For the public register

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Treasury
Market Conduct Division
Langton Cres, Parkes ACT 2600

Via email: digitalcompetition@treasury.gov.au

Re: Digital Platforms – Consultation on Regulatory Reform

Epic Games[1] welcomes the opportunity to provide feedback on the consultation paper released by Treasury to inform the design and implementation of mandatory codes to apply to designated digital platforms.

The Australian Competition and Consumer Commission's (ACCC) Digital Platforms Services Inquiry (DPSI) September 2022 report found, among other things, that digital platforms provide valuable services but that there is a lack of competitive constraints in the markets in which they operate that has led to consumer and competition harms. The ACCC observed that most digital platform markets are dominated by one or two large providers which face limited competitive constraints.

The ACCC observed high levels of concentration and entrenched market power in mobile app marketplaces dominated by Apple and Google.[2] This submission focuses on this finding and provides background and insights informed by Epic's experience with Google and Apple mobile app stores in Australia on the following issues:

- The effectiveness of competition and consumer law in Australia;
- The prevalence and nature of harms to consumers;
- The designation and code of conduct model proposed by the ACCC;

[1] Founded in 1991, Epic Games is a leading interactive entertainment company and provider of 3D engine technology. Headquartered in Cary, North Carolina, Epic has more than 50 offices worldwide, including in Australia. Epic develops software applications (apps) for several devices. Epic is the creator of Fortnite, a massive virtual world where hundreds of millions of people from across the world connect, meet, play, talk, compete, dance, or attend concerts and cultural events. Epic also develops Unreal Engine, which powers the world's leading games and is also adopted across industries such as film and television, architecture, automotive, manufacturing, and simulation. Through Unreal Engine, Epic Games Store, and Epic Online Services, Epic provides an end-to-end digital ecosystem for developers and creators to build, distribute, and operate games and other content.

[2] Australian Competition and Consumer Commission, 'Digital Platform Services Inquiry – September 2023 Interim Report – regulatory reform (11 November 2022) pg.7. Available at https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20September%202022%20interim%20report.pdf.

- Governance models for the design and enforcement of the codes; and
- International developments.

<u>Consultation Question 1</u>: Do you agree with the ACCC's conclusion that relying only on existing regulatory frameworks would lead to adverse outcomes for Australian consumers and businesses? What are the likely benefits and risks of relying primarily on existing regulatory frameworks?

Mobile ecosystems are a critical part of the modern economy. Millions of developers and billions of consumers rely on those ecosystems to make a living and conduct important daily tasks. Apple's and Google's restrictions present harms to competition and consumers that, to-date, have not been prevented by existing frameworks.

Epic initiated private competition law proceedings against both Apple and Google in Australia on 16 November 2020 and 8 March 2021, respectively. In each of these proceedings Epic asserts that contractual and technical restrictions imposed by Apple and Google in relation to mobile app distribution and in-app payment systems constitute contraventions of relevant provisions of the Competition and Consumer Act of 2010.[3] Notwithstanding our confidence in the Australian courts and competition law, Epic agrees with the ACCC that these harms can be addressed through legislative and regulatory intervention and that there is strong public interest in doing so.

There are several reasons why regulatory intervention into mobile app store gatekeeper platforms is appropriate and necessary, both in its own right and in conjunction with private litigation. First, litigation is inherently time-consuming even when courts act expeditiously. The ACCC observed that enforcement of competition and consumer laws through 'traditional' investigations and court proceedings may be lengthy and is necessarily retrospective, addressing competition and consumer harms after conduct has already occurred.[4] As a proof point, the ACCC notes Epic's legal proceedings against Apple and Google, won't go to trial until March 2024.[5] In the meantime, consumers and developers will continue to be harmed by Apple's and Google's anticompetitive mobile app store practices during the pendency of the litigation.

