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Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA

Registrar

Important Information

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 17

Rule 8.05(1)(a)

<u>Further</u> Amended Statement of Claim

VID 341 of 2022

Federal Court of Australia

District Registry: Victoria

Division: General

DAVID ANTHONY

First Applicant

DARK ICE INTERACTIVE PTY LIMITED (ACN 153 761 276)

Second Applicant

APPLE INC

First Respondent

APPLE PTY LIMITED (ACN 002 510 054)

Second Respondent

Amendments to Statement of Claim

This Further Amended Statement of Claim incorporates amendments previously made on 23 March 2023. The amendments to this Statement of Claim as denoted in underline and strikethrough were made on 12 December 2023.

PART I: PARTIES

Applicants and Group Members

1. This proceeding is commenced as a representative proceeding pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) by the Applicants and on behalf of all persons who at any time during the period from 6 November 2017 to 20 June 2022 (**Relevant Period**):

   (a) purchased:

      (i) software comprising an application (**app**) written for iOS (**iOS app**) on an Apple iPhone or Apple iPad (together, **iOS Devices**) from the Australian App Store; and/or

      (ii) in-app digital content within such iOS app; and

      suffered loss or damage by reason of the conduct of the Respondents pleaded in the Amended Originating Application and this Amended Statement of Claim (**iOS Device Group Members**);

   (b) supplied:

      (i) an iOS app on iOS Devices via the Australian App Store; and/or

      (ii) in-app digital content within such iOS app; and

      suffered loss or damage by reason of the conduct of the Respondents pleaded in the Originating Application and this Statement of Claim **(iOS App Developer Group Members)**; and

   (c) were not, during any part of the Relevant Period, and are not, as at the date of this Application, any of the following:

      (i) a related party (as defined by s 228 of the *Corporations Act 2001* (Cth) (**Corporations Act**) of any Respondent;

      (ii) a related body corporate (as defined by s 50 of the Corporations Act) of any Respondent;

      (iii) an associated entity (as defined by s 50AAA of the Corporations Act) of any Respondent;

      (iv) an officer or associate (as defined by s 9 and s 11 of the Corporations Act) of any Respondent;

(v)   a Justice or the Chief Justice of the Federal Court of Australia, or a Justice or the Chief Justice of the High Court of Australia;

(vi)   a solicitor or barrister acting for the Applicants or the Respondents;

(vii)   an expert or professional adviser briefed in relation to this proceeding;

(viii) an employee or officer of a litigation funder providing funding for the proceeding; or

(ix)   an employee or officer of an insurer providing after the event insurance for any party to the proceeding,

(**Group Members**).

2.   The:

(a)   First Applicant purchased iOS apps and in-app digital content on his Apple iPhone device during the Relevant Period.

Particulars

   i.   On 31 July 2020, the First Applicant purchased the in-app digital content "500 Catan Gold" within the iOS app "Catan Universe" for the price of $8.99.

   ii.   On 4 September 2020, the First Applicant purchased the iOS app "Ticket to Ride – Train Game" for the price of $10.99.

   iii. On 18 June 2021, the First Applicant purchased the iOS app "Worms3" for the price of $1.49.

(b)   Second Applicant, Dark Ice Interactive Pty Limited, is a developer of iOS apps and in-app digital content and, during the Relevant Period, its iOS apps and in-app digital content were distributed to iOS Devices via the Australian App Store.

Particulars

   i.   Since the commencement of the Relevant Period, the Second Applicant has supplied the Pocket Cal/kj iOS app via the Australian App Store. While the Pocket Cal/kj iOS app is free to download, it offers an in-app purchase of Pocket Cal/kj Plus at a price of $4.49. The app was initially released on 13 March 2012 and the current

version of the Pocket Cal/kj iOS app was released on 5 October 2022.

ii. Since the commencement of the Relevant Period, the Second Applicant has supplied the Pocket Cal/kj Pro iOS app via the Australian App Store as a paid app. Its current price is $2.99. The Pocket Cal/kj Pro iOS app was initially released on 16 April 2012 and the current version was released on 9 March 2016.

3. The following paragraphs 4 to 123 are taken from paragraphs 17 to 30 and 48 to 149A of the Second Further Amended Statement of Claim filed by Epic Games Inc and another against the Respondents in proceeding No. NSD1236/2020, and are alleged at all material times during the Relevant Period. The amendments marked in paragraphs 4 to 123 below (1) in underlined text have been made by the Applicants in this proceeding to reflect the current pleading in proceeding NSD1236/2020; (2) in underlined green text have been made by the Applicants in this proceeding to reflect the Applicants' case.

The Respondents

4. The First Respondent, **Apple Inc**, and the Second Respondent, **Apple Pty Limited**, are herein collectively referred to as **Apple** except where expressly stated otherwise.

Apple Inc

5. Apple Inc is and, at all material times, was:

(a) a company incorporated in California in the United States;

(b) a foreign corporation within the meaning of the *Competition and Consumer Act 2010 (Cth)* (**CCA**); and

(c) able to sue and be sued in its corporate name.

6. Apple Inc is and, at all material times, was carrying on business in Australia.

Particulars

i. The Applicants rely on s 5(1)(g) and s 5(2) of the CCA.

ii. The Applicants refer to and repeat paragraphs 8-13, 25-27, 53, 67, 74, 83(bb), 90(j), 90(m) and 103(f).

7. Further or alternatively, Apple Inc carries on business in Australia by and/or through its local subsidiary, Apple Pty Limited.

Particulars

The Applicants refer to and repeat paragraphs 11-13, 14-17, 74, 83(bb), 85A, 90(j), 90(m) and 103(f).

8.   Apple Inc:

(a)   is the largest company in the world by market capitalisation, with a market cap of over USD2 trillion;

(b)   is headquartered in California; ~~and~~

(c)   employs approximately 147,000 employees globally~~.~~;

(d)   owns and/or operates the domain apple.com (including the pages at apple.com/au/store) through which Australian consumers are offered and/or are able to purchase Apple products; and

(e)   including in Australia, is appointed by app developers as agent for the marketing and delivery of the Licensed Applications to End-Users.

Particulars

i.   Apple Developer Program Licence Agreement (DPLA), Schedule 1, cl 1.1 and Exhibit A, cl 1.

ii.   DPLA, Schedule 1, cl 1.1 and Exhibit A, cl 1.

9.   Apple Inc relevantly:

(a)   markets and supplies smartphones (iPhone), tablets (iPad) and PCs (Macs); and

(b)   develops and offers apps and other software for its devices.

The App Store, App Store Connect and IAP for iOS

10.   Apple Inc has developed and operates:

(a)   the App Store;

(b)   App Store Connect; and

(c)   the In-App Purchase (**IAP**) payment solution.

11.   The App Store:

(a)   is itself an app pre-installed on iOS Devices;

(b)   was launched, including in Australia, in 2008, following the launch of the iPhone in 2007;

(c)   distributes other <u>native</u> apps written for iOS (iOS apps); and

(d)   has country-specific storefronts, specifically including the **Australian App Store**.

Particulars

> The Australian App Store contains the <u>iOS</u> apps available to iOS Device users who have selected Australia as their region on their iOS Device.

12.   App Store Connect is Apple's portal through which app developers upload, submit and manage <u>iOS</u> apps on the App Store.

12A.   <u>At all material times since the launch of the App Store in 2008, Apple has required that any app developer who wishes to develop an iOS app and distribute it to iOS Device users must:</u>

(a)   <u>enter into an Apple Developer Program Licence Agreement (DPLA) with Apple Inc;</u>

(b)   <u>use the App Store as the sole and exclusive means of providing and or distributing their iOS apps to iOS Device users;</u>

(c)   <u>appoint Apple as their sole agent for the purpose of all dealings with iOS Device users, including the receipt and refunding of in-app purchases; and</u>

(d)   <u>not distribute on the App Store iOS apps that are a store or storefront for other iOS apps, or that are otherwise similar to the App Store.</u>

<u>Particulars</u>

i.   <u>Apple imposes the requirement pleaded in paragraph (a) by refusing to permit app developers who have not entered into a DPLA to use the Apple Software (as defined in the DPLA), including Apple SDKs, iOS and iPadOS.</u>

ii.   <u>Apple imposes the requirements pleaded in paragraphs (b) to (d) by the terms of the DPLA (including Schedule 2) and the App Store Review Guidelines and by enforcing those terms.</u>

12B.   <u>At all material times since the launch of the App Store in 2008, the practical effect of the conduct pleaded at paragraph 12A has been that all iOS Device users (including those in Australia) must acquire their iOS apps (other than those pre-installed on their iOS Devices</u>

by Apple) exclusively from the App Store and from Apple acting as agent of the developers.

Particulars

Apple imposes this requirement by engaging in the conduct described in paragraph 12A above.

13. IAP:

(a) is the payment solution that Apple requires all app developers to use, and the only payment solution that Apple permits app developers to use, for accepting and processing payments for in-app purchases ~~content~~ within iOS apps;

(b) was launched in 2009; and

(c) permits Apple to deduct a 30% commission from all in-app purchases ~~of and in-app content~~ within iOS apps, ~~including subscriptions~~ (or, in some limited circumstances, 15%).

Particulars

i.   The Applicants refer to and repeat the particulars at paragraphs 82 and 83 ~~below~~.

ii.   IAP, as a payment solution, provides for, and facilitates, the acceptance and processing of payments from iOS Device users for apps or in-app purchases. It does this by, among other things, providing for the acceptance and collection of payments from users; the deduction and payment of commissions to Apple for its services as agent and commissionaire; all necessary engagements with credit providers, payment processors and financial institutions; and the payment of the remaining balance to the app developer.

13A. By reason of the matters pleaded in paragraphs 12A, 12B and 13 above, Apple has procured that:

(a)   the App Store constitutes the sole channel for the supply and / or distribution of iOS apps to iOS Device users by app developers;

(b)   the App Store constitutes the sole channel for the acquisition of iOS apps by iOS Device users; and

(c)   IAP constitutes the sole payment solution used for accepting and processing in-app purchases within iOS apps.

13B. Since its launch in 2008, the App Store has generated significant revenue and profits for Apple and has distributed all, or almost all, of the iOS apps ever developed by third-party app developers and acquired by iOS Device users.

Apple Pty Limited

14.   Apple Pty Limited is and, at all material times, was:

(a)   a corporation duly incorporated in Australia and a corporation within the meaning of the CCA;

(b)   a wholly owned indirect subsidiary of Apple Inc; and

(c)   able to sue and be sued in its corporate name.

15.   Apple Pty Limited relevantly:

(a)   has oversight of all content published on the Australian App Store;

(b)   is entitled by reason of its compulsory appointment under the DPLA to act, and does acts as the agent for app developers for the marketing and delivery of apps to iOS Device users located in Australia downloading of apps on the Australian App Store;

(c)   is responsible for promoting apps on the Australian App Store;

(d)   sells apps and in-app content on the Australian App Store;

(e)   collects and receives payment from the purchaser of a paid app, or an in-app purchase, as agent for the app developer; and

(f)   in collecting and receiving payments from the purchaser of a paid app, or an in-app purchase, as agent for the app developer, withholds the commission payable to Apple.

16.   Further, Apple Pty Limited gives effect to the provisions of the Apple Developer Program Licence Agreement (**DPLA**) DPLA and/or Schedule 2 to the DLPA, which is entered into

by app developers who wish to distribute their apps on the App Store, including the Australian App Store.

Particulars

> The Applicants refer to and repeat paragraph 15 above and paragraph 74 below, and the particulars at paragraph 67 below.

17. Apple Pty Limited is also a supplier and distributor to consumers in Australia of iOS Devices and Macs and other Apple branded goods and services.

PART II. APP DISTRIBUTION AND PAYMENTS

Smartphones and tablets

18. Smartphones:

    (a) are mobile telephone and computing devices;

    (b) are generally sufficiently small in dimensions and weight that they are portable in a pocket or bag;

    (c) in addition to performing the function of making and receiving telephone (voice and video) calls and sending messages, possess a wide range of functionality, including but not limited to advanced internet browsing, multimedia and app capabilities;

    (d) are generally operated using a touchscreen;

    (e) generally possess both cellular and WiFi connectivity;

    (f) incorporate hardware and software features that enable them to fulfil many of the functions traditionally associated with PCs; and

    (g) require an operating system (**OS**) to run. control the hardware and other software on the device;

    (h) are powered by a rechargeable battery and, consistent with being portable, are not ordinarily connected to mains power during use;

    (i) typically possess global positioning system (GPS) functionality;

    (j) typically possess near field communication functionality; and

    (k) typically have integrated cameras.

Particulars

Smartphones vary in terms of size, weight, durability, screen size, audio quality, camera size/zoom, web speed, computer processing power, memory, ease-of-use, optical quality, casing quality/design, and additional multimedia offerings.

19. In 2021, there were approximately 20.6 million smartphone users in Australia.

Particulars

According to ~~the most recently available~~ Statista data from 2017, projecting through to 2021.

20. Tablets:

(a) are mobile computing devices;

(b) possess a wide range of functionality, including but not limited to advanced internet browsing, multimedia, sending and receiving email and app capabilities;

(c) sometimes possess telephone (voice and video) functionality;

(d) are generally operated using a touchscreen;

(e) sometimes possess both cellular and WiFi connectivity;

(f) incorporate hardware and software features that enable them to fulfil many of the functions traditionally associated with PCs;

(g) are based on similar hardware to advanced touchscreen smartphones;

(h) are generally larger in dimensions and heavier than a smartphone;

(i) are generally smaller in dimensions and lighter than a laptop or PC; ~~and~~

(j) require an OS to ~~run.~~ control the hardware and other software on the device;

(k) are powered by a rechargeable battery and, consistent with being portable, are not ordinarily connected to mains power during use;

(l) typically possess GPS functionality; and

(m) typically have integrated cameras.

