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### Details of Filing

|                  |   |
|------------------|---|
| Document Lodged: | Concise Statement                                     |
| File Number:     | NSD190/2021   |
| File Title:      | EPIC GAMES, INC & ANOR v GOOGLE LLC & ORS             |
| Registry:        | NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA |



Dated: 10/03/2021 9:05:12 AM AEDT

A handwritten signature in blue ink that reads "Sia Lagos".

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

## Concise Statement

No. \_\_\_\_\_ of 2021

Federal Court of Australia

District Registry: New South Wales

Division: General

**Epic Games, Inc** and another named in the schedule

Applicants

**Google LLC** and others named in the schedule

Respondents

### IMPORTANT FACTS GIVING RISE TO THE CLAIM

#### Introduction

1. This case concerns conduct of the Respondents (**Google**) which contravenes ss 46(1), 47(2) and 45 of the *Competition and Consumer Act 2010* (Cth) (**CCA**) and s 21 of the Australian Consumer Law (**ACL**) in Schedule 2 of the CCA.
2. The Applicants (**Epic**) develop entertainment software for smartphones and tablets (**smart mobile devices**), personal computers and gaming consoles. The most popular game that Epic currently makes is *Fortnite*. Epic has produced a version of *Fortnite* compatible with smart mobile devices using the Android operating system (**Android OS**) (**Android devices**). In the first year after *Fortnite*'s release in 2017, the game attracted over 125 million players; in the years since, *Fortnite* has exceeded 350 million players globally. In October 2018, the Android OS version of *Fortnite* was launched. As at February 2021, there were over 470,000 *Fortnite* players on Android devices in Australia.
3. Android OS is controlled by Google LLC. As an operating system, it provides basic functionality for the Android devices on which it is installed. It is the most ubiquitous operating system used in smart mobile devices: there are around 2.5 billion active Android devices globally and in 2019 around 1.4 billion new Android devices were sold around the world. Almost 50% of the approximately 20 million smartphones used in Australia operate Android OS.
4. Google's contravening conduct hinders or prevents the ability of Epic (and other app developers) from distributing its software applications (**apps**) to Android devices in Australia in

|   |  |     |                |
|---|--|-----|----------------|
| Filed on behalf of (name & role of party) | Epic Games, Inc and Epic Games International S.à r.l. (Applicants) |     |                |
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any way other than through Google's own app store – the **Google Play Store** (which is, itself, an app). Google achieves this by imposing various contractual and technical restrictions. These restrictions stifle or block consumers' ability to download app stores and apps directly from developers' websites (as outlined below at [19]-[28]) and prevent any meaningful competition in the distribution of apps to Android devices. These restrictions have provided Google – through its control of the Google Play Store – with a near-monopoly in the market for the distribution of apps compatible with Android OS to Android devices (**Android App Distribution Market**).

5. For apps distributed through the Google Play Store (including in Australia), Google also forces Epic (and other app developers) to use Google's in-app payment processor (**Google Play Billing**) for the in-app purchase of digital content consumed within the app. This restriction has provided Google with a near-monopoly share in the market for the processing of payments for the purchase of such in-app content (**Android In-App Payment Processing Market**), including in Australia. Google typically charges a 30% commission on all in-app purchases of digital content consumed within the app in this market: a supra-competitive price.
6. On 13 August 2020, Epic added a direct payment processing option for users of *Fortnite* on Android devices. Epic's direct payment processing option enabled Android device users, including users in Australia, to save 20% on the price of in-app content compared to the price charged if the consumer selected Google Play Billing as the payment processor. It is clear that consumers valued this option as many immediately availed themselves of it.
7. Google responded by removing *Fortnite* from the Google Play Store, which means that new users, including users in Australia, are unable to easily download *Fortnite* onto their Android device, and existing users (including more than 470,000 existing Australian players) are unable to satisfactorily obtain updated versions of *Fortnite* on their Android device (for reasons including at least those set out below at paragraphs [27]-[28]).
8. Google's contravening conduct harms app developers and consumers in Australia. It restricts competition and innovation and precludes app developers and consumers from having a choice for app distribution and in-app payment processing on Android devices. Google's conduct inflates the price for apps and in-app content for millions of Android device users in Australia.

## Google

9. The First Respondent (**Google LLC**) is a company incorporated in the United States with a market capitalisation of about US\$1 trillion. Google LLC controls Android OS. Google LLC enters into contracts with companies that design and sell smart mobile devices, referred to as original equipment manufacturers (**OEMs**), to licence a range of proprietary apps including the Google Play Store, Google Search, Google Chrome, Google Maps, Gmail and YouTube. Google LLC also owns and operates Google Play Billing. Well known OEMs include Samsung, Huawei, Oppo and Nokia.

10. The Second Respondent (**Google Asia Pacific**) is a subsidiary of Google LLC. Together with Google LLC, Google Asia Pacific is a contracting entity with app developers in relation to apps made available through the Google Play Store in Australia.
11. The Third Respondent (**Google Australia**) is a subsidiary of Google LLC. It enters into contracts with app developers for the processing of Google's payment transactions in Australia, including purchases through Google Play Billing.

