Federal Court of Australia

Epic Games, Inc v Apple Inc [2021] FCAFC 122

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| Appeal from: | *Epic Games, Inc v Apple Inc (Stay Application)* [2021] FCA 338 |
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| File number: | NSD 325 of 2021 |
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| Judgment of: | **MIDDLETON, JAGOT AND MOSHINSKY JJ** |
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| Date of judgment: | 9 July 2021 |
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| Catchwords: | **PRIVATE INTERNATIONAL LAW** — stay application — proceedings alleging contraventions of Pt IV of *Competition and Consumer Act 2010* (Cth) and s 21 of the Australian Consumer Law — where exclusive jurisdiction clause requires litigation relating to app developer agreement to occur in Northern District of California — whether there are strong reasons to refuse to grant the stay — whether there is a public policy that the proceeding should be heard in the Federal Court of Australia — whether clearly inappropriate forum — stay refused |
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| Legislation: | *Competition and Consumer Act 2010* (Cth)  *Competition Policy Reform Act 1995* (Cth)  *Corporations Act 2001* (Cth)  *Federal Court of Australia Act 1976* (Cth)  *Federal Court Rules 2011* (Cth)  *International Arbitration Act 1974* (Cth)  *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth)  *Jurisdiction of Courts (Miscellaneous Amendments) Act 1987* (Cth)  *Trade Practices Act 1974* (Cth)  *Trade Practices Amendment Act (No 1) 2001* (Cth)  *Trade Practices Legislation Amendment Act 2008* (Cth) |
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| Cases cited: | *Akai Pty Ltd v People’s Insurance Co Ltd* [1996] HCA 39; (1996) 188 CLR 418  *Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd* [2019] NSWCA 61; (2019) 99 NSWLR 419  *Casaceli v Natuzzi SpA* [2012] FCA 691; (2012) 292 ALR 143  *DA Technology Australia Pty Ltd v Discreet Logic Inc* [1994] FCA 101  *eBay Inc v MercExchange* *LLC* 547 US 388 (2006)  *Faxtech Pty Ltd v ITL Optronics Ltd* [2011] FCA 1320  *Global Partners Fund Ltd v Babcock & Brown Ltd* *(in liq)* [2010] NSWCA 196  *Home Ice Cream Pty Ltd v McNabb Technologies LLC (No 2)* [2018] FCA 1093  *House v The King* [1936] HCA 40; (1936) 55 CLR 499  *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248  *Incitec Ltd v Alkimos Shipping Corporation* [2004] FCA 698; (2004) 138 FCR 496  *Petersville Ltd v Peters (WA) Ltd* [1997] ATPR 41-566  *Re Douglas Webber Events Pty Ltd* [2014] NSWSC 1544; (2014) 291 FLR 173  *Re Wakim; Ex parte McNally* [1999] HCA 27;(1999) 198 CLR 511  *Stevens v Head* [1993] HCA 19; (1993) 176 CLR 433  *The “Bremen” v Zapata Off-Shore Co* 407 US1 (1972)  *Truth About Motorways v Macquarie Investment Management Ltd* [2000] HCA 11; (2000) 200 CLR 216  *Voth v Manildra Flour Mills Pty Ltd* [1990] HCA 55; (1990) 171 CLR 538 |
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|  | Davies, Bell, Brereton & Douglas, *Nygh’s Conflict of Laws* (10th ed, 2019) |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Economic Regulator, Competition and Access |
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| Number of paragraphs: | 126 |
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| Date of hearing: | 9 June 2021 |
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| Counsel for the Appellants: | Mr N J Young QC with Mr N De Young SC, Mr C Brown and Ms D Forrester |
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| Solicitor for the Appellants: | Clifford Chance |
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| Counsel for the Respondents: | Mr S J Free SC with Mr C E Bannan and Ms Z M Hillman |
|  |  |
| Solicitor for the Respondents: | Clayton Utz |
|  |  |
| Counsel for the First Intervener | Mr M Hodge SC with Mr D Roche |
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| Solicitor for the First Intervener | Australian Government Solicitor |
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| Counsel for the Second Intervener | Mr N C Hutley SC with Mr J J Hutton and Ms C Trahanas |
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| Solicitor for the Second Intervener | Corrs Chambers Westgarth |

ORDERS

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|  | | NSD 325 of 2021 |
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| BETWEEN: | EPIC GAMES, INC  First Appellant  EPIC GAMES INTERNATIONAL S.À.R.L  Second Appellant | |
| AND: | APPLE INC  First Respondent  APPLE PTY LIMITED (ACN 002 510 054)  Second Respondent | |

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| order made by: | MIDDLETON, JAGOT AND MOSHINSKY JJ |
| DATE OF ORDER: | 9 july 2021 |

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. Orders 1 to 5 of the primary judge made on 9 April 2021 be set aside and in lieu thereof, the interlocutory application filed on 22 December 2020 be dismissed.
3. The respondents pay the appellants’ costs of the interlocutory application and of the appeal as taxed, assessed or otherwise agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

# INTRODUCTION

1. This is an appeal from a decision of the primary judge granting Apple Inc (‘**Apple**’) and Apple Pty Limited a stay of a proceeding brought against them in this Court by Epic Games, Inc. (‘**Epic**’) and Epic Games International S.à.r.l. relating to the online video game, *Fortnite*: *Epic Games, Inc v Apple Inc (Stay Application)* [2021] FCA 338 (‘**J**’).

# BACKGROUND

1. On 16 November 2020, Epic commenced proceedings in the Federal Court alleging that Apple has contravened and will continue to contravene various provisions of the *Competition and Consumer Act 2010* (Cth) (‘**CCA**’) by conduct in relation to its App Store on iOS devices (ie iPhones and iPads). In particular, Epic alleges that Apple has contravened s 46 which prohibits a corporation with a substantial degree of power in a market in Australia from engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition, s 47 which prohibits a corporation from engaging in the practice of exclusive dealing, and s 45 which prohibits, among other things, a party from making a contract which has the purpose, effect or likely effect of substantially lessening competition (‘**alleged Pt IV contraventions**’). Epic also alleges that Apple has contravened s 21 of the *Australian Consumer Law* (‘**ACL**’), being Sch 2 to the CCA, which prohibits unconscionable conduct (‘**alleged ACL contravention**’).
2. We briefly set out the background to the dispute which was described by the primary judge at [4]-[7] J. This background is important to understand as it provides an appreciation of what is involved in the proceeding not only from the point of view of the parties, but also from the point of view of Australian consumers.
3. Epic is a developer of gaming apps, including for use on Apple’s iOS devices. Epic develops games for a wide variety of platforms such as Android devices, Sony’s PlayStation consoles, Microsoft’s Xbox consoles, the Nintendo Switch as well as PCs. The conduct Epic complains of is twofold: Apple requires developers of apps for use on Australian iOS devices only to distribute those apps through Apple’s Australian App Store, and Apple requires that any app developer use only Apple’s in-app payment processing system for the purchase of in-app content. Typically, Apple deducts as commission 30% of any such payment which results in a very substantial flow of revenue to Apple from its Australian users. If Epic’s suit were successful it would result in Australian users of iOS devices being able to download apps to their devices from locations other than Apple’s Australian App Store and it would mean that other firms would be able to provide payment processing systems for in-app content within the environment of iOS apps.
4. The relationship between Apple and Epic is presently governed by an agreement known as the Apple Developer Program License Agreement (‘**DPLA**’). The DPLA imposes the obligations just described by cll 3.2(g), 3.3.3, 7.2 and cl 3.4(a) in Sch 2 to the DPLA. Similar obligations are imposed on the developer by cll 3.1.1 and 3.2.2(i) of the App Store Review Guidelines. By cl 7.3(iv) of Sch 2 to the DPLA Apple is empowered to cease distributing apps to end users if the developer has breached the App Store Review Guidelines.
5. Epic has a contractual agreement with Apple to litigate in the Northern District of California which gives rise to the issues in this appeal. This agreement is embodied in cl 14.10 of the DPLA (which can be referred to as the exclusive jurisdiction clause) and, relevantly, is in these terms:

Any litigation or other dispute resolution between You and Apple arising out of or relating to this Agreement, the Apple Software, or Your relationship with Apple will take place in the Northern District of California, and You and Apple hereby consent to the personal jurisdiction of and exclusive venue in the state and federal courts within that District with respect any such litigation or dispute resolution. This Agreement will be governed by and construed in accordance with the laws of the United States and the State of California, except that body of California law concerning conflicts of law.

