

OPT OUT NOTICE

FEDERAL COURT OF AUSTRALIA

Australian Google Play Store Class Action (VID342/2022)

1. Why is this notice important?

A class action has been commenced in the Federal Court of Australia by Brett McDonald and Dark Ice Interactive Pty Limited against Google LLC, Google Asia Pacific Pte Ltd and Google Payment Australia Pty Ltd (together, **Google**). The action is brought on behalf of app developers who sold their apps and in-app content via the Australian Play Store, as well as eligible users of Android smartphones and tablets who purchased Android apps distributed via the Australian Play Store and/or in-app digital content in Android apps distributed via the Australian Play Store, from 6 November 2017 to 20 June 2022 (**Relevant Period**). The action alleges that Google engaged in conduct in contravention of Australian law, which enabled it to charge fees on purchases of Android apps and in-app digital content from Android apps distributed via the Australian Play Store which were materially higher than the fees it would have been able to charge if not for the allegedly contravening conduct. The action seeks compensation for eligible purchasers and app developers from Google for the alleged excess fees charged.

The Federal Court has ordered that this notice be published for the information of persons who might be members of the class on whose behalf the action is brought and may be affected by the action. **You should read this notice carefully. Any questions you have concerning the matters contained in this notice should not be directed to the Court.** If there is anything in it that you do not understand, you should seek legal advice.

2. What is a class action?

A class action is an action that is brought by one person or a small number of persons (“**Applicant(s)**”) on their own behalf and on behalf of a class of people (“**class members**”) against another person (“**Respondent**”) where the Applicants and the class members have similar claims against the Respondent.

Class members in a class action **are not** individually responsible for the legal costs associated with bringing the class action. In a class action, only the Applicants are responsible for the costs.

Class members are “bound” by the outcome in the class action, unless they have opted out of the proceeding. A binding result can happen in two ways being either a *judgment* following a trial, or a *settlement* at any time. If there is a judgment or a settlement of a class action class members *will not* be able pursue the same claims and *may not* be

able to pursue similar or related claims against the respondent in other legal proceedings. Class members should note that:

- (a) in a *judgment* following trial, the Court will decide various factual and legal issues in respect of the claims made by the applicants and class members. Unless those decisions are successfully appealed they bind the applicants, class members and the respondent. Importantly, if there are other proceedings between a class member and the respondent, it may be that neither of them will be permitted to raise arguments in that proceeding which are inconsistent with a factual or legal issue decided in the class action.
- (b) in a *settlement* of a class action, where the settlement provides for compensation to class members it may extinguish *all* rights to compensation which a class member might have against the respondent which arise in any way out of the events or transactions which are the subject-matter of the class action.

If you consider that you have claims against Google which are based in your individual circumstances or otherwise additional to the claims described in the class action, then it is important that you seek independent legal advice about the potential binding effects of the class action **before** the deadline for opting out (see below).

3. What is this class action?

This class action, the Australian Play Store class action, is brought by the Applicants, Brett McDonald and Dark Ice Interactive Pty Limited, on their own behalf and on behalf of all persons who are “class members” as defined in the proceeding.

The action concerns Google’s conduct in relation to the Australian Play Store. Google Asia Pacific Pte Ltd is the Google entity that contracts with app developers in relation to Android apps distributed through the Play Store to users in Australia. Google Payment Australia Pty Ltd, a subsidiary of Google LLC, accepts and facilitates the processing of payments for Play Store apps and in-app purchases in Australia. During part of the Relevant Period, Google charged developers a 30% fee on these purchases, or in some cases, 15%.

The Applicants allege that from 6 November 2017 to 20 June 2022:

- Google had a substantial degree of power in a market for the supply of services for the distribution of Android apps to users of Android smartphones and tablets (the **Australian Android Mobile App Distribution Market**), a market for the supply of licences for mobile operating systems (the **Mobile OS Licensing Market**), and a market for the supply of services to Android app developers for accepting and processing payments for the purchase of digital content within an Android App (the **Australian Android In-App Payment Solutions Market**).
- Google entered into agreements with original equipment manufacturers (**OEMs**) and Android app developers and engaged in conduct which had the purpose,

effect or likely effect of substantially lessening competition in the markets described above.

