Australian Courts and the Extraterritorial Operation of Laws –
Consumer and Competition Laws

A paper presented to the Australian Judicial Officers Association 2022 Colloquium
8 October 2022

The Honourable Justice Mark Moshinsky[1]
Federal Court of Australia

Introduction

A company based in the United Kingdom conducts a global online business of sports-betting and gambling. Consumers in Australia are able to register with the company and place bets and participate in gambling. If the company makes representations on its UK website that are misleading or deceptive, do Australian consumer laws (in particular, ss 18 and 29 of the Australian Consumer Law[2]) apply to the conduct of the UK company?

A company based in the United States conducts a large global online business for the sale of goods. Customers are able to order online and the goods are delivered by courier. The company has a large presence in the United States and undoubtedly has a substantial degree of power in a market (or markets) in the United States. The company establishes a local subsidiary and website in Australia, but its market share here is small. Does the company or the subsidiary have a substantial degree of power in a market in Australia for the purposes of s 46 of the *Competition and Consumer Act* (the misuse of market power provision)?

This paper will discuss the operation of Australia's consumer and competition laws in relation to extraterritorial conduct that affects Australian consumers or markets. In particular, I will focus on the significant changes that have occurred in the way business is conducted with the introduction of the internet, and the growth of global online businesses. How well adapted are our consumer and competition laws to deal with this new reality?

I will discuss three recent decisions of the courts that illustrate the way in which extraterritorial conduct has been approached. I will develop the proposition that these cases recognise the significant changes that have occurred in globalisation and technology. Then I will make some observations and raise some questions about scenarios that may arise for consideration in future cases.

[1] I would like to thank my Associate, Priyanka Banerjee, for her assistance in the preparation of this paper.
[2] Being Sch 2 to the *Competition and Consumer Act 2010* (Cth).

Recent cases

Valve Corporation

The first case I will discuss is *Valve Corporation v Australian Competition and Consumer Commission*,[3] a judgment of the Full Federal Court (Dowsett, McKerracher and Moshinsky JJ) affirming a judgment of Edelman J.[4]

The basic facts of the case were as follows. Valve is a company based in the State of Washington, United States of America. It operates an online video-game distribution network under the brand name "Steam". The network contained approximately 4,000 video games. At the relevant time, Valve had approximately 118 million subscribers around the world, including approximately 2.2 million Australian subscribers. Valve earned significant revenue from Australian customers on an ongoing basis.

Valve operated a website, which was referred to in the judgments as the "Steam website". This was a US website, not an Australian website.

Valve operated an online delivery platform, known as the Steam Client, by which video games were made available for purchase, including to customers in Australia.

Valve's business premises and staff were all located outside Australia. Valve held no real estate in Australia. However, it owned servers in Australia. These had a value on acquisition of US$1.2 million. The servers were located in commercial "rack space" leased by Valve from an Australian company.

Payments for subscriptions were made in US dollars and processed in Washington State. These included payments made by Australian consumers to Valve.

The Australian Competition and Consumer Commission (the **ACCC**) alleged at trial that Valve had contravened ss 18 and 29(1)(m) of the Australian Consumer Law, by making representations to consumers about the existence, exclusion or effect of the consumer guarantees in Div 1 of Pt 3-2 of the Australian Consumer Law (in particular, the acceptable quality guarantee in s 54). It was alleged that Valve had misrepresented the position, by making statements such as the following statement (in the Steam Subscriber Agreement):

[3] (2017) 258 FCR 190 (***Valve (FFC)***).
[4] *Australian Competition and Consumer Commission v Valve Corporation (No 3)* (2016) 337 ALR 647 (***Valve (first instance)***).

> ALL STEAM FEES ARE PAYABLE IN ADVANCE AND ARE NOT REFUNDABLE IN WHOLE OR IN PART.

The ACCC contended that ss 18 and 29(1)(m) were applicable on two alternative bases. The first was that the representations were made (and thus the conduct occurred) in Australia. The second was that Valve was carrying on business in Australia. The second basis relied on s 5(1)(g) of the *Competition and Consumer Act*, which relevantly provides that the Australian Consumer Law (other than Pt 5-3) extends to the engaging in conduct outside Australia by bodies corporate "carrying on business within Australia".

