

***University of New South Wales Law Research Series***

**COMPETITION AND CONSUMER  
WATCHDOG SPURS AUSTRALIAN  
PRIVACY CHANGES**

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(2020) (167) Privacy Laws & Business International  
Report, 25-28  
[2021] *UNSWLRS* 1

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# Competition and consumer watchdog spurs Australian privacy changes

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(2020) 167 *Privacy Laws & Business International Report* 25-28 (October 2020)

Competition and consumer laws are becoming a major element of data privacy protection in Australia, particularly in relation to digital platforms, often in advance of similar developments in other parts of the world. The country's competition regulator, the Australian Competition and Consumer Commission (ACCC), has been at the centre of these developments for the last three years. This article discusses four related developments:

- (i) The ACCC is suing Google for misleading conduct in respect of its location data practices, alleging that certain Google account settings made the misleading representation that users had opted out of location data retention.
- (ii) The ACCC is also suing Google for misleading conduct in respect of its communications to consumers about its aggregation of personal information from its various services (Google search engine, YouTube etc) with data collected via third-party websites, for commercial purposes including advertising.
- (iii) The ACCC has raised preliminary concerns about Google's acquisition of Fitbit, because of the potential anticompetitive effects of merging personal information collected by the two businesses.
- (iv) The Australian government is proposing to enact a raft of reforms to Australia's out-of-date privacy laws, and to consider further reforms, resulting from ACCC recommendations in 2019, reforms which will give the ACCC an ongoing role in regulating privacy and digital platforms.

The ACCC is also the key player in another challenge to the predominance of Google and Facebook in the Australian digital landscape, because it is implementing a government-supported mandatory code which will require the platforms to pay for displaying Australian commercial news content on their platforms. What is the potential cumulative effect of these developments on surveillance capitalism in Australia?

## Suing Google for misleading location data settings

In the last two years, the ACCC has begun to bring cases under the Australian Consumer Law (ACL) for misleading conduct in respect of privacy statements made by firms in their terms of use, privacy policies and account settings. These include two cases against Google.<sup>1</sup>

The ACCC first brought proceedings against Google in the Federal Court, alleging that Google engaged in misleading conduct in respect of the location data settings and related notices it presented to consumers in the course of 2017 and 2018.<sup>2</sup> The ACCC alleges that Google breached the ACL by misleading users who attempted to navigate Google's account settings on Android phones and tablets during that time, including by:

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<sup>1</sup> In addition to the two cases currently pending against Google, the ACCC brought successful proceedings against the medical booking platform, HealthEngine, including in respect of its misleading representations concerning its data practices: ACCC, 'HealthEngine to pay \$2.9 million for misleading reviews and patient referrals' (Media Release, 20 August 2020).

<sup>2</sup> ACCC, 'Google allegedly misled consumers on collection and use of location data' (Media Release, 29 October 2019) <<https://www.accc.gov.au/media-release/google-allegedly-misled-consumers-on-collection-and-use-of-location-data>>.

- not properly disclosing that two different settings needed to be changed if consumers did not want Google to collect, keep and use their location data; and
- not disclosing on those pages that personal location data could be used for a number of purposes unrelated to the consumer's use of Google services.

During the relevant period, consumers attempting to prevent retention of their location data were presented with an option under the heading "Location History" in account settings, which allowed them to select "Don't save my Location History to my Google Account". According to the ACCC, this would have led consumers to believe that changing this setting would stop Google from collecting, keeping and using their location data.

The ACCC claims Google failed to make clear to consumers that they would in fact also need to navigate to a separate page and change their choices on a setting titled "Web & App Activity" to prevent location tracking via websites and apps that use Google services. The ACCC also alleges that it was misleading for Google to fail to disclose on those pages that personal location data could be used for a number of purposes unrelated to the consumer's use of Google services, given its explanation of data uses. For example, under "Web & App Activity", Google explained "Saves your searches, Chrome browsing history and activity from sites and apps that use Google services. This gives you better search results, suggestions and personalisation across Google services."