Second, litigation is costly – prohibitively so for many innovators, particularly small businesses, and new entrants. While Epic has brought legal proceedings against Apple and Google, few developers have the resources to endure protracted litigation against two of the world's wealthiest companies. Epic is not seeking monetary damages in these cases. Rather, we are seeking injunctive relief against Apple's and Google's app store policies, not just for Epic, but for all mobile app developers.

Finally, on its own, litigation may not fully address issues with digital platforms services that are pervasive to the market (as opposed to those confined to discrete parties). The adverse impacts of Apple's and Google's app store restrictions extend to all mobile app developers, well beyond Epic and the games industry.[6] Epic hopes that our litigation will result in ecosystem-wide change. Regulatory action inherently is directed at remedying broader systemic failure and providing guidance and relief to all those impacted in a market.

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[3] The Federal Register of Legislation, 'Competition and Consumer Act 2010', (1 January 2011) Available at https://www.legislation.gov.au/Details/C2022C00365.

[4] Australian Competition and Consumer Commission, 'Digital Platform Services Inquiry – September 2023 Interim Report – regulatory reform' (11 November 2022) pg.48. Available at https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20September%202022%20interim%20report.pdf.

[5] S Sharwood, *The Register*, "Epic Games' court dates with Apple and Google pushed into 2024', (5 April 2022). Available at https://www.theregister.com/2022/04/05/epic_vs_apple_vs_google_australia_delays/.

[6] Similar actions have also been taken by Epic in the United States and United Kingdom.

While Epic continues to seek injunctive relief in the courts, Apple's and Google's restrictions continue to present clear competition and consumer harms that can and should be addressed through legislative and regulatory intervention. Australian consumers and developers deserve a competitive, functioning mobile app marketplace. The Australian Government does not – and should not – need to await the outcome of private or ACCC proceedings instituted against Apple and Google to implement legislative reform.

Consultation Questions 7 to 12: Consumer Recommendations

The ACCC recommends that Australian Consumer Law (ACL) be amended to include new and expanded consumer safeguards to help address the range of consumer harms identified for digital platform services, including a general prohibition on unfair trading practices and unfair contract terms.[7]

The ACCC observes that Apple and Google "perform gatekeeper roles by controlling app developers' access to their respective app marketplaces" and that they can "unilaterally set, amend, interpret and enforce the terms and conditions that app developers must follow to reach consumers." Apple's and Google's control over their respective app marketplaces enables each of them to bundle developer access to their app stores with a requirement to use their in-app payment systems and to take commission on transactions using those systems.[8][9] Moreover, not only do they control access to their own mobile app stores, Apple and Google use their control over their respective mobile operating systems to prevent developers and consumers from utilising alternative app stores or direct downloads, giving them unilateral control over which applications consumers may install on their phones.

Apple and Google impose contractual restrictions that prevent app developers, including small businesses, from distributing their apps on competing app stores or enabling their apps to be directly downloaded onto consumer devices outside the Google Play and Apple App Store. They also prevent developers from choosing more competitively priced alternative in-app payment systems by mandating that developers exclusively utilise Apple's and Google's proprietary in-app payment systems, and then forcing them to pay exorbitant rates for those services. Notably, the 30% charge imposed by Apple and Google on purchases for in-app content is around 10 times higher than fees charged by analogous electronic payment processors in competitive contexts, such as PayPal, Stripe, Square or Braintree, which typically charge payment processing rates of around 3%. Such restrictions also mean that developers cannot either offer or even alert consumers to cheaper alternative payment methods outside an app (e.g. on a developer's website).

The contractual restrictions imposed by Apple and Google prevent would-be competing app distributors from developing alternative app marketplaces that would provide consumers and app developers with choice beyond the Apple App Store and Google Play Store. These restrictions have also resulted in 'super profits' being collected by each company at the expense of Australian consumers, and prevented the establishment of otherwise viable in-app payment systems that could compete with each of the payment processors offered by Apple and Google. Notably, the systems offered by Apple and Google do not provide any unique benefits over other in-app payment services or existing alternative (and lower-cost) options that offer similar functionality. They are arbitrarily

[7] Australian Competition and Consumer Commission, 'Digital Platform Services Inquiry Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services' pg. 97. Available at https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry.pdf.

