MLL117 Misleading Conduct and Economic Torts
Trimester 2 2021
Assignment – Case Analysis – Individual Assignment

DUE DATE AND TIME:	**Thursday, 9 September 2021, by 8:00pm (AEST)**
PERCENTAGE OF FINAL GRADE:	**40%**
WORD COUNT:	**2,500 words (strict word limit)**

Australian Competition and Consumer Commission v Google LLC

(No 2) [2021] FCA 367

CASE ANALYSIS – 40%

Case: *Australian Competition and Consumer Commission v Google LLC (No 2)* **[2021] FCA 367**

 Court: Federal Court of Australia

Judge: Thawley J

Date of judgment: 16 April 2021

DESCRIPTION

The ability to read, analyse and interpret a case is a foundational legal skill that you will use daily in legal practice or within an academic environment. This is an important skill for a lawyer to develop – most practising lawyers are expected to contribute to the firm's client newsletter summarising a decision for clients. Often, these newsletter items are also published online to the general public to raise the profile of the firm. More generically, the skills associated with this task will help you develop the writing and analytical skills you will need for a wide range of legal tasks, whether in legal practice, government or business.

This assessment requires you to provide a written summary of the decision in *Australian Competition and Consumer Commission v Google LLC (No 2)* [2021] FCA 367, where Thawley J in the Federal Court of Australia held that Google engaged in conduct that breached provisions in the *Australian Consumer Law* (ACL), most relevantly s 18 of the ACL. The basis for the contravention was that Google had misled certain classes of users about whether Google would collect, retain and use personal data about a user's location.

This case has been chosen because of its significance in a number of areas:

1. It demonstrates that a key priority for the ACCC will be on the information provided by businesses to consumers about online privacy and about how personal data is collected and used.

2. The decision develops the law relating to the correct approach where the conduct is directed to a diverse class of persons who might have a variety of 'reasonable' responses to the respondent's conduct; and

3. The case confirms that the Federal Court is willing to rely on evidence from behavioural economists to assist with the determination of how consumers process information, particularly digital information.

To be clear, you are not required yourselves to discuss the legal or practical significance of the case, or to provide a commentary on the decision. Your only task is to summarise and explain the facts, issues and arguments, and reasons for judgment. We have explained why we think the case is significant in order to explain why we chose it, but it is not necessary for

you to elaborate on these points. This is further explained in the 'What is not required' section below.

SPECIFIC REQUIREMENTS

To complete this assessment you are required to draw on your knowledge of the online content (and related seminars) from Weeks 5 and 6 to analyse and summarise the decision.

You should complete the case analysis based on the unit materials provided by the unit team for Weeks 5 and 6. The unit materials include: slides, videos, podcasts, prescribed readings, written materials on the unit site and any other material provided by the unit team, such as in seminars. This includes the material from the week 7 seminar, where the content for week 6 is discussed.

Your assignment must be no more than 2,500 words. There is no 10% tolerance allowed above 2,500 words. It can be less than 2,500 words, as long as you adequately cover the elements of the case specified below. It is a matter for your own academic judgement as to whether you have done this, and not something on which the teaching team can advise.

As there is a strict word limit of 2,500 words, and as the case is lengthy and complex, we have provided you with a cut down version or extract of the case which you should use as the basis for preparing your assignment. You should limit your discussion to those aspects of the case included in the extract. This has been done to ensure that you can complete your assignment within the strict 2,500 word limit. As you will see, your focus will be on:

1. The conduct that was the subject of Scenario 1 only; and

2. The contravention of s 18 only.

You do not need to cover in your paper those aspects of the decision that related to Scenarios 2 and 3, or the contraventions of ss 29 and 34. However, you can if you wish when providing an overview of the decision *briefly* (in a few words) mention that the ACCC did rely on other conduct, and that ss 29 and 34 were also found to be contravened.

WHAT IS NOT REQUIRED

A case analysis will identify the material facts and key issues in the case, the main arguments (submissions) put forward by the parties to the court as to why these issues should be decided in their favour, and the reasons given by the court for its decision on these issues. (You do need to cover these matters in your paper.)

