

NOTICE OF FILING AND HEARING

Filing and Hearing Details

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File Title:	BRETT MCDONALD v GOOGLE LLC & ORS
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 342 of 2022

Federal Court of Australia
District Registry: Victoria
Division: General

BRETT MCDONALD

First Applicant

DARK ICE INTERACTIVE PTY LIMITED (ACN 153 761 276)

Second Applicant

GOOGLE LLC (and others 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: ~~Thursday 23 March~~ 2023, 10.15am

Place: ~~Federal Court of Australia, 305 William Street, Melbourne 3000 Law Courts Building,~~
~~184 Phillip Street, Queens' Square, Sydney NSW 2000~~

Filed on behalf of	<u>Brett McDonald and Dark Ice Interactive Pty Ltd (Applicants)</u>
Prepared by	<u>Paul Zawa Joel Phibbs</u>
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Date:

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



Amendments to 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 15 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 (**Google LLC**), the Second Respondent (Google Asia Pacific Pte. Ltd.) (**Google Asia Pacific**) and/or the Third Respondent (Google Payment Australia Pty. Ltd.) (**Google Australia**) engaged in conduct in contravention of s 46(1) of the CCA in that:
 - (a) Google LLC, Google Asia Pacific and/or Google Australia had a substantial degree of power in the Mobile OS Licensing Market;
 - (b) Google LLC, Google Asia Pacific and/or Google Australia had a substantial degree of power in the Australian Android Mobile App Distribution Market or, in the alternative, in the Australian Mobile App Distribution Market); and
 - (c) Google LLC, Google Asia Pacific and/or Google Australia engaged in conduct with respect to Android App distribution that had the purpose, or had or was likely to have had the effect, of substantially lessening competition in Australia in the Australian Android Mobile App Distribution Market (or, in the alternative, in the Australian Mobile App Distribution Market) and/or the Australian Android In-App Payment Solutions Market (or, in the alternative, in the Australian Play Store In-App Payment Solutions Market), the Australian Mobile App Distribution Market, ~~by the conduct referred to as alleged in paragraphs 124–132-134 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 Google Asia Pacific was involved in Google LLC's contravention in paragraph 1 within the meaning of s 75B of the CCA.



3. In the alternative to paragraph 1, a declaration pursuant to s 21 of the *Federal Court Act*, that Google Australia was involved in Google LLC and Google Asia Pacific's contravention in paragraph 1 within the meaning of s 75B of the CCA.
4. A declaration pursuant to s 21 of the *Federal Court Act* that during the Relevant Period, Google LLC, Google Asia Pacific and/or Google Australia engaged in conduct in contravention of s 46(1) of the CCA in that:
 - (a) Google LLC, Google Asia Pacific and / or Google Australia has a substantial degree of power in the Mobile OS Licensing Market;
 - (b) Google LLC, Google Asia Pacific and / or Google Australia has a substantial degree of power in the Australian Android Mobile App Distribution Market (or, in the alternative, in the Australian Mobile App Distribution Market);
 - (c) Google LLC, Google Asia Pacific and/or Google Australia had a substantial degree of power in the Australian Android In-App Payment Solutions Market (or, in the alternative, in the Australian Play Store In-App Payment Solutions Market); and
 - (d) Google LLC, Google Asia Pacific and/or Google Australia engaged in conduct with respect to Play Store In-App Purchases that had the purpose, or had or was likely to have had the effect, of substantially lessening competition in Australia in the Australian Android In-App Payment Solutions Market (or, in the alternative, in the Australian Play Store In-App Payment Solutions Market) and/or the Australian Android Mobile App Distribution Market (or, in the alternative, in the Australian Mobile App Distribution Market), as alleged by the ~~conduct referred to~~ in paragraphs ~~139–147–150~~ of the Further Amended Statement of Claim.
5. In the alternative to paragraph 4, a declaration pursuant to s 21 of the *Federal Court Act*, that Google Asia Pacific was involved in Google LLC's contravention in paragraph 4 within the meaning of s 75B of the CCA.
6. In the alternative to paragraph 4, a declaration pursuant to s 21 of the *Federal Court Act*, that Google Australia was involved in Google LLC and Google Asia Pacific's contravention in paragraph 4 within the meaning of s 75B of the CCA.
7. A declaration pursuant to s 21 of the *Federal Court Act* that, during the Relevant Period, Google LLC and/or Google Asia Pacific engaged in the practice of exclusive dealing in contravention of s 47(1) of the CCA, in that:



- (a) Google LLC and/or Google Asia Pacific supplied (or offered to supply) services to app developers, for the distribution of Android Apps to Android Smart Mobile Device Users, including in Australia;
- (b) Google LLC and/or Google Asia Pacific supply these services to app developers on the condition that they would not acquire services of a particular kind or description from a competitor of Google, including in Australia, being payment solutions for accepting and processing payments for Play Store App Purchases and/or Play Store In-App Purchases from any persons that competed, or but for Google LLC and/or Google Asia Pacific's conduct, would have or would likely have competed, with Google LLC, Google Asia Pacific and/or Google Australia by providing payment solutions other than Google Play Billing for accepting and processing payments for Play Store App Purchases and/or Play Store In-App Purchases; and
- (c) when they engaged in the conduct described in subparagraphs (a) and (b) above, Google LLC and/or Google Asia Pacific had the purpose, or the conduct had or was likely to have had the effect, of substantially lessening competition in Australia in the Australian Android In-App Payment Solutions Market and/or the Australian Android Mobile App Distribution Market or, in the alternative, in the Australian Mobile App Distribution Market and/or the Australian Android In-App Payment Solutions Market (or, in the alternative, in the Australian Play Store In-App Payment Solutions Market).
8. In the alternative to paragraph 7, a declaration pursuant to s 21 of the *Federal Court Act*, that Google Asia Pacific was involved in Google LLC's contravention in paragraph 7 within the meaning of s 75B of the CCA.
9. A declaration pursuant to s 21 of the *Federal Court Act*, that Google Australia was involved in Google LLC and Google Asia Pacific's contravention in paragraph 7 within the meaning of s 75B of the CCA.
10. A declaration pursuant to s 21 of the *Federal Court Act*, that during the Relevant Period, Google LLC engaged in conduct in contravention of s 45(1) of the CCA in that Google LLC made contracts or arrangements or arrived at understandings with OEMs containing provisions comprising the OEM Restrictive Terms referred to in paragraph 83 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 Australia in the the Australian Android Mobile App Distribution Market (or, in the alternative, in the Australian Mobile App Distribution Market).



11. A declaration pursuant to s 21 of the *Federal Court Act*, that during the Relevant Period, Google LLC engaged in conduct in contravention of s 45 of the CCA, by giving effect to the provisions referred to in paragraph 10 above.
12. A declaration pursuant to s 21 of the *Federal Court Act*, that during the Relevant Period, Google LLC, Google Asia Pacific and/or Google Australia engaged in conduct in contravention of s 45(1) of the CCA in that Google LLC, Google Asia Pacific and/or Google Australia made contracts or arrangements or arrived at understandings with app developers containing provisions ~~comprising the App Developer Restrictive Terms~~ referred to in paragraph 98 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 the the Australian Android Mobile App Distribution Market (or, in the alternative, in the Australian Mobile App Distribution Market) and/or the Australian Android In-App Payment Solutions Market (or, in the alternative, in the Australian Play Store In-App Payment Solutions Market).
13. Further or in the alternative to paragraph 12, a declaration pursuant to s 21 of the *Federal Court Act*, that during the Relevant Period, Google LLC, Google Asia Pacific and/or Google Australia engaged in conduct in contravention of s 45(1) of the CCA, by giving effect to the provisions referred to in paragraph 12 above, by the conduct referred to in paragraphs 158 and/or 163 of the Further Amended Statement of Claim.
14. In the alternative to paragraphs 12 and/or 13, a declaration pursuant to s 21 of the *Federal Court Act*, that Google Asia Pacific was involved in Google LLC's contraventions in paragraphs 12 and/or 13 within the meaning of s 75B of the CCA.
15. In the alternative to paragraphs 12 and/or 13, a declaration pursuant to s 21 of the *Federal Court Act*, that Google Australia was involved in Google LLC and/or Google Asia Pacific's contravention in paragraphs 12 and/or 13 within the meaning of s 75B of the CCA.
16. A declaration pursuant to s 21 of the *Federal Court Act*, that during the Relevant Period, Google LLC, Google Asia Pacific and/or Google Australia engaged in conduct (including as a system of conduct and/or pattern of behaviour), in trade or commerce in connection with the supply, or possible supply of the services pleaded in paragraph 167 of the Amended Statement of Claim that was, in all the circumstances, unconscionable in contravention of s 21 of the ACL by the conduct referred to in paragraphs 168 - 170 of the Further Amended Statement of Claim.



