The Value of Behavioural Experts in Misleading Representation Cases:

Australian Competition and Consumer Commission v Google LLC (No 2) [2022] FCA 1476

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Introduction

Late last year, the Federal Court of Australia delivered judgment in the Australian Competition and Consumer Commission's (**ACCC**) latest foray into the world of data privacy via the magic wardrobe of the Australian Consumer Law (**ACL**). In *Australian Competition and Consumer Commission v Google LLC (No 2)*,[1] Yates J dismissed claims that changes Google LLC (**Google**) made to its use of account holder data and its privacy policy, as part of a global project known as "*Narnia 2.0*", were false, misleading and/or deceptive.[2]

Deciding that consumers would not have been misled by Google's conduct or representations in relation to the changes, Yates J delivered prescient remarks on the value of expert evidence in relation to how consumers would likely have interpreted the impugned statements. His Honour's observations should be considered carefully by experts and practitioners alike. The main takeaway is that such evidence, while not inadmissible in and of itself, will be of limited assistance to the Court, particularly when it proceeds from an expert's non-expert textual analysis of an impugned statement and strays into conjecture without empirical basis.

Factual Background

a) The Notification and Privacy Update

As part of Narnia 2.0, between June 2016 and at least December 2018, Google sought the permission of Google account holders on Android devices to make certain changes to their account settings.[3] Those changes would authorise Google to combine account holders' personal information with their activity on Google services, third party websites and third party apps,[4] and use that combined information to generate and deliver more targeted advertising, among other things.[5] Google sought permission via a notification screen shown to certain users on their devices (**Notification**).[6] Page 1 of the Notification is extracted at Figure 1 below.

In addition, in June 2016 Google also changed the wording of a statement in its privacy policy that it would not combine certain cookie information with an account holder's personally identifiable information unless they gave "opt-in consent".[7] At the time, Google's privacy policy also stated: "[we] will not reduce your rights under this Privacy Policy without your explicit consent."[8]

b) The ACCC's case

The ACCC alleged that Google contravened sections 18, 29(1)(g), 29(1)(m) and 34 of the ACL by the following:

1) **Notification Conduct:** the Notification failed to inform or adequately inform users that Google was seeking consent to combine their data to enable targeted advertising and that Google had made a change to its privacy policy.[9]
2) **Notification Representations:** by displaying the Notification, Google represented that it was only seeking users' consent to "*turn on*" new features that would result in more information being visible to users (thereby making it easier to review and control that information) and Google using that information to target advertising.[10]
3) **Explicit Content Representation:** despite an express statement that Google would not reduce users' rights under the privacy policy without explicit consent, it did in fact do so.[11]

The ACCC alleged that, as a result, users suffered harm by being denied the opportunity to fully understand the changes and withhold their data from Google if they did not consent.[12]

1 [2022] FCA 1476 (***ACCC v Google***).
2 *ACCC v Google* [6]-[10]
3 Ibid, [3].
4 Ibid, [3]. The changes to data collection and use for which Google sought consent involved combining data such as IP addresses, generated by users on services such as YouTube, with personal information obtained on sign up to Google services, such as date of birth.
5 *ACCC v Google,* [3]; [27] and [84]-[85].
6 Ibid, [4].
7 Ibid, [263].
8 Ibid, [265].
9 Ibid, [5].
10 Ibid, [7].
11 Ibid, [9].
12 Concise Statement filed by the ACCC in *ACCC v Google*, [38].

