

Veda Advantage Limited v Malouf Group Enterprises Pty Limited
[2016] FCA 255

FEDERAL COURT OF AUSTRALIA

KATZMANN J

KATZMANN J:

1 This is a dispute about the use in internet advertising of words which are also registered trade marks or which are substantially the same or deceptively similar to those marks by a company which neither owns nor is authorised to use them. In particular, it concerns the use of such words as keywords and in the titles and descriptions of sponsored link advertising in the Google AdWords program. In broad terms, the questions for determination are whether, in so doing, the advertiser infringed the registered trade marks, or engaged in misleading or deceptive conduct or made false or misleading representations in contravention of the Australian Consumer Law.

2 The protagonists are the registered owner of the trade marks (**Veda Advantage** Limited) and the advertiser, Malouf Group Enterprises Pty Limited (**Malouf**). Veda Advantage is one of a number of companies in the Veda group of companies which operates a credit reporting business. For convenience, I shall refer to the companies in the Veda group without discrimination as **Veda**, unless it is necessary to distinguish one from the other. Malouf is in the business of assisting consumers with poor credit ratings to rectify errors in credit reports, including those issued by Veda, a process variously described as credit repair, cleaning or fixing.

THE EVIDENCE

3 Evidence was given by affidavit on behalf of the Veda business by Timothy Hemingway, Lai-Tat Victor Leung, and Ewan Watt.

4 Mr Hemingway is a senior legal counsel with **Veda Group** Limited, the parent company of Veda Advantage.

5 Mr Leung is the General Manager e-Commerce and Marketing for all Australian subsidiaries of Veda Group and an employee of Veda Advantage (Australia) Pty Limited. From July 1999 until July 2001 he was an Associate Lecturer at the University of Sydney in, amongst other

things, Marketing Principles, Marketing Research and Consumer Behaviour. He is himself a graduate of the University, holding a Bachelor of Commerce (Hons). He also holds an MBA from the Macquarie Graduate School of Management.

6 Mr Watt was called to give expert evidence. He is the founder and director of roi.com.au, a digital marketing agency specialising in search engine optimisation, Google AdWords campaigns, website design and development, and social media and content marketing. He was retained by Veda's solicitors as an independent marketing expert with particular expertise in digital marketing and the workings of the Google AdWords program.

7 Evidence about the Malouf business largely came from its sole director, Jordan Francis Malouf.

8 Most of the evidence was uncontroversial. A number of facts were agreed. The dispute largely turned on the inferences to be drawn from the material. Unless otherwise indicated, I accept the evidence.

BACKGROUND

The Veda business

9 The Veda business originated in 1967 with the establishment of the first consumer credit bureau in Australia: the Credit Reference Association of New South Wales, a public company limited by guarantee, which on 21 February 2007 became Veda Advantage Information Services and Solutions Limited (**Veda Solutions**). Veda Solutions is a wholly owned subsidiary of Veda Advantage and the holding company for a series of entities through which the Veda business is run.

10 Veda is a data analytics business. Indeed, it is the leading data analytics company in Australasia. It is known in the industry as a "credit bureau" and under the *Privacy Act 1988* (Cth) (**Privacy Act**) as a "credit reporting body". It collects, analyses, and discloses information about individuals and corporations for the purpose of providing information about the creditworthiness of an individual or corporation. Its core service is the provision of credit reports (**Veda credit reports**) to credit providers, such as banks and other lending institutions (referred to in evidence as its "business to business" services and by the acronym **B2B**). It also provides services to individual consumers (referred to in evidence by the acronym **B2C** or "business to consumer" services). A credit report is a report on the credit history of an individual or a corporation compiled by a credit reporting body which includes information in respect of loan inquiries, credit providers, serious debts and credit infringements, commercial

credit, and information drawn from public records including bankruptcy data and judgments. Veda credit reports are commonly referred to as “Veda files” or “Veda reports”.

11 Veda is the major credit reporting organisation in Australia. As at 30 June 2014 it held credit information on approximately 20 million individuals and 5.7 million commercial entities.

12 Other credit reporting bodies with which Veda competes include Dun & Bradstreet, Experian Credit Services Australia and Tasmanian Collection Service.

13 Business customers are provided with consumer credit scores under or by reference to the sign “VedaScore”. Veda has a web-based portal, accessible to subscribers, branded “VedaCheck”. Its products and services are marketed to business customers by face to face meetings, “customer events”, and direct distribution of promotional material. Marketing to individuals occurs through the **Veda website** (www.veda.com.au). Before September 2011 it occurred through the **Veda Advantage website** (www.vedaadvantage.com.au). Marketing to individuals also occurs through the use of the Google search engine (using the Google AdWords program), referred to as “search engine marketing”; advertising on third party websites, television and radio; through emails, brochures and flyers; and in print and online articles. From time to time the Veda business also engages in “search engine optimisation” to ensure that it appears first in the organic results. I shall explain what all this means later in these reasons.

14 Veda offers its services using various registered trade marks in marketing and promotional material, including as part of the domain names under which it maintains the two websites.

Access to credit reports under the Privacy Act

15 Under s 20R of the Privacy Act credit reporting bodies must provide credit reporting information about an individual to an “access seeker” who makes a request in relation to the information. There are some exceptions to this obligation but they are not relevant for present purposes. An “access seeker” in this context is, in short, the individual debtor or a person properly authorised to make the request on the individual’s behalf: Privacy Act, s 6L. It is a requirement imposed by the Privacy Act that the credit reporting information be provided to an access seeker free of charge if such a request has not been made to the credit reporting body in the previous 12 months: s 20R(5). Paragraph 19 of the Privacy (Credit Reporting) Code 2014 (Version 1.2) (**CR Code**), which has effect under Pt IIIB Div 3 of the Act, sets out additional circumstances in which a credit report must be provided without charge. In

circumstances where a credit reporting body is entitled to charge for giving access to the information, the charge must not be excessive and must not apply to the making of the request: s 20R(6).

Credit repair

16 Errors in credit reports may be rectified or “repaired”. Veda facilitates this process through the Veda Resolution Centre, which is a call centre providing consumers with information about what they can do to correct their Veda files. The service is provided free of charge in conformity with Veda’s understanding of its obligations under the Privacy Act. Information about the process appears on the Veda website. Credit repair services are also provided by specialist companies like Malouf but the evidence indicates that the nature of the repair services Malouf offers is different from those provided by Veda.

17 Cross-examination drew from Mr Leung some key differences in the nature of the services provided by Veda and by credit repair companies like Malouf:

And just to clarify, as part of this investigation process Veda is effectively playing a role, I want to suggest to you, as keeper of the record and evaluating the complaint or the concern the consumer has about the accuracy of the information and determining whether or not the information should be changed as a result of whatever the complaint or the concern is? - - - That’s correct.

Veda does not place itself, as it were, in the shoes of the individual and try and work out what it is that might be corrected but rather responds to the individual’s concern or complaint raised in the request form? - - - That’s correct.

Veda doesn’t enter into any contractual relationship with the individuals seeking to have the record investigated? - - - Not that I’m aware of.

And it doesn’t consider itself to be acting on behalf of that person but rather facilitating the role of a record keeper, analysing whether objectively there should be any change to the record as a result of the concern or the complaint? - - - That’s correct.

And you’re familiar with the fact that people like Malouf act on behalf of individuals to try and raise concerns or identify problems with the record? - - - From what I’ve read on the websites, yes.

18 The “credit repair” services provided by Veda are therefore different from those provided by Malouf. Veda acts as the “keeper of the records” and corrects errors on the face of those records. Unlike Veda, Malouf has no power to alter the records held by Veda. Instead, Malouf acts on behalf of people who are the subject of Veda reports to assist them to deal with Veda and, if necessary, the credit provider responsible for an apparently erroneous listing. A more detailed explanation of the services provided by Malouf can be found later in these reasons.

19 Although the evidence in chief from both Mr Hemmingway and Mr Leung implied that Veda promoted its credit repair services, in cross-examination Mr Leung made some important concessions in this regard.

20 First, Mr Leung admitted that, beyond including on the website information about how a customer can correct a credit file, Veda does nothing to promote its credit repair service.

21 Secondly, he admitted that Veda does not engage in any search engine optimisation strategies or use Google AdWords to try to bring the service to the attention of consumers.

22 Thirdly, Mr Leung acknowledged that the reason Veda does not promote the service is that it is not a moneymaking venture.

23 Fourthly, Mr Leung accepted that consumers looking to correct their credit files are encouraged on Veda's web page for the Resolution Centre to contact the credit providers first and Veda second, and that they are discouraged from making telephone contact with Veda while an investigation is under way.

The Veda Trade Marks

24 Veda Advantage is the owner of a number of Australian registered trade marks which I shall call the "**Veda Trade Marks**". They are:

(1) Trade Mark No. 1426238 "VEDA" in, amongst other classes, class 36 for:

Financial services; provision of credit risk, financial and asset information and reports; credit scoring and risk assessment services; information provision, advice, research, appraisal, analysis, credit enquiry and consultation in relation to the aforementioned services; assembling credit information on individuals and companies and providing credit reports; credit bureau services; provision of credit risk information; credit scoring, decision support and risk assessment services; credit, financial and asset equity report services including the provision of insolvency reports, comprehensive credit reports, credit and financial risk reports, financial health assessment, bankruptcy searches, bank opinions; provision of information relating to financial data, property summary data, property equity data, bankruptcy data, risk analysis and financial health assessment; electronic processing services relating to credit approval including the provision of credit, financial and asset reports.

(2) Trade Mark No. 1133204 "VEDA ADVANTAGE" in, amongst other classes, class 36 for:

Financial services, including information provision, advice, research, credit enquiry and consultation services; assembling credit information on individuals and companies and providing credit reports; credit bureau services; provision of credit risk information; credit scoring, decision support and risk assessment services.

(3) Trade Mark No. 1153164 "VEDACHECK" in, amongst other classes, class 36 for:

Provision of financial services including information provision, advice, research, appraisal, analysis, credit enquiry and consultation in relation to the aforementioned services; assembling credit information on individuals and companies and providing credit reports; credit bureau services; provision of credit risk information; credit scoring, decision support and risk assessment services.

(4) Trade Mark No. 1320811 “VEDAScore” in, amongst other classes, class 36 for:

Financial services; provision of credit risk, financial and asset information and reports; credit scoring and risk assessment services; information provision, advice, research, appraisal, analysis, credit enquiry and consultation in relation to the aforementioned services; assembling credit information on individuals and companies and providing credit reports; credit bureau services; provision of credit risk information; credit scoring, decision support and risk assessment services; credit, financial and asset equity report services including the provision of insolvency reports, comprehensive credit reports, credit and financial risk reports, financial health assessment, bankruptcy searches, bank opinions; provision of information relating to financial data, property summary data, property equity data, bankruptcy data, risk analysis and financial health assessment; electronic processing services relating to credit approval including the provision of credit, financial and asset reports.

25 Veda Solutions is the company which provides the credit reports to consumers and gives consumers access to their credit information. It is an authorised user of the registered trade marks.

Veda’s reputation

26 From at least September 2006 Veda has provided financial services, including credit reporting, credit enquiry and management services, and related services (the **Veda Services**), to a substantial number of individuals and businesses throughout Australia under or by reference to the sign “VEDA”, including as part of the sign “VEDA ADVANTAGE”.

27 From at least September 2006 Veda has continuously advertised and promoted the Veda Services under or by reference to the sign “VEDA”, including as part of the sign “VEDA ADVANTAGE”, in Australia.

28 As a result, Veda has acquired a substantial and valuable reputation and goodwill in the sign “VEDA” in connection with the Veda Services, and the sign as used in connection with the Veda Services is associated within Australia with Veda.

29 As at December 2014 Veda had approximately 11,400 B2B customers in Australia.

30 Flyers and brochures promoting the services offered or provided under or by reference to the sign “VEDAScore” were distributed by Veda to its B2B customers throughout the period 2010–2011.

31 Between October 2006 and August 2011 the Veda B2C services were promoted to individual consumers electronically via the Veda Advantage website. During that period customers looking to obtain copies of their Veda credit reports through the Veda Advantage website, upon clicking the “order now” or “my credit file” link, would be redirected to the website available at the domain name <www.mycreditfile.com.au> (**My Credit File website**) to complete their order.

32 From at least August 2011 the Veda B2C services have been continuously promoted to consumers electronically via the Veda website. The Veda website attracts an average of 110,000 unique visitors each month.

33 In the period August 2013 to May 2015 Veda had approximately 57,000 customers for the four “Veda packages”: “Veda Starter”, “Veda Access”, “Veda ID”, and “Veda Plan”.

34 On average 2000 to 3000 sales of the Veda packages per month are made at the Veda website.

35 For the period August 2013 to May 2015 16% of sales of the Veda packages were made through a mobile device.

The Malouf business

36 Mr Malouf incorporated his business on 20 July 2005. For the first five years of incorporation the business operated as a finance brokerage and he worked as a finance broker. In that capacity he mainly arranged loans, both personal and business. In the course of that work he came across many people with poor credit ratings for whom he would set up “bad credit loans”, which would carry high interest rates, and he became familiar with the credit repair process. In 2010 or thereabouts he established a credit repair business of his own under the name “Malouf Group Enterprises” to capitalise on what he perceived as “a demand and an opportunity in the market” for such a business.

37 The Malouf credit repair business grew. Mr Malouf created other, related credit repair businesses with different business names “to maximise [his] exposure”. He now operates five such businesses. Relevantly they include Credit Clean Australia, Clean Your Credit, and Credit Fix Australia.

38 Malouf is not a credit reporting body. Its target market is people with poor credit ratings and consequently adverse credit reports. It helps its customers to remove disputable or contested negative listings from credit reports compiled and maintained by credit reporting bodies such

as those operated through the Veda companies. To that end it obtains credit reports (sometimes called “files”) on behalf of customers as an authorised “access seeker” under the Privacy Act. In the vast majority of cases Malouf obtains credit reports from Veda because, as Mr Malouf saw it and the evidence indicates, Veda was and is the dominant credit reporting company in Australia with (as Veda itself boasts on its website) the largest, most comprehensive and up-to-date credit data in the country.

39 Malouf competes with other credit repair businesses, including Credit Repair Australia, Clear Credit, Fix Bad Debt, and Credit Boost.

40 Malouf’s businesses are operated as telemarketing platforms, where salespersons receive telephone calls from prospective customers, sourced from either television or internet advertising, and then discuss their services with the callers. The prospective customer either telephones the particular Malouf business using the contact number from the website or advertisement belonging to that business or enters his or her details on the website and requests a return call. Since November 2014, if a prospective customer (or an existing customer) telephones one of Malouf’s businesses he or she would hear two pre-recorded messages. The first states, among other things, the name of the relevant business (such as Credit Clean Australia) and notes that the business is a “specialist in bad credit repair solutions”. The second advises that the business provides “the pathway for you to remove unfair, disputable or contestable negative listings from your credit file”.

41 After listening to the recording, the prospective customer is connected to a salesperson who supplies information about the services provided by the business and asks the customer questions contained in an application form. The salesperson then advises the prospective customer that the application will be assessed and that he or she will receive a call back later.

42 The salesperson has a script, is required to strictly adhere to the script, and is directed not to be distracted from it by anything the customer may ask. The following words appear in bold typeface:

Please note no matter what the client says eg. Can I get a hair cut? are you veda? do you do loans? follow below word for word !!!!!!!!!

43 When the call back is made the prospective customer is asked some 22 questions to obtain information about his or her credit position. If the customer is accepted as a suitable recipient

of the credit repair services, the customer is asked to pay a one-off fee of \$1,095 (including GST).

44 With the authority of the customer, and in the capacity of an “access seeker” under the Privacy Act, Malouf orders the customer’s Veda credit report from Veda. Malouf obtains the Veda credit report by placing individual orders for each customer through Veda’s website for express, one day turnaround. It pays a fee of \$69.95 for each Veda credit report.

45 Malouf (on behalf of its customers) spends approximately \$300,000.00 per year in total obtaining Veda credit reports in supplying these services.

46 Once Malouf receives the Veda credit report, Malouf then submits to Veda on behalf of the customer a request in writing to remove the negative listing on the customer’s credit report pursuant to the Privacy Act. The requests include the reason or reasons for removal.

47 Malouf then sends to the customer an information pack containing various documents, including the Veda credit report, general information on how to remove disputable or contested negative listings from credit reports, general information about how to deal with collection agencies, general information on how to “maintain a clean credit report”, (where relevant) court forms for setting aside default judgments, and Financial Ombudsman Service complaint forms.

48 Two days after lodging the submission with Veda a Malouf case manager telephones the customer to advise that a request to remove the negative listing has been submitted to Veda and that all correspondence from Veda to the customer in respect of the submission needs to be forwarded to Malouf.

49 When Veda receives the request, it raises it with the credit provider responsible for the negative listing (that is, the bank or other financial institution which provided credit to the individual or corporation and listed the default). If the credit provider’s response indicates that the complaint is valid, Veda removes the negative listing pursuant to its obligations as a credit reporting agency. If the negative listing is not removed, a Malouf case manager will then send by email to the customer a questionnaire to complete and return to Malouf.

50 On behalf of the customer Malouf then builds a case file for removal of the negative listing, that is to say a summary of the grounds for removal of the negative listing based on information provided to it by both Veda and the customer. Malouf then provides the case file to the customer and asks him or her to contact the credit provider responsible for the negative listing.

51 The credit provider then reviews the information provided by the customer from the case file and, if satisfied that the negative listing should be removed, asks Veda to remove it from the Veda credit report. If the credit provider does not authorise the removal of the negative listing, Malouf submits a request to the Financial Ombudsman Service to investigate the matter further.