1. After setting out this background to the dispute between the parties, the primary judge then detailed the “immediate irritant” which generated the litigation as follows:

[6] The immediate irritant which has generated this litigation was Epic’s decision to introduce into the iOS version of its popular game, *Fortnite*, a facility for making in-app purchases using a payment processing system of its own devising. It did so by means of a software update which included a hotfix which provided an option for in-app purchases to be processed via Epic’s own system. The software update was made available to all iOS devices with *Fortnite* installed on them. At the same time, fresh versions of *Fortnite* which were downloaded from the App Store (including in Australia) came equipped with this new feature. The hotfix was activated on 13 August 2020. This was a direct breach of the App Store Review Guidelines and, as explained in the preceding paragraph, Apple was authorised under cl 7.3(iv) of Schedule 2 to the DPLA to cease distributing *Fortnite*.

[7] Apple responded the same day the hotfix was activated by preventing any further downloading of *Fortnite* from the App Store (in all jurisdictions) and preventing any updating of *Fortnite* on devices where it had already been installed. Due to the time difference, this removal occurred on 14 August 2020 in Australia. The ability of players of *Fortnite* to play against each other is dependent on the version being played on differing platforms being compatible. By preventing *Fortnite* on iOS devices from being updated, the amenity of the game for iOS device users will be progressively degraded. For instance, no new content can be introduced into the iOS version of the game and iOS device users cannot play with those playing *Fornite* on other platforms who have installed any updates since August 2020. There are approximately 3 million users of *Fortnite* on iOS devices in Australia, 116 million on iOS devices worldwide and 350 million across all platforms worldwide.

1. On 13 August 2020, before commencing proceedings in this Court, Epic commenced proceedings for injunctive relief in the United States District Court for the Northern District of California (‘**US Court**’) (‘**US proceeding**’). In the US proceeding, Epic alleges the effect of the DPLA is to maintain Apple’s monopolisation of certain markets contrary to the requirements of the United States Sherman Act, 15 USC §§1-2 and both the Californian Cartwright Act, Cal Bus & Prof Code §§16700 et seq and Unfair Competition Law, Cal Bus & Prof Code §§17200 et seq. As the primary judge observed (at [8] J), these statutes contain prohibitions that are similar to, but by no means identical with, those in Pt IV of the CCA.
2. The hearing in the US proceeding commenced on 3 May 2021 and judgment is currently reserved.
3. On 9 April 2021, the primary judge ordered that the proceeding in this Court be temporarily stayed for a period of 3 months at which time the proceeding was to be permanently stayed if Epic had not commenced a suit in the Northern District of California alleging contraventions of Pt IV of the CCA or s 21 of the ACL. If Epic had commenced a suit alleging such contraventions by this time, then the stay would be continued with liberty to apply in the event that the court in the Northern District of California declined to determine the allegations. The primary judge granted leave to appeal from the orders he pronounced.
4. The primary judge’s reasons for making these orders can be summarised as follows:
5. the primary judge found that the exclusive jurisdiction clause covered the dispute: at [12] J;
6. the primary judge did not accept Epic’s submission that the inclusion of the exclusive jurisdiction clause in the DPLA constituted unconscionable conduct on the part of Apple such that the clause was unenforceable by reason of s 21 of the ACL: at [17] J; and
7. the primary judge found that Epic failed to demonstrate strong reasons to refuse to grant the stay: at [42], [44] J. In reaching this conclusion, the primary judge referred to the statement of the majority of the High Court in *Akai Pty Ltd v People’s Insurance Co Ltd* [1996] HCA 39;(1996) 188 CLR 418 (‘***Akai***’) at 445 that a stay “may be refused where the foreign jurisdiction clause offends the public policy of the forum whether evinced by statute or declared by judicial decision” and determined that, whilst “distinctly troubled” in granting the stay, the state of the law concerning choice of forum clauses did not permit him to refuse Apple’s application: at [55], [64] J.
8. We also note the primary judge found that Apple’s application for a stay of the proceedings on forum non conveniens grounds did not arise for determination although observed that, if it had arisen, he would have found that Apple had not shown this Court to be a clearly inappropriate forum: at [65] J.
9. Most of the attention before the primary judge and on the appeal was directed to the alleged Pt IV contraventions. In fact, the primary judge did not see the need to include a discussion of the alleged ACL contravention: see [64] J. Whilst we will make mention of the alleged ACL contravention, the determinative feature of the proceeding for present purposes is the alleged Pt IV contraventions. No one suggested that if it was inappropriate to stay the proceeding because of the existence of the alleged Pt IV contraventions, then that approach would be influenced by the alleged ACL contravention also continuing to be heard in this Court. In other words, having reached the conclusion that a stay is not appropriate in relation to the alleged Pt IV contraventions, the existence of the alleged ACL contravention is of no significance as it will remain as part of the proceeding. It may well be (as argued by Epic in relation to ground 7 of the notice of appeal) that as the alleged ACL contravention involves a consideration of norms of conduct involving Australian business standards, this is a policy factor in favour of not enforcing an exclusive choice of forum clause if that involves a foreign court hearing the proceeding. We do not need to finally decide that separate factor in isolation, but we shall return to these public policy considerations later in these reasons when discussing the approach taken by the primary judge.
10. On 16 April 2021, Epic filed a notice of appeal alleging, among other things, that the primary judge erred in failing to give effect to “overriding” public policy considerations that militated against the granting of a stay, and in failing to find that there were strong reasons to permit the proceeding to continue in this Court notwithstanding the existence of the exclusive jurisdiction clause.
11. On 7 May 2021, Apple filed a notice of contention in respect of the primary judge’s findings as to whether or not a court in the Northern District of California would stay claims brought by Epic under Australian law, and that a stay was not justified on forum non conveniens grounds.
12. On 9 June 2021, the primary judge’s orders were temporarily stayed pending determination of the appeal or further order.
13. On 12 May 2021, leave was granted to the Australian Competition and Consumer Commission (‘**Commission**’) under r 36.32 of the *Federal Court Rules 2011* (Cth) to intervene as a non-party and make written submissions.
14. On 9 June 2021, leave to intervene and make written submissions was also granted to Google Payment Australia Pty Ltd (‘**Google**’).
15. We have considered the submissions for the Commission and Google but they do not add anything of substance to the submissions of Epic and Apple.

# OUR VIEWS IN SUMMARY

1. For the reasons that follow, we have determined that the primary judge erred in granting a stay in circumstances where there were strong reasons not to do so, including because (as contemplated in *Akai* at 445) enforcement of the exclusive jurisdiction clause would offend the public policy of the forum. We would dismiss Apple’s notice of contention.
2. In reaching this conclusion we have not found it helpful or necessary to consider the various authorities from other jurisdictions referred to by the parties or the interveners. The determination of this appeal is to be made on the basis of existing principles of law and the approach set out by the High Court in *Akai*.

# DISCUSSION OF RELEVANT LEGISLATION AND RELIEF SOUGHT BY EPIC IN THE SUBSTANTIVE PROCEEDING

1. In respect of the alleged Pt IV contraventions, Epic seeks among, other things, injunctive relief pursuant to s 80 of the CCA. Section 80 relevantly provides:

(1) …where, on the application of the Commission or any other person, the Court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute:

(a) a contravention of any of the following provisions:

(i) a provision of Part IV;

[…]

the Court may grant an injunction in such terms as the Court determines to be appropriate.

[…]

(4) The power of the Court to grant an injunction restraining a person from engaging in conduct may be exercised:

(a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind;

(b) whether or not the person has previously engaged in conduct of that kind; and

(c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.

(5) The power of the Court to grant an injunction requiring a person to do an act or thing may be exercised:

(a) whether or not it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing;

(b) whether or not the person has previously refused or failed to do that act or thing; and

(c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person refuses or fails to do that act or thing...

1. Section 80 of the CCA, which permits any person to apply for an injunction for a breach of the CCA, recognises the public dimension of claims under Pt IV of the CCA and the ACL. The nature of s 80 (as it was formerly in the *Trade Practices Act 1974* (Cth) (‘**Trade Practices Act**’)) was considered by this Court in *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248. At 255-256, Lockhart J observed:

Section 80 is essentially a public interest provision. Conduct of the kind proscribed by both Pts IV and V may be detrimental to the public interest because many persons can be affected and considerable loss or damage may be sustained by them…

Parts IV and V of the act involve matters of high public policy. Part IV and V relate to practices and conduct that legislatures throughout the world in different forms and to different degrees, have decided are contrary to the public interest… [t]hese are legislative enactments of matters vital to the presence of free competition and enterprise and a just society.