A case analysis will also often discuss the wider legal or policy implications of the decision, and identify aspects of the law that might be unsatisfactory and in need of reform – but that is not a requirement of this assignment. Nor do you need to provide a commentary on the court's reasoning or discuss the correctness of the decision. Rather you will be analysing the case by (a) identifying and narrating the material facts (those facts which the judge relied upon in reaching his decision); and (b) identifying and explaining the key issues in the case

and the parties' arguments (submissions) on those issues, and (c) identifying and explaining the court's reasons for its decision on those issues.

A case analysis might or might not involve research on the topic. This assessment task does not require you to conduct research or identify further resources not contained in the unit materials. As discussed in the previous section ('Specific Requirements'), you can complete this assessment task by using the knowledge acquired from the cloud material provided by the unit team for Weeks 5 and 6 (and the related seminars), as well as from prescribed readings.

THE STRUCTURE OF THE CASE ANALYSIS

In the discipline of law there is no prescribed format or structure that a case analysis must follow. For this assessment, you should structure your case analysis around the three key elements specified below.

There is no need to provide an introduction or conclusion.

The case analysis must be written in full (i.e. dot points, contractions etc are **not** acceptable). While you must use legal phrasing and terminology (i.e. use the words the courts use) you should avoid lengthy quotes so that you demonstrate that you understand the principles and concepts involved. For general guidance on how to approach your case analysis, refer to the HD Sample Answer provided in the Assessment Information area under the Content tab on the unit site.

For the purposes of this assessment, please structure your paper around the three elements below. The bullet points under each element represent matters that you should include when preparing your case analysis. They are not prescriptive subheadings (i.e. you do not have to use them as subheadings). However, you can use them as subheadings if you wish, in addition to any other subheadings you consider appropriate.

Factual and procedural background (element 1)

o   Facts

o   Procedural history of the litigation

Notes:

1.   This should be a *concise* statement of the material facts and procedural history – most of your word count should be devoted to elements 2 and 3.

2.   Where the case is a first instance decision your discussion of procedural history should be very brief – essentially just a narration of facts such as the court in which proceedings were commenced, the name of the judge, the date of the decision and the primary allegations based on the facts as recounted.

3. In this section you might wish to briefly (in a few words) refer to the fact that the ACCC relied on other conduct, and that Google was held to have contravened ss 29 and 34 in addition to s 18. However, the primary focus of the paper should be on the conduct that constituted Scenario 1 and the contravention of s 18 that was found to arise from that conduct.

Issues and arguments (element 2)

o   The key issues in the case on which the court had to decide, and the major arguments (submissions) presented to the court on behalf of the ACCC and Google on those issues, to the extent they are set out in the extract.

Notes:

1. In this section you should only discuss the main issues and the arguments put to the court by the ACCC and Google about why the Court should find in their favour on those issues.

2. You should limit yourself to the following aspects of the case, as covered in the extract:

    a. Scenario 1; and
    b. The s 18 contraventions only (not the s 29 or s 34 contraventions).

The decision (element 3)

o   Reasoning and holding(s)/finding(s) of the Court - remember to again limit your discussion to the key aspects of the case set out in element 2.

Notes:

1. This is where you should discuss the reasons given by Thawley J for rejecting Google's submissions and finding in favour of the ACCC.

LEARNING OUTCOME DETAILS

This task allows you to demonstrate achievement towards the unit learning outcomes. The ULOs are aligned with specific graduate learning outcomes – that is, the skills and knowledge graduates are expected to have upon completion of their studies – and this assessment task is an important tool in determining achievement of those outcomes.

If you do not demonstrate achievement of the unit learning outcomes, you will not be successful in this unit.

It is good practice to familiarise yourself with the ULOs and GLOs as they provide guidance on the knowledge, understanding and skills you're expected to demonstrate upon completion of the unit. In this way they can be used to guide your study.