Valve defended the proceeding at first instance on a number of grounds. Among other things, Valve contended that ss 18 and 29 of the Australian Consumer Law were inapplicable on the basis that the representations, if made, were not made in Australia. It was therefore contended by Valve that its conduct fell outside the ordinary operation of the statutory provisions. Valve also contended that it did not carry on business in Australia and therefore that s 5(1)(g) of the *Competition and Consumer Act* did not apply.[5]

At first instance, Edelman J rejected each of Valve's contentions, as summarised above. That is, his Honour held that, on the assumption that the representations were made, Valve made the representations (and thus engaged in conduct) in Australia. Further, he held that Valve was carrying on business in Australia within the meaning of s 5(1)(g). The Full Court agreed with both of those conclusions.

I will now examine each of these points in a little more detail.

The first issue was whether the representations alleged by the ACCC, if made, were made in Australia. Edelman J stated that the conduct that needed to be characterised (to determine whether it was conduct in Australia) was the conduct that was alleged to contravene ss 18 and 29(1)(m) of the Australian Consumer Law. The core of that conduct involved representations by Valve on its US website, in "chat logs" to consumers, and through the Steam Client (being the delivery platform that consumers downloaded onto their computers). His Honour said that the "chat log" representations and the Steam Client representations had been made specifically to consumers in Australia. His Honour therefore held that they were made in Australia.

[5] I put to one side for present purposes another contention made by Valve, namely that the consumer guarantees had no application in circumstances where the "objective proper law" of the contract between Valve and the consumer was the law of a country other than Australia.

In relation to the representations on the US website, his Honour reasoned as follows:[6]

> The website representations are less simple. Considered by themselves, they were general representations to the world at large. They are not representations to any person or to any Australian consumer. Until the representations were accessed, the representations were meaningless and could not be the subject of any alleged contravening conduct. But, by the time a consumer had purchased a game or downloaded Steam Client the consumer had a relationship with Valve and representations were made in Australia. The purchase of a game also required a consumer to click on a box that agreed to the terms of the SSA. The consumer provided Valve with his or her location as Australia at the time of purchase. Indeed, Valve priced some games differently in Australia … The consumer might be told by Valve that "This item is currently unavailable in your region" …

On appeal, the Full Court agreed that Valve had made the representations (and thus engaged in conduct) in Australia.[7] The Full Court stated that the question to be determined was where, for the purposes of ss 18 and 29(1)(m) of the Australian Consumer Law, the relevant conduct took place. In the circumstances of the case, the relevant conduct involved the making of representations.[8] The Full Court stated that the principles discussed in cases concerning service out of the jurisdiction or the choice of law rules for tort were not necessarily transposable to determining the place of conduct for the purposes of ss 18 and 29(1)(m); nevertheless, the cases identified some general themes that could assist, at least by way of analogy. The Full Court discussed *Voth v Manildra Flour Mills Pty Ltd*[9] and *Dow Jones & Company Inc v Gutnick*.[10] The Full Court then stated:[11]

> In light of the above statements of principle, we consider that where it is alleged that a respondent has, by making representations on the internet, engaged in conduct that is misleading or deceptive or likely to mislead or deceive in contravention of s 18 of the Australian Consumer Law, or made false or misleading representations in contravention of s 29 of the Australian Consumer Law, and an issue arises as to the place of the representations, it is necessary to ask where in substance the representations were made. **If the respondent is based overseas and has a relationship with customers in Australia, it is likely that representations addressed to those customers will be taken to have been made in Australia**, being the place where the customer accesses and reads the representations on his or her computer. This is likely to be the case even if the representations are available to be accessed by consumers in other countries around the world. A distinction is to be drawn between the conduct proscribed by ss 18 and 29 and the causation of loss or damage. It is not necessary, for the purposes of these provisions, to establish loss or damage. It follows that, for the purposes of determining the place where the representations were made, it is not necessary to determine whether any loss or damage was suffered and, if

[6] *Valve (first instance)* at [181].
[7] *Valve (FFC)* at [117]-[139].
[8] *Valve (FFC)* at [126].
[9] (1990) 171 CLR 538.
[10] (2002) 210 CLR 575.
[11] *Valve (FFC)* at [134] (emphasis added).

> so, the place of that loss or damage. The approach we have outlined is both consistent with the general principles discussed in the cases and reflective of the consumer protection purpose of the statutory provisions.

