



## Précis Paper

### Upsetting the Apple Tax Cart – Tackling International Law in Australia

Abstract – Worldwide court challenges to Apple Inc over the 30 per cent developers pay to Apple via the App Store, has reached Australia's shores with a current case brought by Epic, developers of popular video game Fortnite, against Apple in the Full Court of the Federal Court of Australia.

#### **Discussion Includes**

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## Précis Paper

### Upsetting the Apple Tax Cart – Tackling International Law in Australia

1. In this edition of BenchTV, Dr Harry Melkonian (Honorary Associate) and Axel Melkonian (Law Student) discuss the current lawsuit by Epic Games against Apple Inc.

#### Procedural case

2. Epic Games has brought a lawsuit against Apple in the Federal Court of Australia. Epic Games produce Fortnite, one of the most popular video games being played now.
3. The case is being brought under s46 of *Competition and Consumer Act 2010* (Cth) (CCA) and s21 of the Australian Consumer Law (ACL).
4. The s46 claim is a prohibition - "A corporation that has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition ...".
5. Section 21 of the ACL prohibits 'unconscionable conduct'.
6. The focus has been s46 of the CCA.
7. There is worldwide dispute going on right now and it involves the App Store. Apple requires anything sold on an iOS device be paid for through the Apple Pay system. And the developer must pay 30 per cent of what the consumer pays to Apple. It's being challenged in Federal Court in California - *Epic Games v Apple Inc*, 493 F. Supp. 3d 817 (N.D. Cal. 2020).
8. It's also being challenged in other US courts and Spotify has brought a complaint before the European Competition Commission about the 30 per cent – sometimes called the 'Apple tax'.
9. This is a worldwide dispute and a major part of Apple's revenue. There are very big stakes.

#### Issues in Australia

10. This is purely a conflict of laws decision. There is no ruling whatsoever that any law has been violated. The issue in Australia was that the contract between Epic Games and Apple provided exclusive jurisdiction of any disputes in the Northern District of California.
11. Nonetheless, Epic brought a case in the Federal Court of Australia under Australian statutes, not American statutes.
12. Apple brought an application in the Federal Court to stay the proceedings based on that exclusive jurisdiction clause.
13. Epic argued to the Federal Court that it was against the public policy of Australia to enforce the exclusive jurisdiction clause in a case involving extremely important issues of Australian law in something as fundamental in Australia as the CCA and ACL.

#### Primary Court decision

14. In the primary court, the Judge took a 'nuts and bolts' decision. The Judge was told there was a similar case pending in California (*Epic Games v Apple Inc*, 493 F. Supp. 3d 817 (N.D. Cal. 2020) and told Epic to file the Australian claims in California, with a temporary stay of three months in Australia.
15. Epic lodged an appeal.

#### Full Court decision

16. The Full Court said the case can go ahead.
17. The Australian Competition and Consumer Commission made a submission and Google Payments Australia also made a submission.
18. Apple's argument for the stay of proceedings was that there was an exclusive jurisdiction clause in the contract.
19. Epic had the onus of showing why the exclusive jurisdiction clause should not be honoured.
20. Epic claimed the exclusive jurisdiction clause did not apply to all the parties. Epic not only sued Apple Inc. They sued Apple Proprietary Ltd. The Full Court noted that Apple Proprietary Ltd was not an 'ornamental party' - the 30 per cent was paid to Apple Proprietary Ltd.
21. Second, Epic claimed you couldn't use the exclusive jurisdiction clause because the exclusive jurisdiction clause is part of the unconscionable conduct being claimed upon by Epic and you can't use an unconscionable conduct to defeat Australian jurisdiction.
22. Finally, Epic argued the foreign jurisdiction clause offended the public policy of Australia because this isn't just a contract case involving the price of shirts or widgets, it involved fundamental competition statutes and Epic relied upon the High Court decision in *Akai Pty Ltd v People's Insurance Co Ltd* [1996] HCA 39.
23. Issues in the Full Court Judgment –
24. One, it would be more cumbersome to carry on the case in the US as Australian law experts would be required.
25. The second issue was remedies. Even if a domestic court applies foreign law the remedies are determined by domestic law. If it had been determined in US, it would have been US remedies.
26. In the third ground, the Court said that Apple P/L was not an ornamental party and was not a party to the exclusive jurisdiction agreement.
27. Fourth, the Court said there was a clear juridical advantage to litigating in Australia. We need to build some law. We need Australian interpretation of statutes.
28. Also, there's a danger of foreign law being misconstrued in translation.
29. Finally, in para 122 of the Full Court decision: 'Epic was entitled to the legitimate forensic advantages presented by the CCA, and being required to litigate this proceeding in the US Court would deprive Epic of these advantages. The proceeding involves fundamental public issues in relation to conduct undertaken in an Australian sub-market, and involves an Australian company that is not itself a party to the exclusive jurisdiction clause.'