Particulars

i. There is no industry standard definition of a tablet, but rather a spectrum of functionalities that devices in this category possess.

    ii.   Tablets vary in terms of size, weight, durability, screen size, audio quality, camera size/zoom, web speed, computer processing power, memory, ease-of-use, optical quality, casing quality/design, and additional multimedia offerings.

21.   In 2021, approximately 53% of the Australian population used tablets.

Particulars

According to the ~~most recently available~~ Statista data <u>from 2018, projecting through to 2021</u>.

22.   [Not used].

23.   There are functional differences between PCs, on the one hand, and smartphones and tablets, on the other.

Particulars

    i.   Laptop PCs are generally larger in dimensions and heavier than smartphones and tablets.

    ii.   Given the relative size and weight of laptop PCs, they are generally less easily portable <u>or capable of being used "on the go"</u> than ~~some~~ tablets and ~~most~~ smartphones<u>, and laptop PCs are not generally used to take photographs</u>.

    iii.   Laptop PCs have a reduced battery life in comparison with smartphones and tablets.

    iv.   Laptop PCs generally cannot connect to the internet using mobile data without an ethernet or a WiFi connection or a smartphone to facilitate the internet connection.

    <u>iva.   Laptop PCs generally require a keyboard and a mouse or trackpad for input.</u>

    <u>ivb.   Laptop PCs typically do not have GPS functionality.</u>

    <u>Ivc.   Laptop PCs typically do not have near field communication functionality.</u>

    v.   Desktop PCs are <u>generally larger in dimensions and heavier than smartphones and tablets, and are</u> generally

not mobile, in the senser of being easily portable and able to be carried in a pocket or bag.

vi. Given that desktop PCs are generally not mobile, they cannot perform functions such as permitting a user to take photographs "on the go" and desktop PCs are not generally used to take photographs.

vii. Desktop PCs generally require fixed power connections (not batteries) to operate.

viii. Desktop PCs generally require keyboard and mouse for input.

ix. Desktop PCs generally cannot connect to the internet without a WiFi connection or a smartphone to facilitate the connection.

x. Desktop PCs typically do not have GPS functionality.

xi. Desktop PCs typically do not have near field communication functionality.

23A. There are functional differences between gaming consoles, on the one hand, and smartphones and tablets, on the other.

Particulars

i. Gaming consoles:

A. are generally single purpose devices that are used almost exclusively for gaming;

B. generally do not offer the same computing features as smartphones and tablets, such as the ability to make calls, take photographs and utilise GPS;

C. generally have different hardware components to smartphones and tablets;

D. in some cases require fixed power connections (not batteries) to operate (for example, in the case of the Xbox and the PlayStation);

E. in many cases require peripherals, such as a screen for viewing and a controller for input (for example, in

the case of the Xbox and the PlayStation) and generally do not support the use of a keyboard or mouse;

F. generally run on an OS that has a set of APIs that restrict software development to games and game-type software;

G. generally cannot connect to the internet without an ethernet or WiFi connection;

H. are generally large and heavy and not portable, in the sense of being easily carried in a pocket or bag or are less portable than smartphones and tablets; and

I. are not connected to cellular networks.

24. [Not used].

iPhones and iPads

25. Apple markets and supplies iPhones and iPads in Australia.

26. Of the 20.6 million smartphone users in Australia referred to at paragraph 19 above, approximately 55% use iPhones.

Particulars

According to ~~most recently available~~ Statista data released in 2021.

27. Of the percentage of tablet users in Australia referred to at paragraph 21 above, approximately 82% used iPads.

Particulars

According to ~~most recently available~~ Statista data released in 2021.

28. In the nine months ended 26 June 2021, Apple earned:

(a) approximately USD153.1 billion in net sales from the sale of iPhones globally; and

(b) approximately 176.7 billion in net sales from the combination of iPhones and iPads globally.

Particulars

Apple Inc Consolidated Financial Statements for Financial Year 2021, Quarter 3 (27 July 2021).

Operating Systems

29.   An OS is software that:

(a)   communicates with the hardware of a computing device on which it is loaded, allows other programs to run and:

(b)   provides basic functionality for the device;

(c)   manages the memory of the device;

(d)   facilitates the operation of the device; and

(e)   may permit the installation and operation of other software programs (for example, apps for smartphones and tablets) on those devices.

30.   OSs are generally updated regularly.

Particulars

    i.   OS updates may, for example, provide upgraded functionality and additional features for users, correct technical errors and/or protect devices from viruses and malware.

    ii.   Updates to an OS may be either installed automatically or installed manually at the election of the user.

31.   PCs, gaming consoles smartphones and tablets each require an OS to operate.

32.   An OS for smartphones and tablets (**Mobile OS**) is software that facilitates the basic operations of the smartphone or tablet and permits the installation and operation of apps on those devices.

Particulars

    i.   Globally (but excluding China), users of smartphones and tablets can effectively choose a device that will run on one of only two Mobile OSs, being either Android OS or iOS.

    ii.   OSs developed for other electronic devices such as PCs and gaming consoles are not substitutes for a Mobile OS.

33.   A Mobile OS typically facilitates functionality, such as:

(a)   cellular;

(b)   bluetooth;

(c)   WiFi;

(d)   button controls;

(e)   touch and motion commands;

(f)   GPS positioning;

(g)   music player;

(h)   near field communication;

(i)   camera and video recording;

(j)   speech and face recognition; and

(k)   voice recording.

Apps for smartphones and tablets

34.   Apps for smartphones and tablets:

(a)   are software programs;

(b)   facilitate smartphone and tablet users to access web content, services and functionality on those mobile devices;

(c)   often can be used without a live WiFi or cellular data connection; and

(d)   enhance and optimise the functionality of those mobile devices.

<div align="center">Particulars</div>

i.   Apps enhance the utility of a mobile device, for example, with respect to banking, health and fitness, social interactions, gaming such as *Fortnite*, productivity, video chatting and movie/TV streaming.

ii.   Apps for smartphones and tablets are optimised for the characteristics of those devices as compared with PCs and gaming consoles, such as reduced text input, limited screen size or convenience of touch-based interfaces.

iii.   That is, unlike desktop applications, apps for smartphones and tablets are designed to be used on-the-go so as to take advantage of the mobility of such devices

and are developed to utilise a small touchscreen interface.

    iv. Apps can be "standalone" and serve offline tasks (such as games or photography) or incorporate some form of online service (such as geolocation or integration with social networks).

35. A~n~ native app for smartphones and tablets:

(a) is written for a specific Mobile OS;

(b) needs to be downloaded and installed onto a device;

(c) appears as an "icon" or "button" on the smartphone or tablet; and

(d) must be updated from time to time, including to add new functions, to ensure compatibility with an OS, and to fix technical issues.

36. App developers who wish to develop a~n~ native app for smartphones and tablets that is compatible with a specific Mobile OS need access to a Mobile OS Software Development Kit (**SDK**).

Particulars

    i. An SDK is a set of software development tools that provides an app developer with the ability to build a custom app for a specific Mobile OS.

    ii. SDKs generally include information concerning Application Programming Interfaces (**APIs**) that app developers use to create apps for a particular OS as well as programming tools and instructions.

    iii. APIs are sets of definitions and protocols for building and integrating application software, and allow third-party app developers to program their apps to connect to OS-provided functionality.

    iv. At a practical level, APIs allow software applications to communicate with each other.

37. App developers who wish to develop an app for smartphones and tablets that is compatible with smartphones and tablets with different Mobile OSs must code different versions of their app for eachOS.

37A. App developers who wish to develop iOS apps must develop a version of their app that is compatible with iOS.

App stores for smartphones and tablets

38. App stores for smartphones and tablets are native apps that enable the download and installation of other apps that are compatible with the Mobile OS on which the app store is used, as well as enabling the updating of those other apps.

39. Through an app store, a user is able to browse or search for apps and apps may generally be:

   (a)   searcheddiscovered;

   (b)   selected;

   (c)   purchased (if the app in question is a paid app);

   (d)   downloaded;

   (e)   installed; and

   (f)   updated by users of a smartphone or tablet.; and

   (g)   reviewed.

39A. App stores enable app developers to describe, distribute and promote their apps to users and update their apps.

Apps for iOS Devices

40. iOS is Apple's Mobile OS for the iPhone.

<div align="center">**Particulars**</div>

> iOS is based on the OS previously developed for the Mac, being macOS (specifically, Mac OS X).

41. iPadOS is Apple's Mobile OS for the iPad.

<div align="center">**Particulars**</div>

> Historically, iOS was also the OS used on iPads, but Apple subsequently announced in or around September 2019 that

it would begin using the name iPadOS to refer to the OS on iPads.

42. iOS and iPadOS are herein collectively referred to as **iOS**.

43. Apple Inc:

    (a)   pre-installs iOS on iOS Devices;

    (b)   does not license or install any other OS for iOS Devices; and

    (c)   does not license iOS to any other manufacturer of smartphones or tablets.

44. Only iOS apps work on iOS Devices.

45. Apple Inc develops iOS apps.

Particulars

Apple's iOS apps include the App Store, Books, Calendar, Calculator, Camera, Clock, Facetime, Find my Friends, Find My iPhone, Health, iTunes, Keynote, Mail, Maps, Messages, Music, Numbers, Pages, Photos, Safari, Stocks, TV and Wallet.

46. In order to develop and write an iOS app, app developers require access to the software tools provided by Apple Inc.

Particulars

The Applicants refer to and repeat paragraph 67 below.

46A. App developer preferences follow and are a function of consumer preferences. App developers can only distribute native apps to iOS Device users by developing iOS versions of their apps and having those apps made available for installation on iOS Devices.

Distribution of iOS apps

46B. But for Apple's conduct, there would be three potential ways for an iOS app developed by a third-party to be installed on iOS Devices:

    (a)   pre-installation on the iOS Device;

    (b)   downloading the app through an app store installed on the iOS Device (having some or all of the features described at paragraphs 38-39A above); or

    (c)   directly downloading the app from a website accessed through the internet browser on the iOS Device.

Particulars

The Applicants refer to and repeat paragraph 54 below.

47. Apple Inc:

    (a) pre-installs the App Store on iOS Devices; and

    (b) does not allow users of iOS Devices to uninstall or delete the App Store from iOS Devices.

48. In addition, Apple Inc:

    (a) pre-installs many Apple iOS apps on iOS Devices; and

    (b) does not pre-install any third-party iOS apps on iOS Devices.

    Particulars

    Apple's iOS apps pre-installed on iOS Devices include the App Store, Books, FaceTime, Mail, Maps, Messages, Music, Safari, TV and Wallet.

49. App developers who develop an iOS app and wish for it to be distributed to iOS Device users, including in Australia, need to be able to:

    (a) make the app available for download and installation on iOS Devices; and

    (b) update the app on iOS Devices.

50. Apple Inc requires app developers who want to develop and distribute an iOS app to iOS Device users to do so only through the App Store, including in Australia through the Australian App Store, save for *de minimis* exceptions.

    Particulars

    The Applicants refer to and repeat paragraphs 67-70 and 72~~79~~-83 below.

51. In addition, Apple Inc:

    (a) prevents iOS Device users from directly downloading, installing or updating iOS apps from websites (in contrast, Apple Inc permits macOS Device users to directly download, install and update macOS apps from websites); and

    (b) prohibits the distribution of alternative app stores (having some or all of the features described at paragraphs 38-39A above) on iOS Devices (in contrast, Apple Inc permits the distribution of alternative app stores on macOS Devices), and has not, approved such apps for inclusion on the App Store as requested by Epic.

Particulars

i. The Applicants refer to and repeat paragraphs <u>67-70 and 72</u>~~79~~-83 below.

ii. <u>The Applicants refer to and repeat particulars (iii) and (v) to paragraph 92 below.</u>

52. The corollary is that the broad base of Australian iOS Device users can only search, select, purchase (if the app in question is a paid app), download, install and update <u>third-party</u> iOS apps on iOS Devices using the Australian App Store.

53. The Australian App Store:

(a) is accessible by iOS Device users that have an Apple ID that is configured to identify Australia as the relevant nominated country or region;

(b) had, as at February 2021, approximately 1.5 million apps available for download, some of which were available for download on the Australian App Store exclusively;

(c) had, as at February 2021, approximately 215,000 apps that utilised Apple's IAP; and

(d) had approximately 1 million distinct apps downloaded in the period from March 2020 to February 2021.

54. There is no technical reason why Apple cannot permit app developers to provide alternative app stores on iOS Devices or to allow iOS Device<u>, including through the App Store,</u> users to directly download install and update iOS apps on iOS Devices.

Payments for in-app purchases ~~of in-app content~~

55. App developers may obtain revenue from an app for a smartphone or tablet by:

(a) charging users to download the app;

(b) charging users for ~~in-app~~ purchases <u>made in-app (including for digital content and physical goods or services)</u> **(in-app purchases)**; and/or

(c) advertising within the app.

Particulars

i. In-app purchases permit app developers to offer <u>digital</u> items or services for purchase by app users~~, such as an extra level in a game or enhanced features in a fitness app,~~ without the user having to leave the app to make the purchase.

> ia. App developers may also offer purchases of physical goods or services (such as food deliveries or transportation) in-app, without the user having to leave the app to make the purchase.
>
> ii. There are fewer obstacles to completing the transaction and/or users are more likely to make the purchase ~~the in-app content~~ if payment can be made without having to leave the app.
>
> iii. For some app developers, in-app purchases represent their sole or major source of revenue.

56. Where app developers offer in-app purchases, they require an in-app payment solution for accepting and processing payments.

57. Further to paragraph 56 above, app developers:

    (a) can develop their own in-app payment solution; or

    Particulars

    Epic Direct Pay is Epic's in-app payment solution.

    (b) can obtain an in-app payment solution from third parties.