Applying these principles to the facts of the case, the Full Court held that the representations, if made, were made in Australia. This included the representations on the US website. These representations related to Valve's refund policy, and thus were seen to have been addressed to Australian consumers who had signed up with Valve and were therefore in a relationship with Valve.

I observe that the conclusion that the representations were made in Australia was tied to the facts of the case, in particular the circumstance that the foreign company had a relationship with customers in Australia. The judgment did not address a situation where representations are made on a foreign website to consumers in Australia who are *not* in an existing relationship with the foreign company.

In light of the conclusion that the representations were made in Australia (and thus the conduct occurred in Australia) it was strictly unnecessary to consider the second issue, namely whether Valve was carrying on business in Australia for the purposes of s 5(1) of the *Competition and Consumer Act*. However, both Edelman J at first instance and the Full Court on appeal went on to consider the issue, in circumstances where it had been the subject of full argument.

At first instance, Edelman J stated[12] that the ordinary meaning of "carrying on business" usually involves (by the words "carrying on") a series or repetition of acts; and those acts will commonly involve "activities undertaken as a commercial enterprise in the nature of a going concern, that is, activities engaged in for the purpose of profit on a continuous and repetitive basis", citing *Thiel v Federal Commission of Taxation*;[13] *Pioneer Concrete Services Ltd v Galli*;[14] and *Hope v Bathurst City Council*.[15]

The primary judge concluded that, on the basis of this test, Valve "undoubtedly carried on a business in Australia". His Honour relied on six reasons, which were, in summary, as follows.[16]

[12] *Valve (first instance)* at [197].
[13] (1990) 171 CLR 338 at 350 per Dawson J.
[14] [1985] VR 675 at 705.
[15] (1980) 144 CLR 1 at 8-9 per Mason J (Gibbs, Stephen and Aickin JJ agreeing).
[16] *Valve (first instance)* at [199]-[204].

First, Valve had many customers in Australia with approximately 2.2 million Australian accounts. It earned significant revenue from Australian customers on an ongoing basis.

Secondly, Steam content was "deposited" on Valve's three servers in Australia when requested by a subscriber. It stayed on the server if it was requested again within a particular period of time.

Thirdly, Valve had significant personal property and servers located in Australia. Valve's Australian servers were initially configured by an employee who travelled to Australia. They were updated in 2013 by another employee who visited Australia.

Fourthly, Valve incurred tens of thousands of dollars per month of expenses in Australia for the rack space and power for its servers. These expenses were paid to the Australian bank account of an Australian company.

Fifthly, Valve relied on relationships with content delivery providers in Australia (such as Internode or ixaustralia) who provided caching for Valve in Australia.

Sixthly, Valve had entered into contracts with third party service providers, which provided content around the world, including in Australia.

For these reasons, his Honour held that, if the representations were not made in Australia (and thus the relevant conduct did not take place in Australia), the Australian Consumer Law nevertheless applied on the basis that Valve carried on business within Australia within the meaning of s 5(1)(g).

On appeal, the Full Court agreed.[17]

The Full Court referred to the judgment of Merkel J in *Bray v F Hoffman-La Roche Ltd*,[18] in particular his Honour's view that, in the context of s 5(1), he saw no reason for importing an additional requirement that, to carry on business in the jurisdiction, the foreign company must also have a *place of business* in the jurisdiction. The Full Court agreed with that proposition.[19]

[17] *Valve (FFC)* at [153].
[18] (2002) 118 FCR 1.
[19] *Valve (FFC)* at [145].

The Full Court discussed the judgment of Barrett J in *Campbell v Gebo Investments (Labuan) Ltd*.[20] In that case, his Honour was concerned with a situation in which Australian consumers responded to solicitation on an overseas website. His Honour stated:[21]

> Advances in technology making it possible for material uploaded on to the Internet in some place unknown to be accessed with ease by anyone in Australia with Internet facilities who wishes (or chances) to access it cannot be seen as having carried with them any alteration of principles as to the place of carrying on business developed at times when such communication was unknown. It has never been suggested that someone who by, say, letters posted in another country and addressed to recipients in Australia, seeks to interest those persons in business transactions to be entered into in the other country and in fact succeeds in concluding such transactions with some of them thereby carries on business in Australia, even though, depending on precise circumstances, the solicitation may contravene some other Australian law. There is a need for some physical activity in Australia through human instrumentalities, being activity that itself forms part of the course of conducting business.

