

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 30/07/2020 4:36:25 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Concise Statement
File Number: NSD816/2020
File Title: AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v
GOOGLE LLC
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF
AUSTRALIA



Sia Lagos

Dated: 3/08/2020 7:37:07 AM AEST

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Form NCF1

Amended Concise Statement

No. NSD816 of 2020

Federal Court of Australia

District Registry: New South Wales

Division: General

Commercial and Corporations National Practice Area (Regulator and Consumer Protection)

Australian Competition and Consumer Commission

Applicant

Google LLC

Respondent

A. OVERVIEW

- 1 This proceeding concerns the way in which Google LLC (**Google**) misled Google account holders (**Account Holders**) to obtain their consent to expand the scope of personally identifiable information that Google could collect and combine about Account Holders' internet activity, for use by Google, including for targeted advertising.
- 2 Google purported to obtain the consent of Account Holders to collect and combine this information by means of a notification displayed to Account Holders on desktop and mobile devices (the **Notification**) between 28 June 2016 and at least 10 December 2018 (the **Relevant Period**). Consumers were prompted to click 'I Agree' to the terms of the Notification. In publishing the Notification, the ACCC alleges that Google engaged in conduct that was misleading or deceptive or likely to mislead or deceive and made false or misleading representations. The ACCC also alleges that Google engaged in conduct that was misleading or deceptive or likely to mislead or deceive and made a false or misleading representation in relation to its Privacy Policy. Google derived significant commercial benefit from its contravening conduct.

B. IMPORTANT FACTS GIVING RISE TO THE CLAIM

Google Services and advertising

- 3 Consumers can (and could during the Relevant Period) become Account Holders by signing up for an account with Google (**Google Account**). To create a Google Account, consumers are required to create a username and password, provide personal information such as their name and date of birth, and are prompted to provide additional personal

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|----------------------------|---|
| Filed on behalf of | Australian Competition and Consumer Commission, Applicant |
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information such as their gender and location. An Account Holder's personal information is associated with their Google Account. Consumers are (and were during the Relevant Period) also required to click 'I Agree' during the sign-up process to accept Google's Terms of Service and Privacy Policy.

- 4 Google supplies a range of services to consumers in Australia (**Google Services**). These include Google Search, Google Maps, Gmail, YouTube, Google Play (a mobile application and online entertainment store) and Google Chrome (an internet web browser). Some Google Services, like Gmail and Google Play, require Account Holders to be signed-in to their Google Account to use the service. Other Google Services, such as YouTube and Google Maps, have reduced functionality if Account Holders are not signed-in to their Google Account when they use the service.
- 5 Google also provides advertising services and analytics services to individuals and businesses. Advertising services are provided on Google Services such as Google Search, Google Maps and YouTube, as well as on websites and mobile device based applications not published or controlled by Google that partner with Google to display advertisements (**Google Partner Websites and Apps**). Google claims that its Display Network "reaches 90% of Internet users worldwide". The Google Display Network includes certain Google websites, like Gmail and YouTube, as well as Google Partner Websites and Apps. Other websites and mobile device based applications use Google tools, such as Google Analytics, without partnering with Google to deliver advertisements (together with Google Partner Websites and Apps, **Third Party Websites and Apps**). Google derives the majority of its revenue from its advertising and analytics services.
- 6 Both before and after 28 June 2016, settings enabled by default during the sign-up process for a Google Account permitted Google to collect and store information about the activity of signed-in Account Holders across Google Services such as Google Search, Google Maps and YouTube. This included information about an Account Holder's browser and device, and their use of the Google Service, such as search queries. Google used that information to deliver targeted advertisements across Google Services to signed-in Account Holders. For example, a signed-in Account Holder searching for mountain bikes on Google Search may be shown an advertisement for sports equipment when watching a video on YouTube or may see a recommendation for a nearby bicycle shop while using Google Maps.
- 7 Both before and after 28 June 2016, Google also collected information about Account Holders' internet browsing activity on Google Partner Websites using DoubleClick cookies. This information was stored on a pseudonymous basis in association with an

identifier unique to the browser used. This information was used by Google to deliver tailored advertisements on Google Partner Websites subsequently accessed using that browser.

