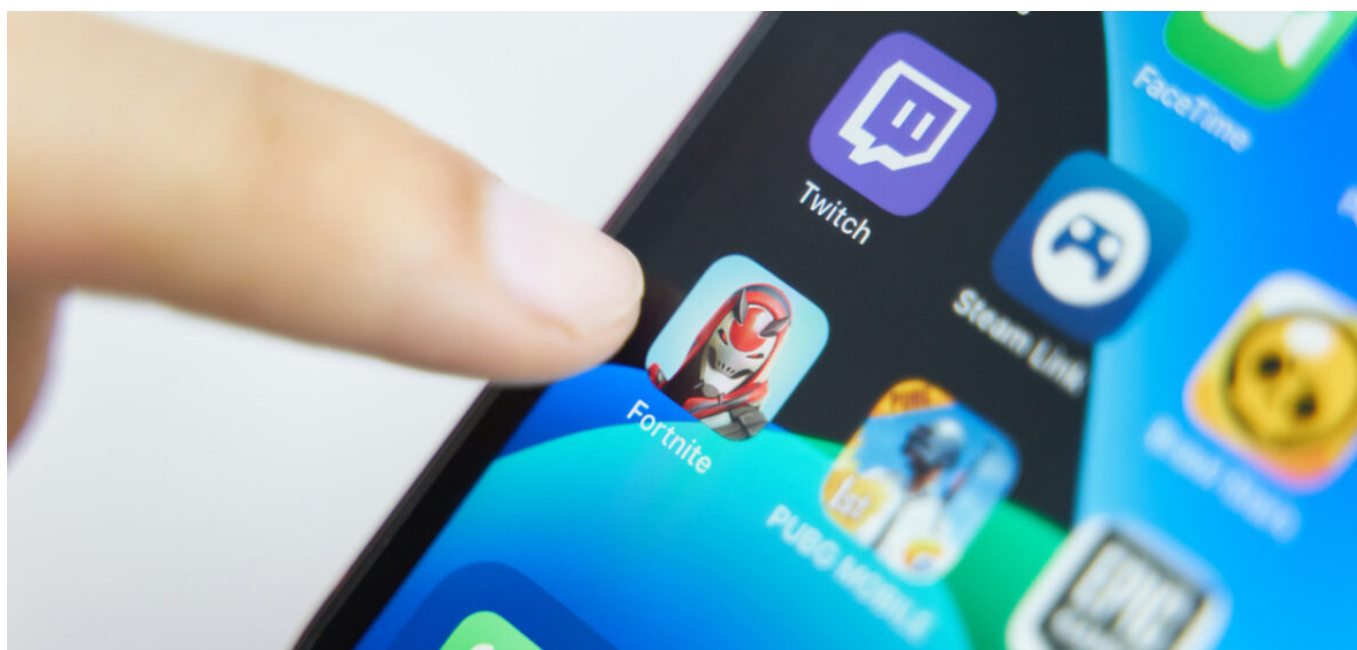


# Epic Games: digital platforms test Australian competition law



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## Snapshot

The Epic Games cases against Apple and Google mark a watershed moment, proving that Australian competition law can hold powerful digital platforms to account.

Yet, relying on litigation alone is far from ideal—court battles are slow, costly and strain the legal system.

This article unpacks the good, the bad and the ugly implications of the Epic Games litigation, highlighting the need for long-promised reform.

The Epic Games litigation against Apple and Google in Australia is the first major test of Australian competition law's ability to deal with anti-competitive conduct by US Big Tech digital platforms. The test has been passed so far but victory laps would be premature.

Four proceedings were tried together—one against Apple (*Epic Games, Inc v Apple Inc* [2025] FCA 900 ('*Epic Games v Apple*')), another against Google (*Epic Games, Inc v Google LLC* [2025] FCA 901 ('*Epic Games v Google*')), and class actions against both (*Anthony v Apple Inc; McDonald v Google LLC* [2025] FCA 902). Apple and Google were found liable for misuse of market power in breach

of [section 46](#) of the *Competition and Consumer Act 2010* (Cth) ('CCA'). Remedies are yet to be considered.

## Background

Gaming is the market setting for these leviathan contests. Gaming is the biggest entertainment category in the world and generates more revenue than the film, music and other media categories combined. Epic Games is a major gaming company, valued at around \$35 billion. 'Fortnite', Epic's most successful game application, is played by over 650 million people. Game applications run on personal computers, smart mobile devices and gaming consoles.