### **Android apps and their distribution**

12. Apps provide key functionality for smart mobile device users, including Android device users. Apps provide a host of capabilities including with respect to banking, health and fitness, social interactions, gaming such as *Fortnite*, video chatting and movie/television streaming.
13. The demand for apps from smart mobile device users is met by app developers. Apps are specific to an operating system: they must be programmed to function on the particular operating system on which they will be downloaded and run. To reach Android device users, app developers must develop an Android OS app, as Epic has done with *Fortnite*.
14. Some apps are pre-installed on Android devices by OEMs. In particular, Android devices are generally supplied in Australia with Google Mobile Services pre-installed. Google Mobile Services is a set of Google proprietary apps, including the Google Play Store, Google Search, Google Chrome, Google Maps and YouTube. If an OEM wishes to pre-install any one of the proprietary apps onto an Android device, Google LLC requires that the OEM must pre-install all of them. Most consumers expect access to at least some of these well-known apps and, for that reason, in practice OEMs are required to (and do) pre-install them. In addition to bundling the Google proprietary apps together, Google LLC requires that the Google Play Store be given prominence by being displayed on the Android device's default home screen, occupying valuable space on the device that otherwise would be available for alternative apps and app stores (see further below at [21]).
15. The above conduct has created a situation where the Google Play Store is pre-installed on more than 90% of Android devices globally (excluding China), and where more than 90% of app downloads through app stores on Android devices occur through the Google Play Store. The Google Play Store is accordingly a must-have distribution channel for Android OS app developers.
16. The vast majority of Android OS apps (and app stores) are developed by third parties and are not pre-installed on Android devices. Third-party app developers must distribute their apps in another way for selection and installation by Android device users. Other than pre-installation and the Google Play Store, there are two technical routes for the distribution of Android OS apps to Android devices:

- (a) direct downloading, which involves manually downloading an app from a third-party website on the internet. However, Google LLC imposes numerous technical barriers to direct downloading, and posts security warnings to consumers attempting to do so. The warnings include statements that the app may harm their device and the security of their data. These warnings affect the *willingness* of consumers to download apps in this way and the technical barriers affect their *ability* to do so (see further below at paragraph [27]). Direct downloading is therefore an unsatisfactory distribution channel.
  - (b) app stores, that are compatible with Android OS, other than the Google Play Store. These include app stores developed by OEMs (eg, Samsung's Galaxy Store) and app stores developed by third parties (eg, the Amazon Appstore) (**alternative app stores**). However, because of Google's technical and contractual restrictions, alternative app stores do not provide an effective distribution channel for Android OS apps to Android devices. They have far less market penetration and have far fewer apps than the Google Play Store (eg, Aptoide, the largest "independent" app store outside of China, has around 700,000 apps compared to more than 3 million on the Google Play Store, and is pre-installed on no more than 5% of Android devices). For app developers, no app store other than the Google Play Store provides the same reach for the distribution of apps to Android devices, and for Android device users no other app store offers an equivalent range of apps from which to choose. In the absence of Google's competitive constraints, a robust market in app stores would develop and thrive.
17. Google LLC (together with Google Asia Pacific) also restrains the distribution of app stores on Android devices. Any product which facilitates the distribution of apps to Android devices (including an app store) cannot be downloaded through the Google Play Store. Therefore, the only way a consumer can download an alternative app store is to try to download it directly from a third-party website. But, for the reasons set out above at paragraph [16(a)], this is not a viable means of downloading an alternative app store.
18. Once an app (including an app store) is installed on an Android device, third-party app developers also require a means of distributing updates to their apps, either to add functions, to address technical issues or to ensure compatibility with any updates to the operating system. App updates are important to the continued functionality and commercial viability of apps, including as a means of making ongoing improvements to the app. If an app (including an app store) has been downloaded directly, updates can only be obtained in the same way, causing updates to be unreasonably difficult.

### Google's restraints

19. As explained below, Google imposes a series of contractual and technical barriers that render any method for distributing apps, other than through the Google Play Store, commercially and

practically unviable. By these restrictions, Google reserves for itself a near-monopoly position in the Android App Distribution Market, including in Australia.

20. In order to obtain Google Mobile Services, Google requires OEMs to enter into a Mobile Application Distribution Agreement (**MADA**). The MADA is a standard form, non-negotiable contract. OEMs have no choice but to enter in to the MADA if they are to meet consumer demand to offer access to at least some of the apps which form part of Google Mobile Services.
21. Under the MADA, Google requires that:
  - (a) if an OEM pre-installs one or more of the proprietary Google apps (referred to above at [14]) on its devices, it must pre-install all of up to 30 proprietary Google apps, including the Google Play Store;
  - (b) OEMs must place the icon which gives access to the Google Play Store on the Android device's home screen (that is, it must be prominently placed on the Android device).
22. As a result, the Google Play Store is often the first (or only) app store consumers see when they start to use their Android device. This is commercially valuable to Google as many consumers are unlikely to look for, or use, an alternative app store.
23. In order to distribute their Android OS apps through the Google Play Store, developers must enter into the Google Play Developer Distribution Agreement (**DDA**). The DDA is a standard form, non-negotiable contract. It requires developers to submit every app that they wish to be distributed through the Google Play Store to Google for review and approval, and permits Google to disable and remove apps that violate the DDA. For apps distributed in Australia, Google Asia Pacific is a contracting entity with app developers under the DDA.
24. By the terms of the DDA, including those listed in Annexure B, Google also imposes the following restraints on Epic and other app developers:
  - (a) they must agree not to use the Google Play Store to distribute or make available any product that *"has a purpose that facilitates the distribution of software applications and games for use on Android devices outside of the Google Play Store"*;
  - (b) they must agree, in respect of apps distributed through the Google Play Store, to exclusively use Google Play Billing for the processing of payments by Android device users for in-app purchases of digital content consumed within the app; and
  - (c) they must agree that Google Australia will deduct a commission of typically 30% from the price paid by users for in-app purchases of digital content consumed within the app (other than in relation to certain subscription users in Australia).
25. The DDA requires app developers to enter into the Google Payments – Terms of Service – Seller Agreement (**Payments Agreement**) with Google Australia in order to receive payment

for apps distributed through the Google Play Store in Australia and for in-app purchases in Australia of digital content consumed within those apps.