1. Justice French (as his Honour then was) agreed with Lockhart J’s reasons and described the Trade Practices Act as being “concerned primarily with the protection of the public interest in the prevention of anti-competitive conduct in markets within Australia (Pt IV) and the fair treatment of consumers (Pt V)”: at 268. In *Truth About Motorways v Macquarie Investment Management Ltd* [2000] HCA 11; (2000) 200 CLR 591, Gleeson CJ and McHugh J stated that, “[i]t has been established for more than twenty years that s 80 means what it says. An application for injunctive relief under s 80 is, in its nature, one for the protection of the public interest”: at [13].
2. Section 80 of the CCA is mirrored in s 232 of the ACL, pursuant to which Epic seeks injunctive relief in respect of the alleged ACL contravention.
3. Epic also seeks relief under s 87(1) of the CCA in respect of the alleged Pt IV contraventions. Section 87 confers a wide power on the Court to make remedial orders in appropriate cases relating to conduct contravening Pt IV of the CCA. The range of orders that the Court may make are listed in sub-s (2), and relevantly includes orders declaring the whole or part of a contract to be void, varying contracts in specified ways or refusing to enforce provisions of a contract.
4. The power under s 87 to void, vary or refuse to enforce the whole or part of a contract on application of a party to the proceeding is enlivened, relevantly, when:
5. the Court finds that the party has suffered, or is likely to suffer, loss or damage by the conduct of another person;
6. the conduct contravened Pt IV of the CCA;
7. the Court considers it appropriate to make such an order; and
8. either:
   1. the Court considers that the order will compensate a person who has suffered or is likely to suffer loss or damage; or
   2. the Court considers the order will prevent or reduce the loss or damage.
9. Section 87(1) of the CCA is mirrored in s 237 of the ACL (read with s 243), pursuant to which Epic seeks relief in respect of the alleged ACL contravention. We will say something more about s 87 below. In addition, Epic seeks declaratory relief pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth).
10. It is then useful to set out other provisions of the CCA which are said to evince a public policy in favour of litigating claims alleging contraventions of Pt IV of the CCA in Australia and more particularly in the Federal Court of Australia. We will refer to the mirrored ACL provisions as necessary, and begin with the ‘**platform provisions**’: ss 83 and 87(1A) of the CCA.
11. Section 83 of the CCA includes a mechanism by which persons who have suffered loss or damage can rely on the findings of fact and admissions in a subsequent action for compensation. It provides:

(1) In a proceeding against a person under section 82 or in an application under subsection 51ADB(1) or 87(1A) for an order against a person, a finding of any fact made by a court, or an admission of any fact made by the person, is prima facie evidence of that fact if the finding or admission is made in proceedings:

(a) that are proceedings:

(i) under section 77, 80, 81, 86C, 86D or 86E; or

(ii) for an offence against section 45AF or 45AG or subsection 56BN(1) or 56CC(1); and

(b) in which that person has been found to have contravened, or to have been involved in a contravention of:

(i) a provision of Part IV, IVB or IVBA; or

(ii) section 55B, 60C or 60K; or

(iii) subsection 56BO(1) or 56BU(1), section 56CD or a civil penalty provision of the consumer data rules.

The finding or admission may be proved by production of:

(a) in any case—a document under the seal of the court from which the finding or admission appears; or

(b) in the case of an admission—a document from which the admission appears that is filed in the court.

1. Section 137H of the CCA similarly provides that a finding of fact or an admission of fact made in proceedings under certain provisions of the ACL is prima facie evidence of that fact.
2. Section 87(1A) of the CCA then relevantly provides:

Without limiting the generality of sections 51ADB and 80, the Court may:

[…]

(b) on the application of the Commission in accordance with subsection (1B) on behalf of one or more persons who have suffered, or who are likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of Part IV (other than section 45D or 45E), Division 2 of Part IVB, Part IVBA, subsection 56BN(1), 56BO(1), 56BU(1) or 56CC(1), section 56CD, 60C or 60K or a civil penalty provision of the consumer data rules; or

[…]

make such order or orders as the Court thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (2)) if the Court considers that the order or orders concerned will:

(c) compensate the person who made the application, or the person or any of the persons on whose behalf the application was made, in whole or in part for the loss or damage; or

(d) prevent or reduce the loss or damage suffered, or likely to be suffered, by such a person.

1. Sections 237 to 240 of the ACL empower the Court to make such orders in respect of contraventions of certain provisions of the ACL on application of either the Commission or a person who has suffered, or is likely to suffer, loss or damage.
2. We do note that s 242(1) of the ACL provides “an application may be made under section 237(1) or 239(1) even if an enforcement proceeding in relation to the conduct, or the term of a contract, referred to in that subsection has not been instituted.”
3. Importantly in relation to Epic’s submissions on the stay application, s 86(1) of the CCA confers jurisdiction on the Federal Court in any matter arising under the CCA in respect of which a civil proceeding has been instituted. Sub-sections (1A), (2), (3A) and (3B) in turn confer limited jurisdiction in respect of certain matters on the Federal Circuit Court or the courts of the states and territories. Sub-section (4) then provides:

The jurisdiction conferred by subsection (1) on the Federal Court is exclusive of the jurisdiction of any other court other than:

(a) the jurisdiction of the Federal Circuit Court under subsection (1A); and

(b) the jurisdiction of the several courts of the States and Territories under subsection (2); and

(ba) the jurisdiction of the Supreme Courts of the States under subsection (3A); and

(bb) the jurisdiction of the Supreme Courts of the Territories under subsection (3B); and

(c) the jurisdiction of the High Court under section 75 of the Constitution.

There is an equivalent provision in relation to matters arising under the ACL in s 138 of the CCA.

1. Section 86A provides for the transfer of certain matters by the Federal Court to a court of a State or Territory, but this does not include matters that arise under Pt IV of the CCA.
2. Section 87CA of the CCA provides that the Commission may, with leave of the Court and subject to any conditions imposed by the Court, intervene in any proceedings instituted under the CCA. There is an equivalent provision in relation to matters arising under the ACL in s 139 of the CCA.
3. Section 4 of the CCA also defines “the Court” or “the Federal Court” to mean the Federal Court of Australia.
4. Section 5 of the CCA provides for the extended application of Pt IV and the ACL to conduct outside Australia.
5. We would also note that s 2 of the CCA provides “the object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection”.

# SUMMARY OF EPIC’S GROUNDS OF APPEAL

1. We do not need to set out verbatim each of the 17 grounds of appeal other than by reference to the specific errors raised by Epic as to the reasoning of the primary judge in evaluating whether there were “strong reasons” to enable Epic to proceed before this Court in contravention of the exclusive jurisdiction clause (which we deal with later in these reasons). Most grounds of appeal relate to the public policy considerations that Epic maintains mandate that the claims brought by Epic must be determined by this Court, and “override” the exclusive jurisdiction clause (‘**first argument**’). Epic argues that there was no contravention of the exclusive jurisdiction clause, but if there was a contravention, that clause is unenforceable for public policy reasons; and then if the clause was enforceable there were “strong reasons” for not enforcing the exclusive jurisdiction clause in the circumstances of the proceeding (‘**second argument**’). Putting aside the issue of whether there was a contravention, in the circumstances confronting the primary judge and on appeal, the two arguments put forward by Epic raise similar factors to consider, and whichever analysis is considered and determined leads to the same result.
2. In view of our conclusion on the issue of “strong reasons” we do not delay on the question of whether there was a contravention. Then as to the first argument, Epic submits that the primary judge held that Pt IV and s 21 are mandatory laws, and further held that the “parties cannot contract out of their application” and the “parties are not at liberty to agree that they do not apply”: at [19], [21] J. Epic then submits that by their designation as mandatory laws, Pt IV and s 21 are characterised as laws that are essential to the legal order of the polity, as reflected by the will of the legislature. They are also laws of a kind that are primarily enforced directly by an agency of the executive, being the Commission.
3. Apart from a specific argument on the operation of ss 86 and 138 of the CCA (which we will address later) Epic submits that there are strong public policy considerations underpinning Pt IV and s 21 as mandatory laws which deny the enforceability of the exclusive jurisdiction clause: claims for contraventions of Pt IV and s 21 should be adjudicated by Australian courts as a matter of public policy, notwithstanding any contractual bargain between the parties.
4. Epic referred to *Home Ice Cream Pty Ltd v McNabb Technologies LLC (No 2)* [2018] FCA 1093 where, in the context of a proceeding alleging contraventions of s 18 of the ACL, the Federal Court stated (at [24]):

It should be recognised, of course, that once the Court’s jurisdiction under the [CCA] is engaged, the Australian forum is **the only forum** in which the claims under the [CCA] can be heard and determined.

(Emphasis added.)

1. Further, Epic relied upon the statement in *Faxtech Pty Ltd v ITL Optronics Ltd* [2011] FCA 1320, also in the context of a s 18 ACL proceeding (at [18]):

…there is no doubt that the claim for misleading or deceptive conduct can only be dealt with in this Court, and not by an English court…

1. Therefore, Epic contends that the primary judge erred in failing to give effect to the public policy considerations that flow from the fact that Pt IV and s 21 are mandatory laws. Epic submits that the primary judge’s analysis overlooks that, not only are parties prevented from “contracting out” of the subject matter of a mandatory law, but — with respect to laws like those in Pt IV and s 21 — parties should also be prevented, as a matter of public policy, from bargaining that a foreign court will determine the application of the mandatory law in every case. The public policy considerations that necessitate the Federal Court — and not a foreign court — hearing and determining Epic’s claims under Pt IV and s 21 are reflected in the features of the relevant law applicable to the proceeding. This is the principal way Epic contends that the primary judge fell into error.
2. As we have alluded to, the other grounds of appeal relate to the second argument, namely whether the primary judge erred in evaluating whether there were “strong reasons” to enable Epic to proceed before this Court in contravention of the exclusive jurisdiction clause. Many of the matters addressed in relation to this issue (and the related issues of onus of proof and forum non conveniensraised in Apple’s notice of contention) are relevant to the public policy considerations said to compel the conclusion that a stay should be refused.

