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Important Information

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Form 33
Rule 16.32

Defence to the Further Amended Statement of Claim

No. VID 341 of 2022

Federal Court of Australia
District Registry: Victoria
Division: General

David Anthony and another

Applicants

Apple Inc and another

Respondents

The Respondents have adopted the headings and subheadings as appear in the Further Amended Statement of Claim (**Claim**), however in doing so the Respondents do not thereby make any admissions. The amendments to this Defence as denoted in underline and strikethrough were made on 20 December 2023.

PART I: PARTIES

Applicants and Group Members

1. In answer to paragraph 1 of the Claim, the Respondents:

   (a) admit that each of the Applicants purport to bring the proceeding on behalf of iOS Device Group Members and iOS App Developer Group Members, as those terms are defined in paragraph 1 of the Claim;

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Filed on behalf of The Respondents
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(b) say that each iOS Device Group Member would have purchased each iOS app or in-app digital content within an iOS app supplied by an iOS App Developer Group Member, each of which entered into an agreement with Apple Inc to supply their iOS app on iPhones or iPads (**iOS devices**) via the Australian App Store;

(c) say that they do not know and therefore cannot admit the specific circumstances of purchase of iOS apps or in-app digital content within such iOS apps by any iOS Device Group Member, which will be individual to each iOS Device Group Member;

(d) say that they do not know and therefore cannot admit the specific circumstances of supply of iOS apps or in-app digital content by any iOS App Developer Group Member, which will be individual to each iOS App Developer Group Member;

(e) deny that each Applicant has a claim which gives rise to a substantial common issue of law or fact for each iOS Device Group Member or iOS App Developer Group Member;

Particulars

Paragraph 63(c)(ii) below of the defence to the Claim.

(f) otherwise deny the allegations in the paragraph.

2. In answer to paragraph 2 of the Claim, the Respondents:

(a) say that Dark Ice Interactive Pty Limited (**Dark Ice**) entered into an Apple Developer Agreement and Developer Program License Agreement (**DPLA**) with Apple Inc on 6 May 2013 and that the expiry of Dark Ice's developer account is currently 2 July 2024~~renewed its DPLA most recently on 6 June 6 2022~~;

(b) admit that Dark Ice is a developer of iOS apps and in-app digital content;

Particulars

i. Dark Ice is the registered developer of the free download iOS app, Pocket Cal kJ, which offers an in-app purchase of Pocket Cal kJ Plus and the paid download iOS app, Pocket Cal kJ Pro (together, the **Dark Ice iOS apps**). Dark Ice has chosen to describe each of Pocket Cal kJ and Pocket Cal kJ Pro as a Health & Fitness app on the App Store.

ii. Dark Ice is also the registered developer of two free download apps, Pocket Weight Track and PHL Portal, both of which offer no in-app

purchases. Dark Ice has chosen to describe Pocket Weight Track as a Health & Fitness app and PHL Portal as a Business app on the App Store.

(c) admit that during the Relevant Period, the Dark Ice iOS apps were made available for download to iOS devices via the Australian App Store;

(d) refer to and repeat paragraph 84(c) below;

(e) say that Dark Ice determines the price at which it makes available the Dark Ice iOS apps via the App Store;

(f) say that since 22 December 2020, Dark Ice has been enrolled in the App Store Small Business Program; and

Particulars

From 22 December 2020, under the App Store Small Business Program, the commission paid to Apple for purchases of, and within, the Dark Ice iOS apps reduced from 30% to 15%.

(g) otherwise do not know and therefore cannot admit the paragraph.

3. The Respondents do not plead to paragraph 3 of the Claim as it contains no allegations against them.

The Respondents

4. The Respondents do not plead to paragraph 4 of the Claim as it contains no allegations against them.

Apple Inc

5. The Respondents admit the allegation in paragraph 5 of the Claim.

6. The Respondents deny the allegation in paragraph 6 of the Claim.

7. In answer to paragraph 7 of the Claim, the Respondents:

(a) say that Apple Pty Limited is an indirect subsidiary of Apple Inc; and

(b) otherwise deny the allegation in the paragraph.

8. In answer to paragraph 8 of the Claim, the Respondents:

   (a) admit that Apple Inc is headquartered in California;

   (b) admit that the amount of its market capitalisation varies from time to time and that it has exceeded USD2 trillion;

   (c) admit that Apple Inc owns the domain "apple.com";

   (d) say that:

      (i) Apple Inc is responsible for the display of information and transactions relating to hardware and software products offered to, and purchased by, consumers at least in the United States through webpages operated by Apple Inc; and

      (ii) Apple Pty Limited is responsible for the display of information and transactions relating to hardware and software products offered to, and purchased by, Australian consumers through webpages operated by Apple Pty Limited;

   (e) say that Apple Inc. is appointed agent by app developers for the marketing and end-user download of the Licensed Applications by end-users in the United States;

   (f) say further that Apple Pty Limited is appointed agent for the marketing and end-user download of the Licensed Applications by end-users in Australia; and

Particulars

Exhibit A, Schedule 1 of the DPLA

   (g) otherwise deny the allegations in the paragraph.

9. In answer to paragraph 9 of the Claim, the Respondents:

   (a) say that Apple Inc also supplies a variety of services; and

   (b) otherwise admit the allegations in the paragraph.

The App Store, App Store Connect and IAP for iOS

10. In answer to paragraph 10 of the Claim, the Respondents:

   (a) admit that Apple Inc has developed and operates the App Store and App Store Connect; and

(b) refer to and repeat paragraph 13 below, and otherwise admit that Apple Inc developed and operates IAP.

11. In answer to paragraph 11 of the Claim, the Respondents:

(a) say that the iPhone was launched in Australia in 2008 with the App Store pre-installed from launch;

(b) refer to and repeat paragraph 63(b)(i)A below; and

(c) otherwise admit the allegations in the paragraph.

12. In answer to paragraph 12 of the Claim, the Respondents:

(a) say that App Store Connect comprises, inter alia, a suite of tools licensed by Apple Inc to app developers which permits app developers on certain terms and conditions to distribute pre-release versions of apps via TestFlight and to publish approved apps on the App Store; and

(b) otherwise admit the allegations in the paragraph.

12A. In answer to paragraph 12A of the Claim, the Respondents:

(a) refer to and repeat paragraphs 8(e) and 8(f) above and paragraphs 15(e), 36, 50, 51(b), 54, 72 and 73(a) below;

(b) rely on the terms of the DPLA, Schedule 2 of the DPLA and the App Store Review Guidelines for their full force and effect; and

(c) otherwise deny the allegations in the paragraph.

12B. In answer to paragraph 12B of the Claim, the Respondents:

(d) refer to and repeat paragraph 12A above; and

(e) otherwise deny the allegations in the paragraph.

13. In answer to paragraph 13 of the Claim, the Respondents:

(a) in respect of subparagraph 13(a):

(i) say that the terms of the App Store Review Guidelines, to which the DPLA requires iOS developers to adhere, do not permit apps distributed through the

App Store which unlock or enable functionality with mechanisms other than through Apple Inc's in-app purchase system (**IAP**);

Particulars

i. Section 3.1.1 of the App Store Review Guidelines

ii. Section 3.3.3 of the DPLA

(ii) say that IAP is an integrated suite of features through which, in Australia, Apple Pty Limited can securely, reliably, and efficiently collect the commission payments to which it is contractually entitled;

Particulars

i. IAP is a functionality within Apple Inc's commerce engine for effecting in-app digital transactions.

ii. IAP is the App Store's secure and centralized system that facilitates simultaneous transactions between developers and consumers, in which digital goods are delivered, payment is transferred, sales are recorded and any commission of Apple is collected.

iii. IAP, for example:

A. allows users to view their purchase history and restore purchases;

B. deploys a digital checkout function that enables Apple to record all transactions that take place on the App Store, calculate the commission payable on such transactions and collect its commission on each in-app sale;

C. provides family account sharing and global parental controls;

D. enables customer support for in-app transactions issues;

E. facilitates transactions that are secure and protected from fraud by linking with Apple Inc's security features, for example, Face ID and two-factor authentication, whilst enabling verification by Apple Inc of the delivery of in-app purchases to users' devices;

F. removes administrative burdens and supports developers in selling their services to, and receiving payments from, customers, including by collecting and managing payment information from customers globally, handling currency conversions and ensuring compliance with local tax laws.

(iii) say that Apple Inc licenses the intellectual property comprised in software development kits (**SDK**) and application programming interfaces (**API**) necessary to develop apps to operate with iOS on certain terms and conditions, including the App Store Review Guidelines, offered to all developers;

(iv) say further that, under the terms of the App Store Review Guidelines and DPLA, certain apps may use purchase methods other than IAP;

(b) in respect of subparagraph 13(b), admit that IAP was launched in 2009;

(c) in respect of subparagraph 13(c):

(i) say that whether a commission is payable, and its rate, is regulated by the DPLA and varies depending on the transaction;

(i) say further that a 15% commission is applicable to substantially all developers and transactions; and

Particulars

Clause 3.1.3 and 3.1.3(a) through (f) of the App Store Review Guidelines.

(d) otherwise deny the allegations in the paragraph.

13A. In answer to paragraph 13A of the Claim, the Respondents:

(a) refer to and repeat paragraphs 12A, 12B and 13 above; and

(b) otherwise deny the allegations in the paragraph.