52 While Veda corrects errors on the face of its credit reports, Malouf does not. As Mr Malouf explained it in his affidavit of 14 July 2015:

[Malouf] assists customers remove disputable and contestable negative listings from their credit history when a Credit Provider has not followed privacy laws and/or credit reporting codes of conduct prior to listing the negative listing on the Veda Credit Report, including sections 6Q, 21(d) and 21D(3) of the Privacy Act and paragraph 9.3 of the [CR] Code.

53 Malouf uses the Google AdWords program to advertise, promote and direct consumers to its websites.

The operation of the Google AdWords program

54 The Google search engine allows internet users to search for web pages on particular topics by entering terms into a search field and clicking on a button marked “Google Search”. It displays two types of search results: “organic search results” and “sponsored links”.

Organic results

55 Organic search results are links to web pages, which are ranked in order of relevance to the search terms entered by the user. The Google search engine always displays organic search results and organic search results are always displayed free of charge.

56 A search term incorporating the word “veda” will return organic results in which the Veda website appears first.

57 The organic entry for Veda appears thus:

Veda

<https://www.veda.com.au/> ▼

Curious to know what your credit score might be? Find out where you stand when it comes to credit. Get your VedaScore today.

VEDA - Sign In

Sign In ... About Veda
Advantage Information
Services and ...

Check

Applying for Credit? Check
where you stand — There are
so many ...

Your Credit and Identity

Check - Credit File - Product
Comparison - VedaScore - ...

VedaScore

Your VedaScore is a credit
rating ... credit report at a
certain point ...

Contact us

Contact us. Personal contact
information. The contact
details ...

Product Comparison

Improving your Veda Score -
About Us - Create Your
Account - ...

[More results from veda.com.au »](#)

58 Searchers understand that Google provides accurate organic results in response to their searches.

59 Businesses may maximise their exposure via organic results by a process known as search engine optimisation. This involves altering the code, content and design of a website to improve the priority of its listing in the organic search results. Search engine optimisation, like sponsored link advertising, is a form of search engine marketing.

Sponsored links

60 Sponsored links are advertisements, which Google's AdWords program allows advertisers to create, change, and monitor. They are triggered by keywords privately supplied by the advertiser to Google. When a word or phrase, which includes or corresponds with one or more of the keywords, is entered in the Google search engine, the search results page will display those sponsored links. I discuss the process in detail below when I deal with the expert evidence given by Mr Watt.

61 A sponsored link appears in hypertext accompanied by a yellow tag in which the word "Ad" appears in white. Clicking on the link takes the searcher to the advertiser's website. A person who has conducted a search and chosen to examine the link in an advertisement can always click on the "back" button on his or her browser and return to the original search results.

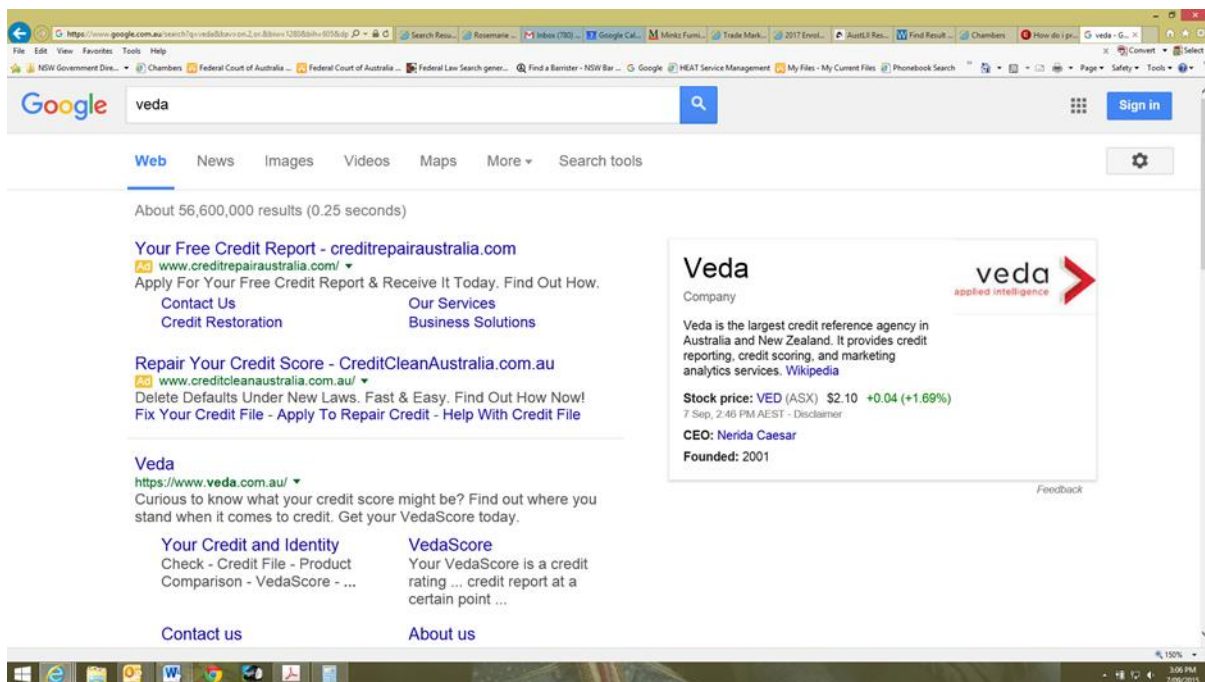
62 A sponsored link consists of three elements: a headline which incorporates a link to a web page (in blue text); the address of the web page to which the headline links (in green text); and

some brief advertising text (in black text). The following is an example of a sponsored link from one of Malouf’s competitors generated by a Google search for Veda:

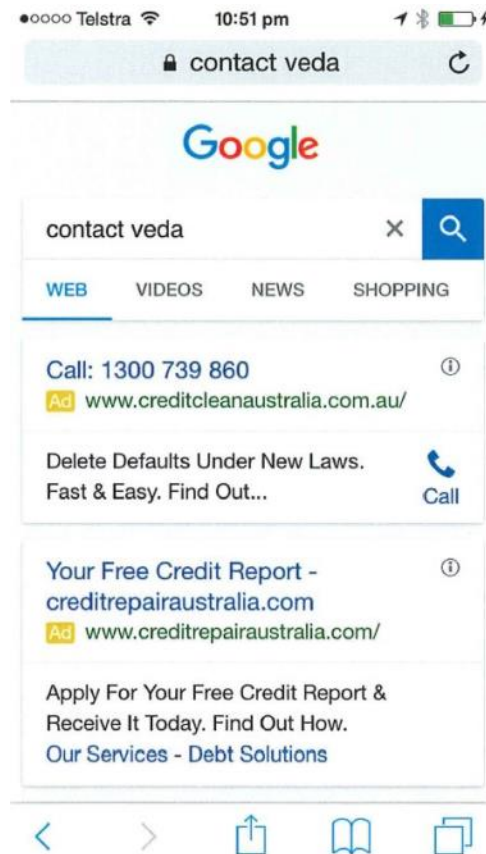
Your Free Credit Report - creditrepairaustralia.com
Ad www.creditrepairaustralia.com/
Apply For Your Free Credit Report & Receive It Today. Find Out How.

Contact Us We're here to help. Get in touch today & see how we can help you.	Credit Restoration Discover the benefits of Credit Restoration & get help today.
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63 Sponsored links do not replace the organic search results, but are listed separately from them, appearing either above or below or to the far right of them or on successive pages. As such, when “veda” is used as a search term a Google search will produce both advertisements and organic results. This is how the search page appears on a desktop or smaller device other than a mobile phone:



64 On a mobile phone, however, the appearance of the display may be different as was demonstrated by a search for “contact veda”:



65 Google provides advertisers with access to the AdWords program through AdWords accounts. An advertiser using the AdWords program to create a sponsored link will specify the headline, the address of the web page to which the headline links, and the advertising text.

66 The advertiser specifies keywords in the AdWords program and more than one advertiser may specify the same keywords.

67 When a user enters search terms into the Google search engine that match the keywords of an advertiser, an “auction” is triggered that determines which sponsored links will appear in the search results, in which order they are shown, and how much Google will charge the advertiser whose sponsored links are displayed (when the user clicks on them). This “auction” is discussed in more detail below in the context of the expert evidence.

68 Advertisers using sponsored links pay Google each time a user of the Google search engine clicks on the sponsored link. This is known as “pay-per-click advertising”.

Landing page

69 When the searcher clicks on a sponsored link advertisement or an organic result he or she is taken to a “landing page”. The searcher cannot get to the landing page via a website; he or she

must use the Google search engine or otherwise know the specific URL (uniform resource locator or web address) for the particular landing page.

Malouf's use of Google AdWords

70 Malouf has been advertising on the internet for some time using the Google AdWords service.

71 Malouf set up Google AdWords accounts for each of its websites on the following dates:

- in relation to <www.cleanyourcredit.com.au> (**Clean Your Credit website**), about 20 June 2014;
- in relation to <www.creditfixaustralia.com.au> (**Credit Fix Australia website**), about 10 June 2012; and
- in relation to <www.creditcleanaustralia.com.au> (**Credit Clean Australia website**), about 3 December 2012.

72 One of the Google AdWords campaigns that Malouf has run, and that which is the subject of the proceedings, involves the use of keywords that comprise or contain the word “veda”.

73 Malouf's AdWords campaigns use the Veda keywords to target people trying to contact Veda, including those who wish to obtain copies of their credit reports. As Mr Malouf explained it in cross-examination (at ts 270):

So, with Veda approximately anywhere from 20 to 40 per cent — which is published on their website — of people may have an adverse credit history with a credit reporting body. A lot of them don't know that they've got bad credit. So, potentially, one in five customers that are trying to contact Veda may be our target market. ... [W]e want to have our ad showing up — anyone trying to contact Veda — because, potentially, one in five of those customers may be wanting to fix their credit file.

The Veda keywords

74 Malouf has used no fewer than 86 keywords which consist of, or incorporate, the word “veda”. They include:

- “contact veda”;
- “how to contact veda”;
- “veda advantage contact number”;
- “veda credit check free”;
- “veda credit score”;

- “veda login”;
- “my veda file”;
- “www veda com au”;
- “veda com au”;
- “veda phone number”; and
- “veda”.

75 A complete list is attached as Schedule A. Not all these keywords were in use by the time Malouf filed its amended defence on 15 October 2015.

Sponsored links

76 A complete list of the sponsored links the subject of this proceeding is attached as Schedule B.

Sponsored links for Malouf websites from July 2014 to September/October 2014

77 During the periods set out below, the advertising text of the Google AdWords sponsored links for Malouf websites referred to “veda” together with other words:

- for the Credit Clean Australia website, from 30 June 2014 until 19 September 2014;
- for the Credit Fix Australia website, from 13 August 2012 until 10 October 2014; and
- for the Clean Your Credit website, from 23 June 2014 until 13 October 2014.

78 The sponsored links included the following advertisements, which when viewed on a computer screen, whether a desktop or mobile device, appeared in the colours mentioned in [61]–[62] above:

Fix Your Veda File Now - Easy Default & Judgement Removal

Ad www.cleanyourcredit.com.au/ ▼

Fast & Easy Removal, Act Today

Remove Marks From File

Fix Your Veda File

Contact Clean Your Credit

Apply To Clear Your File

Fix Your Veda History - Remove Defaults & Judgements

Ad www.creditfixaustralia.com.au/ ▼

Quick, Simple & Affordable Solution

Veda Credit Checks - Fix Your Veda File Now - Remove Defaults Veda File

Sponsored links for Malouf websites in and from September/October 2014

79 During the period October 2014 to about 11 May 2015, the visible text for the Google AdWords sponsored links for the Credit Fix Australia website and the Clean Your Credit website did not use the word “veda”. The sponsored links read as follows, once again in the colours mentioned in [61]–[62] above:

Repair Your Credit File

Ad www.creditfixaustralia.com.au
Remove Defaults & Judgements.
Quick & Easy Removal. Apply Now!

Fix Your Credit Rating

Ad www.cleanyourcredit.com.au
Easy Default & Judgement Removal.
Fast & Easy Removal, Act Today

80 Since 19 September 2014 the sponsored link for the Credit Clean Australia website has not used the word “veda”. On 11 May 2015 Malouf stopped using sponsored links altogether for the Credit Fix Australia and the Clean Your Credit websites.

81 From 11 May 2015 to at least the date the hearing concluded, Malouf used a sponsored link in the following terms for the Credit Clean Australia website:

Repair Your Credit File - CreditCleanAustralia.com.au

Ad www.creditcleanaustralia.com.au/
Delete Defaults Under New Laws. Fast & Easy. Find Out How Now!

82 When a prospective customer clicked on one of the sponsored links referred to above, the customer was directed to the relevant landing page of the applicable Malouf website.

83 At no time have these websites stated that Malouf is affiliated with any of the Veda businesses. Nor have they carried a disclaimer to the effect that the businesses are not affiliated or associated with Veda.

THE EXPERT EVIDENCE

84 Mr Watt’s evidence provides a picture of the use of the internet to find information, which is of some importance in this case. As he explained in his first affidavit (source references omitted):

29 People want access to information fast and in real time. The Internet provides this vehicle. People are spending more time online. Consumers view four screens: television, desktop computers, tablets and smart phones. These facts

highlight the importance and prominence of online inbound marketing strategies:

- (a) 85% of the Australian population are online ...;
- (b) 93% of Internet traffic in Australia is generated by search engines ...;
- (c) Online advertising expenditure in Australia in the past year to 30 June has leapt 14.6 per cent to \$3.6bn...

30 The actual and estimated proportionate spend ratios of Online advertising compared to traditional forms of marketing is consistent with my observation of the practices of the key clients we work for at roi.com.au and their proportionate spend on online advertising becoming increasingly a larger percentage of their overall marketing spend.

31 In my experience, consumers today access Google or other search engines similarly to how they once accessed White Pages and Yellow Pages: to gain a website address, phone number, address etc...

85 Mr Watt discussed at some length search engine marketing and the Google AdWords program.

86 He explained the process of choosing keywords for the Google AdWords campaign at [41] of his first affidavit:

When keywords for the AdWord campaign are selected, the advertiser can specifically choose 5 types of keyword settings. These are known as “match type” settings – how the search term used by the searcher must “match” the keyword selected by the advertiser in order for the sponsored link advertisement to qualify as a possible advertisement to be returned as a sponsored link in response to a search.

87 The match types are “exact match”, “phrase match”, “broad match”, “broad match modifier” and “negative match”. An exact match allows an advertisement to appear only when a search term is entered which matches or closely matches the keyword. A negative match enables advertisers to prevent their advertisements being displayed when a particular search term is employed. 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. 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. Finally, a broad match modifier allows an advertisement to appear when the search term includes the keyword or a variation of it in any order, but with no synonyms. A summary of match types with examples of each was included in Veda’s pleading and is reproduced at the beginning of Schedule A to these reasons.

88 Mr Watt said that keywords are generally classified as informational, commercial or branded. Branded keywords are words like “veda” and “veda advantage” or a website name and variations thereof. On the other hand, words such as “credit file”, “credit score” and “credit

rating” are informational keywords and “credit repair” commercial ones. Branded keywords, he explained, are used “to find a specific brand or site by use of trade marks or brand names pertaining to a business or a product”. He said that traders generally use branded keywords in three circumstances:

- (1) to target existing customers looking for their website or contact information;
- (2) to attract new customers who have heard about their brand through other marketing or word of mouth; and
- (3) to maximise the number of clicks received from any brand related search.

89 In addition to choosing keywords and match types, advertisers may also specify other parameters, such as the time of day their advertisements will be shown and the geographical limits of their campaign.

90 Success is measured by the percentage of clicks leading to a conversion. A conversion occurs when, after the click, the searcher takes action the advertiser considers valuable to its business, such as making an online purchase or simply contacting the business.

91 The Google AdWords reporting system enables advertisers to acquire daily statistics on the number of times the advertisement was displayed per day per “ad group” or campaign (these are known as impressions) or keywords, the number of clicks, the click-through rate (that is, the number of clicks compared to impressions), and the number of clicks which become conversions. An ad group consists of one or more sponsored link advertisements which target a common set of keywords. Each campaign is made up of one or more ad groups.

92 Mr Watt stated that by using a trade mark in a sponsored link advertisement the advertiser intends to reinforce to the consumer the connection between the brand and the product or service appearing on the landing page.

93 Mr Watt said that typically the most effective way to use sponsored link advertising is to feature as the top three listings above the organic search results. That placement is achieved through “a combination of bidding, relevance and the overall ad score algorithm metric used by Google, where the exact formula is not publicly disclosed”.

94 Mr Watt explained that:

[t]o get to the top of the sponsored link listings, there is an auction that is conducted by Google at the time that each search is conducted. The winners of the auction are judged by the Google process of ranking your advertisement by reference to its ‘quality

score' and the maximum cost per click the advertiser has indicated that it is willing to spend. The advertiser with the best combined bid and quality score will feature in the top position.

95 Mr Watt explained that the quality score is calculated by reference to:

- the click-through rate that the sponsored link has previously achieved;
- the relevance of the sponsored link's ad copy to the search terms; and
- the relevance of the content on the sponsored link's landing page to the search terms.

96 The quality score may therefore be improved by:

- using "exact match" keywords to ensure a closer match between the ads and the search terms;
- optimising the advertising text chosen for the sponsored link; and
- optimising the content of the landing page.

97 Mr Watt also conducted an analysis of Malouf's AdWords campaigns using Veda keywords. He concluded that:

- ad groups were specifically set up for "after business hours" searches to target "brand intent" searches for the Veda website and contact information;
- the Clean Your Credit website created a dedicated campaign to target "veda" related searches;
- the development of three websites specifically targeting Veda was a deliberate strategy to try to stay in the top three positions of Google sponsored links for all veda terms throughout the day;
- ad groups were specifically set up with exact match keywords to target top three positioning on sponsored links for three search terms incorporating the Veda trade marks VEDA, VEDA ADVANTAGE, and VEDACHECK;
- targeting the brand names "Veda" and "Veda Advantage" as well as the Veda "contact number and phone number" shows the intention to target existing customers; and
- each ad group shows that the advertiser is aware of how to use negative keywords and has chosen not to exclude any "veda" related search.

