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Details of Filing

Document Lodged: Concise Statement
File Number: NSD1236/2020
File Title: EPIC GAMES, INC & ANOR v APPLE INC & ANOR
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



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

Dated: 17/11/2020 5:03:09 PM AEDT

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.

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Form NCF1

Concise Statement

No. _____ of 2020

Federal Court of Australia

District Registry: New South Wales

Division: General

Epic Games, Inc and another named in the schedule

Applicants

Apple Inc and another named in the schedule

Respondents

IMPORTANT FACTS GIVING RISE TO THE CLAIM

1. This case concerns conduct of the Respondents (**Apple**) in contravention of ss 46(1) and/or 47(2) (or 45) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) and/or s 21 of the Australian Consumer Law (**ACL**) in Schedule 2 of the CCA.
2. The Applicants (**Epic**) develop entertainment software for personal computers, smart mobile devices and gaming consoles. The most popular game that Epic currently makes is *Fortnite*. Epic has produced a version of *Fortnite* compatible with Apple iPads and iPhones (**iOS devices**). In the first year after *Fortnite*'s release in 2017, the game attracted over 125 million players; in the years since, *Fortnite* has topped 350 million players. Epic also offers a software suite, *Unreal Engine*, which is used by third party developers to create 3-D digital content for a wide variety of products including games, films, biomedical research and virtual reality.
3. Apple iOS devices are supplied pre-installed with Apple's iOS or iPadOS operating system software (for simplicity, the operating system on both devices is referred to as **iOS**). Apple's iOS, just like the operating system of any computer (e.g. Microsoft Windows or Apple's macOS), is a piece of software that provides basic functionality to users of iOS devices (**iOS device users**).
4. Apple's contravening conduct forces Epic (and other app developers) to only use Apple's App Store to distribute its software applications (**apps**) to the broad base of iOS device users, and to only use Apple's payment platform for purchases of their in-app content by iOS device users. The conduct prevents Epic (and other app developers) from providing or using competing app

Filed on behalf of (name & role of party)	Epic Games, Inc and Epic Games International S.à r.l. (Applicants)		
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stores to distribute apps to iOS device users and/or from providing or using competing payment processing systems. It also allows Apple to impose a 30% commission on the sale of every paid app and on every purchase of in-app content: a monopoly price. The conduct in turn results in harms including a reduction in choice for app distribution and higher prices for in-app content for iOS device users in Australia.

5. Apple's contravening conduct has not been undertaken by Apple with respect to Apple personal computers (**Macs**), where Apple does not enjoy the same market power. In contrast to Apple iOS devices, software developers such as Epic are not forced to distribute their products through the App Store or to obtain payment processing from Apple with respect to Macs. Rather, in an open market on Macs, software developers can (i) distribute their products through a variety of sources (including via direct downloads from their website) and (ii) can themselves facilitate payment processing, or use a third party for a commission of approximately 3%, being ten times less than the commission (30%) charged by Apple.
6. On 13 August 2020, for the first time, Epic added a direct payment processing option for in-app purchases made by users of *Fortnite* on iOS devices. By providing its own payment processing option as an alternative and competing option to Apple's In-App Purchase (**IAP**) system, Epic was able to offer iOS device users a 20% reduction on the prices of in-app purchases (through **Epic Direct Payment**).
7. Apple responded by removing *Fortnite* from the App Store, which meant that new users cannot download the *Fortnite* app and existing users cannot update it to the latest version. Shortly thereafter, Apple terminated Epic's Apple Developer Program account identified with Apple "Team ID" ending in the numbers "84" (**Team ID '84 account**), removed *Fortnite* and other apps associated with the Team ID '84 account – *Battle Breakers*, *Spyjinx*, and *Infinity Blade Stickers* from the App Store, and *Shadow Complex Remastered* from the Mac App Store – and threatened to terminate Epic's access to the Apple development tools necessary for Epic to keep offering *Unreal Engine* for use on iOS and otherwise updating its iOS-compatible apps. The various other Apple accounts held by Epic and its affiliates – not yet terminated by Apple – are outlined in **Annexure A**.