- As well, Google was able to charge fees on the purchase of Android apps via the Australian Play Store and in-app purchases within those apps materially higher than the fees it would have been able to charge if not for the allegedly contravening conduct.
 - By the above conduct, Google, among other things:
 - entered into contracts which, by imposing restrictive terms on OEMs and Android app developers, prevented or hindered those developers from distributing Android apps other than through the Australian Play Store and from using payment solutions other than those controlled by Google within Android apps distributed via the Australian Play Store; and
 - supplied services to app developers for the distribution of Android apps on the condition that those developers not use payment solutions other than those controlled by Google for payments of Android app purchases via the Australian Play Store and of in-app purchases from Android apps distributed via the Australian Play Store.
 - The above conduct had the purpose, effect or likely effect of substantially lessening competition in the following markets:
 - the Australian Android Mobile App Distribution Market; and/or
 - the Australian Android In-App Payment Solutions Market,
- in contravention of ss. 45, 46 and 47 of the *Competition and Consumer Act 2010* (Cth).
- This conduct resulted in materially higher prices for users who purchased apps and in-app digital content through the Australian Play Store.
 - The above conduct also was, in all the circumstances, unconscionable in contravention of s. 21 of the Australian Consumer Law.

The Applicants seek compensation for eligible purchasers and app developers from Google for the alleged excess fees charged.

The respondents to the class action are Google LLC, Google Asia Pacific Pte Ltd and Google Payment Australia Pty Ltd. The respondents deny that they have engaged in the alleged contravening conduct or that such conduct resulted in materially higher prices and are defending the class action.

A first stage trial of the class action (**First Stage Trial**) is scheduled to begin on 18 March 2024 and will run for approximately 16 weeks. At the First Stage Trial, the Court

will decide if Google contravened the provisions of the *Competition and Consumer Act 2010* (Cth) and Australian Consumer Law listed above, and if Google's conduct allowed it to charge fees on purchases of Android apps and in-app digital content from Android apps materially higher than the fees would have been if not for the allegedly contravening conduct.

The First Stage Trial of the class action will be heard together with a trial in a separate but related legal action that has been commenced by Epic Games, Inc. and Epic Games International S.à r.l. (together, **Epic Games**), in which Epic Games also alleges that Google contravened the same provisions of the *Competition and Consumer Act 2010* (Cth) and Australian Consumer Law listed above.

The Applicants cannot, without leave of the Court, adduce any evidence on these issues except for expert economic evidence.

The parties have agreed that the Applicants and class members (who have not opted out) will be bound by all findings of fact, findings of law and mixed findings of fact and law made as part of the First Stage Trial.

If the class action is successful at the first stage trial, a second stage trial may be held at a later date to determine the loss or damage suffered by class members (if any) as a result of Google's conduct.

A potential conflict of interest may arise between app developer class members and app purchaser class members on questions relating to the allocation of loss and damage between them, including in relation to questions concerning the extent to which app developer class members would have passed on any reduction in fees to app purchaser class members. The Applicants will take appropriate steps to manage any potential conflict of interest.

4. What is 'Opt Out'?

The applicant in a class action does not need to seek the consent of class members to commence a class action on their behalf or to identify a specific class member. However, class members can cease to be class members by opting out of the class action. An explanation of how class members are able to opt out is found below in the section headed "How can you opt out of the proceeding".

5. Are you a class member?

You are a class member if at any time during the Relevant Period you:

- Either:
 - Purchased: (i) an app on an Android smartphone or tablet from the Australian Play Store; and/or (ii) in-app digital content within such an app; and suffered loss or damage by reason of the conduct of Google pleaded in the Applicants' originating application and statement of claim; or

- Supplied: (i) an app on Android smartphones or tablets via the Australian Play Store; and/or (ii) in-app digital content within such an Android app; and suffered loss or damage by reason of the conduct of Google pleaded in the Applicants' originating application and statement of claim; and
- Were not, during any part of the Relevant Period, and are not, as at the date of the Applicants' originating application, any of the following:
 - a related party (as defined by s 228 of the *Corporations Act 2001* (Cth) (**Corporations Act**) of any Respondent;
 - a related body corporate (as defined by s 50 of the *Corporations Act*) of any Respondent;
 - an associated entity (as defined by s 50AAA of the *Corporations Act*) of any Respondent;
 - an officer or associate (as defined by s 9 and s 11 of the *Corporations Act*) of any Respondent; or
 - 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;
 - a solicitor or barrister acting for the Applicants or the Respondents;
 - an expert or professional adviser briefed in relation to this proceeding;
 - an employee or officer of a litigation funder providing funding for the proceeding; or
 - an employee or officer of an insurer providing after the event insurance for any party to the proceeding.