26. Further, the DDA requires compliance with the Google Developer Program Policies (**Google Policies**) which, among other things, requires that app developers offering products within an app downloaded from the Google Play Store or providing access to in-app content must use Google Play Billing as the method of payment (except for the payment of physical products such as food, or payment for digital content that may be consumed outside of the app itself).
27. Google LLC also imposes technical restrictions which may inhibit Android device users from downloading apps other than through the Google Play Store. For example, in order to directly download the Epic Games app from Epic's website on to an Android device, an Android device user in Australia would be required to take numerous steps, including:
  - (a) Navigating to the relevant page of the Epic website and selecting the Epic Games app. On making that selection, consumers are confronted with a warning that reads: "*This type of file can harm your device. Do you want to keep EpicGamesApp.apk anyway?*"
  - (b) If the consumer indicates that they do wish to keep the app, after several additional steps, they are confronted with the statement: "*For your own security, your phone is not allowed to install unknown apps from this source.*"
  - (c) The consumer is then given the option to cancel the installation or to alter their device settings.
  - (d) If the consumer attempts to proceed with the download, they must go to their device settings and manually alter them to allow the installation of "*unknown apps*" from Epic Games.
  - (e) On indicating that they want to allow the installation, the consumer is confronted with the following message: "*Your phone and personal data are more vulnerable to attack by unknown apps. By installing apps from this source, you agree that you are responsible for any damage to your phone or loss of data that may result from their use.*"
  - (f) Consumers must then make the change in the face of this warning, before taking additional steps to complete the installation.

Screenshots of these steps are contained at Annexure A.

28. In addition, Google LLC has configured Android OS to deny directly downloaded apps the permissions necessary to be seamlessly updated in the background. As a result, the consumer must manually approve every update of the directly downloaded app. On some versions of Android OS, consumers are required to repeat some or all of the steps of the initial download and are again confronted with the numerous security warnings. This impacts the continued

functionality and commercial viability of directly downloaded apps and affects users' experiences.

### **Android App Distribution Market**

29. As alleged at [4] above, there is a market for the distribution of Android OS apps to Android devices (Android App Distribution Market). It is comprised of all the channels by which apps may be distributed to Android devices. The primary and dominant channel through which this occurs is the Google Play Store. In the alternative, the Android App Distribution Market is an economically distinct sub-market of a wider market (including Australia) for the distribution of apps to users of smart mobile devices.
30. The geographic dimension of the Android App Distribution Market is global, excluding China. In the alternative, the Android App Distribution Market is a distinct sub-market in Australia.
31. The Android App Distribution Market is distinct from the markets for the distribution of apps for other mobile operating systems, including Apple's iOS.
32. Google does not face any, or any material, competitive constraints in the Android App Distribution Market since channels for the distribution of non-Android OS apps and/or software for personal computers, gaming consoles and other smart mobile operating systems are not compatible with Android devices and therefore do not constrain Google; app developers have no material bargaining power with Google and no app developer can realistically afford to forgo access to Android device users; and consumers are unaware of, or cannot adequately account for, Google's conduct and face high switching costs between Android OS and other smart mobile devices.
33. The contractual and technical barriers imposed by Google (see above) eliminate, or at least significantly restrict, the ability of other app developers, such as Epic, to compete in the Android App Distribution Market on the merits of their alternative product offerings. This is demonstrated by the fact that Google is able to charge a commission of typically 30% for the sale of all paid-for apps through the Google Play Store and for in-app purchases of digital content consumed within such apps, even though alternative app stores offer app developers better revenue distribution arrangements.

### **Android In-App Payment Processing Market**

34. Many app developers generate revenue by making in-app digital content, including in-game content, available to users for a fee. Epic's *Fortnite* – which is available to players for free – is an example of an app that offers in-app content for a fee. Such content is not, however, necessary for gameplay. In *Fortnite*, in-app purchase opportunities include digital outfits, dance moves and other cosmetic enhancements within the game.



35. App developers selling in-app content require an in-app payment processing system that enables users to complete the purchase within the app itself. The demand for in-app payment processing by app developers is met by a number of payment processors (eg Braintree, PayPal, Square and Stripe). Some developers, like Epic, have developed their own payment processing systems. Except for as prescribed by Google's restrictions, app developers can select the payment processor to incorporate into the design of their app.
36. Mobile game developers like Epic place particular value on the ability to provide users with in-app content purchases in a seamless way without distracting from game play. To facilitate the purchase of in-app content, where purchases can extend, enhance and continue play, consumers must be able to make payments quickly and without leaving the app. If a consumer is required to leave an app to make the payment, they are less likely to make the purchase or use the app. For some developers, in-app content purchases represent their sole or major source of revenue.
37. As alleged at [5] above, there is a market for the processing of payments for the purchase of in-app content within apps compatible with Android OS (Android In-App Payment Processing Market). Alternatively, the product dimension of the Android In-App Payment Processing Market is limited to processing of payments for *virtual gaming products* within gaming apps compatible with Android OS.
38. The geographic dimension of the Android In-App Payment Processing Market is global, excluding China. In the alternative, the Android In-App Payment Processing Market is a distinct sub-market in Australia.
39. The Android In-App Payment Processing Market is distinct from the markets for the in-app payment processing for apps developed for other mobile operating systems, including Apple's iOS.
40. Google ties Google Play Billing to the Google Play Store so that, for apps distributed through the Google Play Store, app developers and Android device users must use Google Play Billing for the purchase of digital content within apps. App developers have no real alternative but to distribute their apps using the Google Play Store and, because 90% or more of Android OS app downloads conducted through app stores have been done through the Google Play Store, these further restrictions mean that Google retains for itself a near-monopoly share of the market for the processing of payments for the purchase of in-app content on Android devices, including in Australia.
41. Google does not face any, or any material, competitive constraint in the Android In-App Payment Processing Market since the availability of alternative payment processing solutions are not viable alternatives in light of the terms of the DDA; app developers and consumers have no

material bargaining power in the Android In-App Payment Processing Market; and consumers cannot constrain Google's conduct.

