

NOTICE OF FILING AND HEARING

Filing and Hearing Details

Document Lodged:	Originating Application Starting a Representative Proceeding under Part IVA Federal Court of Australia Act 1976 - Form 19 - Rule 9.32
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File Number:	VID341/2022
File Title:	DAVID ANTHONY v APPLE INC & ANOR
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	To Be Advised
Time and date for hearing:	To Be Advised
Place:	To Be Advised



Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.



**Further Amended Originating Application
starting a representative proceeding
under Part IVA of the Federal Court of Australia Act 1976**

VID 341 of 2022

Federal Court of Australia
District Registry: Victoria
Division: General

DAVID ANTHONY

First Applicant

DARK ICE INTERACTIVE PTY LIMITED (ACN 153 761 276)

Second Applicant

APPLE INC (and another named in the Schedule)

Respondents

To the Respondents

The Applicants apply for the relief set out in this application.

The Court will hear this application, or make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence.

You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing:

Place: Federal Court of Australia
305 William St, Melbourne, VIC 3000

Date: 12 December 2023

Signed by an officer acting with the authority
of the District Registrar

Filed on behalf of	David Anthony and Dark Ice Interactive Pty Ltd (Applicants)
Prepared by	Paul Zawa Joel Phibbs
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Amendments to the Originating Application

This Further Amended Originating Application incorporates amendments previously made on 23 March 2023. The amendments to this Originating Application, as denoted in underline and strikethrough were made on 12 December 2023.

Details of claim

On the grounds stated in the Further Amended Statement of Claim (and adopting the defined terms contained therein), the Applicants claim on their behalf and on behalf of the Group Members:

1. Pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth) (***Federal Court Act***), a declaration that, during the Relevant Period, the First Respondent (**Apple Inc**) and/or the Second Respondent (**Apple Pty Limited**) has engaged in conduct in contravention of s 46(1) of the CCA in that:
 - (a) Apple Inc and/or Apple Pty Limited had a substantial degree of power in one or more of the Australian iOS App Distribution Markets; and
 - (b) Apple Inc and/or Apple Pty Limited engaged in conduct with respect to iOS app distribution that had the purpose, or had or was likely to have had the effect, of substantially lessening competition in one or more of the Australian iOS App Distribution Markets and/or one or more of the Australian iOS In-App Payment Solutions Markets ~~as by the conduct referred to~~ alleged in paragraphs 90C, 93 and/or 97 of the Further Amended Statement of Claim.
2. In the alternative to paragraph 1, a declaration pursuant to s 21 of the *Federal Court Act*, that Apple Pty Limited was involved in Apple Inc's contraventions in paragraph 1 within the meaning of s 75B of the CCA.
3. A declaration pursuant to s 21 of the *Federal Court Act*, that, during the Relevant Period, Apple Inc and/or Apple Pty Limited engaged in conduct in contravention of s 46(1) of the CCA in that:
 - (a) Apple Inc and/or Apple Pty Limited had a substantial degree of power in one or more of the Australian iOS In-App Payment Solutions Markets; and
 - (b) Apple Inc and/or Apple Pty Limited engaged in conduct with respect to iOS In-App Payment Solutions that had the purpose, or had or was likely to have had the effect, of substantially lessening competition in one or more of the Australian



iOS In-App Payment Solutions Markets, and/or one or more of the Australian ~~iOS App Distribution Markets~~ by the conduct referred to as alleged in paragraphs 102, 103 and/or 107 of the Further Amended Statement of Claim.

4. In the alternative to paragraph 3, a declaration pursuant to s 21 of the *Federal Court Act*, that Apple Pty Limited was involved in Apple Inc's contraventions in paragraph 3 within the meaning of s 75B of the CCA.
5. A declaration pursuant to s 21 of the *Federal Court Act*, that, during the Relevant Period, Apple Inc and/or Apple Pty Limited engaged in the practice of exclusive dealing in contravention of s 47(1) of the CCA, in that:

- (a) Apple Inc and/or Apple Pty Limited supplied (or offered to supply) services to app developers, being the distribution of app developers' iOS apps to iOS Device users, including in Australia,

on the condition that:

- (b) they will not acquire services of a particular kind or description from a competitor of Apple Inc and/or Apple Pty Limited (having regard to s 47(13(b))), including in Australia, being payment solutions for accepting and processing payments for iOS apps and in-app purchases ~~digital content~~ within an iOS app ~~purchased by iOS Device users from other persons that~~, but for Apple Inc and/or Apple Pty Limited's conduct, ~~compete, or would~~, or would likely, ~~compete,~~ with the IAP, including in Australia.

where the engaging in that conduct by Apple Inc and/or Apple Pty Limited had the purpose, or had or was likely to have had the effect, of substantially lessening competition in one or more of the Australian iOS App Distribution Markets and/or in one or more of the Australian iOS In-App Payment Solutions Markets.

6. In the alternative to paragraph 5, a declaration pursuant to s 21 of the *Federal Court Act*, that Apple Pty Limited was involved in Apple Inc's contraventions in paragraph 5 within the meaning of s 75B of the CCA.
7. ~~Further or in the alternative to paragraphs 5 and 6, a~~ declaration pursuant to s 21 of the *Federal Court Act*, that, during the Relevant Period, Apple Inc and/or Apple Pty Limited engaged in conduct in contravention of s 45(1) of the CCA in that Apple Inc and/or Apple Pty Limited made contracts, arrangements or understandings with app developers containing provisions comprising the Restrictive Terms referred to in paragraphs 85 and 114 of the Further Amended Statement of Claim, where those



provisions had the purpose, or had the effect or likely effect, of substantially lessening competition in one or more of the Australian iOS App Distribution Markets and/or one or more of the Australian iOS In-App Payment Solutions Markets.

8. ~~Further or in the alternative to paragraphs 5 and 6, a~~ A declaration pursuant to s 21 of the *Federal Court Act*, that, during the Relevant Period, Apple Inc and/or Apple Pty Limited engaged in conduct in contravention of s 45(1) of the CCA, by giving effect to the provisions referred to in paragraph 7 above.
9. In the alternative to paragraphs 7 and 8, a declaration pursuant to s 21 of the *Federal Court Act*, that Apple Pty Limited was involved in Apple Inc's contraventions in paragraphs 7 and 8 within the meaning of s 75B of the CCA.
 - (a) A declaration pursuant to s 21 of the *Federal Court Act*, that, during the Relevant Period, Apple Inc and/or Apple Pty Limited ~~has engaged in conduct in trade or commerce in connection with the supply, or possible supply, of the services pleaded in paragraph 119 of the Further Amended Statement of Claim to app developers, namely distribution of their iOS apps to iOS Device users in Australia and/or associated payment solutions for accepting and processing payments for iOS apps and in-app digital content within an iOS app, including in Australia: and/or~~
 - (b) ~~[Not used]the supply of iOS devices to consumers iOS device users in Australia: and/or~~
 - (c) ~~[Not used]the supply of services for the distribution of iOS apps to iOS Device users, including in Australia,~~

that was, in all the circumstances, unconscionable in contravention of s 21 of the ACL ~~by the conduct referred to for the reasons alleged in paragraph 123 120-124 of the Further Amended Statement of Claim.~~

10. An order pursuant to ss 82 or 87 of the CCA that Apple Inc and/or Apple Pty Limited pay to the Applicants and Group Members compensation for the loss or damage suffered by the conduct of the Apple Inc and/or Apple Pty Limited in contravention of ss 45, 46 and/or 47 of the CCA.
11. An order pursuant to ss 236 or 237 of the ACL that Apple Inc and/or Apple Pty Limited pay to the Applicants and Group Members compensation for the loss or damage suffered by the conduct of the Apple Inc and/or Apple Pty Limited in contravention of s 21 of the ACL.



12. Interest pursuant to s 51A of the *Federal Court of Australia Act 1976* (Cth).
13. Costs.
14. Such further or other orders as this Honourable Court sees fit.

Questions common to claims of Group Members

15. The questions of law or fact common to the claims of the Applicants and Group Members are:

Markets

- (a) Whether, during the Relevant Period, one or more of the Australian iOS App Distribution Markets ~~and/or the App Distribution Market~~ was a market within the meaning of s 4E of the CCA.
- (b) Whether, during the Relevant Period, one or more of the Australian iOS In-App Payment Solutions Markets was a market within the meaning of s 4E of the CCA.