13B. In answer to paragraph 13B, the Respondents:

(a) admit that since 2008, the App Store has generated revenue for Apple Inc.;

(b) say that they do not calculate either the accounting or economic profit referable specifically to the App Store;

(c) refer to and repeat paragraphs 8(e) and 8(f) above and 63(b) below; and

(d) otherwise deny the allegation in the paragraph.

Apple Pty Limited

14. The Respondents admit the allegations in paragraph 14 of the Claim.

15. In answer to paragraph 15 of the Claim, the Respondents:

(a) in respect of sub-paragraph 15(a), say that Apple Pty Limited has oversight over the types of content available on the Australian App Store;

(b) ~~admit~~ in relation to the allegation in sub-paragraph 15(b), refer to and repeat paragraph 8(f) above;

(c) admit the allegation in sub-paragraph 15(c);

(d) admit the allegation in sub-paragraph 15(d);

(e) in respect of sub-paragraph 15(e), admit that Apple Pty Limited receives payment for app purchases and in-app purchases on the Australian App Store from the consumer, as agent for the developer;

(f) in respect of sub-paragraph 15(f), say that Apple Pty Limited, in respect of purchases of paid apps, or in-app purchases, on the Australian App Store retains the commission;

(g) say further that Apple Pty Limited has no role in:

(i) pre-installing the App Store on iOS devices;

(ii) determining which apps are to be made available on, or removed from, the App Store;

(iii) removing apps from the App Store; and

(iv) requiring that developers enter into, be bound by and/or comply with the DPLA or any other related policies of Apple Inc; and

(h) otherwise deny the allegations in the paragraph.

16. In answer to paragraph 16 of the Claim, the Respondents:

(a) refer to and repeat paragraph 15(g)(iv);

(b) say that the reference to "gives effect" in the allegation is vague and embarrassing because it purports to express a legal conclusion; and

(c) otherwise deny the allegations in the paragraph.

17. The Respondents admit the allegations in paragraph 17 of the Claim.

PART II: APP DISTRIBUTION AND PAYMENTS

Smartphones and tablets

18. In answer to paragraph 18 of the Claim, the Respondents ~~say that~~:

(a) say that smartphones are portable electronic devices that can connect wirelessly to the internet and are capable of multipurpose computing functions, including, among other things, internet browsing, sending and receiving email, accessing workplace software, editing documents, using social media, streaming video, listening to music, or playing games; ~~and~~

(b) admit the allegations in sub-paragraphs 18(g), 18(i) and 18(k);

(c) admit that smartphones are powered by a rechargeable battery;

(d) say that smartphones manufactured in recent years typically possess near field communication functionality; and

(e) otherwise deny the allegations in the paragraph.

19. The Respondents do not know and therefore cannot admit the allegation in paragraph 19 of the Claim.

20. In answer to paragraph 20 of the Claim, the Respondents ~~say that~~:

    (a) say that tablets are portable electronic devices that can connect wirelessly to the internet and are capable of multipurpose computing functions, including, among other things, internet browsing, sending and receiving email, accessing workplace software, editing documents, using social media, streaming video, listening to music, or playing games; ~~and~~

    (b) admit the allegations in sub-paragraphs 20(j), 20(l) and 20(m);

    (c) say further that tablets are powered by a rechargeable battery; and

    (d) otherwise deny the allegations in the paragraph.

21. The Respondents do not know and therefore cannot admit the allegation in paragraph 21 of the Claim.

22. Not used.

23. In answer to paragraph 23 of the Claim, the Respondents:

    (a) say that the relative size or weight, battery life and portability of laptop PCs are not relevant functional differences; ~~and~~

    (b) refer to and repeat paragraph 23A(b) through 23A(e) below; and

    (c) otherwise deny the allegations in the paragraph.

23A. In answer to paragraph 23A of the Claim, the Respondents:

    (a) say that the relative size or weight, battery life and portability of gaming consoles, on the one hand, and smartphones and tablets on the other, are not relevant functional differences;

    (b) say further that game apps and some non-game apps typically are able to be operated on a range of smartphones and tablets, laptops and desktop PCs and gaming consoles;

    (c) say further that developers can and do develop cross-platform apps;

Particulars

i. Game and non-game app transactions are made available by developers on a range of platforms including Apple App Store, Google Play, Samsung Galaxy Store, Microsoft Store, Nintendo eShop, Amazon Appstore and PlayStation Store, and game subscription services, such as Xbox Games Pass, Playstation Plus, Nintendo Switch Online, Prime Gaming, and websites such as Origin and Ubisoft Connect and cloud gaming services such as GeForce Now and Xbox Cloud Gaming.

(d) refer to and repeat paragraph 63(b) below;

(e) say further that game app and non-game app transactions are able to be made through a number of channels; and

(f) otherwise deny the allegations in paragraph 23A.

24. Not used.

iPhones and iPads

25. In answer to paragraph 25 of the Claim, the Respondents:

(a) refer to and repeat paragraph 17 above; and

(b) otherwise admit that Apple Pty Limited markets and supplies iPhones and iPads in Australia.

26. The Respondents do not know and therefore cannot admit the allegation in paragraph 26 of the Claim.

27. The Respondents do not know and therefore cannot admit the allegation in paragraph 27 of the Claim.

Operating Systems

28. In answer to paragraph 28 of the Claim, the Respondents:

(a) admit that in the nine months ended 26 June 2021, Apple Inc's net sales from:

(i) iPhones was USD153,105 million; and

(ii) iPads was USD23,610 million; and

(b) otherwise deny the allegations in the paragraph.

29. In answer to paragraph 29 of the Claim, the Respondents:

    (a) say that the references to 'computing device' and 'basic functionality' are vague and embarrassing;

    (b) say further that, with respect to iPhone, iPad and Mac devices, the respective operating systems for those devices are software that provide functionality to those devices, facilitate the operations of those devices, ~~and~~ may permit the installation and operation of apps and manages the memory of those devices; and

    (c) otherwise deny the allegations in the paragraph.

30. The Respondents admit the allegation in paragraph 30 of the Claim.

31. The Respondents admit the allegation in paragraph 31 of the Claim.

32. In answer to paragraph 32 of the Claim, the Respondents:

    (a) admit that a Mobile OS provides functionality to smartphone or tablet users, facilitates the functionality of a smartphone or tablet, and may permit the installation and operation of apps; and

    (b) otherwise deny the allegations in the paragraph.

33. In answer to paragraph 33 of the Claim, the Respondents:

    (a) refer to and repeat paragraph 32 above;

    (b) admit that a Mobile OS is necessary for the proper functioning of the features of a mobile device including, where equipped:

        (i) cellular;

        (ii) bluetooth;

        (iii) WiFi;

        (iv) button controls;

        (v) touch and motion commands;

        (vi) GPS positioning;

        (vii) music player;

(viii) near field communication;

(ix) camera and video recording;

(x) speech and face recognition; and

(xi) voice recording; and

(c) otherwise deny the allegations in the paragraph.

App for smartphones and tablets

34. In answer to paragraph 34 of the Claim, the Respondents:

(a) admit that iOS users use a number of apps on iOS devices, for functions that include shopping, social networking, food ordering, drafting and sending emails, newspaper subscriptions, video and music streaming, playing mobile games, and editing documents, among others;

(b) admit that such apps enhance and optimise the functionality of iOS devices; and

(c) otherwise deny the allegations in the paragraph.

35. In answer to paragraph 35 of the Claim, the Respondents:

(a) in respect of subparagraph 35(a):

(i) refer to and repeat paragraph 51(c) below; and

(ii) say that native apps must be compatible with and are designed to function on the specific OS on which they will be downloaded and run;

(b) in respect of subparagraph 35(b), admit that apps are sometimes downloaded and installed onto a device;

(c) in respect of subparagraph 35(c), admit that iOS apps almost invariably appear as a button or icon on the screen of an iPhone or iPad;

(d) in respect of subparagraph 35(d), admit that app developers seek to update their apps from time to time for various reasons, including to add new functions, to ensure compatibility with hardware or software, and to fix technical issues;

(e) say that the App Store allows developers to provide unlimited, free, and automatic app updates to consumers worldwide; and

(f) otherwise deny the allegations in the paragraph.

36. In answer to paragraph 36 of the Claim, the Respondents:

(a) say that app developers are able to develop apps for any app distribution platform;

(b) say further that in March 2008, Apple Inc released an SDK, comprised of Apple Inc intellectual property, to third-party app developers permitting and enabling them to build native apps for iOS;

(c) say further that if app developers choose to develop native iOS apps exploiting Apple Inc's proprietary tools, including SDKs and APIs, in order to develop native iOS apps they must enter into Apple Inc's DPLA which permits them to do so; and

(d) otherwise do not know and therefore cannot admit the allegations in the paragraph.

37. In answer to paragraph 37 of the Claim, the Respondents:

(a) refer to and repeat paragraph 35(a) above; and

(b) otherwise deny the allegations in the paragraph.

37A. In answer to paragraph 37A, the Respondents,

(a) refer to and repeat paragraphs 35(a)(ii) above and 38(b), 44(b), 51(c), 72(c) and 88 below; and

(b) otherwise deny the allegation in the paragraph.