### ***Allegations and findings***

Apple allegedly forced app developers like Epic Games to use Apple's App Store to distribute their apps to iOS device users and to use Apple's payment system for processing purchases of in-app digital content by iOS device users. Epic Games's litigation against Apple was sparked when Apple removed Fortnite from the App Store on 13 August 2020.

Google allegedly hindered app developers like Epic Games from distributing apps to Android devices other than through Google's Play Store, and imposed Google's payment system for processing the purchases of in-app digital content by Android device users. Litigation against Google was launched after Google removed Fortnite from the Play Store on 13 August 2020.

In *Epic Games v Apple*, Beach J found Apple contravened s 46. There were two relevant markets: the iOS app distribution market and the iOS in-app payment solutions market. Apple had a substantial degree of power in each market. Apple's conduct had the purpose, effect or likely effect, of substantially lessening competition in the iOS distribution market, and the effect or likely effect of substantially lessening competition in the iOS in-app payment solutions market.

In *Epic Games v Google*, Beach J found Google contravened s 46. There were three relevant markets: the mobile OS licensing market, the Android mobile app distribution market, and the Android in-app payment solutions market. Google had a substantial degree of power in each market. Some of Google's conduct had the purpose, effect or likely effect, of substantially lessening competition in the Android mobile app distribution market. Some conduct had the effect or likely effect of substantially lessening competition in the Android mobile app distribution market and the Android in-app payment solutions market.

Will these decisions be appealed? The judgments of Beach J seem resistant to being overturned on appeal. However, exercising rights of appeal is a standard operating procedure of large and litigious American businesses.

### ***Conduct of the proceedings***

The judgments in the Epic Games litigation in Australia are exemplary models of Australian competition law in mega-litigation against massive digital platforms. The issues are stated with surgical precision. The nature of gaming apps, how they work and are paid for, is explained in accessible terms. The facts in dispute about market power and competition effects of the Apple and Google digital platforms are set out fully and incisively. The law on misuse of market power under s 46 is restated and elucidated. Relevant economic principles are extracted from the swamp of theory and made operational. Streams of evidence are assessed thoroughly. Ultimately the law is applied to the facts, point by point, witness by witness, and nuance by nuance.

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Four large and complex proceedings were tried together in a remarkable feat of case management. At the start of the proceedings, Beach J ordered the evidence in one case should be treated as evidence in all other cases unless indicated to the contrary (as in respect of an admission by one party that was not cross-admissible against other parties). Later, in the judgments, Beach J made it clear that findings of fact or law in one proceeding were findings of fact or law in the other proceedings unless indicated to the contrary. The efficiencies and consistency achieved avoided the waste and inconsistency of the separate trials of Apple and Google in the antitrust actions brought against them by Epic Games in the US.

## **Legal questions**

Much of the discussion of the legal elements of misuse of market power in the Epic Games litigation restates and refines the law. Two questions are examined in depth for the first time in the case law since s 46 was amended in 2017.

First, does s 46 require a causal connection between the substantial degree of market power alleged and the conduct said to breach the substantial lessening of competition ('SLC') test under the section? (See Katharine Kemp, '[Causation in Misuse of Market Power Claims under the Competition and Consumer Act 2010 \(Cth\)](#)' (2021) 49(4) *Australian Business Law Review* 208 for a discussion of this question). On a literal interpretation of the statutory wording, the answer is no. That would make a corporation with substantial market power liable for 'misuse of market power' where it has not misused that market power (as where such a corporation engages an arsonist to burn down a competitor's factory and thereby deters or prevents that competitor from engaging in competitive activity). In *Epic Games v Apple*, Beach J interpreted s 46 literally, criticised the drafting of s 46 and said that, on the facts in this case, it did not matter whether s 46 was interpreted to require a causal connection or not (at [3691]-[3723]). That way of getting around the unsatisfactory drafting of s 46 will often, but not always, be available.

Secondly, does the need for security trump a substantial lessening of competition? In *Epic Games v Apple*, Beach J held that, if the conduct alleged had the purpose or effect of SLC in a relevant market, that SLC purpose or effect could not be negated by security or other public benefits of restrictions on competition (at [3807]-[3817]). The analysis of Beach J on this question is welcome. It pushes back against the contention that US rule of reason analysis applies to s 46 and other provisions of the *CCA*. There is no statutory basis in the *CCA* for following that US antitrust approach. If Apple, Google or other digital platforms want to argue security or other public benefits outweigh SLC, they should seek authorisation by the ACCC in advance of the conduct pursuant to [section 88](#) of the *CCA*.

