

## JUST A CLICK AWAY – THE ACCC TAKES ON GOOGLE – THE ACCC'S FIRST CASE BUILDING ON THE ACCC DIGITAL PLATFORMS INQUIRY

Following the Australian Competition and Consumer Commission's (**ACCC**) Digital Platforms Inquiry which culminated in the release of its final report in July 2019 (**Final Report**), the ACCC has commenced action in the Federal Court against Google, in what looks likely to be the first in a number of cases against the digital platforms Google and Facebook for alleged contraventions of the Australian *Competition and Consumer Act 2010* (Cth) (**CCA**).

The ACCC has stated that it was the first time a regulator anywhere in the world had taken on Google over the alleged misuse of personal data of its users based on misleading statements as to location data linked to individuals that Google collects, keeps and uses as part of its advertising business.

### ONGOING ACCC INVESTIGATIONS INTO DIGITAL PLATFORMS

The Final Report noted that the ACCC was undertaking a number of investigations into the digital platforms Google and Facebook. Specifically, these relate to:

- whether representations made by Google, to some users about the control users have over Google's collection of location data, raise issues under the Australian Consumer Law (**ACL**). This investigation has now progressed to the enforcement stage with the ACCC commencing proceedings against Google in the Federal Court, and is the focus of this briefing;
- whether access restrictions imposed by Google on a third-party app developer (believed to be Unlocked), raise issues under section 46 of the CCA;
- whether representations by Google about its privacy policy, and the level of disclosure about subsequent privacy policy changes that enabled it to combine or match different sets of user data, raise issues under the ACL;

#### Key issues

- On 29 October 2019, the ACCC commenced action against Google in the Federal Court, alleging that Google has engaged in misleading or deceptive conduct, in contravention of Australian consumer protection laws, in relation to its advice on how to limit the collection of personal data by Google.
- The ACCC is seeking significant penalties and other orders such as that Google implement a competition law compliance program.
- This action against Google may be the first in a series of cases to be brought against Google in Australia, at a time when antitrust regulators and governments around the world are conducting probes into "digital giants" such as Google and Facebook.

- whether representations made by Google (and / or its related entities) in relation to the nature of its services and the scope of its terms and conditions (including those that allowed user data to be shared with third parties), raise issues under the ACL; and
- whether the terms of use and privacy policies used by Facebook (and/or its related entities) contain unfair contract terms.

Given the nature of the issues being investigated and the number of Australian consumers who use Google and Facebook's services, the potential impact on Australian consumers and businesses is significant.

## **THE ACCC'S CASE AGAINST GOOGLE**

A finding of the ACCC in its Final Report from the Digital Platforms Inquiry was that Google has substantial market power in the supply of general search services and supply of search advertising services.

As noted in the Final Report, Google is somewhat insulated from dynamic competition due to its accumulation of large quantities of user data that it uses in connection with its ad tech services. It is able to collect and use this data from consumers who use a wide range of services and platforms, including Google Search, Google Maps, YouTube, Gmail and by virtue of its position across a range of markets including the Android mobile operating systems and the Chrome web browser.

The case brought by the ACCC against Google looks to be the regulator's first step in addressing Google's conduct relating to consumer data collection and use, which is expected to have significant ramifications for Australian consumers.

### **Misleading / Deceptive Conduct - location data**

On 29 October 2019, the ACCC commenced action against Google in the Federal Court, alleging that Google has engaged in misleading or deceptive conduct, in contravention of the ACL. The ACCC's case focuses on a number of representations made by Google, and alleges that:

- from January 2017 until late 2018, it was misleading for Google to not properly disclose to consumers that two Google Account settings, "Location History" and "Web & App Activity", had to both be switched off if consumers did not want Google to collect, keep and use their location data. The ACCC also alleges that from mid-2018 and until late 2018, Google represented to consumers that the only way they could prevent Google from collecting, keeping and using their location data was to give up the use of certain Google services such as Google Search and Google Maps. However, the ACCC has alleged this could be achieved by switching off both "Location History" and "Web & App Activity"; and
- from March 2017 when a consumer accessed the "Web & App Activity" settings, and from May 2018 when a consumer accessed the "Location History" setting, Google displayed on-screen messages that represented that location data would only be collected and used by Google for the consumer's use of Google services.