- 8 Google also collected information about Account Holders' activity on third party mobile device based applications (such as in-app purchases, views and interactions with in-app advertisements) using Google Mobile Ads SDK for Ad Manager (**Google Mobile Ads SDK**). This information was stored on a pseudonymous basis in association with an identifier unique to the device used and used by Google to deliver tailored advertisements on apps subsequently accessed using that device.
- 9 Prior to 28 June 2016, Google did not combine the information it collected about Account Holders' activity on Third Party Websites and Apps with Account Holders' personal information. Google was therefore unable to deliver targeted advertisements on Google Partner Websites or Google Partner Apps that used an Account Holder's personal information, information about their activities on Google Services, or information about their activities on other devices. Google was also unable to deliver advertisements on Google Services that used information about the Account Holder's activity on Third Party Websites and Apps. This was a significant constraint for Google.

Google's Privacy Policy

- 10 At all relevant times, Google's then applicable Privacy Policy applied to all services offered by Google. Google amended the Privacy Policy from time to time.
- 11 Prior to 28 June 2016, Google's Privacy Policy stated that: "*[w]e will not combine DoubleClick cookie information with personally identifiable information unless we have your opt-in consent*" (**DoubleClick Statement**). Google's Privacy Policy also states (and stated throughout the Relevant Period) "*[w]e will not reduce your rights under this Privacy Policy without your explicit consent*" (**Explicit Consent Statement**).
- 12 On 28 June 2016, Google made a change to its Privacy Policy by, among other things, deleting the DoubleClick Statement and inserting: "*[d]epending on your account settings, your activity on other sites and apps may be associated with your personal information in order to improve Google's services and the ads delivered by Google*" (**June 2016 Privacy Update**).
- 13 Depending on an Account Holder's settings, the June 2016 Privacy Update permitted Google for the first time to combine the information it collected about an Account Holder's activity on Third Party Websites and Apps with an Account Holder's personal

- 18 Under the heading the Notification stated “What changes if you turn on these new features?” and included the following:
- (a) “1. *More information will be available in your Google Account making it easier for you to review and control*”; and
 - (b) “2. *Google will use this information to make ads across the web more relevant for you.*”
- 19 The Notification emphasised the benefits to Account Holders of agreeing to turn on the ‘new features’. Account Holders were required to either click “I AGREE” or “MORE OPTIONS” in the desktop/mobile web browser and Android Operating System examples above or “I AGREE” or “Ask me later” in the mobile device examples at items 3 and 4 in Annexure A.
- 20 If the Account Holder selected “MORE OPTIONS” they were shown a new page titled “Choose what’s right for you”, which contained a link titled “Learn more about these features” and provided the Account Holder with the option to select one of the following:
- (a) ‘No changes – continue on your way’;
 - (b) ‘No changes – review key privacy settings more fully; or
 - (c) ‘Yes, I’m in – turn on these new features’.
- 21 If the Account Holder selected “Learn more” they were shown a new page titled “More about these new features”, which provided the Account Holder with links to obtain additional information about the features Google was promoting.
- 22 After reviewing the “Choose what’s right for you” page, the Account Holder could select “BACK” to return to the Notification, or select one of the three options listed in paragraph 20 and click “Done” or “Continue”, depending on the option the Account Holder selected.
- 23 During the Relevant Period at least 13.5 million Google Account Holders in Australia viewed the Notification. Over 80 per cent of those Account Holders clicked “I Agree” on the first page of the Notification.

The Notification and the Privacy Policy

- 24 If an Account Holder selected “No changes” to the Notification, no changes were made to the Account Holder’s settings and Google was not permitted to combine the

information it collected about an Account Holder's activity on Third Party Websites and Apps with an Account Holder's personal information.

- 25 If an Account Holder selected "I AGREE" to the Notification, changes were made to the Account Holder's settings that permitted Google to combine the information it collected about an Account Holder's activity on Third Party Websites and Apps with an Account Holder's personal information.