THE ALLEGATIONS

98 Veda alleges that Malouf's use of the word "veda" (in its various forms and combinations) as keywords and in the text of the sponsored links generated by the use of those keywords contravenes s 120(1) of the *Trade Marks Act 1995* (Cth) (**Trade Marks Act**) in that it is a use as a trade mark of a sign that is substantially identical with, or deceptively similar to, one or more of the Veda Trade Marks in relation to services within the class 36 specifications of each of the trade marks. An additional or alternative claim (based on s 120(2) of the Act) that the use of the Veda and Veda Advantage signs was in relation to services of the same description as the registered services was abandoned during final oral submissions.

99 Malouf denies that it infringed the registered Veda Trade Marks for the following reasons.

100 First, its use of the Veda Trade Marks was and is not a trade mark use.

101 Secondly, it did not and does not use the Veda Trade Marks in respect of, or supply, services for which they are registered.

102 Thirdly, in the alternative that the Court were to find that it did use the Veda Trade Marks as trade marks it did so in good faith, to indicate the kind, intended purpose or some other characteristic of the services.

103 Veda also alleges that Malouf has engaged in false or misleading conduct in contravention of the Australian Consumer Law (**ACL**), which is contained in Sch 2 to the *Competition and Consumer Act 2010* (Cth), specifically by, in trade or commerce:

- (1) engaging in conduct that is misleading or deceptive or is likely to mislead or deceive (s 18);
- (2) in connection with the supply or possible supply or the promotion by any means of goods or services:
 - (a) making false or misleading representations that it has "a sponsorship, approval or affiliation" with Veda (s 29(1)(h)); and
 - (b) making false or misleading representations with respect to the price of its services (s 29(1)(i)).

104 This judgment is concerned with the question of liability only, an order having been made on 3 February 2015 to deal with liability as a separate question from relief, should it come to that.

DID MALOUF INFRINGE THE VEDA TRADE MARKS?

105 Before answering this question it is necessary to refer to the relevant statutory provisions and the matters in dispute. I will discuss the relevant principles in the contexts in which they arise for consideration.

In what circumstances is a trade mark infringed?

106 A trade mark is infringed in the circumstances described in s 120 of the Trade Marks Act. Section 120(1) provides:

A person infringes a registered trade mark if the person uses as a trade mark a sign that is substantially identical with, or deceptively similar to, the trade mark in relation to goods or services in respect of which the trade mark is registered.

107 “Sign” is broadly defined in s 6. Relevantly it includes “the following or any combination of the following, namely, any letter, word, name, signature, numeral, device, brand, heading, [or] label ...”.

108 “Trade mark” is defined in s 17 as:

[a] sign used, or intended to be used, to distinguish goods or services dealt with or provided in the course of trade by a person from goods or services so dealt with or provided by any other person.

109 A “use of a trade mark in relation to services” means use of the trade mark in physical or other relation to the services: s 7(5).

110 Section 122(1) provides that, in spite of s 120, a person does not infringe a registered trade mark in certain circumstances. These circumstances relevantly include when:

...

(b) the person uses a sign in good faith to indicate:

(i) the kind, quality, quantity, intended purpose, value, geographical origin, or some other characteristic, of goods or services;

...

(c) the person uses the trade mark in good faith to indicate the intended purpose of goods (in particular as accessories or spare parts) or services;

...

The issues

111 There is no dispute in this case that Malouf’s use of the word “veda” and its variations in its Google AdWords campaigns was use in the course of trade. Nor is there any dispute that it

was use of a sign that is substantially identical with, or deceptively similar to, the Veda Trade Marks. It is also common ground, consistently with the observation made by Nicholas J in *Australian Competition and Consumer Commission v Trading Post Australia Pty Ltd* (2011) 197 FCR 498 (*ACCC v Trading Post*) at [75], that there are many circumstances in which the use of trade marks by advertisers, even those owned by a competitor, is “quite legitimate”.

112 The issues that fall for consideration, then, are these:

- (1) Did Malouf’s use of the word “veda” in its various forms as keywords in its Google AdWords campaigns and/or the references to “veda” in the text of its sponsored links involve use of the word “as a trade mark” within the meaning of s 120 of the Trade Marks Act?
- (2) If Malouf did use “veda” as a trade mark, did it do so in relation to services in respect of which the Veda Trade Marks are registered for the purposes of s 120(1) of the Trade Marks Act?
- (3) If so, has Malouf made out a defence under ss 122(1)(b)(i) or 122(1)(c), that is to say, has Malouf proved that it used the word in good faith to indicate the kind or intended purpose of the services?

Has Malouf used the Veda Trade Marks as trade marks?

113 The concept of “use as a trade mark” within s 120 of the Trade Marks Act must be understood in the context of the definition of “trade mark” in s 17 and the legislative history: *E & J Gallo Winery v Lion Nathan Australia Pty Ltd* (2010) 241 CLR 144 at [41]–[42]. The question is whether the mark is used or intended to be used to distinguish goods or services, as the case may be, dealt with or provided in the course of trade by one person, from the goods or services so dealt with or provided by another, that is to say, to indicate a connection in the course of trade between its goods or services and those of another. In *Gallo* the High Court went on to endorse the following statement of the Full Court in *Coca Cola Company v All-Fect Distributors Ltd* (1999) 96 FCR 107 at [19]:

Use “as a trade mark” is use of the mark as a “badge of origin” in the sense that it indicates a connection in the course of trade between goods and the person who applies the mark to the goods: see *Johnson & Johnson Australia Pty Ltd v Sterling Pharmaceuticals Pty Ltd* (1991) 30 FCR 326 at 341, 351. That is the concept embodied in the definition of “trade mark” in s 17 — a sign used to distinguish goods dealt with in the course of trade by a person from goods so dealt with by someone else.

114 These principles apply equally to trade marks for services.

- 115 The question must be determined objectively (*Johnson & Johnson Australia Pty Ltd v Sterling Pharmaceuticals Pty Ltd* (1991) 30 FCR 326 at 335 per Lockhart J; *Lift Shop Pty Ltd v Easy Living Home Elevators Pty Ltd* (2014) 311 ALR 207; [2014] FCAFC 75 at [33]). In other words the answer does not depend on the subjective intention of the alleged infringer. There may be a trade mark use regardless.
- 116 In considering the answer, it is necessary to examine “the purpose and nature” of the impugned use (*The Shell Company of Australia Ltd v Esso Standard Oil (Australia) Ltd* (1963) 109 CLR 407 at 426 per Kitto J, with the agreement of Dixon CJ, Taylor and Owen JJ; *Johnson & Johnson* at 347 per Gummow J) in order to see whether the words are in fact being used as a trade mark (*Johnson & Johnson* per Lockhart J at 335) or, as Lindgren J put it in *Aldi Stores Ltd Partnership v Frito-Lay Trading Company GmbH* (2002) 190 ALR 185; [2001] FCA 1874 at [76], “whether they would be likely to be understood to do so by relevant readers and hearers in the circumstances in which the words [are] likely to be read and heard”.
- 117 The reason for the focus on purpose is obvious. It will be recalled that “trade mark” is defined in the Act by reference to the purpose for which a sign is used or intended to be used. Thus, to be used as a trade mark a sign must, in an objective sense, be used or intended to be used for the purpose of distinguishing the goods or services of one trader from those of another — as a badge of the origin of the goods or services.
- 118 Context is “all-important”: *Shell* at 422. Where the sign is a word mark, the relevant context includes “the totality of the packaging, including the way in which the words are displayed in relation to the goods and the existence of a label of a clear and dominant brand” (*Nature’s Blend Pty Ltd v Nestlé Australia Ltd* (2010) 272 ALR 487; [2010] FCAFC 117 at [491]). Where, as here, the sign is used in advertising, the relevant context will include the surrounding text. The question here will be whether, in the way the Veda name is used, it would appear to consumers as possessing the character of a brand for the purpose of indicating a connection in the course of trade between the services the subject of the advertisement and Malouf, to distinguish its services from the services of other traders: compare *Shell* at 425.
- 119 There are two aspects to Veda’s claims. One relates to the selection and nomination as keywords of the word “veda” in its various forms and alone or in combination with other words (which I shall call the **Veda keywords**), the other to the incorporation of “veda” in the text of the sponsored links. I shall deal first with the allegation relating to the selection and nomination of the Veda keywords.

Use in the keywords

120 There is a dearth of authority on whether use of a trade mark in a keyword is trade mark use under the Trade Marks Act. The learned authors of the leading text on trade mark law in Australia, *Shanahan's Australian Law of Trade Marks and Passing Off* (5th ed) doubted whether an advertiser who uses keywords which are also registered trade marks uses them as trade marks, that is, as a means of distinguishing its goods or services from the goods or services of others.

121 They postulated at [115.1110]:

One interpretation is that the keywords/trade marks are used to identify internet users who have an interest in a particular product and to then present alternatives to those users. The search results present those alternatives rather than suggesting that the keywords used are identifying the origin of any particular goods or services being offered in the ensuing advertisements. ... The end result would be that keyword generated advertising per se would not be a trade mark infringement.

122 In my opinion, Malouf's use of the Veda keywords is not a trade mark use.

123 First, on the agreed facts, the advertiser merely selects the keywords and provides them to Google. This is not use indicating a connection in the course of trade between the services provided by Malouf and the services provided by any other trader. Objectively, Malouf is or was not using the keywords as a sign to distinguish its services from the services of others. Rather, it has used them to identify internet users who may have an interest in using its services.

124 Secondly, the Veda keywords may be acquired by anyone under Google's AdWords program, including Malouf's competitors, and their use as search terms will produce not only sponsored links to Malouf's websites but also sponsored links to those of its competitors as well as organic search results, pre-eminently Veda's own website. While far from determinative, these circumstances are not irrelevant. As the Full Court observed in *Lift Shop* at [41]:

Such use may well provide part of the context in which the alleged infringer has used the sign and inform the question of whether, in such use, the sign performs the function of a trade mark.

125 In the present case, these circumstances are part of the relevant context.

126 Thirdly, the keywords are invisible to consumers. Veda submitted that this circumstance is immaterial. It described use of a trade mark under the Act as an expansive concept. It referred

to the fact that s 7(5) speaks of use “in physical or *other* relation to the services” (emphasis added).

127 But the proposition that using words which are invisible and inaudible, indeed imperceptible, to consumers is using them as a trade mark makes no sense. How could the keywords be understood to be used to distinguish the services of one trader from those of another when the keywords are indiscernible? How could it appear to consumers that, by Malouf’s designation of the Veda keywords to Google, the words are used to denote a connection in the course of trade between Malouf’s services and the services provided by another trader, or to distinguish its services from the services of others, when the consumers have not seen or otherwise perceived the keywords?

128 Moreover, in a case where the consumer does not merely search for “veda”, but enters a term or phrase which includes the word “veda”, how would the consumer know that the trade mark was being used at all? If the consumer searches for “veda credit report”, for example, and the search returns a Malouf advertisement, a consumer who understands how the AdWords program operates might imagine that the keyword generating the advertisement was “veda”. But equally the consumer might imagine that the keyword or words were “credit report”. As the keyword is invisible, the consumer cannot know. The fact that use need not be in physical relation to the services does not address the question at hand. In any case, I doubt very much whether the Parliament had in mind a metaphysical relationship, no matter how expansive the concept of use was intended to be.

129 Veda submitted that the fact that a keyword was not visible did not preclude Rangiah J from finding trade mark infringement in *Accor Australia & New Zealand Hospitality Pty Ltd v Liv Pty Ltd* [2015] FCA 554, referring to his Honour’s remarks at [429]–[436] dealing with a particular use of the registered trade mark “Harbour Lights” by business rivals of the exclusive licensee of the trade mark:

429 There is in evidence a printout of what is called the “source data” for the website www.cairnsluxuryapartments.com.au. The source data includes a “meta-tag”, being “Harbour Lights”. Mr Mezzatesta deposed, without objection, that a meta-tag is not displayed on the screen but is used by search engines such as Google to determine what search results to return when a user undertakes a search.

430 The source data includes the title “Cairns Luxury Accommodation – Waterfront Apartments – Harbour Lights – Cairns Queensland”. Under that are “keywords”. The first of those is indecipherable in the printed document put into evidence, but the second is “Harbour Lights”. The source data also

includes the words “content: = Harbour Lights Apartments in Cairns offer luxury private waterfront apartment accommodation for holiday letting and short-term rental”. The applicants allege that the use of those words in the source code infringes their trade marks.

- 431 The respondents argue that there is no evidence that the use of website keywords is within the control of the respondents.
- 432 Mr Mezzatesta deposed that on 28 May 2013 he looked at the source data for the website www.cairnsluxuryapartments.com.au using his browser. He then caused the printout to be made of the source data for that website. Mr Mezzatesta’s evidence satisfies me that the source data that he located was visible to those who know what to look for, underlay Liv’s website and influenced search results.
- 433 There is no direct evidence that the source data was placed there by someone acting on behalf of Liv. However, there is evidence that Liv engaged an IT consultant to create the website. There is evidence that Liv operates the website and has had the content of the website changed from time to time. From this evidence, I accept that Liv has control of the website, including the source data for the website. I infer that the words comprising the source data must have been included to optimise the search results for Liv’s benefit. In the absence of any suggestion as to how else the relevant words could have come to form part of the source data for Liv’s website, I infer that the IT consultant must have included those words, with Liv’s acquiescence. I therefore consider that the words were “used” by Liv.
- 434 The use of the words “Harbour Lights” in the title “Cairns Luxury Accommodation – Waterfront Apartments – Harbour Lights – Cairns Queensland” appears to be merely a descriptor of the waterfront apartments that are referred to in the title. The first use of the words “harbour lights” in the keywords also appears to be a reference to the apartments appearing, as they do, in the context of surrounding words such as “Cairns apartments”, “waterfront, luxury apartment” and “harbourside”. I cannot see that those words were used as a badge of origin.
- 435 The phrase “content: = Harbour Lights Apartments in Cairns offer luxury private waterfront apartment accommodation for holiday letting and short term rental” seem to use the words “Harbour Lights Apartments” effectively as a business name. Those words represented that Harbour Lights Apartments was the business which offers the accommodation for letting and short-term rental. The words distinguished Liv’s services from those offered by other providers. Their use was trade mark use.
- 436 This use of “Harbour Lights” meets the elements of s 120(1) of the TMA in relation to both registered trade marks. It does so in relation to each of the Class 36 and Class 43 services, other than “commercial real estate agency services”, “agency services for the leasing of real estate properties” and the hotel services.

130 Two things must be understood about this extract. The first is that the “keywords” it refers to are distinct from, and should not be confused with, keywords in the Google AdWords program. The “keywords” in *Accor* were words embedded in metatags. The second is the nature of metatags. These are words placed in the source code of a website and its pages by the person

in charge of the website. Malouf submitted (without contradiction) that they are used by search engines to assist in indexing and ranking websites when displaying search results.

131 It is difficult to know what to make of the extract from *Accor*.

132 First, the metatags in *Accor* were not entirely invisible. To the contrary, in that case there was apparently evidence that the source data was visible “to those who know what to look for”. Here, however, it was not in dispute that the keywords were invisible to consumers.

133 Second, the decision appears to be at odds with the judgment of Kenny J in *Complete Technology Integrations Pty Ltd v Green Energy Management Solutions Pty Ltd* [2011] FCA 1319 to which Rangiah J did not refer and to which his Honour’s attention was not directed.

134 In *Complete Technology* Kenny J rejected the contention that the unauthorised use of registered trade marks as metatags was trade mark use.

135 Complete Technology Integrations Pty Ltd (CTI) owned a number of registered trade marks for the acronym “CTI” and the following terms: “CTI Australia”, “Complete Technology Integrations”, “CTI Energy Management” and “CTI Building Automation”. CTI claimed (amongst other things) that a competitor — Green Energy Management Solutions Pty Ltd (Green Energy) — and three of its directors and shareholders had infringed its registered trade marks in several ways. One of those ways was said to be by using as metatags the acronyms and words “CTI”, “cti”, “CTI Canberra” and “capital technology”. When internet users with an interest in services of the kind offered by CTI searched the internet using any of these terms, the metatags captured the search and “[threw] up the website or the page in respect of which the metatags [were] placed as part of an answer to the search” (*Complete Technology* at [57]).

136 CTI contended that Green Energy’s use of CTI’s registered trade marks as metatags was use of the marks as trade marks within the meaning of the Trade Marks Act because Green Energy had used the marks to “attract customers who were looking for a particular commercial source of services by reference to the name ‘CTI’”. Her Honour accepted that the use of the marks as metatags could help Green Energy to benefit from CTI’s goodwill but she rejected the contention that the use was use as a trade mark, stating (at [32]):

[Section] 120(1) of the TMA requires that [*scil.*] “the person uses as a trade mark a sign that is substantially identical with, or deceptively similar to, the trade mark in relation to goods or services in respect of which the trade mark is registered” before there can be an infringement. I do not accept that the use of any of CTI’s Registered Trade Marks in Green Energy’s metatags would constitute a trade mark infringement for the purposes of s 120(1). **Metatags are invisible to the ordinary internet user,**

although their use will direct the user to (amongst other websites) Green Energy’s website. Once at the Green Energy website, then, in the ordinary course, the internet user will be made aware that the website is concerned with Green Energy’s services. **It cannot, therefore, be said that the use in a metatag of CTI’s Registered Trade Marks is a use that indicates the origin of Green Energy’s services. Thus, metatag use is not use as a trade mark:** compare *Coca-Cola Co v All-Fect Distributors Ltd* (1999) 96 FCR 107 at 115–6 [20].