## **PRIMARY GROUNDS FOR THE RELIEF SOUGHT**

### **Misuse of market power (s 46)**

42. By reason of the matters referred to in paragraphs [9]-[11] and [29]-[33] above, Google has a substantial degree of power in the Android App Distribution Market, including in Australia. Further, Google LLC and Google Asia Pacific have engaged, and continue to engage, in conduct that has the purpose, effect or likely effect of substantially lessening competition in the Android App Distribution Market, including in Australia by the following means:
- (a) (paragraphs [20]-[22] above) Google requires OEMs, as a condition to pre-install on an Android device any of the apps which form part of Google Mobile Services, to enter into and be bound by the MADA. Under the MADA, Google requires OEMs, who wish to pre-install one or more Google proprietary apps on its Android devices, to pre-install all proprietary apps including the Google Play Store. Further, the terms of the MADA require OEMs to prominently display the icon which gives access to the Google Play Store on the Android device's home screen;
  - (b) (paragraphs [23]-[26] above) Google LLC and Google Asia Pacific require app developers to enter into and be bound by the DDA, including the Google Policies, as a condition to distribute apps through the Google Play Store. By the terms of the DDA, Google LLC and Google Asia Pacific prohibit app developers from using the Google Play Store to distribute or make available any product that facilitates the distribution of apps for use on Android devices outside of the Google Play Store. In order for app developers to distribute their apps through the Google Play Store they must submit their apps to Google for review for compliance with the terms of the DDA;
  - (c) (paragraphs [27]-[28] above) Google LLC imposes technical barriers to directly downloading apps (and app stores) which limits the functionality and commercial viability of these apps.
43. The purpose, effect or likely effect of the conduct described in paragraph [42] above is to foreclose competition in the Android App Distribution Market, including in Australia. But for the conduct, the Google Play Store would (or would likely) face vigorous and effective competition in the Android App Distribution Market from other app stores to distribute Android OS apps to Android devices users, including in Australia, leading to pro-competitive benefits including increased quality, innovation and choice and lower prices.
44. Further, by reason of the matters referred to in paragraphs [9]-[10] and [34]-[41] above, Google has a substantial degree of power in the Android In-App Payment Processing Market, including in Australia. Further, Google has engaged, and continues to engage, in conduct that has the

purpose, effect or likely effect of substantially lessening competition in the Android In-App Payment Processing Market, including in Australia, by the following means:

- (a) (paragraphs [23]-[26] above) Google LLC and Google Asia Pacific require app developers to enter into and be bound by the DDA, including the Google Policies, as a condition to distribute apps through Google's app store, the Google Play Store;
  - (b) (paragraph [25] above) Google LLC and Google Asia Pacific require, through the DDA, app developers to enter into the Payments Agreement with Google Australia in order to receive payment for apps distributed through the Google Play Store and for the in-app purchase of digital content consumed within such apps in Australia;
  - (c) Google requires, through Google Policies, that apps distributed through the Google Play Store "*must use Google Play's billing system*" for in-app purchases of digital content consumed within the app;
  - (d) (paragraph [7] above) Google responded to Epic's conduct referred to in paragraph [6] above by removing *Fortnite* from the Google Play Store, including in Australia; and/or
  - (e) (paragraph [24(c)] above) the commission of typically 30% charged by Google and deducted from the price for in-app content represents a monopoly rent.
45. The purpose, effect or likely effect of the conduct described in paragraph [44] above is to foreclose competition in the Android In-App Payment Processing Market, including in Australia. But for the conduct, Google Play Billing would (or would likely) face competition in the Android In-App Payment Processing Market from other payment processors for in-app content purchases, including in Australia, leading to pro-competitive benefits including lower prices and increased quality, innovation and choice.
46. By reason of paragraphs [42] and/or [44] above, Google has by its conduct in Australia and/or in relation to Android device users in Australia, contravened, and continues to contravene, s 46(1) of the CCA.

#### **Exclusive dealing (s 47)**

47. By reason of the matters referred to in paragraphs [19]-[28] and [34]-[41] above, Google LLC and Google Asia Pacific have engaged, and continues to engage, in the practice of exclusive dealing in Australia and/or in relation to Android device users in Australia, contrary to s 47(2) of the CCA in that:
- (a) Google LLC and Google Asia Pacific supply (or offer to supply) services to app developers such as Epic, being the distribution of their apps to Android device users, including in Australia;
  - (b) Google LLC and Google Asia Pacific supply these services to Epic and other app developers on the condition that they will not acquire services of a particular kind or

description from a competitor of Google (having regard to s 47(13)(b)), including in Australia, being, payment processing services from other payment processors for in-app content purchased by Android device users, with respect to apps downloaded through the Google Play Store where, but for the conduct, those other payment processors would or would likely compete, with Google Play Billing.

48. By reason of the matters referred to in paragraphs [42]-[45] above, the conduct in paragraph [47] above has the purpose, effect or likely effect of substantially lessening competition in Australia in the Android In-App Payment Processing Market.
49. By reason of paragraphs [47]-[48] above, Google LLC and Google Asia Pacific have contravened, and continue to contravene, s 47(1) of the CCA.