App stores for smartphones and tablets

38. In answer to paragraph 38 of the Claim, the Respondents:

(a) refer to and repeat paragraph 35(a) above;

(b) admit that app marketplaces, including the App Store, are transaction platforms which provide a convenient place for consumers to discover and obtain apps which are compatible with the Mobile OS of the particular device and for developers to offer and market their apps to consumers; and

(c) otherwise deny the allegations in the paragraph.

39. In answer to paragraph 39 of the Claim, the Respondents:

(a) refer to and repeat paragraph 38 above; and

(b) otherwise admit the allegations in the paragraph.

39A. In answer to paragraph 39A of the Claim, the Respondents:

(a) say that app marketplaces, including the App Store, are transaction platforms which provide a convenient place for consumers to discover and obtain apps which are compatible with the Mobile OS of the particular device and for developers to offer and market their apps to consumers;

(b) refer to and repeat paragraph 63(b) below; and

(c) otherwise deny the allegations in the paragraph 39A.

Apps for iOS Devices

40. The Respondents admit the allegation in paragraph 40 of the Claim.

41. The Respondents admit the allegation in paragraph 41 of the Claim.

42. The Respondents do not plead to paragraph 42 of the Claim as it contains no allegation against them.

43. In answer to paragraph 43 of the Claim, the Respondents:

(a) admit that iOS devices are sold to consumers with iOS or iPadOS pre-installed;

(b) admit that Apple Inc does not license iOS to other manufacturers of smartphones or tablets; and

(c) otherwise admit the allegations in the paragraph.

44. In answer to paragraph 44 of the Claim, the Respondents:

(a) refer to and repeat paragraphs 35(a) above and 51(c) below;

(b) say that iOS apps and web apps work on iOS devices; and

(c) otherwise deny the allegation in the paragraph.

45. In answer to paragraph 45 of the Claim, the Respondents:

(a) say that the vast majority of apps available to iOS users are developed by third-party developers, not Apple Inc; and

(b) otherwise admit the allegation in the paragraph.

46. In answer to paragraph 46 of the Claim, the Respondents:

(a) say that app developers can develop iOS apps by licensing and exploiting Apple Inc's proprietary app development tools and services, for free, by entering into, and abiding by, the Apple Developer Agreement;

(b) say further that in order for app developers to be permitted and to distribute apps through the App Store, app developers must also enter into, and abide by, the DPLA;

(c) say further that by entering into the DPLA, developers are licensed and are permitted to gain access to Apple Inc's proprietary software to develop and distribute iOS apps; and

(d) otherwise admit the allegations in the paragraph.

46A. In answer to paragraph 46A of the Claim, the Respondents:

(a) do not know whether app developer preferences follow and are a function of consumer preferences and therefore cannot admit this allegation;

(b) refer to and repeat paragraphs 38(b) and 44(b) above and 51(c), 72(c) and 88 below; and

(c) otherwise deny the allegations in the paragraph.

Distribution of iOS apps

46B. In answer to paragraph 46B of the Claim, the Respondents:

(a) refer to and repeat paragraph 51(b) above and 54 below; and

(b) otherwise deny the allegations in the paragraph.

47. In answer to paragraph 47 of the Claim, the Respondents:

(a) say that the App Store has since launch and continues to come pre-installed on iOS devices supplied in Australia by Apple Pty Limited;

(b) say that the App Store cannot be uninstalled or deleted by iOS users; and

(c) otherwise deny the allegations in the paragraph.

48. In answer to paragraph 48 of the Claim, the Respondents:

(a) admit that the iPhone and iPad devices supplied in Australia by Apple Pty Limited come pre-installed with a few native Apple iOS apps some of which can be removed by the user;

(b) say further that users may choose to install additional third-party apps from the App Store; and

(c) otherwise deny the allegations in the paragraph.

49. In answer to paragraph 49 of the Claim, the Respondents:

(a) refer to and repeat paragraphs 35(a) above and 50 below with respect to iOS apps; and

(b) otherwise deny the allegations in the paragraph.

50. In answer to paragraph 50 of the Claim, the Respondents:

(a) say that, subject to the terms of the DPLA, developers are permitted by Apple Inc to submit native iOS apps that are developed by exploiting Apple Inc's intellectual property for distribution through the App Store including in Australia through the Australian App Store; and

(b) otherwise deny the allegations in the paragraph.

Particulars

Section 3.2(g) of the DPLA.

51. In answer to paragraph 51 of the Claim, the Respondents:

(a) refer to and repeat paragraphs 46B and 50 above;

(b) say that by the terms of the DPLA, Apple Inc prohibits apps that create a store or storefront for other code or applications;

Particulars

Section 3.3.2(b) of the DPLA.

(c) say that from the launch of the iPhone in 2008 in Australia, third-party developers could make and have made available web apps for download, installation and update on iOS devices through the Safari web browser; ~~and~~

Particulars

Web apps are applications that run on a web browser.

(d) say that in respect of macOS devices, third-party developers could make and have made available native apps and web apps for download, installation and update on macOS devices;

(e) say that macOS and iOS devices face different threat models by reason of a number of differences between these devices and their uses; and

(f) otherwise deny the allegations in the paragraph.

52. In answer to paragraph 52 of the Claim, the Respondents:

(a) refer to and repeat paragraph 51 above; and

(b) otherwise deny the allegations in the paragraph.

53. In answer to paragraph 53 of the Claim, the Respondents:

(a) say that the Australian App Store is accessible by iOS users where the country or region within an iOS user's Apple ID account is set to Australia;

(b) admit that the number of apps available for download on the Australian App Store, as at the end of February 2021, was approximately 1.5 million;

Particulars

The number of apps is based on the number of developers, worldwide, who elected for their app(s) to be made available on the Australian App Store.

(c) admit that, as at the end of February 2021, the developers of approximately 215,000 apps available for download in Australia on the App Store notified, when submitting the binary of the app to Apple Inc, that it had IAP functionality;

(d) admit that the total number of distinct apps downloaded from the Australian App Store, in the period March 2020 to February 2021 (inclusive), was approximately 1 million; and

(e) otherwise deny the allegations in the paragraph.

54. In answer to paragraph 54 of the Claim, the Respondents:

(a) say that the reference to 'technical reason' is vague and embarrassing;

(b) say further that the allegation in the paragraph is unparticularised;

(c) say further that permitting app developers to provide alternative app stores on iOS devices or allowing iOS device users to directly download, install and update iOS apps on iOS devices has the potential to adversely affect the:

(i) functional integrity of iOS devices; and

(ii) security and privacy of data contained on iOS devices;

Particulars

i. The proper functioning or performance of the components of iOS devices separately and together in the manner they have been designed and supplied by the Respondents to end users can be impacted (including in severe cases by rendering the device unusable) by third party software downloaded, installed or updated onto devices.

ii. Centralised app distribution and computer and human review of software downloaded onto iOS devices are critical to the integrity of iOS devices.

iii. Without centralised app distribution, no computer or human review of apps could be ensured because software could be downloaded to the device directly.

(d) say further that permitting app developers to provide alternative app stores on iOS devices or to allow iOS device users to directly download, install and update iOS apps on iOS devices is inconsistent with the terms on which Apple Inc agrees to make its intellectual property available for use by app developers; and

(e) otherwise deny the allegations in the paragraph.

Payment for in-app purchases ~~for in-app content~~

55. In answer to paragraph 55 of the Claim, the Respondents:

(a) say that Apple Inc is aware of at least five commonly used business models which developers have chosen of their own volition over time to use to monetise their apps they make available on iOS devices through the App Store platform; and

Particulars

i. The five business models are free, freemium, subscription, paid, and paymium models.

ii. Under the (1) "free" model, users do not pay to download or use the app and developers can display ads within the app; (2) "freemium" users pay nothing to download the app and are offered optional in-app purchase for premium features, additional content, subscriptions or digital goods; (3) "subscription" model, users can buy in-app purchases to access content, services, and experiences for renewable or non-renewing durations; (4) "paid" model, users pay once to download the app and use all of its functionality with no additional charges; and (5) "paymium" model users pay to download the app and have the option to buy additional features, content, or services through in-app purchases.

(b) otherwise do not know and therefore cannot admit the allegations in the paragraph.

56. In answer to paragraph 56 of the Claim, the Respondents:

(a) admit that developers can choose to license from Apple Inc and exploit an API such as the In-App Purchase API to enable additional content, functionality or services to be delivered or made available to a user for use within an app with or without an additional fee; and

(b) otherwise do not know and therefore cannot admit the allegations in the paragraph.

57. The Respondents do not know and therefore cannot admit the allegations in paragraph 57 of the Claim.

57A. In answer to paragraph 57A of the Claim, the Respondents refer to and repeat paragraph 101 below.

58. Not used.

In-app payments for iOS Devices

59. In response to paragraph 59 of the Claim, the Respondents:

(a) refer to and repeat paragraphs 13(a)(i) and 56 above; and

(b) otherwise deny the allegations in the paragraph.

60. In response to paragraph 60 of the Claim, the Respondents:

(a) refer to and repeat paragraph 59 above; and

(b) otherwise deny the allegations in the paragraph.