(Emphasis added.)

137 In my respectful opinion, her Honour was correct. The position in the present case is relevantly indistinguishable.

138 Furthermore, the issue of whether using registered trade marks as keywords is use as a trade mark was resolved against the registered owner in *Intercity Group (NZ) Ltd v Nakedbus NZ Ltd* (2014) 3 NZLR 177.

139 In New Zealand there will be infringement of a registered trade mark if the relevant use of the sign is “in such a manner as to render the use of the sign as likely to be taken as being use as a trade mark”: *Trade Marks Act 2002* (NZ), s 89(2).

140 In *Intercity*, Asher J, sitting in the High Court of New Zealand, held that the use by the alleged infringer, Nakedbus, of “inter city” and variations of it as keywords in the Google AdWords program did not infringe the plaintiff’s registered trade mark “INTERCITY”. His Honour said at [85]:

The position in relation to the use by Nakedbus of the keywords is entirely different to a use on packaging or other communications to the public. The use of the keyword was by Nakedbus when it purchased that keyword prior to the placement of its advertisement, and then by Google when, through its search engine, it provided for the Nakedbus advertisement to appear when a consumer keyed “intercity” into a computer. In such a situation, the use of the keyword by Nakedbus and indeed Google was not seen by the consumer at all. As Mr Harris observed, these actions were invisible to everyone except Google and the advertiser. If the “use” could not be seen by the consumer it could not be “taken as” anything, let alone “taken as being used as a trade mark”.

141 His Honour went on to point out (at [86]) that this did not mean that the trade mark owner was necessarily without a remedy because using an identical or similar trade mark in the advertisement might itself be an infringing use. But in the absence of evidence that a consumer would know or understand the use of keywords, his Honour was not prepared to assume that the consumer had any awareness of how they are used:

Insofar as the use of the keyword was an act that was not seen or known or understood

by the consumer, there was no use of the sign “likely to be taken as being used as a trade mark”.

142 Veda submitted that *Intercity* was distinguishable because it was not shown that a consumer would know or understand the use of keywords. But neither was it here.

143 Veda also referred to another New Zealand decision — *Tasman Insulation New Zealand Ltd v Knauf Insulation Ltd* (2014) 108 IPR 162; [2014] NZHC 960. In that case, which was heard before *Intercity* but decided afterwards, Brown J, without referring to *Intercity*, came to the opposite conclusion. His Honour considered that invisible use of a registered trade mark by the use of a metatag was use as a trade mark “where the mark can be accessed and viewed by an informed internet user” (at [236]). But there was no evidence of that in the present case. Brown J did refer (at [226]) to Kenny J’s judgment in *Complete Technology* but read the decision down by ignoring the conjunctive adverb “therefore” in the passage extracted above at [136]. His Honour (wrongly in my respectful opinion) treated Kenny J’s conclusion that the metatags did not indicate the origin of Green Energy’s services as an independent finding, rather than one that flowed from her Honour’s consideration of the nature and function of metatags including their invisibility to the ordinary internet user.

144 Veda also relied on the recent European authorities which Asher J declined to follow in *Intercity* — *Google France SARL v Louis Vuitton Malletier SA (C-235/08)* [2011] Bus LR 1; All ER (EC) 411 and *Interflora Inc and Anor v Marks & Spencer No. 5* [2014] EWCA Civ 1403 — and drew attention to a remark in the leading English textbook, *Kerly’s Law of Trade Marks and Trade Names* (15th ed), at [27–071] that the fact that a metatag is normally not seen should not make any difference. Veda submitted that in the European context, the courts have accepted that use of keywords is use in the course of trade and use of a sign in respect of goods and services. Veda also submitted that “use in the course of trade in respect of goods or services” in the European context is the equivalent concept to “use as a trade mark” under the Trade Marks Act.

145 Both *Google France* and *Interflora* were concerned with the use of keywords in the Google AdWords program. Nevertheless, I do not regard those authorities as instructive. The law is not the same, understandably the judgments do not refer to Australian law, and the passages upon which Veda relied were taken out of context. I reject the submission that “use in the course of trade in respect of goods or services” in the European law is the equivalent concept

to “use as a trade mark” in the Trade Marks Act, if by that submission Veda intended to imply that the expressions have the same meaning.

146 The phrases “using in the course of trade” and “in relation to goods and services” considered in *Google France* and *Interflora* appear in Art 5(1)(a) of the *First Council Directive of 21 December 1988 to Approximate the Laws of the Member States Relating to Trade Marks (89/104/EEC)* [1989] OJ L 40/1 and Art 9(1)(c) of *Council Regulation (EC) No 40/94 of 20 December 1993 on the Community Trade Mark* [1994] OJ L 11/1. Article 5(1)(a) provides:

The registered trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade:

- (a) any sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered[.]

147 Article 9(1)(c) provides:

A Community trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade:

...

- (c) any sign which is identical with or similar to the Community trade mark in relation to goods or services which are not similar to those for which the Community trade mark is registered, where the latter has a reputation in the Community and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the Community trade mark.

148 It is a condition of infringement under Art 5(1)(a) that the use is such as to affect or be liable to affect the functions of the trade mark: *Cosmetic Warriors Ltd v amazon.co.uk Ltd* [2014] ECC 28; [2014] EWHC 181 (Ch) at [28]. Neither “using” nor “using in the course of trade”, however, is defined.

149 Veda relied on a passage in the reasons in *Google France* at [85]. There, the Grand Chamber of the **European Court** of Justice considered that the fact that the advertisement appears immediately following the entry of the trade mark search term by the internet user and is displayed at a point when the trade mark is also displayed on the screen “in its capacity as a search term”, “the internet user may err as to the origin of the goods or services in question”. In these circumstances, it held at [85]:

[T]he use by the third party of the sign identical with the mark as a keyword triggering

the display of that ad is liable to create the impression that there is a material link in the course of trade between the goods or services in question and the proprietor of the trademark ...

150 But the Grand Chamber was not addressing the question of “use” at this point. It was addressing the question of “adverse effect on the function of indicating origin”. The question of “use” was addressed earlier (at [50]), under the heading “use in the course of trade”. There, the Grand Chamber stated:

The use of a sign identical with a trade mark constitutes use in the course of trade where it occurs in the context of commercial activity with a view to economic advantage and not as a private matter.

151 That is not the test of use as a trade mark under the Australian Act.

152 The Grand Chamber in *Google France* did not consider whether the purpose for which the keywords were used was to distinguish between the goods or services dealt with or provided by one person from those dealt with or provided by another. Nor was that question considered in *Interflora*.

153 If, however, the finding by the Grand Chamber at [85] is properly to be taken as a statement of its opinion on the use of keywords to indicate a connection in the course of trade between the services of the trader who purchased them and the services of the trade mark owner, I respectfully disagree. On this point I prefer the opinion of the Court of Appeal of England and Wales in *Reed Executive plc v Reed Business Information Ltd* [2004] RPC 40; [2004] EWCA Civ 159 (cited with approval by Lewison LJ in *Interflora v Marks & Spencer* [2013] 2 All ER 663; [2012] EWCA Civ 1501 at [56]). In *Reed*, Reed Executive plc was the registered owner of the trade mark “Reed” registered in respect of employment agency services, which was used by Reed Business Information Ltd as a Yahoo keyword to generate banner advertisements for its recruitment website totaljobs.com. The word “Reed” was not visible in the advertisements. Jacob LJ, with whom Rix and Auld LLJ agreed, said at [137]–[140]:

As anyone who uses internet searches knows, in addition to the results of a search under a particular name or phrase, one often gets unasked for “banner” advertisements. Most of the time they are nothing but an irritation and are ignored. But you can, if you wish, “click-through”, *i.e.* click on the banner and be taken to the advertiser’s site.

...

The web-using member of the public knows that all sorts of banners appear when he or she does a search and they are or may be triggered by something in the search. He or she also knows that searches produce fuzzy results — results with much rubbish

thrown in. The idea that a search under the name Reed would make anyone think there was a trade connection between a totaljobs banner making no reference to the word “Reed” and Reed Employment is fanciful.

154 In *Interflora* Marks & Spencer used “interflora”, a registered trade mark belonging to Interflora Inc, and variations thereof as keywords in a Google AdWords campaign to trigger advertisements for the online sale of “M & S Flowers”. The trial judge had referred a number of questions to the European Court. At [105] the Court of Appeal of England and Wales referred to some of its findings:

The court accepted that **where a competitor of the proprietor of a trade mark with a reputation selects a sign identical to the trade mark as a keyword in an Internet referencing service, the purpose of that use is to take advantage of the character and repute of the trade mark, and further, that the competitor will derive a real benefit for which he has not paid. Such use will, if it is “without due cause” amount to an infringement**, and that is likely to be the case if the goods are mere imitations of those of the trade mark proprietor. But it will not be the case if the goods are genuine alternatives and the use does not cause dilution or tarnishment or adversely affect one of the functions of the trade mark ...

(Emphasis added.)

155 Veda cited the emphasised passage. In that passage the European Court was considering a question posed by Art 9(1)(c) of the Regulation, namely whether the use of the sign took unfair advantage of, or was detrimental to, the distinctive character or repute of the trade mark. That is not a question that arises under the Trade Marks Act.

156 In the passages from both *Google France* and *Interflora*, then, the European Court’s consideration centred on the effect of the allegedly infringing use, not on its purpose or nature.

157 In contrast, in *Intercity Asher J* approached the question of whether the use of trade marks as keywords was use as a trade mark by focussing on “the essential function” of a trade mark, namely, “to guarantee to the consumer the identity of the origin of the trade marked goods or services by enabling that consumer to distinguish the goods or services from others which have a different origin”: (2014) 3 NZLR 177 at [70]. His Honour accepted (at [71]) a submission that it was important not to confuse dicta relating to the issue of confusion and deception in deciding whether use constitutes “use as a trade mark”. He went on to cite a passage from *Shanahan* at [85,560] which referred to the definition in s 17 of the Trade Marks Act, and which emphasises that “factors relevant to whether there is a misrepresentation or likelihood of deception have no role to play in deciding the question of what constitutes ‘use as a trade mark’”.

158 In *Intercity* Asher J was also taken to *Google France* and urged to follow it. He declined to do so, noting (at [76]) that, given the difference in the relevant legislation and case law, it could not be regarded as authoritative in New Zealand. For the same reasons neither *Google France* nor *Interflora* is authoritative here.

159 I do not accept that the use of a sign which is invisible to the consumer is use as a trade mark within the meaning of the Trade Marks Act.

Use in the sponsored links

160 The use of Veda word marks in the titles of the sponsored links is more complicated. For a start the words are visible.

161 In the first period (from at least August 2012 to October 2014) the word “Veda” appeared in the following hyperlinked advertisement headings:

- Clean Your Veda File;
- Fix My Veda History;
- Fix Veda File;
- Fix Your Veda File;
- Fix Your Veda File Now;
- Fix Your Veda History;
- Fix Your Veda Rating;
- Fix Your Veda Report;
- Fix Your Veda score;
- Fix Your Veda-File;
- Get Your Veda Credit File;
- Get Your Veda File;
- Get Your Veda File Now;
- Got a Bad Veda File?;
- Repair Your Veda File;
- Repair Your Veda file;
- Repair your Veda File NOW;

- Repair Your Veda File;
- Repair Your Veda History;
- Repair Your Veda Score
- The Veda Report Centre;
- The Veda-Report Centre; and
- Veda Credit File Repairs.

162 There was no reference, however, to “veda” or “Veda” in the URLs displayed under the headings.

163 Malouf submitted that the reference to Veda in each instance was not trade mark use because it was not used to distinguish the Malouf business from other businesses. Rather, consumers seeing the advertisements would have understood the phrases the subject of Veda’s complaint, including in the context of the other text in the advertisements, as describing the character of the business: repair of Veda credit reports.

164 The fact that a sign contains descriptive elements does not preclude it from being a “badge of origin”: *Nature’s Blend* at [19] and the cases cited there. As Gummow J put it in *Johnson v Johnson* at 347, to say that a trade mark is used as a description, “is not to gainsay the point made by Dixon CJ in *Mark Foys Ltd v Davies Coop and Co Ltd* (the ***Tub Happy*** case) (1956) 95 CLR 190 at 194–195 that language is not always used to convey a single, clear idea; a mark may have a descriptive element but still serve as a badge of trade origin”.

165 Commonly, this question arises where ordinary English words are used in a trade mark, such as “Page Three” (*News Group Newspapers Ltd v The Rocket Record Co Ltd* [1981] FSR 89 at 102, to which Gummow J referred in *Johnson & Johnson*), “Kettle” (***Pepsico Australia Pty Ltd (t/as Frito-Lay Australia) v Kettle Chip Co Pty Ltd*** (1996) 135 ALR 192) and “Lift Shop” (*Lift Shop*), or even arguable neologisms like “caplets” (*Johnson & Johnson*), or geographical names, such as “Michigan” (*Clark Equipment Co v Registrar of Trade Marks* (1964) 111 CLR 511) or “Colorado” (*Colorado Group Ltd v Strandbags Group Pty Ltd* (2007) 164 FCR 506 where the word was applied to shoes and backpacks). Unlike “kettle”, for example, the word “veda” is not essentially or intrinsically descriptive. As Lockhart J observed in *Pepsico* at 193, it is easier to find infringement where the registered mark consists of a coined phrase (as in the *Tub Happy* case) than where the registered mark is “a generally descriptive word” which has acquired a secondary meaning (because in the latter case there is an inherent risk that when

used by others in trade the word will be used in its original descriptive sense). The evidence does not disclose the history of the selection of the word “Veda”. It may not be a coined term. Veda is a Sanskrit word referring to the sacred books of the Hindu religion. Plainly, however, it is not used in this sense by Malouf.

166 There is an intersection between s 120 and s 122(1) in this respect. There are cases in which courts have found that using a trade mark to describe goods or services is not trade mark use. *Johnson & Johnson* is a case in point. So, too, is *Lift Shop*. Yet, on one view (and the view taken by the parties in the present case) s 122(1), which appears to protect the use of a trade mark used in this way, operates as a defence.

167 Veda submitted that there is no evidence that “veda” is understood as a descriptive term and there is no unambiguous descriptive use of the Veda Trade Marks, particularly where the following phrases are used: “*Get Your Veda File*”, “*Veda Credit File Repairs*” and “*The Veda Report Centre*”. The use of the Veda Trade Marks in this context, it contended, is likely to be taken by consumers as use as a trade mark.

168 Veda also submitted that Malouf intended that consumers understand that there was a connection between Malouf’s services and Veda because the targets of its advertising were consumers looking for Veda. That was not Mr Malouf’s evidence. He testified that he was using the mark in a descriptive way. Generally speaking, I accept that evidence. Mr Malouf impressed me as a careful witness. He was clearly at pains to ensure that he gave accurate answers to every question he was asked. He did not seem to me to succumb to the temptation to reply merely in a way that might have appeared to assist his case. He emerged from a vigorous cross-examination with his credit substantially intact. The qualification is necessary because of the opinion I have formed about his evidence concerning “The Veda Report Centre”. As the question of use for the purposes of s 120(1) must be determined objectively, however, this conclusion does not take the matter very far. It will be relevant, though, if it is necessary to consider the defence.

169 Veda accepted that keyword phrases like “fix my veda file”, “repair my veda file” and “clean my veda history” were “directly” descriptive of the services provided by Malouf and for this reason did not complain about their use. In these circumstances, I fail to understand the basis for the complaint about “Veda Credit File Repairs” or, indeed, the other advertisements in which the heading includes words such as “clean”, “fix” or “repair”. Furthermore, as the Malouf businesses obtain Veda files on behalf of their clients, it seems to me that the use of

“Veda” in the advertisement entitled “Get your Veda File” is a use of the Veda mark in a descriptive sense. “The Veda Report Centre” and “The Veda-Report Centre” (collectively “**The Veda Report Centre**”) are, however, vexing.

170 In all but the advertisements featuring “The Veda Report Centre”, I am not satisfied that Malouf has used the Veda Trade Marks as trade marks. Rather, it seems to me that they have been used to describe the object to which its services are directed — fixing, cleaning or repairing Veda credit files or reports — not as a badge of the origin of its business and therefore not as a trade mark. In contrast to the position in *Caterpillar Loader Hire (Holdings) Pty Ltd v Caterpillar Tractor Co* (1983) 77 FLR 139; [1983] FCA 145 and *Britt Allcroft (Thomas) LLC v Miller (t/as The Thomas Shop)* (2000) 49 IPR 7; [2000] FCA 699 (where registered trade marks were used as part of the registered business names of other traders), the Veda Trade Marks have not been used by Malouf to distinguish its services from those provided by others but to describe the kind or character of the services it provides. I am persuaded, however, that “The Veda Report Centre” is in a different category. In my opinion it was used as a badge of origin to indicate a connection between the Malouf business and Veda, to market the Malouf business under the Veda name.

171 Malouf submitted, in effect, that the advertisements featuring “The Veda Report Centre” could be ignored because, by affidavit sworn 10 September 2015 (the second day of trial) Mr Malouf indicated that, until Veda’s senior counsel referred to them in her opening submissions (they were not at this stage part of Veda’s pleaded case), he had forgotten that this text had been used in the advertisements. After these advertisements were brought to his attention, Mr Malouf said that he searched Malouf’s Google AdWords account which revealed that they had only run for a period of about two weeks, had 25 clicks and no conversions. This was said to indicate that no one had in fact been misled. On behalf of Malouf, and without any admission as to liability, Mr Malouf gave a permanent undertaking not to use the text “The Veda Report Centre” in any advertisement. I accept Mr Malouf’s evidence in this respect and I note his undertaking but, while these matters may have a bearing on the orders, they are not relevant to the question of infringement.