The Learning Outcomes that this assessment task is designed to assess are as follows:

Unit Learning Outcome (ULO)	Graduate Learning Outcome (GLO)
ULO 1: Identify and explain the principles underlying the key common law torts and statutory provisions regulating false or misleading statements, defective products and economic loss.	GLO1: Discipline-specific knowledge and capabilities
ULO 2: Communicate discipline knowledge in writing to a legal audience using appropriate language, consistent with legal conventions.	GLO2: Communication
ULO 3: Apply relevant reasoning and interpretation to analyse and summarise a key case in this discipline area.	GLO 4: Critical thinking

CRITERIA AND WEIGHTINGS

Your assignment is worth 40% of your final mark in this unit. You will be assessed according to the following criteria:

- Accurate summary of the factual and procedural background to the case (element 1) – 7.5 marks

- Accurate summary of the issues and major arguments (element 2) – 10 marks

- Accurate summary and analysis of the reasons for the decision in the case (element 3) – 15 marks

- Presentation and communication and compliance with legal conventions – 7.5 marks

You will receive a mark for each of the above criteria, which will then be added together to give your total mark out of a maximum of 40 marks. The full marking rubric with more detailed descriptors is available at the end of this document and also on the unit site under Assessment Resources.

OTHER IMPORTANT INFORMATION ABOUT THIS ASSESSMENT

DUE DATE AND EXTENSION REQUESTS

1. This assignment is due by 8:00pm on Thursday 9 September 2021 (AEST). Extension requests must be made using the University Assessment Extension Application Form, available in the Assessment Information area under the content tab on the unit site. Extension requests are granted where there are unforeseen or exceptional circumstances impeding your ability to complete; they are not available as a result of

foreseeable work or study commitments. Nor are extensions available for computer failure, so please ensure that you keep backups of all drafts.

NB: the process for applying for an extension might change if the new online extension tool is available in T2.

2. The allowable grounds for an extension are the same as for applications for special consideration - see further information at: http://www.deakin.edu.au/students/studying/assessment-and-results/special-consideration

3. The unit chair will request supporting documentation or other evidence of the relevant circumstances.

4. Requests for extensions must ordinarily be made at least 3 working days before the assignment due date. Requests should only be made after this time where there are exceptional reasons for doing so. Extension requests *cannot* be made after the due date. You must apply for Special Consideration if the due date for the assignment has passed.

5. If an extension is granted, the period of the extension will be commensurate to the circumstances which have affected the completion of your assignment. For example, if you were affected by a medical condition for three days, you would expect that the extension granted would be three days. This means that if you submit an extension request, we do not expect you to provide information to us that is sensitive and thus inappropriate to be disclosed, but we do expect you to be able to provide us with an adequate explanation of the circumstances that have led to your extension request. If you do not explain those circumstances, it is not possible to grant an extension, as it is not possible to assess the extent to which the completion of your assignment has been affected.

6. The maximum extension period that can be granted is two weeks. If you require an extension of longer than two weeks you must apply for Special Consideration.

7. For further information please refer to the Faculty Guidance on Extension Request processes, available in the Assessment Information area under the content tab on the unit site.

PENALTIES FOR LATE SUBMISSION

8. The following marking penalties will apply if you submit an assessment task after the due date without an approved extension: 5% will be deducted from available marks for each day up to five days, and work that is submitted more than five days after the

due date will not be marked and you will receive 0% for the task. 'Day' means calendar day for electronic submissions. The Unit Chair may refuse to accept a late submission where it is unreasonable or impracticable to assess the task after the due date.

9. Calculation of the late penalty is as follows: *this is based on the assignment being due on a Thursday at 8:00pm*

- 1 day late: submitted after Thursday 11:59pm and before Friday 11:59pm– 5% penalty.
- 2 days late: submitted after Friday 11:59pm and before Saturday 11:59pm – 10% penalty.
- 3 days late: submitted after Saturday 11:59pm and before Sunday 11:59pm – 15% penalty.
- 4 days late: submitted after Sunday 11:59pm and before Monday 11:59pm – 20% penalty.
- 5 days late: submitted after Monday 11:59pm and before Tuesday 11:59pm – 25% penalty.

Dropbox closes the Tuesday after 11:59pm Melbourne time.

