

KEY LEARNINGS FROM ACCC V GOOGLE (NO 2) FOR DISCLOSING DATA PRACTICES

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Legal Briefings - By **Liza Carver, Patrick Gay, Patrick Clark, Kate French and Tomas Kemmery**

The Federal Court has handed down its decision in *Australian Competition and Consumer Commission v Google LLC (No 2)* [2021] FCA 367.

The decision is important as it shows the continued acceptance by the Federal Court of expert evidence in the field of behavioural economics as a foundation for findings about how consumers understand and react to information in digital environment. The case also reflects the ACCC's focus on issues arising from the use of consumer data, consent to use and the interests of those classes of consumers with a greater level of interest in privacy of their data.

The ACCC was partially successful in its claims against Google, with some of the allegations that particular representations were misleading or deceptive not being made out.

KEY TAKEAWAYS

1. the ACCC is increasingly focussed on the disclosures provided by companies for how personal data is collected, used and disclosed;
2. businesses should consider how terms and conditions, particularly around consumer data, are presented and likely to be understood;
3. not all members of the class of consumer have to be misled for conduct to be misleading or deceptive. It is sufficient if some are likely to be misled; and
4. the courts recognise that consumers are time poor and may be unlikely to effectively engage with information presented in a layered manner that requires attention to links and 'click-throughs' in a digital environment. Businesses should consider whether all relevant information required to be disclosed is presented in a way that is easily accessible to consumers and understood by them.

The Federal Court's decision relied heavily on the use of expert evidence in the field of behavioural economics dealing with the manner in which consumers receive and respond to information when making decisions in conditions of time constraints and complexity of information. Under these conditions people use 'short-cuts' when making decisions. These 'short-cuts' have a number of biases, which result in predictable behaviours, and often result in people making a less 'rational' decision.

The ACCC has increasingly been developing its understanding and reliance on behavioural economics in misleading and deceptive cases, as a basis for explaining why the representation is likely to mislead or deceive all members of the target audience or subclasses of that audience. This case follows *Australian Competition and Consumer Commission v Trivago N.V* [2020] FCA 16, where Trivago was found to have made a number of misleading representations on its website and in TV ads. The ACCC relied on behavioural economics regarding how the presentation of accommodation offers to consumers, and which particular offers were highlighted was misleading.

The focus on behavioural economics follows similar investments by regulators overseas, including the Competition and Markets Authority in the United Kingdom, who are developing expertise in this area as a way to understand how consumers are likely to behave when making decisions.¹

BACKGROUND

The ACCC instituted proceedings against Google LLC and Google Australia Pty Ltd (**Google**) in October 2019 alleging that they had engaged in misleading conduct and made false or misleading representations to consumers regarding the personal location data that Google collects, keeps and uses.

Two settings were central to these representations: the 'Web & App Activity' and 'Location History' settings. When setting up a device, Web & App Activity was defaulted to 'on' and Location History defaulted to 'off'. The ACCC's main argument was that some users, seeing Location History turned off, would have believed that this meant Google would not collect or use personal location data. Instead, Web & App Activity also had to be turned off for that to be the case.

FEDERAL COURT DECISION

The ACCC ran its argument by referring to three different classes of Android users, based upon three scenarios:

- **Scenario 1** users were expected to have more of a concern about privacy than others. The ACCC alleged that Google misled these users about the collection of their personal location data because of what they were shown on the Privacy and Terms screen.
- **Scenario 2** were users who made a decision to have the Location History 'off'. The ACCC alleged Google misled these users about not continuing to collect and use their personal location data.
- **Scenario 3** were users considered turning off Web & App Activity and who had checked what the Web & App Activity Landing Page said about location data. The ACCC alleged Google misled these users that having Web & App Activity "on" would not allow personal location data to be collected.

Thawley J held that the ACCC partially made out its allegations against Google in each of the three scenarios. Central to His Honour's reasoning was his view, informed by expert evidence on behavioural biases, that not all users would act in the same way in what they read or how they understood Google's information regarding its data practices. For His Honour, whilst this meant some users were not misled, others "*would [not] have behaved in the extremely careful and attentive way in which Google submitted that user would behave.*" Notably, this latter category of users included those who may have been especially concerned about privacy issues.

WHAT DOES THIS MEAN FOR BUSINESSES?

The ACCC will continue to be focused on misleading business practices which it considers undermine the ability of consumers to make informed decisions regarding the use and collection of their personal data.

Businesses should consider the design of how information is presented to consumers and in particular:

- whether the design of how information is presented in a digital environment discourages consumers from reading or engaging with the material. This includes the organisation and ease of links, text size, text colour, length of text and use of headings;
- is information presented in a way which is concise, clear and unambiguous so that it can be easily understood by consumers, who are likely to skim or quickly read the information;
- what are consumers likely to understand on a 'quick' reading of the information presented to them. it cannot be assumed that consumers will re-read information and disclaimers repeatedly in order to gain a full understanding; and
- are consumers required to refer to multiple pages in order to gain a full understanding of the terms and conditions - does this complexity mean that some consumers will be misled?

ENDNOTES

1. Kate Beioley, '[UK competition watchdog sets up behavioural unit to 'fight for consumers'](#)', *Financial Times* (online) 25 February 2020.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



LINDA EVANS
REGIONAL HEAD OF
PRACTICE -
COMPETITION,
REGULATION AND
TRADE, AUSTRALIA,
SYDNEY
+61 2 9322 4719
linda.evans@hsf.com



PATRICK GAY
PARTNER, SYDNEY

+61 2 9322 4378
Patrick.Gay@hsf.com



SARAH BENBOW
PARTNER,
MELBOURNE
+61 3 9288 1252
Sarah.Benbow@hsf.com



PATRICK CLARK
PARTNER,
MELBOURNE
+61 3 9288 1038
patrick.clark@hsf.com

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