172 Since October 2014 the word “veda” has not appeared in any of Malouf’s sponsored link advertisements. In these circumstances there was no use of the Veda Trade Marks in the advertisements and consequently no use of them as trade marks.

173 Finally, Veda complained that the landing pages to which a consumer who clicked on the sponsored link would be directed continue to contain references to one or more of the Veda Trade Marks.

174 That complaint can be put to one side, however. It formed no part of Veda's pleaded case. In any case, it seems to me that, read in context, the references on those pages are all descriptive.

Did Malouf use the Veda Trade Marks in relation to services in respect of which the trade marks were registered?

175 Malouf disputes that it provides services in class 36, being the relevant class in respect of which the trade marks were registered. It contended that Veda's services are "financial services" and that it does not offer financial services.

176 Malouf's position should not be accepted.

177 It is convenient to deal with this issue by reference to registered trade mark No 1426238, which Veda accepted offered the broadest coverage. It is registered in relation to the following services:

- financial services;
- provision of credit risk, financial and asset information and reports;
- credit scoring and risk assessment services;
- information provision, **advice**, research, appraisal, analysis, credit enquiry **and consultation** in relation to the aforementioned services;
- assembling credit information on individuals and companies and providing credit reports;
- credit bureau services;
- provision of credit risk information;
- credit scoring, decision support and risk assessment services;
- credit, financial and asset equity report services including the provision of insolvency reports, comprehensive credit reports, credit and financial risk reports, financial health assessment, bankruptcy searches, bank opinions;
- provision of **information relating to financial data**, property summary data, property equity data, bankruptcy data, **risk analysis and financial health assessment**;

- electronic processing services relating to credit approval including the provision of credit, financial and asset reports.

(Emphasis added.)

178 Veda contended that Malouf provides “financial services”, including:

- “information relating to financial data, risk analysis and financial health assessment”;
- “advice and consultation service”;
- “credit reports”; and
- “credit risk assessment and information”.

179 Veda pointed to evidence of “an assessment process” in which the customer’s application is reviewed by a Malouf business and information provided. It emphasised Mr Malouf’s concession in cross-examination that the Malouf business sells credit reports, albeit that this was not the majority of the business.

180 Veda submitted that each of these services is not incidental, but “a critical part of the service delivery of the Malouf Group”. It claimed that it is incontestable that the credit repair services are “financial services” in that they are services pertaining to matters of a financial nature (a person’s credit record and history).

181 On the other hand, Malouf submitted that “information provision, advice, ... and consultation” is only in relation to “the aforementioned services” and Malouf does not supply any such services. It also submitted that the reference to the provision of “credit reports” is in the context of “assembling credit information on individuals and companies” and Malouf does no such thing. It argued that the reference to “credit and financial risk reports” is in the context of “financial and asset equity report services”, again services which Malouf does not supply. Finally, it contended that the last reference to “credit ... reports” is in the context of “electronic processing services relating to credit approval” which Malouf plainly does not provide.

182 I accept that the words should be read in context but reading them in context does not assist Malouf.

183 The “aforementioned services” listed in the description of the services in relation to which the Veda Trade Marks are registered include “financial services” and the “provision of credit risk, financial and asset information and reports”. Malouf provides credit reports including credit risk, financial and asset information, albeit that it obtains the reports on behalf of its customers

from Veda and other credit bureaux or reporting bodies. It also provides information, advice and consultation and information relating to financial data, risk analysis and financial health assessment. It does so in relation to the credit reports it furnishes to its customers. That information is included in the “information pack” sent to each customer.

184 Malouf offers advice about how the customer should manage his or her finances. Included in the information pack is advice to “cease applying for further credit immediately” if there have been more than a certain number of credit inquiries in a certain period (step 8). Step 10 consists of advice to try to pay off “default/serious credit infringement” as soon as possible and if not in a financial position to do so immediately, to “get into a payment plan”. Step 11 contains advice to purchase whitegoods or furniture by not paying cash, for example, through interest-free finance offered by stores.

185 Credit Clean Australia’s standard letter concludes with the following advice:

If you have a busy lifestyle or work life and often forget or don’t have the time to pay bills, set up a direct debit plan with your provider out of an account or credit card so your payment is made each month automatically. ...

When getting any new form of credit always think long term not short. Taking that loan might seem like the logical thing to do at the time but may in the long term end up causing financial strain and hardship. The key is money management. Work out all your expenses within the month ie. Petrol food, electricity, entertainment, phone, even registration renewal (if you renew it every 6 months divided it by 6) etc. Then divide them by 4 to work out your weekly expenses. If you believe there is sufficient funds remaining and you can adequately service the loan without putting financial strain on yourself then it can be a viable option. If however there is not much funds available, although that new item might seem attractive it is highly possible that you are not going to be able to keep up with the payments which can then result in damaging your credit file. To find out more in regards to managing your finances and for free advice in regards to bad credit and management go to the Australian Financial Counselling and Credit Reform Association at www.financialcounsellingaustralia.org.au.

186 This is consumer protection advice. But why is it not also financial advice? After all, it is directed to assisting the consumer to protect his or her financial standing. It is basic advice about managing one’s finances. I appreciate that the services Malouf offers are not the same as the services provided by Veda, but that is not an answer to the present question.

187 I acknowledge that on its websites Malouf maintains that it does not offer financial advice or “any financial services or products”. Mr Malouf pointed out that his company does not hold a licence to provide financial services and much was made of this in submissions. True it is that a person carrying on “a financial services business” in Australia must hold an Australian

financial services licence covering the provision of the financial services (which includes dealing in a financial product) (*Corporations Act 2001* (Cth), ss 911A(1), 766A) and failure to comply with s 911A(1) is an offence (*Corporations Act*, s 1311(1)). But the want of a licence is no answer if Malouf actually requires a licence. That depends on whether the services it provides fall within the meaning of “financial services” in the *Corporations Act*, a subject upon which I was not addressed. The answer to the present question, however, turns on the meaning of the expression in the trade marks register. There is no necessary reason why the expressions would be synonymous.

188 Malouf submitted that Veda must be taken to accept that it does not provide financial services. Otherwise, it would have no case under the ACL as the effect of s 131A(1) of the *Competition and Consumer Act* is to exclude the ACL from applying to the supply or possible supply of financial services or financial products. Veda would have a remedy for misleading or deceptive conduct by Malouf but the remedy would lie elsewhere, in s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**).

189 But “financial services” and “financial products” are defined in the ACL by reference to the definitions of those terms in the ASIC Act. There is no reason to construe the description of the services in the Trade Marks register by reference to the definitions of those services in legislation enacted for purposes outside the regulation of trade marks. The words should bear their ordinary meaning. In any case, Malouf’s submission ignores the opinion expressed by Nicholas J in *Enterprise Finance Solutions Pty Ltd v Austec Pty Ltd* [2013] FCA 491 at [74] that the exclusion in s 51AF of the *Trade Practices Act 1974* (Cth) (the predecessor of s 131A(1) of the *Competition and Consumer Act*) applies only to conduct relating to financial services and that conduct relating not only to financial services but also to a characteristic of goods (to which one could comfortably add “or services”), such as their price, may be actionable under both the *Trade Practices Act* and the ASIC Act.

190 In my opinion Malouf’s services include services of the kind in respect of which the Veda Trade Marks are registered.

Has Malouf made out a defence under s 122(1)(b)(i) or 122(1)(c)?

191 It was common ground that the onus of proof rests with Malouf on this question.

192 As Greenwood J explained in *Mayne Industries Pty Ltd v Advanced Engineering Group Pty Ltd* (2008) 166 FCR 312 at [105]:

Section 122(1) of the Act like s 64(1) of the 1955 Act, assumes infringing conduct on the part of the respondent that is excused when the person uses a sign in good faith to indicate one or more of the identified characteristics ... The essential concern going to good faith in s 122(1) is that the use be honest. Something less than fraudulent intention in the common law sense will suffice to prevent use being in good faith (*Johnson & Johnson v Sterling* 30 FCR at 356 per Gummow J). There must be however, identified conduct on the part of the respondent that demonstrates use of the sign in circumstances where [the alleged infringer] has engaged in **conscious and deliberate acts to undermine the registered owner or the integrity of the trade mark**. Has the respondent sought to undermine the trade mark by the “assiduous efforts of an infringer”? (*Johnson & Johnson v Sterling* 30 FCR at 355 per Gummow J adopting the phrase used by Windeyer J in *Re Bali Brassiere Company Inc’s Registered Trade Mark and Berlei Ltd’s Application* (1968) 118 CLR 128 at 133).

(Emphasis added.)

193 Veda submitted that the onus had not been discharged because the specification of some 55 terms as keywords which were substantially identical with, or deceptively similar to, one or other of the Veda Trade Marks was “targeted and systematic use of Veda’s Trade Marks” inconsistent with their use in good faith for any of the purposes within ss 122(1)(b)(i) or (c). It was, so Veda argued, “excessive”. Moreover, Veda contended that Malouf uses the keywords as a “‘stalking horse’ to promote its own services”; they are neither descriptive nor generic terms.

194 There are a number of difficulties with these submissions. First, they relate only to the keywords, Malouf’s use of which I have found does not constitute trade mark use. Even if I am wrong in this respect, I would reject them. While Malouf was assiduous in identifying keywords which would target individuals with Veda credit reports, I am not persuaded that it was doing so with the conscious and deliberative objective of undermining the registered owner or the integrity of its trade mark.

195 That said, I am not satisfied that use of the Veda trade mark in “The Veda Report Centre” in the sponsored link advertisements for the Clean Your Credit business was a use of the Veda trade mark in good faith for any of the alleged purposes. Frankly, I am perplexed by it. This advertisement first appeared after Mr Malouf received a “cease and desist” notice from Veda in which Veda complained of his company’s use of the Veda Trade Marks and, amongst other things, alleged that it had infringed the Trade Marks Act. In the notice Veda sought various undertakings, including that substantially identical or deceptively similar marks would not be used. The notice was provided in the form of a letter dated 3 September 2014, signed by Veda’s general counsel, sent to Mr Malouf at his office address by express post and also by email.

Mr Malouf's evidence was that the advertisement was run for about the first two weeks of October. Mr Malouf denied that it was stopped because it was unsuccessful, saying (at ts 221):

No, I stopped it shortly after you guys said that you were going to sue us, so we took the name out of the title of the ad to satisfy what you guys were saying.

196 I think it highly likely that that was the reason why the advertisement was pulled or, according to Mr Malouf's September 2015 affidavit, "paused". But Mr Malouf's evidence did not explain why it was run at all in these circumstances.

DID MALOUF'S CONDUCT CONTRAVENE SECTIONS 18, 29(1)(h) OR 29(1)(i) OF THE ACL?

Veda's case

197 Veda's case on the ACL contraventions is put in four different ways. The first three are put in terms of representations alleged to be misleading or deceptive or likely to mislead or deceive. Those representations were to the following effect:

- (1) Malouf's use of each of the Veda Trade Marks or "a substantially identical or deceptively similar sign in the provision of services, including credit repair and related services, signifies to a significant number of persons in Australia" that the services Malouf provides or intends to provide are the services of, or have the sponsorship or approval of Veda, or that Malouf's business is the business of, or has the sponsorship or approval of, or an affiliation with, Veda.
- (2) Malouf's use of the terms listed in Schedule A as keywords in its Google AdWords campaign represented that the services it provides or intends to provide are the services of, or have the sponsorship or approval of, Veda, or that Malouf's business is the business of, or has the sponsorship or approval of, or an affiliation with, Veda.
- (3) Malouf's use of certain terms as keywords in its Google AdWords campaigns to trigger sponsored link advertising for its credit repair and related services signifies "to a number of persons in Australia" that it provides or intends to provide services at its websites which include the provision of a free Veda credit report. The terms in question are:
 - veda free credit report;
 - free veda credit check;
 - veda advantage free credit file;

- veda credit check free; and
- veda credit file free.

198 The fourth ACL claim is based on the totality of Malouf’s conduct. As it was put in Veda’s closing submissions:

[T]he totality of Malouf Group’s *conduct* considered in its commercial context, including the specification of keywords using the Veda Trade Marks to trigger sponsored links advertisements to its websites, the resulting misrepresentations, the content of Malouf websites containing repeated references to the word “veda” and the Malouf Group sales and marketing process which discourages disclosure of the fact that a consumer is not dealing with Veda, is conduct apt to mislead consumers that Malouf’s business is the business of, or has an affiliation with, Veda. Veda submits that this conduct contravenes s 18 of the ACL.

(Original emphasis.)

The relevant legal principles

199 Section 18(1) of the ACL states that:

A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

200 To “engage in conduct” relevantly means to do or refuse to do any act: s 2(2)(a). “Refusing to do an act” includes refraining (otherwise than inadvertently) from doing the act: s 2(2)(c)(i).

201 Section 29(1) is more specific than s 18(1). It relevantly provides that:

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:

...

(h) make a false or misleading representation that the person making the representation has a sponsorship, approval or affiliation; or

(i) make a false or misleading representation with respect to the price of goods or services[.]

...

202 The relevant legal principles are uncontroversial.

203 First, conduct (which may include a statement or representation) will be misleading or deceptive or likely to mislead or deceive if it leads, or is capable of leading, a person into error:

Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd (1982) 149 CLR 191 at 198.

204 Secondly, the question is to be determined objectively in the context of (all) the evidence and the relevant surrounding facts and circumstances: *Taco Company of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177; [1982] FCA 136 at 42 ALR 199, 202; *Parkdale* at 199 (Gibbs CJ). Conduct may be misleading or deceptive or likely to mislead or deceive regardless of the intention of the alleged wrongdoer: *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82 at 88 (Full Court). But where an intention to mislead or deceive can be inferred a court may more readily find that the intention has been, or in all probability will be, realised: *Campomar Sociedad Limitada v Nike International Ltd* (2002) 202 CLR 45 at [33].

205 Thirdly, conduct will be likely to mislead or deceive if there is a “real or not remote chance or possibility” of that occurring; it is not necessary that an applicant prove that the chance is greater than 50%: *Global Sportsman* at 87. While evidence of an erroneous conclusion is admissible to establish that conduct is misleading or deceptive or likely to mislead or deceive, a contravention may be established in the absence of such evidence: *Ibid*.

206 Fourthly, where, as here, conduct is directed to the public at large, the question is to be assessed by reference to its likely effect on an “ ‘ordinary’ or ‘reasonable’ ” member of the class of consumer to whom the conduct is directed and it is necessary “to isolate by some criterion a representative member of that class”: *Campomar* at [102]–[103]. In some decisions of this Court, in determining whether a contravention has occurred, it has been said that “the focus of the inquiry” is on “whether a not insignificant number of persons within the cohort being ordinary or reasonable members of the class ... would have been misled or deceived or are likely to be misled or deceived by the impugned conduct”: *Global One Mobile Entertainment Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 134 at [108]. Contrary to Malouf’s submission, however, these are not separate tests: see *National Exchange Pty Ltd v Australian Securities and Investments Commission* (2004) 61 IPR 420; [2004] FCAFC 90 at [23] (Dowsett J), [70] and [71] (Jacobson and Bennett JJ). As Dowsett J put it in *National Exchange* at [23]:

To speak of a reasonable member of a class necessarily implies that one is speaking of a significant proportion of that class. It is impossible to postulate a situation in which the reasonable member of a class is not representative of such a proportion.

207 Fifthly, the class may include the experienced and the inexperienced, the gullible and the astute, the intelligent and the less intelligent, the informed and the uninformed, but the section is concerned with the effect of the conduct on reasonable members of the class and not on those

who fail to take reasonable care of their own interests: *Parkdale* at 199 (Gibbs CJ); *Cassidy v Medical Benefits Fund of Australia (No 2)* [2002] FCA 1097 at [44] (Hill J). As Nicholas J put it in *ACCC v Trading Post* at [40]:

[T]he relevant class may cover a wide range of people whose personal capacity, knowledge and experience may vary quite significantly. Nevertheless, all members of the relevant class are presumed to take reasonable care to protect their own interests and the behaviour of those who do not may be disregarded. What steps they may be expected to take in order to protect their own interests will depend upon the circumstances of the particular case.

208 Sixthly, it is necessary to consider at the outset “whether the misconceptions, or deceptions, alleged to arise or to be likely to arise are properly to be attributed to the ordinary or reasonable members of the class”: *Campomar* at [105]. Assumptions which are “extreme” or “fanciful” would not be attributed to the ordinary or reasonable member of the class: *Ibid.*

209 Seventhly, in contradistinction to the position under the Trade Marks Act, it is insufficient that the conduct in question could cause confusion or “wonderment”. As Mason J explained in *Parkdale* at 210 in relation to s 52 of the Trade Practices Act, which is in relevantly identical terms to s 18 of the ACL:

The *Trade Marks Act* is concerned with deception or confusion to the public as to the source of goods. The *Trade Practices Act* is concerned with deception of the public as consumers of goods or services. The function of a trade mark is to identify the source of goods; the purpose of s. 52 is to prohibit misleading or deceptive conduct which will affect the recognition or identification of goods. Registration of a mark confers rights of a proprietary nature. The applicant for a trade mark bears the onus of establishing that use of his mark is not likely to deceive or cause confusion. Under s. 52 the onus is on the plaintiff to show that the conduct is likely to mislead or deceive. Therefore conduct which merely causes some uncertainty in the minds of relevant members of the public does not breach s. 52.

See also Gibbs CJ at 198 approving *McWilliam’s Wines Pty Ltd v McDonalds System of Australia Pty Ltd* (1980) 33 ALR 394; [1980] FCA 159 (Full Court); *Campomar* at [106]; and *Knight v Beyond Properties Pty Ltd* (2007) 242 ALR 586; [2007] FCAFC 170 at [60].