Contravention of s 46

- (c) Whether, during the Relevant Period, Apple Inc and/or Apple Pty Limited engaged in conduct in contravention of s 46(1) of the CCA in that:
 - (i) Apple Inc and/or Apple Pty Limited had a substantial degree of power in one or more of the Australian iOS App Distribution Markets; and
 - (ii) Apple Inc and/or Apple Pty Limited engaged in conduct that had the purpose, or had or was likely to have had the effect, of substantially lessening competition in one or more of the Australian iOS App Distribution Markets, by the conduct referred to in paragraph [90] of the Further Amended Statement of Claim.
- (d) Whether Apple Pty Limited was involved in Apple Inc's contravention in paragraph (c) within the meaning of s 75B of the CCA.
- (e) Whether, during the Relevant Period, Apple Inc and/or Apple Pty Limited engaged in conduct in contravention of s 46(1) of the CCA in that:
 - (i) Apple Inc and/or Apple Pty Limited had a substantial degree of power in one or more of the Australian iOS In-App Payment Solutions Markets; and



- (ii) Apple Inc and/or Apple Pty Limited engaged in conduct that had the purpose, or had or was likely to have had the effect, of substantially lessening competition in one or more of the Australian iOS In-App Payment Solutions Markets, by the conduct referred to in paragraph 103 of the Further Amended Statement of Claim.
- (f) Whether Apple Pty Limited was involved in Apple Inc's contraventions in paragraph (e) within the meaning of s 75B of the CCA.

Contravention of s 47

- (g) Whether, during the Relevant Period, Apple Inc and/or Apple Pty Limited engaged in the practice of exclusive dealing in contravention of s 47(1) of the CCA, in that:
- (i) Apple Inc and/or Apple Pty Limited supplied (or offered to supply) services to app developers, being the distribution of app developers' iOS apps to iOS Device users, including in Australia,
- on the condition that:
- (ii) they will not acquire services of a particular kind or description from a competitor of Apple Inc and/or Apple Pty Limited (having regard to s 47(13(b)), including in Australia, being payment solutions for accepting and processing payments for iOS apps and in-app digital content within an iOS app ~~purchased by iOS Device users from other persons~~ that, but for Apple Inc and/or Apple Pty Limited's conduct, ~~compete, or~~ would or would likely compete, with the IAP, including in Australia,
- where the engaging in that conduct by Apple Inc and/or Apple Pty Limited had the purpose, or had or was likely to have had the effect, of substantially lessening competition in one or more of the Australian iOS App Distribution Markets and/or in one or more of the Australian iOS In-App Payment Solutions Markets.
- (h) Whether Apple Pty Limited was involved in Apple Inc's contraventions in paragraph (g) within the meaning of s 75B of the CCA.



Contravention of s 45

- (i) Whether, during the Relevant Period, Apple Inc and/or Apple Pty Limited engaged in conduct in contravention of s 45 of the CCA in that Apple Inc and/or Apple Pty Limited made contracts, arrangements or understandings with app developers containing provisions comprising the Restrictive Terms referred to in paragraph 114 of the Further Amended Statement of Claim, where those provisions had the purpose, or had the effect or likely effect, of substantially lessening competition in one or more of the Australian iOS App Distribution Markets and/or one or more of the Australian iOS In-App Payment Solutions Markets.
- (j) Whether, during the Relevant Period, Apple Inc and/or Apple Pty Limited engaged in conduct in contravention to s 45 of the CCA, by giving effect to the provisions referred to in paragraph (i) above.
- (k) Whether Apple Pty Limited was involved in Apple Inc's contraventions in paragraphs (i) and (j) within the meaning of s 75B of the CCA.