The Full Court in *Valve* noted that *Gebo Investments* concerned different statutory provisions under the *Corporations Act 2001* (Cth). Nevertheless, the Full Court considered the discussion of principles in *Gebo Investments* "generally to be of assistance for present purposes".[22] The Full Court stated that it did not see the reference to "human instrumentalities" in the last sentence of the above passage as laying down an inflexible rule or condition. The Full Court stated that it placed emphasis on a statement in *Gebo Investments* at [31] that case law makes clear that the territorial concept of carrying on business involves acts within the relevant territory that amount to, or are ancillary to, transactions that make up or support the business.[23]

Applying those principles to the facts of the case, the Full Court agreed with Edelman J that Valve was carrying on business in Australia for the purposes of s 5(1)(g). The Full Court set out the six reasons given by Edelman J. The Full Court stated that not only did Valve engage in transactions with a large number of Australian consumers, it owned servers in Australia upon which Steam content was "deposited" when requested by its Australian customers; there was a series or a repetition of acts in Australia that formed part of the conduct of Valve's business.

The judgment of the Full Court in *Valve* on the issue of carrying on a business in Australia was applied by the Full Federal Court in *Facebook Inc v Australian Information Commissioner*.[24] The High Court has granted special leave to appeal in that matter.

[20] (2005) 190 FLR 209 (***Gebo Investments***).
[21] (2005) 190 FLR 209 at [33].
[22] *Valve (FFC)* at [149].
[23] *Valve (FFC)* at [149].
[24] (2022) 402 ALR 445 at [10] per Allsop CJ, at [81]-[84] per Perram J (with whom Allsop CJ and Yates J agreed).

I observe that the conclusion that Valve was carrying on business in Australia was tied to the facts of the case, in particular the six matters highlighted by Edelman J and adopted by the Full Court. These included the presence of servers in Australia and the incurring of ongoing expenses in relation to the servers. It was not necessary to consider whether it was sufficient for a foreign company, such as Valve, to have a large number of customers in Australia and to derive substantial revenues from those customers. This was the first of the six matters relied on by Edelman J and the Full Court; but it was only one of the six matters.

Air New Zealand v Australian Competition and Consumer Commission

The next case I will address is the judgment of the High Court in *Air New Zealand Ltd v Australian Competition and Consumer Commission*.[25] This is an important judgment concerning the definition of "market" in the *Competition and Consumer Act*. As the word "market" appears in many of the trade practices provisions in Pt IV of that Act, the decision is important for the scope of those provisions.[26]

The broader factual context is as follows.[27] The ACCC's litigation against Air New Zealand and Garuda was a small part of a major international enforcement effort arising from an international cartel relating to air cargo. The cartel involved a large number of airlines fixing base rates and surcharges for international air cargo services, primarily between 1999 and 2006. In Australia, the ACCC brought proceedings against 15 international airlines. The proceedings against 13 of the airlines settled, but the proceedings against Air New Zealand and Garuda did not. The penalties against the 13 airlines totalled almost $100 million. Globally, penalties reached into the billions and resulted in the imprisonment of several of the executives involved.

Focussing now on the ACCC's case against Air New Zealand and Garuda, the key relevant provision was s 45(2) of the *Trade Practices Act 1974* (Cth). This provided (in part) that a corporation shall not arrive at an understanding which has the purpose, or has or is likely to have the effect, of *substantially lessening competition*.[28] Section 45(3) defined "competition"

[25] (2017) 262 CLR 207 (***Air New Zealand***).

[26] The cartel provisions in Div 1 of Pt IV of the *Competition and Consumer Act* do not refer to "market" and therefore are not confined in this way. I note that, following the Harper Report, a jurisdictional nexus has been inserted into the cartel provisions. These provisions now refer to "trade or commerce", which is defined in s 4 to mean trade or commerce within Australia or between Australia and places outside Australia.

[27] See Clarke, J, "Extra-territoriality and markets 'in Australia'" (2017) 25 AJCCL 292 at 293.