Apple

8. The First Respondent (Apple Inc) is a company incorporated in the United States with a market capitalisation of approximately US\$2 trillion. It manufactures iOS devices and personal computers (Mac and MacBook).
9. The Second Respondent (Apple Pty Limited) is a subsidiary of Apple Inc. It relevantly imports, distributes and supplies Apple-branded mobile devices and personal computers in Australia, as well as related software, services and third-party digital products.

10. It is estimated that there are over 1 billion iOS device users globally, and that iPhones comprise over 55% of mobile devices used in Australia.

iOS App Distribution Market

11. Smart mobile device users, including iOS device users, use apps in connection with their devices. Apps enhance the functionality of the device, for example, with respect to banking, health and fitness, social interactions, gaming such as *Fortnite*, productivity, video chatting and movie/TV streaming.
12. 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 iOS device users, app developers must program an iOS-compatible version of their app, as Epic has done with *Fortnite*. In order to create iOS-compatible versions of their apps, app developers need to access and licence a suite of Apple proprietary software.
13. In addition to iOS, Apple iOS devices are supplied with certain Apple apps pre-installed (such as Apple's App Store). However, the vast majority of iOS-compatible apps are developed by third parties. Unlike Apple apps, third party iOS-compatible apps do not come pre-installed on iOS devices. Those iOS-compatible apps must be distributed to iOS device users for their selection and installation.
14. Apps must be updated from time to time, either to add functions, to address technical issues, or to ensure compatibility with an operating system that has been updated. App updates are important to the continued functionality and commercial viability of apps, including as a means to make ongoing improvements to the app.
15. There is a market for the distribution of iOS-compatible apps to iOS device users (**iOS App Distribution Market**). The geographic dimension of the iOS App Distribution Market is global, and includes Australia. In the alternative, the iOS 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.
16. Apple exercises monopoly power in the iOS App Distribution Market. Apple's App Store is the sole means by which iOS-compatible apps can be distributed to the broad base of iOS device users.¹ Apple pre-installs the App Store on all iOS devices. It cannot be removed by iOS device

¹ The Apple Developer Program License Agreement provides that apps may be distributed only if selected by Apple for distribution via the App Store, Custom App Distribution, for beta distribution through TestFlight, or through Ad Hoc distribution. Custom App Distribution, beta distribution through TestFlight, and Ad Hoc distribution are limited distribution channels that can only be used for specific types of commercial users, meaning that the App Store is the only channel through which developers can distribute apps to the broad base of iOS device users. Apple also allows certain Apple-approved large commercial organisations to participate in Apple's Developer Enterprise Program, which permits the approved organisations to develop and deploy proprietary, internal-use apps to their employees. This program does not permit developers to distribute apps to the broad base of iOS device users.

users. Apple also prevents iOS device users from downloading apps directly from websites (known as “sideloading”). As explained below, Apple forecloses all potential competitors from entering the iOS App Distribution Market, and contractually prohibits app developers such as Epic from distributing iOS-compatible apps to the broad base of iOS device users, including in Australia, other than through the App Store.

17. Apple does not face any, or any material, competitive constraint in the iOS App Distribution Market since channels for the distribution of Android apps and/or software for personal computers and gaming consoles are not compatible with iOS devices and therefore do not constrain Apple; app developers have no material bargaining power with Apple and no app developer can realistically afford to forgo access to 1 billion iOS device users; and consumers are unaware of or cannot adequately account for Apple's conduct, face high switching costs between iOS and Android devices, and the other duopolist for mobile operating systems – Google – engages in similar anti-competitive practices with Android devices.

iOS In-App Payment Processing Market

18. 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. In *Fortnite*, players may purchase digital outfits, dance moves and other cosmetic enhancements within the game.
19. App developers selling in-app content, such as Epic, 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 for personal computers (such as Macs) is met by a number of payment processors (e.g. Braintree, PayPal, Square and Stripe). Some developers, like Epic, have developed their own payment processing systems (in this case Epic Direct Payment, which permitted iOS device users of *Fortnite* to save 20% on the prices of in-app purchases). App developers can select the payment processor to incorporate into the design of their app.
20. 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. For some developers, in-app content purchases represent their sole or major source of revenue.
21. There is a market for the processing of payments for the purchase of in-app content within iOS-compatible apps used in iOS devices (**iOS In-App Payment Processing Market**). The geographic dimension of the iOS In-App Payment Processing Market is global, and includes Australia. Alternatively, the product dimension of the iOS In-App Payment Processing Market is limited to processing of payments for in-app content for *virtual gaming products* within iOS-compatible apps.
22. Apple exercises monopoly power in the iOS In-App Payment Processing Market. Apple's IAP system is the sole means by which app developers such as Epic can obtain in-app payment

processing on iOS devices. As explained below, Apple compels app developers to use Apple's IAP exclusively if they want to distribute their iOS-compatible apps to iOS device users, including in Australia.