# ERRORS IN PRIMARY JUDGE’S CONSIDERATION OF “STRONG REASONS” NOT TO STAY?

1. We will deal with the determinative issue of whether the primary judge otherwise erred in evaluating whether, as he described it, Epic had demonstrated strong reasons to enable it to proceed before this Court in contravention of the exclusive jurisdiction clause in cl 14.10 of the DPLA, referring to *Akai* at 427-429, 445: at [43] J. In resolving this issue, appellate review must accord with the principles in *House v The King* [1936] HCA 40; (1936) 55 CLR 499 at 504-505. We do not need to determine the first argument raised by Epic as to the existence of mandatory laws and an “overriding” public policy in light of our views as to the existence of the strong reasons we identify below.
2. We will return to the issue of onus later. For present purposes, we proceed on the same basis as the primary judge, that Epic had the onus of demonstrating strong reasons for the refusal of the grant of the stay given that Epic’s proceeding in this Court involves, on the face of it at least, a contravention of cl 14.10 of the DPLA.
3. On that basis, we are nevertheless satisfied that the primary judge’s reasoning involved three errors of principle.

## The first error: failure to make a cumulative assessment

1. The first error, raised in ground 9 of the notice of appeal, may be explained as follows. The primary judge posed the relevant question in the heading above, “[i]s a strong reason for refusing a stay otherwise shown?”: at [43] J. The primary judge answered that question at [44] J, saying he did not think that strong reasons had been shown. He explained his consideration of this question at [44]-[54] J. At [55] J, albeit under the same heading, the primary judge turned to the part of the case which he said concerned him most — “whether there is something about the nature of proceedings under Pt IV which means they should generally be heard in this Court”. The primary judge explained that he had in mind “the statement of the majority in *Akai* at 445 that a stay ‘may be refused where the foreign jurisdiction clause offends the public policy of the forum whether evinced by statute or declared by judicial decision’”. The primary judge then identified these concerns, but concluded at [64] J that:

Despite those matters, however, I do not consider that the state of the law concerning choice of forum clauses permits me to refuse Apple’s application although I am distinctly troubled in acceding to it. For completeness, I have not included ACL s 21 in the above discussion. No such issues appear to me to arise in relation to it.

1. The problem is that the very matters which the primary judge identified as underlying his concern constituted “strong reasons” which arguably demonstrated that the stay should not be granted. It must be inferred, however, that the primary judge did not cumulatively weigh up these considerations in reaching his conclusion at [44] J that “strong reasons” had not been demonstrated. This is apparent from the fact that the primary judge does not say that he has weighed these factors in his evaluation. Further, the primary judge identified his concern in [55]ff J by posing a series of rhetorical questions. The fact that the questions are so posed, as incapable of meaningful answer, indicates both why the questions are relevant to the existence or not of strong reasons not to grant the stay and that the primary judge did not weigh those matters in his overall evaluation.
2. For example, the primary judge identified that Epic sought an injunction under s 80 of the CCA and accepted that this involved the public interest: [56] J. The primary judge then identified that proceedings not involving Pt IV of the CCA under s 80 were capable of being the subject of arbitration. But the relevant point was that Epic’s proceeding did involve claims under Pt IV of the CCA, so the observation by the primary judge at [56] J that the public interest dimensions to Epic’s claims “does not carry Epic very far” did not follow. The primary judge, however, did say that this “is a relevant matter” at [56] J, but it must follow from the terms of [64] J that his Honour did not include this relevant matter in his evaluation because he considered the state of the law precluded him from doing so. The primary judge was rightly concerned by this, but the answer is that the law did not preclude him from considering these matters. Rather, he was required to evaluate these, along with all other relevant matters, in deciding whether Epic had demonstrated strong reasons against the stay.
3. At [57] J the primary judge correctly identified that “in this case the effect will be particularly far reaching and will extend into the pockets of a large part of the population. Further, the nation has an interest in maintaining the integrity of its own markets”. However, again, it appears from the terms of [64] J that the primary judge did not consider that this could be taken into account in determining whether strong reasons against the stay had been demonstrated.
4. At [58] J the primary judge correctly identified that “[i]f cl 14.10 had selected the courts of New South Wales as the forum, it would therefore be ineffective because those courts lack jurisdiction under Pt IV. It is perhaps slightly surprising that cl 14.10 may select the courts of the Northern District of California instead”. What must be appreciated, however, is that this slightly surprising outcome was itself relevant to the evaluation of whether or not there were strong reasons weighing against the grant of the stay. The primary judge’s observation at [64] J indicates that he did not consider this to be the case.
5. At [59] J the primary judge identified that this Court had refused to stay a proceeding under Pt IV so that it could be subject to arbitration: *Petersville Ltd v Peters (WA) Ltd* [1997] ATPR 41-566 at 43,847. At [60] J the primary judged asked, “[i]f the parties may not agree to arbitrate, how can they agree that the matter should be heard by a foreign court?” The primary judge noted that the present case was starkly different from *Casaceli v Natuzzi SpA* [2012] FCA 691; (2012) 292 ALR 143 (‘***Casaceli***’) in which arbitration had been ordered in a case not raising “any significant questions of competition law”. The primary judge noted Apple’s references to international cases to the contrary at [61] J, then observed at [62] J that he “would prefer not to express a view on the issue of whether Pt IV cases may be arbitrated”. The point is that the primary judge’s question at [60] J remained unanswered. A consideration of that question, however, could have been relevant to the evaluative task of deciding if there were strong reasons not to grant a stay. Nevertheless, we accept that in considering the enforceability of an arbitration agreement, difference considerations will apply to those raised in this appeal at least because of the existence of s 7(2) of the *International Arbitration Act 1974* (Cth) (which requires a stay of a court proceeding in favour of arbitration). No such legislative provision is relevant to this appeal. Further, it is important to focus on the nature of the proceeding that is currently before this Court, and there has been no suggestion in this appeal that the dispute ought to proceed in any way other than in open court.
6. At [63] J the primary judge correctly identified that if this case had to be litigated in accordance with cl 14.10 of the DPLA, then “complex questions of competition law will be litigated through the lens of expert evidence”. Further, “appellate review of that evidence will not be directed at the question of how that law should develop but instead will simply be to ascertain as a matter of fact what the Australian law proved by the evidence was” and “the role of the High Court as the ultimate explicator of Australian competition law is undermined”. The primary judge rightly identified that “the most serious issues of public policy are at play” and noted that there was “a real question in my mind as to whether this Court should permit the role given to it by Parliament under CCA s 86 to be thwarted in this way”. All of these matters were relevant to the question whether there were strong reasons not to grant a stay of this proceeding. Yet at [64] J, as noted, the primary judge said that “[d]espite those matters” he considered he was not permitted to refuse Apple’s application for a stay. To the contrary, he was required to evaluate these matters as part of deciding if there were strong reasons against granting a stay.

## The second error: failure to recognise juridical disadvantages of proceeding in the US Court

1. The second error, raised in grounds 1, 9, 16, and 17 of the notice of appeal, is disclosed in [53] of the primary judge’s reasons. His Honour said:

On the other hand, I do accept that having to litigate this case in the Northern District will be more cumbersome because the law of Part IV and ACL s 21 will need to be addressed in the form of expert evidence about the content of Australian law. And, as I have said, I do accept Epic’s submission that in a proceeding in the Northern District any finding by that Court will not be able to be tendered in a subsequent proceeding under CCA s 83. I also accept that the Australian Competition and Consumer Commission will not be able to intervene in such a proceeding. These last two matters, however, seem to me to be relatively insubstantial in the scheme of things. In any event, I do not think any question of inconvenience should figure much in the analysis. Any inconvenience flows from the choice of forum clause to which Epic has agreed. It does not sit well in its mouth to complain about the consequences of its own bargain: *Incitec* [***Incitec*** *Ltd v Alkimos Shipping Corporation* [2004] FCA 698; (2004) 138 FCR 496] at [49]; *Australian Health* [***Australian Health*** *& Nutrition Association Ltd v Hive Marketing Group Pty Ltd* [2019] NSWCA 61; (2019) 99 NSWLR 419] at [103].

