

The Freemium Approach – Like Taking Candy from a Baby:

Misleading and Deceptive Conduct in the iOS App Market Economy

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This article is only an introduction to the issues and remedies around Freemium Apps. To appeal to a general rather than legal audience, I avoid addressing legal issues in depth and use minimal jargon. Instead I have sought to outline the issues and how they apply through a policy perspective. (Due to the recent appreciation of the implications of this new ‘trap for young players’, there is limited academic discussion and case law on point.)

Contents

What is the App Store™, and How Prevalent is its Use?	2
The Freemium Approach – What it is and how it differs from other models:.....	3
What is the Problem with the Freemium Approach and Children?	4
Category 1 – Plants vs Zombies™	6
Category 2 – The Smurfs Villiage™	8
What Does the Apple App Store Agreement Say About All of This?.....	9
Contracts and Children Using Apps – What are the Issues?	10
But the App Was ‘Free’ ... That Surely Means ‘No Cost’?	11
Where Do You Complain, and What is the Process?.....	12
Where to Next?	14
Summing Up: So How Does this All Intersect?	16

We all know that many ‘things’ cost 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 seized the opportunity to monetize the user experience and thereby earn greater profits through the new “freemium” business model. Unsurprisingly, children have commonly taken this up with sometimes devastating effects on their parents and their finances.

Here, games offered ‘for free’ are followed by a bevy of virtual goodies that come at a hefty price of very real and tangible money.² Often these goods are necessary to advance in games, whether it is by reason of gameplay itself or simple impatience. These apps that present as free but later pressure consumers to make in-app purchases might have the potential for misleading claims to be bought against their

¹ Intern at Cyberspace Law and Policy Community, Law Faculty, University of New South Wales (Sydney Australia), working with Alana Maurushat and David Vaile. <http://cyberlawcentre.org/2013/freemium.htm> See also the infographic on that page.

² Anton Troianovski, Spencer Ante & Jessica Vascellaro, ‘Mom, Please Feed My Apps: Mobile-Game Critters Need Money From Their Young Keepers, and Parents Are Paying’, *The Wall Street Journal*, 11 June 2012.

creators (or even Apple themselves) under the Australian Consumer Law.³ While this article does not answer all questions pertaining to this large topic, I offer an introduction to the various issues concerning this subject matter.

What is the App Store™, and How Prevalent is its Use?

On a traditional level, the App Store is a place where people can purchase applications on their mobile device running iOS.⁴ It offers a platform for manufacturers to design and develop software to extend the functionality and experience of the mobile operating system.⁵ The implementation of the 'freemium' experience within applications is a relatively new phenomenon in the mobile application market. This is largely because of the opportunity seen in the emerging digital arena as smart-devices begin to find their way into the everyman's household. This is evidenced in a report on smartphones and tablets by Australian Communications and Media Authority (ACMA), which noted that by the end of May 2012 there was 8.67 million people aged 18 years and over with a smartphone, compared with 4.25 million in the preceding year.⁶ Of these, approximately 5.9 million are subscribed to and use a mobile wireless connection.⁷

Since the release of the Apple iPhone 3G in July 2007 the growth of the mobile application market has surged.⁸ In the first 30 days of operation Apple had more than 5,000 new applications and an unanticipated \$30 million in revenue.⁹ It is estimated that by the end of 2013 the combined revenues of all mobile application markets will reach a total of \$26 billion worldwide.¹⁰

Brian Blau, research director at Gartner Inc¹¹, notes that free apps currently account for 60% of the total available apps in the App Store with in-app purchases accounting for 17% (or \$4.42 billion) of total revenues.¹² Gartner forecasts that by 2017, in-app purchases will take up 48% of revenues¹³ making the 'freemium' model a sustainable and economically profitable business standard for

³ ACANN, *App Purchases By Australian Consumers* (2013) Australian Communications Consumer Advisory Action Network <

http://accan.org.au/files/App_purchases_by_Australian_consumers.pdf> at 20 November 2013, 6.

⁴ Author Unknown, *What is an App Store* (n.d.) *WiseGeek* < <http://www.wisegeek.com/what-is-an-app-store.htm>> at 3 November 2013.

⁵ *Ibid.*

⁶ AMCA, *Smartphones & Tablets: Take-Up Use in Australia* (2013) Australian Communications & Media Authority < www.acma.gov.au/.../report-3-smartphones-tablets- > at 20 November 2013.

