



21 May 2021

Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
Canberra ACT 2600
Via email: corporations.joint@aph.gov.au

Dear Chair and Committee Members

1. **Introduction and purpose of submission**

- 1.1 Epic Games, Inc. (**Epic**) appreciates the opportunity to provide this submission to the Parliamentary Joint Committee on Corporations and Financial Services (**Committee**) and welcomes its inquiry into mobile payment and digital wallet financial services (**Inquiry**).
- 1.2 This submission summarises the concerns of Epic in respect of the anticompetitive harm resulting from the terms and conditions currently imposed by each of Apple and Google on Australian app developers that require the use of the Apple App Store (for app distribution) and in-app purchase system (**IAP**) (for the purchase of in-app digital content) or Google Play (for app distribution) and Google Pay (for the purchase of in-app digital content), respectively. These restrictions have had a significant effect on competition in Australia for the provision of these services, which has manifested itself in the foreclosure of alternatives, higher prices being paid by Australian consumers and stifled innovation.
- 1.3 Mobile app stores, such as the Apple App Store and the Google Play Store and the in-app payment systems embedded in them, operate as gateways to essential consumer services through digital platforms. The explosive growth in mobile app downloads means there is every reason to believe that these app stores will play an even greater role in the future. For this reason, Epic contends that app store operators, such as Apple and Google, must operate in a manner that does not restrict competition, and facilitates consumer access and choice, including in the provision of in-app payment services.
- 1.4 Currently, Australian consumers pay a 30% commission that Apple and Google impose on the purchase of in-app content, which is many multiples of the single digit fees charged in financial transactions that exist in an open and competitive environment. Apple and Google are unable to reasonably or legitimately justify these commissions and the restrictions imposed on app developers beyond vague "security" concerns (yet fail to reconcile why such restrictions and commissions are only imposed in respect of their mobile operating systems and not their other platforms such as MacOS). It is apparent that the market power of each of Apple and Google has led to this market failure which has resulted in substantial anticompetitive harm to Australian app

developers, consumers and other providers of mobile app distribution and in-app payment processing systems.

1.5 Below we set out further background to the conduct of Apple and Google as it relates to in-app payment systems in Australia and draw the Committee's attention to a number of key issues that are relevant to the terms of the Inquiry, particularly around:

- (a) The growing importance and role of the mobile app marketplace to the Australian economy (**Part 1**)
- (b) the implications of the restrictions imposed by Apple and Google for consumers and competition in Australia (**Part 2**);
- (c) the nature of the commercial relationship between each of Apple and Google and Australian app developers (including details around the contracts of adhesion that app developers must enter into if they wish to be able to access Apple and Google users) that give rise to the anticompetitive conduct (**Part 3**); and
- (d) the adequacy of Australian legislation and regulation to address these issues compared to other jurisdictions (**Part 4**).

2. **Part 1: Background to Epic and the growing importance of app marketplaces to the Australian economy**

(A) Epic

2.1 Founded in 1991, Epic Games is an American company founded by CEO Tim Sweeney. The company is headquartered in Cary, North Carolina and has more than 50 offices worldwide.

2.2 Today Epic is a leading interactive entertainment company and provider of 3D engine technology. Epic also develops Unreal Engine, which powers the world's leading games and is also adopted across industries such as film and television, architecture, automotive, manufacturing, and simulation. Through Unreal Engine, Epic Games Store, and Epic Online Services, Epic provides an end-to-end digital ecosystem for developers and creators to build, distribute, and operate games and other content.

2.3 Epic operates *Fortnite*, a multifaceted online video game that has attracted over 350 million registered users globally, generated 2.5 billion friend connections and become a cultural phenomenon. *Fortnite*, Epic's most popular game, has connected hundreds of millions of people in a colourful virtual world where they meet, play, talk, compete, dance, and even attend concerts and other cultural events. Australia is one of Epic's key markets.