1. The problem is fourfold.
2. One, it was not reasonably open to the primary judge to conclude that the identified matters were “relatively insubstantial in the scheme of things”: [53] J. The statutory scheme provides that findings of fact and admissions in Epic’s proceeding if litigated in this Court would be prima facie evidence for the purpose of other specified proceedings (s 83), and the Commission may intervene in Epic’s proceeding if litigated in this Court (s 87 of the CCA). These provisions are important aspects of the statutory scheme. They reinforce the fact that proceedings under Pt IV of the CCA can involve fundamental public interest issues. Epic’s proceeding, as the primary judge accepted at [60] J, involves such fundamental public interest issues.
3. Two, the primary judge at [53] J correctly identified that having to litigate this proceeding in the US “will be more cumbersome because the law of Pt IV and ACL s 21 will need to be addressed in the form of expert evidence about the content of Australian law”. But at [63] J the primary judge also correctly identified that the consequence of Epic’s proceeding being required to be litigated in the US would not merely be that proof of Australian law would be cumbersome. All of the considerations identified at [63] J would be relevant. Other considerations put to but not discussed by the primary judge would also be relevant including the likelihood or at least the reasonably arguable prospect that adjectival provisions of the CCA such as s 84 (facilitating proof of states of mind) would not apply. Nor would the specific remedies be available as provided for in ss 80, 87 and otherwise.
4. At [52] J the primary judge said “I reject Epic’s contention that somehow the injunctive relief that might be granted in this Court is superior to that which might be granted by a court in the Northern District. The onus lay on Epic to prove this by evidence and it has not been demonstrated”. Apple supported this finding in the appeal, but it involves error. Epic had proved that the injunctive relief that might be granted in this Court is superior to that which might be granted by the US Court. For one thing, Epic was correct in identifying that remedies would be determined in the US Court by reference to the local law and not Australian law: *DA Technology Australia Pty Ltd v Discreet Logic Inc* [1994] FCA 101 at 19, citing *Stevens v Head* [1993] HCA 19; (1993) 176 CLR 433 at 454-460. The very fact that the special remedial provisions of the CCA would not apply involves a distinct juridical disadvantage. For another, Epic had identified that the general approach in the US for injunctive relief involves a plaintiff demonstrating that “(1) it has suffered irreparable injury; (2) remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) considering balance of hardships between plaintiff and defendant, remedy in equity is warranted; and (4) public interest would not be disserved by permanent injunction”: *eBay Inc v MercExchange* *LLC* 547 US 388, 391 (2006) and see also US Proceeding Order Granting in Part and Denying in Part Motion for Preliminary Injunction dated 9 October 2020, as exhibited at pages 400-407 of Exhibit DS-1 to the Affidavit of Daniel Swanson sworn 20 December 2020.
5. These considerations should have informed the primary judge’s evaluation of the question whether there were strong reasons not to grant the stay, but did not.
6. Three, even on the basis of the primary judge’s conclusions at [53] J, it cannot reasonably be said that what was involved in requiring Epic to litigate this proceeding in the US Court would involve a mere “question of inconvenience” to Epic. These considerations meant that Epic would be a material juridical disadvantage in being forced to litigate this proceeding in the US Court.
7. Four, the primary judge’s observation in [53] J that “[a]ny inconvenience flows from the choice of forum clause to which Epic has agreed. It does not sit well in its mouth to complain about the consequences of its own bargain: *Incitec* at [49]; *Australian Health* at [103]” may deal with the position of Epic, but does not deal with the fact that Epic’s proceeding has the potential to affect the position of app developers generally who are subject to the same contractual regime as Epic.
8. Contrary to Apple’s (and Google’s) submissions, this is not an issue of the mere location of the court granting relief. It is self-evident that the provisions of the CCA concerning proof and remedies are intended to facilitate proof and enable the grant of remedies in circumstances which would not otherwise be available at common law. The evidence supported the inference that the US Court would not have available to it similar provisions. This is a direct consequence of the fact that the Epic’s claims are brought under the CCA and the ACL and the relief which Epic seeks has the potential to affect the position of all app developers in the same position as Epic. The same considerations would not apply, or would not apply so acutely, in a different case. In this regard, it is not to the point that Epic has not brought a class action on behalf of all developers of apps in the same position as it. It did not have to do so given the broad scope for remedies under the CCA.
9. Accordingly, it is not the case, as Apple and Google would have it, that “the enforcement of exclusive jurisdiction clauses could be avoided simply by pointing to the fact that foreign courts cannot grant relief in the precise form that Australian courts can grant relief in matters governed by Australian forum law”. The issues concern the substantive powers of the US Court to grant the kinds of relief that this Court can grant by reason of ss 80 and 87 of the CCA.

## The third error: the role of Apple Pty Limited

1. The third error, raised in ground 8 of the notice of appeal, involves the primary judge’s characterisation of the role of Apple Pty Limited in the proceeding as merely “ornamental” or “parasitic”: [48] J.
2. In *Australian Health* Bell P explained at [90] that:

In cases such as the present, when not all parties to the proceedings are party to an exclusive jurisdiction clause, the court should not, in my view, start with a prima facie disposition in favour of a stay of proceedings, which is the default starting point where the litigation only involves parties who are bound by the exclusive jurisdiction clause (cf the various formulations collated by Spigelman CJ in *Global Partners* [***Global Partners*** *Fund Ltd v Babcock & Brown Ltd (in liq)* [2010] NSWCA 196; (2010) 79 ACSR 383] set out at [79] above). In the passage from Lord Bingham’s speech in *Donohue v Armco* [*Donohue v Armco Inc* [2001] UKHL 64; [2002] 1 All ER 749], which I have cited at [78] above, his Lordship was careful to qualify his observations with the phrase “and the interests of other parties are not involved”. The importance of holding parties to their bargain is a very powerful consideration but is not one that should be elevated or given some special status in the hierarchy of factors where not all parties to the dispute are parties to the exclusive jurisdiction clause.

1. The primary judge referred to this principle at [47] J, but said this at [48] J:

In this matter it is apparent that the joinder of Apple Pty Limited is largely ornamental. The suit against it is parasitic on the claims Epic makes against Apple. The DPLA is with Apple and it is Apple’s requirements about the use of its App Store for the distribution of apps and the use of its in-app payment processing system which are in dispute. Apple Pty Limited is not a stranger to the DPLA, in fact it is by Schedule 2 to the DPLA that it is appointed as agent on behalf of Apple to collect the commission charged on in-app purchases. Epic’s complaint against Apple Pty Limited in this proceeding is concerned entirely with conduct that is provided for by the DPLA. Given these circumstances, Apple should not be prevented from insisting on compliance with cl 14.10 on behalf of Apple Pty Limited in a dispute that clearly arises out of the DPLA: see *Global Partners* at [73].

1. In *Global Partners* at [73] Spigelman CJ considered the particular contractual arrangements there in question and at [74] concluded that “there are non parties and non parties. These respondents are not strangers to the [Limited Partnership Agreement (**LPA**)]”. The asserted non-parties were involved in the relevant partnership and had the benefit of indemnities under the LPA.
2. The evidence before the primary judge about the role of Apple Pty Limited was that:

Where a developer chooses to distribute their apps to consumers in Australia or New Zealand, the License Agreement provides that the distribution of apps is operated through an agency model. That is, Apple AU [Apple Pty Limited] sells the apps (including the applications and the in-App content) to the Australian consumer, through the App Store, and receives payment from the consumer, as agent for the developer.

Apple Inc makes available a price matrix for apps and the cost of in-app purchases. The developer, as part of the app design process, then selects from these pricing tiers and sets the retail price to be paid by the consumer. Apple AU has no role in determining the price of apps. Under the agency model, where a consumer purchases a ‘paid’ app, or makes an ‘in-app’ purchase under their Apple account, on the Australian App Store, the payment received from the consumer is paid to Apple AU via the In App Purchase system (IAP) which is part of iOS. Apple AU collects the monies paid by the consumer which is split, pursuant to the License Agreement, with Apple receiving 30%, and the remaining 70% being provided to the Developer.

1. Apple Pty Limited was not a stranger to the DPLA. But the circumstances are not analogous to those considered in *Global Partners*. In particular, Apple Pty Limited was not a party to the DPLA and cl 14.3 of the DPLA provides that:

This Agreement is not for the benefit of any third parties.

