

The Freemium Approach to Children in the iOS App Market Economy :

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<http://cyberlawcentre.org/2013/freemium.htm>. See also the infographic on that page.

This article was written for the purpose of an undergraduate law research thesis and aims to be an introduction to the issues, remedies and responses surrounding Freemium gaming Apps. Due to the relative recency of the policy debate concerning this issue in Australia there is limited academic discussion and case law on point. As this paper is written to strict criteria encompassing a standardised word limit it will only cover the discussion in relation to the Apple iOS ecosystem rather than the Freemium approach across the board.

I should note here, that unless otherwise specified the statistical information relied upon comes from American sources where more generalised research into this area has been undertaken.

Please note the writing style of this paper is intentional. The vernacular used attempts to enlighten a broad spectrum of audiences to provide insight on this contemporary and topical issue. For a more simplistic understanding of this topic please see my secondary paper tailored specifically for a non-legal audience. There is also an accompanying infographic that may be referred to.²

Introduction:

We all know that entertainment costs money, but in today's day and age that now seems to include inanimate digital items like berries, doughnuts and zombie killing plants. Developers of software, especially for smartphones and tablets, have taken the opportunity to monetize the user experience and thereby earn greater profits through the new "freemium" business model. Many of the popular and notorious games that adopt the freemium model are based on either children's franchises like 'The Smurfs'TM or employ a colourful aesthetic like 'Plants vs Zombies'TM thereby appealing to children.³ It is therefore not surprising that children are often misled into making purchases simply by virtue of their naivety.

Games adopting this model are initially offered for 'free' but later include a barrage of virtual goods that come at a hefty price.⁴ Often these goods are necessary to advance in games, whether it is by reason of gameplay itself or simple impatience. Consumers, especially parents of young children, need to be aware that 'free' may

² Ibid.

³ Luchiano Carment, *In-App Purchases* (Working Paper, Youth Action Policy Centre, 2013), 3.

⁴ Anton Troianovski et al, *Mom, Please Feed My Apps: Mobile-Game Critters Need Money From Their Young Keepers, and Parents Are Paying* (2012) *The Wall Street Journal* <<http://online.wsj.com/news/articles/SB10001424052702303753904577452341745766920>> at 12 October 2012.

therefore not mean free in the literal sense.⁵ These apps that present themselves as free but later pressure consumers to make these in-app purchases might have the potential for claims alleging misleading and unfair conduct to be brought against their creators or even Apple themselves under the Australian Consumer Law.⁶

Central to the inherent problems with the freemium model is the concern over childrens' use of the App Store, more specifically in regards to the binding nature of the contractual agreement associated with its use. It is interesting to note that Apple attempts to constrain a minors liability in favour of the parent or guardian incurring any resulting debts. There is, however, difficulty in ascribing third-party dues. This is especially so considering those debts have been made under the contractual schema voidable at the request of a minor who is merely exercising their legal right to have the contract set aside.

In looking into this complex issue, it proves useful to deconstruct how these apps actually work and target children. It should be noted that many of these games are designed to lure children into spending. This is achieved by disguising the mechanics of these in-app payments as part of the game experience itself whereby such purchases can be easily mistaken for digital rather than actual currency.⁷

The first part of this paper will discuss the issues to be addressed and outline the various concepts, business models and industry practices; the second part will focus on the legal issues and critiques; whilst the third will offer some key hypothetical remedies and practical advice on the issues discussed. This essay does not attempt to answer all questions pertaining to this extensive topic, but rather aims to offer an introduction to the various concerns regarding this subject matter.

⁵ ACCC, *ACCC Joins international sweep for apps targeting children* (2013) Australian Competition and Consumer Commission < <http://www.accc.gov.au/media-release/accc-joins-international-sweep-for-apps-targeting-children> > at 13 September 2013.

⁶ ACANN, *App Purchases By Australian Consumers* (2013) Australian Communications Consumer Advisory Action Network [6] < http://accan.org.au/files/App_purchases_by_Australian_consumers.pdf > at 20 November 2013.

⁷ Jane Hansen, 'Free Apps Can Cost A Fortune', *The Sunday Telegraph* (Sydney), 29 December 2013, 20.

Part One – The Basics:

The App Store, the Freemium Model & Terms of Service Explained:

What is the App Store™ & The Freemium Model?

Smartphones and tablets are limited without their corresponding app environment. People buy these devices because of the rich background of applications available. These ‘apps’ are essentially pieces of software aimed at providing a specific user experience that can only be enjoyed through the tactile interface provided by the physical device.⁸ Platform operators like Apple typically create these digitised stores called ‘App Stores’ to house their various offerings to entice users to participate in the ‘ecosystem’ that the company seeks to provide.⁹ On a traditional level, the ‘App Store’ (in question) is a place where people can purchase such applications on their mobile device running iOS.¹⁰

The aforementioned Apple ‘ecosystem’ is made up of different actors that together form the user experience.¹¹ A breakdown of these actors is illustrated below in Figure 1.1. It is this multifarious relationship that often causes confusion in relation to consumer redress capabilities which will be discussed towards the end of this paper. As shown below, even though purchases are made from the App Store itself, Apple nor its subsidiaries are in fact the creators of many of these applications. This must be borne in mind when deconstructing the intricacies of the issue at hand.

⁸ Matt Dawes, *Submission: App Purchases by Australian Consumers on Mobile and Handheld Devices* (2013) Google Australia Public Policy & Government Affairs Department <<http://ccaac.gov.au/files/2013/02/Google.pdf>> at 2 September 2013.

⁹ Ibid.

¹⁰ iOS is the Apple i[Phone/Pod/Pad] operating system that hosts or houses the phones visual interface amongst other things; Author Unknown, *What is an App Store* (n.d.) *WiseGeek* <<http://www.wisegeek.com/what-is-an-app-store.htm>> at 3 November 2013.

¹¹ Romel Ayalew, *Consumer Behaviour in Apple's App Store* (Masters Thesis in Human Computer Interaction, Uppsala Universitet, 2011), 13.

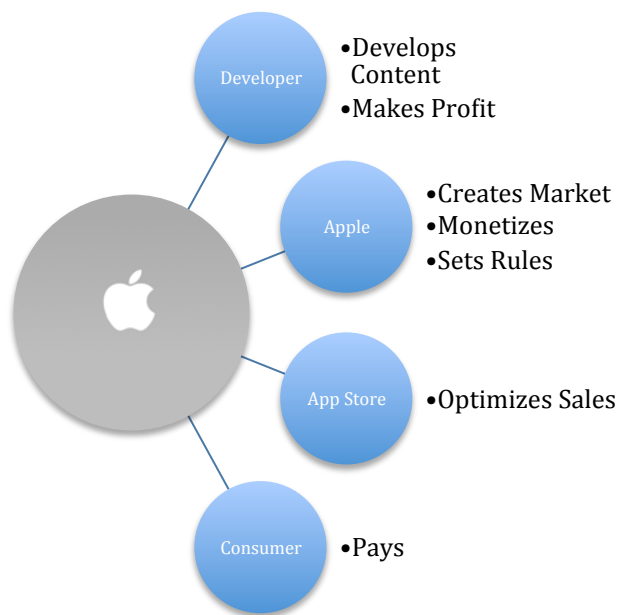


Figure 1.1

The players in the Apple Ecosystem. Taken from Consumer Behaviour in Apple's App Store.¹²

It is within this system that the freemium model has come into play. These freemium gaming applications are based on a hybrid model of free to download with the added ability to purchase paid premium content. As users are more likely to download free apps, developers have begun adopting this business model to lure customers into downloading their offerings for no cost before implementing the paid material.¹³

Apple who creates and monetizes the market has sought to optimise sales of the developers content. Since the release of the Apple iPhone 3G in July 2007 the app market has grown exponentially with approximately \$26 billion being generated as of 2013.¹⁴ Gartner forecasts that by 2017 the in-app purchases generated by freemium apps will account for 48 per cent of revenue or USD \$1.8 billion.¹⁵ It is therefore not surprising that app analytics company Distimo claims that an app must make an average of \$47,000 USD a day to be in Apple's top ten grossing

¹² Ibid.

¹³ Trioanovski, above n 4.

¹⁴ Andreas Constantinou, *The Mobile Application Store Phenomenon* (2008) Vision mobile blog < <http://www.visionmobile.com/blog/2008/11/the-mobile-application-store-phenomenon/>> at 09 November 2013.

¹⁵ Paul Verna, *Mobile Game Monetization: A Virtual Gold Rush* (2013) [8] < <http://www.emarketer.com/Article/Mobile-Gaming-Revenues-Lag-Behind-Other-Channels/1010328>> at 28 September 2013.

apps.¹⁶ Whilst not all of these are free or ‘freemim’ applications, it should be noted that at the time of writing this article one of freemium’s poster children ‘Candy Crush Saga’TM featured at number one.¹⁷

These virtual goods purchased by way of in-app consumption represents the largest growing monetization model.¹⁸ This is largely because ‘freemium’ provides a more progressive option for developers looking to make money outside of offering in-app advertising and is thereby both sustainable and economically profitable.¹⁹ The pervasive nature of this emerging digital economy has therefore prompted Government to look into various digital economic policies to safeguard consumers and their associated rights.