210 Eighthly, the likely impact or practical effect of the impugned conduct must be taken into account in considering whether it is misleading or deceptive or likely to mislead or deceive. A “transient or ephemeral” misleading impression, which is immediately dispelled, may be of no commercial significance and therefore not amount to misleading conduct within s 18: *Knight* at [54]; *Lumley Life Ltd v IOOF of Victoria Friendly Society* (1989) 16 IPR 316 at 324. Where

the misleading conduct is transient in duration and insubstantial in extent, the conduct is unlikely to be misleading “in any commercially significant sense”: *Knight* at [58].

The issues

211 There is no dispute that, if the representations were made, they were made in trade or commerce. The issues were agreed as follows:

First ACL case:

- (1) By its use of the Veda Trade Marks between August 2012 and October 2014 as keywords to trigger sponsored link advertising in respect of Malouf’s websites, and using the Veda Trade Marks in the text of the sponsored link, did Malouf represent to consumers that:
 - (a) the services Malouf provides or will provide are the services of, or have the sponsorship or approval of, Veda; and/or
 - (b) Malouf’s business is the business of, or has the sponsorship or approval of or affiliation with, Veda?
- (2) If the answer to (a) and/or (b) is “yes”, were the representations false or misleading or deceptive, or likely to mislead or deceive, in contravention of ss 18 and/or 29 of the ACL?

Second ACL case:

- (3) By its use in the period since August 2012 of the Veda Trade Marks in the keywords to trigger sponsored link advertising to its websites, has Malouf represented to consumers that:
 - (a) the services Malouf provides or will provide are the services of, or have the sponsorship or approval of, Veda; and/or
 - (b) Malouf’s business is the business of, or has the sponsorship or approval of or affiliation with, Veda?
- (4) If the answer to (a) and/or (b) is “yes”, were the representations false or misleading or deceptive, or likely to mislead or deceive, in contravention of ss 18 and/or 29 of the ACL?

Third ACL case:

- (5) By its use as keywords of the Veda Trade Marks in combination with the word “free” to trigger sponsored link advertisements to its websites, did Malouf represent to consumers that it offers free credit reports?
- (6) If so, was the representation false or misleading or deceptive, or likely to mislead or deceive, in contravention of ss 18 and/or 29 of the ACL?

Fourth ACL case:

- (7) By its conduct taken in totality (comprising the use of the Veda Trade Marks between August 2012 and October 2014 and continuing as the keywords to trigger sponsored link advertising in respect of Malouf’s websites, in the period August 2012 to October 2014 using the Veda Trade Marks in the text of the sponsored link, and the content of Malouf websites on which the trade mark VEDA appears), has Malouf contravened s 18 of the ACL?

212 Within these broader issues, however, there are some important areas of dispute. One such area is the identification of the relevant class of consumer. Another is the level of understanding to be attributed to the ordinary or reasonable member of that class.

What is the relevant class of consumer?

213 It is convenient to start with this issue.

214 Veda submitted that the relevant class of consumer consists of members of the general public who are conducting internet search enquiries to obtain information about Veda and the services it offers. They contended that this would include people who have access to a computer connected to the internet and who have “some basic knowledge of computers and how the internet works” as well as those whom Malouf targets, “being people who may not know what services Veda offers and may not know that credit repair services exist and who require those services”.

215 In its written submissions Malouf described the class as members of the general public who have access to a computer or other device connected to the internet and who are conducting internet searches using the Google search engine to locate web pages on the World Wide Web relevant to Veda credit reports. In oral argument it contended that the relevant class consists of “people who are seeking to have their credit reports repaired”. The submission is

disingenuous in the face of the numerous keywords referring merely to “veda” and “contact veda”.

216 The fact that a person who is searching for Veda is part of its target audience means that Malouf’s position is too narrow. In my opinion, the relevant class embraces both groups — those members of the general public using the internet to obtain information about services offered by Veda and also those who have concerns about their credit reports and who may or do wish to have their reports “repaired”. As the class includes people seeking information about Veda’s services, it is inevitable that these people would at least have heard of Veda. Having regard to Veda’s profile (the association with the books of Hinduism aside), I think it more likely than not that the ordinary or reasonable member of the class who is searching for Veda or wanting to contact Veda would know that Veda produces credit reports (compare *ACCC v Trading Post* at [123]). As Veda gives no prominence to the services it provides to correct errors in its reports, he or she may not also know that it offers such a service.

What is the level of understanding to be attributed to an ordinary or reasonable member of the class?

217 Up to a point, the parties agreed on the characteristics to be attributed to the ordinary or reasonable member of the class in that they agreed that he or she would:

- have a basic knowledge and understanding of computers, the internet, search engines including the Google search engine, and general internet conventions;
- understand that search results include organic results and advertisements;
- understand that the organic results are accurate;
- know that every web page has a unique URL;
- perceive that representations made in or by an advertisement are representations of the advertiser; and
- perceive that representations made in or by an organic result relating to a business are representations made by the business.

218 Malouf submitted that the ordinary or reasonable member of the class would also likely believe that advertisements are different from organic results. Veda argued, however, that there was no evidence to support it. Veda’s argument is untenable in the face of the agreed characteristics set out above.

219 In any event, I do not accept that this is a matter upon which evidence would otherwise have been required. In *ACCC v Trading Post* at [169], Nicholas J found that ordinary and reasonable members of the class would be likely to believe that sponsored links are advertisements and are different to organic results. His Honour concluded at [173]:

In my view the representation conveyed by the use of the term “sponsored links” in the context in which it was used was that each of the links so described was a form of advertisement. Accordingly, I do not accept that users would have been likely to understand that sponsored links were the same as organic search results or that their position on the results page was determined by the same considerations that determined the position of organic search results ...

220 I respectfully agree. Although sponsored links on Google no longer display the words “sponsored links” as they did at the time of the events in *ACCC v Trading Post*, the yellow “ad” box that now appears sends the same message to the user with equal, if not greater, clarity. I discuss this matter further below at [233].

221 I also accept Malouf’s submission that the ordinary or reasonable member of the class would understand that organic results are generated and ordered by the search engine mainly by reference to the relevance of the displayed websites to the search terms used by the searcher. Mr Watt’s evidence was that rankings are accorded to organic results, not merely because of their relevance to the search terms, but also by how important or authoritative the website is “seen in the context of a market or topic”.

222 But the effect of Mr Watt’s evidence is that these are matters which would not be known to the ordinary or reasonable member of the class. When asked what he meant by “authoritative (*scil.*)”, he replied:

Authority [authoritative?] would be in Google’s eyes how important that website is seen in the context of a market or a topic. There is (*sic*) many instances where there might not even be mention of words on pages where sites are ranking high organically because the association of those words are considered to be sort of grand mentions within that category and Google would make a determination that that is an authority [authoritative?] site. On that probably the best example would be, you know, a company that was featured on a major website, such as the Sydney, you know, Daily Telegraph or something like that, where the information may not be considered relevant, but it is considered authoritative because they have published it in a well respected newspaper.

223 The exchange continued:

Are these matters that are known to Google and part of its internal workings when it comes to ranking results? - - - Known to who in Google?

These aren't matters that are publicly disclosed by Google, are they? - - - No.

It's your understanding of what Google might do internally in order to rank results? - - - No. Google does have a webmaster blog that they provide certain parts of information about how they go about it. They just – they don't provide the specifics to the public.

224 Furthermore, I accept that the ordinary or reasonable member of the class will tend to “skip past” the sponsored links to the organic results.

225 Mr Watt agreed that people go to Google to search because they appreciate that they will receive accurate organic results in response to their search. Once again the argument to the contrary was based on Mr Watt's evidence but in this respect Mr Watt's evidence should be rejected.

226 Mr Watt's evidence on this question was as follows. The cross-examiner is Mr Hennessy SC, senior counsel for Malouf.

Just in relation to consumer behaviour in relation to generally related sponsored links in terms of search terms, it's a factor, isn't it, that **a high percentage of people are wary about the credibility of anything marked “ad” on a Google result page?** - - - Based on what?

In your experience? - - - **But my experience is certainly not that. It would be the opposite of that.**

It would be the opposite? - - - Yes.

Very well. I want to suggest to you that by contrast the consumer typically knows that the organic results are going to be the most relevant to the consumer's search inquiry? - - - No.

I also want to suggest to you that the consumer or the searcher is likely to skip past those first few entries which are the sponsored ad links and seek to avoid them when having a look or going into the results from the search inquiry? - - - Look, in my business I would have been supporting that viewpoint probably eight years ago but in terms of the advent of particularly mobile devices when you're doing a search on that, you don't see the organic listings on the screen for a great period of time and plus all the developments of Google and how dynamic it can be, the opportunity for direct connection to the need of the customer is much better than it was. **So I would argue in most cases in commercial search that that's not the case.**

(Emphasis added.)

227 This evidence was undermined by evidence from the website of Mr Watt's own company as at 8 September 2015 in which it was stated that, while organic and paid advertising are beneficial, the click-through rate on organic results is 94% compared to 6% for advertisements. The web page goes on to advise:

While people do still click on paid listings, the click through rate on organic listings win (*sic*) by a wide margin. That's because a high percentage of people are wary about the credibility of anything marked as an "ad", and are likely to skip past those first few results to avoid them.

228 While there was some initial prevarication, Mr Watt ultimately conceded that his evidence was inconsistent with what appeared on his website. At first he attempted to avoid the inconsistency by pointing out that he did not write the text. Later he sought to minimise it by saying that it was out of date or that it did not have regard to mobile searches.

229 It is of some significance that, although Mr Watt had been asked by Veda's solicitors to comment in his affidavit on what consumers are expected to understand about sponsored links, he did not do so. This was the only question he was invited by the solicitors to address which was not touched upon in his evidence in chief. What is more, when he was asked to concede as much, his replies were evasive until I was compelled to intervene in an attempt to elicit a direct response. He also had difficulty explaining why he had ignored this question. When pressed, his answer was rambling. Ultimately, it seems to me that he did not deal with the matter in his affidavit because he felt he was unable to do so or, at least, do so to the satisfaction of the questioner.

230 I had the distinct impression that Mr Watt was embarrassed by the inconsistencies in his evidence and, in the light of his failure to refer to this matter in his evidence in chief and the unsatisfactory nature of his efforts to explain his omission, I am not persuaded that Mr Watt genuinely holds the position he advanced in cross-examination.

231 That I reject this evidence, however, should not be taken to imply that I am of the opinion that the ordinary or reasonable consumer will always avoid the sponsored links. Were that the case it could reasonably be concluded that no sensible trader would bother spending money on a Google AdWords campaign. No doubt, on occasions the ordinary or reasonable consumer will click on a sponsored link. But I accept that a high percentage of people are wary about the credibility of anything marked as an "ad", and are likely to skip past the first few to avoid them.

232 Malouf submitted that the ordinary or reasonable member of the class would understand that Google is a commercial enterprise and that it generates revenue by causing advertisements to appear on its results pages. Veda accepted the first proposition but submitted that the second was perhaps a "step too far". I disagree. Malouf's submission should be accepted.

233 Malouf further submitted that the ordinary or reasonable member of the class would infer from the yellow “ad boxes” appearing on a results page that those entries are links for which businesses seeking to promote their goods or services made payments to Google. This submission should also be accepted. Veda countered that there was no evidence to support it, but any ordinary or reasonable person would appreciate that advertisements must be paid for and, knowing that Google is a commercial enterprise, he or she would also appreciate that the payments would be made to Google.

234 It follows that I accept that the ordinary or reasonable member of the class will perceive that representations made in or by a sponsored link are representations of the advertiser and representations made in or by an organic search result relating to a business are representations of the business concerned: see *REA Group Ltd v Real Estate 1 Ltd* (2013) 217 FCR 327 at [98] (Bromberg J). Additionally, it seems to me that the ordinary or reasonable member of the class would not, without good cause, regard the advertiser responsible for the sponsored link and the business the subject of the organic search result as one and the same entity.

235 Malouf submitted that the ordinary or reasonable member of the class would also know that any variation between one URL and another is significant and indicative of a different web page or website. Once again, Veda submitted that there was no evidence to support it.

236 Malouf’s submission should be accepted.

237 In *REA* at [99] Bromberg J said:

I also ascribe to the ordinary and reasonable members of the class, a basic understanding of general internet conventions. This includes ... knowledge that every web page has a unique URL and that any variation between one URL and another is significant and indicative of a different web page or website.

238 These conclusions were not based on evidence but evidence on this question was not necessary, any more than it is necessary to call evidence of the attributes of a reasonable person in a torts case. They were opinions his Honour was entitled to form as a judge of the facts, based on his experience of the world and the application of common sense. They are, with respect, opinions I share. They are matters of common experience in the 21st century.

Were any of the representations made? Are they misleading or deceptive?

First ACL case

By its use of the Veda Trade Marks as keywords and in the text of the sponsored links did Malouf represent to consumers that:

- (a) the services Malouf provides or will provide are the services of, or have the sponsorship or approval of, Veda; and/or*
- (b) Malouf's business is the business of, or has the sponsorship or approval of, or affiliation with, Veda?*

239 Veda's arguments in relation to both the first and second ACL claims were identical. On the question of whether the representations were made, it made the following submissions:

- 142. When a consumer searching for Veda on the internet enters a query, such as "how to contact veda" or "veda phone number", the search results displayed on the Google website will include the Malouf Group advertisements displayed above, adjacent to and/or below the organic search results. In the case of a user searching on a mobile device, the sponsored links advertisements occupy, on first impression, the entire interface of the mobile device, until such time as the consumer scrolls down the page, if indeed they do.
- 143. The specification and use by Malouf Group of Veda's Trade Marks and match settings as the keywords triggering the appearance of Malouf's sponsored links advertisements is fundamental to the misleading representations which arise from the appearance of its sponsored links. Malouf Group takes advantage of consumer enquiries concerning Veda and its services, or how to contact Veda, as a springboard to funnel prospective consumers to its websites and its services.
- 144. Malouf Group has intentionally selected keywords that are likely to have the effect of drawing people searching the internet for information about Veda and its service to the attention of the Malouf Group Websites ...
- 145. Malouf Group's conduct evinces an intention to take advantage of a consumer's lack of knowledge of what services Veda offers. It stands to reason that a not insignificant proportion of prospective customers would not be aware of the services offered by Malouf without its use of Veda's Trade Marks as keywords to funnel consumers to its websites.
- 146. Malouf Group's conduct was manifest in the period August 2012 to October 2014 ...
- 147. It is not apparent from the text used by Malouf Group in the advertisements that the links are not, in fact, links to Veda's website or a website affiliated or associated with Veda. The appearance of the Malouf Group website address beneath the headline text referring to Veda in the Malouf Group advertisement is insufficient to dispel the misleading representation.
- 148. The ad copy used in the Malouf Group's advertisements in the period after October 2014, including "Repair Your Credit File" and "Fix Your Credit Rating" is no less apt to mislead. The fact is that the advertisements appear in response to a consumer's search about Veda and the content of the advertisements do not operate to dissuade consumers of the assumption that the site is Veda's or affiliated in some way with Veda.

240 The submissions should be rejected.

241 To some extent they presuppose that the representations are misleading. No real attempt was made to distinguish the question of whether the representations were made from the question of whether they were misleading or deceptive. Hayne J observed in *Google v ACCC* (2013) 249 CLR 435 at [93] that “[m]elding the two issues of conduct and characterisation is apt to distract and confuse”.

242 As I have already pointed out, the evidence is that the keywords were not visible. Moreover, an ordinary or reasonable consumer is highly unlikely to know what a keyword is, let alone how it interacts with the search process. For these reasons I am not persuaded that the use of veda as a keyword on its own or in combination with any other word or in any format was a representation to a consumer; it was a representation to Google.

243 The content of the sponsored links, however, is another matter.

244 In my opinion the phrases — “Get your Veda Credit File”, “Get Your Veda File”, “Get Your Veda File Now” and “The Veda Report Centre” — might suggest services provided by Veda or, at least, an affiliated or associated organisation. Each conveys the impression that the advertiser is the source of the report or the person who generates it. Certainly, in the case of the last of these phrases, an ordinary or reasonable consumer would be likely to think that The Veda Report Centre is a place or business operated by Veda Advantage or a related or authorised company.

245 Nevertheless, the ordinary or reasonable consumer would not ignore the other parts of the advertisement. As Nicholas J observed in *ACCC v Trading Post* at [125], the URL in a sponsored link is unlikely to escape the consumer’s attention. Ordinary and reasonable members of the class would read the advertisement as a whole, see the address appearing immediately below the headline, understand it to indicate the web page to which they would be taken if they were to click on the relevant link, and would expect to be taken to that website. Nicholas J reached a similar conclusion in respect of the following advertisement in *ACCC v Trading Post*:

Kloster Ford

lwww.tradingpost.com.au New/Used Fords — Search 90,000 + auto ads online.
Great finds daily!

246 In that case the ACCC alleged that Trading Post engaged in misleading and deceptive conduct with respect to its sponsored link advertising using the Google AdWords program. The above advertisement was one of several the subject of the ACCC's action. Kloster Ford was a car dealership. It did not advertise in the Trading Post. The title "Kloster Ford" was hyperlinked to the Trading Post website. Amongst the representations alleged to have been made were representations that, by clicking on the headline of the advertisements a person would be taken to a website associated with Kloster Ford (or, at least, one operated by Kloster Ford) (**Representation A**); that there was an association between Trading Post and Kloster Ford (**Representation B**); that there was an affiliation between them (**Representation C**); that Kloster Ford approved of the link between its name and the Trading Post website (**Representation D**); and that Kloster Ford was a sponsor of the Trading Post site (**Representation F**). These alleged representations were very similar to the representations alleged to have been made in the present case. The differences in my opinion are relevantly immaterial.