Contravening Conduct

The Notification – misleading or deceptive conduct

- 26 In relation to Account Holders who clicked "I Agree" or "Yes, I'm in – turn on these new features" and "Done" to accept the 'new features' (**Turned on the New Features**), Google considered itself authorised to:
- (a) combine or associate the Account Holder's personal information with their activity on Third Party Websites and Apps, in addition to combining or associating the Account Holder's personal information with their activity on Google Services;
 - (b) allow that combined or associated information to be used to create or generate personalised advertisements for Google Partner Websites and Apps; and
 - (c) deliver those advertisements to signed in Account Holders on both Google Services and Google Partner Websites and Apps on any device.
- 27 By the Notification, Google failed to inform, or adequately inform, Account Holders that:
- (a) Google had made the June 2016 Privacy Update to the Privacy Policy; and
 - (b) Google was seeking the Account Holder's consent to be able to undertake the matters set out in paragraph 26 above,

(the **Notification Conduct**).

The Notification - False or Misleading Representations

- 28 The Notification represented that Google was only seeking the consent of Account Holders to turn on new features which would result in:
- (a) more information being visible in the Account Holder's Google Account, making it easier to review and control; and

- (b) Google using that information to make advertisements across the internet more relevant to Account Holders,

(the **Notification Representations**).

- 29 In fact, Google was also seeking the consent of Account Holders to authorise Google to undertake the matters set out in paragraph 26 above.

Privacy Policy – false or misleading representation

- 30 In the period 28 June 2016 to at least December 2018, by making the Explicit Consent Statement, Google represented that it could not or would not reduce an Account Holder's rights under Google's Privacy Policy, without obtaining that Account Holder's explicit consent (**Explicit Consent Representation**).

- 31 In fact, Google reduced Account Holder's rights under the Privacy Policy by:

- (a) deleting the DoubleClick Statement without obtaining the explicit consent of Account Holders, thereby removing the requirement for Google to obtain the Account Holder's opt-in consent in order to combine DoubleClick cookie information with personally identifiable information;
- (b) making the June 2016 Privacy Update without obtaining the explicit consent of Account Holders, thereby permitting Google, depending only on an Account Holder's settings, to combine information it collected about an Account Holder's activity on Third Party Websites (which included information that was substantively similar to that collected using DoubleClick cookies) and Apps with the Account Holder's personal information; and/or
- (c) authorising, in respect of Account Holders who Turned on the New Features in response to the Notification, Google to undertake the conduct set out in paragraph 26 above without obtaining the explicit consent of Account Holders.

- 32 To the extent that the Explicit Consent Representation was a representation with respect to any future matter, the ACCC relies on section 4 of the Australian Consumer Law (**ACL**). From at least the time Google decided to effect the June 2016 Privacy Update, which reduced Account Holders' rights under the Privacy Policy without seeking their

explicit consent, until at least December 2018, Google did not have reasonable grounds for making the Explicit Consent Representation.

C. RELIEF SOUGHT FROM THE COURT

33 The ACCC seeks the relief set out in the accompanying Originating Application, which includes declarations, pecuniary penalties, redress/publication orders, compliance orders and costs.

D. PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

34 Google engaged in the conduct referred to at paragraph 27 and made the representations referred to at paragraphs 28 and 30 in trade or commerce.

35 By the Notification Conduct, Google engaged in conduct which was misleading or deceptive, or likely to mislead or deceive, and which was liable to mislead the public as to the nature or characteristics of Account Holders' Google Accounts and Google Services, in contravention of ss 18(1) and 34 of the ACL.

36 By making the Notification Representations, Google:

- (a) made a false or misleading representation as to the performance characteristics, uses or benefits of Account Holders' Google Account and Google Services, in contravention of s 29(1)(g),
- (b) engaged in conduct that:
 - (i) was misleading or deceptive or likely to mislead or deceive, in contravention of s 18; and/or
 - (ii) was liable to mislead the public as to the nature or characteristics of Account Holders' Google Accounts and Google Services in contravention of s 34.

37 By making the Explicit Consent Representation, Google:

- (a) made a false or misleading representation as to the performance characteristics, uses or benefits of Account Holders' Google Account and Google Services, in contravention of s 29(1)(g);
- (b) made a false or misleading representation concerning the existence, exclusion or effect of a right in relation to Account Holders' Google Account and Google Services, in contravention of s 29(1)(m); and
- (c) engaged in conduct that:

- (i) was misleading or deceptive or likely to mislead or deceive, in contravention of s 18; and/or
- (ii) was liable to mislead the public as to the nature or characteristics of Account Holders' Google Accounts and Google Services in contravention of s 34.