⁷ ABS, *Media Release* (2012) Australian Bureau of Statistics < <http://www.abs.gov.au/ausstats/abs@.nsf/latestProducts/8153.0Media%20Release1Jun%202012> > at 14 November 2013.

⁸ Andreas Constantinou, *The Mobile Application Store Phenomenon* Vision mobile blog (2008) Vision Mobile < <http://www.visionmobile.com/blog/2008/11/the-mobile-application-store-phenomenon/>> at 09 November 2013.

⁹ *Ibid.*

¹⁰ 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.

¹¹ The world's leading information technology research company

¹² Garner, above n 9.

¹³ *Ibid.*

developers.¹⁴ This is largely because ‘freemium’ model provides a more progressive option for developers looking to make money outside of offering in-app advertising.¹⁵

The Freemium Approach – What it is and how it differs from other models:

So what exactly is the freemium approach? To put it lightly freemium applications (or more specifically, games) are based on a hybrid model of free to download with the added ability to purchase paid premium content. The issue here is that consumers are encouraged or in some cases find it mandatory to purchase content to progress through these games.¹⁶ This is where the point of contention really lies as consumers need to be aware that ‘free’ may not mean free in the literal sense.¹⁷ Although these applications are marketed as ‘free’ in the App Store it does not mean that their entire usage is actually of no additional cost.¹⁸ It is therefore not surprising that app analytics company Distimo claims that an app must make an average of \$47,000USD a day to be in Apple’s top ten grossing apps.¹⁹ Whilst not all of these are free or ‘freemim’ applications, it should be noted that at the time of writing this article Candy Crush Saga™ (one of freemium’s poster children) features at number one.

‘Freemium’ must, however, be distinguished from ‘lite’ based applications, where the latter gives users a taste of an app by providing a limited free use experience before users agree to fork over the cash for the full service product. Both of these categories must again be separated from ‘add-enabled/funded’ content. For these apps that there is no upfront fee for the user to use of that application, however, banner advertisements are usually displayed within use as a consequence. A combination of these models may also be used. If you think about things this way, nothing in life is ever truly free ... so why should life work differently in the digital world?

It should be mentioned here that those applications, which require these so called ‘in-app purchases’, are given an inadequate warning by the App Store itself there being only a small notification in the applications description to consumers. It appears that more reliance is placed on instruction by the developers themselves.

¹⁴ 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; Author Unknown, *Rockin in the Freemium World* (2013) MagicSolver <<http://www.magsolver.com/?p=1972>> at 12 October 2013.

¹⁵ Author Unknown, *Rockin in the Freemium World* (2013) MagicSolver < <http://www.magsolver.com/?p=1972> > at 12 October 2013.

¹⁶ ACANN, above n 2, 5.

¹⁷ 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.

¹⁸ Ibid.

¹⁹ Phil Dzikiy, *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.



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.²⁰ Quite frankly, the system in place is not ideal especially when it comes to children. This brings me to the main issue here – freemium applications and misleading vulnerable and economically naive children.

What is the Problem with the Freemium Approach and Children?

Where there is money to be made there is money to be lost. This is especially so in a market likely Australia which has one of the highest rates of mobile phone ownership by children in the world.²¹ According to the game-research firm SuperData, the mobile games market generated \$2.7 billion in revenue from marketing games to children.²² These game developers leverage the desire of children to master games by engaging them with attainable achievements before implementing roadblocks that often require purchasable material to get around.²³ Of course, this could potentially come within the purview of misleading and deceptive conduct, and has already come within the firing line of consumer watchdog authorities and ad hoc advisory bureaus. This is largely due to the fact that some of these apps are marketed to children in such a specific and targeted manner so that children are unable (or simply do not connect) that the purchases they are making are with their parents real-world cash.²⁴

²⁰ 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.

²¹ National Children's & Youth Law Centre, *Caps, Apps and Other Mobile Traps: Responding to Young Australians' Financial and Legal Issues Arising from Mobile Phone Usage*, (Australian Communications Consumer Action Network, 2013), 4.

²² Troianovski, above n 1.

²³ Ibid.

²⁴ ACCC, above n 16.

In defence of Apple, it has provided software controls and support articles to show parents how to enable various settings to prohibit unwanted purchases by their children.²⁵ This is largely in response to the 15 minute window of opportunity embedded into iOS that on default settings allows content to be purchased for 15 minutes after the master password has been typed in.