247 His Honour found that the first of these alleged representations (Representation A) was not made. He explained (at [129]):

Ordinary and reasonable members of the relevant class would understand that by clicking on the headline to the Kloster Ford advertisement they would be taken to the webpage at www.tradingpost.com.au. They would also understand that to be the website of Trading Post. They would have no reason to understand from the Kloster Ford advertisement that the Trading Post website was operated by or on behalf of Kloster Ford or with Kloster Ford's approval. I find that representation A was not conveyed.

248 His Honour also found that Representation D had not been made. He said of that representation (at [132]):

There is nothing about the Kloster Ford advertisement to suggest that the operator of the business conducted under the Kloster Ford name approved of the link to the Trading Post website. Nor do I think that ordinary and reasonable members of the class would be prompted to turn their mind to the question whether the use of the Kloster Ford name in the link occurred with the approval of the person or entity that carried on business under that name. Even if they did, they are not likely to do more than wonder whether the use of the Kloster Ford name occurred in accordance with such approval. I find that representation D was not conveyed.

249 Of the representation that Kloster Ford was a sponsor of the Trading Post website (Representation F) his Honour held at [134]:

There is nothing in the evidence to suggest that the Kloster Ford advertisement would have led [*scil.*] ordinary and reasonable members of the relevant class to believe that Kloster Ford was a sponsor of the Trading Post website. Again, no such representation was conveyed by the Kloster Ford advertisement. I find that representation F was not conveyed.

250 None of these findings was disturbed on appeal: *Australian Competition and Consumer Commission v Google Inc* (2012) 201 FCR 503 (Full Court) (*ACCC v Google*); *Google v ACCC*. In neither the Full Court nor the High Court did either party challenge the primary judge's findings as to whether the alleged representation was made and if so whether it was misleading or deceptive or likely to mislead or deceive. See Hayne J in the High Court at [81].

251 In the present case, save in relation to the sponsored link advertisements for the "Veda Report Centre", I am not satisfied that any of the alleged representations in the first ACL case was made.

252 In my view, like Nicholas J found with respect to Representations A and F in *ACCC v Trading Post*, here, ordinary or reasonable members of the relevant class would understand that by clicking on the headline to any of the advertisements in question they would be taken to the web page of the relevant Malouf business. They would have no reason to understand from the advertisements that the relevant Malouf website was operated by or on behalf of Veda, or with its sponsorship or approval. While in *ACCC v Trading Post* Nicholas J found that the representations as to association and affiliation were conveyed (Representations B and C), the advertisements in the present case are materially different in several respects. First, unlike the advertisements in *ACCC v Trading Post*, the Malouf advertisements are not advertisements for the sale of products in an on-line newspaper. Secondly, it will be recalled that, unlike the advertisements in the present case, the Kloster Ford advertisements contained no text providing any context to the reference to the allegedly misleading trade name. Moreover, "Kloster Ford" was not used descriptively. In contrast, here, with the exception of the advertisements featuring "The Veda Report Centre", the text of the advertisements uses "Veda" to describe the source or type of file the Malouf business was declaring it could "get", "clean", "fix" or "repair".

253 The sponsored link advertisements for "The Veda Report Centre" are in a different category. They have an authoritative air. They suggest to the searcher that this is the place where Veda reports are generated. They represent that the services the searcher will receive if she or he clicks on the links are services provided by Veda.

Were the representations false or misleading or deceptive, or likely to mislead or deceive, in contravention of ss 18 and/or 29 of the ACL?

254 The sponsored link advertisements for “The Veda Report Centre” were apt to mislead, particularly given the coexistence of the Veda Resolution Centre, operated by Veda. They were likely to lead ordinary or reasonable consumers in the relevant class to mistakenly think that they would be dealing with Veda. It is no answer to say, as Malouf did, that any mistaken impression would be transitory because it would have been dispelled once the consumer clicked on the link and was taken to the website of the relevant Malouf business. By then, the consumer has been enticed into Malouf’s “marketing web”: see *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 at [50] and the authorities cited there. As Murphy J observed at first instance in those proceedings (*Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2011] FCA 1254 at [115]):

It is impossible for the Court to know whether a consumer misled by an online advertisement will immediately “click” through to the terms and conditions page, whether he or she will take a different step such as no longer proceeding with the purchase of an alternative service from a competitor, or whether he or she will take no immediate step but will go away under a false impression to act later. A false advertisement that may cause these actions is likely to mislead and is prohibited by s 52 [of the *Trade Practices Act 1974* (Cth), now s 18 of the ACL].

255 Malouf also submitted that consumers are unlikely to understand that any entity’s business or services are the business or services of Veda Advantage because Veda Advantage does not have a business and does not offer any services because it does not trade. The basis for this submission is Mr Hemingway’s evidence (at [7] of his affidavit) that Veda Advantage is not a trading corporation. The problem for Malouf, however, (as Veda pointed out in its submissions in reply) is that Malouf made admissions the effect of which is to make Mr Hemingway’s evidence irrelevant. Had it not done so, I expect Veda Advantage would have applied to add Veda Solutions as an applicant.

256 On 15 April 2015 Veda served on Malouf a notice requiring it to admit the truth of the following facts for the purposes of the proceeding:

1. From at least September 2006, [Veda Advantage] has provided financial services, including credit reporting, credit enquiry and management services, and related services (Veda Services), to a substantial number of persons and businesses throughout Australia under or by reference to the sign “VEDA”, including as part of the sign “VEDA ADVANTAGE”.
2. From at least September 2006, [Veda Advantage] has continuously advertised and promoted the Veda Services under or by reference to the sign “VEDA”, including as part of the sign “VEDA ADVANTAGE”, in Australia.

3. By reason of the facts in paragraphs 1 and 2:
 - (a) [Veda Advantage] has acquired a substantial and valuable reputation and goodwill in the sign “VEDA” in connection with the Veda Services; and
 - (b) the sign “VEDA” as used in connection with the Veda Services is associated within Australia with [Veda Advantage].

257 No notice to dispute these facts was ever filed. Consequently, Malouf is taken to have admitted the truth of them: *Federal Court Rules 2011* (Cth), r 22.04.

258 In any case, there is no general principle that in order to show sufficient connection between the conduct and the deception it is necessary to prove that there is a continuing goodwill attaching to the business of a particular person or entity: *Mark Foys Pty Ltd v TVSN (Pacific) Ltd* (2000) 104 FCR 61 at [48] (Full Court).

259 Nonetheless, I am not persuaded that, with the exception of the advertisements featuring The Veda Report Centre, any of the sponsored link advertisements were misleading or deceptive or likely to mislead or deceive. There was no evidence of confusion, let alone evidence of anyone having been misled. Mr Malouf’s evidence was that he had never heard of any confusion between Veda and any of Malouf’s credit repair businesses. Nor had he received any communications from prospective customers mistaking any of the Malouf businesses for Veda or asking if any of those businesses were in any way affiliated with Veda. That is not the end of the inquiry by any means. It is unnecessary that Veda prove that anyone was actually misled. Still, the evidence on this question from Mr Malouf, which was not challenged, is not irrelevant; it is part of the relevant context: see *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 634 at [45] (Allsop CJ).

260 Veda submitted that it was reasonably open to the Court to infer that there is “a real and likely possibility that some consumers will make contact with Malouf on the basis that they are operating under a misapprehension that they are contacting Veda”.

261 That submission was apparently based on the instruction given to Malouf staff when answering calls from prospective customers not to respond to the question: “Are you Veda?” By itself, such an instruction could indicate that callers had previously asked whether Malouf was Veda or that the possibility had occurred to Mr Malouf or someone else in the business. Alternatively, it could signify that Mr Malouf held the opinion that this was a question that callers were likely to ask, which, given his experience running the Malouf business, might be

an opinion that he was well qualified to give. But neither proposition was put to Mr Malouf in cross-examination. In those circumstances, no such inference should be drawn.

262 In any event, Veda took the instruction out of context. The direction to staff was a direction not to deviate from the script, no matter what question the caller might ask. The direction not to respond to the question “are you Veda” is just as likely to be an innocuous direction for staff to stay “on message”.

263 Nevertheless, for the reasons given at [253] above, I accept that there is a real chance that ordinary or reasonable members of the relevant class of consumer whose search generates a sponsored link advertisement featuring the words “The Veda Report Centre” will think that if they click on the link they will be contacting Veda.

264 I reject Veda’s contention that Malouf’s “ad copy” after October 2014 in which there was no reference to Veda in the sponsored links could mislead a consumer into thinking that any of the Malouf businesses had an association with Veda. It defies common sense to conclude that someone looking for information about Veda or looking to contact Veda is likely to be taken in by an advertisement which makes no mention of Veda. I respectfully adopt the observations of Jacob LJ in *Reed* extracted at [153] above.

265 In *Cosmetic Warriors* it was held in the context of a claim of trade mark infringement that Amazon’s use of keywords including “lush” (which was also a trade mark for soap owned by the first claimant and which the second was authorised to use) did not create a likelihood of confusion where the advertisement did not display the word “lush”.

266 Here, the ordinary or reasonable member of the class of consumers with the characteristics I have attributed to it would understand the difference between advertisements and organic search results and, in the overwhelming majority of cases, as Mr Watt’s evidence disclosed, would pass over the advertisements.

267 In general, while there is a possibility of confusion — even error — reading only the titles to some of the sponsored links, in the absence of a reference to Veda in the URL I do not accept that ordinary or reasonable consumers are likely to be misled into thinking that the Malouf business and Veda are one in the same, are related in any way, or have the sponsorship or approval of Veda. As the Full Court said in *SAP Australia Pty Ltd v Sapiant Australia Pty Ltd* (1999) 169 ALR 1 at [51]:

The characterisation of conduct as “misleading or deceptive or likely to mislead or

deceive” involves a judgment of a notional cause and effect relationship between the conduct and the putative consumer’s state of mind. Implicit in that judgment is a selection process which can reject some causal connections, which, although theoretically open, are too tenuous or impose responsibility otherwise than in accordance with the policy of the legislation.

268 The connection Veda seeks to draw here is too tenuous.

269 I also reject Veda’s submission that there was a misrepresentation by silence as a result of the absence of a statement disassociating the Malouf business from Veda. The inclusion in the advertisement of the URL, which does not include “veda”, would dispel any passing misconception.

270 I take a different view, however, of the sponsored links entitled “The Veda Report Centre”. The use of the definite article points to the existence of only one “centre”: one belonging to Veda. The message being conveyed is that if the consumer clicks on the link, he or she will be directed to Veda’s Report Centre. In this way some members of the class could be misled into thinking that these are advertisements for Veda, regardless of the absence of a reference to Veda in the URLs.

271 Veda submitted that the search results, including the sponsored links, appear differently on a mobile phone. That is certainly true. For a start, when the search results first load, less of the screen can be seen, particularly on the smaller phones. Further, in an advertisement that appears in response to the search “contact veda”, a telephone icon can be seen enabling a call to be made directly from the search page and the heading states “Call: 1300 739 860”. Viewed in isolation, the relationship between the heading of that sponsored link and the search terms that trigger the link is troubling, because the headline purports to be an answer to the searcher’s specific inquiry.

272 For the reasons I have discussed above, however, the content of the sponsored link must be considered as a whole. I do not believe that an ordinary and reasonable member of the relevant class would conclude, after viewing the advertisement, that the services Malouf provides or will provide are the services of, or have the sponsorship or approval of, Veda. Nor would (s)he conclude that Malouf’s business is the business of, or has the sponsorship or approval of or affiliation with, Veda. First, the word “veda” appears nowhere on the advertisement. Secondly, it is marked with the yellow “ad” tag, which the person would understand means it is a result that has appeared because someone has paid for it to appear, not because it is the most accurate result. And finally, it has a URL which is not suggestive of Veda.

273 Veda asserted that Credit Repair Australia, one of Malouf’s competitors, has a “disclaimer” on its website and submitted that, “by contrast”, Malouf fails to disclaim an affiliation with Veda. Veda contended that this is apt to reinforce a consumer’s misapprehension. This submission must be rejected, not least because it is illogical.

274 In fact, Credit Repair Australia’s website contains no disclaimer. It states that it is an authorised agent of Veda. Malouf’s websites do not. Logically, any reasonable consumer taking the trouble to compare the websites would conclude that Credit Repair Australia is affiliated with Veda but that the Malouf businesses are not.

275 There is, however, a disclaimer on the website of one of Malouf’s other competitors (Fix Bad Debt) (“we are not directly affiliated with Veda”). While it would have been prudent for Malouf to include disclaimers on its websites, at least with the benefit of hindsight, I do not consider that their absence would cause or reinforce any misapprehension of an association between Malouf and Veda.

276 At least two of Malouf’s competitors explain on their websites who Veda is; others, including Malouf, appear to take it for granted that anyone coming to their websites would know already.

277 In my opinion, only an “extraordinarily” or “unusually stupid” consumer who happens to click on a hyperlink embedded in the Malouf advertisements might conclude that he or she is on a Veda or Veda affiliated or sponsored website. A consumer answering this description is not a member of the relevant class: see *Taco Bell* at 181 (Franki J).

278 The first ACL case should be dismissed, other than with respect to The Veda Report Centre sponsored links.

Second ACL case

By its use of the Veda Trade Marks in the keywords, has Malouf represented to consumers that:

- (a) the services Malouf provides or will provide are the services of, or have the sponsorship or approval of, Veda; and/or*
- (b) Malouf's business is the business of, or has the sponsorship or approval of or affiliation with, Veda?*

Were the representations false or misleading or deceptive, or likely to mislead or deceive, in contravention of ss 18 and/or 29 of the ACL?

279 It is common ground that, if the pleaded representations were conveyed by the use of the Veda keywords, they would be untrue (and therefore likely to mislead or deceive consumers). Once again, however, as the only use by Malouf of the keywords occurred during its private dealings with Google of which consumers were entirely ignorant, I do not accept that, by specifying the keywords, Malouf made any representation to consumers.

280 The second ACL case should be dismissed.

Third ACL case

By its use as keywords of the Veda Trade Marks in combination with the word "free" to trigger sponsored link advertisements to its websites did Malouf represent to consumers that it offers free credit reports?

Was the representation false or misleading or deceptive, or likely to mislead or deceive, in contravention of ss 18 and/or 29 of the ACL?

281 Veda contends that by its use of certain keywords containing the word "free" to trigger sponsored link advertisements for the Malouf websites, Malouf has made false and misleading representations aimed at consumers searching for Veda's free credit checking service that Malouf offers free services when it does not. I reject the contention.

282 The relevant keywords are:

- "veda free credit report";
- "free veda credit check";
- "veda advantage free credit file";
- "veda credit check free"; and
- "veda credit file free".

283 For the reasons given above, I do not accept that Malouf’s use of keywords of which the ordinary or reasonable consumer would be oblivious amounts to a representation to consumers.

284 Even if I am wrong in this respect, and such a representation were conveyed by the keywords, I do not accept that it is likely to cause the ordinary or reasonable consumer in the relevant class to fall into any error, because the advertisements themselves say nothing about price and the ordinary or reasonable member of the class would know that “searches produce fuzzy results — results with much rubbish thrown in” (*Reed* above at [153]).

285 It follows that the third ACL case should also be dismissed.

Fourth ACL case

Considered as a whole has Malouf engaged in conduct which is misleading or deceptive, or likely to mislead or deceive, in contravention of s 18 of the ACL?

286 Veda argued that “the totality of [Malouf’s] conduct in its commercial context” was also apt to mislead or deceive. The conduct it relied upon was said to include:

- (a) specification of keywords and match types in AdWords campaigns to generate advertisements in response to consumer searches for Veda;
- (b) targeting consumers “trying to look for Veda”;
- (c) representations made by the appearance of the sponsored link advertisements; and
- (d) repeated prominent uses of “Veda” on its landing pages.

287 It is not unlawful *per se* for a business to identify (or target) potential customers by focussing on their concerns or interests so that it may market its products or services to them. Anyway, s 18 is a consumer protection provision. “It is not concerned, as such, with any unfairness of competition in trade as between two traders”: *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 226 (Stephen J).

288 I am not persuaded that Malouf’s conduct as a whole is apt to mislead or deceive as alleged. To the contrary, it seems to me that any misconception that ordinary or reasonable members of the relevant class of consumer might have had about the relationship between Veda and the Malouf businesses, indeed any confusion, (including that which might have been produced by the advertisements for The Veda Report Centre) would be dispelled once the consumers saw the references to Veda in the context in which they appeared on the landing pages.

289 First, the name of the relevant Malouf business is prominently displayed on each of the landing pages and it does not include “Veda”. As Malouf submitted, if the business were Veda’s ordinary or reasonable consumers would expect to see “Veda” feature in the business name.

290 Secondly, there is no statement to the effect that the relevant Malouf business is associated or affiliated with, or sponsored by, Veda. There is no reason to believe that ordinary or reasonable members of the class would deduce from Malouf’s conduct considered as a whole that Malouf was affiliated with Veda or had Veda’s sponsorship or approval.

291 Thirdly, the natural inference from the statements which appear on the Credit Fix Australia landing page is that it is in the business of repairing credit files. Nothing more. In my opinion, ordinary or reasonable members of the relevant class are unlikely to conclude that a person whose business it is to repair credit files is the same entity or likely to be related to an entity which is in the business of producing those files, at least not without a statement to that effect.

292 The landing pages for Credit Clean Australia and Clean Your Credit are even more explicit. Each draws a clear distinction between the relevant Malouf business and Veda. Both display letters received “from Veda”. The Clean Your Credit landing page proclaims:

Don’t take our word for it, here are letters from Veda Advantage after our clients disputable defaults were removed!

(Original emphasis.)

293 Underneath this proclamation is the beginning of a letter prominently displaying the Veda logo, which is quite unlike the Clean Your Credit logo.

294 The Credit Clean Australia landing page similarly states in large font:

Here is a sample **letter received from Veda** after our customer’s disputable default was removed!