17. In the alternative to paragraph 16, a declaration pursuant to s 21 of the *Federal Court Act*, that Google Asia Pacific was involved in Google LLC's contravention in paragraph 16 within the meaning of s 237 of the ACL.
18. In the alternative to paragraph 16, a declaration pursuant to s 21 of the *Federal Court Act*, that Google Australia was involved in Google LLC and Google Asia Pacific's contravention in paragraph 16 within the meaning of s 237 of the ACL.
19. An order pursuant to ss 82 or 87 of the CCA that Google LLC, Google Asia Pacific and/or Google Australia pay to the Applicant and Group Members compensation for the loss or damage suffered by the conduct of Google LLC, Google Asia Pacific and/or Google Australia in contravention of ss 45, 46 and/or 47 of the CCA.
20. An order pursuant to ss 236 or 237 of the ACL that Google LLC, Google Asia Pacific and/or Google Australia pay to the Applicant and Group Members compensation for the loss or damage suffered by the conduct of Google LLC, Google Asia Pacific and/or Google Australia in contravention of s 21 of the ACL.
21. Interest pursuant to s 51A of the *Federal Court of Australia Act 1976* (Cth).
22. Costs.
23. Such further or other orders as this Honourable Court sees fit.

Questions common to claims of Group Members

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

Markets

- (a) Whether, during the Relevant Period, the Mobile OS Licensing Market was a market within the meaning of s 4E of the CCA.
- (b) Whether, during the Relevant Period, the Australian Android Mobile App Distribution Market (or, in the alternative, the Australian Mobile App Distribution Market) was a market within the meaning of s 4E of the CCA.
- (c) Whether, during the Relevant Period, the Australian Android In-App Payment Solutions Market (or in the alternative, the Australian Play Store In-App Payment Solutions Market) was a market within the meaning of s 4E of the CCA.



Contravention of s 46

- (d) Whether, during the Relevant Period, Google LLC, Google Asia Pacific and/or Google Australia engaged in conduct in contravention of s 46(1) of the CCA in that:
- (i) Google LLC, Google Asia Pacific and/or Google Australia had a substantial degree of power in one or more of the Australian Android Mobile App Distribution Market (or in the alternative, in the Australian Mobile App Distribution Market) and/or the Mobile OS Licensing Market; and
 - (ii) Google LLC, Google Asia Pacific and/or Google Australia engaged in conduct that had the purpose, or had or was likely to have had the effect, of substantially lessening competition in the Australian Android Mobile App Distribution Market (or, in the alternative, in the Australian Mobile App Distribution Market), as alleged by the conduct referred to in paragraphs ~~139–147~~ ~~124~~ 135–136 of the Further Amended Statement of Claim.
- (e) Whether Google Asia Pacific was involved in Google LLC's contravention in paragraph (d) within the meaning of s 75B of the CCA.
- (f) Whether Google Australia was involved in Google LLC and Google Asia Pacific's contravention in paragraph (d) within the meaning of s 75B of the CCA.
- (g) Whether, during the Relevant Period, Google LLC, Google Asia Pacific and/or Google Australia engaged in conduct in contravention of s 46(1) of the CCA in that:
- (i) Google LLC, Google Asia Pacific and/or Google Australia had a substantial degree of power in one or more of the Australian Android In-App Payment Solutions Market, the Australian Android Mobile App Distribution Market (or, in the alternative, the Australian Mobile App Distribution Market) and/or, the Mobile OS Licencing Market; and
 - (ii) Google LLC, Google Asia Pacific and/or Google Australia engaged in conduct that had the purpose, or had or was likely to have had the effect, of substantially lessening competition in the Australian Android In-App Payment Solutions Market (or in the alternative, the Australian Play Store In-App Payment Solutions Market), by the conduct referred to as alleged in paragraphs ~~139–~~ ~~147-~~ 148 of the Further Amended Statement of Claim.



- (h) Whether Google Asia Pacific was involved in Google LLC's contravention in paragraph (g) within the meaning of s 75B of the CCA.
- (i) Whether Google Australia was involved in Google LLC and Google Asia Pacific's contravention in paragraph (g) within the meaning of s 75B of the CCA.

Contravention of s 47

- (j) Whether, during the Relevant Period, Google LLC and/or Google Asia Pacific engaged in the practice of exclusive dealing in contravention of s 47(1) of the CCA, in that:

- (i) Google LLC and/or Google Asia Pacific supplied (or offered to supply) services to app developers, being the distribution of app developers' Android Apps to Android Smart Device users, including in Australia,

on the condition that:

- (ii) they would not acquire services of a particular kind or description from a competitor of Google LLC and/or Google Asia Pacific (having regard to s 47(13(b)), including in Australia, being payment solutions for accepting and processing payments for Play Store App Purchases and/or Play Store In-App Purchases from other persons that, but for Google LLC and/or Google Asia Pacific's conduct, competed or would have or would likely have competed, with the Google LLC, Google Asia Pacific and/or Google Australia by providing payment solutions other than Google Play Billing for accepting and processing payments for Play Store App Purchases and/or Play Store In-App Purchases,

where the engaging in that conduct by Google LLC and/or Google Asia Pacific had the purpose, or had or was likely to have the effect, of substantially lessening competition in one or more of the Australian Android In-App Payment Solutions Market (or in the alternative, the Australian Play Store In-App Payment Solutions Market) or the Australian Android Mobile App Distribution Market (or, in the alternative, in the Australian Mobile App Distribution Market).