61. In answer to paragraph 61 of the Claim, the Respondents:

(a) refer to and repeat paragraph 53 above;

(b) admit that in the period March 2020 to February 2021 (inclusive), the number of transactions in Australia utilising IAP was approximately 156 million;

(c) admit that in the period March 2020 to February 2021 (inclusive) the aggregate value in Australian dollars of transactions on the Australian App Store utilising IAP was approximately A$1.8 billion; and

(d) otherwise deny the allegations in the paragraph.

62. In answer to paragraph 62 of the Claim, the Respondents:

(a) refer to and repeat paragraphs 13(a) and 59 above;

(b) say that the reference to 'technical reason' is vague and embarrassing;

(c) say further that the allegation in the paragraph is unparticularised;

(d) say further that permitting app developers to use alternative in-app payment methods for accepting and processing payments for in-app content within an iOS app has the potential to adversely affect the:

(i) functional integrity of iOS devices; and

(ii) security and privacy of data contained on iOS devices; and

Particulars

IAP is an integrated feature of iOS and the App Store and supplies multiple services to both developers and users that are inseparable from the transactions facilitated by the App Store.

(e) otherwise deny the allegations in the paragraph.

PART III: RELEVANT MARKETS

The Australian iOS App Distribution Markets

63. In answer to paragraph 63 of the Claim, the Respondents:

(a) say that the allegation is vague and embarrassing because:

(i) it fails to properly articulate a precise market(s) or a relevant demand said to give rise to the alleged market(s); and

(ii) the reference to "app developers" in general terms in particular (i) to the paragraph exacerbates the lack of specificity in the definition of the alleged market(s) including in relation to the Second Applicant;

(b) under cover of that objection, and on the basis that the alleged contraventions pleaded in Parts V through VII of the Claim are confined to the period from 6 November 2017 to 20 June 2022 (**Relevant Period**), say that:

(i) the App Store is a two-sided transaction platform that connects app developers, like the Second Applicant, with consumers by:

A. creating a platform through which developers can publish their apps and from which a consumer can download the application;

B. facilitating observable transactions that simultaneously connect developers with consumers; and

C. adopting pricing strategies, service provision strategies, and rules of behaviour to attract these two distinct groups of users and to facilitate productive interactions between them;

(ii) a successful interaction—a download, an app update, or an in-app purchase—will result in a transaction simultaneously provided to the developer and the user, such that the single product supplied via the App Store is app transactions;

(iii) the App Store is one of a number of substitute online platforms available on multiple devices, including tablets, smartphones, laptops, PCs, Macs, and game consoles, that facilitate two-sided transactions;

(iv) the product and services supplied through the platforms described in paragraphs 63(b)(i) through 63(b)(iii) above are dynamic in nature and continually evolving including as a result of the introduction of new and different online platforms;

(c) say further that:

(i) the App Store competes with other transaction platforms in multiple transaction markets, including those relevant to transactions involving apps acquired by the First Applicant and apps supplied by the Second Applicant respectively;

Particulars

i. The App Store competes with at least the following game app transaction platforms:

A. game app transaction platforms on mobile devices (e.g., Google Play, launched as

Android Market in 2008 becoming Google Play in 2012; Samsung Galaxy App Store, launched 2009);

B. game app transaction platforms on PCs/Macs (e.g., Steam, launched 2003; Epic Games Store (**EGS**), launched 2018; Ubisoft Connect, launched 2012; Bethesda, launched 2016);

C. game app transaction platforms on consoles (e.g., Sony PlayStation Store, launched 2006 and Microsoft Xbox Live Marketplace, launched 2005; Nintendo eShop, launched 2011); and,

D. web-based game app transaction platforms including most recently, streaming game services (e.g., Nvidia GeForce Now; launched early 2020; Google Stadia launched November 2019; Microsoft Xbox Cloud Gaming; Amazon Luna available for web streaming of games to connected devices including iOS devices).

ii. In respect of non-game transactions, app developers and consumers can choose to transact through a number of one or two sided platforms, and it is common for app developers to do so.

(ii) the appropriate market and its competitive conditions in which apps are acquired by the First Applicant, (Catan Universe, Ticket to Ride - Train Game and Worms3), and apps are supplied by the Second Applicant (the Dark Ice iOS apps), differ because:

A. for example, there is limited demand or supply-side substitutability between app transactions with the First Applicant and the Second Applicant; and

B. the set of two-sided platforms and one-sided businesses that compete with the App Store to facilitate transactions with the First Applicant, on the one hand, and the Second Applicant, on the other hand, vary; and

(d) otherwise deny the allegations in the paragraph.

63A. In answer to paragraph 63A of the Claim, the Respondents:

(a) refer to and repeat paragraph 63 above;

(b) say that the product market described in paragraph 63A of the Claim is incompatible with the product market described in paragraph 63 of the Claim; and

~~(c) say that the allegation is vague and embarrassing because:~~

~~(i) it fails to identify the "wider market or markets" of which the alleged iOS App Distribution Market is alleged to be "an economically distinct sub-market"; and~~

~~(ii) it fails to articulate whether the App Distribution Market is itself an economically distinct market (or sub-market); and~~

(~~d~~c) otherwise deny the allegations in the paragraph.

64. In answer to paragraph 64 of the Claim, the Respondents:

(a) refer to and repeat paragraphs 63 and 63A above;

(b) say that the allegation is vague and embarrassing because it defines, collectively, the primary and alternative product markets described in paragraphs 63 and 63A, and the alternative geographic market~~s~~ described in paragraph 64 of the Claim, as "Australian iOS App Distribution Markets", in circumstances where:

(i) the product market(s) described in paragraph 63A of the Claim includes the distribution of non-iOS apps; and

(ii) such alleged markets are mutually exclusive; and

(c) otherwise deny the allegations in the paragraph.

The Australian iOS In-App Payment Solutions Market~~s~~

65. In answer to paragraph 65 of the Claim, the Respondents:

(a) say that the allegation is vague and embarrassing because:

(i) it fails to properly articulate a precise market; and

(ii) the reference to "app developers" in general terms exacerbates the lack of specificity in the definition of the alleged market;

(b) under cover of that objection, and on the basis that the alleged contraventions pleaded in Parts V through VII of the Claim are confined to the Relevant Period:

(i) refer to and repeat paragraph 63;

(ii) say that there is not a separate market for the supply of services to app developers for accepting and processing payments for in-app content within an iOS app;

(iii) say that the in-app payment feature within the App Store (IAP):

A. is a secure and centralized system used to record sales, manage payments to developers, and collect commissions from developers that utilise the App Store;

B. facilitates simultaneous transactions in which digital goods are delivered, payment is transferred, and Apple's commission is collected; and

C. is an integrated feature of iOS and the App Store that is inseparable from the transactions facilitated by the App Store,

such that IAP is not a separate product; and

(c) otherwise deny the allegations in the paragraph.

66. In answer to paragraph 66 of the Claim, the Respondents:

(a) refer to and repeat paragraph 65 above;

(b) say that the allegation is vague and embarrassing because it defines, collectively, the alternative geographic market~~s~~ described in paragraph 66 of the Claim as "Australian iOS In App Payment Solutions Markets", in circumstances where such alleged markets are mutually exclusive; and

(c) otherwise deny the allegations in the paragraph.

PART IV: APPLE'S RESTRICTIVE AGREEMENTS WITH APP DEVELOPERS

The Contractual Framework

67. In answer to paragraph 67 of the Claim, the Respondents:

(a) say further that the DPLA is an intellectual property license which permits the exploitation on terms and conditions by developers of the software and services provided by Apple Inc to developers;

(b) refer to and repeat subparagraph 72(a) below; and

(c) otherwise admit the allegations in the paragraph.

Particulars

Purpose clause, DPLA.

68. The Respondents admit the allegations in paragraph 68 of the Claim.

69. In answer to paragraph 69 of the Claim, the Respondents:

(a) refer to and repeat paragraphs, 13(a), 51(b) and 54 above, and paragraphs 72 and 80 below; and

(b) otherwise admit the allegations in the paragraph.

70. In answer to paragraph 70 of the Claim, the Respondents:

(a) say that, under the terms of the DPLA, developers agree to pay an annual program fee "[a]s consideration for the rights and licenses granted to [the developer] under [the DPLA]"; and

(b) otherwise admit the allegations in the paragraph.

Particulars

Clause 8, DPLA.

71. In answer to paragraph 71 of the Claim, the Respondents:

(a) say that the term "in connection with Australia" is vague and embarrassing;

(b) under cover of that objection, say that in the period March 2020 to February 2021 (inclusive), based on the number of Developer Agreements entered into with persons who have registered using an Australian address as at approximately 4 March 2021, there were:

(i) 12,097 new Developer Agreements entered into;

(ii) 19,231 existing Developer Agreements which were renewed; and

(c) otherwise deny the allegations in the paragraph.

72. In answer to paragraph 72 of the Claim, the Respondents:

(a) say that, to distribute a native iOS app exploiting Apple Inc's software, an app developer must enter into, and abide by, the DPLA;

(b) say further that the distribution of free native iOS apps through the App Store is subject to the distribution terms contained in Schedule 1 to the DPLA;

Particulars

i. DPLA, Purpose clause: "Distribution of free (no charge) Applications (including those that use the In-App Purchase API for the delivery of free content) via the App Store or Custom App Distribution will be subject to the distribution terms contained in Schedule 1 to this Agreement".

ii. The DPLA applies only to apps "developed using the Apple Software": Clause 3.2(g), DPLA.