23. Apple does not face any, or any material, competitive constraint in the iOS In-App Payment Processing Market because: the availability of payment processing solutions outside of iOS-compatible apps does not constrain Apple's behaviour as these are not a viable alternative for app developers; app developers have no material bargaining power in the iOS In-App Payment Processing Market; and consumers cannot constrain Apple's conduct.

Apple restraints

24. In order to develop and offer iOS-compatible apps in the App Store, app developers must enter into a number of standard, non-negotiable agreements as demanded by Apple, including the Apple Developer Agreement and the Apple Developer Program License Agreement (**PLA**). The PLA also requires compliance with the App Store Review Guidelines (**App Store Guidelines**). In addition, the PLA requires app developers like Epic to enter into a separate agreement with Apple in the form of Schedule 2 if they want iOS device users to be able to purchase in-app content (**Schedule 2**).
25. By the terms of the PLA, App Store Guidelines and Schedule 2 in **Annexure B**, Apple imposes the following restraints on app developers such as Epic:
- (a) they must agree to distribute their apps to iOS device users only through the App Store, and not distribute them to iOS device users through any other channel;²
 - (b) they must agree to appoint Apple Inc and its subsidiaries, including Apple Pty Limited, to distribute their apps via the App Store;³
 - (c) they must agree to only use Apple's IAP for the processing of payments for in-app content purchased by iOS device users; and
 - (d) they must agree that Apple Inc and its subsidiaries, including Apple Pty Limited, will deduct a 30% commission from the price paid by users for purchasing apps or in-app content (other than in relation to certain long-term subscription users) (**30% commission**).
26. Apple also imposes technical restrictions that prevent the broad base of iOS device users from downloading apps other than through the App Store. The result is that the only viable distribution channel for the broad base of iOS device users is the pre-installed App Store.

² Subject to the narrow exceptions specified at footnote [1] above.

³ Subject to the narrow exceptions specified at footnote [1] above.

PRIMARY GROUNDS FOR THE RELIEF SOUGHT

Misuse of market power (s 46)

27. By reason of the matters referred to in paragraphs 8 to 17 above, Apple has a substantial degree of power in the iOS App Distribution Market. Further, Apple has engaged, and continues to engage, in conduct that has the purpose, effect or likely effect of substantially lessening competition in the iOS App Distribution Market, including by the following means:
- (a) (paragraph 16 above) Apple:
 - i. pre-installs the App Store on iOS devices, including in Australia;
 - ii. prevents the broad base of iOS device users, including in Australia, from deleting the App Store;
 - iii. prevents the broad base of iOS device users, including in Australia, from downloading apps on iOS devices from any source other than the App Store – including sideloading apps from internet sources – and from downloading any app that distributes apps;
 - (b) Apple prevents app developers from creating or distributing to iOS device users any store or storefront for other apps, or any interface for displaying third party apps similar to the App Store;
 - (c) (paragraph 24 above) Apple requires app developers to enter into and be bound by the PLA (including at times Schedule 2) and the App Store Guidelines if they want to develop and offer iOS-compatible apps in the App Store;
 - (d) (paragraph 25(a) above) Apple restrains app developers such as Epic from distributing their apps to the broad base of iOS device users, including in Australia, other than through the App Store; and/or
 - (e) (paragraph 7 above) Apple responded to Epic's conduct referred to in paragraph 6 above by removing *Fortnite* and certain other Epic apps from the App Store including in Australia, by terminating Epic's Team ID '84 account, and by threatening to terminate Epic's other Apple Developer Program accounts (including those of Epic's affiliates).
28. The purpose, effect or likely effect of Apple's conduct (as described in paragraph 27 above) is to foreclose competition in the iOS App Distribution Market. But for Apple's conduct the App Store would (or would likely) face vigorous and effective competition in the iOS App Distribution Market from other app stores to distribute iOS-compatible apps to iOS devices users including in Australia, leading to pro-competitive benefits including increased quality, innovation and choice, as occurs with Apple personal computers.