[28] Section 45(2)(a)(ii). See also s 45(2)(b)(ii). Section 45A deemed a provision of contract, arrangement or understanding to have the purpose, effect or likely effect of substantially lessening competition if the provision had the purpose, effect or likely effect of fixing, controlling or maintaining the price for services supplied by the parties to the contract, arrangement or understanding in competition with each other.

to mean competition in any *market* in which a corporation that was a party to the contract, arrangement or understanding supplied or was likely to supply services. Section 4E defined "market" to mean a "market in Australia".[29]

The primary judge held that there was *not* a market in Australia for air cargo services for which Air New Zealand and Garuda competed. However, his Honour held that the conduct of the airlines would have contravened s 45(2) of the *Trade Practices Act* if they were in competition to supply services in a market in Australia. This latter aspect was not in issue in the High Court.

In concluding that there was no market in Australia, the primary judge treated the place where the ultimate choice of airline was effected (referred to as the "switching decision") as the location of the market. On this basis, his Honour identified Hong Kong, Singapore and Indonesia as markets, but not Australia.

The Full Federal Court, by a majority, allowed the appeal. The majority, comprising Dowsett and Edelman JJ, held that the relevant market *was* in Australia. Yates J, in dissent, agreed with the primary judge.

On appeal, all members of the High Court held that the competition between the airlines took place in a market in Australia. Kiefel CJ and Bell and Keane JJ delivered a joint judgment. Nettle J and Gordon J each delivered separate judgments. Nettle J agreed with the reasons of Gordon J, but provided additional reasons.

In their joint judgment, Kiefel CJ, Bell and Keane JJ stated that "[r]econciling the abstract notion of a market with the concrete notion of location, so that they work coherently, presents something of a challenge".[30] This was particularly so because "competition" describes a process, rather than a situation. Their Honours said that "given that the TPA regulates the conduct of commerce, it is tolerably clear that the task of attributing to the abstract concept of market a geographical location in Australia is to be approached as a *practical matter of business*".[31]

[29] At all relevant times, s 4E provided that "[f]or the purposes of this Act, unless the contrary intention appears, market means a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services".
[30] *Air New Zealand* at [14].
[31] *Air New Zealand* at [14] (emphasis added).

The judgment of the plurality records that it was common ground between the parties that a market in Australia does not cease to be so located because it encompasses other places as well. Their Honours then framed the issue as follows: "The issue … is whether the rivalrous behaviour … occurred in Australia, whether or not it also occurred elsewhere".[32]

The judgment of the plurality sets out key facts about the market. Their Honours noted that, apart from rare occurrences, airlines dealt directly only with freight forwarders situated in the port of origin or in nearby environs (i.e. in Singapore, Hong Kong or Indonesia), and not with shippers (who were located in Australia).[33] Their Honours acknowledged that rates were negotiated between freight forwarders and staff of airlines at the local sales office at the airport of origin.[34] However, the plurality placed emphasis on the following findings of the primary judge:[35]

> Importantly, the primary judge found that the airlines "tousled [sic] to obtain" the custom of those shippers in Australia who were substantial importers. His Honour said that "[a]lthough the contracts of carriage were entered into in Hong Kong by the freight forwarders … as a practical matter, substantial importers in Australia had the capacity to influence or even direct the decision as to which airline was to be used" to transport goods from the airport of origin to Australian airports. His Honour said that the evidence "strongly suggested" that the airlines regarded these shippers both as targets for their marketing activities and as the ultimate source of this business. A cursory examination of the cargo magazines produced by the airlines for the cargo trade showed that these larger shippers were regarded by the airlines as objects to be pursued. It was obvious, his Honour said, that the airlines would "compete for volumes of cargo directly from large shippers". The airlines' marketing magazines were directed to multiple markets. The marketing materials proceeded upon the basis that, regardless of the port of origin, the airlines were focused on shipper activity.

The plurality stated that the approach of the primary judge, with respect, accorded "too much significance to the fact that substitution or switching may occur outside Australia".[36]

The plurality stated that the act of substitution or switching marked the *conclusion* of the rivalry: one of the rivals had prevailed.[37]

Their Honours said that the place where the act of substitution occurred did not necessarily locate the geographical area of the rivalry that *preceded* that act of substitution.[38]

[32] *Air New Zealand* at [15].
[33] *Air New Zealand* at [20].
[34] *Air New Zealand* at [20].
[35] *Air New Zealand* at [21] (footnotes omitted).
[36] *Air New Zealand* at [23].
[37] *Air New Zealand* at [27].
[38] *Air New Zealand* at [28].