The Expert Evidence

Each party adduced expert evidence in support of their respective contentions as to how the Notification would have been understood by consumers. The ACCC called Associate Professor Elise Payzan-LeNestour, a behavioural scientist who purported to have expertise in the field of "*neurofinance*".[13] She gave evidence with respect to how users would have interpreted the impugned statements, having regard to "*key behavioural science principles*" and based on her "*own reading and personal understanding of the Notification*".[14]

Google responded by calling Professor John List. Professor List produced a report criticising Associate Professor Payzan-LeNestour's evidence as consisting of subjective conjecture based on undefined criteria and lacking the support of empirical evidence.[15] Associate Professor Payzan-LeNestour responded with a sur-reply report that "*maintained and repeated the substance of the views she expressed in her first report*".[16] This was followed by a joint report setting out the areas on which the two experts agreed and disagreed.[17]

Although Yates J admitted the evidence of both experts and found it provided "*some relevant background material, and some context in which to consider the Notification*", his Honour ultimately found it to be "*of very limited assistance, despite the time devoted to it at the hearing*".[18] His Honour was particularly critical of Associate Professor Payzan-LeNestour's evidence, noting that it largely involved her own "*non-expert reading*" of the Notification.[19]

Decision

Justice Yates ultimately dismissed the ACCC's case.[20] In finding that the Notification Conduct and the Notification Representations did not contravene the ACL, his Honour relevantly made the following observations:

1) Insofar as the ACCC's case was based on Google omitting information from the Notification, Google's conduct must be evaluated against the premise that users *actually read* page 1 of the Notification because users who did not take the trouble to do so "*would not have been acting reasonably in their own interests*".[21]

2) By page 1 of the Notification, Google explicitly informed users of the matters for which it was seeking consent.[22] Although the Notification did not use the words "*combined*" or "*associated*", users — acting reasonably in their own interests — would have understood the reference to "*more information*" being available in their Google Account as meaning Google would now combine or associate the new information with the personal information already existing in their accounts, and that this information, as a whole, could be used by Google.[23]

3) Contrary to the ACCC's submission, the screens in D3 and D4 of the Notification could be combined so as to constitute a "*single source of information*", because the screens in D2 to D5 constituted "*one page through which [users] were required to scroll*".[24]

4) It was not relevant to the ACCC's pleaded case that Google presented the proposed changes as beneficial for users without also referring to the fact that the proposed changes were beneficial for Google.[25]

In finding that the Explicit Content Representation did not contravene the ACL, his Honour was satisfied that Google sought the consent of users in relation to the combination and use of their data, and only combined and used that data with users' explicit consent.[26]

Takeaways

The key takeaway from Yates J's decision is the approach to the expert evidence adduced by the parties.

In cases involving allegations of false, misleading or deceptive representations,[27] it is increasingly common for parties to rely on expert evidence in relation to how ordinary and reasonable consumers would likely have interpreted the statements sought to be impugned. Such a strategy may cause an expert to stray beyond their "*specialised knowledge*" or verge on answering the ultimate issue in the case.[28] While the latter is not prohibited in Australia,[29] it can nevertheless be a cause for scepticism by judges, because it may be seen as undermining the "*essential curial function*" of the Court.[30]

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13 *ACCC v Google,* [13], [14] and [18].
14 Ibid, [163] and [231].
15 Ibid, [186].
16 Ibid, [223].
17 Ibid, [225].
18 Ibid, [227].
19 Ibid, [235].
20 Ibid, [291].
21 Ibid, [240].
22 Ibid, [242].
23 Ibid, [245].
24 Ibid, [91] and [252].
25 Ibid, [254].
26 Ibid, [277].
27 Including also deceptive similarity in relation to s 120(1) of the *Trade Marks Act 1995* (Cth): *Mitolo Wines Aust Pty Ltd v Vito Mitolo and Son Pty Ltd* [2019] FCA 902.
28 As Mason P cautioned, judges should "*exercise particular scrutiny when experts move close to an ultimate issue, lest they arrogate expertise outside their field or express views unsupported by disclosed and contestable assumptions*": *R v GK* [2001] NSWCCA 413; (2001) 53 NSWLR 317, [40].
29 *Evidence Act 1995* (Cth), s 80.
30 *Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd (No 6)* (1996) 64 FCR 79, [83] per Lindgren J, quoted in *Australian Competition and Consumer Commission v Lux Pty Ltd* [2003] FCA 89, [15].