#### **Contracts, arrangements and understandings (s 45)**

50. Further or alternatively, by reason of the matters referred to in paragraphs [19]-[22] above, Google has made, and continues to make, contracts or arrangements, or has arrived at, or continues to arrive at, understandings with OEMs, containing provisions that require OEMs to agree that, as conditions applying to their pre-installation on an Android device any of the apps which form part of Google Mobile Services, they will:
  - (a) pre-install all Google proprietary apps, including the Google Play Store, on the Android device; and
  - (b) prominently display the icon which gives access to the Google Play Store on the Android device's home screen.
51. Further or alternatively, by reason of the matters referred to in paragraphs [23]-[27] above, Google has made, and continues to make, contracts or arrangements, or has arrived at or continues to arrive at, understandings with app developers through the DDA, and/or through the Google Policies, which contain provisions that:
  - (a) restrain app developers from using any in-app payment processing system, other than Google Play Billing, for the purchase of digital in-app content by Android device users, including in Australia;
  - (b) restrain app developers from distributing their apps to Android device users, including in Australia, other than through the Google Play Store;
  - (c) permit Google to remove from the Google Play Store apps that violate the DDA.
52. By reason of the matters referred to in paragraphs [42]-[45] above, the provisions referred to at paragraphs [50] and [51] above have, individually and/or cumulatively, the purpose, effect or likely effect of substantially lessening competition in the Android App Distribution Market and/or the Android In-App Payment Processing Market, including in Australia. In addition:

- (a) by Google's conduct in paragraph [7] above, Google has given effect to the provisions referred to at paragraph [51] above, including in Australia or in relation to Australian users of Android devices; and
- (b) by Google Australia's conduct at paragraphs [11] and [44] above, Google Australia has given effect to the provisions referred to at paragraph [51] above, including in Australia or in relation to Australian users of Android devices.

53. By reason of paragraphs [50]-[52] above, Google has contravened, and continues to contravene, s 45(1) of the CCA, including by reason of s 45(4).

**Unconscionable conduct (s 21)**

54. By reason of the matters referred to in paragraphs [29]-[41] above, Google has engaged, and continues to engage, in unconscionable conduct in trade or commerce by the following means:

- (a) (paragraphs [29]-[33] above) Google LLC and Google Asia Pacific have in all the circumstances acted unconscionably in connection with the supply of services to Epic, namely in the distribution of Epic's apps to Android device users in Australia; and/or
- (b) (paragraphs [34]-[41] above) Google has in all the circumstances acted unconscionably in connection with the supply of payment processing services to Epic, namely in the processing of in-app purchases of digital content within Epic's apps in Australia.

55. In the circumstances referred to at paragraph [54] above, Google has engaged, and continues to engage, in trade or commerce in a system of conduct, or a pattern of behaviour, that is in all the circumstances unconscionable in connection with its supply of services to Epic and other app developers generally, namely in the distribution of their apps to Android device users in Australia and/or in the provision of associated payment processing services to Android device users in Australia.

56. Epic relies on, inter alia, the matters in s 21(4)(b) and (c) and s 22(1)(a), (b), (e) and (j) of the ACL. Epic, and app developers such as Epic, cannot avoid the Google restraints referred to in paragraphs [19]-[28] in order to distribute their apps to Android device users, including in Australia, which restraints are not reasonably necessary for the protection of Google's legitimate interests. Likewise, Epic, app developers such as Epic, and Android device users in Australia and elsewhere, cannot avoid payment of the commission of typically 30% if they wish to purchase third-party fee-based Android OS apps or in-app content on their Android device, including for the purpose of taking advantage of and/or enhancing the functionality of their Android device.

57. By reason of paragraphs [54]-[56] above, Google has contravened, and continues to contravene, s 21(1) of the ACL.

## RELIEF SOUGHT FROM THE COURT

58. Epic seeks the relief set out in the accompanying Originating Application.

## ALLEGED HARM

59. Google's conduct has hindered or prevented, and continues to hinder and prevent, Epic and other app developers and in-app content payment providers from competing or effectively competing in the Android App Distribution Market and the Android In-App Payment Processing Market, including in Australia. This has resulted in reduced innovation, lower quality apps, reduced consumer choice and higher prices for both developers and consumers.
60. Google's conduct has forced Epic and other app developers, in the case of apps downloaded through the Google Play Store, to pay Google monopoly prices (the commission of typically 30%) in connection with all in-app purchases of their in-app content on Android devices. This has led to harms including increased prices for in-app content by Android device users in Australia and lost profits for Epic.
61. Further, Google's conduct referred to in paragraph [7] above has harmed Epic through loss of goodwill in respect of *Fortnite* and Epic more broadly. This loss and damage to Epic's ongoing business and to its reputation and trust with customers, including its business and customers in Australia, is permanent and irreparable.
62. But for Google's conduct, app developers such as Epic and other app developers would (or would be likely to) distribute alternative app-stores to Android device users directly from their websites without undue friction and/or through the Google Play Store, including users in Australia. This would cause competition on the basis of (among other things) price, service and innovation, including by Google in the Android App Distribution Market. Epic and other app developers would also offer users of its software, including users in Australia, a range of payment processing options (eg PayPal or Amazon Pay). Absent Google's conduct, these competing in-app payment processors would cause Google to compete on the basis of price, service and innovation.

### **Certificate of lawyer**

I, Dave Poddar, certify to the Court that, in relation to the concise statement filed on behalf of the Applicants, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 8 March 2021



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Signed by Dave Poddar

Lawyer for the Applicants

## Schedule

No. of 2021

Federal Court of Australia  
District Registry: New South Wales  
Division: General

### Applicants

Second Applicant: Epic Games International S.à r.l.