Their Honours reasoned as follows:[39]

> In the present case, Australia was not merely the end of the line for services generated by an interplay of forces of supply and demand occurring outside Australia. The primary judge's findings of fact demonstrate that shippers in Australia were a substantial source of demand for the airlines' services, and that the airlines engaged in rivalrous behaviour seeking to match the supply of their services with that demand. The primary judge found that the airlines appreciated that the large shippers who required air cargo services to ports in Australia were the "economic foundation of the market". And importantly, the primary judge found that the airlines tussled to obtain the custom of shippers in Australia who were substantial importers, and whom the airlines regarded as the ultimate source of their business. To speak of suppliers tussling to obtain orders is to describe the rivalrous behaviour which is the essence of competition.

Gordon J's judgment contains a detailed analysis of the relevant factual findings made by the primary judge.[40] Her Honour held that there was a market in Australia as this "accurately and realistically describes and reflects the interactions between, and perceptions and actions of, one or more of the relevant actors and participants in the market for those services".[41] Her Honour identified five key facts and matters that underpinned that conclusion. On this basis, her Honour concluded that, in relation to the air cargo services, an area of effective competition in which each airline operated was in Australia, and the airlines engaged in rivalrous behaviour in Australia.[42]

Her Honour observed that that conclusion was unsurprising when set against the purposes of the *Trade Practices Act*, referring to the purpose of "enhanc[ing] the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection".[43]

Nettle J emphasised that the airlines marketed their services in Australia to potential customers in Australia, and perceived themselves to be competing for Australian customers in Australia.[44]

His Honour acknowledged that the "switching decisions" (that is, decisions to choose one airline over another or to substitute one airline's service for another's) were executed or given effect in Singapore or Hong Kong. His Honour then stated that equally, at least in some cases, "those decisions were the result of determinations previously made by Australian customers in

[39] *Air New Zealand* at [31] (footnotes omitted).
[40] *Air New Zealand* at [96]-[118].
[41] *Air New Zealand* at [121].
[42] *Air New Zealand* at [121].
[43] *Air New Zealand* at [122].
[44] *Air New Zealand* at [43].

Australia in response to the airlines' marketing activities in Australia".[45] In international commerce, the place of entry into a contract is not necessarily a significant factor.[46]

The judgments of the High Court represent a significant development in the approach to market definition, which is relevant to many of the provisions of Pt IV of the Act. The overall tenor of the judgments of the High Court is supportive of the identification of a market in Australia. This has significant implications for the scope of the provisions and their capacity to apply to conduct that takes place overseas but affects Australian consumers.

Epic Games v Apple

The third case that I wish to discuss is *Epic Games Inc v Apple Inc*,[47] a recent judgment of the Full Federal Court (comprising Middleton, Jagot and Moshinsky JJ).

The issue in the case was whether a proceeding commenced in the Federal Court of Australia by Epic Games Inc (**Epic**), a US company, against Apple Inc (**Apple**), another US company, alleging contraventions of the trade practices provisions of the *Competition and Consumer Act* and a provision of the Australian Consumer Law should be stayed on the basis of an exclusive jurisdiction clause in favour of the courts of the Northern District of California.

Epic is a developer of video games, including the popular game "Fortnite". This game is available in three distinct game mode versions: *Fortnite Battle Royale*, a game in which up to 100 players fight to be the last person standing; *Fortnite: Save the World*, a co-operative hybrid tower defence and survival game in which up to four players fight off zombie-like creatures and defend objects with traps and fortifications they can build; and *Fortnite Creative*, in which players are given complete freedom to create worlds and battle arenas. Across all platforms (i.e. iOS devices, Android devices and other devices for playing video games), there are approximately 350 million users of *Fortnite* worldwide. The proceeding was concerned only with iOS devices (iOS being the Apple operating system). Focussing only on iOS devices, there are approximately 116 million users of *Fortnite* worldwide, and approximately 3 million users of *Fortnite* in Australia.