[8] DPSI Report, p 79.

[9] Australian Competition and Consumer Commission, 'Digital Platform Services Inquiry – Discussion Paper for Interim Report No. 5: Updating Competition and Consumer Law for Digital Platform Services' (28 February 2022) available at https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry.pdf, at 24.

applied to what Apple and Google deem to be 'digital apps', while other apps offering similar (physical) services to consumers are exempted.

<u>Consultation Question 13:</u> Do you agree with the designation and code of conduct model proposed by the ACCC for the new competition regime? What would be the main implementation challenges for such a regime?

The ACCC recognised that digital platforms provide valuable services to Australian consumers. However, a lack of competitive constraint can reduce digital platforms' incentives to innovate and improve the quality of their products and services. This in turn can lead to higher prices, lower quality and fewer choices.[10] Nowhere is this more evident than in the distribution of applications on mobile devices. Mobile app distribution is controlled by two companies operating parallel monopolies over distribution of apps within their respective ecosystems. Apple and Google have used their market power to artificially suppress a more competitive marketplace for participants on both sides of the platform. As a consequence, consumers and developers pay more for fewer options and lower quality. Stronger safeguards are needed for consumers and businesses and to address these competition concerns.

Epic supports the ACCC's recommendation to develop a new regulatory regime to promote competition in digital platform services through the implementation of obligations through service-specific codes of conduct, including those targeted to address mobile app store gatekeepers. These codes would operate under high-level principles established in legislation, and be tailored to specific anticompetitive conduct through ex ante rules and mandatory codes to prevent harm to the consumer before it occurs. Such regulatory reform would be consistent with the type of regulatory reform recently introduced by the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021, which amended the CCA to establish a mandatory code of conduct that applies to news media businesses and digital platforms when bargaining in relation to news content made available by digital platforms.[11]

Given the dynamic nature of digital platform services and the various and evolving business models used by digital platforms, new regulations should be flexible to respond to the rapid developments in the digital platforms section, have targeted obligations for specific digital platforms to address specific anti-competitive conduct and barriers to entry and provide sufficient certainty to address and deter harm to competition caused by specific digital platforms. Where possible, the new competition measures for digital platforms in Australia should seek to align with emerging international competition reforms for digital platforms. As the ACCC notes, international coherence could help to reduce the regulatory burden for affected digital platforms that operate across jurisdictions and provide greater certainty to digital platforms and related firms.[12]

To achieve the objectives outlined above, the codes should take a service-by-service approach. This will provide flexibility and the new codes can be developed in response to emerging concerns about anti-competitive conduct or limited competition in particular markets for new or existing digital platform services. It will also be more efficient and expeditious to update subordinate legislation than

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[10] Australian Competition and Consumer Commission, 'Digital Platform Services Inquiry Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services' pg. 39. Available at https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry.pdf.

[11] Australian Competition and Consumer Commission, 'Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021' (19 March 2021) Available at https://www.accc.gov.au/system/files/Final%20legislation%20as%20passed%20by%20both%20houses.pdf.

[12] Australian Competition and Consumer Commission, 'Digital Platform Services Inquiry – September 2023 Interim Report – regulatory reform (11 November 2022) pg.110. Available at https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20September%202022%20interim%20report.pdf.

primary legislation as this will allow for obligations to be added, amended or removed in response to new concerns or developments as required.

<u>Consultation Question 14-15</u>: Do you agree with the proposed framework of prescribing general obligations in legislation, and specific requirements in codes? Do you agree with the proposed principles for designating platforms for the regime?