Some of the alleged breaches of the ACL carry maximum penalties of the higher of AUD \$10 million or 10 percent of annual turnover in Australia in the past 12 months (the alternative measure of three times the benefit obtained as a result of the breach, is unlikely to be calculable in the case of these data practices).<sup>3</sup>

### **Suing Google for misleading notices about merging personal data**

The ACCC has subsequently brought further proceedings against Google for allegedly misleading millions of Australians in respect of privacy promises it made before it began combining user data from non-Google apps and websites, as well as data acquired as a result of its acquisition of DoubleClick, with user data collected via Google's own sites and using that data for Google's advertising purposes.<sup>4</sup> The ACCC alleges further that the notices by which Google purported to notify its users of these developments were misleading.

To explain, when Google acquired the ad tech company, DoubleClick, in 2007, it stated that it would not combine its own Google account holder datasets with personal data collected by DoubleClick, unless users opted in. It included this promise in its terms of use at the time. Eight years later, Google deleted this promise from its privacy policy, and combined the relevant datasets.

Further, in 2016, Google provided a pop-up notification to users, which purported to obtain consent to Google combining user data from non-Google apps and websites with user data collected via Google's own sites and using that data for Google's advertising purposes. The notice led with the innocuous headline, 'Some new features for your Google Account', and proceeded:

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<sup>3</sup> *Competition and Consumer Act 2010* (Cth), Sched 2, ss 29, 34, 224.

<sup>4</sup> ACCC, 'ACCC alleges Google misled consumers about expanded use of personal data' (Media Release, 27 July 2020) <<https://www.accc.gov.au/media-release/correction-accc-alleges-google-misled-consumers-about-expanded-use-of-personal-data>>.

“We’ve introduced some optional features for your account, giving you more control over the data Google collects and how it’s used, while allowing Google to show you more relevant ads.”

Statements later in the notification left unclear what Google in fact planned to change. The ACCC alleges the notification was misleading on the ground that: “Consumers could not have properly understood the changes Google was making nor how their data would be used and so did not – and could not – give informed consent.”

The Commission also claims Google misled consumers by stating in its privacy policy that it would not reduce users’ rights under the policy without their explicit consent, but then failing to seek explicit consent for the above changes.

### **Preliminary concerns about Google’s acquisition of Fitbit**

The ACCC has raised its preliminary concerns about Google’s proposed acquisition of fitness tracker company, Fitbit.<sup>5</sup> Google announced its plans to acquire Fitbit Inc for USD 2.1 billion in November 2019.<sup>6</sup> The deal will only proceed if it receives clearance from a number of competition regulators around the world.

The ACCC has not directly raised the issue of threats to individuals’ privacy which might result from Google’s acquisition of Fitbit, but has taken issue with the potential for it to entrench Google’s substantial market power in some markets and extend that market power to other markets. In the statement of its preliminary views, the ACCC expressed concern that the proposed acquisition could substantially lessen competition between Fitbit, Google and other players in “data-dependent health services”, for example, those supplying:

- tailored health advice based on individual health signals to users of Fitbit and other wearables on how to improve their health or manage a medical condition;
- commercial insights to insurance companies or employers seeking to compile risk profiles, reduce costs or enhance productivity; and
- diagnostic tools for medical institutions and doctors to determine early indicators of chronic disease.

If Google acquires Fitbit user datasets, it could prevent other suppliers accessing Fitbit user datasets to provide such services, and gain a significant advantage over those rivals.

The ACCC also recognised potential anticompetitive effects if the acquisition:

- gives Google an incentive to “handicap” rivals such as Apple, Samsung and Garmin, by ceasing to provide them with access to Google Maps, Google Play Store and Wear OS; or
- entrenches Google’s market power in certain ad tech markets as a result of the targeted advertising advantages gained from combining Google and Fitbit datasets.