Categories of Freemium Applications:

The Australian Consumer Action Network (ACANN) has divided these problematic freemium applications into two categories. Firstly, there are those that are free to download and advertised as free to play but in reality are not free at all and secondly, those which employ a “pay or wait” method to encourage in-app spending.²⁰ Those applications labeled as ‘free’ but requiring ‘in-app purchases’ do however, display a small sub-heading notarising this inclusion as seen below in Figure 1.2. Nevertheless, it can be argued that this is not distinctive enough and will be discussed later in this paper.

¹⁶ Phil Dzikkiy, *Top Grossing Apps Make \$47k Daily; New International Prices* (2013) iLounge < <http://www.ilounge.com/index.php/news/comments/top-grossing-apps-make-47k-daily-new-international-prices/>> at 05 September 2013.

¹⁷ This statement was made in November 2013.

¹⁸ Verna, above n 15.

¹⁹ Author Unknown, *Rockin in the Freemium World* (2013) MagicSolver < <http://www.magicsolver.com/?p=1972>> at 12 October 2013; Ingrid Lunden, *Gartner: 102B App Store Downloads Globally in 2013, \$26B in Sales, 17% From In-App Purchases* (2013) Tech Crunch < <http://techcrunch.com/2013/09/19/gartner-102b-app-store-downloads-globally-in-2013-26b-in-sales-17-from-in-app-purchases/>> at 12 October 2013.

²⁰ ACANN, above n 6, 5-6.



Figure 1.2

This is a screen capture taken from the App Store. Please note the small, faint and less distinctive in-app purchase notification. This image is taken post purchase. Before purchase the blue box displaying the capitalised word 'open' would have said 'FREE'.

A distinction should, however, be made between those apps that provide non-essential content by way of in-app purchases, and those that make such purchases an essential component of gameplay, as both are considered to be freemium.²¹ Gameplay that encourages overspending by coercing, encouraging or mandating the payment of additional in-app fees, without which progression becomes near impossible or at least slow is essentially not *free*.²² This includes offering supplementary items, extra levels, or virtual currency to progress in gameplay after a particular app has been labeled as free to use.²³

Rather than simply re-hashing the examples given by ACANN I have chosen to undertake my own research. While I am a university student and not a child, it is nonetheless surprising how many of the same potholes someone of my age and experience can fall into. It is therefore not unexpected that children can, and have, fallen prey to this clever form of monetization.

Category 1 – Free To Download but Not Necessarily Free to Play – Plants vs Zombies:

The idea of this game is to “protect your house” using plants and other miscellaneous fantasy items from the attack of oncoming zombies. Initially,

²¹ Carment, above n 3, 6.

²² Carment, above n 3, 6-7; ACANN, above n 6, 5.

²³ ACANN, above n 6, 5.

progression through the game was simple, however it became increasingly more difficult to abstain from using paid content the further in you went. This game operates on coins as its core form of currency and while it is possible to earn these during gameplay it is much faster to purchase them.

As illustrated in Figure 1.3, the largest amount of coins which can be purchased at any given time is 450,000, which is highlighted by a red tab and displayed as the “best deal.” Although it is good value for money as compared with multiple purchases of the smaller bundles, it does cost \$109.99. Additional species of plants can also be purchased for as much as \$4.49. These are separate and additional purchases to the coins. This can be seen below in Figure 1.4. Even at later stages in the game when in-app purchases are suggested, the most economical and coincidentally expensive option is always flagged for the user as the “best deal”.



Figure 1.3 & 1.4 – Screenshot taken from Plants vs. Zombies. Shows the payment options for the in-app purchases.

It is not strictly necessary for any purchases to be made during gameplay, however, as previously stated, the game does not make it easy to continue at a regular pace without purchases being made. As seen below in Figure 1.5, there are also reminders to visit the in-app store for additional items and power-ups which can be purchased.



Figure 1.5 – Screenshot from *Plants vs. Zombies*. Shows the reminders used within the game to direct players to the virtual store.

It should be mentioned that users are allowed to experiment with the “power up” features in level five before the game highlights them for the user in the store. These allow you to kill zombies at a faster rate. By this time one would have become invested in the game. By level six, the free power ups are disabled and users are instructed that, “if you want to use a power up you can buy one with coins.”²⁴ Even though these games are marketed as ‘free’ with in-app purchases, the requirement or necessity of making such additional purchases is not stressed enough at the outset.

Category 2 – Pay or Wait – *The Smurfs Villiage*:

This particular game is notorious for its implementation of the freemium model. Based on a well known childrens’ franchise, ‘The Smurfs’ is specifically targeted towards children. Nevertheless, it incorporates a dialogue that makes it possible for children to have difficulties discerning whether the purchases they are making are with real or digital in-game currency.²⁵

The game focuses on building a village and playing mini-games to help feed and nurture a community of Smurfs built by the user. To complete tasks, Smurfs must be used in the form of manpower. However, if all the Smurfs in the users village are busy, the user can opt to use smurfberries to “free up some time.” By agreeing to buy these berries the tiny blue characters can undertake the necessary activity.

²⁴ Electronic Arts, *Plants v Zombies*, Electronic Arts (2012) iOS v 2.0.

²⁵ ACCC, above n 5, 16.

Alternatively, it is possible to wait for Smurfs to become “free”, but again this can take time.

From my own experience, I was given the option of waiting 17 hours and 52 minutes for a task to be achieved, or alternatively I could use 1 smurfberry. In another example, a bridge would take 119 hours, 15 minutes and 13 seconds to build or cost 20 smurfberries to be instantly constructed. This is further evidenced below in Figure 1.6.



Figure 1.6 – Screenshot taken from The Smurfs Village. Shows an example of the ability to pay instead of wait within game use. Here, a smurf is busy working in the forest. However, he is needed back in the village for work. Players can either wait 4 minutes and 51 seconds for the Smurf to return or use 1 smurfberry to lieu of waiting.

Even though these berries grow on digital bushes, the plants themselves cost real world money. These berries cost anywhere between \$5.49 for 50 to \$109.00 for 2000. Similarly to the first category, the game is technically free as no one is forcing the user to spend the money to speed up time. Nevertheless, this game, like many others, plays on a child’s generational and emotional weakness whereby impatience, a need for instant gratification, and the unawareness that real money is being spent can and has resulted in large credit-card bills.²⁶ Under the App Store’s terms there appears to be little redress for such issues with much of

²⁶ Sarah Court, ‘Children and Young People as Vulnerable Consumers – the ACCC’s Role’ (Press Release, 9 March 2012), 8.

the responsibility being shifted onto the parents rather than the developer or Apple themselves. However, recent United States decisions suggest that recursive action is possible (at least in the United States) regardless of the enumerated terms. This will be further discussed in Part Two.

The Apple App Store Terms & Conditions:

The primary issue with the Apple App Store Terms and Conditions (T&Cs) is that it appears that liability for purchases made by minors shifts to their parents. When considering other Australian legislation, especially those dealing with children and their ability to contract, there does appear to be some difficulties with this. Although this will be discussed more extensively in Part Two it is important to keep this in mind when looking at the associated T&Cs. Whilst this is only intended to be a simplistic overview of these terms, it becomes evident that there are a number of issues in regards to children and their use of the store.

According to the T&Cs, the App Store is available to individuals 13 years or older, with those under the cut-off age needing their parent or guardian to review said terms. Upon assenting to these terms, parents or guardians of children under 13 years would find that at all times they will be held responsible for maintaining the “confidentiality and security”²⁷ of the account. This means that Apple will not regard itself as responsible for any losses arising out of “unauthorized use.”²⁸ Conceivably, this can include a child making purchases without explicit permission.

Express choice of law and jurisdiction clauses firmly plant the contractual agreement within Australian (more specifically New South Wales) law. There is also explicit mention of the recognition of Australian consumer rights under the T&Cs and its associated guarantees.

The terms also indicate that an Apple ID is necessary when making authorised purchases. However, subsequent to initial authentication, a password need not be

²⁷ Apple Inc, *Terms and Conditions* (2013) Apple < <http://www.apple.com/legal/internet-services/itunes/au/terms.html> > at 3 September 2013.

²⁸ Ibid.

entered for 15 minutes.²⁹ This function can be disabled by following the support pages referenced by Apple in the enumerated terms.³⁰

The 15 Minute Window of Opportunity:

The abovementioned 15-minute window of opportunity is a feature of iOS that on default allows content to be purchased for a specified amount of time after entering the master password. It is conceivable that such a window could be used to the advantage of game developers who can design games with this feature in mind.

As stated, some developers can be seen to influence children's spending by engaging them with attainable goals before effecting roadblocks that often require in-app purchases to overcome.³¹ Alternatively, some apps are marketed to children in such a specific and targeted manner that the children are unable or simply do not connect that the purchases being made are with actual money rather than intangible in-game currency.³² This is evidenced in the above discussion of The Smurfs Village.

If a parent downloads one of these freemium applications without changing the default settings, the child has the potential to make additional in-app charges. As a result, non-tech-savvy parents unaware of these monetization schemes and/or their ability to close the aforesaid window can incur unexpected bills from downloading a 'free' app.