2.4 *Fortnite* is free to download and play. Epic generates revenue by offering users various in-app purchases of in-app content. For example, players who wish to further express themselves within *Fortnite* through digital avatars, costumes, dances, or other cosmetic enhancements may purchase them within the *Fortnite* app. Through this model, Epic makes *Fortnite* widely accessible at no cost to consumers, while earning a return on its artistic and engineering investments through the sale of cosmetic enhancements. This model relies heavily on being able to access and provide in-app payment systems on fair and reasonable terms.

(B) Role and growing importance of app marketplaces and in-app payment systems in the Australian economy

- 2.5 Smartphones are increasingly integral to the lives of Australians. Advances in technology have led to smartphones that offer many of the capabilities of a personal computer within the convenience of a small, portable device. Mobile apps work in conjunction with the operating system ("OS") running on the device on which they are installed. Therefore, mobile apps must be designed and built to run on a specific OS. The OS operates in a similar way to operating systems on desktop or laptop computers.
- 2.6 Mobile apps are predominately distributed on app marketplaces which are digital storefronts that provide a centralised distribution platform for developers to offer and distribute their apps, and for consumers to discover, download, and update apps. App marketplaces provide benefits to both consumers and app developers. They offer a secure and easily accessible way for consumers to navigate and browse the millions of available apps, and help them find and install the apps that best meet their needs. For developers, particularly smaller developers, app marketplaces (and app development tools) help to reduce barriers and costs, and provide access to a large market of potential consumers. The value of an app marketplace to consumers is greater the more apps and app choice that the marketplace offers and, similarly, app developers benefit the more consumers use the marketplace. The Apple App Store and Google Play Store are the most significant app marketplace platforms in Australia, with estimated 2020 app developer revenues (net of commission paid to the app marketplaces) in Australia, of around AUD1.2 billion and AUD0.6 billion respectively. Notably, around 40% of online payments were initiated via mobile apps¹.

As a result of the proliferation and year-on-year growth of the number of mobile apps, mobile apps are increasingly becoming the means through which consumers transact commercially with businesses (including but not limited to ordering food delivery, paying bills, entertainment, ride sharing or retail shopping). This reinforces the importance of being able to offer consumers an ability to transact with in-app payments on mobile phones. With over 40% of online payments being initiated by mobile apps, in-app payment systems have become an essential means through which to facilitate a substantial volume of trade and commerce, particularly in a post-COVID world. The RBA expects that there has been an increased shift to online commerce in response to the COVID-19 pandemic, which may lead to a more permanent shift in purchasing patterns for consumers. In light of the importance of the mobile ecosystem to commerce and online payments in Australia, it is essential that IAPs are appropriately regulated in a way that facilitates fair and effective competition across the relevant mobile ecosystems.

3. **Part 2: Key competition and consumer implications arising from the conduct of Apple and Google**

- 3.1 The ACCC recently expressed the view in its *Digital Platform Services Inquiry – Interim Report No. 2 – App Marketplaces* ("**DPSI Report**") released on 28 April 2021 that Apple and Google face limited competitive constraints in mobile app distribution and resultingly have market power in their dealings with app developers, which is likely to be significant. App developers wishing to access iOS and Android have few, if any, viable alternatives for app distribution. This is highly likely to mean commission rates associated with the in-app payment systems offered by Apple and Google and used for the purchase of digital in-app content are inflated. It is also highly likely that

¹ RBA Consumer Payment Behaviour in Australia: Evidence from the 2019 Consumer Payments Survey, June 2020, p 29.

this market power enables them to unilaterally set and enforce the rules that app developers must satisfy, including requirements that prevent app developers from distributing their apps on competing or alternative distribution platforms and from offering alternative payment systems for in-app purchases of digital content².