    Particulars

    Third parties providing in-app payment solutions for accepting and processing payments for physical goods and services include Stripe, PayPal/Braintree and Square.

57A. Paragraph 101 below is repeated here.

58. [Not used].

In-app payments for iOS Devices

59. Apple requires app developers to exclusively use Apple's payment solution, IAP, for in-app purchases ~~of iOS app and/or in-app content~~ within iOS apps.

    Particulars

    i. In 2008, when the App Store was introduced, app developers were free to use other in-app payment solutions.

ii. In 2009, Apple introduced IAP and required all app developers selling iOS apps and/or in-app digital content to use IAP and to pay a 30% commission to Apple from all such in-app purchases ~~of digital content~~.

iii. In 2011, Apple expanded the reach of IAP to cover subscriptions. Prior to 2011, app developers could instead send users outside the app to purchase subscriptions without paying commission to Apple.

60. The corollary is that Australian iOS Device users who make <u>an in-app purchase</u> ~~a purchase of in-app content~~ within an iOS app must use Apple's IAP.

61. As at <u>February</u> ~~late~~ 2021, approximately 215,000 iOS apps available on the Australian App Store utilise<u>d</u> IAP, through which:

(a) approximately 156,000,000 transactions took place utilising IAP in the period from March 2020 to February 2021; and

(b) an aggregate of AUD 1.8 billion was transacted in the period from March 2020 to February 2021.

62. There is no technical reason why Apple cannot permit app developers to use alternative in-app payment solutions for accepting and processing payments for in-app <u>purchases</u> ~~content~~ within an iOS app.

PART III: RELEVANT MARKETS

The<u> Australian</u> iOS App Distribution Market<u>s</u>

63. At all relevant times, in the circumstances described at paragraphs 34 ~~54~~<u>62</u> above, there was a market or markets for the supply of services for the distribution of iOS apps to iOS Device users (**iOS App Distribution Market**).

Particulars

i. The services consisted of the provision of services to app developers enabling and/or facilitating app developers to reach, offer and provide iOS Device users with iOS apps and associated updates and/or the provision of services to iOS Device users enabling and/or facilitating iOS Device users to be presented with/or find, obtain and utilise iOS apps and associated updates.

    ii. The geographic dimension of the iOS App Distribution
      Market is described at paragraph 64 below.

63A. In the alternative to paragraph 63 above, at all relevant times, ~~the iOS App Distribution Market was an economically distinct sub-market of a wider~~ <u>there is a</u> market or markets for the supply of services for the distribution of ~~apps to smartphone or tablet users~~ <u>iOS apps and native apps written for Android OS (**Android apps**) (together, **Mobile Apps**) to, respectively, iOS Device users and users of Android smartphones or Android tablets (**Android Device users** and **Android Devices**)</u> (**App Distribution Market**).

Particulars

    i. The services consisted of the provision of services to app developers enabling and/or facilitating app developers to reach, offer and provide ~~smartphone and tablet~~ <u>iOS Device</u> users <u>and/or Android Device users</u> with <u>Mobile</u> <u>A</u>~~a~~pps and associated updates and/or the provision of services to ~~smartphone and tablet~~ <u>iOS Device</u> users <u>and/or Android Device users</u> enabling and/or facilitating ~~smartphone and tablet~~ <u>iOS Device</u> users <u>and/or Android Device</u> users to be presented with and/or find, obtain and utilise <u>A</u>~~a~~pps and associated updates.

    ii. The geographic dimension of the App Distribution Market is described at paragraph 64 below.

64. Each of the iOS App Distribution Market and the App Distribution Market was a market in Australia for the purposes of s 4E of the CCA in that:

  (a) its geographic dimension is limited to Australia; or

  (b) <u>[Not used]</u>~~it is an economically distinct sub-market in Australia of a global market (excluding China); or~~

  (c) the market in Australia formed part of a global market (excluding China),

  (**Australian iOS App Distribution Markets**).

The<u> Australian</u> iOS In-App Payment Solutions Market<u>s</u>

65. At all relevant times, in the circumstances described at paragraphs <u>34</u>~~55~~-62 above, there was a market for the supply of services to app developers for accepting and processing payments for in-app <u>purchases</u> ~~content~~ within an iOS app **(iOS In-App Payment Solutions Market).**

Particulars

The services consist of the provision of services to app developers, including the provision of a payment solution enabling and/or facilitating app developers to accept and process payments for in-app purchases within an iOS app.

66. The iOS In-App Payment Solutions Market was a market in Australia for the purposes of s 4E of the CCA in that:

    (a) its geographic dimension is limited to Australia; or

    (b) [Not used]~~it is an economically distinct sub-market in Australia of a global market (excluding China); or~~

    (c) the market in Australia formed part of a global market (excluding China),

    (**Australian iOS In App Payment Solutions Markets**).

PART IV: APPLE'S RESTRICTIVE AGREEMENTS WITH APP DEVELOPERS

The contractual framework

67. At all relevant times Apple Inc required that any app developer who wished to distribute its apps through the App Store (including the Australian App Store) must have:

    (a) set up a Developer Program account with Apple and entered into the Apple **Developer Agreement**; and

    (b) entered into the ~~Apple Developer Program License Agreement (**DPLA**)~~ DPLA.

    ### Particulars

    i.   The Developer Agreement establishes certain basic terms governing the app developer's relationship with Apple and Apple software tools.

    ii. The DPLA governs the terms and conditions for distribution of apps through the App Store.

    iii. Clause 1.1, DPLA states: "In order to use the Apple Software and Services, You [the app developer] must first accept this Agreement. If You do not or cannot accept this Agreement, You are not permitted to use the Apple Software or Services…"

68. At all relevant times, Apple Inc required that any app developer entering into the DPLA adhere to, relevantly, the App Store Review Guidelines.

69. At all relevant times, in relation to Australia, Apple, by enforcing the DPLA and App Store Review Guidelines, prevented app developers from distributing or offering alternative app stores on iOS Devices and from using and offering alternative payment solutions for accepting and processing payments for in-app purchases ~~content~~ within an iOS app.

Particulars

> The Applicants refer to and repeat paragraphs <u>67-70 and</u>
> <u>72</u>~~79~~–83 below.

70. At all relevant times, Apple Inc requires that any app developer entering into the DPLA must pay Apple Inc an annual fee for membership in the Apple Developer Program.

Particulars

> Clause 8, DPLA.

71. In the period from March 2020 to February 2021 there were approximately 12,097 new Developer Agreements entered into in connection with Australia, and there were 19,231 existing Developer Agreements which were renewed.

72. To distribute a free iOS app, an app developer must additionally enter into Schedule 1 to the DPLA with Apple.

73. Alternatively, to distribute a paid iOS app or offer in-app purchases, an app developer must additionally enter into Schedule 2 to the DPLA with Apple.

74. Pursuant to the terms of Schedule 2 to the DPLA, in Australia, both Apple Inc and Apple Pty Limited:

(a) were required to be appointed by the app developer as the app developer's agent for the marketing and delivery of the Licensed Applications to End-Users;

Particulars

> i. Clauses 1.1 and 1.3
>
> ii. Exhibit A, clause 1
>
> iii. "Licenses Application" is defined in Schedule 2 at cl 1.1(c) to include "any content, functionality, extensions, stickers or services offered in the software application."

iv. "End-User" is defined in Schedule 2 at cl 1.1(b) to include "individual purchasers as well as eligible users associated with their account via Family Sharing."

(b) market and make the Licensed Applications available for download by End-Users through the App Store, for and on behalf of the app developer;

Particulars

Clause 1.1

(c) market, solicit and obtain orders on the app developer's behalf for Licensed Applications from End-Users;

Particulars

Clause 1.2(a)

(d) provide hosting services of Licensed Applications;

Particulars

Clause 1.2(b).

(e) make copies of, format, and otherwise prepare Licensed Applications;

Particulars

Clause 1.2(c)

(f) issue invoices for the purchase price payable by End-Users for the Licensed Applications;

Particulars

Clause 1.2(e)

(g) allow the download of Licensed Applications by End-Users;

Particulars

Clause 3.1

(h) are responsible for the collection of all prices payable by End-Users for Licensed Applications acquired by those End-Users;

Particulars

Clause 3.1

(i) remit to app developers amounts held in trust;

Clause 3.3

(j)   are entitled to a commission "for [its] services as … agent and/or commissionaire under this Schedule 2" of:

   i.   30% of all prices payable by each End-User for Licensed Applications; or

   ii.   for an auto-renewing subscription purchase in its second or subsequent year, 15% of all prices payable by each End-User; or

   iii.   where the app developer qualifies and has been approved by Apple for the App Store Small Business Program, 15% of all prices payable by each End-User for Licensed Applications; and

Particulars

Clause 3.4

(k)   upon collection of any amounts from any End-User as the price for any Licensed Application delivered to that End-User, deduct the full amount of the commission with respect to that Licensed Application and any taxes collected by Apple, and remit the remainder to the app developer.

Particulars

Clause 3.5

The Restrictive Terms

75.   The Developer Agreement, the DPLA and Schedule 2 to the DPLA are each standard form contracts.

76.   Apple Inc did not permit app developers to negotiate any terms of each of:

   (a)   the Developer Agreement;

   (b)   the DPLA;

   (c)   the App Store Review Guidelines; and/or

   (d)   Schedule 2 to the DPLA.

77.   Apple Inc may amend the terms of each of the stand form Developer Agreement, DPLA and Schedule 2 to the DPLA at any time.

Particulars

   i.   Clause 9, Developer Agreement.

ii. Clause 4, DPLA, "Changes to Program Requirements or Terms"

iii. Apple Inc released a new version of the DPLA on ~~7 June 2021~~5 June 2023.

iv. Apple Inc released a new version of Schedule 2 on ~~7 June 2021~~5 June 2023.

v. <u>Apple Inc released a new version of the Developer Agreement on 5 June 2023.</u>

78. Acceptance by an app developer of the latest version of Schedule 2 was required to offer paid apps and in-app purchases processed using IAP.

79. Pursuant to the DPLA, Apple Inc imposed the following terms on app developers:

(a) iOS apps may be distributed via the App Store only if selected by Apple Inc in its sole discretion;

Particulars

i. Clause 3.2(g) states: "Applications for iOS<u>, iPadOS, tvOS, visionOS, and watchOS</u> ~~Products, Apple Watch, or Apple TV~~ developed using the Apple Software may be distributed only if selected by Apple (in its sole discretion) for distribution via the App Store, ~~Custom App Distribution,~~ for beta distribution through TestFlight, or through Ad Hoc distribution as contemplated in this Agreement".

ii. Clause 6.9 states: "You understand and agree that if You submit Your Application to Apple for distribution via the App Store, Custom App Distribution or TestFlight, Apple may, in its sole discretion:…reject Your Application for distribution for any reason, even if Your Application meets the Documentation and Program Requirements;…<u>"</u>.

iii. <u>Chapeau to clause 7.</u>

iv. <u>"Purpose", DPLA.</u>

(aa) <u>iOS apps may only use APIs documented by Apple in published documentation and which are contained in software provided to developers by Apple in the manner prescribed by Apple and must not use or call any private APIs;</u>

Particulars

<u>Clause 3.3.1 states: "Applications may only use Documented APIs in the manner prescribed by Apple and must not use or call any private APIs."</u>

(b) iOS apps may not download or run ~~executable~~ code that, among other things, creates a store or storefront for other apps or code

Particulars

Clause 3.3.2 states: "...an Application may not download or install executable code. Interpreted code may be downloaded to an Application but only so long as such code: (a) does not change the primary purpose of the Application by providing features or functionality that are inconsistent with the intended and advertised purpose of the Application as submitted to the App Store, (b) does not create a store or storefront for other code or applications, and (c) does not bypass signing, sandbox, or other security features of the OS."

(c) <u>iOS apps may not provide, unlock or enable additional features or functionality through distribution mechanisms other than those permitted under the DPLA without Apple's prior written approval or as permitted in relation to the use of IAP</u>~~app developers must not allow users to access content, subscriptions or features they purchased through another app distribution channel, such as the app developer's own website, without also selling it in the App Store~~;

Particulars

Clause 3.3.3 states: "Without Apple's prior written approval or as permitted under Section 3.3.25 (In-App Purchase API), an Application may not provide, unlock or enable additional features or functionality through distribution mechanisms other than the App Store, Custom App Distribution or TestFlight."

(cc) iOS apps may only read data from or write data to a designated container area on the iOS Device, except as otherwise specified by Apple;

Particulars

Clause 3.3.4 states: "An Application for iOS, watchOS, iPadOS, tvOS or visionOS may only read data from or write data to an Application's designated container area on the device, except as otherwise specified by Apple."

(d) app developers are prohibited from issuing any refunds to users of their iOS apps;

Particulars

Clause 3.4 of Attachment 2 states: "You will not issue any refunds to end- users of Your Application, and You agree that Apple may issue refunds to end-users in accordance with the terms of Schedule 2."

(e) app developers must comply with the App Store Review Guidelines;

Particulars

Clause 6.1 states: "By submitting Your Application, You represent and warrant that Your Application complies with the Documentation and Program Requirements then in effect as well as with any additional guidelines that Apple may post on the Program web portal or in App Store Connect."

(f) app developers must not distribute their iOS apps to third parties via distribution methods other than those expressly permitted by the DPLA;

Particulars

Clause 7.6 states: "In the absence of a separate agreement with Apple, You agree not to distribute Your Application for iOS, iPadOS, tvOS, visionOS, or watchOS ~~Products, Apple Watch, or Apple TV~~ to third parties via other distribution methods or to enable or permit others to do so."

(g) app developers may not make any public statements regarding the DPLA or the app developer's relationship with Apple Inc without Apple Inc's express prior written approval; and

Particulars

Clause 9.4 requires app developers to seek Apple Inc's "express prior written approval [...] which may be withheld at Apple's discretion".