A recent report on internet safety measures published by Ofcom, the Independent Regulator and Competition Authority for the United Kingdom Communications Industries, revealed that children know more about navigating the internet than their parents.³³ Researchers found that 18 per cent of kids know how to disable

²⁹ Ibid.

³⁰ Apple Inc, *iOS: Understanding Restrictions (Parental Controls)* (2013) <http://support.apple.com/kb/HT4213> at 3 September 2013.

³¹ Trioanovski, above n 4.

³² ACCC, above n 5.

³³ Jenna Kagel, *Confirmed: Your Web-Savvy Kids Are Outsmarting Your Parental Controls* (2014) Fast Company <<http://www.fastcolabs.com/3025155/confirmed-your-web-savvy-kids-are->

internet filters whilst 6 per cent admitted to doing so.³⁴ This is evidence of the relative ease children have when making these in-app purchases even without permission.

For example, it has been reported that one child spent \$3,000 USD whilst within this window after mistaking the in-app purchases for regular in-game currency devoid of any true monetary value.³⁵ Similarly, earlier last year, a young child spent \$2,600 USD on in-app add-ons in the free to download and play *Zombie vs Ninjas* in a single evening.³⁶ The vast majority of similar examples are directly attributable to children purchasing innocuous items in their favourite games within this 15-minute window. This could also be attested to the belief that the freemium model promotes gambling type behavior as children become obsessed with progressing through certain apps.³⁷ This has been said to result in “habitual or compulsive rather than accidental behaviour.”³⁸ It is therefore not surprising that the games market has generated \$2.7 billion in revenue from marketing such games to children.³⁹

From these examples one might even argue that Apple is aiding and abetting the commission of larceny under the *Crimes Act*.⁴⁰ One can appreciate how individuals could potentially be held accountable for theft having wrongfully taken personal goods (namely money) from another with the intention of permanently depriving the owner of such property without consent.⁴¹ Although this is a distinct possibility due to textual constraints this cannot be discussed any further.

[outsmarting-your-parental-controls](#)> at 17 January 2014; Ofcom, *Ofcom Report on Internet Safety Measures: Strategies of Parental Protection Online* (2014) Ofcom < <http://stakeholders.ofcom.org.uk/binaries/internet/internet-safety-measures.pdf>> at 17 January 2014.

³⁴ Ibid.

³⁵ Lauren Goode, *Kids Get New Tablets Over the Holidays? Here's How to Lock 'Em Down* (2013) All Things D < <http://allthingsd.com/20131227/kids-get-new-tablets-over-the-holidays-heres-how-to-lock-em-down/>> at 27 December 2013.

³⁶ Joshua Gardner, *Apple Loses \$100 Million Class Action Suit to Parents of Kids Who Went on Unauthorized App Spending Sprees* (2013) < <http://www.dailymail.co.uk/news/article-2349003/Apple-loses-100MILLION-class-action-suit-parents-kids-went-unauthorized-app-spending-sprees.html> > at 04 September 2013.

³⁷ Carment, above n 3, 3 & 7.

³⁸ Ibid.

³⁹ Trioanovski, above n 4.

⁴⁰ *Crimes Act 1900* (NSW) ss 117, 249F.

⁴¹ Author Unknown, *Larceny* (n.d.) Armstrong Legal < <http://www.armstronglegal.com.au/corporate-crime/fraud/larceny-shoplifting>> at 10 January 2014.

In defense of Apple, it has provided software controls and support articles to show parents how to enable the various settings to prohibit unwanted purchases by their children.⁴² These are also explicitly mentioned in the T&Cs assented to before an App Store account is made. Nevertheless, it is common knowledge that most do not read these and simply accept the offer by clicking agree.⁴³ Bearing this in mind Apple should do more to bring this to the attention of credit controllers, that is, adults.

Online Contracts Generally:

Contracts like the Apple T&Cs that provide for the ability to agree to their terms with the click of a button are often termed 'clickwrap' agreements. The legal position of such contracts is deemed to be the same as their written counterparts.⁴⁴ It is, "no different to that of a person who signs a document on the back of which are T&Cs which he does not read, although the face of the document, which he signs, refers to those T&Cs."⁴⁵ As such, it will only be in the absence of a vitiating factor like fraud or lack of capacity that one can escape the liability ensuing from assenting to a clickwrap agreement.⁴⁶

Where such a contract is supplied, the service provider (in this case Apple) offers to provide services to the consumer upon the users agreement to abide by the enumerated terms.⁴⁷ This is illustrated in the above discussion on the App Store's T&Cs. In these contracts, it does not matter if consumers have actually read the terms, provided that everything necessary has been done to bring said terms to the attention of the consumer.⁴⁸ Acceptance of these contractual terms is, however,

⁴² Apple Inc, above n 30.

⁴³ Dale Clapperton, Stephen Corones, 'Unfair Terms in 'Clickwrap' And Other Electronic Contracts' (2007) 35 *Australian Business Law Review* 152, 152-159.

⁴⁴ Kayleen Manwaring, 'Enforceability of Clickwrap & Browsewrap Terms in Australia: Lessons from the U.S. & the U.K.' (2011) 5 *Studies in Ethics, Law & Technology* 1; Cheryl Preston, 'Cyberinfants' (2012) 39 *Pepperdine Law Review* 225, 230; John Adams, 'Digital Age Standard Form Contracts Under Australian Law: "Wrap" Agreements, Exclusive Jurisdiction, And Binding Arbitration Clauses' (2004) 13 *Pacific Rim Law & Policy Journal* 503, 515.

⁴⁵ *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52.

⁴⁶ *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52.

⁴⁷ Clapperton, above n 43, 159.

⁴⁸ *L'Estrange v Graucob* [1934] 2 KB 394; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*

different from written standard form agreements. This is because the offer is completed by virtue of ticking the 'I Agree' box rather than signing ones name.⁴⁹ By "clicking on the relevant buttons and by the computer bringing up all the terms needed to make the purchase"⁵⁰ Australian common law authorities would regard "the whole transaction to be in writing, signed and agreed to by the parties."⁵¹

Apart from these standard considerations, there has been little attention from Australian courts regarding the enforceability of the T&Cs of such 'clickwrap' agreements.⁵² Most recent authority suggests that there is no unifying set of rules or requirements for Australian businesses to follow regarding online mass-market consumer contracts.⁵³ As a result, users are often given lengthy material encompassing much legal jargon and thereby gain little understanding of their rights. This is clearly displayed in the terms provided by Apple upon entering into the user arrangement.

Part Two – The Legal Issues:

(a) Minors, Online Contracts & The Apple Store Terms & Conditions:

Contracting Children to Use Apps – What are the Issues?

The basic law of contract requires that for the contract to exist both parties must have 'capacity'. There are certain individuals or classes of individuals who from the

[2004] HCA 52; Author Unknown, *Online Contracting – "Wrapping" Up Your Terms of Use* (2011) King & Wood Mallesons <<http://www.mallesons.com/publications/marketAlerts/2011/Information-Technology-Update-November-2011/Pages/Online-contracting-wrapping-up-your-terms-of-use.aspx>> at 2 September 2013; *Ebay International AG v Creative Festival Entertainment Pty Ltd* (CAN 098 183 281) [2006] FCA 1768 (per Rares J); *Oceanic Sun Line Special Shipping Company Inc v Fay* [1988] HCA 32.

⁴⁹ Clapperton & Corones, above n 43, 152.

⁵⁰ *Ebay International AG v Creative Festival Entertainment Pty Ltd* (CAN 098 183 281) [2006] FCA 1768 (per Rares J); *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52.

⁵¹ *Ebay International AG v Creative Festival Entertainment Pty Ltd* (CAN 098 183 281) [2006] FCA 1768 (per Rares J); *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52.

⁵² Christina Kafalias (ed), *Australian Government Review of Australian Contract Law* (2012) The Law Society of New South Wales Young Lawyers Civil Litigation Committee and Business Law Committee <<http://www.lawsociety.com.au/cs/groups/public/documents/internetyounglawyers/644777.pdf>> at 10 December 2013.

⁵³ *Ebay International AG v Creative Festival Entertainment Pty Ltd* (CAN 098 183 281) [2006] FCA 1768 (per Rares J).

outset lack capacity to enter into a valid contract largely because there is the potential for exploitation. In Australia, both the common law and statute operate to restrict the capacity of minors to contract. As a general presumption, a contract made by a person under the age of 18 is voidable, albeit certain exceptions apply.⁵⁴ This is reaffirmed and expanded upon in New South Wales by Part 3 of the *Minors (Property and Contracts) Act*.⁵⁵

Under this Act, where a minor participates in a civil act (defined to include a contract⁵⁶), that Act is not binding on the minor except as provided for in the Act.⁵⁷ Furthermore, a minor will not be bound where (s)he lacks understanding necessary for participation in such an act as enunciated by legislation.⁵⁸

However, entering into a contract *will* be 'presumptively' binding on the minor if it for his or her 'benefit'.⁵⁹ The word 'benefit' has not been judicially defined so one may look to the Act's overall purpose to construe its meaning.⁶⁰ The Act seeks to protect minors from naively entering into contracts unless they are not so lacking in understanding. Therefore, minors will not be bound by contracts unto which they have little understanding. This could conceivably include complex online agreements.