News articles from around the world have produced stories en-mass about the huge bills racked up by little tykes and their shiny tactile toys. For example, earlier this year a little boy spent \$2,600USD in in-app add-ons in the free to download and play Zombies vs Ninjas™ in just a single evening.²⁶ The vast majority of similar examples were directly attributable to children purchasing innocuous items in their favorite games within this 15-minute window and it is amazing how much they can spend!!!

Having said all this I pose the question: Should it be the responsibility of the App Store and Developers to put an end to this or is the responsibility in the purview of parental guidance?

In answering this question it proves useful to deconstruct how these apps actually work and target children in order to get them to spend big. To demonstrate this, the Australian Communications Consumer Action Network (ACANN) has divided these problematic apps into two separate categories. Firstly, there are those that are free to download and advertised as free to play (but really aren't free at all) and secondly, those which employ a "pay or wait" method to encourage in-app purchasing.²⁷ Rather than simply re-hashing the examples given by ACANN I have chosen to undertake my own research into this subject. It must be distinguished,

²⁵ <http://support.apple.com/kb/HT4213>

²⁶ 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.

²⁷ ACANN, above n 2, 5-6.

however, that I am of course a university aged student and am not a child. Nevertheless, it is surprising how many of the same potholes someone of my age and experience can fall into. It is therefore not surprising that children can and have fallen prey to this clever form of psychological manipulation.

Category 1 – 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 the game was quite easy to proceed from level to level, however as the game progressed it became more difficult not to use paid content. This game operates on coins as its core form of currency. You can earn these during gameplay, albeit it is at a much slower rate than purchasing them. This of course means that progressing through gameplay becomes quite difficult without making a purchase.

The largest amount of coins that can be purchased at any given time is 45,000, which is highlighted by a red tab and displayed as the “best deal.” Although it is good value for your money compared with multiple purchases of the smaller bundles it does come in at a grand total of \$109.99. You can also purchase additional species of plants for as much as \$4.99, which are a separate and additional purchase to the coins. Even at later stages in the game when in-app purchases are suggested to you the most economical (and coincidentally expensive) option is always flagged for the user as the “best deal.”





Gameplay throughout this game does not make it strictly necessary for any purchases to be made, however as previously stated, it does not make it easy for you to continue on in the game at a regular pace without them. There is also the not so occasional prompt to visit the store as a friendly reminder of what you can purchase to have a better game experience.



It only takes the user until level 5 before one begins to see the value in any of the in-app purchases offered. At this point users are allowed to experiment with the “power up” features. These allow you to kill zombies much faster. By this time one is quite invested in the game. By level 6 free power ups are quickly disabled and users are instructed that “if you want to use a power up you can buy one with coins.” At this stage I only had 1,340 coins and each power up would cost either 800, 1200 or 1000 coins (note that they are not in value order). By level 9 things become more intense and the reality of needing to make in-app purchases becomes even more apparent.



I could continue with a blow-by-blow deconstruction of each level, but by this stage I believe I have made my point clear (at least for this model). Although games are marketed as ‘free’ with ‘in-app purchases’, the requirement or necessity of making such additional purchases isn’t stressed enough at the outset.

Category 2 – The Smurfs Villiage™

This probably has to be one of the most talked about child-centric money gouging applications out there. The game focuses on building a village and playing mini-games to help you feed and nurture the community you are building. To do tasks within this game you need Smurfs, however, if all your little blue fellas are busy doing other tasks you need to use smurfberries to “free up some time” so they can do the necessary activity you need them to do. Alternatively, you can wait for however long the timer indicates for a Smurf to be free to do your bidding. The game also has a nasty habit of constantly prompting you to purchase by highlighting exclusive offers (when in actual fact they are probably offered to everyone).





At one stage 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. I was also instructed to build a bridge to get over the lake in my village at a time cost of 119 hours, 15 minutes and 13 seconds or the cost of 20 smurfberries. The thing is although smurfberries conceivably grow on the digital bushes you plant, however, if you want to earn smurfberries fast you will need to purchase those bushes with real life money. Again, although the game is technically free gameplay would be a real grind if you didn't front up for those pesky berries and they can set you back from anywhere between \$5.49 for 50 to \$109.00 for 2000. This game (like many others) plays on a child's emotional weakness in that they would of course choose to be impatient and be instantly gratified than having to wait over a day to continue to provide and care for their little blue friends. In a sense one could even regard such actions as emotional hijacking or blackmail.