(h) app developers must submit to the exclusive jurisdiction of the state and federal courts of the Northern District of California with respect to any litigation arising out of or relating to the DPLA, and the laws of the United States and the State of California (**exclusive jurisdiction and governing law clause**).

Particulars

Clause 14.10 states: "Any litigation or other dispute resolution between You and Apple arising out of or relating to this Agreement, the Apple Software, or Your relationship with Apple will take place in the Northern District of California, and You and Apple hereby consent to the personal jurisdiction of and exclusive venue in the state and federal courts within that District with respect any such litigation or dispute resolution. This Agreement will be governed by and construed in accordance with the laws of the United States and the State of California, except that body of California law concerning conflicts of law."

80. If an app developer does not comply with the terms of the DPLA, including, but not limited to, those provisions referred to at paragraph 79 above:

(a) the iOS app will not be approved by Apple Inc for distribution via the App Store, or if the app is already on the App Store, it can be removed from the App Store; and/or

(b) the app developer's Developer Program account may be suspended or terminated.

Particulars

i. Clause 6.9, DPLA states: "You understand and agree that if You submit Your Application to Apple for distribution via the App Store, Custom App Distribution, or TestFlight, Apple may, in its sole discretion: (a) determine that Your Application does not meet all or any part of the Documentation or Program Requirements then in effect; ..."

ii. Clause 10, Developer Agreement states: "Apple may terminate or suspend you as a registered Apple Developer at any time in Apple's sole discretion. If Apple terminates you as a registered Apple Developer, Apple reserves the right to deny your reapplication at any time in Apple's sole discretion."

iii. Clause 11.2, DPLA states: "This Agreement and all rights and licenses granted by Apple hereunder and any services provided hereunder will terminate, effective immediately upon notice from Apple: (a) if You or any of Your Authorized Developers fail to comply with any term of this Agreement other than those set forth below in this Section 11.2 and fail to cure such breach within 30 days after becoming aware of or receiving notice of such breach;...".

iv. Clause 11.2, DPLA states: "Apple may also terminate this Agreement, or suspend Your rights to use the Apple Software or services, if You fail to accept any new Program Requirements or Agreement terms as described in Section 4."

v. Clause 11.3, DPLA states: "Upon the termination of this Agreement for any reason, You agree to immediately cease all use of the Apple Software and services and erase and destroy all copies, full or partial, of the Apple Software and any information pertaining to the services (including Your Push Application ID) and all copies of Apple Confidential Information in Your and Your Authorized Developers' possession or control."

81. The App Store Review Guidelines were non-negotiable, and Apple Inc reserved the right to update them from time to time.

Particulars

i. The App Store Review Guidelines relevantly state: "This is a living document...".

ii. Apple Inc released a new version of the App Store Review
Guidelines on ~~7 June 2021~~5 June 2023.

82. Pursuant to the App Store Review Guidelines, Apple Inc imposed the following terms on
app developers:

(a) it is "unacceptable" for an app developer to submit an iOS app which creates an
interface for displaying third-party apps "similar to the App Store or as a general-
interest collection";

Particulars

i. Clause 3.2.1(ii) states: "Your app should provide robust
editorial content so that it doesn't seem like a mere
storefront."

ii. Clause 3.2.2(i) states: "Creating an interface for
displaying third-party apps, extensions, or plug-ins similar
to the App Store or as a general- interest collection."

iii. The App Store Review Guidelines thereby prevent app
developers from distributing would-be competing third-
party app stores through the App Store.

(aa) iOS apps may only contain or run code not embedded in the binary code of the app,
such as HTML5-based games, if code distribution is not the main purpose of the app
and the code is not offered in a store or store-like interface;

Particulars

Clause 4.7.

(b) app developers must use IAP for ~~digital~~ in-app purchases and may not include an
alternative payment solution within the app;

Particulars

Clause 3.1.1.

(c) it is "unacceptable" for an app developer to steer iOS Device users from within an
iOS app to alternative payment methods outside the iOS app, save for, since 30
March 2022, "reader" apps (which are permitted to apply for the "External Link
Account Entitlement" to provide an informational link in their app to a website the
developer owns or maintains responsibility for in order to create or manage an
account);

Particulars

i.   Clause 3.1.1 states: "Apps and their metadata may not
     include buttons, external links, or other calls to action that
     direct customers to purchasing mechanisms other than
     in-app purchase."

ii. Clause 3.1.3 ~~applies to app developers that offer multi-
     platform apps, and~~ states: "Apps in this section cannot,
     within the app, encourage users to use a purchasing
     method other than in-app purchase, except as set forth in
     3.1.3(a). Developers can send communications outside of
     the app to their user base about purchasing methods
     other than in-app purchase". Until October 2021, Clause
     3.1.3 stated: "[apps] cannot, within the app, encourage
     users to use a purchasing method other than in-app
     purchase. Developers cannot use information obtained
     within the app to target individual users outside of the app
     to use purchasing methods other than in-app purchase
     (such as sending an individual user an email about other
     purchasing methods after that individual signs up for an
     account within the app)."

iii. Clause 3.1.3(a) states: ""Reader" Apps: Apps may allow
     a user to access previously purchased content or content
     subscriptions (specifically: magazines, newspapers,
     books, audio, music, and video). Reader apps may offer
     account creation for free tiers, and account management
     functionality for existing customers. Reader app
     developers may apply for the External Link Account
     Entitlement to provide an informational link in their app to
     a web site the developer owns or maintains responsibility
     for in order to create or manage an account. Learn more
     about the External Link Account Entitlement".

(cc) app developers must not allow users to access content, subscriptions or features
      they purchased through another app distribution channel, such as the app
      developer's own website, without also making it available as an in-app purchase
      within their iOS apps distributed via the App Store;

Particulars

Clause 3.1.3(b) states: "Apps that operate across multiple platforms may allow users to access content, subscriptions, or features they have acquired in your app on other platforms or your web site, including consumable items in multi-platform games, provided those items are also available as in-app purchases within the app."

(d)   "each streaming game" must be submitted to the App Store "as an individual app"; ~~and~~

Particulars

Clause 4.9.1 states: "Each streaming game must be submitted to the App Store as an individual app so that it has an App Store product page, appears in charts and search, has user ratings and review, can be managed with ScreenTime and other parental control apps, appears on the user's device, etc."

(e)   apps must not "include irrelevant information"~~.~~; and

Particulars

i.   Clause 2.3.10 states: "Make sure your app is focused on the iOS, iPadOS, macOS, tvOS or watchOS experience, and don't include names, icons, or imagery of other mobile platforms in your app or metadata unless there is specific, approved interactive functionality. Make sure your app metadata is focused on the app itself and its experience. Don't include irrelevant information."

ii.   The App Store Review Guidelines thereby prohibit app developers from mentioning anywhere within the iOS app the commission they pay Apple.

(f)   browsers on iOS Devices must use only Apple's own WebKit browser engine.

Particulars

i. Clause 2.5.6 states: "Apps that browse the web must use the appropriate WebKit framework and WebKit JavaScript."

ii. Clause 4.7 states: "Apps may contain or run code that is not embedded in the binary (e.g. HTML5-based games, bots, etc.), as long as code distribution isn't the main purpose of the app, the code is not offered in a store or store-like interface, and provided that the software adheres to the additional rules that follow in 4.7.1 and 4.7.2."

iii. Clause 4.7.1 states: "Software offered under this rule must …. Only use capabilities available in a standard WebKit view (e.g. it must open and run natively in Safari without modifications or additional software); and use WebKit and JavaScript Core to run third-party software and should not attempt to extend or expose native platform APIs to third-party software".

83. Pursuant to Schedule 2 of the DPLA, Apple imposed the following terms on app developers:

(a) app developers must allow Apple to collect a 30% commission on the sale of paid apps, except for in limited circumstances where the commission is reduced to 15%;

Particulars

Clause 3.4.

(b) app developers must allow Apple to collect a 30% commission on ~~digital~~ in-app purchases, ~~including subscriptions (with a reduction to 15% on subscriptions after the first year),~~ except for in limited circumstances where the commission is 15%;

Particulars

i. Clause 3.4.

ii. The commission charged by Apple is for its services as agent under Clause 3.4, the chapeau of which states: "Apple shall be entitled to the following commissions in

consideration for its services as Your agent and/or commissionaire under this Schedule 2: ...".

(bb)   app developers seeking to distribute iOS apps must appoint Apple Inc and Apple Pty Limited as their agent for the purposes of Apple conducting all dealings with iOS Device users;

Particulars

i.   Clause 1.1 states: "You hereby appoint Apple and Apple Subsidiaries (collectively "Apple") as: (i) Your agent for the marketing and delivery of the Licensed Applications to End-Users located in those regions listed on Exhibit A, Section 1 to this Schedule 2, subject to change; and (ii) Your commissionaire for the marketing and delivery of the Licensed Applications to End-Users located in those regions listed on Exhibit A, Section 2 to this Schedule 2, subject to change, during the Delivery Period."

ii.   Clause 1.3 states: "The parties acknowledge and agree that their relationship under this Schedule 2 is, and shall be, that of principal and agent, or principal and commissionaire".

iii.   Clause 3.1, Schedule 2 states: "…As Your agent and/or commissionaire, Apple shall be solely responsible for the collection of all prices payable by End-Users for Licensed Applications acquired by those End-Users under this Schedule 2."

iv.   Clause 3.4 states: "Apple shall be entitled to the following commissions in consideration for its services as Your agent and/or commissionaire under this Schedule 2: (a) For sales of Licensed Applications to End- Users, Apple shall be entitled to a commission equal to thirty percent (30%) of all prices payable by each End-User. Solely for auto-renewing subscription purchases made by customers who have accrued greater than one year of paid subscription service within a Subscription Group (as defined below) and notwithstanding any Retention Grace

Periods or Renewal Extension Periods, Apple shall be entitled to a commission equal to fifteen percent (15%) of all prices payable by each End-User for each subsequent renewal."

(c) where Apple determines to refund a customer, it ~~may~~ require_s_ reimbursement for the full amount of the price paid by the "End-User" for that "Licensed Application";

Particulars

i. Clause 3.8(c) states: "In the event that Apple refunds any such price to an End-User, You shall reimburse, or grant Apple a credit for, an amount equal to the price for that subscription."

ii. Clause 6.3 states: "Apple may refund to the End-User the full amount of the price paid by the End-User for that Licensed Application. In the event that Apple refunds any such price to an End-User, You shall reimburse, or grant Apple a credit for, an amount equal to the price for that Licensed Application. In the event that Apple receives any notice or claim from a payment provider that an End-User has obtained a refund for a Licensed Application, You shall reimburse, or grant Apple a credit for, an amount equal to the price for that Licensed Application."

(d) Apple may withhold payments due to the app developer if Apple determines – or even suspects – that the relevant app developer or any affiliate of the app developer has engaged in, encouraged or participated with other app developers to engage in any suspicious, misleading, fraudulent, improper, unlawful or dishonest act or omission; and

Particulars

i. Clause 7.1 states: "If at any time Apple determines or suspects that You or any developers with which You are affiliated have engaged in, or encouraged or participated with other developers to engage in, any suspicious, misleading, fraudulent, improper, unlawful or dishonest act or omission, Apple may withhold payments due to You or such other developers."

ii.   This clause was introduced into Schedule 2 in the version
       released on 31 March 2021.

(e)   Apple may delist app developers' apps from the App Store at any time~~.~~; and

Particulars

Clause 7.3.

(f)   Apple also requires app developers to price their iOS app within
      global pricing tiers set by Apple.

Particulars

Clause 3.1.

84.   [Not used]~~Apple also required app developers to price their iOS app within global pricing tiers set by Apple.~~

85.   The matters referred to above at paragraphs 67-70 and 72~~79~~-83 are herein collectively
      referred to as the **Restrictive Terms**.

85A. By reason of the matters referred to at paragraphs 15, 16 and 74 above, Apple Pty Limited:

(a)   imposed the Restrictive Terms above jointly with Apple Inc;

(b)   in the alternative, gave effect in Australia to the Restrictive Terms; and/or

(c)   in the further alternative, was involved in the imposition of the Restrictive Terms by
      Apple Inc, and/or the giving effect to the restrictive Terms by Apple Inc, within the
      meaning of s 75B of the CCA.

Particulars

i.   Apple Pty Limited engaged in the conduct pleaded at
      paragraph 15 above. Apple Pty Limited thereby ~~has, and
      continues~~ jointly ~~to~~ participated in Apple Inc's
      contraventions.

ii.   Apply Pty Limited gave effect to the DPLA as pleaded at
      paragraph 16 above. Apple Pty Limited thereby ~~has, and
      continues~~ jointly ~~to~~ participated in Apple Inc's
      contraventions.

iii. The Applicants refer to and repeat paragraphs 98, 109,
      113 and 118 below.

iiia. Apple Pty Limited ~~has and continues to~~ act<u>ed</u> <u>jointly or in</u> <u>concert with Apple Inc in furtherance of a common</u> <u>purpose to impose and enforce anti-competitive</u> <u>restrictions.</u>

iv. Further particulars may be provided prior to trial.