### Respondents

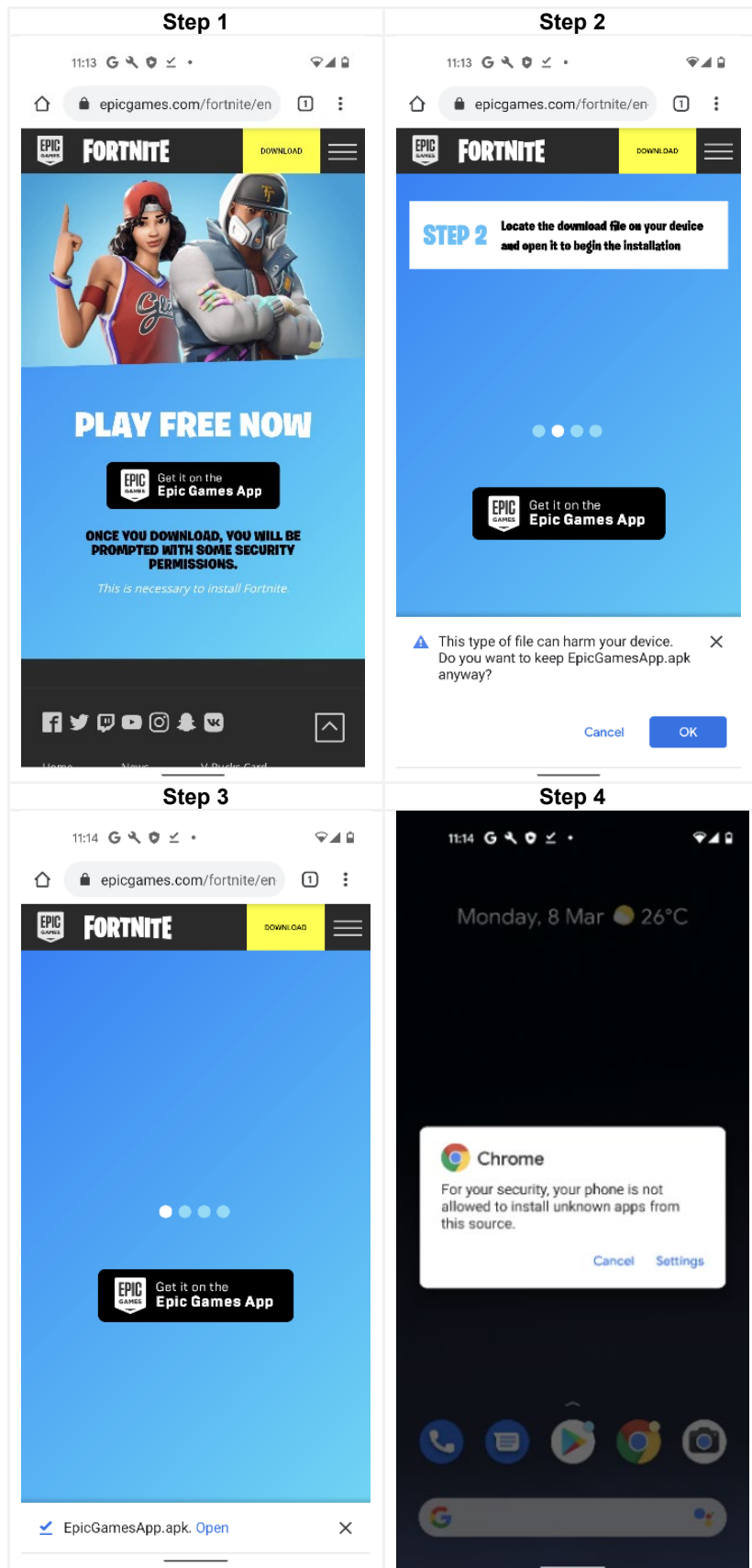
Second Respondent: Google Asia Pacific Pte. Ltd. (200817984R)

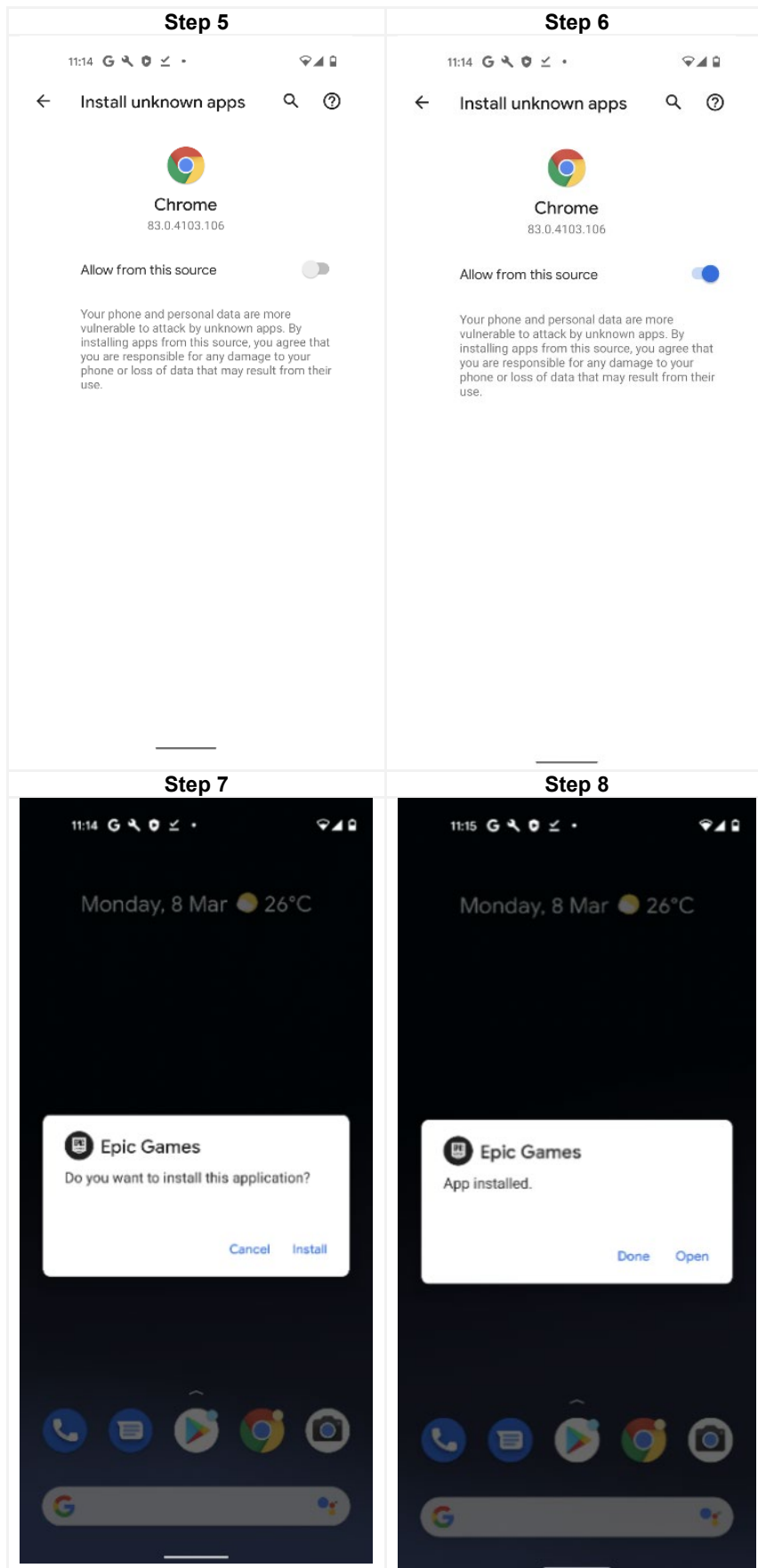
Third Respondent: Google Payment Australia Pty Ltd (ACN 122 560 123)