A key aspect of the ACCC's case is that Google represented to users of the Android operating system that it would not obtain data about their location, or that where such data was obtained it would only be used for the user's own purposes; however, Google did obtain and retain such data, and used that

data for Google's purposes (see [here](#) for the Concise Statement which sets out the background facts giving rise to the ACCC's claim).

Google supplies a range of software products and services to Australian consumers including the Google Play Store, Google Search, Google Chrome, Google Maps, Gmail and YouTube. Access to most of these services is facilitated through creating a Google Account; the default setting for new Google Accounts is for "Location History" to be turned off (or paused), and the "Web & App Activity" setting to be "on".

As noted by the ACCC, even when "Location History" is switched off, Google is still able to collect and retain personal data relating to the user's activities on Google apps and services, including personal data relating to the user's location. For example, where a consumer has switched off "Location History" but has left "Web & App Activity" on, this would have allowed Google to save data relating to his or her movements based on his or her activity on Google Maps and any other App that obtains location data.

The ACCC allege that when consumers access the "settings" page for "Web & App Activity", there is no express mention of location data being collected, retained, or used. Moreover, in collecting its users' location data, Google is able to then use such data for a range of purposes, which include targeted advertisements / promotions, inference of demographic information, and generation of advertisement statistics (such as store visit conversion statistics) to share with advertisers.

The ACCC considers that because of Google's failure to transparently disclose how users' location data is collected and used, consumers were and still are deprived of the opportunity to make an informed choice about whether to share their personal location data with Google.

As indicated by the ACCC's Chairman, Mr Rod Sims, "*Transparency and inadequate disclosure issues involving digital platforms and consumer data were a major focus of our Digital Platforms Inquiry, and remain one of the ACCC's top priorities.*"

## **REMEDIES AND NEXT STEPS ... MORE CASES AGAINST GOOGLE A CLICK AWAY?**

The ACCC is seeking penalties and orders requiring that Google publishes a corrective notice in terms to be agreed between Google and the ACCC, and that Google establishes a competition law compliance program.

The ACCC has indicated that while some of the contraventions were alleged to have occurred under the previous penalty regime applying under the ACL, other alleged contraventions occurred under the current penalty regime which carries significant penalties up to 10% of a company's Australian revenue.

This case against Google looks to be the start of the regulator's drive to address Google's conduct relating to data collection and use, and looks likely to be followed by another case in 2020 in relation to misrepresentations as to the combination of personal information obtained by Google from different sources.

The ACCC's action against Google comes at a time where regulators and governments around the world are conducting probes into the conduct of "digital giants" such as Google and Facebook, so as to better safeguard consumers' rights to their own data and privacy, and businesses' ability to

effectively compete in markets where these players hold a significant degree of market power.

The ACCC's allegations are consistent with the focus in the Digital Platforms Report in relation to the transparency and adequacy of disclosure by Google of collection practices in relation to user data. In this sense, the ACCC's current action against Google may well go to the heart of its business model in how consumers' data is "hoovered up" for a number of purposes unrelated to the consumers use of particular Google services.

Time will tell whether the ACCC brings more of its Digital Platform Inquiry investigations to Court.

## CONTACTS

**Dave Poddar**  
Partner

**T** +61 2 8922 8033  
**E** dave.poddar  
@cliffordchance.com

**Angel Fu**  
Associate

**T** +61 2 8922 8089  
**E** angel.fu  
@cliffordchance.com

**Mark Grime**  
Senior Associate

**T** +61 2 8922 8072  
**E** mark.grime  
@cliffordchance.com

**Elizabeth Hersey**  
Senior Associate

**T** +61 2 8922 8025  
**E** elizabeth.hersey  
@cliffordchance.com

**Holly Cao**  
Associate

**T** +61 2 8922 8098  
**E** holly.cao  
@cliffordchance.com

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London, E14 5JJ

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