(Original emphasis.)

295 As Malouf put it, this is very much an “us” (“our customer”, that is a Malouf customer) and “them” (Veda) approach.

296 Moreover like the letter on the Clean Your Credit landing page, the sample letter contains the Veda logo which is markedly different from the Credit Clean Australia logo.

297 Fourthly, the letters aside, all the other references to Veda on the Malouf landing pages are
merely descriptive of the kind or source of the credit file.

298 Fifthly, if the hypothetical consumer is confused even at this stage and clicks on the hyperlink
entitled “Frequently Asked Questions” on either the Credit Clean Australia or Clean Your
Credit website, (s)he will see the following question and answer:

10. **How long does it take to remove defaults if they can be removed?**

Veda promotes up to 30 days to have a response but the time can vary
depending on which avenue is taken to assist in removing them.

299 A similar question and answer appear on the Credit Fix Australia website. These answers make
it plain that Veda and the relevant Malouf business are different entities.

300 At all events, as Veda well knows, Malouf does provide its customers with Veda reports and it
does “repair”, “clean” or “fix” such reports. In *McWilliam’s Wines* at 404 Smithers J, with
whom Northrop and Fisher JJ generally agreed, said that it was “difficult to think that conduct
is truly misleading or deceptive if it tells the truth and is such that if it is observed by persons
who have no false ideas concerning extraneous matters nobody will be misled”.

301 Veda’s approach is selective, taking selected words and acts in isolation without viewing them
in context, an approach which was rightly deprecated by Gordon J in *Australian Competition
and Consumer Commission v Dukemaster Pty Ltd* [2009] FCA 682 at [119].

302 The fourth ACL case must be dismissed.

CONCLUSION

303 I am satisfied that Malouf infringed the Veda Trade Marks by using the sign “Veda” as a trade
mark in its sponsored link advertisements featuring the text “The Veda Report Centre” and
“The Veda-Report Centre” for its Clean Your Credit business in October 2014 when that sign
was substantially identical with, or deceptively similar, to the Veda Trade Marks in relation to
services in respect of which those marks are registered. In all other respects, however, the trade
mark infringement claim has not been made out.

304 I am also satisfied that Malouf contravened ss 18 and 29(1)(h) of the ACL by its use of the
terms “The Veda Report Centre” and “The Veda-Report Centre” in its sponsored link
advertisements, but not otherwise.

305 The parties should bring in short minutes of order reflecting these reasons within 14 days. I will list the matter for directions to set a timetable for the trial of the remaining issues.

Schedule A

Summary of Match Type Settings

Match Type	Special symbol	Example keyword	Ads may show on searches that	Example searches:
Broad match	none	women's hats	include misspellings, synonyms, related searches and other relevant variations	<i>buy ladies hats</i>
Broad match modifier	+keyword	+women's +hats	contain the modified term (or close variations, but not synonyms), in any order	<i>hats for women</i>
Phrase match	"keyword"	"women's hats"	are a phrase, and close variations of that phrase	<i>buy women's hats</i>
Exact Match	[keyword]	[women's hats]	are an exact term and close variations of that exact term	<i>women's hats</i>
Negative Match	-keyword	-women	are searches without the term	<i>baseball hats</i>

+my +veda +file
 +veda
 +veda +cra
 +veda +credit
 +veda +credit +history
 +veda +file
 +veda +history
 +veda +rating
 +veda +record
 +veda +report
 +veda +score
 +vedascore
 "credit check veda"
 "my veda file"
 "my veda"
 "veda advantage credit file"
 "veda advantage"
 "veda check"
 "veda cra"
 "veda credit check"
 "veda credit file"
 "veda credit history"
 "veda credit report"
 "veda credit score"
 "veda credit"
 "veda file"

"veda listing"
"veda rating"
"veda record"
"veda score"
"veda"
"vedascore"
[my veda file]
[veda advantage]
[veda cra]
[veda credit check]
[veda credit file]
[veda credit history]
[veda credit report]
[veda credit score]
[veda credit]
[veda file]
[veda rating]
[veda record]
[veda report]
[veda score]
[veda]
[vedacheck]
[vedascore]
veda
veda advantage
veda credit history
veda credit report
veda file
veda record
veda report
"contact veda"
"corrections veda com au"
"corrections veda"
[vedacheck contact]
[www veda com au]
[veda login]
[veda com au]
[veda contact number]
[veda contact]
"www veda com au"
"veda login"
"veda phone number"
"how to contact veda"
"veda advantage contact number"
"veda advantage contact"
"veda advantage phone number"

"veda com au contact"
"veda com au yourcreditandidentity"
"veda com au"
"veda contact number 1300"
"veda contact number sydney"
"veda contact number"
"veda contact"
"veda credit contact number"
"veda credit check contact number"
"veda free credit report"
"free veda credit check"
"veda advantage free credit file"
"veda credit check free"
"veda credit file free"

Schedule B

Ad	Description line 1	Description line 2	Display URL
<u>Clean Your Veda File</u>	Defaults Removed - Under New Laws	Quick, Simple & Affordable Solution	CreditCleanAustralia.com.au
<u>Clean Your Veda File</u>	Defaults Removed - Under New Laws	Quick, Simple & Affordable Solution	CreditCleanAustralia.com.au
<u>Clean Your Veda File</u>	Defaults Removed - Under New Laws	Quick, Simple & Affordable Solution	CreditCleanAustralia.com.au
<u>Clean Your Veda File</u>	Defaults Removed - Under New Laws	Quick, Simple & Affordable Solution	CreditCleanAustralia.com.au
<u>Clean Your Veda File</u>	Clean Your Veda File & Start Saving	Fast & Easy Removal, Act Today	www.cleanyourcredit.com.au
<u>Clean Your Veda File</u>	Clean Your Veda File & Start Saving	Fast & Easy Removal, Call Us Now!	www.cleanyourcredit.com.au
<u>Clean Your Veda File</u>	Clean Your Veda File & Start Saving	Fast & Easy Removal, Act Today	www.cleanyourcredit.com.au
<u>Clean Your Veda File</u>	Clean Your Veda File & Start Saving	Fast & Easy Removal, Act Today	CleanYourCredit.com.au/ CreditRepair
<u>Clean Your Veda File</u>	Clean Your Veda File & Start Saving	Fast & Easy Removal, Call Us Now!	www.cleanyourcredit.com.au
<u>Clean Your Veda File</u>	Clean Your Veda File & Start Saving	Fast & Easy Removal, Act Today	www.cleanyourcredit.com.au
<u>Clean Your Veda File</u>	Clean Your Veda File & Start Saving	Fast & Easy Removal, Act Today	www.cleanyourcredit.com.au
<u>Clean Your Veda File</u>	Clean Your Veda File & Start Saving	Fast & Easy Removal, Act Today	CleanYourCredit.com.au/ CreditRepair
<u>Fix My Veda History</u>	Remove Defaults & Judgements	Quick, Simple & Affordable Solution	www.creditfixaustralia.com.au
<u>Fix Veda File</u>	Defaults & Judgements Deleted !	Fast & Easy Removal, Act Today	www.cleanyourcredit.com.au
<u>Fix Your Veda File</u>	Get Defaults & Judgements Removed.	Quick & Easy Removal, Call Us Now!	www.creditfixaustralia.com.au
<u>Fix Your Veda File</u>	Get Defaults & Judgements Removed.	Quick & Easy Removal, Call Us Now!	www.creditfixaustralia.com.au
<u>Fix Your Veda File</u>	Get Defaults & Judgements Removed.	Quick & Easy Removal, Call Us Now!	www.creditfixaustralia.com.au
<u>Fix Your Veda File</u>	Get Defaults & Judgements Removed.	Quick & Easy Removal, Call Us Now.	www.creditfixaustralia.com.au
<u>Fix Your Veda File</u>	Get Defaults & Judgements Removed.	Quick & Easy Removal, Call Us Now!	www.creditfixaustralia.com.au
<u>Fix Your Veda file</u>	Remove Defaults & Judgements	Quick & Easy Removal. Apply Now	www.creditfixaustralia.com.au

<u>Fix Your Veda Report</u>	Defaults & Judgements Deleted !	Fast & Easy Removal, Call Us Now!	www.cleanyourcredit.com.au
<u>Fix Your Veda Report</u>	Defaults & Judgements Deleted !	Fast & Easy Removal, Act Today	www.cleanyourcredit.com.au
<u>Fix Your Veda Report</u>	Fast Credit Repair - Under New Laws	Remove Defaults & Judgements Today	www.creditfixaustralia.com.au
<u>Fix Your Veda Report</u>	Defaults & Judgements Deleted !	Fast & Easy Removal, Act Today	www.cleanyourcredit.com.au
<u>Fix Your Veda Report</u>	Defaults & Judgements Deleted !	Fast & Easy Removal, Call Us Now!	www.cleanyourcredit.com.au
<u>Fix Your Veda Report</u>	Default & Judgement Deleted !	Fast & Easy Removal, Act Today	www.cleanyourcredit.com.au
<u>Fix Your Veda Report</u>	Easy Default & Judgement Removal.	Fast & Easy Removal, Act Today	www.cleanyourcredit.com.au
<u>Fix Your Veda Report</u>	Easy Default & Judgement Removal.	Fast & Easy Removal, Act Today	www.cleanyourcredit.com.au
<u>Fix Your Veda score</u>	Defaults & Judgements Deleted	Fast & Easy Removal, Call Us Now	www.cleanyourcredit.com.au
<u>Fix Your Veda score</u>	Defaults & Judgements Deleted	Fast & Easy Removal, Call Us Now	www.cleanyourcredit.com.au
<u>Fix Your Veda score</u>	Defaults & Judgements Deleted !	Fast & Easy Removal, Call Us Now!	www.cleanyourcredit.com.au
<u>Fix Your Veda score</u>	Defaults & Judgements Deleted	Fast & Easy Removal, Call Us Now	www.cleanyourcredit.com.au
<u>Fix Your Veda-File</u>	Easy Default & Judgement Removal.	Fast & Easy Removal, Act Today	www.cleanyourcredit.com.au
<u>Fix Your Veda-File</u>	Easy Default & Judgement Removal.	Fast & Easy Removal, Act Today	www.cleanyourcredit.com.au
<u>Get Your Veda Credit File</u>	Check Your Credit Rating & Remove	Defaults & Judgements. Act Today !	www.cleanyourcredit.com.au
<u>Get Your Veda Credit File</u>	Check Your Credit Rating & Remove	Defaults & Judgements. Act Today !	www.cleanyourcredit.com.au
<u>Get Your Veda Credit File</u>	Check Your Credit Rating & Remove	Defaults & Judgements. Act Today	www.cleanyourcredit.com.au
<u>Get Your Veda Credit File</u>	Check Your Credit Rating & Remove	Defaults & Judgements. Call Us Now	www.cleanyourcredit.com.au
<u>Get Your Veda Credit File</u>	Check Your Credit Rating & Remove	Defaults & Judgements. Call Us Now	www.cleanyourcredit.com.au
<u>Get Your Veda Credit File</u>	Check Your Credit Rating & Remove	Defaults & Judgements. Call Us Now!	www.cleanyourcredit.com.au
<u>Get Your Veda Credit File</u>	Check Your Credit Rating & Remove	Defaults & Judgements. Call Us Now!	www.cleanyourcredit.com.au

<u>Get Your Veda File Now</u>	Check Your Credit Rating & Remove	Defaults & Judgements. Call Us Now!	www.cleanyourcredit.com.au
<u>Get Your Veda File Now</u>	Check Your Credit File & Remove	Defaults & Judgements. Act Today!	www.cleanyourcredit.com.au
<u>Get Your Veda File Now</u>	Check Your Credit Report & Remove	Defaults & Judgements. Act Today!	www.cleanyourcredit.com.au
<u>Get Your Veda File Now</u>	Check Your Credit Rating & Remove	Defaults & Judgements. Call Us Now!	www.cleanyourcredit.com.au
<u>Get Your Veda File Now</u>	Check Your Credit Rating & Remove	Defaults & Judgements. Call Us Now!	www.CreditCleanAustralia.com.au
<u>Get Your Veda File Now</u>	Check Your Credit Rating & Remove	Defaults & Judgements. Call Us Now!	www.CreditCleanAustralia.com.au
<u>Get Your Veda File Now</u>	Check Your Credit Rating & Remove	Defaults & Judgements. Act Today!	www.CreditCleanAustralia.com.au
<u>Get Your Veda File Now</u>	Check Your Credit Rating & Remove	Defaults & Judgements. Act Today!	www.CreditCleanAustralia.com.au
<u>Got A Bad Veda File ?</u>	Remove Defaults & Judgements	Easy & Affordable 1300 170 464	www.creditfixaustralia.com.au
<u>Got A Bad Veda File ?</u>	Remove Defaults & Judgements	Easy & Affordable 1300 170 464	www.creditfixaustralia.com.au
<u>Got A Bad Veda File ?</u>	Remove Defaults & Judgements	Easy & Affordable 1300 170 464	www.creditfixaustralia.com.au
<u>Repair Your Veda File</u>	Get Defaults & Judgements Removed.	Quick & Easy Removal, Call Us Now.	www.creditfixaustralia.com.au
<u>Repair Your Veda file</u>	Remove Defaults & Judgements.	Quick & Easy Removal. Apply Now	www.creditfixaustralia.com.au
<u>Repair Your Veda File</u>	Get Defaults & Judgements Removed.	Quick & Easy Removal, Call Us Now!	www.creditfixaustralia.com.au
<u>Repair Your Veda File</u>	Get Defaults & Judgements Removed.	Quick & Easy Removal, Call Us Now!	www.creditfixaustralia.com.au
<u>Repair Your Veda file</u>	Remove Defaults & Judgements	Quick & Easy Removal. Apply Now	www.creditfixaustralia.com.au
<u>Repair Your Veda File NOW</u>	Remove Defaults & Judgements Today	Call 1300 170 464 & Start Now!	www.creditfixaustralia.com.au

<u>Repair Your Veda File NOW</u>	Remove Defaults & Judgements Today	Call 1300 170 464 & Start Now!	www.creditfixaustralia.com.au
<u>Repair Your Veda File NOW</u>	Remove Defaults & Judgements Today	Call 1300 170 464 & Start Now!	www.creditfixaustralia.com.au
<u>Repair Your Veda File.</u>	Get Defaults & Judgements Removed.	Quick & Easy Removal, Call Us Now!	www.creditfixaustralia.com.au
<u>Repair Your Veda History</u>	Remove Defaults & Judgements.	Quick & Easy Removal. Apply Now !	www.creditfixaustralia.com.au
<u>Repair Your Veda History</u>	Remove Defaults & Judgements.	Quick & Easy Removal. Apply Now !	www.creditfixaustralia.com.au
<u>Repair Your Veda History</u>	Remove Defaults & Judgements	Quick & Easy Removal. Apply Now !	www.creditfixaustralia.com.au
<u>Repair Your Veda Score</u>	Easy Default & Judgement Removal.	Fast & Easy Removal, Act Today	www.cleanyourcredit.com.au
<u>Repair Your Veda Score</u>	Easy Default & Judgement Removal.	Fast & Easy Removal, Act Today	www.cleanyourcredit.com.au
<u>Repair Your Veda Score</u>	Defaults & Judgements Deleted !	Fast & Easy Removal, Call Now	www.cleanyourcredit.com.au
<u>Repair Your Veda Score</u>	Defaults & Judgement Deleted!	Fast & Easy Removal, Act Today	www.cleanyourcredit.com.au
<u>Repair Your Veda Score</u>	Defaults & Judgement Deleted!	Fast & Easy Removal, Act Today	www.cleanyourcredit.com.au
<u>Repair Your Veda Score</u>	Easy Default & Judgement Removal.	Fast & Easy Removal, Act Today	www.cleanyourcredit.com.au
<u>Repair Your Veda Score</u>	Defaults & Judgement Deleted !	Fast & Easy Removal, Act Today	www.cleanyourcredit.com.au
<u>Repair Your Veda Score</u>	Easy Default & Judgement Removal.	Fast & Easy Removal, Act Today	CleanYourCredit.com.au/CreditRepair
<u>Repair Your Veda Score</u>	Easy Default & Judgement Removal.	Fast & Easy Removal, Call Now	www.cleanyourcredit.com.au
<u>Repair Your Veda Score</u>	Easy Default & Judgement Removal.	Fast & Easy Removal, Act Today	CleanYourCredit.com.au/CreditRepair
<u>Repair Your Veda Score</u>	Defaults & Judgement Deleted !	Fast & Easy Removal, Act Today	www.cleanyourcredit.com.au
<u>The Veda Report Centre</u>	Easy Default & Judgement Removal.	Fast & Easy Removal, Act Today	www.cleanyourcredit.com.au
<u>The Veda-Report Centre</u>	Easy Default & Judgement Removal.	Fast & Easy Removal, Act Today	www.cleanyourcredit.com.au
<u>The Veda-Report Centre</u>	Easy Default & Judgement Removal.	Fast & Easy Removal, Act Today	www.cleanyourcredit.com.au
<u>Veda Credit File Repairs</u>	Remove Defaults & Judgements	Quick, Simple & Affordable Solution	www.creditfixaustralia.com.au

<u>Veda Credit File Repairs</u>	Remove Defaults & Judgements	Quick, Simple & Affordable Solution	www.creditfixaustralia.com.au
<u>Veda Credit File Repairs</u>	Remove Defaults & Judgements	Quick, Simple & Affordable Solution	www.creditfixaustralia.com.au
<u>Veda Credit File Repairs</u>	Remove Defaults & Judgements	Quick, Simple & Affordable Solution	www.creditfixaustralia.com.au
<u>Veda Credit File Repairs</u>	Remove Defaults & Judgements	Quick, Simple & Affordable Solution	www.creditfixaustralia.com.au