The agreement provided for in the App Stores T&Cs may provide some 'benefit' by way of allowing for the procurement of advantages attached to intangible in-game objects and currencies in addition to a licence for gameplay. Conversely, having regard to the T&Cs as a whole, one could also suggest there is no such 'benefit'. Specifically, the minor has not profited, gained or received an advantage from using the service. If anything, they are disadvantaged by being misled, confused or taken advantage of by virtue of the application of the freemium model. As such, the contract could likely be unenforceable.

⁵⁴ Julie Clarke, *Capacity to Contract* (2010) Australian Contract Law < <http://www.australiancontractlaw.com/law/formation-capacity.html> > at 10 October 2013.

⁵⁵ *Minors (Property and Contracts) Act 1970* (NSW).

⁵⁶ *Minors (Property and Contracts) Act 1970* (NSW) s 6.

⁵⁷ *Minors (Property and Contracts) Act 1970* (NSW) s 17.

⁵⁸ *Minors (Property and Contracts) Act 1970* (NSW) s 18.

⁵⁹ *Minors (Property and Contracts) Act 1970* (NSW) s 19.

⁶⁰ *Acts Interpretation Act 1901* (Cth) s 15AA.

Nevertheless, the contract presented by Apple does not appear to solely bind the actions of a minor. It is instead expected that by virtue of pressing the 'agree' button parents/guardians would have read the T&Cs with their children, assented to them, and thereby agree to incur any resulting liabilities. This is especially so considering most App Store accounts would be funded by a credit card not in the name of the minor. Even if a minor has actual authority to use the account, the adult owner could become liable to pay even if the minor is not.⁶¹ As stated:

If you are 13 or older but under the age of 18, you should review this Agreement with your parent or guardian to make sure that you and your parent or guardian understand it.⁶²

On deconstruction, this term uses the word '*should*' rather than '*must*.' In effect, it gives the appearance of encouraging minors to advise their parents of the contractual terms without actively requiring them to do so. Therefore, should an adult supply a minor with their own App Store account, it is expected that they would have read the associated T&Cs.

A Fundamental Issue – Can a Child Can Enter Into These Agreements in the First Place?

A fundamental issue is exhibited here in that it remains a question whether a minor can enter into such an agreement and whether it can bind their parents in the first place? Whilst this has not been debated in Australia, there have been some useful actions filed in the United States which can be persuasive in their rationale.

For example, in *Glynnis Bohannon v Facebook Inc*,⁶³ a mother filed a class action suit against Facebook alleging that the company made it too easy for minors (including her son) to incur credit card charges without parental knowledge. Initially the Bohannon allowed her son use of her credit card to purchase \$20 USD in Facebook credits. However, Facebook failed to make clear that the card details would be stored thereby allowing for later purchases to be made. This lead to subsequent in-game acquisitions of virtual currency at a significant cost.

⁶¹ Preston, above n 44, 269.

⁶² Apple Inc, above n 27.

⁶³ *Glynnis Bohannon v Facebook Inc*, No 112-CV-219256 (DC Cal, 2 March 2012).

The action made it clear that, “Facebook knows that many of its users are minors” and “specifically permits minors to register and use its services” under its Statement of Rights and Responsibilities.⁶⁴ The same can be said for Apple who also permits minors to assent to, and supposedly make liable, their parents or guardians.

Here, Justice Wilken rejected Facebook’s argument that minors have benefitted from purchasing in-game currency. Additionally, Justice Wilken also allowed the minors to disaffirm the contractual terms of use.⁶⁵ According to Californian law, a minor may “disaffirm all obligations under a contract, even for services previously rendered.”⁶⁶ It is explained that “[o]ne deals with infants at his peril” as “upon disaffirmance the minor is entitled to recover all benefits paid under the contract.”⁶⁷ These circumstances bear some similarity to Australian provisions which as stated similarly allow for voidable contracts by minors.

What is notable in this case is that the complainants also claimed that Facebook violated the *Electronic Funds Transfer Act*⁶⁸ (EFTA) because the purchases made were unauthorised credit transfers. The EFTA is “intended to protect individual consumers engaging in electronic funds transfers”⁶⁹ and “allows electronic documents and signatures to have the same validity as paper documents.”⁷⁰

Although Justice Wilken disaffirmed this claim because it did not refer to a specific provision of law, it was left open for the complainants to amend the complaint at a later stage.

Conceivably, a similar argument could be made in Australia if Apple had assented to the *ePayments Code* (EPC).⁷¹ Unlike the EFTA, the Australian based EPC is a voluntary code of practice and is only applied where businesses choose to subscribe to the code by virtue of assenting to it in their T&Cs. Unfortunately, this

⁶⁴ *Glynnis Bohannon v Facebook Inc*, No 112-CV-01894 (DC Cal, 2 March 2012), 2.

⁶⁵ *Glynnis Bohannon v Facebook Inc*, No 112-CV-01894 (DC Cal, 2 March 2012), 14.

⁶⁶ *Glynnis Bohannon v Facebook Inc*, No 112-CV-01894 (DC Cal, 2 March 2012), 14.

⁶⁷ *Glynnis Bohannon v Facebook Inc*, No 112-CV-01894 (DC Cal, 2 March 2012), 14.

⁶⁸ *Electronic Funds Transfer Act* 15 USC 1693 (1978).

⁶⁹ *Electronic Funds Transfer Act* 15 USC 1693 (1978).

⁷⁰ *Electronic Funds Transfer Act* 15 USC 1693 (1978).

⁷¹ Australian Securities and Investments Commission, *ePayments Code*, September 2011.

is not something Apple has included and therefore it appears that there is little authoritative regulation on point.

If, however, this code was assented to, the credit holder, which in this case would be the parent, would not be liable for loss arising from certain unauthorised transactions. Such would only be the case if the cause of the loss involved an unauthorised transaction performed after the subscriber has been informed that the device has been used, or the security of a pass code has been breached.⁷² Liability could only be avoided in these circumstances if the user did not voluntarily disclose their passcode to anyone, including a family member.⁷³ It therefore appears that minors may not be held liable for unwarranted purchases or unauthorised debts in certain situations.

Such rationale may not apply when a child is using their parent or guardian's App Store account *with* permission. According to Apple's T&Cs users are responsible for preventing "unauthorised use" of their accounts.⁷⁴ Therefore, giving a minor access to an account inclusive of credit card facilities could conceivably amount to carelessness of which Apple bears no responsibility.

Normally parents are not liable for the acts committed by their children, however, they may be liable where the parent has not exercised proper control or supervision.⁷⁵ For example, in *McHale v Watson*⁷⁶ the defendant's father was not held to be liable even though he had provided his son with the metal dart that caused injury. In this case the misuse of the dart was not 'reasonably foreseeable.' However, the result may have been different depending on the child's age and the utility provided.⁷⁷

⁷² Australian Securities and Investments Commission, *ePayments Code*, September 2011, 10.1(3).

⁷³ Australian Securities and Investments Commission, *ePayments Code*, September 2011, 12.2(a).

⁷⁴ "Don't reveal your Account information to anyone else. You are solely responsible for maintaining the confidentiality and security of your Account, and for all activities that occur on or through your Account, Apple shall not be responsible for any losses arising out of the unauthorized use of your Account." (Apple Inc, above n 27).

⁷⁵ Author Unknown, *Contracts and Leases* (n.d.)

<<http://www.lawhandbook.org.au/handbook/ch06s01s05.php>> at 10 January 2014.

⁷⁶ *McHale v Watson* [1964] HCA 64.

⁷⁷ Unknown, above n 75.

Imputing the same logic into this factual matrix, it could be 'reasonably foreseeable' that providing a child with an App Store password could result in unauthorised purchases. This is regardless of the existence of the freemium model. Although there is an issue that some of these apps benefit from user inexperience⁷⁸ it is arguable that parents in this situation may have little recursive action. Nonetheless, there is still the issue of misleading and deceptive conduct which may provide for some prospective remedies.

(b) Misleading & Deceptive Conduct:

The Australian Context – the Australian Consumer Law (ACL):

Corresponding to the issue of minors and their contractual capacity is the similarly pertinent matter of misleading and deceptive conduct under the ACL. The ACL applies to all States and Territories in Australia⁷⁹ and provides for multiple regulators who exercise their own functions.⁸⁰ The law requires that both the App Store itself and app developers make accurate representations about the functionality of an app. Under the ACL, computer software is considered to be a 'good.'⁸¹ This means that the enumerated consumer safeguards apply to the supply of apps in both trade and commerce. As such, the consumer is entitled to a remedy for a major failure to comply with the applicable standards. However, due to the aforesaid multiplicity in the regulatory framework, there remains uncertainty in the consumer redress process.⁸² As a result, consumers are unclear as to which entity they should pursue in order to make a complaint.⁸³

⁷⁸ ACANN, above n 6.

⁷⁹ CIS, *Enquiry into App Purchases: Submission by the Centre for Internet Safety* (2013) The Centre for Internet Safety [6] < <http://www.canberra.edu.au/cis/storage/CCAAC%20app%20submission%20by%20Centre%20for%20Internet%20Safety.pdf> > at 17 September 2013.

⁸⁰ Ibid.