- 3.2 Epic's concerns stem from the contractual restrictions imposed by Apple and Google that prevent app developers from distributing their apps on other distribution platforms and choosing among competitively priced alternative in-app payment systems, such as those from FinTechs. Notably, the 30% charge imposed by Apple and Google on purchases for in-app content is around **10 times higher** than fees charged by analogous electronic payment processors in competitive contexts, such as PayPal, Stripe, Square or Braintree, which typically charge payment processing rates of around 3%. Such restrictions also mean that developers cannot either offer or even alert consumers to cheaper alternative payment methods outside an app (e.g. on a developer's website).
- 3.3 The contractual restrictions imposed by each of Apple and Google prevent would-be competing app distributors from developing viable and compatible app marketplaces that would provide consumers and app developers with choice beyond the Apple App Store and Google Play Store. These restrictions have also resulted in 'super profits' being collected by each company at the expense of Australian consumers and prevented the establishment of otherwise viable in-app payment systems that could compete with each of the payment processors offered by Apple and Google. Notably, the systems offered by Apple and Google do not provide any unique benefits over other in-app payment services or existing alternative (and lower-cost) options that offer similar functionality. They are arbitrarily applied to what Apple and Google deem to be 'digital apps', while other apps offering similar (physical) services to consumers are exempted. There are no legitimate security concerns or justifications for the imposition of these restrictions.
- 3.4 The contractual restrictions imposed by each of Apple and Google also:
- (a) *Deny app developers the opportunity to innovate and/or choose how best to distribute their apps.* Developers cannot distribute their apps through competing app marketplaces that could offer increased visibility or better or cheaper marketing. App developers can also not offer apps directly through their own websites or use cheaper or more innovative payment systems which could be provided by would-be competing in-app payment processors;
 - (b) *Foreclose competition in respect of app distribution reducing the competitive pressure for Apple and Google to innovate and improve their own app marketplaces.* This results in app developers being left with inferior distribution outlets compared to what would exist if competition were to drive further development and innovation in the market.
 - (c) *Deny app developers choice and coerce them to use the Apple or Google in-app payment processing.* Developers are contractually required to use Apple's in-app payment processing to facilitate in-app purchases of digital in-app content on their iOS apps—and no alternative third-party payment processor can be used;
 - (d) *Increase app developer costs.* Apple and Google extract an exorbitant 30% commission on in-app purchases of in-app content. Developers require a reasonable return on their investment in order to dedicate the substantial time and financial resources it takes to develop an app. By imposing a 30% commission, Apple and Google necessarily (i) force

² Digital Platform Services Inquiry – Interim Report No. 2 – App Marketplaces (28 April 2021) ("**DPSI Report**"), p 80.

developers to suffer lower profits (rendering some apps financially unviable altogether), (ii) reduce the quantity or quality of their apps, (iii) raise prices for consumers, or some combination of the three.

- 3.5 The ACCC recognised these concerns in its DPSI Report indicating that Apple's and Google's control over their respective app marketplaces enables each of them to bundle developer access to the app marketplace with a requirement to use their respective in-app payment systems, and to take commissions on transactions using those systems. The ACCC went on to further state³:

*Apple and Google's respective terms which prevent app developers from using alternative payment systems for payments made in-app affects the ability of alternative payment systems to operate in the app marketplaces. **This in turn leads to a loss of consumer choice, as consumers are unable to use any other payment option when making payments in-app...deters developers from offering products to consumers or charging customers more to cover the commission.***

...

Removing these requirements would allow app developers to offer consumers alternative methods to pay for goods and services, including potentially cheaper prices.

...

It is highly likely that the commission rates are inflated by the market power that Apple and Google have.

- 3.6 These restrictions effectively remove all choice and competition in respect of in-app payment services, enable the charging of anticompetitive commissions and, ultimately, precipitate higher prices for consumers.