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

Apple's conduct in respect of iOS App Distribution

Apple's market power

86. At all material times during the Relevant Period, features of the Australian iOS App Distribution Markets, or one or more of those markets, were that:

(a) Apple required app developers who wish to distribute iOS apps to the broad base of iOS Device users to do so only through the App Store, with the effect that<u>:</u>

<u>(i) Apple was the only distributor of iOS apps in the Australian iOS App Distribution Markets;</u>

<u>(ii) with the exception of those iOS apps that</u> ~~are~~<u>were pre-installed on iOS Devices,</u> <u>iOS Device users c</u>ould <u>only obtain iOS apps through the App Store;</u>

(b) Apple Inc pre-installed the App Store on the home screen of all iOS Devices and prohibited iOS Device users from removing the App Store from their iOS Devices, as described at paragraph 0 above;

(bb) Apple Inc pre-installed many Apple iOS apps on the home screen of all iOS D~~d~~evices;

<u>(bbb) Apple prohibits the pre-installation of third-party apps (including app stores) on iOS</u> <u>Devices;</u>

(c) Apple Inc prohibited the distribution or offering of alternative app stores on <u>the App</u> <u>Store and on </u>iOS Devices, as described at paragraphs 51 and 69 above;

(d) Apple Inc prevented iOS Device users from directly downloading, installing or updating iOS apps from websites, as described at paragraph 51 above

(e) Apple Inc prohibited the distribution of iOS apps to iOS Devices other than through the App Store, save for *de minimis* exceptions, as described at paragraph 50 above;

(f) Apple required app developers to enter into the Developer Agreement and DPLA (including the App Store Review Guidelines) if they wanted to distribute iOS apps to iOS Device users, as described at paragraphs 67-83 above;

(g) Apple did not permit app developers to negotiate any of the terms of the Developer Agreement, DPLA, or the App Store Review Guidelines, as described at paragraphs 76 and 81 above;

(h) Apple imposed some or all of the Restrictive Terms upon app developers seeking to distribute iOS apps or offer in-app purchases to iOS Device users, as described at paragraphs 79-83 above, including restrictions which prohibited app developers from using and offering alternative payment solutions for accepting and processing payments for in-app purchases content within an iOS app, and by charging supra-competitive prices to app developers and/or deriving supra-competitive profits, unconstrained by competition, in connection with the distribution of iOS apps and/or for IAP; and

(hh) Apple Inc and/or Apple Pty Limited hasd a substantial degree of power in the Australian iOS In-App Payment Solutions Markets, or in one or more of those markets;

Particulars

The Applicants refer to and repeat paragraph 102 below.

(i) app developers had no material countervailing bargaining power with Apple Inc and/or Apple Pty Limited as no app developer could realistically afford to forgo distribution of iOS apps to iOS Device users, including Australian iOS Device users.

(j) Apple requiresd its appointment under the DPLA to act as the agent for app developers for the marketing and downloading of apps on the Australian App Store.

86A. By reason of the matters described at 86 above, Apple's operation of the App Store iswas not the subject of material constraint from other means by which iOS Device users could obtain iOS apps.

87. At all material times during the Relevant Period, in the circumstances described at paragraph 86 above, Apple Inc and/or Apple Pty Limited had and/or together havehad a substantial degree of power monopoly and dides not face any, or any material, competitive constraints in the supply of iOS app distribution services in the Australian iOS App Distribution Markets.

88. Further to paragraph 87 above:

(a)   web apps;

(b)   [Not used]~~streaming apps;~~

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

(d)   apps developed for PCs and gaming consoles,

were not substitutes, or effective substitutes, <u>for</u> ~~to the distribution of~~ iOS apps ~~to iOS Device users~~.

Particulars

i.   Web apps have limited capabilities on iOS devices and inferior functionality and performance when compared to iOS apps, including because they:

A.   can only be accessed within a web browser;

B.   need to be rendered through a web browser;

C.   are limited to a set of APIs available within a web browser;

D.   are not available on the App Store;

E.   are slower than iOS apps;

F.   cannot call on certain web APIs on iOS Devices, such as the API that provides for push notifications;

G.   have memory limitations;

H.   are not suitable for some apps; and

I.   typically provide inferior support as compared to iOS apps.

ii.   Apple requires that browsers on iOS Devices use only its own WebKit browser engine and Apple thereby restricts the functionality of web apps on iOS Devices.

iii.   ~~A streaming app is an app where the content that the user is experiencing is delivered over the internet.~~ App streaming occurs when an app resides on a remote server (often referred to as "the cloud") and <u>where the content that the user is experiencing is delivered as a</u>

video stream over the internet. It has severe limitations in comparison to iOS apps, including the following:

A.   app streaming requires a fast internet connection, which means it cannot be achieved anywhere and everywhere. It is highly dependent upon the quality of the user's internet connection and the data usage involved;

B.   app streaming is vulnerable to latency issues, whereas apps running locally on a device are not, because of the round trip that data must take from the device to the server and back again;

C.   scalability is limited with app streaming due to limited server capacity; and

D.   Apple does not accept apps that offer a selection of third-party streamed apps on the App Store.

iv.   Apps for smartphones and tablets that are not iOS apps (i.e. Android OS apps) do not function on iOS Devices. Further, iOS Device users are disincentivised to switch to the Android OS, including because of the following costs associated with changing Mobile OSs:

A.   the layout and functions of the iOS are different from the Android OS. These differences include (but are not limited to) button, touch and voice controls, search functions, configuring settings and organising digital content, such as photos. Learning to use a new OS is time consuming and frustrating for many users, as is the process of switching itself. This acts as a deterrent from switching from the iOS to the Android OS.

B.   Apple provides services that facilitate the interaction between a user's different Apple devices, which encourages ownership of more than one Apple device. A user who owns more than one Apple device is less likely to switch to mobile devices which use

Android OS because doing so would cause the user to lose the interoperability among their smartphone and other Apple devices, and because they would lose some or all of the benefits of their investments in their Apple devices.

C. Apple allows family members to access songs, music, TV shows, books and apps purchased by other family members. Further, numerous Apple apps (including FaceTime, Find My, iMessage and AirDrop) work only between Apple device users. This encourages users to commit to the Apple ecosystem on a family or household basis. Where this is the case, a user within that family or household is less likely to switch to a mobile device (or devices) which use Android OS because doing so would cause the user to lose access to those shared and iOS-specific services

D. An iOS Device user may lose access to apps that are only available on iOS, need to re-install certain apps, lose their settings on certain apps, or otherwise face difficulties in seeking to continue to use the apps the user had downloaded to their iOS Device (such as in managing subscription costs).

E. Upfront costs associated with purchasing a new smartphone or tablet.

v. Apps for PCs and gaming consoles do not function on iOS Devices. Further, PCs and gaming consoles are not substitutes for smartphones and tablets, for the reasons outlined at paragraphs 34, 35 and 37 above.

89. By reason of the matters described at paragraphs 86-88 above, at all material times during the Relevant Period:

(a) Apple Inc; and/or

(b) Apple Pty Limited,

had a substantial degree of power in the Australian iOS App Distribution Markets.

Apple's conduct in respect of iOS App Distribution

90. At all material times during the Relevant Period, Apple Inc and Apple Pty Limited ~~have~~ each engaged~~, and continue to engage,~~ in the following conduct in trade or commerce:

(a) Apple required app developers who wish to distribute iOS apps to the broad base of iOS Device users to do so only through the App Store, with the effect that:

    (i) Apple was the only distributor of iOS apps in the Australian iOS App Distribution Markets;

    (ii) with the exception of those iOS apps that are pre-installed on iOS Devices, iOS Device users ~~can~~ould only obtain iOS apps through the App Store;

(b) Apple Inc pre-installed the App Store on the home screen of all iOS Devices and prohibited iOS Device users from removing the App Store from their iOS Devices, as described at paragraph 0 above;

(bb) Apple Inc pre-installed many Apple iOS apps on the home screen of all iOS ~~d~~Devices;

(bbb) Apple prohibits the pre-installation of third-party apps (including app stores) on iOS Devices;

(c) Apple Inc prohibited the distribution or offering of alternative app stores on the App Store and on iOS Devices, as described at paragraphs 51 and 69 above;

(d) Apple Inc prevented iOS Device users from directly downloading, installing or updating iOS apps from websites, as described at paragraph 51 above

(e) Apple Inc prohibited the distribution of iOS apps to iOS Devices other than through the App Store, save for *de minimis* exceptions, as described at paragraph 50 above;

(f) Apple required app developers to enter into the Developer Agreement and DPLA (including the App Store Review Guidelines) if they wanted to distribute iOS apps to iOS Device users, as described at paragraphs 67-83 above;

(g) Apple did not permit app developers to negotiate any of the terms of the Developer Agreement, DPLA, or the App Store Review Guidelines, as described at paragraphs 76 and 81 above;

(h) Apple imposed some or all of the Restrictive Terms upon app developers seeking to distribute iOS apps or offer in-app purchases to iOS Device users~~, as described at paragraphs 79-83 above,~~ including restrictions which prohibited app developers from using and offering alternative payment solutions for accepting and processing

payments for in-app purchases content within an iOS app, and by charging supra-competitive prices to app developers and/or derivinged supra-competitive profits, unconstrained by competition, in connection with the distribution of iOS apps and/or for IAP; and

(hh)   Apple prohibitsed app developers from steering iOS Device users from within iOS apps to alternative payment methods to IAP for purchasing digital in-app content outside the app, save for, since 30 March 2022, "reader" apps which are permitted to apply for the "External Link Account Entitlement" to provide an informational link in their app to a website the developer owns or maintains responsibility for in order to create or manage an account;

(i)   app developers had no material countervailing bargaining power with Apple Inc and/or Apple Pty Limited as no app developer could realistically afford to forgo distribution of iOS apps to iOS Device users, including Australian iOS Device users.

(j)   Apple enforced the Restrictive Terms, including by enforcing some or all of the Restrictive Terms against Epic Games, Inc. and Epic Games International S.à.r.l. (collectively, Epic) by:

  i.   removing *Fortnite* from the App Store; and

  ii.   terminating Epic Games, Inc.'s Team ID '84 account.;

(l)   Apple refused to permit EGS to be included on the App Store and to be distributed to iOS Device users on iOS Devices; and

(k)   Apple requiresd its appointment under the DPLA to act as the agent for app developers for the marketing and downloading of apps on the Australian App Store.

90A. Through its imposition and enforcement of the Restrictive Terms, Apple hasd procured that:

(a)   the App Store constitutes the sole means by which app developers may make their iOS apps available to iOS Device users; and

(b)   the App Store constitutes the sole means by which iOS Device users may obtain iOS apps.

90B. By reason of the matters in paragraphs 90 and 90A, Apple has foreclosed any and all alternative iOS app distribution methods.

90C. By reason of the matters in paragraphs 90, 90A and 90B Apple has prevented or hindered competition in the Australian iOS App Distribution Markets.

Particulars

    i.   The competition that is hindered is in respect of the means
          by which iOS Device users may obtain iOS apps.

    ii.   Paragraphs 91 to 93 are repeated.

91.   But for the conduct described at paragraphs 90, 90A, 90B and/or 90C above, at all material times during the Relevant Period, the App Store Apple Inc and/or Apple Pty Limited would or would likely have faced the threat of entry by competitors and vigorous and effective competition in the Australian iOS App Distribution Markets, or in one or more of those markets, from:

(a)   alternative methods of iOS app distribution such as competing app stores and direct downloading options; and/or

(b)   from developers using or offering alternative payments solutions for accepting and processing in-app purchases to other app developers and/or to iOS Device users.

92.   At all material times during the Relevant Period, competition in the Australian iOS App Distribution Markets of the kind referred to at paragraph 91 above would have or would likely have led to pro-competitive benefits including:

(a)   increased quality, innovation and choice in respect of the distribution of apps to iOS Devices;

Particulars

    i.   Absent some or all of the Restrictive Terms, alternative app stores, including a version of the Epic Games Store (**EGS**) that would distribute iOS apps, could compete with the App Store.

    ii.   Alternative app stores could have innovated, including by:

        A.   curating the apps available on competing stores;

        B.   providing more reliable or a different form of app reviews;

        C.   providing different marketing or promotion;

        D.   providing different means of search or discovery;

        E.   offering different pricing models;

        F.   providing community or social features;

        G.   providing different check-out methods or payment processors;

      H.   providing better security;

      I.   providing better parental controls; and

      J.   operating across multiple platforms.

  iii.   On macOS, where Apple has not imposed the Restrictive Terms on app distribution by third parties, multiple third-party app stores could have offered distribution of apps outside the Mac App Store. <u>There is a similar diversity of app stores on PCs running an OS other than macOS.</u>

  iv.   Absent some or all of the Restrictive Terms, direct downloading could compete with <u>or constrain</u> the App Store.

  v.   On macOS, where Apple has not imposed the Restrictive Terms on app distribution by third parties, many app developers choose to distribute their apps outside the Mac App Store, including directly to users. <u>There is a similar diversity of choice for app developers for the distribution of apps on PCs running an OS other than macOS.</u>

(b)   increased quality, innovation and choice in respect of apps available on iOS Devices;

Particulars

  i.   Game streaming services such as those offered by Microsoft, Google, Nvidia and Amazon could be made available as iOS apps.

  ii.   App development would be encouraged generally, as app developers would not face the uncertainty of being excluded from the App Store due to, among other things, the App Store Review Guidelines or the exercise of Apple's discretion.

  iii.   Third-party apps would be less disadvantaged by the pre-installation of Apple own iOS apps.

(c)   lower commissions paid by app developers to app distributors for purchases of iOS apps and in-app <u>purchases</u> ~~content~~ by iOS Device users, compared to the existing

position where Apple had been able to exercise market power without competitive constraints so as to impose supra-competitive commissions in connection with the distribution of iOS apps and/or the provision of an in-app payment solution;

Particulars

    i.   would-be competing app distributors would have competed with Apple on commissions for app distribution and in-app purchases. For example, Epic's EGS charges a 12% commission for PC app distribution as well as for in-app purchases when the app developer chooses to use Epic Direct Pay.

    ii.   competition in the Australian iOS App Distribution Markets would have been likely to result in more efficient commission pricing, including commissions that bore some relationship to a firm's costs and/or competitors' pricing.

    iii.   Apple Inc and/or Apple Pty Limited charged a 30% commission through IAP in connection with the distribution of iOS apps and/or for IAP (or, in some limited circumstances, 15%).