Epic supports the ACCC's proposal that the primary legislation that sets out the codes of conduct should include a set of high-level principles to guide the obligations. The ACCC suggests that these codes should apply to digital platform services that meet specific designation criteria, and that such criteria should account for the characteristics of digital platforms that give them critical positions in the Australian economy, as well as the ability and incentive to engage in conduct harmful to competition.[13]

Epic supports the ACCC's assertion that this should be based on a quantitative criterion, such as the number of Australia users and the platform's revenue, and qualitative criteria, such as whether the digital platform holds an important intermediary position between developers and consumers, and whether it has substantial market power in the provision of the digital platform service.

Epic also supports the principles for guiding obligations as outlined by the ACCC: "competition on the merits;" "informed and effective consumer choice;" as well as "fair trading and transparency for users of digital platforms." Given the nature of multi-sided digital platforms such as mobile app stores, where there are "users" on both sides of the transaction, it is important to recognise that the term "user of digital platforms" encompasses developers, as well as consumers. Consumers have no choice to install mobile applications except via the Apple and Google App Stores. Likewise, mobile app developers have no choice but to distribute their applications except via Apple's and Google's app stores. Developers must program and support an app both on iOS and Android OS to successfully commercialise an app, and must adhere to Apple's and Google's unilateral, arbitrary and often opaque app store terms, just as consumers must. Consequently, to ensure the effectiveness of any codes of conduct, "fair trading and transparency" principles should apply to users on both sides of the mobile app marketplace.

<u>Consultation Question 16</u>: Do you agree that the focus of any new regulation should be on the competition issues identified by the ACCC in Recommendation 4? Should any issues be removed or added?

Epic agrees that obligations under an ex-ante regime should address anticompetitive conduct related anticompetitive tying, self-preferencing and interoperability.

In service of these goals, Epic urges the implementation of provisions that would open mobile devices to alternative app distribution, including competing app stores and sideloading, would address these concerns directly and have a significant and salutary impact on the mobile ecosystem but subjecting the App Store and Play Store to direct competition and consumers to choices, which in turn would inject much-needed market-discipline where currently none exists. These solutions already exist and are regularly and safely used by consumers every day when they use their laptop or desktop computers, including PCs, macs and Chromebooks. It is only when consumers shift from the computer on their desk to the computer in their pocket that they are limited to software installation through the App Store and Play Store.

[13] Australian Competition and Consumer Commission, 'Digital Platform Services Inquiry – September 2023 Interim Report – regulatory reform (11 November 2022) pg.5. Available at https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20September%202022%20interim%20report.pdf.

In addition to opening up alternative means of mobile app distribution, prohibiting the tying of proprietary in-app payment systems to app distribution would be an important complementary remedy. Consumers and app developers should be able to choose which payment system providers process in-app payments for digital goods on their mobile devices – just as they are able to do now on their macs, Chromebooks and PCs. This choice is not available to users of mobile devices because the Apple App Store and Google Play Store prohibit it by tying payment processing to distribution in their respective app stores. Without this choice – and the attendant competition for payment processing – there is no market discipline on Apple's and Google's ability to unilaterally set rates for payment processing, nor is there any competitive pressure for Apple or Google to innovate including around improving the security and privacy of their payment processing services.

Implemented together, these alternative distribution and in-app payment solutions would open-up existing mobile app distribution ecosystems, unlocking competition and innovation from additional entrants and expand choice for consumers. Epic cautions that in-app payment reform alone may be insufficient to discipline Apple's and Google's control over the mobile economy. While it is important to establish clear rules that make Apple and Google offer third party payment services, payments are just one part of a broader pattern of Apple's and Google's monopolist behaviour. Their ability to levy supracompetitive 'rents', whether levied through app store dominance or payment rules, are an indication of their respective monopolies, and require comprehensive action to prevent them from simply finding new ways to charge or allocate commissions in response to enforcement measures. Without the creation of an independent market for mobile app distribution, Apple and Google can continue to play an app store fee "shell game" with developers and consumers. That is why, as a baseline, the codes must provide for alternative app distribution means outside the proprietary app stores, including sideloading and competing app stores.