4. **Part 3: Nature of the commercial relationship between each of Apple and Google and app developers in Australia**

(A) Apple and Google have unconstrained market power that enables them to impose anticompetitive restrictions on app developers

- 4.1 Both Apple and Google have significant market power in the relevant markets for iOS mobile app distribution and iOS in-app payment processing, and Android mobile app distribution and Android in-App payment processing markets, respectively. The ACCC has recognized that the duopoly nature of the market for mobile operating systems and the significant barriers to entry and expansion provide each of Apple and Google significant market power in the supply of mobile operating systems in Australia⁴. Apple and Google face limited competitive constraints in mobile app distribution. The lack of strong competitive constraints faced by Apple and Google provides each with market power in mobile app distribution in Australia, which is then used as leverage in respect of in-app payment systems.
- 4.2 Apple's iOS is a proprietary ecosystem. All iPhones (and iPads) are shipped with iOS pre-installed. Unlike Google's Android OS, Apple does not licence iOS nor does it permit iOS to be used on other, non-Apple devices. Apple does not permit any operating system other than iOS on its

³ DPSI Report, p 79.

⁴ DPSI Report, p 25.

hardware. In terms of app distribution, Apple expressly prohibits app distribution other than through the Apple App Store. Apple's IAP provides a digital checkout for in-app sales and is the means by which Apple collects its commission on eligible transactions.

- 4.3 In contrast to Apple, Google's business model relies on the license of the Android OS to third-party companies that design and sell smart mobile devices, such as Original Equipment Manufacturers ("**OEMs**") like Samsung. This is a source of significant leverage for Google due to the entrenched position of the Android OS relative to other licensable OSs. Google's Android OS provides Android devices on which it is installed with basic functionality and is the most ubiquitous operating system used in smart mobile devices. Aside from Google's Android OS, there are very few, if any, meaningful operating systems available for OEMs.
- 4.4 Google also owns and licences a range of proprietary apps (including the Google Play Store, Google Search, Google Chrome, Google Maps, Gmail and YouTube), known as Google Mobile Services, to OEMs; and owns and operates an in-app payment processor ("**Google Play Billing**") for the purchase of in-app digital content that is consumed within the app. Google's practices amount to an "all or nothing" for an OEM: if the OEM refuses to take the Google Play Store, it does not receive access to these other "must have" apps.
- 4.5 There are no other suppliers of app marketplaces in Australia that are capable of providing viable alternatives for use on iOS or Android OS for app developers and mobile device users. This stems from the sheer network effects that alternative app distribution platforms would need to overcome to entice a sufficient volume of users away from either iOS or Android OS to remain viable. From a developer's perspective, due to the respective market power of each of Apple (in respect of iOS) and Google (in respect of the Android OS), it is critical for app developers to have an app both on iOS and Android OS in order to successfully commercialise an app. Both Apple and Google leverage their market power in relevant markets for app distribution to foreclose competition (and require use of their own respective in-app payment systems).

(B) Contractual restrictions requiring use of Apple and Google mobile distribution platforms and in-app payment systems

- 4.6 Epic's primary concerns arising from the use of contractual restrictions imposed by both Apple and Google on app developers (and on mobile device users), relates to required use of each of the App Store and Play Store to distribute mobile apps and of the IAP and Google Play Billing in-app payment processing on the iOS and Android ecosystems, respectively. Such restrictions individually and collectively prevent competition with Apple and Google, and enable them to impose a 30% commission on purchases of digital in-app content consumed within an app through the foreclosure of competition.

(i) *Apple*

- 4.7 In order to develop and offer iOS-compatible apps in the App Store, mobile app developers must enter into a number of standard, non-negotiable agreements set by Apple, including the Apple Developer Program Licence Agreement ("**PLA**"). The PLA, in turn, requires compliance with the App Store Review Guidelines ("**App Store Guidelines**"). In addition, the PLA requires app mobile developers like Epic to enter into a separate agreement with Apple in a standard form (known as "**Schedule 2**" to the PLA) if they want iOS device users to purchase in-app content.