While the ACCC was the first competition regulator to publish its views on the merger, the European Commission and the US Department of Justice are the regulators which will exert the most influence over whether the acquisition is ultimately permitted to proceed. The European Commission announced in August that it would conduct an in-depth investigation into the acquisition, and is scheduled to deliver its decision before the end of December 2020.

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<sup>5</sup> ACCC, ‘Statement of Issues: Google LLC – proposed acquisition of Fitbit Inc’ (18 June 2020) <<https://www.accc.gov.au/system/files/public-registers/documents/Google%20Fitbit%20-%20Statement%20of%20Issues%20-%202018%20June%202020.pdf>>.

<sup>6</sup> ‘Fitbit to be Acquired by Google’ (Press Release, 1 November 2019) <<https://investor.fitbit.com/press/press-releases/press-release-details/2019/Fitbit-to-Be-Acquired-by-Google/default.aspx>>.

### Privacy law reforms, particularly for digital platforms

The ACCC released the *Final Report* in its *Digital Platforms Inquiry*<sup>7</sup> in July 2019, following a *Preliminary Report* (December 2018). The ACCC's recommendations presented a 'once in a generation' opportunity for serious reform of Australia's moribund privacy laws, which now lag far behind international standards, particularly since the EU's enactment of the General Data Protection Regulation (GDPR).<sup>8</sup>

The Australian Government held a public consultation<sup>9</sup> on the ACCC report, and announced its response in December 2019.<sup>10</sup> In relation to data privacy issues, the response was a mixture of acceptance with a commitment to legislation, 'support in principle, subject to consultation' on implementation design, and deferral to a further review of the federal *Privacy Act 1988*, but there were no outright rejections of recommendations. However, with COVID 19 emerging as a major threat only a month later, it is not surprising that no concrete steps toward implementation have yet become visible.

In March 2019, after publication of the ACCC's draft report, the Australian government anticipated some of its proposals, and announced proposed legislation.<sup>11</sup> This proposed legislation now overlaps with the government's response to the ACCC's final recommendations. Implementation of these announcements has also been 'COVID delayed'.

The government's position on each of the ACCC's privacy-related recommendations (and its earlier response in March 2019) is as follows:

- Commitment to legislation to raise maximum *Privacy Act* penalties for serious or repeated infringements to the highest of AUD \$10 million, or three times the benefit received, or 10 percent of the Australian turnover of the business (in line with penalties in the ACL).
- Commitment to legislation to increase fines for non-cooperation with the Office of the Australian Information Commissioner (OAIC) to resolve minor breaches; and to a wider range of dispute resolution mechanisms.
- Commitment to additional funding of AUD \$25 million over three years to the OAIC for enforcement actions, and an additional AUD \$26.9 million over three years for a new unit within the ACCC to focus on regulation of digital platforms.
- Commitment to legislation for a binding Digital Platforms Privacy Code, to be developed by the OAIC, to apply to social media, and to digital platforms that trade in personal information. This 'Platforms Code' would impose higher standards than otherwise apply under the *Privacy Act* (the ACCC proposes many specific inclusions), but would still not reach GDPR standards. The ACCC proposed that it would have a role in such a Code, as the competition regulator.

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<sup>7</sup> ACCC, *Digital Platforms Inquiry Final Report* (26 July 2019) <<https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platforms-inquiry/final-report-executive-summary>>.

<sup>8</sup> See G. Greenleaf, 'Australia debates tougher privacy regulation of digital platforms' [2019] 161 *Privacy Laws & Business International Report*\* 17-19.

<sup>9</sup> Treasurer; Minister for Communications, Cyber Safety and the Arts, 'Public consultation on the ACCC Digital Platforms Report now open' (Joint Media Release, 1 August 2019) <<http://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/public-consultation-accc-digital-platforms-report-now>>.

<sup>10</sup> Australian Government, 'Regulating in the digital age - Government Response and Implementation Roadmap for the Digital Platforms Inquiry' (12 December 2019).