ACCC Recommendation 4 also contemplates exceptions to otherwise anticompetitive conduct based on "*justifiable reasons for the conduct (such as necessary and proportionate privacy or security justifications)*". While Epic supports this in principle, in practice we urge authorities to employ skepticism when such claims are invoked. Too often privacy and security are used as pretext or scare tactic to justify anti-competitive actions. Regulators must therefore put the onus on platforms to demonstrate that such measures are necessary and proportional to achieve legitimate privacy and security interests and are not being used as a blind to distract from genuine anti-competitive or anti innovation effects.

For example, Apple and Google have argued that a closed ecosystem, which limits or bans direct downloads or competing App Stores while limiting interoperability, is the only guarantee of safety and privacy. Contrary to Apple's and Google's claims, there is nothing illicit or risky about sideloading or alternative app stores. In fact, application "sideloading" is identical to the application "downloading" that consumers safely perform every day on their macs, Chromebooks and PCs. Rather, these limits on mobile devices are the product of commercial decisions by Apple and Google – not of safety or technical necessity.

The choice between competition and security is not binary. Rather, greater competition in the distribution of applications on mobile devices will not only open the market to greater price competition, it will also spur innovation and improvements in security and privacy offerings.

<u>Consultation Questions 19-21</u>: Who should be responsible for the design of the proposed codes of conduct and obligations? Who should be responsible for selecting or designating platforms to be covered by particular regulatory requirements? Who should enforce any potential codes and obligations?

The ACCC recommended that an appropriate regulator develop digital service specific codes in consultation with the policy agency and that the same regulator be responsible for enforcement. Epic believes that the ACCC is well-positioned as the expert agency to develop and enforce such codes. The

ACCC is responsible for enforcing and regulating a number of codes of conduct, including the News Media Bargaining Code, that are prescribed in regulations. Looking to historical precedent, a similar approach was taken in the development and enforcement of the News Media Bargaining Code. Following direction from the Australian Government, the ACCC worked with the Departments of the Treasury and Infrastructure, Transport, Regional Development and Communications to draft a mandatory code.

As the ACCC has identified in the September 2022 DPSI report, "markets for digital platform services are characterised by fast-moving technological developments."[14] The regime for selecting or designating platforms must be dynamic and sufficiently flexible in order to respond to changes and developments in the digital platform services market in a timely manner. A regime that required legislative change to select or designate a platform would be unlikely to be effective at addressing the competition and consumer harms identified due to the inflexibility of the regime and its inability to keep up with the fast-moving market.

Consultations Questions 25-27: Should Australia seek to largely align with an existing or proposed international regime? If so, which is the most appropriate? What are the benefits and downsides of Australia acting in advance of other countries or waiting and seeking to align with other jurisdictions? Are there any particular aspects of the ACCC's proposed regime that would benefit from quick action or specific alignment with other jurisdictions?

Epic is pleased with the ACCC's intent to consider the efforts of, and collaboration with, other competition regulators around the world. Given the size of companies concerned, multilateralism will be required to force lasting change in business practices and avoid Apple and Google ceding minor and narrow carve-outs one jurisdiction at a time.

Several jurisdictions have begun to undertake efforts to rein in anticompetitive mobile app store practices, whether through investigation, enforcement or legislative efforts. Among these are: the European Union, Japan, India, Netherlands, South Korea, the United Kingdom, and the United States. Of these, Epic believes those regimes that identify and treat the root cause of the market failure in mobile app ecosystems – the complete lack of competition and options for app distribution outside of Apple's and Google's proprietary app stores – will be most effective and sustainable long term. Not only would this create a functioning open market for mobile app distribution where currently none exists, it is critical for the effectiveness and viability of other important remedies, such as alternative in-app payment solutions, that will bring choice and innovation to consumers and developers alike.

[14] Australian Competition and Consumer Commission, 'Digital Platform Services Inquiry – September 2023 Interim Report – regulatory reform (11 November 2022) pg.109. Available at https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20September%202022%20interim%20report.pdf.