If you are unsure whether or not you are a class member, you should in the first instance visit the website for the class action (www.playstoreclassaction.com.au). If you are still unsure after visiting the website, you may contact the Applicants' lawyers, Phi Finney McDonald and Maurice Blackburn on 1800 879 141 or email consumer@playstoreclassaction.com.au (if you are a consumer / app purchaser) or developer@playstoreclassaction.com.au (if you are an app developer) or seek your own legal advice without delay. Phi Finney McDonald and Maurice Blackburn are law firms acting jointly for the Applicants.

You may also be excluded from participating in the class action if you have released Google from any claims related to the facts underlying this class action, for example, in the context of a class action overseas.

6. Funding of the class action

The class action is being funded partly by a litigation funder, CF FLA Australia Investments 2 Pty Ltd, which is an Australian proprietary company owned and controlled by funds managed by Fortress Investment Group LLC (**CF FLA**). This means that the Applicants (known as **Funded Class Members**) have entered into a Litigation Funding Agreement (**LFA**) with CF FLA. Class members who have not entered into a LFA with CF FLA are known as unfunded class members (**Unfunded Class Members**). The Applicants, as Funded Class Members have also entered into a Conditional Legal Costs Agreement with Phi Finney McDonald or Maurice Blackburn.

Pursuant to the LFA, CF FLA will:

- (a) pay the disbursements of the class action, for example the costs of the Applicants' barristers and expert witnesses;
- (b) pay a portion of the Applicants' lawyers' legal fees;
- (c) indemnify the Applicants against any orders to pay Google's costs (**Adverse Costs Order**);
- (d) provide any security for Google's costs that is required;
- (e) pay for other costs associated with the class action, for example the costs incurred in securing or providing insurance against any Adverse Costs Order; and
- (f) pay any GST on the above costs or expenses being incurred.

Under the above arrangements, Phi Finney McDonald and Maurice Blackburn are deferring payment of the portion of their legal fees that are not being paid by CF FLA.

If the class action results in an award of damages or a settlement sum payable to class members, the LFA provides that CF FLA is entitled to receive out of the share of the settlement or judgment amount of the Funded Class Members:

- (a) reimbursement of the amounts paid by CF FLA under the LFA, which are summarised above; and
- (b) a funding commission, being a percentage of the damages or a settlement sum payable to class members,

(together, **CF FLA Entitlement**).

Under the LFA, if the class action results in an award of damages or a settlement sum payable to class members, the Applicants agree that they will ask the Court to make a "common fund order" (**CFO**). A CFO, in general terms, requires all class members who receive compensation in the class action (i.e. both Funded Class Members and Unfunded Class Members) to pay to CF FLA a percentage of any compensation to which the class member becomes entitled as commission for funding the class action.

The Court may choose to make a CFO, or alternatively, make a “funding equalisation order” (**FEO**). Under an FEO, only Funded Class Members are liable to pay CF FLA. The Court would calculate the dollar-value of the CF FLA Entitlement payable by Funded Class Members and pro rate that sum over the entire class of Funded Class Members and Unfunded Class Members so that the commission payable by Funded Class Members to CF FLA under their LFAs is effectively paid (in equal shares) by all class members (including Unfunded Class Members).

The return to class members will differ depending on whether the Court makes a CFO or an FEO.