The background to the litigation is that Apple required developers of apps for iOS devices to distribute those apps only through Apple's App Store (including, in the case of Australia,

[45] *Air New Zealand* at [43].
[46] *Air New Zealand* at [44].
[47] (2021) 286 FCR 105 (*Epic v Apple (FFC)*).

Apple's Australian App Store). Further, Apple required app developers to use Apple's in-app payment processing system for the purchase by customers of in-app content. Typically, Apple deducted a commission of 30% on such payments. These obligations were contained in the App Store Review Guidelines and the Apple Developer Program License Agreement (**DPLA**).

The DPLA contained an exclusive jurisdiction clause in favour of the courts of the Northern District of California.

The immediate events leading up to the litigation were as follows.

In August 2020, Epic introduced into the iOS version of *Fortnite* a facility for making in-app purchases using a payment processing system of its own devising. Epic did so by means of a software update which included a hotfix that 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. The hotfix was activated on 13 August 2020.

At the same time, fresh versions of *Fortnite* that were downloaded from the App Store came equipped with this new feature.

This was a direct breach of the App Store Review Guidelines. In these circumstances, under the terms of the DPLA, Apple was authorised to cease distributing *Fortnite*.

Apple responded the same day that 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.

On 13 August 2020 (i.e. the same day that the hotfix was activated and Apple responded as outlined above), Epic commenced proceedings for injunctive relief in the United States District Court for the Northern District of California, alleging that the effect of the DPLA was to maintain Apple's monopolisation of certain markets contrary to the United States Sherman Act and certain competition law statutes of California.

Some three months later, on 16 November 2020, Epic commenced a proceeding in the Federal Court of Australia, alleging contraventions of Pt IV of the *Competition and Consumer Act* and s 21 of the Australian Consumer Law.

Apple brought an application for a stay of the Australian proceeding, relying primarily on the exclusive jurisdiction clause.

The primary judge granted Apple's application for a stay.[48] The order that his Honour made was that the proceeding be temporarily stayed for a period of three 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 *Competition and Consumer Act* or s 21 of the Australian Consumer Law. If Epic had commenced a suit alleging such contraventions by that 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.

In summary, the primary judge held that the exclusive jurisdiction clause covered the dispute, and that Epic failed to demonstrate strong reasons to refuse the stay.[49]

On appeal, the Full Court held that the primary judge erred in granting the stay. In a joint judgment, the Full Court held that there were strong reasons not to grant a stay, including because enforcement of the exclusive jurisdiction clause would offend the public policy of the forum,[50] relying on the judgment of the High Court in *Akai Pty Ltd v People's Insurance Co Ltd*.[51]

The Full Federal Court stated that the proceeding involved serious issues of public policy and the effect of the proceeding would be particularly far reaching.[52] This was because the alleged contravening conduct had adversely affected, and was continuing to adversely affect, the state of competition in markets in Australia and very large numbers of Australians. It may be observed that Epic's allegations, if made out, would apply also to other developers of apps for use on iOS devices in Australia.

The Full Court referred to the economic significance for Australia of conduct regulated by Pt IV and to the legislative policy of the Act.[53]

In the course of the judgment, the Full Court referred to the "platform provisions", namely ss 83 and 87(1A) of the *Competition and Consumer Act*.[54] Section 83 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. The Full Court reasoned that, having

[48] *Epic Games Inc v Apple Inc* (2021) 151 ACSR 444 (***Epic v Apple (first instance)***).
[49] *Epic v Apple (first instance)* at [12], [42], [44].
[50] *Epic v Apple (FFC)* at [20], [87].
[51] (1996) 188 CLR 418.
[52] *Epic v Apple (FFC)* at [97].
[53] *Epic v Apple (FFC)* at [99]-[102].
[54] *Epic v Apple (FFC)* at [29].

regard to the issues in the proceeding, and the impact that a determination by the Court would have on consumers in Australia, this was a very strong policy consideration that favoured denying a stay of the proceeding.[55]

The Full Court also noted that, if contraventions of Pt IV of the *Competition and Consumer Act* are determined by foreign courts, they will be determined through the prism of expert evidence about the content of Australian law; that process is not the same as ascertaining and applying the law directly.[56]

Although at one level the case involves the application of established principles, it provides an illustration of how those principles may apply in the context of foreign companies operating online businesses in many countries, including in Australia. Where a dispute arises involving alleged contraventions of the trade practices provisions of the *Competition and Consumer Act*, public policy considerations may provide a strong reason why a stay should not be granted notwithstanding the presence of an exclusive jurisdiction clause nominating the courts of another country in the agreement between the parties.