1. Further, and more importantly given that Apple Pty Limited is a subsidiary of Apple, in its amended concise statement (‘**ACS**’) Epic’s claims include that there is a distinct sub-market in Australia for the distribution of iOS-compatible apps to iOS device users which involves Apple Pty Limited implementing “the same course of conduct in Australia as Apple follows or mandates elsewhere in the world”: ACS [9] and [21]. Epic also claims that “Apple Pty Limited gives effect in Australia to the restraints referred to in paragraph 25 and in doing so acts at the direction of and/or as agent for Apple Inc”: ACS [26].
2. While the same declarations and orders are sought against all respondents, the evidence discloses that it is Apple Pty Limited which sells the developers’ apps through the App Store. The payment made by the consumer is to Apple Pty Limited. It is Apple Pty Limited which gives effect to the allegedly anti-competitive and unconscionable contractual provisions in contravention of ss 45, 46 and 47 of the CCA and s 21 of the ACL by collecting the monies paid and then dividing the payment as required by the impugned contractual provisions. In so doing, Epic claims that Apple Pty Limited is conducting itself in either a global or an Australian sub-market.
3. In these circumstances, the primary judge’s conclusion that the role of Apple Pty Limited was “ornamental” and “parasitic” was not reasonably open. Rather, it was necessary for the primary judge to accept that Epic claimed relief against a non-party to the DPLA, Apple Pty Limited. Apple Pty Limited does not have the benefit of cl 14.10 of the DPLA. As Bell P discussed in *Australian Health* at [80]-[90], in a case where a party to the proceedings is not a party to the exclusive jurisdiction clause there are competing public policy considerations in play; on the one hand, holding parties to their contractual bargains and, on the other hand, “the high desirability of minimising the possibility or prospect of different courts reaching different decisions (whether as to the facts or the law or both) in relation to the same dispute, a consequence apt to undermine confidence in the rule of law…”.
4. In the present case, we accept that the proceeding may be heard and determined either by the US Court applying Australian law as a matter of fact or by this Court. Accordingly, there is no issue of public policy concerning the increased fragmentation of the litigation. Contrary to Epic’s submissions, the primary judge was right to reach this conclusion at [46] J. The observations of Bell P in *Australian Health* at [90], that in a case where enforcing the exclusive jurisdiction clause would cause or increase the fragmentation of litigation due to the role in the proceeding of a non-party to the exclusive jurisdiction clause, there should not be a prima facie disposition to enforce the clause, accordingly, are not engaged. The primary judge was not in error in proceeding on this basis.
5. Nevertheless, in wrongly characterising the role of Apple Pty Limited in Epic’s proceedings as merely “ornamental” or “parasitic”, the primary judge failed to undertake the required evaluative exercise on the basis that an important aspect of Epic’s claims involves claims under Pt IV of the CCA and s 21 of the ACL against an Australian company, Apple Pty Limited, for conduct undertaken in Australia in connection with arrangements affecting Australian consumers in an Australian sub-market. The primary judge recognised these very facts at [65] J in rejecting Apple’s forum non conveniens claim, but did not weigh those matters as part of his evaluation of the existence or not of strong reasons established by Epic against the grant of the stay. This also involved an error of principle.
6. We are not otherwise persuaded by Epic’s submissions as to error of principle by the primary judge. In particular, we do not consider that the primary judge erred at [46] J in concluding that refusal of the stay would not increase the fragmentation of the litigation. As the primary judge said, the position is that, one way or another, there will be two proceedings, and the issue is only whether Epic’s proceedings should be litigated in this Court or the US Court. Epic’s focus on other alleged errors, such as increased potential for delay if Epic’s proceedings are not resolved in this Court, involve speculation rather than any established juridical disadvantage in being required to litigate the proceedings in the US Court.

## Onus

1. To return to the issue of the onus, at [40] J the primary judge said:

If this case were on all fours with *Akai* I would be bound to apply it and conclude that it was Apple which had failed to discharge its onus. However, this case is not an *Akai* case. In this case the question is not whether the courts of the Northern District will apply Part IV and ACL s 21. It is whether they will decline to hear the case brought under those provisions on discretionary grounds. As I have indicated already, this does not necessarily entail the same binary consequence that answering the question in *Akai* had. In my opinion, *Akai* is distinguishable.

1. The majority judgment of Toohey, Gaudron and Gummow JJ in *Akai* said at 445:

Akai responds to the application for the stay of the proceeding in New South Wales by asserting that s 54 of the Act confers upon it a legitimate juridical advantage in any forum in which the Act will be applied as part of the *lex causae* and that the Supreme Court of New South Wales is such a court. It would then be for People’s Insurance to show that in truth enjoyment by Akai of a legitimate juridical advantage is not confined to the New South Wales court and that, in particular, s 54 would be applied as part of the *lex causae* in the English courts. That task People’s Insurance did not attempt.

Accordingly, the matter is to be approached on the footing that (i) the English courts would apply as the *lex causae* the proper law, namely that of England, chosen in the first sentence of cl 9, and (ii) this would not include as a component any relevant provisions of the Act.

1. The primary judge was right to identify at [40] that the present case is different from *Akai* in that the US Court could hear and determine Epic’s proceeding on the basis of the substantive law of Australia if proved as a matter of fact in those proceeding by way of expert evidence. The better view of the majority judgment in *Akai* at 445 is that if the party resisting the stay application on the basis of an exclusive forum clause establishes that there are aspects of Australian law that would not apply in the foreign court, the non-application of which involves depriving that party of a legitimate juridical advantage, that may comprise strong reasons not to grant a stay unless the party seeking the stay proves to the contrary.
2. Contrary to Epic’s submissions, we do not consider that the majority in *Akai* were proposing that where a party responds to a stay application by asserting that a law of the invoked jurisdiction confers upon it a juridical advantage, the onus shifts to the party seeking the stay of proceedings. In such a case, in our view, the onus remains on the party seeking to resist the enforcement of the exclusive jurisdiction clause to prove strong reasons not to enforce the exclusive jurisdiction clause: *Australian Health* at [79]. It does not generally matter if the exclusive jurisdiction clause is itself part of the contract sought to be impugned on some or other ground. Provided the exclusive jurisdiction clause appears to bind the party resisting the stay and the commencement of the proceedings involves a prima facie contravention of the exclusive jurisdiction clause, it is for the party resisting the stay to prove the existence of the strong reasons not to enforce the clause.

## Conclusion on whether primary judge erred in relation to “strong reasons”

1. On this basis, in the present case, Epic had established that being required to litigate these proceedings in the US Court would deprive it of the legitimate forensic advantage presented by, at the least, ss 84, 80 and 87 of the CCA. As such, these considerations were capable of constituting strong reasons not to grant the stay.
2. The three kinds of error discussed above are material, and any one of them is sufficient to vitiate the primary judge’s decision to grant the stay. It follows that it is necessary for this Court to consider for itself if the stay should be granted.

# RE-EVALUATION OF THE EXISTENCE OR NOT OF STRONG GROUNDS TO REFUSE THE STAY

1. It will be apparent from our discussion as to the errors of principle made by the primary judge that it is our view a stay should have been refused. In addition to the matters raised above, we have come to the view that there are public policy considerations which (cumulatively) indicate strong reasons for this proceeding to remain in this Court, even if such considerations do not statutorily mandate the proceeding be heard in the Federal Court.
2. At the outset it is clear that a stay may be refused if the exclusive jurisdiction clause offends the public policy of the forum “whether evinced by statute or declared by judicial decision”: *Akai* at 445 (Toohey, Gaudron and Gummow JJ). Epic relies upon this statement in *Akai* to assert that public policy considerations “override” the exclusive jurisdiction clause and mandate that the proceeding be heard in the Federal Court, an argument which is put (as noted above) on a separate basis to the strong reasons inquiry. Yet it is clear that the majority in *Akai* considered public policy as part of its inquiry into whether there are strong reasons against a stay (rather than as some special rule that necessarily trumps all other considerations). This can be illustrated by having regard to the statement in context (at 445):

In *Huddart Parker Ltd v The Ship “Mill Hill”* Dixon J referred with approval to English authority which indicated that, where there was a special contract of this nature between the parties, a foreign jurisdiction clause, the courts begin with a firm disposition in favour of maintaining that bargain unless strong reasons be adduced against a stay, it being the policy of the law that the parties who have made a contract should be kept to it.

A stay may be refused where the foreign jurisdiction clause offends the public policy of the forum whether evinced by statute or declared by judicial decision…

(Footnotes omitted).