The total of any amounts deducted from compensation payable to class members for legal costs and funding commission will never exceed the amount a class member receives in the event of a successful outcome. **That is, you will never be out of pocket by remaining in the class action.**

7. Will you be liable for legal costs if you remain a class member?

You will **not become liable for any legal costs** simply by remaining as a class member for the determination of the common questions. However:

- (a) as outlined in section 6 above, if any compensation becomes payable to you as a result of any order, judgment or settlement in the class action, the Court may make an order that some of that compensation be used to help pay a share of the costs which are incurred by the Applicant in running the class action but which are not able to be recovered from the respondents. Any such amounts will only be payable in the event of a successful outcome by way of a deduction from any compensation to which you become entitled, and will never exceed the amount of compensation to which you may otherwise become entitled. The Court will assess whether any amounts proposed to be deducted are fair and reasonable. You will be given a notice at that time informing you of the amount which it is proposed to be deducted and given an opportunity to tell the Court if you agree or disagree with what is proposed.; and
- (b) class actions are often settled out of court. If this occurs in the class action, you may be able to claim from the settlement amount without retaining a lawyer.

After determination of the common questions, if the preparation or finalisation of your personal claim requires work to be done in relation to issues that are specific to your claim, you can engage Phi Finney McDonald and Maurice Blackburn or other lawyers to do that work for you.

A copy of the terms on which Phi Finney McDonald and Maurice Blackburn are acting in the class action and on which CF FLA is funding the class action may be obtained from them on the number shown below.

8. What will happen if you choose to remain a class member?

Unless you opt out, you will be bound by any settlement or judgment of the class action. If the class action is successful you will be entitled to share in the benefit of any order, judgment or settlement in favour of the Applicant and class members, although you may have to satisfy certain conditions before your entitlement arises. If the action is unsuccessful or is not as successful as you might have wished, you will not be able to pursue the same claims and may not be able to pursue related claims against the respondent in other legal proceedings.

9. What class members need to do

(a) How you can remain a class member

If you wish to remain a class member there is **nothing you need to do** at the present time. The Applicant will continue to bring the proceeding on your behalf up to the point where the Court determines those questions that are common to the claims of the Applicant and the class members. However, you are invited to visit the website for the class action (playstoreclassaction.com.au) and register your details so that future notices about the class action can be sent to your preferred address.

(b) How you can opt out of the class action

If you do not wish to remain a class member you must opt out of the class action. If you opt out you will not be bound by or entitled to share in the benefit of any order, judgment or settlement in the class action, but you will be at liberty to bring your own claim against the respondents, provided that you issue Court proceedings within the time limit applicable to your claim. If you wish to bring your own claim against the respondents, you should seek your own legal advice about your claim and the applicable time limit **prior** to opting out.

If you wish to opt out of the class action you **must** do so by completing an “**Opt Out Form**” in the form shown in Schedule 1 below (Form 21 of the Court’s approved forms), then returning it to the Registrar of the Federal Court of Australia at the address on the form. **IMPORTANT: the Opt Out Form must reach the Registrar by no later than 4.00 pm (AEDT) on Friday, 23 February 2024**, otherwise it will not be effective. Each class member seeking to opt out should fill out a separate Opt Out Form. If you are opting out on behalf of a company or business please provide your name, the name of the company or business and your position within the company or business (e.g. director or partner).

10. Where can you obtain copies of relevant documents?

Copies of pleadings filed by the parties, including the application, the statement of claim, and the defence, may be obtained by:

- (a) downloading them from www.playstoreclassaction.com.au;
- (b) inspecting them between 9am and 5pm at one of the offices of Phi Finney McDonald or Maurice Blackburn, contact details for which are available from www.playstoreclassaction.com.au or by emailing consumer@playstoreclassaction.com.au (if you are a consumer / app purchaser) or developer@playstoreclassaction.com.au (if you are an app developer); or
- (c) by contacting a District Registry of the Federal Court (contact details are available www.fedcourt.gov.au) and paying the appropriate inspection fee.

Please consider the above matters carefully. If there is anything of which you are unsure, you should in the first instance visit the website for the class action (playstoreclassaction.com.au). If you are still unsure after visiting the website, you may contact Phi Finney McDonald and Maurice Blackburn on 1800 879 141 or email consumer@playstoreclassaction.com.au (if you are a consumer / app purchaser) or developer@playstoreclassaction.com.au (if you are an app developer) or seek your own legal advice. You should not delay in making your decision.