30. The case involves critical domestic issues inherent to the country's own sovereignty.
31. Twice, the Full Court uses Australian law to interpret US law which is 100 per cent opposite – this is in paras 77 and 82 of the Full Court decision. Foreign law is a matter of law in the US courts, whereas foreign law is treated as a question of fact under Australian common law. See US Federal Rules of Civil Procedure Rule 44.1 Determining Foreign Law and *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 at [115]. (Case reference added.)

#### Future of the case

32. *Epic v Apple* moves forward in the Federal Court of Australia, unless Apple seeks High Court review.
33. If the California Court decision rules against Apple, there's a guaranteed right of appeal in the US which could take several years.
34. The Australian case could be over before the US case.

#### Significance of case

35. The case is significant for a couple of reasons. It allows teaching conflict of laws with something current that hits a whole bunch of the issues. From a teaching standpoint this is great.
36. Beyond that, from the viewpoint of Australian practice, here we have a Full Court decision in a modern context looking at issues of stays and litigation. This kind of multinational litigation proceeding in parallel fora is going to become more and more commonplace so from a practitioner's standpoint, this is a very helpful decision. From a general viewpoint, anything involving Fortnite and how much it costs, has an audience. For a procedural case, it's worthy of note.

#### Post recording update

37. Subsequent to the recording, in the USA - Northern District of California, in the class action *Cameron v Apple*, (not part of the *Epic* litigation but before the same judge - Yvonne Gonzalez Rogers) there has been a tentative settlement in which Apple has agreed (for 3 years) to lower the commission to 15 per cent and to allow developers to communicate with customers outside of the app for payments. The settlement class only includes smaller American developers. The settlement was only recently announced and is only beginning the approval process.

## **BIOGRAPHY**

### Dr Harry Melkonian

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Dr Melkonian is admitted to practise in England, New York, California and New South Wales. He is a scholar on the Constitution of the United States. He has conducted over 1000 jury trials in the USA and is now resident in Sydney, where he practises law specialising in media and defamation, constitutional issues and private international law. He is a faculty member of Macquarie University Law School and the author of *Freedom of Speech and Society: A Social Approach to Freedom of Expression and Defamation, Libel Tourism and the Speech Act of 2010: The First Amendment Colliding with the Common Law*. He was the lead trial lawyer in the landmark *Meinhold v US* case in which the right of gays to serve in the US military was first established. He represented the Chief of Police during the aftermath of the riots in Los Angeles following the Rodney King trial.

### Axel Melkonian

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Axel Melkonian is currently the National Publications Officer of the Australian China Youth Association. He is also a Publications Committee member at the Sydney University Law Society.

## **BIBLIOGRAPHY**

### Focus Case

*Epic Games, Inc v Apple Inc* [2021] FCAFC 122

### Benchmark Link

[https://benchmarkinc.com.au/benchmark/weekly\\_banking/benchmark\\_16-04-2021\\_weekly\\_banking\\_law\\_review.pdf](https://benchmarkinc.com.au/benchmark/weekly_banking/benchmark_16-04-2021_weekly_banking_law_review.pdf)

### Judgment Link

<https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/full/2021/2021fcafc0122>

### Cases

*Akai Pty Ltd v People's Insurance Co Ltd* [1996] HCA 39

*Epic Games, Inc v Apple Inc* [2021] FCA 338

*Epic Games v Apple Inc*, 493 F. Supp. 3d 817 (N.D. Cal. 2020)

European Competition Commission case numbers AT.40437, AT.40652

*Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 at [115]

*Voth v Manildra Flour Mills Pty Ltd* [1990] HCA 55

### Legislation

*Australian Consumer Law*

*Competition and Consumer Act 2010* (Cth)

*US Federal Rules of Civil Procedure*

*Sherman Anti-Trust Act* (1890)