1. Relevantly, the majority of the High Court (at 445, n 74) cited the decision of *The “Bremen” v Zapata Off-Shore Co* 407 US 1 (1972) at 15-16 as authority for the public policy ground of refusal, wherein the US Supreme Court held:

Thus, in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong [reason] showing that it should be set aside…The correct approach would have been to enforce the forum clause specifically unless Zapata could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching. Accordingly, the case must be remanded for reconsideration. We note, however, that there is nothing in the record presently before us that would support a refusal to enforce the forum clause. The Court of Appeals suggested that enforcement would be contrary to the public policy of the forum under *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 75 S.Ct. 629, 99 L.Ed. 911 (1955), because of the prospect that the English courts would enforce the clauses of the towage contract purporting to exculpate Unterweser from liability for damages to the Chaparral. A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision…

1. It is also significant that the majority in *Akai* went on to say (at 447):

…we note that considerations of public policy present in an Australian court may flow from, even if not expressly mandated by the terms of, the Constitution or statute in force in the Australian forum. Thus, the courts may disregard or refuse effect to contractual obligations which, whilst not directly contrary to any express or implied statutory prohibition, nevertheless contravene “the policy of the law” as discerned from a consideration of the scope and purpose of the particular statute. The Parliament has made particular legislative provision in the case of certain contracts of insurance and, to that extent, there may be curtailed or qualified in an Australian court what otherwise would be the freedom to choose a forum in which the Act has no application…

1. Before we explain why the exclusive jurisdiction clause offends the public policy of the forum by reference to the various provisions of the CCA and other public policy considerations, we will mention one specific argument relating to the operation of ss 86 and 138 of the CCA. It is sufficient if we concentrate our attention on s 86.
2. Epic submits that the Federal Court is the mandatory forum for this dispute as, on the proper construction of s 86, the Federal Court is vested with exclusive jurisdiction to hear, determine and grant remedies in respect of a case under Pt IV. The primary judge found s 86(4) to be “a rule concerned with the distribution of jurisdiction” and as such it was “unlikely that it speaks to the position of foreign courts”: at [58] J.
3. Epic submits that the primary judge erred in construing s 86(4) of the CCA, as the provision is not simply concerned with “the distribution of jurisdiction” domestically; it “vests” jurisdiction specifically in the Federal Court to the exclusion of all courts including foreign courts.
4. Epic points to s 4 of the CCA which provides that “the Court or the Federal Court” (noting the use of the definite article) means “the Federal Court of Australia”. Section 86(1) then provides that “the Federal Court” has jurisdiction over “any matter arising under this Act”. Section 86(4) also states this jurisdiction is “exclusive of the jurisdiction of any other court”.
5. Epic then refers to *Re Douglas Webber Events Pty Ltd* [2014] NSWSC 1544; (2014) 291 FLR 173, where Brereton J refused to stay the proceedings, and in doing so considered the meaning of “Court” as distinct from “court” in the *Corporations Act 2001* (Cth). His Honour held at [34]:

… even if the forum’s choice of law rules would otherwise permit a foreign statutory claim to be litigated before it [as to which see A.S. Bell, *Forum Shopping* and *Venue in Transnational Litigation*, Oxford 2003, [3.111]], there is an additional obstacle where the statute confers jurisdiction only on a specified court or courts, not including a foreign court. *Corporations Act*, s 237, confers jurisdiction on “the Court”. Section 1317H similarly confers jurisdiction on “a Court”. Sections 232 and 233 likewise confer jurisdiction on “the Court”. **By s 58AA, “Court” means, relevantly, any of the Federal Court of Australia, the Supreme Court of a State or Territory of Australia, or the Family Court of Australia.** **No other court may exercise the powers given by those sections. Necessarily, that means that no foreign court may do so**. (Where, under the Act, jurisdiction is not limited to a “Court” but given to any “court”, it is at least arguable that a foreign court whose choice of law rules selected Australian law as applicable would be able to exercise such Corporations Act jurisdiction as is exercisable by any “court”, as distinct from a “Court”).

(Emphasis added.)

