

ACCC Finds ‘Significant Issues’ With Operation of App Marketplaces by Apple and Google

Luke Dale, Partner, and **Daniel Kiley**, Special Counsel, HWL Ebsworth, consider the ACCC’s report into App marketplaces.

On 28 April 2021, the ACCC issued its interim report into the operation of the Apple App Store and Google Play Store. In its report, the ACCC identified ‘significant issues’ with the manner in which these marketplaces are operated, and made a number of recommendations as a result.

The ACCC had called for feedback from app developers on these marketplaces late last year, with this report drawing on the responses received.

The ACCC’s findings included that:

- there is a ‘duopoly’ in the market for smartphone operating systems, with significant barriers to entry, providing ‘each of Google and Apple significant market power’; and
- because Apple and Google ‘control the key gateways through which app developers can access consumers on mobile devices’, they have ‘market power in mobile app distribution in Australia, and the ACCC considers it likely that this market power is significant’.

Merely possessing ‘significant market power’ is not contrary to Australian law, but there are provisions of the *Competition and Consumer Act 2010* (Cth) (CCA) which only apply once a business operator has a requisite degree of market power. For example, under section 46 of the CCA, a corporation that has a ‘substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in’ that market, or any other market in which the corporation acquires or supplies (or is likely to acquire or supply) goods or services.

The ACCC accordingly went on to consider relevant markets which might be influenced by Apple and Google, looking not only at competition between their operating systems, but also the market for supply of apps on those platforms.

In the latter market, developers raised concerns with the ACCC about the gatekeeper role played by Apple and Google, including:

- ‘a lack of transparency in the policies and processes governing Apple and Google’s app review’;
- perceived incentives for Apple and Google to ‘favour their own first-party apps at the expense of rival third-party apps’; and
- commissions taken by Apple and Google on in-app payments, which are typically charged at 30% (though both platforms reduce this rate to 15% in certain scenarios). These commissions are of particular concern to many developers on the basis of restrictions on the use of alternative in-app payment mechanisms.

Given the control that Apple and Google have over their respective app marketplaces, the ACCC also took the view that they each ‘should do more to address the risks associated with harmful or malicious apps’, with ‘more than one in five respondents’ to the ACCC’s survey reporting having observed ‘misleading’ or ‘scam’ apps, including ‘subscription traps’, ‘bait and switch features’ and prize scams.

The ACCC declined to suggest specific regulation is required, instead outlining a number of ‘steps that could be undertaken by Apple and Google’ to address issues raised. However, the ACCC does suggest

that ‘regulation may be required’ if Apple and Google fail to take appropriate steps, also noting that ‘a number of jurisdictions have already, or are proposing to, put in place rules’.

Key steps proposed by the ACCC include:

- allowing apps to alert users to alternative payment mechanisms available – some categories of app are already allowed to have purchases or subscriptions made via external websites, but marketplace rules prevent the app from directing users to those channels;
- greater transparency around marketplace discovery processes, including search algorithms and editorial placement, which the ACCC considers would also help to address concerns that Apple and Google may be providing preferential listings for their own apps;
- ensuring that consumers are able to leave reviews and ratings for Apple and Google’s own apps;
- providing or improving mechanisms to allow users to choose their default apps;
- taking stronger steps to ‘address the risks of malicious, exploitative or otherwise harmful apps’, including via proactive monitoring and intervention; and
- ring-fencing information collected by Apple and Google in their role as app marketplace operators from their other operations and business decisions, to ‘minimise the risk of this information being used to provide Apple and Google with an unfair competitive advantage over third-party app developers’.

Notably, these steps do not necessarily include more radical measures often sought by third party app developers, such as:

- allowing third-party payment mechanisms to be used 'in-app';
- reducing commissions taken; or
- in the case of Apple, allowing third party app marketplace platforms and/or 'sideloaded' apps to operate on iOS (as is already the case on Android, although the report notes that, notwithstanding this, around '90% of apps available on Android mobile devices are downloaded using the Play Store').

Recent legal action taken by Epic Games against Apple essentially alleges that Apple's failure to take these kinds of steps is contrary to competition laws in a number of jurisdictions, including Part IV of the Australian CCA. The Federal Court of Australia has declined to decide those questions at this stage, leaving the matter to be considered by US Courts in the first instance.

Both Apple and Google have taken steps over the past year which seem to be designed to appease developers and regulatory bodies, including:

- both Apple and Google reducing commissions payable on apps published by small businesses; and
- Apple announcing new mechanisms to appeal app review issues, and processes to ensure that policy issues do not delay developers from issuing 'bug fix' updates to existing apps.

Those changes though do not go as far as the ACCC's suggestions, nor do they address the issues raised by Epic Games.

The ACCC's interim report notes that the issues considered apply globally, and are being assessed by regulators and lawmakers elsewhere, noting specific action in the United States, Germany, Japan, South Korea, European Union, United Kingdom and the Netherlands.

Mere days after the ACCC released its interim report, the European Commission on Friday issued a Statement of Objections to Apple, outlining its '*preliminary view that [Apple] distorted competition in the music streaming market as it abused its dominant position for the distribution of music streaming apps through its App Store*'.

The European Commission's concerns arise from the combination of two of the rules that Apple imposes on developers, being:

- the mandatory use of Apple's proprietary in-app purchase system, on which Apple charges a 30% commission; and
- limitations on the ability of app developers to inform users of alternative purchasing possibilities.

The Commission's preliminary view is therefore that '*Apple's rules distort competition in the market for music streaming services by raising the costs of services which compete with Apple's own Apple Music product*'.

Per the Commission's Executive Vice-President Margrethe Vestager:

App stores play a central role in today's digital economy. We can now do our shopping, access news, music or movies via apps instead of visiting websites. Our preliminary finding is that Apple is a gatekeeper to users of iPhones and iPads via the App Store. With Apple Music, Apple also competes with music streaming providers. By setting strict rules on the App store that disadvantage competing music streaming services, Apple deprives users of cheaper music streaming choices and distorts competition. This is done by charging high commission fees on each transaction in the App store for rivals and by forbidding them from informing their customers of alternative subscription options.

While the Commission's opinion is only preliminary at this stage, if the claims are substantiated then Apple could be in breach of European laws

prohibiting the abuse of a dominant position in a market.

The European Commission also has a broader review into Apple's App Store rules underway.

The timing of the interim report comes less than a fortnight after the ACCC's Federal Court win over Google, wherein the Federal Court found that Google had engaged in misleading or deceptive conduct by virtue of statements made to users about collection of location data.

This is the second report arising from the ACCC's digital platform services inquiry project, commenced last year following the ACCC's Digital Platforms Report in 2019.

The next interim report from the digital platform services inquiry is due in September, and will be '*examining the provision of web browsers and general search services to Australian consumers and the effectiveness of choice screens in facilitating competition and improving consumer choice*'. As part of this, the ACCC will be assessing the effectiveness of steps taken by Google in Europe to provide Android users with a screen to choose between a number of different default search providers, not only Google's own search engine, following a €4.34 billion fine issued by the European Commission.

With another Court case from the ACCC against Google currently pending, along with one from the Office of the Australian Information Commissioner against Facebook, and further reports from the ACCC to come, Australian regulators are continuing to show an appetite to grapple with the role these digital giants have come to play in our modern economy.