(d)   lower prices paid by iOS Device users for the purchase of iOS apps and in-app purchases;~~content within iOS apps; and~~

(e)   the application of competitive pressures to Apple in relation to the App Store, such that, among other things:

    i.   Apple would have been incentivised to enhance search and discoverability functionality within the App Store;

    ii.   Apple would have been incentivised to offer app developers and consumers greater customer service, including in relation to the handling of complaints and refunds;

    iii.   Apple would have been incentivised to improve the app review process, including in relation to the time between an app being submitted via App Store Connect and made available on the App Store;

    iv.   Apple would have been incentivised to improve the App Store Review Guidelines, in relation to fairness, transparency and equal enforcement;

v. Apple would have been disincentivised to impose price tiers that adversely affect app developers and consumers;

vi. Apple would have been disincentivised to preference its own apps within the App Store, including those that compete with third-party apps also available within the App Store; ~~and~~

vii. decreased barriers to competition as the availability of multi-platform apps stores would have made it easier for smartphone and tablet users to switch between OS~~.~~; and

93. Further, at all material times during the Relevant Period, the conduct described at paragraph~~s~~ 90, 90A and/or 90B above had the effect or likely effect in the Australian iOS App Distribution Markets, or in one or more of those markets, of:

(a) foreclosing alternative methods of iOS app distribution including competing app stores and direct downloading options;

(b) decreased quality, innovation and choice in respect of the distribution of apps to iOS Devices;

(c) decreased ~~the~~ quality, innovation and choice in respect of apps available on iOS Devices;

(d) inflating commissions paid by app developers to app distributors for the purchase of iOS apps and in-app purchases ~~content~~ by iOS Device users;

(e) inflating prices paid by iOS Device users for the purchase of iOS apps and in-app purchases ~~content on iOS apps~~;

(f) distorting competition between Apple's own apps and third-party iOS apps;

(g) enabling Apple to exercise market power without competitive restraint so as to impose supra-competitive commissions in relation to the distribution of iOS apps and/or the provision of an in-app payment solution;

Particulars

i. Would-be competing app distributors, would compete with Apple on commissions for app distribution and in-app purchases. For example, Epic's EGS charges a 12% commission for PC app distribution as well as for in-app purchases when the app developer chooses to use Epic Direct Pay.

ii. Competition in the Australian iOS App Distribution Markets may be expected to result in more efficient commission prices, including commissions that bear some relationship to a firm's costs.

iii. Apple Inc and/or Apple Pty Limited charged, a 30% commission through IAP in connection with the distribution of iOS apps and/or for IAP (or, in some limited circumstances, 15%).

(h) disincentivising Apple to enhance search and discoverability functions within the App Store;

(i) disincentivising Apple to offer app developers and consumers greater customer service, including in relation to the handling of complaints and refunds;

(j) disincentivising Apple to improve the app review process, including in relation to the time between an app being submitted via App Store Connect and made available on the App Store;

(k) disincentivising Apple to improve the App Store Review Guidelines, in relation to fairness, transparency and equal enforcement;

(l) incentivising Apple to impose price tiers that adversely affect app developers and consumers;

(m) incentivising Apple to preference its own apps within the App Store, including those that compete with third-party apps also available within the App Store; and

(n) increasing barriers to switching by precluding multi-platform app stores that would make it easier for smartphone and tablet users to switch between OSs.

94. The purpose, effect or likely effect of the conduct described at paragraphs 90, 90A and/or 90B above was to substantially lessen competition in the Australian iOS App Distribution Markets, or in one or more of those markets, and/or the Australian iOS In-App Payment Solutions Markets or in one or more of those markets.

Particulars

i. The purpose can be inferred from the Restrictive Terms and the conduct of Apple in enforcing and/or giving effect to some or all of the Restrictive Terms.

    ii.   The effect or likely effect is demonstrated by the matters at paragraphs 90C, 91, and 92 and 93 above.

    iii.   Further particulars may be provided prior to trial.

95.   [Not used].

96.   [Not used].

97.   By reason of the matters referred to at paragraphs 86–94 above, Apple Inc and/or Apple Pty Limited has contravened, s 46(1) of the CCA.

98.   In the alternative to paragraph 97 above, Apple Pty Limited was involved in Apple Inc's contravention at paragraph 97 above within the meaning of s 75B(1)(a) and/or (c) and/or (d) of the CCA. Specifically, at all material times, Apple Pty Limited:

(a)   aided, abetted, counselled or procured Apple Inc's contraventions at paragraph 97 above; and/or

(b)   was knowingly concerned in Apple Inc's contraventions at paragraph 97 above with knowledge of Apple Inc's market power at paragraph 89 above, Apple Inc's conduct at paragraph 90, 90A and/or 90B above, and that Apple Inc's conduct at paragraph 90, 90A and/or 90B above had, the effect or likely effect of substantially lessening competition as pleaded at paragraph 97 above; and/or

(c)   conspired with Apple Inc in respect of Apple Inc's contraventions at paragraph 97 above.

Particulars

    i.   [Not used].

    ii.   Apple Pty Limited engaged in the conduct as pleaded at paragraph 15 above. Apple Pty Limited thereby has, and continues jointly to participated in Apple Inc's contraventions.

    iii.   Apple Pty Limited gave effect to the DPLA as pleaded at paragraph 16 above. Apple Pty Limited thereby has, and continues jointly to participated in Apple Inc's contraventions.

    iv.   Apple Pty Limited's knowledge of the matters in paragraph 98(b) is to be inferred in circumstances where, inter alia, it is a wholly owned subsidiary of Apple

Inc and engages in the conduct pleaded at paragraphs 7 and 15-16.

iiia. Apple Pty Limited ~~has and continues to~~ act~~ed~~ jointly or in concert with Apple Inc in furtherance of a common purpose to impose and enforce anti-competitive restrictions.

v. Further particulars may be provided prior to trial.

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

Apple's market power

99. At all material times during the Relevant Period, features of the Australian iOS In-App Payment Solutions Markets, or one or more of those markets, were that:

(aa) Apple Inc and/or Apple Pty Limited ha~~sd~~ a substantial degree of power in the Australian iOS App Distribution Markets, or in one or more of those markets;

Particulars

The Applicants refer to and repeat paragraph 89 above.

(a) Apple Inc and/or Apple Pty Limited required app developers to use Apple Inc's IAP if they wanted to distribute a paid iOS app or offer in-app purchases ~~of in-app digital content~~ to iOS Device users;

(b) Apple Inc and/or Apple Pty Limited restrain~~e~~d app developers from using any other payment solution for accepting and processing payments for in-app purchases ~~content within an iOS app~~;

(c) Apple Inc and/or Apple Pty Limited required pp developers to enter into the Developer Agreement, DPLA (including the App Store Review Guidelines) and Schedule 2 to the DPLA if they want to distribute a paid app or offer in-app purchases ~~of in-app content~~ to iOS Device users, as described at paragraphs 67–83 above;

(d) Apple Inc and/or Apple Pty Limited did not permit app developers to negotiate any of the terms of the Developer Agreement, DPLA (including the App Store Review Guidelines) or Schedule 2 to the DPLA, as described at paragraphs 76 and 81 above;

(e) Apple Inc and/or Apple Pty Limited imposed some or all of the Restrictive Terms upon app developers seeking to distribute an iOS app or offer in-app purchases ~~of in-app content~~ to iOS Device users~~, as described at paragraphs 79–83 above~~;

(f) Apple Inc and/or Apple Pty Limited enforced the Restrictive Terms, including by enforcing some or all of the Restrictive Terms against Epic Games, Inc. and Epic Games International S.à.r.l. by:

    i. removing *Fortnite* from the App Store; and

    ii. terminating Epic Games, Inc.'s Team ID '84 account; and

(g) app developers had no material countervailing ~~bargaining~~ power with Apple Inc and/or Apple Pty Limited;

(h) Apple Inc and/or Apple Pty Limited has charged supra-competitive prices to app developers and/or derived supra-competitive profits, unconstrained by competition, in connection with the distribution of iOS apps and/or for IAP~~.~~; and

Particulars

    i. Apple Inc and/or Apple Pty Limited charged, a fee of 30% through IAP in connection with the distribution of iOS apps and for IAP, with limited exceptions.

    ii. Epic's ESG charges a 12% commission for in-app purchases when the app developer chooses to use Epic Direct Pay for in-app purchases.

(i) Apple require~~sd~~ its appointment under the DPLA to act as the agent for app developers for the marketing and downloading of apps on the Australian App Store.

100. At all material times during the Relevant Period, in the circumstances described at paragraph 99 above, Apple Inc and/or Apple Pty Limited had and/or together ha~~ved~~ a substantial degree of power ~~monopoly~~ and did not face any, or any material, competitive constraints in the supply of ~~iOS in-app payment solutions~~ services to app developers for accepting and processing payments for in-app purchases within an iOS app in the Australian iOS In-App Payment Solutions Markets, or in one or more of those markets.

101. Further to paragraph 100 above, payment solutions for accepting and processing payments for ~~in-app~~ digital content outside an iOS app were not a substitute, or an effective substitute, for payment solutions for accepting and processing payments for ~~in-app~~ such digital content within an iOS app.

Particulars

    i. App developers may not offer the same ~~in-app~~ digital content for sale both in- app and outside the app

    ii.   Consumers may not be aware of payment solutions outside iOS apps, including because of the Restrictive Terms.

    iii.   Even where app developers do offer the same ~~in-app~~ <u>digital</u> content for sale both in-app and outside the app, and consumers were aware of payment solutions outside iOS apps:

        A.   utilising a payment solution outside the app often requires the user to go through multiple steps, including leaving the app, identifying the alternative payment solution, navigating to that alternative payment solution, locating the content to purchase, logging in to the user's account, locating the content the user is interested in purchasing, entering payment credentials, logging out of the user's account, and returning to the app;

        B.   convenience is particularly important for in-app purchases, many of which are small or time-sensitive. Delay or other purchase "friction" may have caused the user not to complete the purchase; and

        C.   consumers are likely to stop engaging with an app if they have to leave the app or complete a number of steps to make a purchase, as this can be a negative experience. Therefore, app developers view being able to offer in-app purchases as essential.

102. By reason of the matters described at paragraphs 99–101 above, at all material times during the Relevant Period:

(a)   Apple Inc; and/or

(b)   Apple Pty Limited,

had a substantial degree of power in the Australian iOS In-App Payment Solutions Markets, or in one or more of those markets.

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

103. At all material times during the Relevant Period, Apple Inc and/or Apple Pty Limited engaged in the following conduct in trade or commerce in the Australian iOS In-App Payment Solutions Markets, or in one or more of those markets:

(a) Apple Inc and/or Apple Pty Limited required app developers to use Apple Inc's IAP if they wanted to ~~distribute a paid iOS app or~~ offer in-app purchases ~~of in-app content~~ to iOS Device users;

(b) Apple Inc and/or Apple Pty Limited restrained app developers from using any other payment solution for accepting and processing payments for in-app <u>purchases</u> ~~content~~ within an iOS app;

(bb) Apple Inc and/or Apple Pty Limited <u>prohibit</u>~~sed~~ <u>app developers from steering iOS Device users from within iOS apps to alternative payment methods to IAP for purchasing digital in-app content outside the app, save for, since 30 March 2022, "reader" apps (which are permitted to apply for the "External Link Account Entitlement" to provide an informational link in their app to a website the developer owns or maintains responsibility for in order to create or manage an account);</u>

(c) Apple Inc and/or Apple Pty Limited required app developers to enter into the Developer Agreement, DPLA (including the App Store Review Guidelines) and Schedule 2 to the DPLA if they wanted to ~~distribute a paid app~~ or offer in-app purchases of ~~in-app content~~ to iOS Device users, as described at paragraphs 67–83 above;

(d) Apple Inc and/or Apple Pty Limited did not permit app developers to negotiate any of the terms of the Developer Agreement, DPLA (including the App Store Review Guidelines) or Schedule 2 to the DPLA, as described at paragraphs 76 and 81 above;

(e) Apple Inc and/or Apple Pty Limited imposed some or all of the Restrictive Terms upon app developers seeking to distribute an iOS app or offer in-app purchases ~~of in-app content~~ to iOS Device users~~, as described at paragraphs 79–83 above~~;

(f) Apple Inc and/or Apple Pty Limited enforce<u>e</u>d the Restrictive Terms, including by enforcing some or all of the Restrictive Terms against Epic Games, Inc. and Epic Games International S.à.r.l. by:

    iii. removing *Fortnite* from the App Store; and

    iv. terminating Epic Games, Inc.'s Team ID '84 account;

(g)   app developers have no material <u>countervailing</u> ~~bargaining~~ power with Apple Inc and/or Apple Pty Limited; ~~and~~

(h)   Apple Inc and/or Apple Pty Limited charged supra-competitive prices to app developers <u>and/or derive</u>d <u>supra-competitive profits, unconstrained by competition,</u> in connection with the distribution of iOS apps and/or IAP, as referred to at paragraph 99(h) above~~.~~<u>; and</u>

(i)   <u>Apple require</u>~~s~~<u>d its appointment under the DPLA to act as the agent for app developers for the marketing and downloading of apps on the Australian App Store.</u>

<u>103A. Further, at all material times:</u>

(a)   <u>Apple Inc and/or Apple Pty Limited ha</u>~~s~~<u>d a substantial degree of power in the Australian iOS App Distribution Markets, or in one or more of those markets; and</u>

Particulars

<u>The Applicants refer to and repeat paragraph 89 above.</u>

(b)   <u>Apple Inc and/or Apple Pty Limited engage</u>d~~(s)~~ <u>in some or all of the conduct pleaded at paragraph 103 above in circumstances where Apple Inc and/or Apple Pty Limited ha</u>~~s~~<u>d</u> ~~or have~~ <u>a substantial degree of power in the Australian iOS App Distribution Markets, or in one or more of those markets.</u>

104.   But for the conduct described at paragraph 103 <u>and 103A</u> above, at all material times during the Relevant Period, ~~IAP~~ <u>Apple Inc and/or Apple Pty Ltd</u> would or would likely have faced the threat of entry by competitors and vigorous and effective competition in the Australian iOS In-App Payment Solutions Markets, or in one or more of those markets~~, from other payment solution providers for accepting and processing payments for in-app content within an iOS app~~.