SUBMISSION AND PLAGIARISM DECLARATION

10. All assignments are to be submitted online via the unit site in the Dropbox. You are not required to use *Turnitin* to 'check your draft', but you are advised to do so to enable you to identify and correct any inadvertent plagiarism in your assignments prior to final submission. *No hard copy assignments will be accepted.* Should you have technical difficulties submitting via the Dropbox please contact the IT service desk for assistance (details at http://www.deakin.edu.au/about-deakin/administrative-divisions/esolutions/it-help). If your difficulties are not resolved in time to enable you to submit by the due date and time, email your assignment to the unit chair (sharon.erbacher@deakin.edu.au) by the due date and time and include your IT reference number in the email.

11. It is possible to submit more than one document to the Dropbox; consequently, if you submit early and then decide you wish to replace your assignment with a modified version, you may do so. **Make sure that you have submitted the final version of your assignment and that you have submitted the correct assignment for this unit; also that your assignment is readable.** This is your responsibility. The unit team does not have the capacity to check the correctness of your submission for you. The last assignment submitted prior to the due date will be the one that is assessed.

12. You will receive an email to your Deakin email address confirming that it has been submitted. You should check that you can see your assignment in the Submissions view of the Assignment dropbox folder after upload, and check for, and keep, the email receipt for the submission.

13. There is no need to upload a cover sheet with your assignment. However, please note that the Dropbox folder includes a **plagiarism declaration**. Submission of your assignment indicates acceptance of this declaration.

14. Any work you submit may be checked by electronic or other means for the purposes of detecting collusion and/or plagiarism. The University regards plagiarism as an extremely serious academic offence. Information about the University's rules in this regard can be found in the assessment area in the cloud site and also as part of *Rights and responsibilities as a student*. You should also be aware that, if an allegation of academic misconduct (including plagiarism or collusion) is made against you, you will be required to disclose this to the Board of Examiners when seeking admission to legal practice. Please avoid putting yourself in this position.

15. For further information about conduct amounting to a breach of academic integrity (academic misconduct), such as plagiarism or collusion, refer to the Student Academic Integrity Policy at https://policy.deakin.edu.au/view.current.php?id=00107. Refer to clause 12 of the policy for examples of breaches of academic integrity.

CONTRIBUTION TO FINAL MARK

16. This assignment is worth 40% and is compulsory. Failure to submit this assignment by the due date and time (without prior extension) will result in a score of zero (0) for this assignment (subject to the late marking policy referred to in paragraphs 8 and 9 above). Your final grade for the unit comprises the sum of all the marks received for each of the assessment items.

WORD LIMIT

17. The word limit for this assignment is 2,500 words. A 10% tolerance above this is **not** permitted. The word limit will be strictly enforced and words in excess of 2,500 words will not be marked. There are important reasons for imposing and enforcing word limits. Strict word limits are something lawyers have to grapple with in practice. For example, arguments for special leave to the High Court must not exceed 10 pages (responses to those applications must not exceed 5 pages) and must adhere to formatting requirements. Oral arguments for special leave to appeal to the High Court must not exceed 20 minutes. More importantly, there is an important skill associated with conveying your arguments with brevity. It is often harder to be brief than verbose when formulating an argument but working to achieve the former will normally produce a better result; as with most things, quality is more important than quantity!

18. The word limit applies to all components of the assessment, including references and all preliminary matters such as the assignment title.

19. You must include a word count at the beginning of the assignment.

FORMAT AND REFERENCING

20.   This assessment should be structured around the three key elements discussed above under 'Structure of the case analysis'. There is no need to provide an introduction or conclusion.

21. The submission should be written in essay style, with sub-headings to provide structure. Note form is not acceptable.

22. You should not include a bibliography.

23. Any material used in this assignment that is not your original work must be acknowledged as such and appropriately referenced. You can find information about plagiarism and other study support resources at the following website: http://www.deakin.edu.au/students/study-support

24. Your referencing and citations should comply with the Australian Guide to Legal Citation 4 (AGLC4) for this assessment task. The Deakin Guide to Referencing - AGLC summarises the key points relating to referencing and citation in compliance with AGLC 4.

