrases like 'Fair Work Ombudsman' (FWO), 'Fair Work Australia' and 'Fair Work Commission' (FWC), gave the ads an "official" or "authoritative air". Importantly, Employsure itself was not mentioned in any of the ads.

The ACCC also noted that ads had the following traits:

- (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.

Finally, the context of the ads also played a role in the ACCC's case. By appearing for search terms normally used to locate specific sites or services like the FWO or FWC, the ads misrepresented themselves as being affiliated with or endorsed by those sites or services.

At first instance, the court found in favour of EmploySure, dismissing all of the ACCC's claims. His Honour, Griffiths J, found 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" (the class in question was deemed to be business owners who are employers and who search for employment-related advice on the internet) [3, 4].

The ACCC's Appeal

The ACCC appealed only a part of the primary judgement – that which related to six of the Google ads [5]. In the appeal, [the Full Court set aside the orders of the primary judge](#) and found:

- The ads were misleading or deceptive.
- The conduct (creating the ads) and representation (the ads themselves) were likely to mislead a reasonable member of the relevant class towards whom the conduct and representation were directed.
- It isn't necessary to prove that anyone was actually misled, only that they were likely to be misled.
- There does not need to be an intention to mislead or deceive under the relevant legislation.
- Many readers won't study the ads closely, so small details, like the 'Ad' symbol, are likely to be overlooked. It's the general impression or "thrust" of the ad that matters.
- The class in question (business owners) is highly diverse. As such, the prism of a 'reasonable member' needs to take into account that heterogeneity. The court found that:
 - EmploySure knew that around 30% of its target audience did not speak English as their first language
 - Small business owners are not necessarily highly intelligent, digitally literate, or commercially sophisticated.
 - The target audience was not necessarily profitable or successful small business owners.
 - Small business owners may not have a high level of experience with employment issues.
 - Therefore, given all of the above, a reasonable member of the relevant class could have reasonably been misled by the ads.

Following the upheld appeal, the Federal Court [imposed a \\$1 million penalty on EmploySure](#).

Takeaways for Marketers and Businesses

The key points for marketers and businesses are as follows:

- (a) Advertising doesn't actually have to mislead anyone. That it is *likely* to mislead a reasonable member of the relevant class is enough.
- (b) The relevant class (or, in marketing terminology, your target audience) may be diverse, so your advertising needs to take that into account. Don't make assumptions about what may or may not be misleading without considering your target audience's makeup.
- (c) Hiding caveats in the fine print isn't acceptable. If the general impression of your ad is misleading, that may be enough to constitute a likelihood of the relevant class being misled.

- (d) Not intending to mislead is not an excuse. There doesn't need to be intent for a likelihood of false representation to occur.

When you're crafting marketing collateral, whether it's copy for Google Ads or a billboard, take a moment to think about how your target audience is likely to view your ad. Will they possibly assume that you're affiliated with or endorsed by a government agency? Does your marketing give a false representation of authority? Are you likely to be mistaken for a competing service?

Consider, also, the impact of algorithms and AI on your marketing collateral. AI-driven ad creation is on the rise, so it's important to ensure that misleading claims aren't accidentally being made.

With the ACCC's appeal setting a new precedent, it's important that business owners and marketers pay closer attention than ever to the fine lines of advertising. If you're not sure whether a campaign or piece of collateral could create liability for you, seek the advice of an experienced commercial lawyer.

Find out how Bell Legal Group can help by exploring our [commercial law services](#) or by [booking a meeting](#) with one of our experienced commercial lawyers.

The content of this publication is for information only. The content does not constitute legal advice and should not be relied upon as such. You should obtain advice that is specific to your circumstances before taking any action.

[accordion – References]

1. *Australian Competition and Consumer Commission v Employsure Pty Ltd* [2021] FCA 1409.
2. *Australian Competition and Consumer Commission v Employsure Pty Ltd* [2020] FCA 1409 [13].
3. *Australian Competition and Consumer Commission v Employsure Pty Ltd* [2021] FCAFC 142.
4. *Australian Competition and Consumer Commission v Employsure Pty Ltd* [2020] FCA 1409 [259].
5. *Australian Competition and Consumer Commission v Employsure Pty Ltd* [2021] FCAFC 142 (ACCC v Employsure (FFC No 1)).

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