Contravention of s 21

- (l) Whether, during the Relevant Period, Apple Inc and/or Apple Pty Limited has engaged in conduct in trade or commerce in connection with:
 - (i) ~~the supply, or possible supply, of the services pleaded in paragraph 119 of the Further Amended Statement of Claim to app developers, namely distribution of their iOS apps to iOS Device users in Australia and/or associated payment solutions for accepting and processing payments for in-app content within an iOS app, including in Australia;~~
 - (ii) ~~the supply of iOS Devices to consumers iOS device users in Australia;~~
~~and/or~~
 - (iii) ~~the supply of services for the distribution of iOS apps to iOS Device users, including in Australia,~~

that was, in all the circumstances, unconscionable in contravention of s 21 of the ACL by the conduct referred to in paragraphs 120–121 and or 122 of the Further Amended Statement of Claim.



Counterfactual Commission

- (m) Whether, during the Relevant Period, the commission rate charged to Contravening Conduct caused the Second Applicant and iOS App Developer Group Members for purchases price of iOS apps and/or in-app digital content within an iOS app paid by iOS Device Group Members users in Australia to be materially higher than the price that would have existed been lower had the Contravening Conduct not occurred, and if so, what the commission rate would have been.
- (ma) Whether, during the Relevant Period, the Contravening Conduct caused the commissions paid by commission rate charged to the Second Applicant and iOS App Developer Group Members to Apple in respect of purchases of iOS apps and/or in-app for digital in-app content within an iOS apps purchased by iOS Device Group Members to be materially higher than the commissions that would have existed been lower had the Contravening Conduct not occurred, and if so, what the commission rate would have been.
- (n) Whether the Applicants and the Group Members suffered loss or damage by the Contravening Conduct, and if so, what is the proper method of assessment of that loss and damage.

Representative action

16. The Applicants brings this application as representative parties under Part IVA of the *Federal Court of Australia Act 1976* (Cth).
17. The group members to whom this proceeding relates are all persons who at any time during the period from 6 November 2017 to 20 June 2022 (**Relevant Period**):
- (a) purchased:
- (i) an iOS app on an iOS Device from the Australian App Store and/or
- (ii) in-app digital content within such iOS app; and
- suffered loss or damage by reason of the conduct of the Respondents pleaded the Amended Statement of Claim (**iOS Device Group Members**);
- (b) supplied:
- (i) an iOS app on iOS Devices via the Australian App Store; and/or



(ii) in-app digital content within such iOS apps; and

suffered loss or damage by reason of the conduct of the Respondents pleaded in the Further Amended Statement of Claim Claim (**iOS App Developer Group Members**); and

(c) were not, during any part of the Relevant Period, and are not, as at the date of this Application, any of the following:

(i) a related party (as defined by s 228 of the *Corporations Act 2001* (Cth) (**Corporations Act**) of any Respondent;

(ii) a related body corporate (as defined by s 50 of the *Corporations Act*) of any Respondent;

(iii) an associated entity (as defined by s 50AAA of the *Corporations Act*) of any Respondent;

(iv) an officer or associate (as defined by s 9 and s 11 of the *Corporations Act*) of any Respondent; or

(v) a Justice or the Chief Justice of the Federal Court of Australia, or a Justice or the Chief Justice of the High Court of Australia; or

(vi) a solicitor or barrister acting for the Applicants or the Respondents;

(vii) an expert or professional adviser briefed in relation to this proceeding;

(viii) an employee of a litigation funder providing funding for the proceeding; or

(ix) an employee of an insurer providing after the event insurance for any party to the proceeding.

Applicants' address

The Applicants' address for service is:

Place: c/- Phi Finney McDonald, Level 3, 325 Flinders Lane, Melbourne VIC 3000

Email: ~~paul.zawa@phifinneymcdonald.com~~joel.phibb@phifinneymcdonald.com

The First Applicant's address is [REDACTED]

The Second Applicant's address is c/o Maurice Blackburn, Level 8, 179 North Quay, Brisbane QLD 4000.

Service on the Respondent

It is intended to serve this application on all Respondents.

Date: 12 December 2023 ~~23 March 2023~~



Signed by ~~Paul Zawa~~Joel Phibbs
Lawyer for the Applicants



Schedule

VID 341 of 2022

Federal Court of Australia
District Registry: Victoria
Division: General

Respondents

Second Respondent: Apple Pty Limited (ACN 002 510 054)

Date: 12 December 2023 ~~23 March 2023~~