25. **You must use pinpoint referencing** when referring to the decision; i.e. you should refer to the paragraph number [1234] where the relevant proposition is located. This is very important when covering Elements 2 and 3 (but is not necessary when explaining the facts and history (Element 1)). Where a pinpoint reference is required, it will be sufficient to include the relevant paragraph number. You do not need to include the fact that the reference is from the *Google* decision, provided this would be clear from the context of your discussion.

26. **You must cite authorities in-text**; that is, in the body of the document, rather than in footnotes (this is different to what you would ordinarily do under the AGLC). **One mark will be deducted under criteria 4 of the marking rubric if footnotes are used contrary to these instructions.**

27. You must present your work professionally. We recommend that you use a size 12 font (Calibri Body or Times New Roman) with a line spacing of 1.5.

28. You should submit your assignment using either .doc, .docx or .rtf format. Please avoid submitting assignments in Pages, Wordperfect, Works formats; if you use programs producing these formats, please save your assignment as an .rtf file before uploading to ensure the system can view the file.

MARKING AND FEEDBACK

29. The marking rubric for this task is below and also available in the unit site - in the Assessment folder (under Assessment Resources).

30. It is always a useful exercise to familiarise yourself with the criteria before completing any assessment task. Criteria act as a boundary around the task and help identify what assessors are looking for specifically in your submission. The criteria are drawn from the unit's learning outcomes ensuring they align with appropriate graduate attribute/s.

31. Identifying the standard you aim to achieve is also a useful strategy for success and to that end, familiarising yourself with the descriptor for that standard is highly recommended.

32. If you submitted by the due date your assignment will be marked, commented upon and returned to you via the Dropbox within 15 working days of the due date. In the event of an unavoidable delay you will be advised immediately via the discussion forum on the unit site.

33. Your marked assignment may contain a range of positive and negative feedback. The purpose of this feedback is to help you learn from your submission. Please take the opportunity to consider the feedback you have received and to think about how you might use that feedback to improve on future assignments and/or to keep doing the things that you have been doing well. It is not necessarily the case that every item of positive feedback is something that you 'gained marks' for, or that every item of negative feedback is something that you 'lost marks' for. In other words, not every piece of feedback is provided to explain the mark; sometimes it is there to help you learn and improve in the future.

ASSIGNMENT DISCUSSION

34. Assignment FAQs have been posted to the Case Analysis Discussion forum on the unit site. Any further queries regarding this assignment should be posted to that forum. This ensures that all students are able to see the question and answer on the forum. Questions about this assignment should not be emailed to members of the unit team or asked in seminars. Please note that we expect you to have read through this document and the FAQs carefully, and will not respond to questions where the answer has been provided in either document.

SUPPORT

35. The Division of Student Life provides a range of Study Support resources and services, available throughout the academic year, including **Writing Mentor** online drop ins and

the SmartThinking 24 hour writing feedback service at this link. If you would prefer some more in depth and tailored support, make an appointment online with a Language and Learning Adviser.

BUILDING A PORTFOLIO

Building a portfolio that evidences your skills, knowledge and experience will provide you with a valuable tool to help you prepare for interviews and to showcase to potential employers. There are several tools that you can use to build a portfolio. You are provided with cloud space through OneDrive, or through the Portfolio tool in the Cloud Unit Site, but you can use any storage repository system that you like. Remember that a Portfolio is YOUR tool. You should be able to store your assessment work, reflections, achievements and artefacts in YOUR Portfolio. Once you have completed this assessment piece, add it to your personal Portfolio to use and showcase your learning later, when applying for jobs, or further studies. Curate your work by adding meaningful tags to your artefacts that describe what the artefact represents.