⁸¹ Commonwealth Consumer Affairs Advisory Council, *App Purchases by Australian Consumers on Mobile and Handheld Devices: Inquiry Report* (2013) Australian Government: The Treasury [29] < <http://ccaac.gov.au/2013/07/19/app-purchases-by-australian-consumers-on-mobile-and-handheld-devices/> > at 19 September 2013; *Australian Competition and Consumer Law 2010* (Cth) Sch 2, s 2.

⁸² ACANN, above n 6.

⁸³ Please note, that this will be discussed at a later stage; ACANN, above n 6.

The applicable provision of law in the ACL is relatively clear, in that, “A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.”⁸⁴ Ascertaining such conduct must not be done “in the abstract”, instead, a precise view of the inherent issues must be taken.⁸⁵ Unlike much of the case law on point, the factual matrix surrounding this issue is not one where, “an express representation [has been made] ... [which] is demonstrably false.”⁸⁶ This is largely because not all freemium applications are of the type discussed in this paper. However, for those free applications that do comply with the freemium model as discussed, certain criteria must be applied for the above law to be relevant.

In *Google v ACC*⁸⁷, Justices Crennan & Kiefel alongside Chief Justice French enunciated that there are a number of “well established propositions” about the provisions concerning misleading and deceptive conduct.⁸⁸ These are enumerated as follows:

Firstly, the words ‘likely to mislead or deceive’ make it clear that it is *not* necessary to demonstrate *actual* deception to establish a contravention; Secondly, the court must consider whether the ‘ordinary’ or ‘reasonable’ members of a class of persons, which in this case constitutes consumers, would be misled or deceived; Thirdly, conduct causing “confusion and wonderment” is *not* necessarily co-extensive with misleading or deceptive conduct; and lastly, ACL s 18/TPA s 52⁸⁹ is not confined to conduct which is intended to mislead or deceive. As such, a corporation *could* contravene these sections even though it had acted reasonably and honestly.⁹⁰

These criteria must be applied to the conduct undertaken by Apple to establish if there has in fact been any malfeasance.

⁸⁴ *Australian Competition and Consumer Act 2010* (Cth) Sch 2 ss (18)(1).

⁸⁵ *Squibb & Sons Pty Ltd v Tully Corp Pty Ltd* (1986) ATPR 40-691 (per Grey J); *Australian Airships Ltd v Primus Telecommunications Pty Ltd* [2004] VSCA 232 [24]-[25] (per Nettle JA with Batt & Vincent JJA agreeing); Colin Lockhart, *The Law of Misleading & Deceptive Conduct* (3rd ed, 2011), 74.

⁸⁶ *Conagra Inc v McCain Foods (Aust) Pty Ltd* (1992) FCR 302, 380.

⁸⁷ *Google Inc v Australian Competition & Consumer Commission* [2013] HCA 1 (per French CJ; Crennan & Kiefel JJ).

⁸⁸ *Google Inc v Australian Competition & Consumer Commission* [2013] HCA 1, [6] (per French CJ; Crennan & Kiefel JJ).

⁸⁹ *Trade Practices Act 1974* (Cth).

⁹⁰ Please note this has been slightly paraphrased. This is not a direct quote. Words have been *italicized* for emphasis; *Google Inc v Australian Competition & Consumer Commission* [2013] HCA 1, [7]-[9](per French CJ; Crennan & Kiefel JJ).

In the above case, it was alleged that Google participated in misleading and deceptive conduct by publishing or displaying sponsored links containing misleading representations made by advertisers. The ACCC questioned whether Google adopted or endorsed these misleading claims. French CJ, Crennan & Kiefell JJ established that it is only misleading and deceptive where, “it would appear to the ordinary and reasonable member of the relevant class that the [intermediary] has adopted or endorsed that representation.”⁹¹ Google did not create or produce any of the sponsored links in question. It was also understood that a reasonable search engine user would know the difference between an advertised result and a general search result. Therefore, Google did not make any misleading or deceptive representations.

Unlike Google, Apple is not an intermediary which publishes, communicates or passes on a misleading representation of another.⁹² Even though the apps are not strictly made by Apple itself, nor is its delineated price stipulated by the company, Apple controls which apps are featured on its store, the pricing model generally, and how in-app items are bought and sold. There have even been reports of the removal of certain apps for not fitting within the stringent guidelines.⁹³ For example, Apple asked HMV Music to remove its app from the store for enabling people to purchase music not within the iOS purchasing model but from outside of the app interface.⁹⁴

This suggests that Apple ultimately has the dominant control over its developers on how users interact with applications and their associated purchasing capabilities. The issue then becomes not whether Apple has made a general misrepresentation by passing on information, but whether the business model stipulated by Apple to its developers is in fact misleading and/or deceptive. Apple could then be seen as directly enforcing this misleading and unfair practice. By

⁹¹ *Google Inc v Australian Competition & Consumer Commission* [2013] HCA 1, [15] (per French CJ; Crennan & Kiefell JJ).

⁹² *Google Inc v Australian Competition & Consumer Commission* [2013] HCA 1 citing *Butcher v Lachlan Elder Realty Pty Ltd* [2004] 218 CLR 592, [15] (per French CJ; Crennan & Kiefell JJ).

⁹³ Stuart Dredge, *Apple Reviews HMV iOS App For ‘Violating App Store Guidelines’* (2013) The Guardian < <http://www.theguardian.com/technology/2013/oct/22/apple-hmvgroup> > at 29 December 2013.

⁹⁴ *Ibid.*

implication, the reasonable user can not be expected to understand that a free application necessitates rather than simply provides for the possibility of in-app purchases. As such, it may be the case that when applying the criteria enumerated above that the freemium model as a whole is not compliant with the relevant ACL provisions.

Application of ACL Provisions From an International Perspective – An Issue of ‘Conflict of Laws’:

There is also an issue with these misleading and deceptive conduct provisions under the ACL when having regard to the App Store T&Cs and composite in-app agreements provided for in individual applications. In-app purchases under the T&Cs are to be regarded as ‘third party products’⁹⁵ regulated by their own End User Licensing Agreements (EULA), many of which dictate that recursive measures take place extraterritorially. For example, the agreement put forth by Beeline Interactive Inc, the makers of ‘The Smurf Village’, notes that “any ... and all disputes ... shall be finally settled by binding arbitration between [the user] and beeline ... in Los Angeles, California.”⁹⁶ The issue with such agreements, is that consumers are entitled to pursue a remedy against the supplier of an app within Australia.⁹⁷ This would be inclusive of both developers and Apple generally as it is the controlling body of the App Store.

According to the Commonwealth Consumer Affairs Advisory Council (CCAAC), “by insisting that a consumer first seek a remedy against a developer, the supplier risks being in breach of s 29(1)(m) of the ACL.”⁹⁸ In this situation, the provision stipulates that consumers should not be misled about their right to remedy their complaints in Australia. This is because, it is possible for leave to be granted to serve proceedings on a defendant based outside of Australia who makes a

⁹⁵ “You agree that Apple ... will not have any liability or responsibility for any third-party materials or websites, or for any other materials, products, or services of third parties”; “BY USING THE APP AND BOOK SERVICES, YOU AGREE, TO THE EXTENT PERMITTED BY LAW, TO INDEMNIFY AND HOLD APPLE, ITS DIRECTORS, OFFICERS, EMPLOYEES, AFFILIATES, AGENTS, CONTRACTORS, PRINCIPALS, AND LICENSORS HARMLESS WITH RESPECT TO ANY CLAIMS ARISING OUT OF YOUR BREACH OF THIS AGREEMENT” (Apple Inc, above n 27).

⁹⁶ Beeline Interactive, *The Smurfs Village* (27 September 2013) iOS.

⁹⁷ Carment, above n 3, 10.

⁹⁸ Ibid.

representation causing harm under Sch 2, s 18 of the *Competition and Consumer Act* to occur within Australia.⁹⁹ It is also because many countries do not have a direct equivalent to section 52 of the TPA/ 18 of the ACL, therefore, pursuing legal remedies overseas (as per third party EULAs) might deprive adequate redress for misleading and deceptive conduct as understood in Australia.¹⁰⁰ Accordingly, the presence of a claim for misleading and deceptive conduct under the relevant Australia law might serve as an “anchor” keeping proceedings within the jurisdiction.¹⁰¹

If, however, this “anchoring effect” is not enough, there also exists a number of initiatives that support cross-jurisdiction compliance with the ACL. For example, the International Consumer Protection and Enforcement Network (ICPEN) works closely with the Australian Competition and Consumer Commission (ACCC) to protect consumers economic interests and foster international cooperation amongst law enforcement.¹⁰² It is therefore evident as to the difficulty one has in overcoming the pervasiveness of the ACL. This is regardless of the terms assented to in consumer contracts by minors or adults. Effectively, redress capabilities should not be hampered by Apple’s T&Cs and the subsequent in-app agreements.

(c) Unfair Terms:

The App Store Agreement As Unfair:

Another area of concern that not only affects those freemium apps discussed in this paper but the App Store in its entirety is the unfairness of the T&C’s presented. Unlike traditional computer update models, it is difficult if not impossible, to update the operating system on an iOS device without incidentally updating the entirety of the phones feature suite. Inevitably, updates to one feature of the device are often ‘bundled’ in with with updates for ancilliary features. Comprehending

⁹⁹ *Australian Wool Innovation Ltd v Newkirk (No 3)* [2005] FCA 1308 (16 September 2005); *Australian Competition and Consumer Commission v Chen* (2003) 132 FCR 309; B Fitzgerald et al, *Internet and E-Commerce Law: Business and Policy* (2011), 66.