(c) say further that app developers can distribute web apps for iOS devices without entering into the DPLA or abiding by the App Store Review Guidelines; and

Particulars

"For everything else there is always the open Internet": Introduction, App Store Review Guidelines.

(d) otherwise deny the allegations in the paragraph.

73. In answer to paragraph 73 of the Claim, the Respondents:

(a) say that, to distribute a paid iOS app or offer in-app purchases, an app developer must enter into Schedule 2 to the DPLA;

Particulars

> DPLA, Purpose clause: "If You would like to distribute Applications for which You will charge a fee or would like to use the In-App Purchase API for the delivery of fee-based content, You must enter into a separate agreement with Apple ("Schedule 2")".

(b) refer to and repeat paragraph 72(c) above; and

(c) otherwise deny the allegations in the paragraph.

74. In answer to paragraph 74 of the Claim, the Respondents:

(a) admit the allegations in subparagraph 74(a);

(b) admit the allegations in subparagraph 74(b);

(c) admit the allegations in subparagraph 74(c);

(d) admit the allegations in subparagraph 74(d);

(e) admit the allegations in subparagraph 74(e);

(f) admit the allegations in subparagraph 74(f);

(g) admit the allegations in subparagraph 74(g);

(h) admit the allegations in subparagraph 74(h);

(i) admit the allegations in subparagraph 74(i);

(j) deny the allegations in subparagraph 74(j), and say that, pursuant to the terms of Schedule 2 to the DPLA, in Australia, the applicable commission on paid apps and in-app purchases of digital content for virtually all developers is 15%, with the following additional categories of commission:

(i) for the less than 1% of developers globally and in Australia where revenue from paid apps and in-app purchases exceeds US$1 million per annum in aggregate: 30% commission on the amount in excess of US$1 million;

(ii) for developers whose revenue did not exceed US$1 million per annum in aggregate in the preceding calendar year and are enrolled in the App Store Small Business Program: 15% commission on paid apps and in-app purchases;

(iii) for auto-renewing subscription purchases: a commission of 15% of all prices payable by each End-User for renewals after the first year of the subscription period;

(iv) for premium subscription video providers who integrate their services into the Apple TV app: a 15% commission when users make an in-app purchase of a subscription to their content streaming;

(v) for subscription news publications that provide their content to Apple News in Apple News Format: 15% commission on certain in-app purchase subscriptions; and

(vi) zero commission for:

A. free apps, including those that generate revenue from in-app advertising;

B. "reader apps", where users purchase or subscribe to content outside of the app, but can access that content on their devices (eg a subscription to Netflix or Spotify, book titles for use in Amazon's Kindle app, or newspapers or magazines); and

C. sales of physical goods and services in an app;

Particulars

Clause 3.4, Sch 2 DPLA.

(k) in respect of the allegations in subparagraph 74(k) admit that, pursuant to cl 3.5 of the DPLA, upon collection of any amounts from any End-User as the price for any Licensed Application delivered to that End-User, Apple Inc may deduct the full amount of the commission with respect to that Licensed Application and any taxes collected by Apple Inc, and remit the remainder to the app developer; and

(l) otherwise rely on the terms of Schedule 2 of the DPLA for their full force and effect.

The Restrictive Terms

75. In answer to paragraph 75 of the Claim, the Respondents:

(a) say that the terms of the Developer Agreement, the DPLA, Schedule 2 to the DPLA and App Store Review Guidelines are standardised and not negotiated in individual cases;

(b) say that the terms of the Developer Agreement, the DPLA and Schedule 2 to the DPLA have been amended since the introduction of the App Store, in response to comments from, and engagement with, app developer counterparties; and

(c) otherwise deny the allegations in the paragraph.

76. In answer to paragraph 76 of the Claim, the Respondents:

(a) say that the allegations are vague and embarrassing because they do not identify when Apple Inc is said to have engaged in the relevant conduct;

(b) refer to and repeat subparagraph 75 above; and

(c) otherwise deny the allegations in the paragraph.

77. In answer to paragraph 77 of the Claim, the Respondents:

(a) say that the allegations are vague and embarrassing because they do not identify when Apple Inc is said to have engaged in the relevant conduct;

(b) say further that Apple Inc reserves the right, at its discretion, to modify the terms of the Developer Agreement, including any rules and policies at any time;

(c) say further that Apple Inc may change the terms of the DPLA at any time, but new or modified Program Requirements will not retroactively apply to Applications already in distribution via the App Store or Custom App Distribution;

Particulars

> Clause 4, DPLA: Changes do not retrospectively apply "provided however that [developers] agree that Apple [Inc] reserves the right to remove Applications from the App Store or Custom App Distribution that are not in compliance with the new or modified Program Requirements at any time".

(d) say further that, except as referred to in (e) below, there have been no material changes to the DPLA since the launch of the App Store;

(e) say further that the only changes made to the DPLA since its creation have been to favour developers; and

Particulars

i. In 2016, Apple Inc announced that the commission on subscription renewals after one year would be reduced to 15%.

ii. In 2020, Apple Inc announced that the commission for small app developers would likewise be reduced to 15%.

(f) otherwise admit the allegations in the paragraph.

78. In answer to paragraph 78 of the Claim, the Respondents:

(a) refer to and repeat subparagraph 73(a) above; and

(b) otherwise deny the allegation in the paragraph.

79. In answer to paragraph 79 of the Claim, the Respondents say that the allegations are vague and embarrassing because they do not identify when Apple Inc is said to have engaged in the relevant conduct, and otherwise admit that the DPLA contains:

(a) a section titled "Purpose" and the chapeau to clause 7;

(b) clauses 3.2(g) and 6.9;

(c) clause 3.3.1;

(d) clause 3.3.2;

(e) clause 3.3.3;

(f) clause 3.3.4;

(g) clause 3.4;

(h) clause 6.1;

(i) clause 7.6;

(j) clause 9.4;

(k) clause 14.10,

and rely on the terms of those clauses for their full force and effect; and

(l) otherwise deny the allegations in the paragraph.

80. In answer to paragraph 80 of the Claim, the Respondents:

(a) say that it is a condition of the license of Apple Inc's intellectual property and permitting the distribution of apps on the App Store by Apple Inc that developers comply with the DPLA including the App Store Review Guidelines, failing which the relevant app is not permitted for distribution on the App Store platform;

(b) say further that, in circumstances where a developer breaches the DPLA, the developer's account may be suspended or terminated in accordance with the terms of the DPLA;

(c) admit that the DPLA contains clauses 6.9, 11.2 and 11.3, and the Developer Agreement contains clause 10, and rely on the terms of those clauses for their full force and effect; and

(d) otherwise deny the allegations in the paragraph.

81. In answer to paragraph 81 of the Claim, the Respondents say that the allegations are vague and embarrassing because they do not identify when Apple Inc is said to have engaged in the relevant conduct, and otherwise:

(a) refer to and repeat paragraphs 75 to 77 above;

(b) deny the allegation in the paragraph.

82. In answer to paragraph 82 of the Claim, the Respondents:

(a) say that the allegations are vague and embarrassing because they do not identify when Apple Inc is said to have engaged in the relevant conduct, and otherwise admit that the App Store Review Guidelines contain:

(i) clauses 3.2.1(ii) and 3.2.2(i);

(ii) clause 4.7, 4.7.1 and 4.7.2;

(iii) clause 3.1.1;

(iv) clauses 3.1.1 and 3.1.3;

(v) clause 4.9.1; ~~and~~

(vi) clause 2.3.10~~,~~; and

(vii) clause 2.5.6,

and rely on the terms of those clauses for their full force and effect; and

(b) otherwise deny the allegations.

83. In answer to paragraph 83 of the Claim:

(a) in respect of subparagraphs 83(a)-(e):

(i) refer to and repeat subparagraph 74(j) above and otherwise deny the allegation; and

(ii) say that the vast majority of apps distributed via the Australian App Store are distributed for free and have no in-app purchases;

Particulars

i. More than 99% of developers (and almost 100% of Australian app developers) who distribute paid apps or whose apps use in-app purchases are eligible to pay no more than 15% commission to Apple.

ii. Over 90% of apps distributed on the iOS App Store are free to download.

iii. In 2022, 78% of the apps on the Australian App Store were distributed for free with no in-app purchases. Apple Inc does not collect any commission on free apps.

iv. Neither Apple Inc nor Apple Pty Limited receives any compensation or commission for:

A. paid content purchased through other platforms;

B. free apps that generate revenue from in-app advertising;

C. "reader apps", where users purchase or subscribe to content outside of the app, but can access that content on their devices (eg a subscription to Netflix or Spotify, book titles for use in Amazon's Kindle app, or newspapers or magazines); and

D. sales of physical goods and services in an app.

v. Apple Inc also permits cross-wallet functionality, which allows for purchases made on one platform to be used on another.

vi. The 15% commission payable to Apple under the DPLA applies to all:

A. subscription charges after the first year, since 2016;

B. premium subscription video providers who integrate their services into the Apple TV app. Those providers then pay only a 15% commission when users make an in-app purchase of a subscription to their content streaming;

C. subscription news publications that provide their content to Apple News in Apple News Format. Those publishers that work with Apple News, pay only a 15% commission on qualifying in-app purchase subscriptions; and

D. for all developers under the App Store Small Business Program, which applies to all developers on their first US$1 million each year in App Store revenue.