- 4.8 By the terms of the PLA, App Store Guidelines and Schedule 2, Apple imposes a number of restraints on app developers such as Epic, including but not limited to requiring app developers to:
- (a) agree to distribute their apps to iOS device users only through the App Store, and not distribute them to iOS device users through any other channel;
 - (b) agree to appoint Apple Inc and its subsidiaries, including Apple Pty Limited, to distribute their apps via the App Store;
 - (c) agree to only use Apple's IAP for the processing of payments for in-app content purchased by iOS device users; and
 - (d) agree that Apple Inc and its subsidiaries, including Apple Pty Limited, will deduct a 30% commission from the price paid by users for in-app content (other than in relation to certain long-term subscription users and smaller developers under Apple's Small Business Program).

4.9 But for Apple's restrictions, would-be competing app distributors, such as Epic, could develop and offer iOS-compatible app stores, thereby providing consumers and developers choice beyond Apple's own App Store and injecting healthy competition for iOS app distribution. These stores could compete on the basis of (among other things) price, service and innovation. Competitors could innovate by (among other things) curating the apps available on a competing app store (such as offering selections of apps in particular categories of consumer interest, like gaming, travel, or health), providing more reliable reviews and other information about the apps, showing or advertising apps in different ways, or offering different pricing schemes. Apple itself has recognised that its commission is prohibitive to many app developers, because the 30% surcharge makes the development of many apps unprofitable. Epic therefore believes that there is a strong public interest in legislative reform to address the type of contractual restrictions identified above.

(ii) *Google*

4.10 Similarly, in order to distribute their Android OS apps through Google Play Store, app developers must enter into the Google Play Developer Distribution Agreement ("**DDA**"), which is a standard form, non-negotiable contract. The DDA requires every app to be distributed through the Google Play Store to first be submitted to Google for review and approval, permitting Google to unilaterally refuse to carry (or de-list) apps which violate the DDA.

4.11 Under the terms of the DDA:

- (a) App developers must agree to not use the Google Play Store to distribute or make available any product that 'has a purpose that facilitates the distribution of software applications and games for use on Android devices outside of the Google Play Store'⁵;
- (b) App developers must agree, in respect of apps distributed through the Google Play Store, to exclusively use Google Play Billing, for the processing of payments for purchases of in-app digital content consumed within those apps purchased by Android device users. This effectively ties Google Play Billing to the Google Play Store such that for apps distributed

⁵ See cl 4.5 of the DDA, accessible at <https://play.google.com/about/developer-distribution-agreement.html>.

through the Google Play Store, app developers and Android device users must use Google Play Billing for the purchase of in-app digital content for consumption within apps;

- (c) App developers must agree that Google or its relevant subsidiary, will deduct a 30% commission for the sale of all paid-for apps through the Google Play Store and for in-app purchases of digital content consumed within such apps (other than in relation to certain subscription users).

4.12 Google reserves the right to remove and disable any app that Google determines violates the above provisions. Under the DDA, app developers are also required to enter into the 'Google Payments – Terms of Service – Seller Agreement' in order to receive payment for apps distributed (or purchased) through the Google Play Store and for purchases of in-app digital content made within those apps. The DDA requires app developers to comply with the Google Developer Program Policies. Among other things, this requires app developers offering products within an app downloaded from the Google Play Store or providing access to in-app content to use Google Play Billing as the only method of payment (except for the payment of physical/digital product that may be consumed outside the app).

4.13 The restrictions imposed by Google result in significant detriment to Australian consumers. With respect to Android OS app distribution, customers are denied the opportunity to find and access apps by ways of new, innovative distribution methods such as specialised app stores catering to customer specific interests and preferences. Customers also must bear at least some of the costs of the 30% commission imposed by Google on developers such as Epic.