E. ALLEGED HARM SUFFERED

38 Google's contravening conduct:

- (a) deprived millions of Account Holders in Australia of the opportunity to make an informed choice about the collection and use to be made of their personal information by Google;
- (b) resulted in millions of Account Holders in Australia purportedly consenting to important changes to the way Google collected and used their personal information; and
- (c) resulted in millions of Account Holders in Australia providing additional, valuable personal information to Google about their internet activity, which Google in turn used to increase the value of its advertising products for commercial gain.

39 It is likely that, had the contravening conduct not occurred, a number of Account Holders who turned on the new features through the Notification would have rejected changes that the Notification enabled. Those Account Holders would not have provided Google with additional, valuable personal information about their internet activity. It is not possible to quantify how many Account Holders would have rejected these changes and therefore not possible to quantify the loss or damage suffered by consumers as a result of Google's contravening conduct.

40 The contravening conduct enabled Google to combine and use information about Account Holders to deliver personalised advertisements from which Google derived substantial revenue. Google thereby derived substantial commercial benefit from its contravening conduct.

Date: 30 July 2020



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Signed by Andrew Riordan
Norton Rose Fulbright Australia
Lawyers for the Applicant

This Concise Statement was prepared by Andrew Riordan of Norton Rose Fulbright Australia and settled by Kate Morgan SC and Daniel Tynan of Counsel.

Certificate of lawyer

I Andrew Riordan certify to the Court that, in relation to the Concise Statement filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 30 July 2020