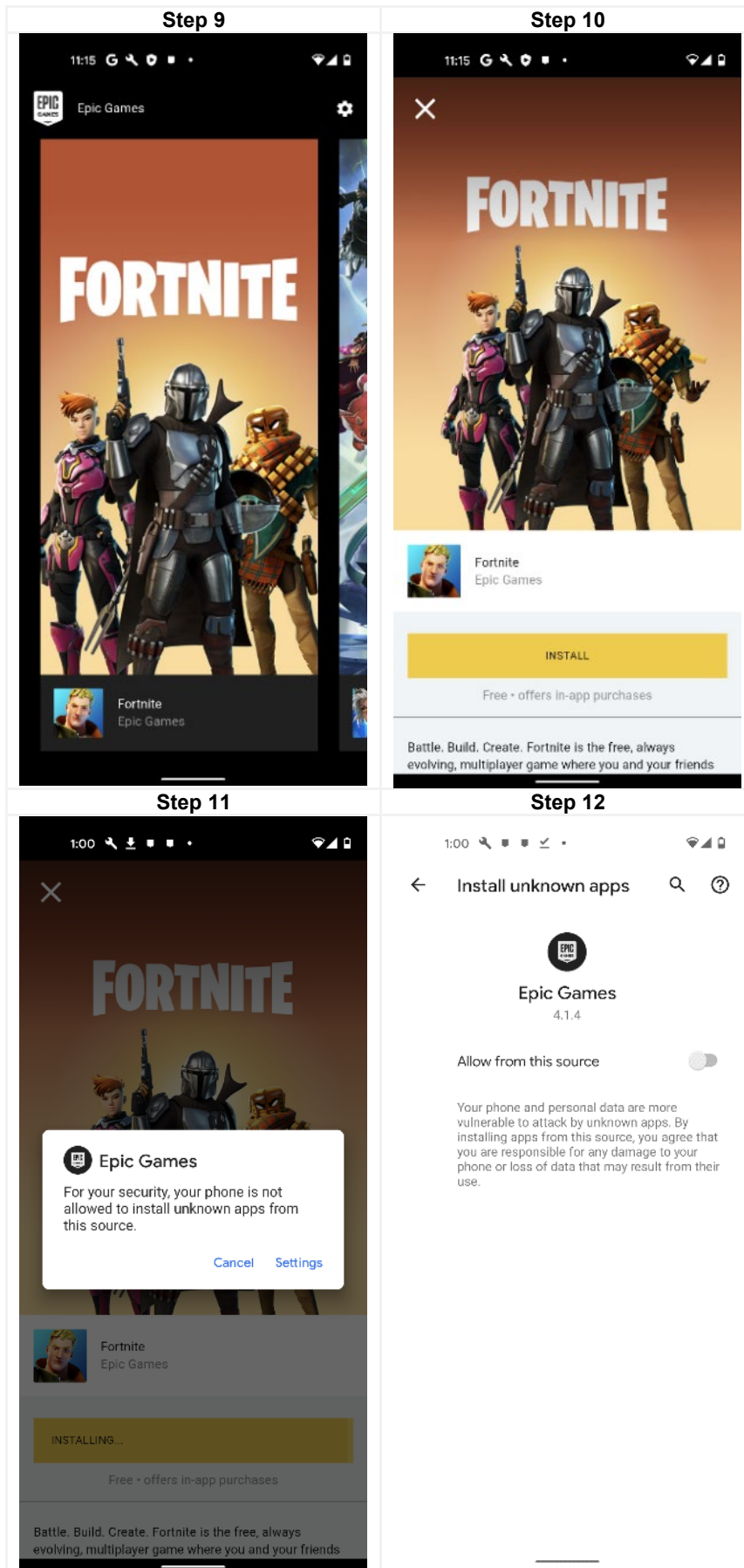
Date: 8 March 2021

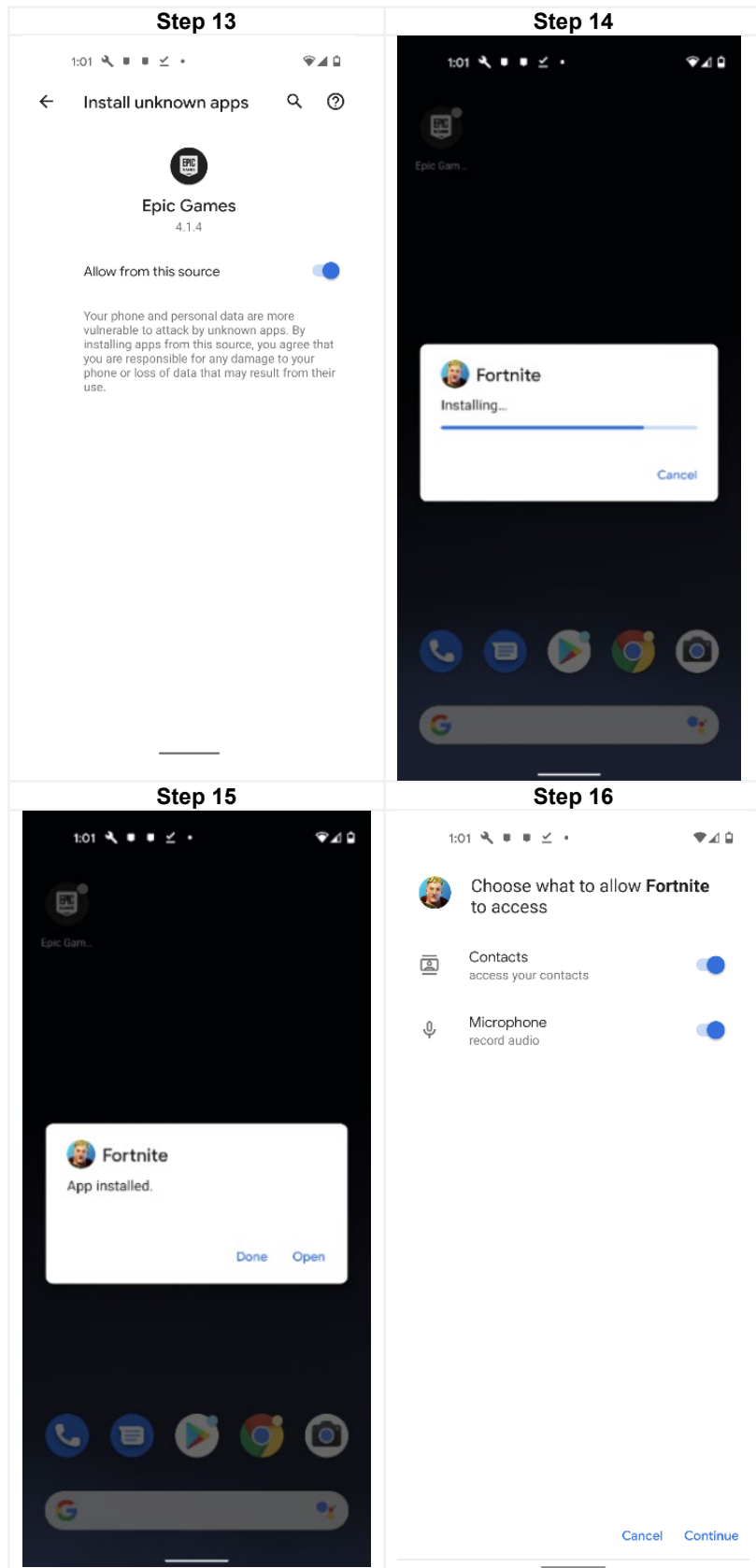


## Annexure A

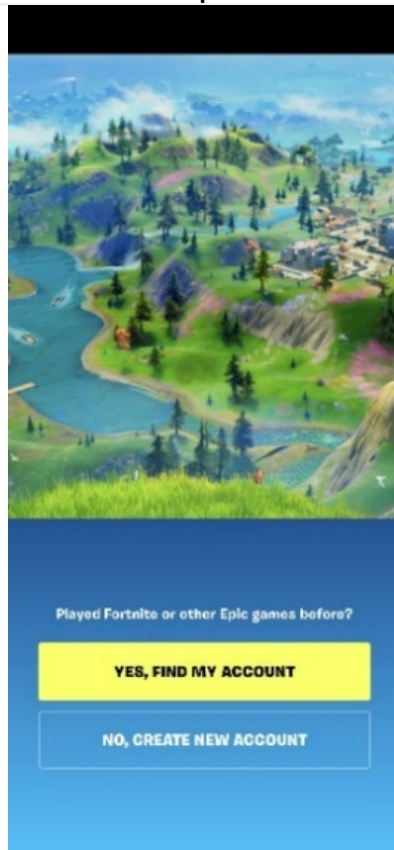








**Step 17**



## Annexure B

| Restraints imposed by Google on app developers                |  |
|---|--|
| DDA   |  |
| Clause 3.2  |  |
| Clause 3.4  |  |
| Clause 4.1  |  |
| Clause 4.5  |  |
| Clause 8.3  |  |
| Clause 10.3   |  |
| Google Policies   |  |
| Monetisation and ads; Payments; clause 1                      |  |
| Monetisation and ads; Payments; clause 2                      |  |
| Monetisation and ads; Payments; clause 3                      |  |
| Monetisation and ads; Payments; clause 4                      |  |
| Privacy, deception and device abuse; Devise and network abuse |  |