<u>104A. Further to paragraph 104, entry by competitors and vigorous and effective competition in the Australian iOS In-App Payment Solutions Markets, or in one or more of those markets, would</u> <u>have</u> <u>enable</u>d <u>app developers:</u>

(a)   <u>to</u> <u>have</u> <u>use</u>d<u>, and offer</u>ed <u>to iOS Device users, alternative payment solutions to IAP within their apps; and</u>

(b)   <u>to</u> <u>have</u> <u>offer</u>ed <u>direct refunds and other after-sales services to iOS Device users who acquire their apps.</u>

<u>104B. By reason of the matters in paragraph 104A, entry by competitors and vigorous and effective competition in the Australian iOS In-App Payment Solutions Markets or in one or</u>

more of those markets would <u>have</u> increase<u>d</u> competition in the Australian iOS App Distribution Markets, or in one or more of those markets.

105. At all material times during the Relevant Period, such competition in the Australian iOS In-App Payment Solutions Markets, or in one or more of them <u>and/or in the Australian iOS Distribution Markets or in one or more of them</u>, would have   lead to pro-competitive benefits including:

(a)   increased quality, innovation and choice in payment solutions; and

Particulars

i.   But for Apple's restrictions, would-be competing in-app payment solution providers would be able to offer alternative in-app payment solutions. This would spur innovation, better service and lower prices.

iia.   There is clear app developer demand for alternative payment solutions, including by Epic, Match Group and Spotify.

ii.   Absent Apple's restrictions, existing iOS payment solutions could be offered to app developers offering in-app purchases ~~of in-app content~~ on iOS Devices.

iii.   Innovations could include, for example:

A.   Alternative means to pay for in-app purchases ~~of in-app digital content~~ – which Apple does not offer – such as Bitcoin or other cryptocurrencies;

B.   rewards points to customers;

C.   enhanced speed;

D.   enhanced data analytics;

E.   enhanced security and fraud prevention;

F.   enhanced parental controls;

G.   enhanced checkout features; and

H.   multi-platform IAP.

    iv.   But for Apple's restrictions, developers could direct iOS Device users to alternative purchasing mechanisms other than IAP.

(b)   lower prices for payment solutions.

Particulars

IAP far exceeds the levels charged by other payment solution providers, including payment solutions employed by iOS apps that sell physical, as opposed to digital, goods and services. Fees for payment solutions employed by iOS apps selling physical goods and services average 5% or less.

106.   Further, at all material times during the Relevant Period, the conduct described at paragraphs 103 and 103A above had the effect or likely effect in the Australian iOS In-App Payment Solutions Markets, or in one or more of those markets, and/or in the Android iOS App Distribution Markets or in one or more of them, of:

(a)   foreclosing alternative in-app payment solutions for accepting and processing payments for in-app purchases content within an iOS app;

(b)   decreased quality, innovation and choice of payment solutions;

(c)   inflating prices for such payment solutions; and

(d)   decreased quality, innovation and choice for developers and users of iOS apps.

107.   The purpose, effect or likely effect of the conduct described at paragraphs 103 and 103A, including by reason of the matters referred to in paragraphs 103A-106 above, was to substantially lessen competition in the Australian iOS In-App Payment Solutions Markets, or in one or more of those markets and/or in the Australian iOS App Distribution Markets or in one or more of those markets.

Particulars

    i.   The purpose can be inferred from the Restrictive Terms and the conduct of Apple in enforcing and/or giving effect to some or all of the Restrictive Terms.

    ii.   The effect or likely effect is demonstrated by the matters at paragraphs 104, 104A, 104B,and 105, and 106 above.

    iii.   Further particulars may be provided prior to trial.

108. By reason of the matters described at paragraphs 99–107 above, Apple Inc and/or Apple Pty Limited has contravened, s 46(1) of the CCA.

109. In the alternative to paragraph 108 above, Apple Pty Limited was involved in Apple Inc's contravention at paragraph 108 above within the meaning of s 75B(1)(a) and/or (c) and/or (d) of the CCA. Specifically, at all material times, Apple Pty Limited:

    (a) aided, abetted, counselled or procured Apple Inc's contraventions at paragraph 108 above; and/or

    (b) was knowingly concerned in Apple Inc's contraventions at paragraph 108 above with knowledge of Apple Inc's market power in paragraph 102 above, Apple Inc's conduct at paragraph 103 above, and that Apple Inc's conduct at paragraph 103 above had the effect or likely effect of substantially lessening competition as pleaded at paragraph 107 above;

    (c) conspired with Apple Inc in respect of Apple Inc's contraventions at paragraph 97 above.

Particulars

    i.   [Not used].

    ii. Apple Pty Limited engaged in the conduct as pleaded at paragraph 15 above. Apple Pty Limited thereby has, and continues jointly to participated in Apple Inc's contraventions.

    iii. Apple Pty Limited gave effect to the DPLA as pleaded at paragraph 16 above. Apple Pty Limited thereby has, and continues jointly to participated in Apple Inc's contraventions.

    iv. Apple Pty Limited's knowledge of the matters at paragraph 109(b) is to be inferred in circumstances where, inter alia, it is a wholly owned subsidiary of Apple Inc and engages in the conduct pleaded at paragraphs 7 and 15–16.

    iva. Apple Pty Limited has and continues to acted jointly or in concert with Apple Inc in furtherance of a common purpose to impose and enforce anti-competitive restrictions.

v.   Further particulars may be provided prior to trial.

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

110. At all material times during the Relevant Period, by the terms of the DPLA and Schedule 2 to the DPLA, in trade or commerce, Apple Inc and/or Apple Pty Limited supplied, or offered to supply, to app developers services for the distribution of iOS apps to iOS Device users, on condition that app developers would not obtain payment solutions for accepting and processing payments for in-app purchases content within an iOS app from any person that is, or but for Apple's conduct would, or would be likely to, compete with Apple's IAP.

Particulars

> The Applicants refer to and repeat paragraphs 79(c) and 82(b) above.

111. The conduct of each of Apple Inc and/or Apple Pty Limited referred to at paragraph 110 above had the purpose, effect or likely effect of substantially lessening competition in a market in Australia consisting of:

(a)   the Australian iOS In-App Payment Solutions Markets, or one of more of those markets; or

Particulars

> i.   The purpose can be inferred from the Restrictive Terms and the conduct of Apple in enforcing and/or giving effect to some or all of the Restrictive Terms.
>
> ii.   The effect or likely effect is demonstrated by the matters at paragraphs 104, 104A, 104B, and 105 and 106 above.
>
> iii.   Further particulars may be provided prior to trial

(b)   Further or alternatively, the Australian iOS App Distribution Markets, or one or more of those markets.

Particulars

> i.   The purpose can be inferred from the Restrictive Terms and the conduct of Apple in enforcing and/or giving effect to some or all of the Restrictive Terms.
>
> ii.   The effect or likely effect is demonstrated by the matters at paragraphs 91, 92 and 93.
>
> iii.   Further particulars may be provided prior to trial.

112. By reason of the matters set out at paragraphs 110 and 111 above, Apple Inc and/or Apple Pty Limited has contravened s 47(1) of the CCA.

113. In the further alternative to paragraph 112 above, Apple Pty Limited was involved in Apple Inc's contravention at paragraph 112 above within the meaning of s 75B(1)(a) and/or (c) and/or (d) of the CCA. Specifically, at all material times, Apple Pty Limited:

    (a) aided, abetted, counselled or procured aided Apple Inc's contraventions at paragraph 112 above; and/or

    (b) was knowingly concerned in Apple Inc's contraventions at paragraph 112 above with knowledge of Apple Inc's conduct at paragraph 110 above, and that Apple Inc's conduct at paragraph 110 had the effect or likely effect of substantially lessening competition as pleaded at paragraph 111 above.

    (c) conspired with Apple Inc in respect of Apple Inc's contraventions at paragraph 97 above.

Particulars

    i. [Not used].

    ii. Apple Pty Limited engaged in the conduct as pleaded at paragraph 15 above. Apple Pty Limited thereby has, and continues jointly to participated in Apple Inc's contraventions.

    iii. Apple Pty Limited gave effect to the DPLA as pleaded at paragraph 16 above. Apple Pty Limited thereby has, and continues jointly to participated in Apple Inc's contraventions.

    iv. Apple Pty Limited's knowledge of the matters in paragraph 113(b) is to be inferred in circumstances where, inter alia, it is a wholly owned subsidiary of Apple Inc and engages in the conduct pleaded at paragraphs 7 and 15–16.

    iva. Apple Pty Limited has and continues to acted jointly or in concert with Apple Inc in furtherance of a common purpose to impose and enforce anti-competitive restrictions.

v.   Further particulars may be provided prior to trial.

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

114. At all material times during the Relevant Period, by the terms of the DPLA and Schedule 2 to the DPLA, in trade or commerce, Apple Inc and/or Apple Pty Limited entered into a contract, or contracts, with app developers containing the Restrictive Terms, which include provisions that:

(a)   restrained app developers from distributing iOS apps to iOS Device users other than through the App Store; and

(aa)   prohibited developers from distributing on the App Store iOS apps that are a store or storefront for other iOS apps, or that are otherwise similar to the App Store;

(b)   restrained app developers from using any payment solution for accepting and processing payments for in-app purchases content within an iOS app, other than Apple's IAP; and

(c)   enabled Apple to charge supra-competitive prices to app developers in connection with the distribution of iOS apps and/or for IAP.; and

Particulars

The Applicants refer to and rely on the whole of the Restrictive Terms, individually and cumulatively.

(d)   required Apple's appointment under the DPLA to act as the agent for app developers for the marketing and downloading of apps on the Australian App Store.

115. The provisions referred to at paragraph 114 above, individually or cumulatively, and/or the DPLAs made with app developers containing those provisions, taken together, have had the purpose, effect or likely effect of substantially lessening competition in the Australian iOS App Distribution Markets, or in one or more of those markets.

Particulars

i.   The purpose can be inferred from the Restrictive Terms and the conduct of Apple in enforcing and/or giving effect to some or all of the Restrictive Terms, and from Apple's conduct pleaded in paragraph 12A(a) above, whereby Apple has entered into a DPLA with every or almost every

app developer who has ever developed an iOS app and distributed it to iOS users.

    ii.   The effect or likely effect is demonstrated by the matters at paragraphs 90C, 91, and 92 and 93 above.

    iia.   Section 45(4) of the Act.

    iii.   Further particulars may be provided prior to trial.

116.   The provisions referred to at paragraph 114 above, individually or cumulatively, and/or the DPLAs made with app developers containing those provisions, taken together, have had the purpose, effect or likely effect of substantially lessening competition in the Australian iOS In-App Payment Solutions Markets, or in one or more of those markets.

Particulars

    i.   The purpose can be inferred from the Restrictive Terms and the conduct of Apple in enforcing and/or giving effect to some or all of the Restrictive Terms, and from Apple's conduct pleaded in paragraph 12A(a) above, whereby Apple has entered into a DPLA with every or almost every app developer who has ever developed an iOS app and distributed it to iOS users.

    ii.   The effect or likely effect is demonstrated by the matters at paragraphs 104, 104A, 104B, and 105 and 106 above.

    iia.   Section 45(4) of the Act.

    iii.   Further particulars may be provided prior to trial.

117.   By reason of:

    (a)   paragraphs 114 and 115 above; or

    (b)   further, or alternatively, paragraphs 114 and 116,

Apple Inc and/or Apple Pty Limited has contravened, s 45(1) of the CCA, including by reason of s 45(4)(a) and (b).

117A.   Further, Apple Inc and/or Apple Pty Limited gave effect to the provisions referred to in paragraph 114 above.

Particulars

i. On 13 August 2020, Apple removed Fortnite from the App Store, including in Australia.

ii. On 28 August 2020, Apple terminated Epic Games, Inc's Team '84 account.

iii. At all material times, Apple charged and collected a 30% commission through IAP in connection with the distribution of iOS apps and/or for IAP with limited exceptions.

v. Apple refused to allow Epic to offer Epic Direct Pay for any in-app purchases within an iOS app distributed via the App Store.

vi Apple refused to permit EGS to be included on the App Store and to be distributed to iOS Device users on iOS Devices.

117B. By reason of:

(a) paragraphs 115 and 117A above; or

(c) further, or alternatively, paragraphs 116 and 117A above,

Apple Inc and/or Apple Pty Limited contravened, s 45(1) of the CCA, including by reason of s 45(4).

118. In the alternative to paragraphs 117 and 117B above, Apple Pty Limited was involved in Apple Inc's contraventions at paragraphs 117 and 117B above within the meaning of s 75B(1)(a) and/or (c) and/or (d) of the CCA. Specifically, at all material times, Apple Pty Limited:

(a) aided, abetted, counselled or procured Apple Inc's contraventions at paragraphs 117 and 117B above; and/or

(b) was knowingly concerned in Apple Inc's contraventions at paragraphs 117 and 117B above with knowledge of Apple Inc's conduct at paragraphs 114 and 117A above and that Apple Inc's conduct at paragraph 114 above had the effect or likely effect of substantially lessening competition as pleaded at paragraphs 115 and/or 116 above; and/or

(c)   conspired with Apple Inc in respect of Apple Inc's contraventions at paragraph 97 above.