- (k) Whether Google Asia Pacific was involved in Google LLC's contravention in paragraph (j) within the meaning of s 75B of the CCA.
- (l) Whether Google Australia was involved in Google LLC and Google Asia Pacific's contravention in paragraph (j) within the meaning of s 75B of the CCA.



Contravention of s 45

- (m) Whether, during the Relevant Period, Google LLC engaged in conduct in contravention of s 45 of the CCA in that Google LLC made contracts with OEMs containing provisions comprising the OEM Restrictive Terms referred to in paragraph 83 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 the Australian Android Mobile App Distribution Market (or in the alternative, in the Australian Mobile App Distribution Market).
- (n) Whether, during the Relevant Period, Google LLC engaged in conduct in contravention to s 45 of the CCA, by giving effect to the provisions referred to in paragraph (m) above.
- (o) Whether, during the Relevant Period, Google LLC, Google Asia Pacific and/or Google Australia engaged in conduct in contravention of s 45 of the CCA in that Google LLC, Google Asia Pacific and/or Google Australia made contracts with app developers containing provisions comprising the App Developer Restrictive Terms referred to in paragraph 98 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 the Australian Android Mobile App Distribution Market, (or in the alternative, in the Australian Mobile App Distribution Market).
- (p) Whether, during the Relevant Period, Google LLC, Google Asia Pacific and/or Google Australia engaged in conduct in contravention to s 45 of the CCA, by giving effect to the provisions referred to in paragraph (o) above.
- (q) Whether Google Asia Pacific was involved in Google LLC's contraventions in paragraphs (o) and (p) within the meaning of s 75B of the CCA.
- (r) Whether Google Australia was involved in Google LLC and/or Google Asia Pacific's contravention in paragraphs (o) and (p) within the meaning of s 75B of the CCA.

Contravention of s 21

- (s) Whether, during the Relevant Period, Google LLC, Google Asia Pacific and/or Google Australia engaged in conduct in trade or commerce in connection with the supply or possible supply of:



- (i) services to OEMs for the licensing of the Android OS, including in Australia;
- (ii) services to app developers for the distribution of Android Apps to Android Smart Mobile Device Users, including in Australia;
- (iii) services to app developers for payment solutions for accepting and processing payments for the purchase of digital content within an Android App, including in Australia; and
- (iv) services to consumers for the distribution of Android Apps from app developers, 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 167–170 of the Further Amended Statement of Claim.

- (t) Whether Google Asia Pacific was involved in Google LLC's contravention in paragraph (s) within the meaning of s 75B of the CCA.
- (u) Whether Google Australia was involved in Google LLC and Google Asia Pacific's contravention in paragraph (s) within the meaning of s 75B of the CCA.

Counterfactual Commission

- (v) Whether, during the Relevant Period, the ~~Contravening Conduct~~ caused commission rate paid to Google by Second Applicant and Android App Developer Group Members on purchases the purchase price of Android Apps and/or in-app digital content within Android app paid by Android Device Group Members in Australia would have been lower ~~to be materially higher than the price that would have existed had the Contravening Conduct not occurred,~~ and if so, what the commission rate would have been;
- (va) Whether, during, the Relevant Period, ~~Contravening Conduct~~ caused the commissions rate paid by Android App Developer Group Members to Google by the Second Applicant and Android App Developer Group Members on in-app digital content within in respect of Android Apps and/or in-app digital content within an Android App purchased by Android Device Group Members would have been lower ~~to be materially higher than the commissions that would have existed had the Contravening Conduct not occurred,~~ and if so, what the commission rate would have been.;



- (w) 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

25. The Applicants brings this application as representative parties under Part IVA of the *Federal Court of Australia Act 1976 (Cth)*.

26. 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 Android App on an Android Smart Mobile Device from the Australian Play Store; and/or

(ii) in-app digital content within such Android App; and

suffered loss or damage by reason of the conduct of the Respondents pleaded in the Amended Statement of Claim (**Android Device Group Members**);

(b) supplied:

(i) an Android App on an Android Device via the Australian Play Store; and/or

(ii) in-app digital content within such Android App; and

suffered loss or damage by reason of the conduct of the Respondents pleaded in the Amended Statement of Claim (**Android 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;
- (vi) a solicitor or barrister acting for the Applicants or 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~~joel.phibbs@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: ~~23 March~~ 15 December 2023



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



Schedule

VID 342 of 2022

Federal Court of Australia

District Registry: Victoria

Division: General

Respondents

Second Respondent:

Google Asia Pacific Pte. Ltd. (200817984R)

Third Respondent:

Google Payment Australia Pty Ltd (ACN 122 560 123)

Date: ~~23 March~~ 15 December 2023