What Does the Apple App Store Agreement Say About All of This?

According to Apple, 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 the terms and conditions. At this point parents would find that at all times a person 13 years and above will be held responsible for maintaining the "confidentiality and security" of the account; Apple will not regard itself as responsible for any losses arising out of "unauthorized use". Conceivably this can include a child making purchases without express permission. The terms clearly indicate that an Apple ID will need to be entered to make any authorized purchases, however, "you will not need to authenticate again for 15 minutes". This function can be turned off and if assistance is needed Apple instructs users to its support page on point.

Express choice of law and jurisdiction clauses are supplied firmly planting the contractual agreement within Australian (more specifically New South Wales) law with explicit mention of consumer rights and guarantees. From this quite simplistic overview of Apples contractual license to use its App Store facilities it appears that liability would reside solely with the parents when it comes to young children.

There also appears to be some difficulties with this when considering other Australian legislation (please not this will be discussed in later.) The main issue here is that when interpreting consumer rights in light of this agreement, it remains unclear as to what avenue to pursue in order to remedy an in-app-purchase-frenzy undertaken by an unaware or irresponsible child.

Contracts and Children Using Apps – What are the Issues?

If you know anything about contract law, it's probably the case that you know that contracts and minors is generally a 'no go' zone. The basic law of contract requires that for the contract to exist in the first place both parties must have contractual capacity. There are certain individuals or classes of individual who from the 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 common law rule, a contract made by a person under the age of 18 is voidable, albeit certain exceptions do apply. This is reaffirmed and expanded upon in New South Wales by Part 3 of the *Minors (Property and Contracts) Act 1970*.²⁸

However, from the contract presented by Apple it appears that at no point in time do they actually contract with the child, but instead with the parent or guardian. It is expected that the parents would have read the terms and conditions by pressing the agree button and therefore expected that they are aware of the associated liabilities and dangers.

The main question then is: if a child uses their parent's or guardian's App Store account without permission, does this come under the umbrella of "unauthorized used" outlined in the App store terms of use?

As App Store customers are expected to maintain the "confidentiality and security" of their account, giving a minor carte blanche access to a credit card without necessary supervision could conceivably amount to carelessness of which Apple bears no responsibility.

Alternatively, should an adult supply a minor with their own App Store account, it is expected that they would have again read the associated terms and conditions to discover that liability over security and payment facilities rests with the adult. To paint a more general picture, no one in their right mind would give their child their physical credit card and let them loose in a toy store so the same regulation should occur when signing a child into an App Store account that has a credit card linked to it. Therefore, it is evident that contract law is of little use here; liability ultimately rests with the adult. The issue then stands with how the apps are presented both in the App Store and the app itself. This would come within the purview of the Australian Consumer Law.

²⁸ Julie Clarke, *Capacity to Contract* (2010) Australian Contract Law < <http://www.australiancontractlaw.com/law/formation-capacity.html> < at 10 October 2013.

But the App Was 'Free' ... That Surely Means 'No Cost'?

As the law currently stands, "A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."²⁹ As established, free does not always mean 'free' in the conventional sense. The term 'free' simply denotes that the download of the application itself is of no cost to the user, however, this does not necessarily extend to its continued use. Therefore, it is just to say that descriptions of apps being 'free' in some examples may be misleading in accordance with the Australian Consumer Law (ACL).³⁰

The ACL applies to all states and territories in Australia.³¹ The legislation provides for multiple regulators, each of which exercises its own functions.³² It requires that both the App Store itself and app developers make accurate representations about the functionality of an app. The ACL also provides for a number of consumer protections that are capable of applying to the purchase of apps. These include provisions against misleading and deceptive conduct (as above) and specific prohibitions against unfair practices in addition to enforcement and consumer redress provisions.³³

As computer software is expressly considered a 'good' under the ACL it means that the abovementioned consumer protections are applicable to the supply of apps in both trade and commerce.³⁴ Therefore, the consumer is entitled to a remedy for a major failure to comply with applicable standards.³⁵ The issue, however, is that the ACL adopts what has been considered above as a "multi-regulator model" and it remains unclear as to which entity a consumer should complain.³⁶

According to the Consumer Affairs Advisory Council (CCAAC), clearer information is necessary to improve consumers' understanding of the difference between free and freemium apps and the cost of in-app purchases upfront.³⁷ Currently as it stands, some of these apps benefit from user inexperience whilst not breaching Apple policies or guidelines.³⁸ Some parents of younger children who let them use the App Store may be unfamiliar with the freemium platform and as a result are unaware that downloading a free app could potentially open Pandora's box in regards to credit card charges. Due to this lack of awareness requisite settings may remain in their default position leaving that ominous 15-minute free-for-all window open without any realization of a spending spree until it is too late.