1. Despite Epic’s submission, it can be accepted that two or more interpretations of s 86 are open, one functioning as a distribution of jurisdiction domestically, and one having the effect contended for by Epic. In view of our approach to the public policy considerations, and our decision that there are “strong reasons” to refuse a stay, we do not need to further address the issue of the proper construction of s 86 (or s 138) of the CCA. We will proceed to consider Epic’s submission that even if s 86 is solely dealing with the domestic distribution of jurisdiction, the reasoning which underpins that distribution applies with even greater force in respect of foreign courts, and in this regard forms part of the indicia in the CCA that public policy requires the Federal Court to hear the proceeding.
2. We will address this issue by reference to this proceeding and the ambit of the claims being brought by Epic. The nature of the particular proceeding is the relevant focus of the inquiry as to whether public policy considerations constitute a strong reason not to grant a stay.
3. As the primary judge accepted, this proceeding involves serious issues of public policy and the effect of the proceeding below “will be particularly far reaching”: at [57], [63] J. This is because the alleged contravening conduct has, and is continuing to, adversely affect the state of competition in markets in Australia and very large numbers of Australians. Apple and Google submit that there is nothing about the proceeding that is “unique” to Australian markets, and that in fact the proceeding is concerned with two global markets. This may be so, but there is no doubt that the proceeding will impact on Australian consumers and will involve the application of Australian substantive law.
4. We do accept that not every claim brought under the CCA benefits consumers even if successful. For instance, in *Casaceli*, it was found that the dispute in question was in substance a commercial dispute, and the claims under the Trade Practices Act (which were mostly claims for misleading or deceptive conduct, rather than Pt IV claims) were window dressing. At [50], Jagot J observed: “It seems to me that the applicants sought to surround their claims with an aura of important public policy issues when, in substance, the dispute is a commercial cause between two companies involved in the international furniture trade by which one company seeks damages from another”. It is for this reason that it is important to look at the particular proceedings before the Court to determine whether public policy considerations relevantly apply.
5. However, some general comments can be made as to Pt IV of the CCA. As we will explain, there is a legislative policy that claims pursuant to Pt IV should be determined in Australia, preferably in the Federal Court. This public policy reflects the economic significance for Australia of conduct regulated by Pt IV and is reflected in the legislative intention that, with limited and carefully prescribed exceptions, Pt IV contraventions should be heard by this Court.
6. Part IV of the CCA prohibits a range of anti-competitive practices including: civil and criminal cartel conduct (Pt IV Div 1); exclusionary conduct (ss 45, 45E); misuse of market power (s 46); exclusive dealing (s 47); resale price maintenance (s 48); anticompetitive mergers (s 50); and secondary boycotts (ss 45D-45DD).
7. What each of these provisions has in common is a concern with the protection of competition in Australian markets. Competition promotes efficiency in the production, distribution and sale of goods and services. Through the promotion of competition, the CCA aims to enhance the welfare of Australians: see s 2 of the CCA. Australian consumers depend critically on competition to ensure that they receive the best, most innovative products and services, at the most efficient prices.
8. The distinguishing feature of Pt IV claims is that usually by their very nature they have a public dimension, whereas in a number of cases, ACL contraventions consist of private disputes either between a consumer and a business or between businesses.
9. This difference helps explain why under the CCA jurisdiction for Pt IV matters is conferred exclusively on the Federal Court, but jurisdiction for ACL matters is also conferred on state courts (including inferior state courts): s 138B of the CCA. Originally, the Federal Court also had exclusive jurisdiction for the consumer protection provisions contained in Pt V of the Trade Practices Act. Jurisdiction for federal consumer protection provisions was eventually conferred on state courts by the *Jurisdiction of Courts (Miscellaneous Amendments) Act 1987* (Cth).
10. There are clear advantages in having Pt IV claims heard in this Court: they can be determined by specialist judges with relevant expertise, the Commission can intervene if necessary, private parties can obtain the benefit of any factual findings and admissions, and the Court’s ultimate judgment can contribute to the development of a single, coherent body of doctrine. If Pt IV claims are heard in a foreign court then these benefits will be lost.
11. It is important to recall that even private proceedings play an important role in supplementing the role of the Commission in enforcing the provisions of Pt IV of the CCA. Although the Commission has investigative powers that a private litigant does not possess and can seek relief that a private litigant cannot (most notably pecuniary penalties), in many respects, litigation commenced by private parties can achieve the same benefits. Private litigants can obtain injunctive relief under s 80 to stop the relevant conduct. Private litigation can also help develop and clarify the law, set guidelines for participants in industries, encourage industry participants to change their practices and deter future contraventions.
12. We do not accept that the public interest in having disputes concerning Pt IV of the CCA and s 21 of the ACL determined in the Federal Court is sufficiently safeguarded by the ability of the Commission to bring proceedings in the Federal Court free of any contractual constraint.
13. This proceeding itself illustrates the way in which private proceedings can present important opportunities for clarifying the law. Section 46 of the CCA, which regulates the behaviour of corporations with a substantial degree of market power, is a key provision in Pt IV. Epic’s claim against Apple relies on the new s 46, which was amended with effect from 6 November 2017, and is yet to be the subject of judicial interpretation by this Court.
14. We have already referred to the platform provisions, which are of significant importance in the operation of the legislative scheme and specific relief that is available in this Court. Having regard to the issues in this proceeding, and the impact a determination by this Court will have on consumers in Australia, this is a very strong policy consideration that favours denying a stay of this proceeding.
15. We accept that a foreign court could apply the provisions of the CCA in a proceeding before it and that at a general level appropriate injunctions and declarations could be ordered: but the platform provisions would not be available.
16. Further, if contraventions of Pt IV of the CCA are determined by foreign courts they will be determined through the prism of expert evidence about the content of Australian law (as acknowledged by the primary judge at [63] J). This process is not the same as ascertaining and applying the law directly. One of the difficulties and uncertainties involved in proving foreign law is the risk that important aspects of the foreign law will be lost in translation. Matters of meaning and context may be overlooked or misconstrued. Similarly, just as a judgment of this Court applying the laws of the United States is unlikely to make a contribution to US jurisprudence, any judgment of a US court, applying Australian law, is unlikely to make a contribution to the body of doctrine on Pt IV.
17. In coming to the view that a stay should not be granted, we do not cavil with the proposition that exclusive jurisdiction clauses are a significant feature of global commerce, being a major tool in limiting jurisdictional risk and exposure: see, eg, *Incitec* at [43] (Allsop J (as his Honour then was)); *Australian Health* at [78]-[79] (Bell P, Bathurst CJ and Leeming JA agreeing). Undoubtedly, the enforcement of exclusive jurisdiction clauses stimulates commerce by preventing a multiplicity of suits arising out of the same dispute, and removing or reducing the risk of inconsistent factual findings: *Australian Health* at [75], [81], [92]; *Incitec* at [47], [52]-[56]; *Global Partners* at [67] (Spigelman CJ, with whom Giles and Tobias JJA agreed). As stated by Spigelman CJ in *Global Partners* at [67], “[t]here is a clear commercial interest in minimising the possibility of a dispute being determined by multiple tribunals, with the consequent prospect of divergent findings”.
18. Avoiding inconsistent factual findings is a strong public policy consideration here, where both of the parties to the agreement containing the exclusive jurisdiction clause are engaged in global commerce and offer goods and services across international borders. Apple points out that this consideration is even more powerful where, as in this case, a group of companies carrying on business internationally institute several proceedings across a number of jurisdictions involving overlapping allegations of fact, including the existence of a global market, the technical aspects of the operation of the App Store, the circumstances of the removal of *Fortnite*, and some elements of the market analysis.
19. Apple also submits that the enforcement of exclusive jurisdiction clauses serves the public good of holding commercial persons to their promises. Parties who operate in international commerce and have agreed to an exclusive jurisdiction clause have decided, for whatever reason, that the forum specified in such a clause is acceptable to them. Apple submits the parties should appreciate the agreement they made and be held to it.
20. It is these matters that form the basis of Apple’s submission that Epic’s account of the public policy considerations is incomplete and overstates the public benefit in having claims under Pt IV of the CCA and s 21 of the ACL decided in the Federal Court, and that there are countervailing and competing policy considerations that must be taken into account.
21. We should address the point raised by Apple that even within the Australian context it is not the case that the Federal Court has unique standing when it comes to interpretation and enforcement of the CCA: it is said by Apple that courts other than the Federal Court are authorised to determine Pt IV claims and so the Federal Court is not the “sole arbiter” of matters under Pt IV of the CCA (even domestically) and no legislative intention to that effect can properly be inferred.
22. We recognise that other Australiancourts may determine Pt IV claims, but within a limited compass and for specific reasons.
23. Just before we go to that matter, it is to be noted that the Australian Competition Tribunal has jurisdiction to hear applications including to grant or revoke authorisations permitting conduct and arrangements that would otherwise be prohibited under Pt IV of the CCA because of their anti-competitive effect and to review determinations by the Commission in relation to the issue of notices concerning exclusive dealing or resale price maintenance: ss 101-101A of the CCA. However, this is not the same thing as jurisdiction to hear claims in relation to contraventions of Pt IV of the CCA, which is what we are concerned with in this appeal. Further, the Australian Competition Tribunal is a branch of the executive, and has limited powers as prescribed by legislation.
24. Then there are three qualifications to the Federal Court’s exclusive jurisdiction that should be noted which permit other Australian courts to determine Pt IV claims. The first is for private claims under s 46, in respect of which jurisdiction is also conferred on the Federal Circuit Court: s 86(1A). This provision was introduced by the *Trade Practices Legislation Amendment Act 2008* (Cth), and as explained in the accompanying explanatory memorandum (at [1.7]-[1.8]), was made to address concerns expressed about the costs and delays in bringing s 46 matters.
25. The second is s 4(1) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) (‘**CVA**’), which relevantly vests the Supreme Courts of the states with jurisdiction that they would not otherwise have where the Federal Court has jurisdiction with respect to that civil matter. This provision confers jurisdiction even in respect of matters where another Act specifies that the Federal Court’s jurisdiction is exclusive. However, this creates only a narrow exception, given that the CVA: (i) specifically excludes some provisions of Pt IV of the CCA from the conferral of jurisdiction (s 4(4)); (ii) otherwise designates a matter arising under Pt IV of the CCA as a “special federal matter” which absent “special reasons” must be transferred to the Federal Court (ss 3, 6(1), 6(3)); and (iii) in determining whether there are “special reasons” requires the court to have regard to the “general rule that special federal matters should be heard by the Federal Court …” (s 6(6)(a)).
26. The third is the Code, which allows claims under the Schedule version of Pt IV of the CCA to be determined by state courts. The Code was introduced by the *Competition Policy Reform Act 1995* (Cth) and corresponding state and territory enabling legislation. The purpose of the Code was to extend the competition conduct rules in Pt IV to unincorporated businesses which are mostly exempt under the CCA. The Commission would remain the sole enforcement agency, and all enforcement action would continue to be brought in the Federal Court. The original legislative scheme provided for the states and territories to confer jurisdiction on the Federal Court for matters arising under the Code. Insofar as the states purported to confer jurisdiction on the Federal Court, this scheme proved ineffective following the High Court’s decision in *Re Wakim; Ex parte McNally* [1999] HCA 27;(1999) 198 CLR 511, but it nevertheless evidences the collective legislative intention that the Federal Court was the appropriate court to determine Pt IV matters. Under the CCA (s 150D), the Federal Court may exercise jurisdiction conferred on it by law of the ACT or the Northern Territory in respect of matters under the Code, and under the CVA (s 3), such matters are designated as “special federal matters”.
27. We do not accept that this Court (in relation to the proceeding now before this Court) has not been given the responsibility to determine the dispute before it, as contemplated by the legislative policy described above.
28. We do not need to rehearse what we have written already, other than to say that Epic was entitled to the legitimate forensic advantages presented by the CCA, and being required to litigate this proceeding in the US Court would deprive Epic of these advantages. The proceeding involves fundamental public interest issues in relation to conduct undertaken in an Australian sub-market, and involves an Australian company that is not itself a party to the exclusive jurisdiction clause. We also consider that there are considerations of public policy in relation to Pt IV claims that flow from the scope and purpose of the CCA in the sense contemplated by *Akai* (at 445, 447) and indicate this proceeding ought to be heard in this Court. The focus should not only be on the nature of competition law, but the significance of the statutory provisions which allow the Commission to intervene, private parties to get the benefit of factual findings and admission, and the relevance of the Federal Court being chosen by the legislature as the court of its choice. In these circumstances, notwithstanding the countervailing public policy considerations that Apple relies upon, there are strong reasons to refuse to grant a stay of Epic’s proceeding and to decline to enforce the exclusive jurisdiction clause.

# APPLE’S NOTICE OF CONTENTION

1. Apple contends that, in any event, this Court should decide that Epic’s proceeding should be stayed on the ground of forum non conveniens.
2. Apple submits that this Court is a clearly inappropriate forum on the following bases:
3. where a plaintiff institutes proceedings in Australia having first sued abroad with respect to the same matter in issue, the Australian proceedings are prima facie vexatious or oppressive, citing Davies, Bell, Brereton & Douglas, *Nygh’s Conflict of Laws* (10th ed, 2019) at [8.47];
4. while Epic may seek to argue that the case is one brought for the benefit of developers, in substance it involves Epic’s desire to avoid paying Apple contractually agreed commissions for sales of digital goods and services sold through iOS applications; and
5. in substance, the dispute between Apple and Epic is an argument between two large, successful, American companies in respect of issues that can be readily determined by the US Court.
6. The primary judge rightly rejected this argument at [65] J and found that Apple had not shown that the Federal Court was a clearly inappropriate forum, applying *Voth v Manildra Flour Mills Pty Ltd* [1990] HCA 55; (1990) 171 CLR 538 at 564-565 (Mason CJ, Deane, Dawson and Gaudron JJ). As the primary judge explained, “this is a case about the Australian App Store, the developers of apps for distribution in that store and the Australian users of iOS devices. It arises under Part IV (and ACL s 21). It is a case commenced in Australia in reliance on Australian competition law, involving Australian markets and consumers.”

# DISPOSITION

1. For the foregoing reasons we will order that:
2. The appeal be allowed.
3. Orders 1 to 5 of the primary judge made on 9 April 2021 be set aside and in lieu thereof, the interlocutory application filed on 22 December 2020 be dismissed.
4. The respondents pay the appellants’ costs of the interlocutory application and of the appeal as taxed, assessed or otherwise agreed.

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| I certify that the preceding one hundred and twenty-six (126) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Middleton, Jagot and Moshinsky. |

Associate:

Dated: 9 July 2021