Federal Court of Australia

Australian Competition and Consumer Commission v Google LLC (No 3) [2021] FCA 971

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| File number: | NSD 1760 of 2019 |
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| Judgment of: | **THAWLEY J** |
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| Date of judgment: | 16 August 2021 |
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| Catchwords: | **DISCOVERY** **–** discovery in relation to a penalty hearing following liability judgment – discovery by categories – whether disputed categories “directly relevant” to appropriate relief – burden of compliance – potential vacation of hearing date – discovery ordered |
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| Legislation: | *Competition and Consumer Act 2010* (Cth) sch 2, *Australian Consumer Law*, ss 18, 29, 34  *Federal Court Rules 2011* (Cth) r 20.14 |
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| Cases cited: | *Australian Competition and Consumer Commission v Google LLC (No 2)* [2021] FCA 367  *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25  *Australian Competition and Consumer Commission v Woolworths Limited* [2016] FCA 44 |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Regulator and Consumer Protection |
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| Number of paragraphs: | 28 |
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| Date of hearing: | 13 August 2021 |
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| Counsel for the Applicant: | Ms K Richardson SC with Mr A d’Arville |
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| Solicitor for the Applicant: | Norton Rose Fulbright Australia |
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| Counsel for the Respondents: | Mr P Brereton SC with Mr R Yezerski |
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| Solicitor for the Respondents: | Corrs Chambers Westgarth |

ORDERS

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|  | | NSD 1760 of 2019 |
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| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSION  Applicant | |
| AND: | GOOGLE LLC  First Respondent  GOOGLE AUSTRALIA PTY LTD  Second Respondent | |

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| order made by: | THAWLEY J |
| DATE OF ORDER: | 16 August 2021 |

THE COURT ORDERS THAT:

1. The parties confer with a view to providing within 7 days agreed orders reflecting the conclusions reached by the Court and appropriate further steps.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THAWLEY J:

1. On 16 April 2021, the Court published reasons for concluding that Google LLC contravened ss 18, 29(1)(g) and 34 of the *Australian Consumer Law* (**ACL**), being Sch 2 of the *Competition and Consumer Act 2010* (Cth): *Australian Competition and Consumer Commission v Google LLC (No 2)* [2021] FCA 367 (**liability judgment**). The Court also concluded that Google Australia Pty Limited engaged in those same contraventions by adopting or endorsing the relevant conduct of Google LLC. The Court then listed the matter for hearing for three days in September 2021 to determine the appropriate relief (**penalty hearing**). It was not then anticipated that there would be any significant interlocutory dispute between the parties. The parties have acted expeditiously and co-operatively throughout the proceedings.
2. Although substantial agreement has been reached, the parties have not been able to resolve all the issues between them concerning discovery in relation to the penalty hearing. The Australian Competition and Consumer Commission (**ACCC**) has, accordingly, applied by way of interlocutory application dated 23 July 2021 for an order that the respondents give discovery of various documents falling within various identified categories. Initially, the categories of documents in respect of which discovery was sought fell into two broad areas, referred to by the parties as the “knowledge categories” and the “data categories”. The “data categories” were directed to data from which the number of consumers who may have been misled might be established. Shortly before hearing, the parties reached substantial agreement in respect of the “data categories” with the result that the Court was not asked to resolve any residual issue in that respect.
3. The “knowledge categories” concern documents which might establish a state of mind on the part of Google LLC and Google Australia Pty Limited (**Google**) relevant to penalties in respect of the contraventions which have been established. The only categories that remain in dispute are: 9, 10, 11, 12, 14, 15 and 19.
4. Given the impending penalty hearing and the need for this issue to be resolved expeditiously, I will express these reasons more concisely than I might otherwise. Familiarity with the liability judgment is assumed and I have adopted the abbreviations in that judgment.
5. Google made a number of general objections to discovery of the disputed categories and a number of specific objections.
6. First, Google submitted that the categories were not framed by reference to the contraventions which have been established and so could not be said to be “directly relevant” within the meaning of r 20.14 of the *Federal Court Rules 2011* (Cth). The phrase “directly relevant” is used in r 20.14(1), which must be read with r 20.14(2). They provide:

**20.14 Standard discovery**

(1) If the Court orders a party to give standard discovery, the party must give discovery of documents:

(a) that are directly relevant to the issues raised by the pleadings or in the affidavits; and

(b) of which, after a reasonable search, the party is aware; and

(c) that are, or have been, in the party’s control.

(2) For paragraph (1)(a), the documents must meet at least one of the following criteria:

(a) the documents are those on which the party intends to rely;

(b) the documents adversely affect the party’s own case;

(c) the documents support another party’s case;

(d) the documents adversely affect another party’s case.

1. Google’s submissions included that:
2. “[d]ocuments that touch generally on the subject of location data, the functionality of the Location History [**LH**] and Web & App Activity [**WAA**] settings, or the AP Article… are not directly relevant to the determination of the appropriate remedies for the contraventions found by the Court unless those documents specifically relate to the contravening conduct”;
3. in so far as the documents sought concerned the AP Article, the Court had concluded in the liability judgment at [76] that it was not clear that the settings to which the AP Article referred were the same as the settings the subject of the proceedings;
4. the ACCC was pursuing the categories on the mistaken assumption that, if Google was aware of user confusion that would establish or suggest that the contraventions were “deliberate”;
5. “[e]ven if there was evidence of user confusion in relation to the settings, and [Google was] aware of it, conduct which causes ‘confusion’ is not to be conflated with contravening conduct”.
6. I am satisfied that the categories which remain in dispute are sufficiently likely to include documents which are directly relevant to the question of the appropriate relief (including penalties) as to warrant an order for discovery. It would be a misunderstanding to think that “direct relevance” is established only if documents are relevant to the question of whether or not the contraventions were deliberate. The question is relevance to the appropriate relief for the contraventions which have been established. Google’s state of mind is relevant to relief, including penalties, in a number of ways. Nor should the phrase “directly relevant” be attributed a narrow meaning. Its meaning is explained in r 20.14(2)(a) and its history is well known.
7. The AP Article was published on or around 13 August 2018. It included:

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 & 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 …

1. The evidence reveals that, after publication of this article and as one would expect, there were a number of meetings. An urgent meeting was held between various Google employees, where the AP Article was discussed and which was referred to internally as the “Oh Shit” meeting. Also, Mr Sundar Pichai, the chief executive officer of Google LLC, became involved in discussions, again, as one might expect given the serious nature of the issues which had been raised in the AP Article. Two of the categories of discovery relate to specific meetings which included Mr Pichai.
2. It is likely that material was prepared after the AP Article which examined the issues the subject of the AP Article and, specifically, the interaction between LH and WAA. It is likely that the material addressed what issues existed and the reasons for those issues, including how they arose and the reasons for why the LH and WAA settings generally were set up in the way they were. This material is reasonably likely to be relevant to the specific settings the subject of the liability judgment. It is likely that the LH and WAA settings used in various Google products followed the same general structure. It may well be that the specific LH and WAA settings, and the screens, the subject of the liability judgment were not specifically or individually addressed. That does not mean that documents falling within the categories sought are unlikely to address matters which are relevant in the penalty hearing.
3. I do not accept Google’s submission that the only state of mind on the part of Google relevant to penalties is knowledge in regards to the precise screens or settings the subject of the contraventions. Google’s submission that user confusion is not to be conflated with contravening conduct may be accepted. It does not follow from that proposition that knowledge of user confusion on the part of Google is irrelevant to penalties. All other things being equal, the relief might be different in respect of companies A and B where company A knew its product caused confusion in a way or for reasons relevant to the specific contraventions and chose to do nothing about it for reasons of commercial convenience, but company B was unaware of any such confusion.
4. I do not accept the proposition, implicit in some of Google’s submissions, that the only relevant documents concerning Google’s state of mind would be documents relevant to establishing that the specific contraventions were deliberate. I am satisfied that knowledge on the part of Google in relation to its LH settings and WAA settings, and the interaction between the two, is sufficiently likely to be relevant to the particular contraventions the subject of the penalty hearing as to warrant discovery of the identified categories. For example, if documents tend to establish that – at the time of the contraventions or before – Google was aware that, generally, the interaction between its LH and WAA settings was misleading certain consumers, this might be shown to be relevant to the specific settings the subject of the contraventions (either directly or by way of reasonable inference) and to the appropriate form of relief, including the level of penalties.
5. Secondly, Google submitted that the ACCC had not pleaded that Google intentionally engaged in the conduct giving rise to the contraventions and that it was not open to the ACCC to seek discovery relevant to Google’s state of mind.
6. In this regard, Google referred to what was said by the Full Court in *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25 at [131], emphasising the use of the word “assert” and its grammatical variants:

If a contravention does not involve any state of mind then it is for the party asserting any particular state of mind (be it a deliberate flouting of the law, recklessness, wilful blindness, “courting the risk”, negligence, or innocence or any other characterisation of state of mind) to prove its assertion. If, in the event, neither party discharges its onus to establish any particular state of mind in relation to the contraventions, the Court determines penalty on no more than the fact of the proscribed nature of the conduct (see, by analogy see *R v Olbrich* (1999) 199 CLR 270; 166 ALR 330; [1999] HCA 54 (*Olbrich*) at [22]–[28]). However, if any degree of awareness of the actual or potential unlawfulness of the conduct is proved then, all other things being equal, the contravention is necessarily more serious. Such awareness may be able to be inferred from the very nature of the conduct or representations constituting the conduct. However absence of such proof does not establish a mitigatory state of mind (see, by analogy, *R v Storey* [1998] 1 VR 359 at 369, quoted with approval by the majority in *Olbrich* at [27]; see also [25]). It means only that the neutral state of mind required for liability has not been disturbed for the purposes of penalty. If a contravening party wishes to go beyond the neutral statutory state of mind for liability and positively assert a lack of consciousness of the character of the conduct for the purposes of penalty, that is a circumstance of mitigation which the contravening party must prove.

1. In this passage, the Full Court is simply stating that it is for the party which puts forward a particular case to prove it. The Full Court made clear at [121] that the bringing of proceedings for a penalty puts the respondent on notice “that its state of mind, including that it might have acted intentionally or recklessly in carrying out the contravening conduct, was potentially in issue”. If that was not obvious in the present case from the bringing of proceedings for a penalty, it is obvious from the course of the proceedings. The ACCC has sought discovery of similar documents before and consistently made it clear that it contends that Google knew at relevant times that the interaction between its LH and WAA settings caused confusion. Whether it can establish such a matter and the particular consequences if it does, in terms of relief with respect to the specific contraventions, is a matter to be determined later.
2. The ACCC was not required to plead that Google intentionally engaged in the conduct giving rise to the contraventions in order to run a case, in respect of penalties, that aspects of its state of mind should have consequences in terms of the appropriate relief in respect of the contraventions.
3. As was explained in *Australian Competition and Consumer Commission v Woolworths Limited* [2016] FCA 44 at [124], all relevant matters may be taken into account in respect of penalties, including such matters as whether the conduct was systematic or deliberate and the corporate level at which the conduct occurred.
4. I do not accept, having regard to the way the case has been run, including the earlier discovery dispute and the cross-examination at trial, that Google is in any way taken by surprise. A part of the context is that, from an early stage, the matter proceeded on the basis that liability would be determined first. Penalties would not have been an issue requiring determination if no contraventions had been established. The fact that state of mind is raised as a matter relevant to penalties has not, and could not realistically have, taken Google by surprise.
5. Thirdly, Google submitted in relation to some of the categories that it covered ground in relation to which Mr Monsees was cross-examined. That is not a sound basis for refusing discovery. Mr Monsees gave evidence, amongst other things, to address evidence introduced from discovery given by Google in the context of the liability phase of the proceedings. That discovery was framed by reference only to liability issues in light of the fact that liability, if any, was to be determined first. There is no relevant unfairness in the categories which would in part cover ground in respect of which Mr Monsees gave evidence.