29. Further, by reason of the matters referred to in paragraphs 8 to 10 and 18 to 23 above, Apple has a substantial degree of power in the iOS In-App Payment Processing Market. Further, Apple has engaged, and continues to engage, in conduct that has the purpose, effect or likely effect of substantially lessening competition in the iOS In-App Payment Processing Market, including by the following means:
- (a) (paragraph 24 above) Apple requires app developers to enter into and be bound by the PLA, Schedule 2 and the App Store Guidelines if they want iOS device users to be able to purchase in-app content;
 - (b) (paragraph 25(c) above) Apple restrains app developers such as Epic from using any in-app payment processing system other than Apple's IAP in order to distribute in-app content for their iOS-compatible apps to iOS device users, including in Australia;
 - (c) (paragraph 7 above) Apple responded to Epic's conduct referred to in paragraph 6 above by removing *Fortnite* and certain other Epic apps from the App Store including in Australia and threatening to terminate its Apple Developer Program accounts (including those of its affiliates); and/or
 - (d) (paragraph 25(d) above) the 30% commission charged by Apple and deducted from the price for in-app content represents monopoly rents.
30. The purpose, effect or likely effect of Apple's conduct in paragraph 29 above is to foreclose competition in the iOS In-App Payment Processing Market. But for Apple's conduct, like on Apple personal computers, Apple's IAP system would (or would likely) face competition in the iOS 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.
31. By reason of paragraphs 27 and/or 29 above, Apple has contravened, and continues to contravene, s 46(1) of the CCA.

Exclusive dealing (s 47)

32. By reason of the matters referred to in paragraphs 24 to 25 above, Apple has engaged, and continues to engage, in the practice of exclusive dealing pursuant to s 47(2) of the CCA in that:
- (a) Apple supplies (or offers to supply) services to app developers such as Epic, being the distribution of their apps to iOS device users, including in Australia,
- on the condition that:
- (b) they will not acquire services of a particular kind or description from a competitor of Apple (having regard to s 47(13(b))), including in Australia, being payment processing for in-app content purchased by iOS device users from other payment processors that, but for Apple's conduct, compete, or would or would likely compete, with Apple's IAP.

33. By reason of the matters referred to in paragraphs 27 to 30 above, Apple's conduct in paragraph 32 above has the purpose, effect or likely effect of substantially lessening competition in the iOS App Distribution Market and/or the iOS In-App Payment Processing Market.
34. By reason of paragraphs 32 and 33 above, Apple has contravened, and continues to contravene, s 47(1) of the CCA.

Contracts, arrangements and understandings (s 45)

35. Further or alternatively, by reason of the matters referred to in paragraphs 24 to 25 above, Apple has made, and continues to make, contracts, arrangements or understandings with app developers such as Epic containing provisions (**Apple Provisions**) that individually and/or cumulatively have the effect that:
 - (a) (paragraph 25(a) above) Apple restrains app developers such as Epic from distributing their apps to the broad base of iOS device users, including in Australia, other than through the App Store;
 - (b) (paragraph 25(c) above) Apple restrains app developers such as Epic from using any in-app payment processing system other than Apple's IAP in order to distribute their iOS-compatible apps to iOS device users, including in Australia.
36. By reason of the matters referred to in paragraphs 27 to 30 above, the Apple Provisions have the purpose, effect or likely effect of substantially lessening competition in the iOS App Distribution Market and/or the iOS In-App Payment Processing Market. In addition, by Apple's conduct in paragraph 7 above, Apple has given effect to the Apple Provisions.
37. By reason of paragraphs 35 and/or 36 above, Apple has contravened, and continues to contravene, s 45(1) of the CCA.

Unconscionable conduct (s 21)

38. In the circumstances referred to above, Apple has engaged, and continues to engage, in unconscionable conduct in trade or commerce in connection with:
 - (a) the supply of services to app developers such as Epic, namely distribution of their apps to iOS device users in Australia and/or associated payment processing services; and/or
 - (b) the supply of iOS devices to iOS device users in Australia.
39. Epic relies on, inter alia, the matters in s 21(4)(b) and (c) and s 22(1)(a), (b) and (e) of the ACL. App developers such as Epic cannot avoid the Apple restraints referred to in paragraph 25 in order to distribute their apps to iOS device users, which restraints are not reasonably necessary for the protection of Apple's legitimate interests. Likewise, app developers and iOS device users cannot avoid payment of the 30% commission if they wish to download third party fee-based

iOS-compatible apps or in-app content on their iOS device, including for the purpose of taking advantage of and/or enhancing the functionality of their iOS device.