Observations

The three cases that I have discussed provide illustrations of the operation of Australian consumer and competition laws in the context of foreign companies conducting online businesses that affect Australian consumers and markets.

While each of these cases was able to be resolved in a way that gave scope for the operation of those laws notwithstanding the extraterritorial elements of the conduct, other cases may arise where the position is less clear.

I return to the two scenarios I raised at the beginning of this paper.

The first involves a company based in the United Kingdom that conducts a global business of sports-betting and gambling. Consumers in Australia are able to register with the company and place bets and participate in gambling. If the company makes representations on its UK website that are misleading or deceptive, do Australian consumer laws (in particular, ss 18 and 29 of the Australian Consumer Law) apply to the conduct of the UK company?

[55] *Epic v Apple (FFC)* at [108]-[109].
[56] *Epic v Apple (FFC)* at [110].

This scenario involves an adaptation of the facts of an actual case, namely *Australian Competition and Consumer Commission v Hillside (Australia New Media) Pty Ltd trading as Bet365*,[57] a judgment of Beach J. In that case, the UK parent had an Australian subsidiary and there was an Australian website. The ACCC brought proceedings alleging misleading or deceptive conduct on the basis of statements on the website offering "free bets" for new customers. In fact, there were a number of conditions that needed to be fulfilled before a customer could access the so-called "free bets".

In the actual case, there was an Australian website and no issue arose as to where the representations were made.

However, if the facts are varied such that there is no Australian website, and only a UK website, and the representation are made on the UK website to consumers worldwide (including in Australia), the question would arise as to whether the representations were made in Australia.

In the *Valve* case, the representations on the Steam website were made in the context of an existing relationship with customers in Australia, and this was one of the bases on which the Full Court concluded that the representations were made in Australia. But if there is no existing relationship with consumers in Australia, will the representations be treated as made in Australia? Is it sufficient that the website solicits business from consumers in Australia?

Further, if the position is that the representations are not made in Australia, a further question may arise, namely whether the foreign company is to be treated as carrying on business within Australia for the purposes of s 5(1)(g)? Assume that the UK company does not have place of business in Australia. Assume that it does not have any physical assets in Australia. Is it sufficient that the UK company has a large number of customers in Australia and derives substantial revenue from those customers? As indicated above, I do not consider *Valve* to resolve this question.

The second scenario mentioned at the outset of this paper concerns s 46 of the *Competition and Consumer Act*, the new misuse of market power provision. Under s 46, 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 certain

[57] [2015] FCA 1007.

other *markets*. As we have seen, the word "market" is defined as meaning a "market in Australia".

In the scenario, a company based in the United States conducts a large global online business for the sale of goods. Customers are able to order online and the goods are delivered by courier. The company has a large presence in the United States and undoubtedly has a substantial degree of power in a market (or markets) in the United States. The company establishes a local subsidiary and website in Australia, but its market share here is small.

Does the foreign company or the local subsidiary have a substantial degree of power in a market in Australia for the purposes of s 46?[58]

While the judgment of the High Court in *Air New Zealand* is relevant and important in determining whether or not there is a "market in Australia", it does not address the issue posed by this scenario.

The answer to the question will depend on a detailed analysis of the facts of the particular case, in particular an analysis of the circumstances and drivers of competition in the market in Australia. Nevertheless, the scenario serves to illustrate an issue that may well arise in the context of large foreign online businesses that enter the Australian market.

Conclusion

While the cases discussed in this paper provide significant guidance as to the application of the consumer law and competition law provisions to extraterritorial conduct, the cases only go so far, and, as I have sought to demonstrate, questions remain as to the potential application of the provisions to the extraterritorial conduct of foreign companies.

[58] See the useful discussion of the general principles concerning substantial market power in Clarke, J, "Digital Platforms, Emerging Markets, and Section 46", in Gvozdenovic, M, and Puttick, S (eds), *Current Issues in Competition Law: vol II: Practice and Perspectives* (Federation Press, 2021), p 98 at pp 108-110.