6. Fourthly, Google submitted that, if discovery was ordered, it would be burdensome and oppressive and would result in a vacation of the penalty hearing dates. I do not accept, having regard to the resources available to Google and the context of this piece of litigation, that the discovery is oppressive or burdensome. As to the hearing dates, these were set by the Court on the assumption that there would not be any dispute concerning discovery. The loss of hearing dates is always regrettable. This litigation has been conducted expeditiously and the parties have worked together co-operatively. In my view, the hearing dates should not be kept at the cost of denying the discovery sought by the ACCC.
7. A number of Google’s specific submissions have been addressed in what is said above. The residue are specific complaints, largely about the breadth of the categories. The breadth was said to show that documents were being sought which were unlikely to be relevant and to impose an undue burden on Google in terms of compliance.
8. As to the relevance, the difference between the parties lies in large part in Google’s approach of denying relevance to anything which does not directly address the specific contraventions as opposed to its state of mind in a way which is relevant to the appropriate penalties for the contraventions which have been found. I have addressed this above.
9. As to the burden of compliance, the categories (as amended by the ACCC in Annexure B to take account of certain of Google’s submissions as to breadth) are not burdensome when assessed in context. An example, emphasised by Google, is as follows. Category 9 was:

In respect of the OS Meeting:

(a) all documents provided or presented to participants either at or prior to that meeting;

(b) all documents recording what was said or done during the meeting; and

(c) all communications between any combination of persons who attended that meeting between 13 August 2018 and 31 December 2018 in relation to:

(i) Location History;

(ii) Web & App Activity; or

(iii) the AP Story entitled “Google tracks your movements, like it or not” dated 13 August 2018.

1. Google submitted:

The effect [of category 9(c)] is that… the Respondents would have to:

a) identify each person that attended that meeting;

b) find each communication between any combination of those persons over a four and half month period (which itself extends well past the end of Scenarios 2 and 3); and

c) then discover any document that is in relation to Location History, or Web & App Activity, or the AP Article.

1. Contrary to Google’s submissions, I do not accept that the task “is a vast discovery exercise”, particularly when assessed in context. It is an exercise, sufficiently likely to result in the production of relevant documents as to warrant discovery, appropriately confined by reference to: (1) only the specific people who attended a well-documented meeting; (2) communications between them for the closed period of 13 August 2018 to 31 December 2018; and (3) identified subject matter.
2. Having reviewed each of the categories and the parties’ submissions in respect of them, I am satisfied that discovery of categories 9, 10, 11, 12, 14, 15 and 19 should be ordered. Having regard to the parties’ submissions, and the evidence given on behalf of Google as to what would be required if an order for discovery were made, I accept that the necessary consequence of ordering discovery is that the penalty hearing will need to be vacated. That is not because the task is unduly burdensome; it is because the task is unlikely to be able to be completed, with inspection of the documents by the ACCC, within time to start the hearing on 8 September 2021.
3. Google noted in submissions, and I did not understand the ACCC to disagree, that should the ACCC wish to rely upon documents produced on discovery, Google might wish to adduce evidence addressing the documents. That is what occurred in the liability phase of the proceedings and is an appropriate way to proceed. These issues can be addressed if and when they arise.

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| I certify that the preceding twenty-eight (28) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Thawley. |

Associate:

Dated: 16 August 2021