(b) admit that Schedule 2 to the DPLA contains clauses 1.1, 1.3, 3.1, 3.4, 3.8(c), 6.3, 7.1 and 7.3, and rely on the terms of those clauses for their full force and effect; and

(c) otherwise deny the allegations in the paragraph.

84. [Not used] ~~In answer to paragraph 84 of the Claim, the Respondents:~~

~~(a) say that the allegations are vague and embarrassing because they do not identify when the Respondents are said to have engaged in the relevant conduct;~~

~~(b) refer to and repeat subparagraph 72(a) above;~~

~~(c) say that Apple Inc makes available a price matrix for apps and in-app purchases, and the developer, as part of the app design process, selects from these pricing tiers and sets the retail price to be paid by the consumer in each country/currency in which the developer wishes to offer their app; and~~

~~(d) otherwise deny the allegations in the paragraph.~~

85. The Respondents do not plead to paragraph 85 of the Claim as it contains no allegations against them.

85A. In answer to paragraph 85A of the Claim, the Respondents:

(a) plead to the paragraph on the basis that the contraventions to which sub-paragraph 85A(c) relate are confined to those pleaded in Parts V to VII of the Claim;

(b) refer to and repeat paragraphs 15, 16 and 74 above and 98, 109, 113 and 118 below; and

(c) otherwise deny the allegations in the paragraph.

PART V: APPLE'S CONDUCT IN CONTRAVENTION OF SECTION 46

Apple's conduct in respect of iOS App Distribution

Apple's market power

86. In answer to paragraph 86 of the Claim, the Respondents:

(a) deny that either of the Australian iOS App Distribution Markets are markets in Australia;

(b) refer to and repeat paragraphs 63 to 66, and in respect of:

(i) subparagraph 86(a), refer to and repeat subparagraph 72(a) above, and otherwise deny the allegations;

(ii) subparagraphs 86(b) and (bb), admit that the App Store comes pre-installed on iOS devices, but otherwise deny the allegations;

(iii) subparagraph 86(bbb), refer to and repeat paragraphs 11(a), 47, 48, 51(b) and 86(b)(ii) above, and otherwise deny the allegations;

(iv) subparagraph 86(c), refer to and repeat subparagraph 72(a) above, and otherwise deny the allegations;

(v) subparagraph 86(d), refer to and repeat subparagraph 72(a) above, and otherwise deny the allegations;

(vi) subparagraph 86(e), refer to and repeat subparagraph 72(a) above, and otherwise deny the allegations;

(vii) subparagraph 86(f), refer to and repeat subparagraph 72(a) above, and otherwise deny the allegations;

(viii) subparagraph 86(g), refer to and repeat paragraphs 75 to 77 above;

(ix) subparagraph 86(h):

A. refer to and repeat paragraphs 69 and 79 to 83 above;

B. say that the reference to "supra-competitive prices" is vague and embarrassing; and

C. otherwise deny the allegations; ~~and~~

(x) subparagraph 86(hh), refer to and repeat paragraphs 87 and 102 below and otherwise deny the allegations in the paragraph;

(xi) subparagraph 86(i), refer to and repeat paragraph 72(a) above, and otherwise deny the allegations in the paragraph; and

(xii) subparagraph 86(j):

A. say that the allegations do not identify the particular Respondent who is alleged to have engaged in the relevant conduct;

B. refer to and repeat paragraphs 8(e) and 8(f) above; and

C. otherwise deny the allegations.

86A. The Respondents deny the allegations in paragraph 86A of the Claim.

87. In answer to paragraph 87 of the Claim, the Respondents:

(a) deny the existence of either of the Australian iOS App Distribution Markets in Australia and refer to and repeat paragraphs 63 to 66;

(b) say that the App Store:

(i) is a two-sided transaction platform;

(ii) which competes against other transaction platforms;

Particulars

i. The App Store is a two-sided transaction platform which exhibits strong indirect network effects and has many competitors, including other app transaction platforms—for mobile, PC, and console—as well as cloud-based streaming services.

ii. Competition in the sale of devices imposes constraints on Apple Inc and Apple Pty Limited globally and in Australia.

(c) further and in the alternative, refer to and repeat paragraph 88 below; and

Particulars

i. Developers have many options for distribution and monetisation.

ii. Apple Inc has never raised the commission payable by developers under the DPLA since the introduction of the App Store.

(d) otherwise deny the allegations in the paragraph.

88. In answer to paragraph 88 of the Claim, the Respondents:

(a) refer to and repeat paragraph 63;

(b) say that transactions involving:

(i) web apps;

(ii) streaming apps;

(iii) non-iOS (i.e. Android OS) apps for smartphones and tablets; and

(iv) apps developed for PCs and gaming consoles,

are substitutes on various transaction platforms including on iOS devices in Australia and elsewhere;

(c) say that the allegations in the paragraph are vague and embarrassing; and

(d) otherwise deny the allegations in the paragraph.

Particulars

i. Web apps are applications that run on a web browser.

ii. Apple Inc has always enabled web apps on iOS as a way for developers to build applications using web technologies for iOS.

iii. Web apps offer the ability to take icons and place them directly on the home screen of an iPhone so that users can tap on an icon and launch the web application.

iv. Web apps can be substitutes for native apps, but each app or web app is subject to differing demands and requirements.

v. Apple Inc's multi-platform rule permits developers, including game app developers, to sell content outside of the iOS app (e.g., selling content directly from websites) that users can then access in the iOS app. Developers could also offer alternative packages and further discounts that are not available on iOS, or through traditional retail

channels.

89. The Respondents deny the allegations in paragraph 89 of the Claim.

Apple's conduct in respect of iOS App Distribution

90. In answer to paragraph 90 of the Claim, the Respondents, in respect of:

(a) subparagraph 90(a), refer to and repeat subparagraphs 72(a) and 87 above;

(b) subparagraphs 90(b) and (bb), refer to and repeat paragraphs 47 and 86(b) above;

(c) subparagraph 90(bbb), refer to and repeat paragraphs 11(a), 47, 48, 51(b) and 86(b)(ii) above, and otherwise deny the allegations;

(d) subparagraph 90(c), refer to and repeat paragraphs 51 and 72(a) above

(e) subparagraph 90(d), refer to and repeat paragraphs 51 and 72(a) above;

(f) subparagraph 90(e), refer to and repeat paragraphs 50, 72(a) and 87 above;

(g) subparagraph 90(f), refer to and repeat paragraphs 67 to 83 above;

(h) subparagraph 90(g), refer to and repeat paragraphs 76 and 81 above;

(i) subparagraph 90(h), refer to and repeat paragraphs 79 to 83 above;

(j) subparagraph 90(hh), say that they rely on the terms of clause 3.1.1 of the App Store Review Guidelines for their full force and effect;

(k) subparagraph 90(i), refer to and repeat paragraphs 69, 72(a) and 87 above;

(l) subparagraph 90(j), refer to and repeat paragraph 90(i) above;~~say that:~~

~~(i) Epic Games, Inc (**Epic Games**) introduced a "hotfix" in version 13.40 of the Fortnite app update that clandestinely enabled a direct payment function in Fortnite in breach of Epic Games' contractual obligations under the DPLA;~~

~~(ii) Apple Inc suspended Epic Games' Team ID '84 Account, as well as its Developer Agreement and DPLA with Apple Inc (and later terminated that membership) and removed from the App Store the apps associated with the Team ID '84 Account after Epic Games breached the DPLA and App Store~~

~~Guidelines, including the obligation not to hide, misrepresent or obscure features, content, services or functionality in apps;~~

~~(iii) the termination by Apple Inc. of the DPLA with Epic Games was lawful; and~~

~~**Particulars**~~

~~i. Rule 52 Order After Trial on the Merits, Epic Games, Inc. v Apple Inc. 4:20-cv-05640-YGR.~~

~~ii. Affirmed on appeal: Opinion of the United States Court of Appeals for the Ninth Circuit, Epic Games Inc. v Apple Inc. No. 21-16506 D.C. No. 4:20-cv-05640 YGR; Epic Games Inc. v Apple Inc. No. 21-16695 D.C. No. 4:20-cv-05640 YGR.~~

(m) subparagraph 90(k):

(i) say that the allegations do not identify the particular Respondent who is alleged to have engaged in the relevant conduct; and

(ii) refer to and repeat paragraphs 8(e) and 8(f) above,

and otherwise deny the allegations in the paragraph.

90A. In answer to paragraph 90A of the Claim, the Respondents:

(a) say that pursuant to the DPLA, iOS apps must be distributed through the App Store;

(b) refer to and repeat paragraphs 13A, 37A, 44(b), 51(c) and 72(c) above; and

(c) otherwise deny the allegations in the paragraph.

90B. In answer to paragraph 90B of the Claim, the Respondents:

(a) refer to and repeat paragraphs 54, 63(b) and 90A above and 91(c) below; and

(b) otherwise deny the allegations in the paragraph.

90C. The Respondents deny the allegation in the paragraph 90C of the Claim.