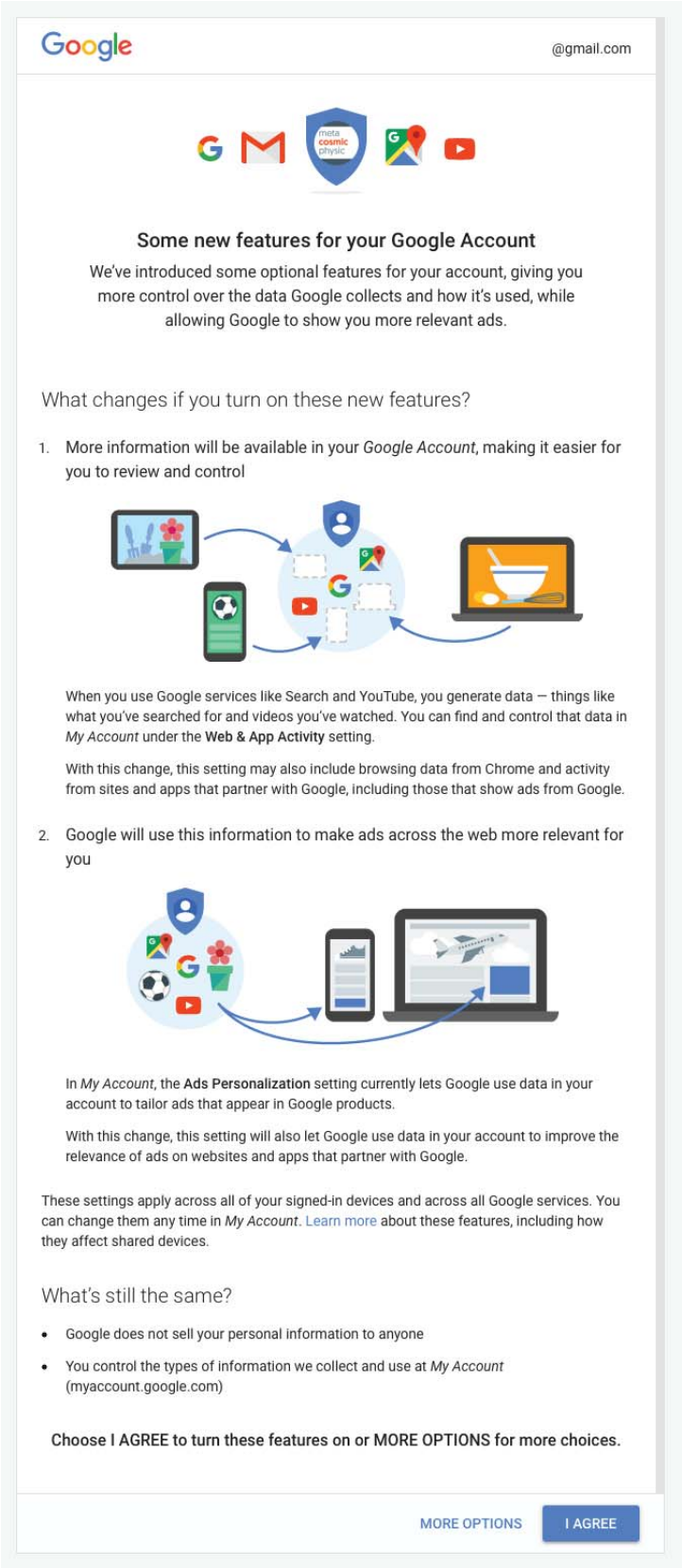

Figure 1: The Notification[45]

The approach of Yates J to Associate Professor Payzan-LeNestour's evidence illustrates the point. Associate Professor Payzan-LeNestour's opinions were in essence that Google had manipulated and misled Google account holders into accepting the changes the subject of Narnia 2.0:

> *"it is likely that many users — including internet-savvy users — were misled by the way the proposed change was described in the Notification, and that they agreed to something different from the actual change intended by Google."*[31]

