

# This is why Epic Games can run its competition case against Apple in Australia

MARQUE

Epic Games, maker of *Fortnite*, has won an appeal giving it the right to sue Apple in the Federal Court over the App Store's dominance. This is a pretty significant win in the global battle to rein in the major digital players.

Apple forces app developers like Epic to use the App Store to distribute apps and collect payments on iOS devices. Apple then takes a cool 30% commission on those payments. Epic tried to subvert Apple's rules and got swiftly booted from the App Store. And so, off to court.

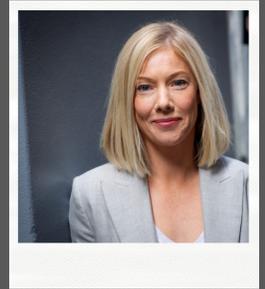
Epic says Apple misused its market power, engaged in exclusive dealing, and made contracts with the purpose or effect of substantially lessening competition – serious competition law breaches. Apple argued that an exclusive jurisdiction clause in their app developer terms meant that the Australian case must be heard in the Northern Californian courts (applying Australian competition laws).

The law says that a court can override the foreign jurisdiction clause if it offends Australian public policy. The primary judge said the public policy concerns weren't strong enough to trump the clause. The appeal court said nope, here are all the public policy reasons that the case should stay here.

- As a start point, the idea of competition law is to prevent anti-competitive conduct in Australian markets, and an injunction awarded by an Australian court will protect the public interest. Competition promotes efficiency in the production, distribution and sale of goods and services. Through the promotion of competition, the CCA aims to enhance the welfare of Australians.
- Australian courts should be in control of the interpretation and advancement of competition law (and the protection of the underlying public interest). Having the case held in the US would undermine the Australian remedies available, the appeals process, and the role of the High Court as the 'ultimate explicator' of Australian competition law.
- The CCA allows for findings of fact in a Federal Court case to be used as evidence in subsequent proceedings. It also allows for the ACCC to intervene in Federal Court proceedings (further highlighting the public interest issues in CCA cases). Neither of these mechanisms would be available if the case were heard in the US. Given that the case has broad implications for all businesses dealing with Apple's App Store, that's a significant concern.
- The Australian Apple entity was also named as a defendant in the case and was not a party to the contract in question. The trial judge said that its role was merely ornamental. The appeal court disagreed, where Apple AU sells the apps on the App Store, collects payment from consumers, and divides the money between the app developer and Apple. That also weighed in favour of the case proceeding here.

The case represents a blow to the digital giants like Apple, Google and Facebook in their ongoing battle with governments and regulators globally. Usually, an exclusive jurisdiction clause would be a major tool for managing risk in global business dealings. This case shows the limitations on that concept, and benefits the businesses seeking protection against the big guys' dominance.

Questions? Give us a call.



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