<sup>11</sup> Attorney-General, Christian Porter and Minister for Communications and the Arts, Mitch Fifield, 'Tougher penalties to keep Australians safe online' (Media Release, 24 March 2019) <<https://www.attorneygeneral.gov.au/Media/Pages/Tougher-penalties-to-keep-australians-safe-online-19.aspx>>.

- The proposed 'Platforms Code' would allow individuals to require that platforms stop using or disclosing their personal information, a 'right to erasure' (or 'right to be forgotten') which is only 'to be considered' for reforms to the *Privacy Act* generally, because of freedom of speech concerns.
- Support in principle, subject to consultation on implementation design, was given to updating the definition of 'personal information' to ensure that it captures technical data which can act as an identifier; and to much stronger notification and consent requirements (which would bring them closer to GDPR standards).
- There is support in principle for enactment of a right for individuals to take actions directly before courts to obtain remedies under the *Privacy Act*, rather than requiring complaints to be made to the OAIC (a major problem with the current Act).
- However, enactment of a statutory tort of serious invasion of privacy (broader than *Privacy Act* breaches), as recommended by the Australian Law Reform Commission (ALRC), and in similar form by State bodies, as well as by the ACCC, is deferred until a promised further review of the *Privacy Act*.
- Also deferred until a further review of the *Privacy Act* (which was to be by mid-2021, but now who knows?) is consideration of reforms such as removal of exemptions ('for example, small businesses, employers, registered political parties'); requiring fair and lawful processing; 'protections for inferred information'; and addressing risks of re-identification.
- Also deferred until other enquiries are completed are two other ACCC recommendations for amendments to the *Competition and Consumer Act 2010* which, if adopted, will have a very significant effect on the protection of privacy. First, unfair contract terms (UCT) would be prohibited (not just void), meaning that civil pecuniary penalties would apply to the use of UCT in any standard form consumer or small business contract, including contracts which have a zero monetary price. Second, certain unfair trading practices would be prohibited, in addition to the current prohibitions of misleading or deceptive conduct and unconscionable conduct under the ACL. This could deter digital platforms from exploiting acute information asymmetries and bargaining power imbalances in their transactions with consumers. These reforms, if enacted, would bring consumer protection regulators into central roles in the protection of privacy in Australia, taking the sole responsibility for this out of the hands of the OAIC, and enable ACCC to pursue systemic problems in ways that OAIC has never achieved.

These proposed Australian reforms would not seem radical in the EU, or in many other countries, but that is a reflection of how far Australian law is behind international standards. Until such reforms occur, it would be pointless for Australia to attempt to obtain a positive EU adequacy finding under the GDPR.

### **A mandatory code for platform payment for news**

Another outcome of the ACCC's final report is that Facebook and Google may be forced to compensate Australian commercial media companies (but not public broadcasters) for journalistic content which appears on their platforms. As part of its December 2019 response, the federal government asked the ACCC to develop a voluntary code between the media companies and the two platforms, to require the platforms 'to negotiate in good faith on how to pay news media for use of their content, advise news media in advance of algorithm changes that would affect content rankings, favour original source news content in search



page results, and share data with media companies'.<sup>12</sup> However, there was little progress on negotiations, so in April 2020 the government asked the ACCC to draft a mandatory code instead. The draft was released on 31 July.<sup>13</sup> After consideration of industry submissions, the government intends to legislate to introduce the code in December 2020.

According to the draft, the media bargaining code would:

- regulate bargaining between news businesses that register under the code and designated digital platforms (initially Google and Facebook);
- set minimum standards, including requiring platforms to provide notice about changes in the algorithmic ranking of news content, and information about platform practices in respect of users' data;
- mandate negotiations and mediation of matters between the platforms and a news business(es), including remuneration for news content, where requested by a registered news business; and
- mandate arbitration of news content remuneration disputes if negotiations and mediation do not succeed after three months.