91. In answer to paragraph 91 of the Claim, the Respondents:

(a) refer to and repeat paragraphs 69 and 90 above;

(b) deny the existence of either of the Australian iOS App Distribution Markets in Australia;

(c) say that in order for alternative methods of iOS app distribution such as competing app stores and direct downloading options to be made available on iOS, it would require Apple Inc to grant a license for the exploitation of its intellectual property by the developer, on terms and conditions other than those under the DPLA; and

(d) otherwise deny the allegations in the paragraph.

Particulars

i. Clause 2.1 of the DPLA.

ii. Further particulars may be provided prior to trial.

92. In answer to paragraph 92 of the Claim, the Respondents:

(a) refer to and repeat paragraphs 51 and 91 above;

(b) in relation to subparagraph 92(c):

(i) say that the reference to "supra-competitive prices" is vague and embarrassing; and

(ii) refer to and repeat subparagraph 83(a) above; and

(c) otherwise deny the allegations in the paragraph.

93. In answer to paragraph 93 of the Claim, the Respondents:

(a) refer to and repeat paragraphs 51(c), 69, 72(c), 75(b), 83(a), 88 and 92(b) above;

(b) in respect of subparagraph 93(l), say that Apple Inc makes available a broad price matrix for apps and the cost of in-app purchases, from which the app developer selects and sets the retail price to be paid by the consumer; and

(c) otherwise deny the allegations in the paragraph.

94. The Respondents deny the allegations in paragraph 94 of the Claim.

95. Not used.

96. Not used.

97. The Respondents deny the allegations in paragraph 97 of the Claim.

98. The Respondents deny the allegations in paragraph 98 of the Claim.

Apple's conduct in respect of iOS In-App Payment Solutions

Apple's market power

99. In answer to paragraph 99 of the Claim, the Respondents:

(a) say that the allegations in subparagraphs (aa) to (f) and (h) are vague and embarrassing because they do not identify the particular Respondent who is said to have engaged in the relevant conduct; and

(b) in relation to subparagraph 99(i):

(i) say that the allegation does not identify the particular Respondent who is said to have engaged in the relevant conduct; and

(ii) refer to and repeat paragraphs 8(e) and 8(f) above; and

(c) otherwise deny the allegations in the paragraph.

100. In answer to paragraph 100 of the Claim, the Respondents:

(a) refer to and repeat paragraph 87 above; and

(b) otherwise deny the allegations in the paragraph.

101. In answer to paragraph 101 of the Claim, the Respondents:

(a) say that, in order for alternative methods of iOS app distribution such as competing app stores and direct downloading options to be made available on iOS, it would require Apple Inc to grant a license for the exploitation of its intellectual property by the developer, on terms and conditions other than those under the DPLA; and

(b) otherwise deny the allegations in the paragraph.

102. The Respondents deny the allegations in paragraph 102 of the Claim.

Apple's conduct in respect of iOS In-App Payment Solutions

103. In answer to paragraph 103 of the Claim, the Respondents:

(a) say that the allegations in subparagraphs (a) to (f) and (h) are vague and embarrassing because they do not identify the particular Respondent who is said to have engaged in the relevant conduct; ~~and~~

(b) in relation to subparagraph 103(bb), refer to and repeat paragraph 90(j) above;

(c) in relation to subparagraph 103(i):

(i) say that the allegation does not identify the particular Respondent who is said to have engaged in the relevant conduct; and

(ii) refer to and repeat paragraphs 8(e) and 8(f) above; and

(d) otherwise deny the allegations in the paragraph.

103A. In answer to paragraph 103A of the Claim, the Respondents:

(a) refer to and repeat paragraph 103 above; and

(b) otherwise deny the allegations in the paragraph.

104. In answer to paragraph 104 of the Claim, the Respondents:

(a) say that, in order for alternative methods of iOS app in-app payment options to be made available on iOS, it would require Apple Inc to grant a license for the exploitation of its intellectual property by the developer, on terms and conditions other than those under the DPLA; and

(b) otherwise deny the allegations in the paragraph.

104A. In answer to paragraph 104A of the Claim, the Respondents:

(a) refer to and repeat paragraph 104 above;

(b) deny the existence of either of the Australian iOS In-App Payment Solutions Markets; and

(c) otherwise deny the allegations in the paragraph.

104B. In answer to paragraph 104B of the Claim, the Respondents:

(a) refer to and repeat paragraph 104A above; and

(b) otherwise deny the allegations in the paragraph.

105. In answer to paragraph 105 of the Claim, the Respondents:

(a) deny the existence of either of the Australian iOS In-App Payment Solutions Markets and either of the Australian iOS App Distribution Markets in Australia, and refer to and repeat paragraph 92 above; and

(b) otherwise deny the allegations in the paragraph.

106. In answer to paragraph 106 of the Claim, the Respondents:

(a) deny the existence of either of the Australian iOS In-App Payment Solutions Markets and either of the Australian iOS App Distribution Markets in Australia;

(b) refer to and repeat paragraphs 103 to 105 above; and

(c) otherwise deny the allegations in the paragraph.

107. The Respondents deny the allegations in paragraph 107 of the Claim.

108. The Respondents deny the allegations in paragraph 108 of the Claim.

109. The Respondents deny the allegations in paragraph 109 of the Claim.

PART VI: APPLE'S EXCLUSIVE DEALING (SECTION 47)

110. In answer to paragraph 110 of the Claim, the Respondents:

(a) say that the allegation is vague and embarrassing because:

(i) it fails to identify the particular Respondent who is said to have engaged in the relevant conduct;

(ii) it fails to identify the specific terms of Schedule 2 to the DPLA which are alleged to give rise to the alleged conduct and when they applied; and

(iii) the general reference to "app developers" does not provide a locus for the alleged contravention of s 47 of the *Competition and Consumer Act 2010* (Cth) (**CCA**); and

(b) otherwise deny the allegations in the paragraph.

111. In answer to paragraph 111 of the Claim, the Respondents:

(a) say that the allegations are vague and embarrassing because:

(i) they do not identify the particular Respondent who is said to have engaged in the relevant conduct;

(ii) they fail to properly identify a precise market(s) in which the conduct is alleged to have substantially lessened competition in Australia; and

(b) otherwise deny the allegations in the paragraph.

112. In answer to paragraph 112 of the Claim, the Respondents:

(a) say that the alleged contravening conduct prior to 13 September 2019 falls within s 51(3)(a) of the CCA such that the exemption under that sub-section applies to that alleged contravening conduct; and

Particulars

i. The Respondents refer to and repeat paragraphs 13, 36, 54, 67 and 80 above.

ii. s 51(3)(a) of the CCA was repealed by the *Treasury Laws Amendment (2018 Measures No. 5) Act 2019* (Cth) which came into effect on 13 September 2019.

(b) otherwise deny the allegations in the paragraph.

113. In answer to paragraph 113 of the Claim, the Respondents:

(a) refer to and repeat paragraph 112(a) above; and

(b) otherwise deny the allegations in the paragraph.

PART VII: APPLE'S CONTRACTS, ARRANGEMENTS AND UNDERSTANDINGS SUBSTANTIALLY LESSENING COMPETITION (SECTION 45)

114. In answer to paragraph 114 of the Claim, the Respondents:

(a) say that the allegation is vague and embarrassing because the general references to "app developers" and "supra-competitive prices" does not provide a locus for the alleged contravention of s 45 of the CCA;

(b) say that Apple Inc enters into the DPLA (and Schedule 2 to the DPLA) with app developers which permits the exploitation, on terms and conditions, by developers of the software and services provided by Apple Inc to developers;

(c) rely on the terms of the DPLA (and Schedule 2 to the DPLA) for their full force and effect; ~~and~~

(d) refer to and repeat paragraph 51(b), 8(e) and 8(f) above; and

(e) otherwise deny the allegations in the paragraph.

115. The Respondents deny the allegations in paragraph 115 of the Claim.

116. The Respondents deny the allegations in paragraph 116 of the Claim.

117. In answer to paragraph 117 of the Claim, the Respondents:

(a) refer to and repeat paragraph 112(a) above;

(b) otherwise deny the allegations in the paragraph.

117A. In answer to paragraph 117A of the Claim, the Respondents:

(a) say that the allegations are vague and embarrassing in circumstances where the allegations are directed to "Apple Inc and/or Apple Pty Ltd" and the particulars in support refer generally to "Apple" but describe conduct of Apple Inc; and

(b) otherwise deny the allegations in the paragraph.

117B. In answer to paragraph 117B of the Claim, the Respondents:

(a) refer to and repeat paragraph 112(a) above;

(b) otherwise deny the allegations in the paragraph.

118. In answer to paragraph 144 of the Claim, the Respondents:

(a) refer to and repeat paragraph 112(a) above;

(b) otherwise deny the allegations in the paragraph.

PART VIII: APPLE'S UNCONSCIONABLE CONDUCT (SECTION 21)

119. In answer to paragraph 119 of the Claim, the Respondents:

(a) refer to and repeat paragraphs 120 to 122 below;

(b) say that the supply of services to app developers by Apple Pty Limited is conduct in trade or commerce;

(c) admit that the supply of iOS devices to consumers, and the supply of services for the distribution of iOS apps to iOS device users, by Apple Pty Limited in Australia is conduct in trade or commerce;

(d) say that neither Apple Inc nor Apple Pty Limited supply separate services to app developers for payment methods for accepting and processing payments for in-app content within an iOS app and refer to and repeat paragraphs 65(b)(iii), 62(d), 104 and 105 above; and

(e) otherwise deny the allegations in the paragraph.