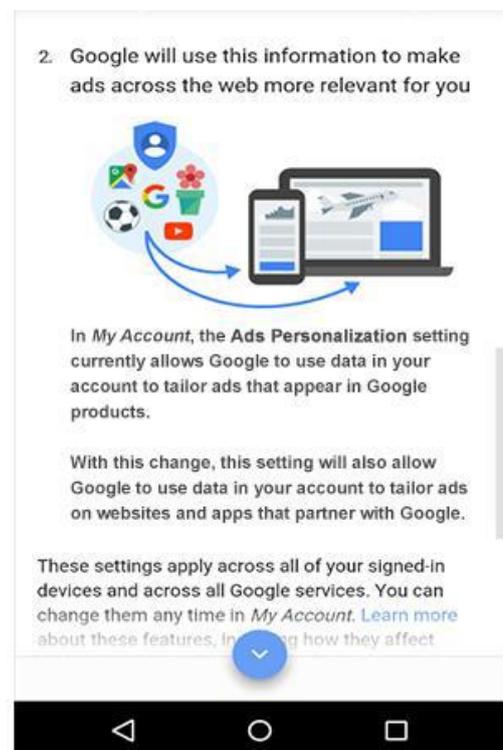
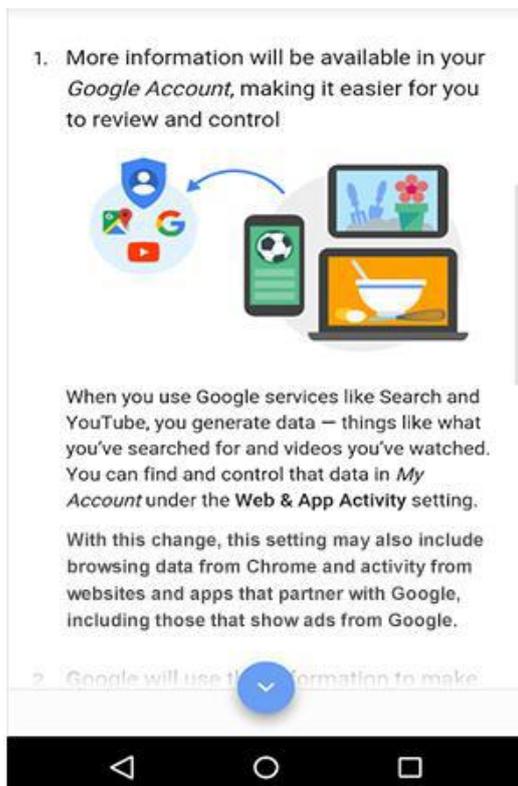
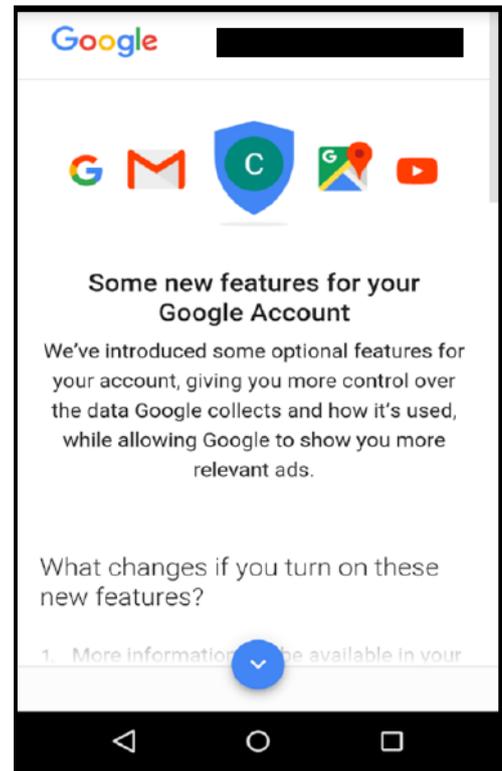
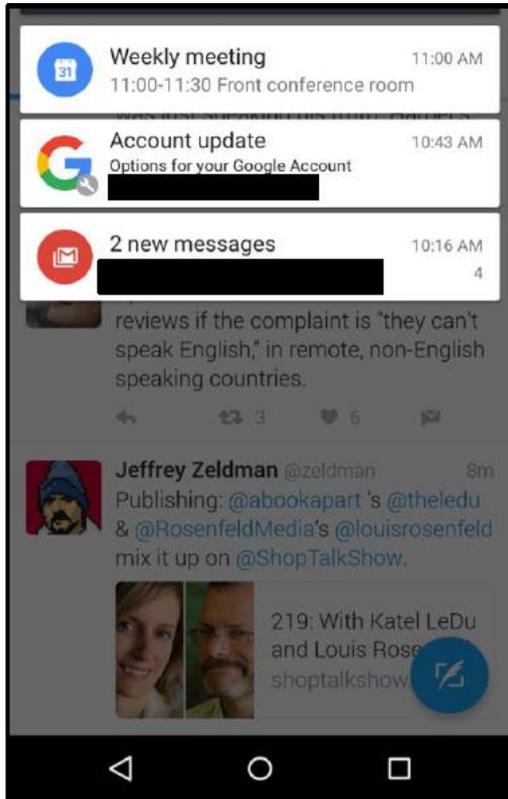


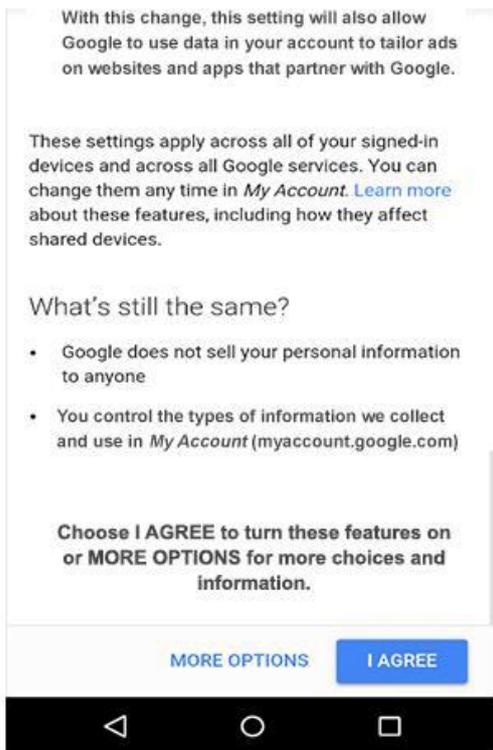
Signed by Andrew Riordan

Lawyer for the Applicant

Annexure A

1. Notification shown to existing Account Holders on an Android mobile device as an Operating System notification





2. Notification shown to existing Account Holders on a desktop device web browser and mobile device web browser



Google



Some new features for your Google Account

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.