¹⁰⁰ M Davies, A Bell, P Brereton, *Nigh’s Conflict of Laws in Australia* (8th ed, 2010), 184.

¹⁰¹ *Conflict of Laws* (Nygh) (p.184); *Reinsurance Australia Corp Ltd v HIH Casualty & General Insurance Ltd* (2003) 254 ALR 29.

¹⁰² CCAAC, above n 81, 17.

this model can be a hard task for most consumers, especially children or non tech-savvy adults.

The issue here, is that the Apple ecosystem adopts a layered or bundled approach, where the operating system, firmware, application software, and e-commerce business model are closely intertwined. Therefore, in the example of a security update achieved by an incremental revision of the overall software or firmware, it is possible for unwelcome changes to the T&Cs to be put in place. In practice, users have little or no choice but to agree to these new T&Cs if they want the necessary security features.¹⁰³ Such occurrences often transpire when upgrading from one version of Apple's iOS to another.

Apple's ability to force the new terms of use on customers in such situations derives from the user agreement itself. Under the App Store T&Cs, users must assent to this capacity on Apple's part to unilaterally change the terms:

iTunes reserves the right at any time to modify this Agreement and to impose new or additional terms or conditions on your use of the App and Book Stores. Such modifications and additional terms and conditions will be effective immediately and incorporated into this Agreement. Your continued use of the App and Book Stores will be deemed acceptance thereof.¹⁰⁴

For example, in the transition between iOS 2 and iOS 3 in June 2009, the in-app purchasing model for paid apps was introduced expressly noting that "free apps [will] always remain free."¹⁰⁵ This new feature was bundled in with other security enhancements such as the introduction of "Find my iPhone" for MobileMe customers. This allowed users to remotely locate their device and wipe sensitive data if stolen. Additionally, this update provided encryption and password protection capabilities to safeguard phone content backups through iTunes.¹⁰⁶ Later incremental updates also saw general "bug fixes" and "fixes to SMS

¹⁰³ Clapperton & Corones, above n 43, 171.

¹⁰⁴ Apple Inc, above n 27.

¹⁰⁵ Apple Inc, iOS 3.0 Software Update (17 June 2009).

¹⁰⁶ Ibid.

vulnerability” both of which involved necessary security enhancements inter alia.¹⁰⁷

However, by October 2009, Apple announced via an email to its developers that it would support in-app purchasing for free applications.¹⁰⁸ This is in direct contradiction to those terms assented to by users earlier in 2009. Nevertheless, as evidenced from the T&Cs it appears that Apple can impose these modifications. It should be noted that there appears to be no mention of this change in any latter iOS software or firmware update.

Where such changes to important terms are bundled with features like software enhancement it could be said that the consumer has virtually no bargaining power. Consumers are effectively compelled to accept new T&Cs if they want the benefit of the more or less essential operating system features like security updates.¹⁰⁹ The question then arises as to whether this may be ‘unfair’ within the meaning of the ACL.¹¹⁰

What is Unfair Conduct under the Australian Consumer Law (ACL)?

A term of a contract is unfair if it conforms to the three-limbed test set out in s 24 of the *Competition and Consumer Act*,¹¹¹ and the contract is a standard form consumer agreement.¹¹² There is little judicial comment on this provision due to the relative recency of its enactment. Comparable examples can primarily be found

¹⁰⁷ Apple Inc, iOS 3.0.1 Software Update (31 July 2009).

¹⁰⁸ “In App Purchase is being rapidly adopted by developers in their paid apps. Now you can use In App Purchase in your free apps to sell content, subscriptions, and digital services. You can also simplify your development by creating a single version of your app that uses In App Purchase to unlock additional functionality, eliminating the need to create Lite versions of your app. Using In App Purchase in your app can also help combat some of the problems of software piracy by allowing you to verify In App Purchases” sourced from Jason Kincaid, *Apple Announces In-App purchases for Free iPhone Applications* (2009) TechCrunch <<http://techcrunch.com/2009/10/15/apple-announces-in-app-purchases-for-free-iphone-applications/>> at 19 September 2013;

¹⁰⁹ Clapperton & Corones, above n 43, 172.

¹¹⁰ 2010 (NSW) s 21; 23-28 (was s 51AB of the *Trade Practices Act 1974* (NSW)).

¹¹¹ (a) It would cause a *significant* imbalance in the parties’ rights and obligations arising under the contract; and (b) It is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and (c) It would cause detriment (whether financial or otherwise) to a party if it were to be applied and relied on (*Competition and Consumer Act 2010* (Cth), Sch 2, s 24(1)).

¹¹² *Competition and Consumer Act 2010* (Cth), Sch 2, s 23(1)(b); s 27.

in the Victorian *Fair Trading* legislation which inspired this section.¹¹³ Nevertheless, the explanatory memorandum provides a useful delineation as to the application of such provisions in the relevant context.

The first element of the test involves a factual determination of whether a *significant* imbalance to the parties' rights and obligation would arise under the contract.¹¹⁴ This limb requires that the claimant prove such disparity of rights beyond the balance of probabilities.¹¹⁵ According to the *Director of Consumer Affairs v AAPT Ltd (Civil Claims)*¹¹⁶ the word 'significant' simply means 'important' or 'of consequence,' rather than 'substantial,' and is designed to identify an imbalance/detriment of the consumer which should be regarded as unfair.¹¹⁷ Justice Morris, President of the Victorian Civil and Administrative Tribunal, draws on English legal history to observe that, "if the balance of the parties' rights and obligations is thought to be contrary to the requirements of good faith, this would be indicative of a *significant imbalance*."¹¹⁸

The second element necessitates the courts consideration on whether the questionable term is 'reasonably necessary' to protect the 'legitimate interests' of the party who would be advantaged by the term.¹¹⁹ According to the explanatory memorandum, a term of a consumer contract is presumed not to be as such unless the party can prove otherwise in court.¹²⁰ It is for the Respondent to establish that a term is 'reasonably necessary' to protect its legitimate interests on the 'balance of probabilities.'¹²¹ This 'legitimate interest' must be 'sufficiently compelling' on the balance of probabilities to overcome any detriment caused to the consumer in

¹¹³ *Fair Trading Act 1999* (Vic) s 32W, 32X.

¹¹⁴ *Competition and Consumer Act 2010* (Cth), sch 2, 23(1)(a); Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 (Cth), 5.23.

¹¹⁵ Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 (Cth), 5.24.

¹¹⁶ *Director of Consumer Affairs v AAPT Ltd (Civil Claims)* [2006] VCAT 1493.

¹¹⁷ *Director of Consumer Affairs v AAPT Ltd (Civil Claims)* [2006] VCAT 1493, 33.

¹¹⁸ *Director of Consumer Affairs v AAPT Ltd (Civil Claims)* [2006] VCAT 1493, 44.

¹¹⁹ *Competition and Consumer Act 2010* (Cth), sch 2, s 23(1)(b).

¹²⁰ Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 (Cth), 5.26.

¹²¹ Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 (Cth), 5.27.

order for that term to be ‘reasonably necessary’.¹²² Any relevant evidence may be adduced to counteract this element of the test.¹²³

Lastly, the court must consider whether the term would cause either financial or non-financial ‘detriment’ if relied upon by a party.¹²⁴ This element will involve a factual determination and must again be proved by the claimant on the balance of probabilities.¹²⁵ This requires more than a hypothetical case, however, the claimant need not prove that actual detriment was suffered only that the detriment would exist as a result of the application or reliance on the term in question in the future.¹²⁶ Such a term does not need to be enforced. Nevertheless, the possibility of enforcement may impact upon the decision made.¹²⁷ It should be noted that any form of remedy would likely be limited to a situation where actual detriment can be proven.¹²⁸

As stated, for these above principles to apply the contract must also be a ‘standard form consumer contract.’¹²⁹ ‘Standard form’ contracts are undefined by legislation¹³⁰ there does, however, exist a rebuttable presumption that a consumer contract is ‘standard form’ unless proven otherwise.¹³¹ In deciding whether a contract is ‘standard form’ the court may “take into account such matters as it thinks relevant”¹³² in addition to the points listed in s 27(2).¹³³ Consumer contracts on the other hand are explicitly defined and reflect agreements for the supply of goods or services ordinarily acquired for ‘personal, domestic or household use or

¹²² Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 (Cth), 5.28.

¹²³ Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 (Cth), 5.27.

¹²⁴ *Competition and Consumer Act 2010* (Cth), sch 2, s 23(1)(c).

¹²⁵ Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 (Cth), 5.30.

¹²⁶ Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 (Cth), 5.31.

¹²⁷ Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 (Cth), 5.32.

¹²⁸ Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 (Cth), 5.34.

¹²⁹ Please see page 20.

¹³⁰ *Competition and Consumer Act 2010* (Cth), sch 2, s 27(1).

¹³¹ *Competition and Consumer Act 2010* (Cth), sch 2, s 27(1).