120. The Respondents deny the allegations in paragraph 120 of the Claim.

121. In answer to paragraph 121 of the Claim, the Respondents:

(a) say that the allegations are vague and embarrassing because they do not identify the particular Respondent who is alleged to have engaged in the relevant conduct;

(b) rely on their Defence to the Second Further Amended Statement of Claim in proceeding no. NSD 1236 of 2020 in respect of allegations against the Respondents by Epic Games and Epic International S.A.R.L (together, **Epic**) for its full force and effect; and

(c) otherwise deny the allegations in the paragraph.

122. In answer to paragraph 122 of the Claim, the Respondents:

(a) say that the allegations are vague and embarrassing because they do not identify the particular Respondent who is alleged to have engaged in the relevant conduct or held the superior bargaining position;

(b) refer to and repeat paragraphs 46, 55, 67 and 75 to 77 above and say further that:

(i) Dark Ice entered into the DPLA voluntarily thereby gaining access to Apple Inc's intellectual property and iOS device users through the Australian App Store without any further effort on its part; and

(ii) Dark Ice chose the monetisation model of its own volition to monetise the Dark Ice iOS Apps, which it knew entailed the payment of commission; and

(c) otherwise deny the allegations in the paragraph.

123. The Respondents deny the allegations in paragraph 123 of the Claim.

123A. The Respondents deny the allegations in paragraph 123A of the Claim.

PART IX: CAUSATION, LOSS AND DAMAGE

iOS App Developers

124. In answer to paragraph 124, the Respondents:

(a) say that the allegation is vague and embarrassing because it fails to properly articulate:

(i) the counterfactual market structure that would have emerged absent the alleged Contravening Conduct (as defined in paragraph 124 of the Claim);

(ii) material facts which provide a description of various charges (including commissions and other prices) and non-price service attributes that developers would face in the counterfactual, both as a consequence of the App Store's counterfactual monetisation strategy and the competitive strategies of the current alternative channels and the alternative channels that would emerge;

(iii) material facts relating to the effects of the pricing changes referred to in paragraph 124(a)(ii) above on app developers, including:

A. developers' individual pricing decisions for the many different apps and in-app purchases; and

B. whether, and the extent to which, any lower amount of commission payable by developers would in fact have been 'passed on' to consumers in the form of lower end prices for paid apps and paid in-app digital content to the First Applicant and the iOS Device Group Members;

(b) under cover of that objection:

(i) refer to and repeat paragraphs 63(b), 74(j) and 83(a)(ii) above;

(ii) say that Apple's commission rates are competitive, and reflect the economic value to app developers of the App Store that Apple has created through its innovation;

(iii) say further that the commission rates reflect the market's quantification of that value; and

Particulars

The economic value that Apple provides to developers and consumers is substantial.

(c) otherwise deny the allegation in the paragraphs.

124A. In answer to paragraph 124A, the Respondents:

(a) refer to and repeat paragraph 124 above; and

(b) otherwise deny the allegation in the paragraph.

124B. In answer to paragraph 124B, the Respondents:

(a) refer to and repeat paragraphs 84(c), 124 and 124A above;

(b) say that the pricing tier and corresponding retail price to be paid by consumers for purchase of their iOS apps or in-app content is selected by app developers at their discretion and is independent of the applicable amount of Apple's commission from time to time;

Particulars

i. The commission in relation to the Dark Ice iOS apps changed from 30% to 15% in or around January 2021 when Dark Ice joined the App Store Small Business Program.

ii. The price of the Pocket Cal kJ Pro iOS app has remained stable for the entire Relevant Period, including following Dark Ice joining the App Store Small Business Program in or around January 2021.

iii. The price of Pocket Cal kJ Plus in-app purchase within the Pocket Cal kJ iOS app has remained stable since approximately the beginning of 2018 and for the remainder of the Relevant Period, including following Dark Ice joining the App Store

Small Business Program in or around January 2021.

(c) say that any assessment of alleged loss and damage must take into account:

(i) any pass through of commissions by the Second Applicant and iOS App Developer Group Members to the First Applicant and iOS Device Group Members; and

(ii) the facts, matters and circumstances pleaded in paragraph 124(a) above;

(d) say that, to the extent that part or all of any commissions paid to Apple by the Second Applicant or iOS App Developer Group Members at a rate above the Counterfactual Commissions (as defined in paragraph 124 of the Claim) (which is denied) was passed through to the First Applicant or iOS Device Group Members for purchases of iOS apps and in-app digital content, neither the Second Applicant nor iOS App Developer Group Members suffered any loss or damage;

(e) say that the circumstances of any loss or damage occasioned by the Contravening Conduct (which is denied) is individual to the Second Applicant and each iOS App Developer Group Member; and

(f) otherwise deny the allegation in the paragraph.

iOS Device Consumers

124C. In answer to paragraph 124C, the Respondents:

(a) refer to and repeat paragraphs 74(k) and 124 above;

(b) say that the purchase price of iOS apps and/or in-app digital content within an iOS app was paid by the First Applicant and iOS Device Group Members to Apple as agent for the Second Applicant and/or the iOS App Developer Group Members; and

Particulars

Clauses 1.1 and 3.5 of Schedule 2 to the DPLA.

(c) otherwise deny the allegation in the paragraph.

125. In answer to paragraph 125, the Respondents:

(a) refer to and repeat paragraph 124C above; and

(b) otherwise deny the allegation in the paragraph.

126. In answer to paragraph 126, the Respondents:

(a) refer to and repeat paragraphs 124, 124A, 124B, 124C and 125 above;

(b) say that the circumstances of any loss or damage occasioned by the alleged Contravening Conduct (which is denied) are individual to the First Applicant and each iOS Device Group Member, and are not capable of common determination;

(c) say that, to the extent that part or all of any commissions paid to Apple by the Second Applicant or iOS App Developer Group Members at a rate above the Counterfactual Commissions (which is denied) was not passed through to the First Applicant or iOS Device Group Members for purchases of iOS apps and in-app digital content, neither the First Applicant nor iOS Device Group Members suffered any loss or damage; and

(d) otherwise deny the allegation in the paragraph.

127. In answer to paragraph 127, the Respondents:

(a) refer to and repeat the matters referred to in paragraphs 1 to 126 above;

(b) deny that the Applicants and Group Members are entitled to any of the relief sought in the Further Amended Originating Application;

(c) deny that the Applicants and Group Members are entitled to the relief sought in paragraphs 2, 4, 6 and 9 of the Further Amended Originating Application to the extent that Apple Inc's conduct alleged to be in contravention of part IV of the CCA occurred outside of Australia;

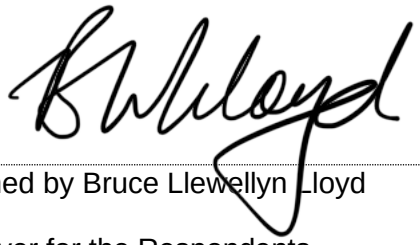
(d) deny that any iOS App Developer Group Members precluded by the settlement reached in the class action brought in the Northern District of California by developers, Donald R. Cameron v Apple Inc Case No. 4:19-cv-03074-YGR are entitled to any of the relief sought in the Further Amended Originating Application; and

Particulars

Affidavit of Bruce Llewellyn Lloyd sworn on 7 February 2023, paragraphs 1 to 7.

(e) say that to the extent allegations are made in these proceedings concerning conduct with respect to Epic, the Respondents rely on the Defence to the Second Further Amended Statement of Claim in proceeding no. NSD 1236 of 2020 for its full force and effect.

Date: ~~3 May 2023~~ 20 December 2023



Signed by Bruce Llewellyn Lloyd

Lawyer for the Respondents

This pleading was prepared by Clayton Utz and settled by Matthew Darke SC, Stephen Free SC, Zoe Hillman, ~~and~~ Conor Bannan and Xuelin Teo of counsel.

Certificate of lawyer

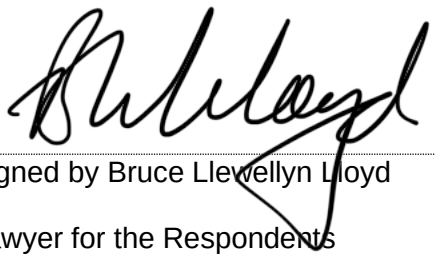
I Bruce Llewellyn Lloyd certify to the Court that, in relation to the defence filed on behalf of the Respondents, the factual and legal material available to me at present provides a proper basis for:

(a) each allegation in the pleading; and

(b) each denial in the pleading; and

(c) each non admission in the pleading.

Date: ~~3 May 2023~~ 20 December 2023



Signed by Bruce Llewellyn Lloyd

Lawyer for the Respondents

Schedule

No. VID 341 of 2022

Federal Court of Australia

District Registry: Victoria

Division: General

Applicants

Second Applicant: Dark Ice Interactive Pty Limited (ACN 153 761 276)

Respondents

Second Respondent: Apple Pty Limited (ACN 002 510 054)