Criteria	Fail (not attempted)	Needs improvement	Satisfactory	Good	Very Good	Exemplary
Accurate summary of the factual and procedural background to the case **(7.5 points)** ULO1 GLO1, ULO 3 GLO4	1 point Does not identify any of the factual or procedural background to the case (0-2.1 points)	3 points A bit of the factual or procedural background to the case was identified but a lot of it was not and/or a lot of irrelevant or immaterial information was provided (2.2-3.6 points)	4 points Some of the factual and procedural background to the case was identified but there were some omissions and/or some irrelevant or immaterial information was provided (3.7-4.4 points)	4.8 points Most of the factual and procedural background to the case has been correctly identified (4.5-5.1) points)	5.5 points All of the factual and procedural background to the case has been correctly identified apart from some minor omissions (5.2-5.9points)	7.5 points All of the factual and procedural background to the case has been correctly identified (6-7.5 points)
Accurate summary of the issues and major arguments	1.4 points Does not identify any of the relevant issues or major arguments	4 points A small number of the issues or major arguments were identified but there	5.4 points Some of the relevant issues and major arguments were identified but some were	6.4 points Most of the issues and major arguments have been correctly identified but greater detail was	7.4 points All of the issues and major arguments have been correctly identified apart from some minor	10 points All of the issues and major arguments have been correctly identified

(10 points) ULO1 GLO1, ULO3 GLO4		were a significant number of issues or major arguments that were not identified and/or a lot of irrelevant or immaterial information was provided (3-4.9 points)	not identified and/or required further discussion (5-5.9 points)	required and/or a couple were missing (6-6.9 points)	errors and/or minor lack of detail (7-7.9 points)	(8-10points)
	(0-2.9 points)					
Accurate summary and analysis of the decision **(15 points)** ULO1	2.2 points Does not accurately identify any of the reasons for the decision	6 points Insufficient identification and analysis of the reasons for the decision	8 points Some of the reasons for the decision were accurately identified and analysed but there were errors in the analysis and/or some irrelevant or immaterial information was provided and/or	9.75 points Accurate analysis of most of the reasons for the decision with good judgment about the weight to be given to particular elements	11.2 points Accurate analysis of the reasons for the decision with only minor errors	15 points Accurate analysis of all of the reasoning with no errors.

GLO1, ULO 3 GLO4			judgment was lacking about the weight to be given to the elements of the decision (7.5-8.9 points)			
	(0-4.4 points)	(4.5-7.4 points)		(9-10.4 points)	(10.5-11.9 points)	(12-15 points)
Presentation and communication (7.5 points) ULO2 GLO2	1 points Presentation, structure and clarity of expression is very poor and/or does not demonstrate any awareness of purpose and context and/or no real attempt made to format or reference legal sources in accordance with the	3 points Presentation, structure and clarity of expression is poor and/or does not demonstrate a satisfactory awareness of purpose and context and/or the formatting or referencing of legal sources does not	4 points The structure, presentation and expression could have been improved in significant ways. There is a satisfactory awareness of purpose and context however there are notable spelling, grammatical and/or punctuation errors which derogate from the professional presentation of the paper and/or the	4.8 points Presentation, structure and clarity of expression is good though some improvement was warranted. Language is appropriate for purpose and context. The document tends to be logically structured, including use of appropriate headings, and the formatting and	5.5 points Presentation, structure and clarity is very good, except in some minor respects. Language is appropriate for purpose and context. The document is generally structured logically and uses appropriate headings, and the formatting and	7.5 points The assignment uses clear expression throughout. The language demonstrates an understanding of the purpose and context, the document is structured logically and uses appropriate headings. The document is formatted and legal sources are referenced in accordance with the

| | assignment instructions.

(0-2.1 points) | accord with the assignment instructions.

(2.2-3.6 points) | document is not always logically structured and/or the formatting or referencing of legal sources does not consistently accord with the assignment instructions.

(3.7-4.4 marks) | referencing of legal sources generally accords with the assignment instructions.

(4.5-5.1 points) | referencing of legal sources accords with the assignment instructions except in some minor respects.

(5.2-5.9 points) | assignment instructions.

(6-7.5 marks) |
|---|---|---|---|---|---|---|
| Overall score out of 40 | Fail (not attempted)

(0 or more) | Fail (needs improvement) (12 or more) | Pass (P)

(20 or more) | Credit (C)

(24 or more) | Distinction (D)

(28 or more) | High Distinction (HD) (32 or more) |