40. By reason of paragraphs 38 and 39 above, Apple has contravened, and continues to contravene, s 21(1) of the ACL.

RELIEF SOUGHT FROM THE COURT

41. Epic seeks the relief in the accompanying Originating Application.

ALLEGED HARM

42. Apple's conduct has hindered or prevented, and continues to hinder or prevent, Epic and other app developers and in-app content payment providers from competing or effectively competing in the iOS App Distribution Market and the iOS In-App Payment Processing Market.
43. Among other things, Apple's conduct has forced Epic and other app developers to pay Apple monopoly prices (the 30% commission) in connection with all in-app purchases of their in-app content on iOS devices. This has led to harms including increased prices for in-app content by iOS device users in Australia and lost profits for Epic. When Epic introduced Epic Direct Payment, *Fortnite* users on iOS for the first time had a competitive alternative to Apple's IAP payment system, which in turn enabled Epic to pass along its cost savings by offering its users a 20% reduction in in-app prices.
44. Apple's conduct has also denied app developers (such as Epic) and iOS device users their choice of in-app content payment providers and denied app developers and iOS device users the choice of app stores for distribution of apps on iOS devices.
45. Further, Apple's conduct referred to in paragraph 7 above has harmed Epic through, inter alia, loss of goodwill in respect of both *Fortnite*, other Epic games on iOS devices, and Epic more broadly. This loss and damage to Epic's ongoing business and to its reputation and trust with customers is permanent and irreparable.
46. But for Apple's conduct, like on Apple personal computers, app developers such as Epic would (or would be likely to) distribute its software through other channels. These other channels would cause competition on the basis of (among other things) price, service, and innovation, including by Apple. Epic would also offer users of its software a range of payment processing options. Absent Apple's conduct, these competing in-app payment processors would cause Apple to compete on the basis of price, service, and innovation. The state of competition should be no different for Apple's iOS devices.

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: 16 November 2020



Signed by Dave Poddar

Lawyer for the Applicants

Annexure A

	Team name	"Team ID" / Account	Applications in App Store	Status of account
Apple Developer Program accounts				
1	Epic Games, Inc	84	n/a - removed (formerly Fortnite up until 13 August 2020 and Battle Breakers, Infinity Blade Stickers, Spyjinx up until 28 August 2020)	Terminated on 28 August 2020
2	Epic Games International S.a.r.l.	3Y	Unreal Remote, Unreal Remote 2, Unreal Match 3, Action RPG Game Sample, Live Link Face	Active
3	Life on Air, Inc	RG	Houseparty	Active
4	Life on Air, Inc	TS	n/a	Active
5	KA-RA SARL	JU	n/a	Active
6	Psyonix LLC	TY	n/a	Active
7	Quixel AB	T4	n/a	Active
Apple Developer Enterprise Program accounts				
8	Epic Games, Inc	RR	n/a	Active
9	YEVVO entertainment Inc	Y8	n/a	Active

Annexure B

Restraints imposed by Apple on app developers		
PLA	App Store Guidelines	Schedule 2
Clause 1.1	Clause 2.4.5	<i>The entirety of Schedule 2, but in particular:</i>
Clause 2.8	Clause 2.4.5(iv)	Clause 1.1
Clause 3.2(e)	Clause 2.5.1	Clause 3.4(a)
Clause 3.2(f)	Clause 2.5.2	Clause 3.5
Clause 3.2(g)	Clause 3.1.1	Clause 3.11
Clause 3.3.1	Clause 3.2.2(i)	
Clause 3.3.2	Clause 3.2.2(ii)	
Clause 3.3.3		
Clause 3.3.25		
Clause 7.2		

Schedule

No. of 2020

Federal Court of Australia

District Registry: New South Wales

Division: General

Applicants

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

Respondents

Second Respondent Apple Pty Limited (ACN 002 510 054)