## **The limits of competition law**

The Australian litigation is part of Epic Games' global litigation campaign, 'Project Liberty'. Overseas, the campaign has had mixed results. Epic Games achieved comprehensive victory against Google in US

courts after a 2023 jury unanimously found Google maintained Android monopolies through exclusionary deals like ‘Project Hug’ payments and OEM restrictions. This led to 2024 injunctive relief upheld by the Ninth Circuit and left intact by the Supreme Court. However, Epic Games largely failed in US antitrust claims against Apple because of market definition selection. An action in California led to Apple being found in contempt in 2025. The subsequent ruling barred Apple from external payment commissions.

The Epic Games litigation in Australia is seen by some as confirming the power of existing competition law and disavouring digital regulation of platform markets. Admirable as the Epic Games litigation is, in many respects, it shows that competition law still has its limits. There are reasons to be apprehensive.

First, these are early days in the Epic Games proceedings. The litigation has yet to reach the stage of remedies. Appeals are highly likely in relation to liability and remedies. Appeals may take more time than two or three annual Fortnite Champion Series.

Secondly, further blockbuster litigation against Big Tech platforms is to be expected given the trend in the US and Europe. One example in Australia is the class action underway against Sony in relation to allegations Sony misused its market power, engaged in exclusive dealing and entered into contracts or arrangements that affected competition by requiring digital games and add-ons to be purchased and sold only via its PlayStation Store. This is currently at the pre-hearing under Moore J.

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Thirdly, Epic Games is a well-resourced and very successful corporation. Thought needs to be given to all the small businesses, including start-ups, who do not have the resources to fight litigation battles at such a scale.

Fourthly, the power of s 46 as a weapon against misuse of market power should not be overstated. The s 46 prohibition only applies if the defendant had a substantial degree of market power in a relevant market. Establishing that element will be more difficult in cases where the market power of the defendant is less obvious than that of Apple or Google.

Fifthly, joint trials were possible in the Epic Games litigation and did much to achieve efficiencies and expedite the proceedings. However, joint trials are not always possible. Indeed, they are likely to be rare.

Sixthly, Apple and Google might each have done more to help protect themselves against litigation by using better liability control procedures to guard against ‘smoking guns’. They and other Big Tech corporations will learn from the Epic Games litigation in Australia.

Finally, mega-litigation like that brought by Epic Games imposes a considerable strain on the legal system. One negative impact is that the capacity of a trial judge is monopolised by multi-national goliaths for months on end, at the expense of other litigants who may have to wait longer for their access to justice.

# Regulation of digital platforms to prevent anti-competition conduct

The limits of competition law as a means of keeping market power in check in the digital economy have been recognised widely, in Australia and around the world. The modern trend is to regulate digital platforms by imposing rules designed to prevent anti-competitive conduct in advance, in order to reduce the need for competition law litigation after anti-competitive harm has occurred.

Europe has led the way on this front. The [Digital Markets Act \(Regulation \(EU\) 2022/1925\)](#) (*'DMA'*) requires 'gatekeepers' (large online platforms) to comply with rules against anti-competitive conduct. For instance, there is a rule against gatekeepers giving preference to their own services over services offered by others who wish to compete using the same platform. The *DMA* entered into force on 1 November 2022 and became applicable on 2 May 2023. It has significantly impacted digital platforms like Apple. For example, Apple was obliged to modify its security technology to accommodate third-party app stores and in-app payment solutions. There are continued disputes over Apple's 'Core Technology Fee'. That was told heavily against Apple in the Epic Games litigation in Australia. Apple argued the restrictions it imposed were necessary for security but that did not square with the pro-competitive changes Apple had been required to make under the *DMA* (*Epic Games v Apple* at [5400]-[5406]).

From 2020-2025, the ACCC undertook the large-scale [Digital Platform Services Inquiry](#) and issued 10 reports with many recommendations. A major recommendation in the [September 2022 interim report](#) and the [final report](#) is that targeted upfront (or *ex ante*) competition obligations be implemented through mandatory service-specific codes. These codes would complement existing competition laws under the *CCA*. They would apply to digital platforms that meet designation criteria in respect of specific digital services they supply. The service-specific codes envisaged would be flexible, targeted, and clear and certain. The guiding objective would be to promote competition and innovation in the provision of digital platform services and related products and services. Breach of the service-specific codes would be subject to serious penalties and remedies under the *CCA*.