- (C) Restrictions around not promoting or notifying users of alternative in-app payment systems

4.14 The ACCC also considers (and Epic agrees) that Apple and Google's respective restrictions regarding not informing customers about alternative payment options available to them result in insufficient information for informed choice: consumers are not fully informed about the payment options available to them, including possibly cheaper options for content that they will access in an app⁶. The restrictions also limit the business models available to app developers, which can in turn lead to a loss of innovation. For new and emerging apps, the inability to direct consumers off-app makes operating as a 'read only' app more challenging.

5. **Part 4: Adequacy of the Australian regulatory landscape to address the issues raised**

5.1 Epic initiated private competition law proceedings against both Apple and Google in Australia on 16 November 2020 and 8 March 2021, respectively seeking declaratory relief that such restrictions constitute contraventions of relevant provisions of the CCA ("**Apple and Google Cases**"). The claims raised by each of these proceedings include concerns regarding the contractual and technical restrictions imposed by Apple and Google, respectively, in relation to mobile app distribution and in-app payment systems. There are a number of other important issues that remain to be addressed, including app review processes, app store rankings and search algorithms that do not form part of the Apple and Google Cases in Australia but nevertheless pose important policy issues.

5.2 Similar action has been taken by Epic in the United States and the United Kingdom:

⁶ DPSI Report, p 82.

- (a) In relation to Apple, these proceedings relate to contractual and technical restraints imposed by Apple on app developers that foreclose competition in respect of iOS app distribution and iOS in-app payment processing. Epic believes that Apple's conduct is symptomatic of unrestrained market power that results in significant harm to Australian consumers and the competitive process. In the absence of these anti-competitive restraints, app developers would have a greater ability to distribute their apps leading to increased competition and innovation to the benefit of Australian consumers. In addition, Australian consumers would not be paying the 30% tax that Apple (and Google) impose on the purchase of in-app content, but would be paying a fraction of that, more consistent with the single digit fees charged in financial transactions that exist in an open and competitive environment.
- (b) In relation to Google, United States claim principally alleges that Google dominates the merchant market for mobile operating systems; unlawfully maintains a monopoly in the Android mobile app distribution market and unlawfully acquired and maintains a monopoly in the Android in-app payment processing market. The United Kingdom claim principally alleges that Google has unfairly restricted competition from alternative channels for the distribution of software applications to consumers who use Android mobile devices; unlawfully ties the distribution of Android apps through the Google Play Store to the use of Google's proprietary payment processing tool for purchases of in-app digital content consumed within Android apps; and/or imposes an unfair fee on the purchase of apps and in-app digital content consumed within the app through the Google Play Store within apps distributed through the Google Play Store.

5.3 Epic also believes that there is a strong public interest in legislative reform to address the type of contractual restrictions identified above.. Epic draws the Committee's attention to the regulatory reform currently happening in a number of US State legislatures in respect of the issues raised in this submission⁷, and the recently *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021* in Australia, that amended the CCA to establish a mandatory code of conduct that applies to news media businesses and digital platforms when bargaining in relation to news content made available by digital platform services.

5.4 Epic believes that there is a strong public interest in Australia investigating and adopting similar styles of legislative reform. Addressing concerns around mobile app distribution and in-app payment systems would be consistent with addressing the concerns raised by Epic and identified in the ACCC's DPSI Report.

6. Conclusion

6.1 Epic welcomes the Committee inquiry into mobile payments and digital wallet financial services. The inquiry is timely because these markets, and the players involved in them, are evolving quickly and the public interest issues are acute given rapid changes in Australian consumer behaviour.

6.2 Epic would be pleased to assist the Committee with its deliberations. Please contact the undersigned if you would like any further information on any of the matters raised in this submission.

Yours sincerely

⁷ See Georgia -- [House Bill 229](#), [Senate Bill 63](#); Illinois – [Senate Bill SB 2311](#); Minnesota – [House Bill HF 1184](#), [Senate Bill SF 1327](#); New York – [Senate Bill 4822](#); and Rhode Island – [House Bill H 6055](#)

SIGNED

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