¹³² *Competition and Consumer Act 2010* (Cth), sch 2, s 27(2).

¹³³ *Competition and Consumer Act 2010* (Cth), sch 2, s 27(2).

consumption.’¹³⁴ ‘If a contractual term meets the conditions in which it may be classified unfair by the courts, it is treated as if it never existed in the contract.’¹³⁵

Bearing this in mind, a contract may be unfair if it includes a term that “permits, or has the effect of permitting, one party (but not another party) to ... vary the terms of the contract”¹³⁶ or “vary the characteristics of the good or services to be supplied.”¹³⁷ It should be noted that these provisions do not presume such terms to be unfair and should only be construed as mere examples.¹³⁸ Following this logic, providing new terms and conditions bundled with an upgrade containing necessary functional and security enhancements *could* be considered ‘unfair’. This is especially so when such terms are unilaterally variable by only one party as “a term is less likely to be found unfair if it has been individually negotiated than if it has not been.”¹³⁹

Therefore, a term that allows for the unilateral right to modify terms *could* be declared by the ACCC as an unfair term,¹⁴⁰ and a court could then order Apple to do what it thinks is appropriate in the circumstances.¹⁴¹ As such, the premise for the inclusion of the freemium model as a methodology of purchase could in fact have come about as a result of unfairness on the part of Apple and consequentially be void according to law. Although one can only talk in hypotheticals in the Australian jurisdiction more precise and argued points of law have been debated successfully elsewhere, namely the United States.

(d) How is This Issue Being Debated Overseas?

The issue of purchases made by minors in Apple’s App Store has been widely debated overseas, primarily in the United States (US). In April 2011, Plaintiff Garen

¹³⁴ *Competition and Consumer Act 2010* (Cth), sch 2, s 23(3).

¹³⁵ Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 (Cth), 5.17.

¹³⁶ *Competition and Consumer Act 2010* (Cth), sch 2, s 25(1)(d).

¹³⁷ *Competition and Consumer Act 2010* (Cth), sch 2, s 25(1)(g).

¹³⁸ Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 (Cth), 5.13.

¹³⁹ *Jetstar Airways Pty Ltd v Free* [2008] VSC 539.

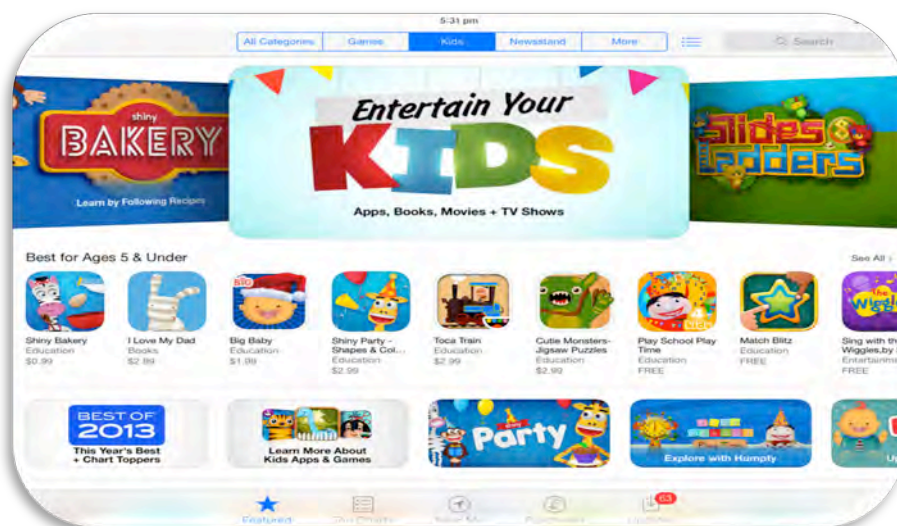
¹⁴⁰ *Competition and Consumer Act 2010* (Cth), sch 2, s 250.

¹⁴¹ *Competition and Consumer Act 2010* (Cth), sch 2, s 243.

Megurian filed a class action suit against Apple alleging that the Plaintiff's children, amongst others, were able to purchase "game currencies" without their parent's knowledge or authorisation. This was typically done during gameplay within free apps and was achieved as a result of the aforementioned 15-minute window with charges ranging from \$99.99 - \$338.72 USD at a time.¹⁴²

Originally, Apple argued the action should be dismissed as a matter of law; the, "relevant contractual relationship governing in-app purchases [being] between Apple and the Plaintiffs and is based on the original T&Cs signed by Plaintiff's thus making the individual purchases not voidable."¹⁴³ However, in May 2013 Apple purported to settle this claim loosing approximately \$100 million by way of offering restitution in the form of money or store credit.¹⁴⁴ It is possible that Apple chose to settle as their argument was problematic due to the voidable nature of contracting with minors as discussed above.

In response to this class action suit Apple introduced a new 'kids section' into the App Store in September 2013. This introduced "[n]ew catalogues for kids based on their age."¹⁴⁵ Although it is a step in the right direction, sub-categories on the initial page at the time of viewing still included "Best of 2013" of which games like "Plants vs. Zombies" can be easily found and accessed. This can be seen in Figure 2.1.



¹⁴² *Re Apple In-App Purchase Litigation* Civ Act No: 5:11-CV-01758 EJD (ND Cal, March 31, 2012), 1-2.

¹⁴³ *Re Apple In-App Purchase Litigation* Civ Act No: 5:11-CV-01758 EJD (ND Cal, March 31, 2012), 5.

¹⁴⁴ *Re Apple In-App Purchase Litigation* Civ Act No: 5:11-CV-01758 EJD (ND Cal May 2, 2013).

¹⁴⁵ Apple Inc, iOS 7 Software Update (18 September 2013).

Figure 2.1 – Screenshot taken of the Apple App Store ‘Kids’ section within iOS 7 on an iPad in December 2013.

It should be noted here, that as of January 2014 the US Federal Trade Commission (FTC) has pressured Apple to further their efforts and refund an additional \$32.5 million to US customers for unauthorised purchases made by children from the App Store.¹⁴⁶ By failing to properly inform parents of the 15-minute window, Apple was said to have failed to apply “fundamental consumer protections” that apply in both online and brick-and-mortar style business.¹⁴⁷ The settlement also required Apple to “modify its billing practices to ensure that express, informed consent” for payment prior to being billed for in-app purchases.¹⁴⁸ Such changes must be made no later than March 31, 2014.¹⁴⁹

Presently, this form of consumer redress is only available in the US, however, it is anticipated that the changes made to the 15-minute window will be made worldwide. Following this, an action pursued by the ACCC using similar facts but incorporating different procedural and substantive rules may be potentially viable in Australia. This warrants further investigation by regulators.

PART THREE

Remedies & Possible Solutions:

Making Changes to the App Store Itself:

As it has been shown the current state of the App Store is undesirable in relation to its interaction with children. The CCAAC notes that clearer information is necessary to improve consumers’ understanding of the difference between free

¹⁴⁶ Author Unknown, *Apple Refunds Kids’ App Payments* (2014) The Australian <<http://www.theaustralian.com.au/technology/apple-refunds-kids-app-payments/story-e6frgakx-1226802910000>> at 16 January 2014.

¹⁴⁷ Federal Trade Commission, ‘Apple Inc. Will Provide Full Consumer Refunds of At Least \$32.5 Million to Settle FTC Complaint It Charged For Kids’ In-App Purchases Without Parental Consent’ (Press Release, 15 January 2014).

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

and freemium apps and the cost of in-app purchases upfront.¹⁵⁰ From a consumer advisory perspective, Apple should create a more obvious and prominent way for consumers to see that a certain application offers in-app purchases and further this by specifying those that require them.¹⁵¹ The Youth Action and Policy Association asserts that the best way to inform consumers is to use clear symbols and plain language which is especially important when communicating to children.¹⁵²

An example of such a system includes the model infographic developed by the *App Trust Project*. This model encompasses a simple icon displaying basic information that can assist both parents and children in making informed decisions when selecting an app.¹⁵³ This can be seen below in Figure 3.1. As such, simple graphical changes on the part of Apple may assist in preventing misleading and deceptive conduct claims. This would be especially useful considering the above noted class action suit has not been judicially recognised in the Australian jurisdiction.



Figure 3.1 – Icon developed by the App Trust Project as depicted in the YAPA policy paper (see bibliography for full citation)

Making Changes to the App Store’s Terms & Conditions:

In order to remedy the problematic consequence of taking a relaxed approach to reading clickwrap terms it could be suggested that graphical changes be made to the App Store’s T&Cs. Lord Denning in *Thorton v Shoe Lane Parking*¹⁵⁴ provides useful obiter dicta to overcome this issue stating that, written agreements should be aesthetically reformatted to explicitly draw attention to key terms allowing for

¹⁵⁰ Gartner Inc, Gartner Says Mobile App Stores Will See Annual Downloads Reach 102 Billion in 2013 (2013) Gartner <<http://www.gartner.com/newsroom/id/2592315>> at 15 October 2013.

¹⁵¹ MG Siegler, *iPhone In-App Purchases Already Leading to the Dreaded Two Words: Bait and Switch* (2009) TechCrunch <<http://techcrunch.com/2009/06/23/iphone-in-app-purchases-already-leading-to-the-dreaded-two-words-bait-and-switch/>> at 02 September 2013.