In their [response](#) to the inquiry, the government accepted that recommendation in principle. Treasury released 'A new digital competition regime' [proposal paper](#) for consultation in December 2024 which echoed the ACCC recommendation and the decision of the government that a new regime for regulating competition in digital platforms be introduced. This is the vista:

'The proposed framework would introduce new, upfront requirements for certain "designated" digital platforms with a critical position in the Australian economy.

Amendments to the *CCA* would establish overarching principles, the ability to designate identified digital platform entities in respect of a specific service, broad obligations, enforcement and compliance mechanisms, and a framework for making subordinate legislation with detailed obligations applying at the service-level. Once a digital platform entity has been designated in respect of a specific service, the ACCC would be responsible for enforcing the obligations.

The legislation would set out the scope of digital platform services which would be subject to designation.

It is proposed that the first services to be investigated for designation under the regime would be app marketplace services and ad tech services. Comment is also sought on whether social media services should be similarly prioritised' (at 6).

A prohibition against unfair trading practices could offer a more expedient way of countering anti-competitive conduct by digital platforms than competition law.

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Submissions on the Treasury proposal paper were requested by 14 February 2025. Remarkably, over eight months later, the submissions are yet to be published.

Had the government acted in a timely way after the September 2022 interim report, perhaps continuation of the Epic Games litigation in Australia might have been unnecessary. Under the legislative scheme proposed, the conduct of concern to Epic Games would have become the subject of regulation, prohibition, serious penalties for breach and remedies to prevent the use of walled gardens and other anti-competitive devices.

## **Prohibition of unfair trading practices as an alternative to competition law**

The government has [supported](#) new prohibitions of unfair trading practices under the Australian Consumer Law. The main reason is to help combat dark patterns and other scams that are not covered entirely by existing prohibitions against misrepresentations and unconscionable conduct. It is also possible a general prohibition against unfair trading practices could be used against misuse of market power and other forms of anti-competitive conduct as a more expedient weapon than competition law.

Introduction of new prohibitions against unfair trading practices has been urged by the ACCC and others in Australia for many years. The Digital Platforms Inquiry's final report included a recommendation that a prohibition against unfair practices be introduced. Treasury issued consultation papers on unfair trading practices in [2023](#) and [2024](#). The government seems to support the introduction of a new general prohibition against unfair trading practices, supplemented with new specific prohibitions. A [media release](#) by the Prime Minister, the Treasurer and the Assistant Treasurer in 2024 made this forecast: '[f]ollowing consultation, the Government will work with states and territories to settle a final reform proposal in the first half of 2025'. A final reform proposal has not been announced and draft legislation is yet to be published.

A prohibition against unfair trading practices could offer a more expedient way of countering anti-competitive conduct by digital platforms than competition law. The test of liability would be unfairness, not competition nor unfair methods of competition. Liability could be established without having to define markets, find substantial market power or determine whether or not the purpose, effect or likely effect of conduct has been to SLC. Section 46 might collapse under the weight of its 20<sup>th</sup> century design and experience a Polaroid moment.

One objection is that the concept of unfairness is too vague a test of liability. That objection has been raised in some submissions to Treasury. But unfairness is in much the same bag as other fuzzy tests that

are among the law's best traditions. One classic example is the duty to take 'reasonable' care in the tort of negligence.

It would be good to have more flesh on the bones of the idea that a prohibition against unfair trading practices be used as an alternative to s 46 and other non-cartel prohibitions under competition law. More commentary is needed. It would also be instructive to have a hypothetical judgment or two showing how *Epic Games v Apple* might have been decided if the basis of liability alleged had been a prohibition against unfair trading practices.

## Conclusion

The Epic Games litigation is a spectacular contest between might and right. It is also a remarkable showcase of judicial method. Beach J made Australian competition law work against large digital platforms accustomed to reign with impunity. There is more to come on remedies and appeals but the decisions on liability are cause for instant celebration.

The Epic Games litigation is also a striking reminder that competition law is limited in what it can do to counter anti-competitive conduct by digital platforms. Court battles over possible breaches of competition law are best avoided if possible—they are slow, complex and costly, and bog down the legal system.

Legislation is needed. Regulating anti-competitive conduct by digital platforms and prohibiting unfair trading practices are on the reform agenda, thanks largely to the ACCC. The government has said it supports the reforms recommended by the ACCC. However, draft legislation is yet to emerge, after years of speeches, media releases, consultations and submissions by stakeholders.

\*Thanks are due to Rob Nicholls for comments.



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