Particulars

i.   [Not used].

ii.   Apple Pty Limited engaged in the conduct as pleaded at paragraph 15 above. Apple Pty Limited thereby has, and continues jointly to participated in Apple Inc's contraventions.

iii.   Apple Pty Limited gave effect to the DPLA as pleaded at paragraph 16 above. Apple Pty Limited thereby has, and continues jointly to participated in Apple Inc's contraventions.

iv.   Apple Pty Limited's knowledge of the matters in paragraph 118.b is to be inferred in circumstances where, inter alia, it is a wholly owned subsidiary of Apple Inc and engages in the conduct pleaded at paragraphs 20 and 15-16.

iva.   Apple Pty Limited has and continues to acted jointly or in concert with Apple Inc in furtherance of a common purpose to impose and enforce anti-competitive restrictions.

v.   Further particulars may be provided prior to trial.

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

119.   The conduct of Apple Inc and Apple Pty Limited referred to in this Part VIII at all material times during the Relevant Period was conduct in trade or commerce in connection with the supply, or possible supply, of:

(a)   services to app developers for the distribution of iOS apps to iOS Device users and for payment solutions for accepting and processing payments for in-app purchases content within an iOS app, including in Australia;

(b)   iOS devices to consumers, including in Australia; and

(c)   services for the distribution of iOS apps to iOS Device users, including in Australia.;

    (cc)   services to consumers for the distribution of iOS apps from app developers, including in Australia; and

    (d)   iOS apps to iOS Device users, including in Australia.

120. Apple Inc and/or Apple Pty Limited engaged in the conduct described at paragraphs 90 and 103 above.

121. Further, Apple Inc and/or Apple Pty Limited has intentionally:

    (a)   prevented any other app store ~~(such as the EGS)~~ from being included on the App Store and being made available to iOS Device users in Australia;

    (b)   ensured that the Australian App Store is the only method of distribution of iOS apps to iOS Devices in Australia, save for *de minimis* exceptions;

    (c)   prevented any other payment processing system (such as Epic Direct Pay) from being available for in-app purchases ~~of in-app content~~ within iOS apps, including Epic's iOS apps, in Australia;

    (d)   ensured that its IAP is the only payment solution available for in-app purchases ~~of in-app content~~ within iOS apps, in Australia;

    (e)   prevented iOS Device users in Australia from paying a reduced amount for in-app purchases using any other payment processing system (such as Epic Direct Pay);

    (f)   prevented or hindered app developers, including Epic Games, Inc. and Epic Games International S.à.r.l, from seeking remedies in Australian courts and/or under the CCA and/or the Australian Consumer Law (**ACL**) in respect of the conduct by Apple that is referred to in this pleading;

    ~~(ff)   terminated the Team ID '84 account as referred to at paragraph [45] above;~~

    ~~(fff)   caused Fortnite and a number of other apps associated with the Team ID '84 Account to be removed from the App Store and also revoked Epic's permission to use the tools necessary to develop, distribute and update apps on macOS and iOS, including Fortnite as referred to at paragraph [46] above;~~

    (g)   refused to reinstate Epic Games, Inc's Team ID 84; and

    (h)   compelled Epic and other app developers to appoint it as agent for the distribution of iOS apps in Australia in circumstances where there was and is a conflict of interest and Apple has not acted and did not intend to act in the best interests of the principal (whether Epic and/or other app developers).

122. The conduct of Apple Inc and/or Apple Pty Limited described at paragraphs 120 and 121 above constituted a system of conduct or pattern of behaviour within the meaning of s 21(4) of the ACL, and occurred in circumstances where:

    (a)   Apple had a superior bargaining position to that of app developers;

    (b)   Apple took advantage of that superior bargaining position to engage in the conduct;

    (c)   Apple required app developers to enter into non-negotiable, standard form contracts that it may unilaterally amend; and

    (d)   the conduct was not reasonably necessary to protect Apple's legitimate business interests.

123. By reason of paragraphs 120–122 above, Apple Inc and/or Apple Pty Limited has engaged in conduct that is, in all the circumstances, unconscionable in contravention of s 21(1) of the ACL.

123A. In the alternative to paragraph 123, Apple Pty Limited ~~is~~was involved in Apple Inc's contraventions pleaded at paragraph 123 within the meaning of s 232(1)(c), (e) and/or (f) and/or s 237 of the ACL. Specifically, at all material times, Apple Pty Limited ~~has, and continues to~~:

    (a)   aid~~ed~~, abet~~ted~~, counsel~~led~~ or procure~~d~~ Apple Inc's contraventions at paragraph 123 above; and/or

    (b)   ~~be~~ was knowingly concerned in Apple Inc's contraventions at paragraph 123 above with knowledge of Apple Inc's market power at paragraphs 89 and 102 above, Apple Inc's conduct at paragraphs 90 and 103 above, and that Apple Inc's conduct at paragraphs 90 and 103 above had~~, and continues to have,~~ the effect or likely effect of substantially lessening competition as pleaded at paragraphs 97 and 108 above; and/or

    (c)   conspire~~d~~ with Apple Inc in respect of Apple Inc's contraventions at paragraph 123 above.

Particulars

    i.   Apple Pty Limited engaged in the conduct as pleaded at paragraph 15 above. Apple Pty Limited thereby has, and continues jointly to participate in Apple Inc's contraventions.

ii.   Apple Pty Limited gives effect to the DPLA as pleaded at paragraph 16 above. Apple Pty Limited thereby ~~has, and continues~~ jointly ~~to~~ participated in Apple Inc's contraventions.

iii.   Apple Pty Limited's knowledge of the matters in paragraph 123A(b) is to be inferred in circumstances where, inter alia, it is a wholly-owned subsidiary of Apple Inc and engage~~s~~d in the conduct pleaded at paragraphs 7 and 15-16.

iv.   Apple Pty Limited ~~has and continues to~~ act~~ed~~ jointly or in concert with Apple Inc in furtherance of a common purpose to impose and enforce anti-competitive restrictions.

v.   Further particulars may be provided prior to trial.

PART IX: CAUSATION, LOSS AND DAMAGE

iOS App Developers

124. At all material times during the Relevant Period, the conduct of Apple Inc and/or Apple Pty Limited, referred to at paragraphs 97–98 and 108–109 (s 46), paragraphs 112–113 (s 47), paragraphs 117–118 (s 45) and paragraph 123 (s 21) (individually or in combination, the **Contravening Conduct**) caused the commissions paid by:

(a)   The Second Applicant; and

(b)   iOS App Developer Group Members

to Apple for purchases of iOS apps and/or in-app digital content within an iOS app by iOS Device Group Members to be materially higher than the commissions that would have existed had the Contravening Conduct not occurred.

Particulars

i.   [Not used]

ii.   [Not used]

iii.   [Not used]

iv.   [Not used]

v.   [Not used]

The Second Applicant

vi. During the Relevant Period, the Second Applicant paid a commission to Apple for all purchases by iOS Device Group Members of Pocket Cal/kj Pro iOS app and and/or in-app digital content within the Pocket Cal/kj app. From the commencement of the Relevant Period until in or about early 2021, the commission was charged at a rate of 30%. From in or about early 2021, the commission was charged at a rate of 15%.

vii. But for the Contravening Conduct, the commissions paid to Apple by the Second Applicant for purchases of the Pocket Cal/kj Pro iOS app and/or Pocket Cal/kj Plus in-app digital content within the Pocket Cal/kj iOS app during the Relevant Period would have been in the range of 5̶10%-1̶5̶20% with a midpoint of 15% (**Counterfactual Commissions**): Expert Report of Derek James Holt dated 21 August 2023 (EXP.ANTH.001.0001). A̶f̶f̶i̶d̶a̶v̶i̶t̶ ̶o̶f̶ ̶P̶a̶u̶l̶ ̶E̶d̶w̶a̶r̶d̶ ̶Z̶a̶w̶a̶ ̶d̶a̶t̶e̶d̶ ̶5̶ ̶A̶u̶g̶u̶s̶t̶ ̶2̶0̶2̶2̶,̶ ̶P̶E̶Z̶1̶,̶ ̶p̶.̶ ̶1̶1̶9̶3̶,̶ ̶P̶r̶e̶l̶i̶m̶i̶n̶a̶r̶y̶ ̶E̶x̶p̶e̶r̶t̶ ̶R̶e̶p̶o̶r̶t̶ ̶b̶y̶ ̶D̶e̶r̶e̶k̶ ̶J̶a̶m̶e̶s̶ ̶H̶o̶l̶t̶ ̶d̶a̶t̶e̶d̶ ̶1̶0̶ ̶M̶a̶y̶ ̶2̶0̶2̶1̶.̶

iOS App Developer Group Members

viii. But for the Contravening Conduct, the commissions paid to Apple by iOS App Developer Group Members for purchases of iOS apps and/or in-app digital content within an iOS app made by iOS Device Group Members during the Relevant Period would have been the Counterfactual Commissions: Expert Report of Derek James Holt dated 21 August 2023 (EXP.ANTH.001.0001).A̶f̶f̶i̶d̶a̶v̶i̶t̶ ̶o̶f̶ ̶P̶a̶u̶l̶ ̶E̶d̶w̶a̶r̶d̶ ̶Z̶a̶w̶a̶ ̶d̶a̶t̶e̶d̶ ̶5̶ ̶A̶u̶g̶u̶s̶t̶ ̶2̶0̶2̶2̶,̶ ̶P̶E̶Z̶1̶,̶ ̶p̶.̶ ̶1̶1̶9̶3̶,̶ ̶P̶r̶e̶l̶i̶m̶i̶n̶a̶r̶y̶ ̶E̶x̶p̶e̶r̶t̶ ̶R̶e̶p̶o̶r̶t̶ ̶b̶y̶ ̶D̶e̶r̶e̶k̶ ̶J̶a̶m̶e̶s̶ ̶H̶o̶l̶t̶ ̶d̶a̶t̶e̶d̶ ̶1̶0̶ ̶M̶a̶y̶ ̶2̶0̶2̶1̶.

ix. Further particulars will be provided following the completion of discovery, subpoenas and expert evidence.

124A. By reason of the matters set out in paragraph 124 above, the commissions paid by the Second Applicant and iOS App Developer Group Members to Apple for purchases of iOS apps and digital in-app digital content by iOS Device Group Members were artificially inflated during the Relevant Period by the Contravening Conduct.

124B. By reason of the matters set out in paragraphs 124–124A, the Second Applicant and iOS App Developer Group Members have suffered loss and damage by the Contravening Conduct.

Particulars

i.   The loss and damage suffered by the Second Applicant is the difference between the commissions it paid to Apple in respect of purchases by iOS Device Group Members of the Pocket Cal/kj Pro iOS app and the Pocket Cal/kj Plus in-app digital content within the Pocket Cal/kj iOS app and the Counterfactual Commissions, less the proportion of commissions that the Second Applicant passed on to iOS Device Group Members.

ii. The loss and damages suffered by iOS App Developer Group Members is the difference between the commissions which they paid to Apple for purchases of iOS apps and in-app digital content by iOS Device Group Members and the Counterfactual Commissions, less the loss and damage suffered by iOS Device Group Members.

iii. Further particulars will be provided following expert evidence.

iOS Device Consumers

124C. Further, at all material times during the Relevant Period, the Contravening Conduct caused the purchase price of iOS apps and/or in-app digital content within an iOS app paid by:

(a)   The First Applicant, and

(b)   iOS Device Group Members

to Apple to be materially higher than the price that would have existed had the Contravening Conduct not occurred.

Particulars

The First Applicant

i. But for the Contravening Conduct, the purchase price paid by the First Applicant for the purchases set out in the particulars to paragraph 2(a) above would have been in the range of 40%-60% of the Counterfactual Commission (**Pass Through prices**): Affidavit of Paul Edward Zawa dated 5 August 2022, PEZ1, at p. 1193, Preliminary Expert Report by Derek James Holt dated 10 May 2021.

ii. Further particulars will be provided following expert evidence.

iOS Device Group Members

iii. But for the Contravening Conduct, the purchase price paid by iOS Device Group Members for purchases of iOS apps and/or in-app digital content within an iOS app paid during the Relevant Period would have been the sPass Through prices: Affidavit of Paul Edward Zawa dated 5 August 2022, PEZ1, at p. 1193, Preliminary Expert Report by Derek James Holt dated 10 May 2021.

iv. Further particulars will be provided following expert evidence.

125. By reason of the matters set out in paragraph 124C ~~124~~ above, when the First Applicant and iOS Device Group Members purchased iOS apps and in-app digital content within iOS apps on iOS Devices during the Relevant Period, the price of the iOS apps and in-app digital content they acquired had been artificially inflated by the Contravening Conduct.

126. By reason of the matters set out in paragraphs 124C–125, the First Applicant and iOS Device Group Members have suffered loss and damage by the Contravening Conduct.

Particulars

i. The loss and damages suffered by the First Applicant and iOS Device Group Members is the difference between the prices at which they purchased iOS apps and digital in-app digital content on iOS Devices during the Relevant

Period and the Pass Through prices that would have prevailed had the Contravening Conduct not occurred.

ii. Further particulars will be provided following the completion of discovery, subpoenas and expert evidence.

127. The Applicants and Group Members seek the relief set out in the accompanying Amended Originating Application.

Date: 12 December 2023 ~~23 March 2023~~

Signed by ~~Paul Zawa~~ Joel Phibbs
Lawyer for the Applicants

This further amended pleading was prepared by Nicholas De Young KC~~, Kate Burke~~ and Daniel Preston of counsel.

Certificate of lawyer

I, ~~Paul Zawa~~ <u>Joel Phibbs</u>, certify to the Court that, in relation to the statement of claim 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: <u>12 December 2023</u> ~~23 March 2023~~

....

Signed by ~~Paul Zawa~~ <u>Joel Phibbs</u>
Lawyer for the Applicants

Schedule

VID341 of 2022

Federal Court of Australia

District Registry: Victoria

Division: General

Respondents

Second Respondent   Apple Pty Limited (ACN 002 510 054)