

FULL FEDERAL COURT GIVES EPIC GAMES THE GREEN LIGHT TO CONTINUE IN ITS AUSTRALIAN PROCEEDINGS AGAINST APPLE - IMPLICATIONS FOR COMPETITION ENFORCEMENT

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Legal Briefings - By **Liza Carver, Christine Wong, Gila Segall and Tomas Kemmery**

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HIGH COURT DISMISSES APPLE'S APPLICATION TO APPEAL

The High Court has given the final say in Apple's attempt to stay Epic Games' proceedings in Australia for alleged anti-competitive and unconscionable conduct relating to Apple's App Store. On Thursday, the High Court dismissed Apple's application to appeal the Full Federal Court's decision discussed below, concluding it did not raise a question of law of general importance and the case was not sufficiently arguable.

As a refresher, Apple sought to have the proceedings stayed in Australia on the basis of an exclusive jurisdiction clause in its licence agreement with Epic. That clause required disputes to be litigated in the US. Whilst the company was successful in the first instance, on appeal to the Full Federal Court, the Court held the dispute involved "serious issues of public policy" and therefore declined to enforce the clause.

The High Court's decision means the substantive proceedings between Apple and Epic will be (on the current timetable) heard during a six week trial starting 28 November 2022.

The Epic Games (**Epic**) v Apple proceedings are back in action, with the Full Court overturning the primary judge's stay of the proceedings.

Epic is claiming that Apple engaged in anti-competitive and unconscionable conduct under Australian laws by forcing Epic to only use Apple's App Store to distribute its video games to iOS users and Apple's payment processing system for in-app purchases. This is just one arm of global litigation between the parties in relation to the App store, with similar proceedings ongoing in the US.

An early skirmish has centred on whether Epic is permitted to bring Australian proceedings as the licence agreement between Epic and Apple contains an exclusive jurisdiction clause requiring proceedings to be brought in the US.

A recent Full Federal Court decision confirms that provided these disputes involve “serious issues of public policy” and have potentially far reaching implications for Australian consumers – as opposed to being purely commercial disputes between two companies – it is likely they will be heard by Australia’s Federal Court, irrespective of any exclusive jurisdiction clause. This has broader implications for competition and certain consumer law disputes arising out of commercial agreements containing these clauses.

Australian courts have the power to override these clauses. However, in the first instance decision, Justice Perram ordered the proceedings be stayed, leaving Epic to pursue its claim in the US, with his Honour finding that the “state of the law” did not permit him to allow a different result.

On 9 July 2021, the Full Federal Court overturned that decision. In doing so, it declined to enforce the exclusive jurisdiction clause. The Court considered that if Epic were to establish its allegations against Apple of anticompetitive and unconscionable conduct, such conduct could “adversely affect the state of competition in markets in Australia and very large numbers of Australians.” Therefore, notwithstanding commercial considerations around enforcing agreements, there were sufficiently serious issues of public policy for the Court to decline to enforce the exclusive jurisdiction clause.

Apple has publicly confirmed that it intends to seek special leave to appeal the decision to the High Court of Australia.

FULL FEDERAL COURT DECISION

The Full Federal Court found that there were strong reasons not to grant Apple’s application for a stay on the basis of the contractual exclusive jurisdiction clause, and held that enforcing the exclusive jurisdiction clause in this case would offend the public policy of Australian law.

According to the Full Court, the primary judge made three errors of principle:

- **Cumulative assessment.** Incorrectly interpreting the law resulted in a failure to consider the public policy considerations that, cumulatively, could give rise to strong reasons not to grant a stay. These considerations included the adverse effect of the alleged misconduct on Australians and Australian markets, the nation’s interest in maintaining the integrity of its own markets and the role of the High Court as the ultimate explicator of Australian competition law.
- **Disadvantages of litigating in the US.** For the Full Court, the initial decision did not properly account for the disadvantages of litigating in the US. This included the public interest importance of litigating anti-competitive conduct claims in Australia, superior remedies being available to Epic in Australia as compared to the US, complexities and costs involved in litigating in the US and the potential impact of the proceeding on Australian app developers in the same position as Epic.

- **The role of Apple Pty Limited.** Apple’s Australian subsidiary was not a party to the license agreement, which was between Epic and Apple Inc. However, the Full Court did not consider the Australian entity’s role to be merely “ornamental”. Epic’s claim involved allegations against an Australian company, Apple Pty Limited, for conduct undertaken in Australia in connection with arrangements affecting Australian consumers in an Australian sub-market.

The Full Court considered there were strong reasons not to grant a stay, including public policy considerations relating to the nature of Part IV claims and Apple’s alleged anticompetitive conduct in Australian markets. In particular, the Full Court found the following factors persuasive:

- the proceeding involved serious issues of public policy, the resolution of which will have far reaching implications for Australian markets and the public;
- the legislative intent for Part IV claims (being restrictive trade practices, such as cartel conduct, misuse of market power and resale price maintenance) to be pursued in Australia, primarily in the Federal Court. The Court considered that this public policy reflects the economic significance for Australia of the type of conduct being regulated under Australian competition law. The Court pointed to the fact that the conduct regulated under Part IV is concerned with competition in Australian markets, and that competition promotes efficiency in the production, distribution and sale of goods and services which enhances the welfare of all Australians. The Court noted that “the distinguishing feature of Pt IV claims is that usually by their very nature they have a public dimension”;
- the advantages of such claims being heard in the Federal Court, including the availability of judges with relevant specialist expertise, the ability for the ACCC to intervene, private parties obtaining the benefit of any factual findings and admissions, and the Court’s ultimate judgment contributing to the development of a single, coherent body of law in Australia; and
- the involvement of an Australian company as a party to the proceedings, that was not itself a party to the agreement containing exclusive jurisdiction clause.

The Court held that the public interest in hearing the proceeding in Australia outweighed the commercial interests in enforcing the clause.

IMPLICATIONS FOR THE FUTURE

The Full Court's decision in this case demonstrates the preparedness of the Federal Court to find that it has jurisdiction to determine competition and consumer law disputes between parties, despite the terms of a contractual exclusive jurisdiction clause providing for the determination of competition and consumer law disputes in a different forum or jurisdiction, where there are sufficient public policy factors. Where a dispute involves allegations of contravention of Pt IV of the Competition and Consumer Act in relation to conduct potentially affecting Australian consumers and Australian markets, these policy factors may be more likely to be considered present.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



CHRISTINE WONG
PARTNER, SYDNEY

+61 2 9225 5475
Christine.Wong@hsf.com



LINDA EVANS
REGIONAL HEAD OF
PRACTICE –
COMPETITION,
REGULATION AND
TRADE, AUSTRALIA,
SYDNEY

+61 2 9322 4719
linda.evans@hsf.com



PATRICK GAY
PARTNER, SYDNEY

+61 2 9322 4378
Patrick.Gay@hsf.com

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