

19 April 2021

## Google Held to Have Misled Users

In what has been trumpeted by the chair of the Australian Competition & Consumer Commission (“ACCC”) as a “world-first” decision, the Federal Court last week ruled that Google partially misled some users, contravening sections 18, 29(1)(g) and 34 of the Australian Consumer Law (“ACL”), in the case of *Australian Competition and Consumer Commission v Google LLC (No.2)* [2021] FCA 367.

Justice Thomas Thawley ruled in the Australian Federal Court on Friday that, because Google had an unusual requirement on some Android and Pixel phones that required a user to check “No” or “Do Not Collect” to both the “Location History” and “Web and App Activity” settings, someone who ticked “No” to just one of those settings would still end up having their location tracked by Google, and that as a result, Google had then had at least partially misled some consumers.

### Overview

The ACCC alleged that “particular users of mobile devices with Android operating systems (**Android OS**) were misled by reason of the content of various screens those users saw on their devices. Two settings were central to the ACCC’s case: “**Web and App Activity**” and “**Location History**”. When setting up a device relevant to the proceedings, Web and App Activity was defaulted to “on” and Location History was defaulted to “off”. These default settings meant that Google LLC could obtain, retain and use personal location data when a user was using various apps, including Google services such as Google Maps. At the core of the ACCC’s case was the contention that there were users who were misled or likely to have been misled by what was, and what was not, stated or shown on various relevant screens on the users’ devices; there were users who, acting reasonably, would have been led into thinking that, with Location History “off”, Google LLC would not obtain, retain and use personal data about a user’s location, and that this was not relevantly changed by the fact that Web and App Activity was “on”” (*Australian Competition and Consumer Commission v Google LLC (No.2)* [2021] FCA 367 @ paragraph 2).

The judge noted (@ paragraph 129 of the ACCC v Google (No.2) decision) that “it was accepted that there were approximately 6.3 million users who opened a Google Account on their Android phone during the period January 2017 to August 2019”.

Evidence showed that an article was published by Associated Press (“AP”) on 13 August 2018 (*Australian Competition and Consumer Commission v Google LLC (No.2)* [2021] FCA 367 @ paragraph 71) stating that:

*“An Associated Press investigation found that many Google services on Android devices and iPhones store your location data even if you’ve used privacy settings that say they will prevent it from doing so.*

...

*Google’s support page on the subject states: “You can turn off Location History at any time. With Location History off, the places you go are no longer stored.”*

*That isn’t true. Even with Location History paused, some Google apps automatically store timestamped location data without asking.*

...

*To stop Google from saving these location markers, the company says, users can turn off another setting, one that does not specifically reference location information. Called “Web and App Activity” and enabled by default, that setting stores a variety of information from Google apps and websites to your Google account.*

*When paused, it will prevent activity on any device from being saved to your account. But leaving “Web and App Activity” on and turning “Location History” off only prevents Google from adding your movements to the “timeline,” its visualization of your daily travels. It does not stop Google’s collection of other location markers ...”*

Internal Google documents showed that following the publication of the AP Article, there was at least a 500% increase in the number of users disabling Location History and Web and App Activity (*Australian Competition and Consumer Commission v Google LLC (No.2)* [2021] FCA 367 @ paragraph 75).

### Australian Consumer Law

The relevant sections of the ACL provide that:

Section 18:

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

Section 29(1)(g):

*“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 ... make a false or misleading representation that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits”*

Section 34:

*“A person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any services”*

## Court Decision

The Federal Court determined that Google continued to collect “Location History” on some Android and Pixel phones, even for customers who ticked “No” or “Do not collect” in the settings on their phones.

The judge stated that *“So far as concerns s 18 of the ACL, it is sufficient for the ACCC to establish that Google’s conduct was misleading or deceptive or likely to mislead or deceive ordinary or reasonable members of the relevant class, extreme or fanciful responses being disregarded”* and *“concluded that the ACCC’s case under s 18 of the ACL is partially made out in respect of each of the three scenarios. Google’s conduct would not have misled all reasonable users in the classes identified; but Google’s conduct misled or was likely to mislead some reasonable users within the particular classes identified. The number or proportion of reasonable users who were misled, or were likely to have been misled, does not matter for the purposes of establishing contraventions”* and *“also concluded that the ACCC’s case under ss 29(1)(g) and 34 of the ACL is partially made out in respect of each scenario”* (Australian Competition & Consumer Commission v Google LLC (No.2) [2021] FCA 367 @ paragraphs 17 & 18).

The judge held that:

- a. *“I am satisfied that the ACCC has established contraventions of s 18 to the extent indicated”* (@ paragraph 224);
- b. *“I am satisfied that Google’s conduct ... was “liable to mislead the public” in that there is a probability that members within the class identified by the ACCC, acting reasonably, were misled “as to the nature, the characteristics, [or] the suitability for their purpose ... of ... services”. ... I conclude that Google LLC breached s 34”* (@ paragraph 225); and
- c. *“Further, I would draw the inference that, within the class identified by the ACCC, there were users who, acting reasonably, were in fact misled by representations ... which I find Google made through what it stated and what it did not state ... I therefore conclude that Google breached s 29(1)(g) of the ACL by representing that the services which Google provided had “performance characteristics”, “uses” or “benefits” which they did not have in breach of s 29(1)(g). Such representations were “false or misleading” within the meaning of s 29(1)(g)”* (@ paragraph 226).

## Key Takeaways

Because the decision only relates to Android users, and Google had by the time of the decision already updated the settings that formed the basis of the ACCC’s complaint, the decision may practically not make much difference to many consumers.

However, some consumers may feel better that the ACCC is taking action to keep big tech companies “honest” and help protect the privacy of consumers.

Many people are confused by their phone’s terms and settings, including their Google settings. As Peter Lewis of thinktank The Australia Institute said of this Federal Court

case, *“One would think selecting ‘no’ or ‘do not collect’ in a phone’s location history would stop the collection of data. But it just highlights the complexity of Big Tech terms and conditions, where in this case, data was still being collected due to a setting being switched on in another part of the phone’s settings.”*

This case does highlight to phone users the importance of checking your phone settings for things like privacy, location and Bluetooth:

1. Check your account privacy settings under the “Settings” tab on your Android phone. From there:
  - a. Find the “Accounts” section and select your Google account.
  - b. Scroll to the “Manage your data and personalisation” tab and select it for a range of settings to review for various activities to prevent your location from being shared with Google.
2. Experts such as Australian cryptographer Vanessa Teague of the Australian National University have recommended that unless you are actively using Bluetooth to play music through wireless headphones or similar, you should turn off the Bluetooth function and shouldn’t let your phone automatically scan for Bluetooth connections, because that can be used to track you:
  - a. Check the “Location” tab in the Settings section on an Android phone.
  - b. Tap “Improve Accuracy” to give you the option to stop your phone from letting apps use wifi and Bluetooth scanning when you don’t want those to be used.
3. Third party apps and even things like Siri and Google Assistant can still track you, even if you have changed your Google settings to stop Google from tracking you. It is good practice not to download random apps unnecessarily, and always check the location and privacy settings for those apps in order to make sure in order to make sure that you are not giving those apps permissions they should not have:
  - a. Under the “Privacy” tab in your phone’s settings you should have a “Permissions manager” tab, which will allow you to see which apps have what permissions.
  - b. Tap on any app and you can change the settings for that app.

A spokesman for Google has said that Google “disagreed” with the Court’s decision, and was considering whether to appeal the decision.