His Honour was highly critical, considering those opinions to consist largely of "*hypotheses, conjecture, or predictions*"[32] which "*cannot be accepted or rejected without subsequent testing by empirical analysis*".[33] Further, his Honour characterised Associate Professor Payzan-LeNestour's subsequent analysis of the meaning arising from the Notification as proceeding "*from her own non-expert reading of the Notification*" in circumstances where she was not an expert in textual analysis.[34] However, rather than excluding her evidence, Yates J ultimately placed limited weight on it:

> *"As the tribunal of fact, I am able to read and form my own views as to what the Notification says and whether, on the evidence before me, it is accurate or inaccurate in the particular respects raised by the present case."*[35]

This approach is not dissimilar to that applied by Thawley J in an earlier proceeding commenced by the ACCC against Google.[36] That case also concerned alleged contraventions of the ACL by Google and saw both parties adduce evidence from behavioural experts.[37] Thawley J similarly gave that evidence limited weight, but was marginally more receptive:

> *"The experts ultimately agreed in their Joint Report that "[b]ehavioural economics ... yields ambiguous predictions regarding the effort users will put into reading and navigating" the screens. As both parties ultimately submitted, in short, the economists agreed that behavioural economics alone could not predict how users' decision-making would be affected by the screens. Nevertheless, the various points the experts made, which accord with common-sense, are useful in considering how a user faced with the various screens referred to in the proceedings might have reacted."*[38]

31 An excerpt of Associate Professor Payzan-LeNestour's evidence referred to by Yates J at [165] in *ACCC v Google*.
32 *ACCC v Google,* [231].
33 Ibid, [233].
34 Ibid, [235].
35 Ibid, [235].
36 [2021] FCA 367.
37 Professor List for Google and from Professor Robert Slonim (also a behavioural economics expert) for the ACCC.
38 *Australian Competition and Consumer Commission v Google LLC (No 2)* [2021] FCA 367, [64].

Such comments ought to be considered carefully in future disputes where the meaning of an allegedly misleading statement is in issue. They point to a general degree of scepticism on the part of the Court towards expert evidence as to the meaning of statements sought to be impugned. This is not a recent phenomenon.[39]

Nevertheless, there may be circumstances in which the evidence of behavioural economists, behavioural scientists and marketers is of assistance to the Court. For example, in *Australian Competition and Consumer Commission v Trivago N V*,[40] which concerned contraventions of the ACL in relation to strike-through pricing, Moshinsky J highlighted the potential utility of behavioural economics in assisting the Court to understand consumer interactions with websites.[41] His Honour admitted the majority of the evidence of Professor Robert Slonim, a behavioural economist, "*about the purchasing decisions of consumers in the context of evaluating, comparing, choosing and purchasing hotel accommodation online*", observing that:

> "*Evidence of this nature is potentially of assistance in a case such as this in determining whether or not the alleged representations were conveyed by the website and whether or not consumers were likely to be misled. It cannot be assumed that, even if the Judge has used such websites on occasion, he or she is necessarily familiar with the way in which consumers generally, or a substantial portion of consumers, interact with such a website.*"[42]

While these decisions suggest that the value of the evidence of a given behavioural expert may differ depending on the circumstances of the particular case, they also demonstrate the importance of credible and transparent reasoning when an expert applies their "*specialised knowledge*" to the facts at hand. The requirement that an expert's opinions be wholly or substantially based on their specialised knowledge looms large.[43] While in *Trivago* Moshinsky J was persuaded that Professor Slonim's specialised knowledge had been clearly and logically applied to the facts,[44] Yates J was ultimately highly critical of the non-expert assumptions that informed Associate Professor Payzan-LeNestour's reasoning in *ACCC v Google*.

39 See e.g., *Cat Media Pty Limited v Opti-Healthcare Pty Limited* [2003] FCA 133, [55].

40 [2020] FCA 16 (***Trivago***).

41 *Trivago,* [154].

42 *Trivago,* [153].

43 *Evidence Act 1995* (Cth), s 79.

44 *Trivago,* [152].

45 Screens D2-D5 as extracted at *ACCC v Google,* [91].

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