¹⁵² Carment above n 3, 12.

¹⁵³ Ibid.

¹⁵⁴ *Thorton v Shoe Lane Parking* [1971] 1 All ER 686.

transparency. Such could be achieved by “printing in red [the necessary terms] with a red hand pointing to it, or something equally startling.”¹⁵⁵ This would amount to what Denning called ‘sufficient notice’. Even though the application of this case is connected to written contracts, as it has already been established, the same principles can be applied to online agreements.

This has been similarly applied in U.S. obiter which states that there must be, “reasonably conspicuous notice of the existence of contract terms”¹⁵⁶ for online agreements. Such must be in addition to an “unambiguous manifestation of assent to those terms by consumers.”¹⁵⁷ This explanation adopts the requirement that said terms must be displayed prominently and in a position where users would usually expect to see them.¹⁵⁸ Although common law is not applied here, these decisions can still provide guidance.¹⁵⁹ This is particularly so in the area of e-commerce where the development of technological business models and the pursuit of disputes to final judgment tend to happen earlier and in more volume than in Australia.

This issue of ‘sufficient notice’ was also discussed in the Australian jurisdiction in *Ebay v Creative*.¹⁶⁰ In this case, the Federal Court found that purchasers of concert tickets through Ticketmaster’s website were not given adequate notice of essential terms at the time of purchase. The court found that vague reference in Ticketmaster’s online purchaser policy purported to incorporate additional terms found on the back of the physical ticket which could not be viewed until delivery.¹⁶¹

Even though Creative argued that the purchaser could return the ticket for containing terms not to the purchasers satisfaction, the judge ruled that the provisions on the back of the ticket must be brought to the attention of the

¹⁵⁵ *Thorton v Shoe Lane Parking* [1971] 1 All ER 686, 690.

¹⁵⁶ *Specht v Netscape Communications Corp*, 150 F Supp 2D 585 (SDNY 2001), 28; *Southwest Airlines Co v Boardfirst LLC* Civ Act No 3:06-CV-0891-B (ND Texas, September 12, 2007), 9.

¹⁵⁷ *Specht v Netscape Communications Corp*, 150 F Supp 2D 585 (SDNY 2001), 28; *Southwest Airlines Co v Boardfirst LLC* Civ Act No 3:06-CV-0891-B (ND Texas, September 12, 2007), 9.

¹⁵⁸ *Specht v Netscape Communications Corp*, 150 F Supp 2D 585 (SDNY 2001).

¹⁵⁹ Manwaring, above n 44, 3.

¹⁶⁰ *Ebay International AG v Creative Festival Entertainment Pty Ltd (CAN 098 183 281)* [2006] FCA 1768.

¹⁶¹ King & Wood Mallesons, above n 48.

purchaser at the time of purchase.¹⁶² By analogy, it could be argued that additional terms presented after downloading individual apps no matter the cost should not be enforceable. This is largely because they too are only presented after the original contract has been entered into by an individual creating an App Store account. Therefore, there remains scope to argue that there is a flaw in the operation of the App Store that could be remedied by the application of the abovementioned logic.

Pursuing a Remedy Through Australia's Current Regulatory Model:

At a regulatory level there is no single or easy solution that one can take to remedy an app related consumer concern. This is because, there is no legal schema set in place intended to regulate this area of the market. The overwhelming prevalence of app related disputes has caused much debate surrounding how these digital content stores should be regulated, by what legislation and by whom. It is not enough to rely on current legislation such as the *Electronic Transactions Act*¹⁶³ or *National Consumer Credit Act*.¹⁶⁴ Instead, a new robust framework should be put in place to govern the digital consumer market by providing for a new body of contract and consumer law for cyberspace.¹⁶⁵

In addition, changes should be made to the current regulatory offices available to deal with similar matters. For example, changes to the scope of problems that can be dealt with by the Telecommunications Industry Ombudsman (TIO) would widen the redress solutions that are currently available. The TIO, whilst able to hear some disputes in this area is limited to very particular disputes. According to a recent paper released by the TIO in February 2013, it can only consider disputes that involve members of the TIO Scheme.¹⁶⁶ TIO membership is mandatory for all

¹⁶² *Ebay International AG v Creative Festival Entertainment Pty Ltd* (CAN 098 183 281) [2006] FCA 1768; *Oceanic Sun Line Special Shipping Company Inc v Fay* [1988] HCA 165 CLR, 206, 228, 261.

¹⁶³ 1999 (Cth) s 8(1).

¹⁶⁴ 2009 (Cth).

¹⁶⁵ Preston, above n 44, 230.

¹⁶⁶ Simon Cohen, *Telecommunications Industry Ombudsman: Submission on the Issues Paper: App Purchases by Australian Consumers on Mobile and Handheld Devices* (2013) Telecommunications Industry Ombudsman < http://www.tio.com.au/_data/assets/pdf_file/0015/131136/2013-02-15_CCAAC-Treasury_Issues-Paper-on-Mobile-Apps.pdf > at 25 November 2013.

carriers and eligible carriage service providers (CSPs) under the *Telecommunications (Consumer Protection and Service Standards) Act*.¹⁶⁷

However, in the case of Apple and iOS, apps are not purchased from telecommunication companies themselves but instead from the App Store. As the App Store is not classified as a CSP under the Act, there are only a small proportion of complaints that fall within the jurisdiction of the TIO. Generally, if the app has been billed to a consumer by a TIO member and was provided by means of a carriage service (ie: downloaded via the internet), then the TIO will have jurisdiction.¹⁶⁸ If jurisdiction can be established, the TIO will then be able to look into the misleading and deceptive conduct provisions found in the ACL and can investigate cases of inadequate disclosure prior to entering into a contract.

Such recourse is reflective of the TIO's position statement which states that:

The TIO takes the view that telecommunications providers should provide consumers with sufficient information about a product to allow them to make an informed purchase or to give their informed consent when they agree to buy [a] product.¹⁶⁹

Specifically in regards to in-app content disputes the TIO has recognised that it will conduct an investigation considering: "An app not performing in accordance with pre-sale information" or "Unexpected or excessive charges for 'in-app' purchases..."¹⁷⁰

The main issue here is that there is little assistance the TIO can presently offer because the App Store is not a carriage service provider and apps in this instance are not billed to the customers phone bills. This is potentially something that providers could look into to remedy the situation – either billing apps to CSPs or making App Stores like the Apple App Store fall within the ambit of CSPs thereby coming within the jurisdiction of the TIO.

¹⁶⁷ 1999 (Cth).

¹⁶⁸ Cohen, above n 165, 1.

¹⁶⁹ Ibid, 6.

¹⁷⁰ Ibid.

Alternatively, claims can be put to the ACCC. It was this peak body who identified the key issues discussed in this paper and sparked debate on point in Australia.¹⁷¹ The ACCC enforces the *Competition and Consumer Act*.¹⁷² In doing so, it “promot[es] fair trad[e] and competition through the provision of consumer protections”¹⁷³ in order to “enhanc[e] the welfare of Australians.”¹⁷⁴

Presently, the ACCC advises that consumers contact them if they have a complaint. Alternatively, if purchases are in fact billed directly to the mobile phone bill then the TIO should be contacted as explained above. However, even with the assistance of the ACCC, there is still no clear legal outcome for out of pocket consumers. As such, without a more robust framework in place on the part of both Apple and developers will continue to go unregulated and unpunished and difficult and oppressive consumer redress strategies will endure.

Practical Advice/Conclusion:

As you can see, the App Store contains many apps which could be classified as misleading, deceptive, unfair or unjust. This is achieved by assisting children to make purchases by making it unclear that real money is being spent. By engaging users in long and complex EULA’s in the form of clickwrap agreements it is often the case that terms are not outlined and defined. It remains unclear as to whether such terms as presented throughout are actually enforceable under Australian law or void for contravening the relevant sections of the ACL. As established, there has been no judicial analysis directly on point so it is difficult to say with sufficient certainty as to the outcome of such complaints.

Regardless, it is clear that there is an issue when it comes to minors and their ability to assent to the terms provided for in Apple’s T&Cs. Regardless, Apple and its developers should be held accountable to consumers and seek to assure customers as to what they are actually paying or in this case not paying for. Like in

¹⁷¹ ACCC, above n 5.

¹⁷² 2010 (Cth).

¹⁷³ ACCC, *Legislation* (2013) Australian Competition and Consumer Commission <<http://www.accc.gov.au/about-us/australian-competition-consumer-commission/legislation#main-sections-of-the-cca>> at 23 October 2013.

¹⁷⁴ *Ibid.*

the United States recursive action against Apple and its developers should be available to those parents who have been directly affected. In saying this, however, parents should not be entirely blameless. Those that allow their child(ren) to be privy to the passwords needed to make an App Store purchase should not be allowed to benefit for their careless actions or inactions. Therefore, if a compensation scheme were possible, it would not be unjust for such considerations to be taken into account.

The main lesson to be learned is to always read the T&Cs of everything before use. Also, never give a young child an App Store password that would allow them to have access to credit facilities. A best practice solution would be to make a secondary account with an attached store voucher containing a finite amount of money. This way there is less risk of an economical backfire and children can learn the value of a dollar.

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