The digital platforms could face hundreds of millions of dollars in fines if they were to breach the code.<sup>14</sup>

Both Google and Facebook have responded to the draft code with claims that the code itself will undermine the workings of this market. Facebook has threatened to remove local and international news from its Australian Facebook site, and from Instagram, if the code proceeds.<sup>15</sup> Google has protested with an 'Open Letter to Australians' on its websites, saying that the code 'puts Google Search at risk',<sup>16</sup> and other claims rejected by the ACCC.<sup>17</sup>

The main reason for the virulence of the platform's complaints is not the millions of dollars per annum that they might have to pay to local media, it is that the code would set a global precedent for paying news media for content. Although the European Union enacted a new copyright Directive in 2019 which requires such payments,<sup>18</sup> because it is a Directive (not a

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<sup>12</sup> Josh Taylor, 'Facebook and Google to be forced to share advertising revenue with Australian media companies' *The Guardian Australia*, 20 April 2020 <<https://www.theguardian.com/media/2020/apr/19/facebook-and-google-to-be-forced-to-share-advertising-revenue-with-australian-media-companies>>.

<sup>13</sup> Exposure Draft: Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 <<https://www.accc.gov.au/system/files/Exposure%20Draft%20Bill%20-%20TREASURY%20LAWS%20AMENDMENT%20%28NEWS%20MEDIA%20AND%20DIGITAL%20PLATFORMS%20MANDATORY%20BARGAINING%20CODE%29%20BILL%202020.pdf>>.

<sup>14</sup> Josh Taylor, 'Facebook and Google to be forced to share advertising revenue with Australian media companies' *The Guardian Australia*, 20 April 2020 <<https://www.theguardian.com/media/2020/apr/19/facebook-and-google-to-be-forced-to-share-advertising-revenue-with-australian-media-companies>>.

<sup>15</sup> Will Easton, Managing Director, Facebook Australia & New Zealand, 'An Update About Changes to Facebook's Services in Australia' (31 August 2020) <<https://about.fb.com/news/2020/08/changes-to-facebooks-services-in-australia/>>.

<sup>16</sup> Google, 'Open Letter to Australians' <[https://about.google/intl/ALL\\_au/google-in-australia/an-open-letter/](https://about.google/intl/ALL_au/google-in-australia/an-open-letter/)>

<sup>17</sup> ACCC, 'Response to Google open letter' (Media Release, 17 August 2020) <https://www.accc.gov.au/media-release/response-to-google-open-letter>; Josh Taylor, 'Why is Google taking aim at the Australian government with saturation advertising?' *The Guardian Australia*, 20 August 2020.

<sup>18</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, PE/51/2019/REV/1, OJ L 130, 17.5.2019, p. 92-125 <[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2019.130.01.0092.01.ENG](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2019.130.01.0092.01.ENG)>.

Regulation) it requires transposition by legislation enacting it in each EU member state. Australia is therefore 'ahead of the game' in establishing what could become global standards.

### **A threat to surveillance capitalism?**

To what extent will the cumulative effect of these Australian developments in relation to data privacy, competition/consumer law, and unorthodox means of media regulation, weaken surveillance capitalism? While Australian developments alone will not result in fundamental changes to the business models of the platforms, they are significant. The ACCC is moving faster than many EU, US or Asian regulators who are travelling in the same direction, so what ACCC does could start or accelerate the process of setting global standards. The simple fact that strong critical actions against US business models are coming from Australia, not Europe, helps 'globalise' these critiques, taking them outside the expected 'trans-Atlantic tensions'. Finally, the ACCC has thrown into doubt a couple of the foundation principles of surveillance capitalist business models.<sup>19</sup> First, the voracious demand for evermore intense personal data is threatened if mergers of business, both past and prospective, cannot deliver that data for aggregation. Second, there is an assumption that uses of personal data, however obtained, will not be constrained by users. This is threatened by potential sanctions and negative publicity for misleading claims regarding how data will be used.

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<sup>19</sup> G. Greenleaf 'Elements of Zuboff's Surveillance Capitalism' (2019) 160 *Privacy Laws & Business International Report* 29-32 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3479907](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3479907)>