What changes if you turn on these new features?

1. More information will be available in your *Google Account*, making it easier for you to review and control



When you use Google services like Search and YouTube, you generate data – things like what you've searched for and videos you've watched. You can find and control that data in *My Account* under the **Web & App Activity** setting.

With this change, this setting may also include browsing data from Chrome and activity from websites and apps that partner with Google, including those that show ads from Google.

▼

With this change, this setting may also include browsing data from Chrome and activity from websites and apps that partner with Google, including those that show ads from Google.

 You have Chrome browsing history stored in your *Google Account*. [Learn more](#) about how turning on this setting affects how this data is used for personalization.

2. Google will use this information to make ads across the web more relevant for you



In *My Account*, the **Ads Personalization** setting currently allows Google to use data in your account to tailor ads that appear in Google products.

With this change, this setting will also allow Google to use data in your account to tailor ads on websites and apps that partner with Google.

These settings apply across all of your signed-in devices and across all Google services. You can change them any time in *My Account*. [Learn more](#) about these features, including how they affect shared devices.

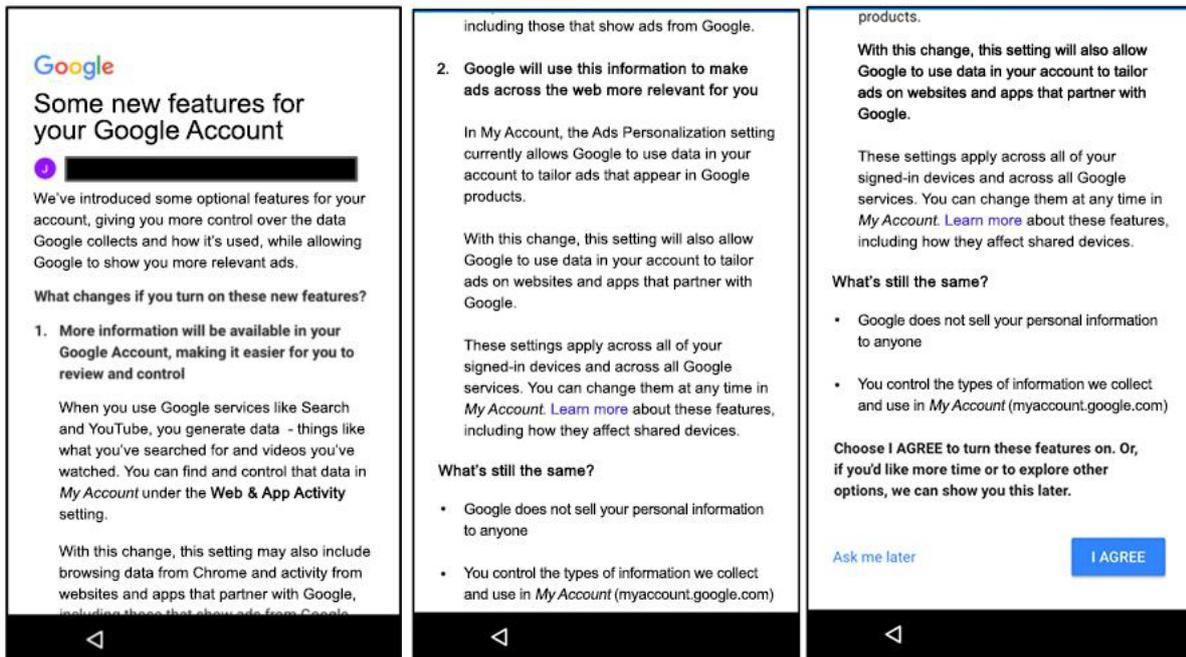
What's still the same?

- Google does not sell your personal information to anyone
- You control the types of information we collect and use in *My Account* (myaccount.google.com)

Choose **I AGREE** to turn these features on or **MORE OPTIONS** for more choices and information.

MORE OPTIONS **I AGREE**

3. Notification shown to existing Account Holders on a non-Android mobile device



4. Notification shown to existing Account Holders on an Android mobile device

