

Epic Games takes on Apple and Google in Australia over alleged misuse of market power

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When Apple's first iPhone launched in 2007, all its apps were made by Apple. Steve Jobs was reluctant to allow the apps of third-party developers on the iPhone, according to his biography by Walter Isaacson. He ultimately caved to pressure with the launch of the App Store in 2008. But the company wanted strict control over what was allowed on the platform, an email released in 2021 revealed. Apple's control over its empire will be front and centre in a case heard over the next five months in Melbourne's federal court. At the same time, Google – which has prided itself on having a more open ecosystem than Apple – will have its own practices put to the test. Two Australian federal court cases were put on hold in April 2021, pending the outcome of similar cases in the US. Epic Games, maker of the popular game Fortnite, has spent the past three years in a global legal battle against Apple and Google, alleging misuse of market power over the control they wield over their app stores. Fortnite was kicked off the Google and Apple app stores in 2020 after Epic Games offered its own in-app payment system that bypassed the one used by the platforms, and cut out the fees Apple and Google receive for in-app payments. Epic lost its 2021 antitrust case against Apple, but won its case against Google late last year. Originally separate, the Australian cases have now been combined into a single monolith. Justice Jonathan Beach decided to hear the two cases and an associated class action at the same time to avoid duplication of witness evidence. David and Goliath? In the Australian cases, which originally kicked off in 2020, Epic Games has alleged that Apple's control over in-app purchases and its actions in banning the Fortnite app are a misuse of market power, which has substantially lessened competition in app development. The company has also alleged Google harmed app developers and consumers in Australia by preventing choice over app distribution and in-app payments on Android devices. Just like their phone operating systems, the legal cases between Apple and Google have many similarities – but also key points of difference. Apple's iOS and App Store are completely closed and controlled by Apple. That means if an app is on your phone, and there is a payment through that app, it has to go through Apple. Similar rules operate on Google's Android operating system for the Play Store, but Google also allows "sideloading" of apps – meaning apps installed directly on the phone without using the app store. It also allows for phone manufacturers such as Samsung to have their own app stores. Fortnite is still available on Android, but only through sideloading or through the Samsung store. Each company charges fees for transactions in their app stores. Google Play charges a 15% fee for the first US\$1m earned by developers each year, increasing to 30% above that. Apple developers pay a 15% fee if the revenue generated the previous year is lower than \$1m, but pay 30% if they earn more than that. Fees are common in the industry – Epic's own store charges developers a 12% fee. Epic argues that it should be able to offer its

own store as competition to Apple's store, and also offer alternative payment options within their app in the official Games Store. While Google has argued it is more open than the Apple App Store, it was this openness that cost the tech company in the US case. A jury found that tying the Google Play Store to payments in apps was illegal, and that the company had entered into anti-competitive agreements with select developers to keep their apps in the Play Store. In the Apple case, the judge took a narrower view, considering mobile gaming transactions specifically rather than the app store as a whole. The judge found that Apple was not a monopoly, instead it was competing against Google and others. The judge also backed Apple's concerns about the security implications of opening up the App Store, and supported the company seeking a fee for the use of its intellectual property through in-app payments. Apple is expected to run a very similar case in Australia. The company believes there is little difference between the cases, and the principles underlying Australian competition law are similar to those in US antitrust laws. Apple sees Epic not as David to its Goliath, but as a multibillion dollar company seeking to further profit at the expense of the security of iPhone users. Google argues it does offer customers a choice in app stores, as well as alternative options for developers to sell content outside Google Play. It also points to its permissions allowing the sideloading of apps while also trying to preserve security for users – something it argues Epic is attempting to water down. "It's clear that Android and Google Play provide more choice and openness than any other major mobile platform and it's a model that's good for Australian developers and consumers," Google's VP of government affairs and public policy, Wilson White, said in a post this week. "We will continue to vigorously defend our right to a sustainable business model that enables us to keep users safe, partner with developers to grow their businesses and keep the Android ecosystem thriving and healthy for all Australians." Apple compelled to make changes in EU App Store Opening submissions will last two weeks, followed by evidence from fact witnesses and experts spanning three months, followed by two weeks of closing submissions ending in mid-July. Witnesses expected to testify include Epic's CEO, Tim Sweeney, who is in Melbourne for the hearing, as well as key executives from Apple and Google. A class action being run at the same time on behalf of Australian developers and consumers will fail if Epic's case fails. The case is unlikely to be resolved this year, with Beach not expected to deliver a judgment within six months, after which there could be appeals. Regardless of whether Epic wins the battle, Apple and Google may ultimately lose the app store war. Apple has been forced to implement changes to its App Store in the European Union – including allowing alternate payment options and marketplaces – following the Digital Markets Act. As a result, Apple restored Epic's developer account in the EU last week. According to Epic, Apple's implementation of those changes is imperfect, but it may lead to other governments, including Australia, following suit.