²⁹ *Australian Competition and Consumer Act 2010* (Cth) Sch 2 ss (18)(1).

³⁰ Commonwealth Consumer Affairs Advisory Council, *App Purchases by Australian Consumers on Mobile and Handheld Devices: Inquiry Report* (2013) Australian Government: The Treasury < <http://ccaac.gov.au/2013/07/19/app-purchases-by-australian-consumers-on-mobile-and-handheld-devices/> > at 19 September 2013, 12.

³¹ CIS, *Enquiry into App Purchases: Submission by the Centre for Internet Safety* (2013) The Centre for Internet Safety < <http://www.canberra.edu.au/cis/storage/CCAAC%20app%20submission%20by%20Centre%20for%20Internet%20Safety.pdf> > at 17 September 2013, 6.

³² *Ibid.*

³³ CCAAC, above n 29, 25.

³⁴ CCAAC, above n 29, 26; *Australian Competition and Consumer Law 2010* (Cth) Sch 2.

³⁵ CCAAC, above n 29, 25.

³⁶ *Ibid.*, 27.

³⁷ *Ibid.*, 12.

³⁸ *Ibid.*, 14.

Nevertheless, even if parents are knowledgeable enough to enable the restrictive settings it is all too possible for children to turn this off should they know the pin number to unlock the device itself. In saying this, the CCAAC raises the distinct possibility that parents may also be unaware of the extent to which apps encourage children to make in-app purchases which are not necessarily clear at the time of initial download.³⁹ As such, it is not always possible for a parent to avoid the pitfalls of aggressive marketing short of linking a gift voucher to an account rather than a credit card.

Should the parents really have to sit there and watch their children play and pay in games that are marketed as 'free'?

The answer most would give is "I don't think so!!" Just like buying any other product or 'good', consumers should know what they are paying for (or in this case not paying for) and should have the peace of mind to know that a free app wont cost them hundreds of dollars in the long run.

Where Do You Complain, and What is the Process?

Currently, the App Store has a in-built mechanism to report such activity, however, with regards to the terms of use it may not always be the case that consumers can obtain a refund. This can make proceeding with any claim very difficult for the everyday consumer. This is especially so considering the "the borderless nature of e-commerce."⁴⁰ Sometimes a remedy may only be achievable by going directly to the source – the developer. As indicated in the next example, the associated contractual provisions found in an app End User Licensing Agreement may mandate such recourse.

According to the agreement put forth by Beeline Interactive Inc, the makers of "The Smurf Village", "Apple is not responsible for addressing any disputes" associated with this product and all disputes "under or relating to [the Smurfs Vilage] shall be finally settled by binding arbitration between [the user] and beeline." This will, however, only occur after "informal negotiation" has taken place. All arbitration is noted to be "conducted in Los Angeles, California" by a "single arbitrator under the Rules of the American Arbitration Association." The law that is stated to apply is the law of California, however, "use of the game may also be subject to ... international laws." (* * * Please see images below for some samples)

Nevertheless, there exist a number of initiatives that support cross-jurisdiction compliance with the ACL like the International Consumer Protection and Enforcement Network (ICPEN) which works closely with the Australian Competition and Consumer Commission (ACCC).⁴¹ This network seeks to foster international cooperation amongst law enforcement. If complaining to the source doesn't achieve the desired response – there are always industry bodies.

* * *

³⁹ Ibid, 17.

⁴⁰ CIS, above n 30.

⁴¹ CCAAC, above n 29, 17.

**BELINE INTERACTIVE, INC.
End User License Agreement**

Last Update: September 27, 2013

PLEASE READ THIS END USER LICENSE AGREEMENT ("EULA") BETWEEN YOU AND BELINE INTERACTIVE CAREFULLY BEFORE USING THE GAME. BY DOWNLOADING OR USING THE GAME, YOU ARE AGREEING TO BE BOUND BY THE TERMS OF THIS EULA. IF YOU DO NOT AGREE TO THE TERMS OF THIS EULA, PLEASE CLICK DO NOT DOWNLOAD OR USE THE GAME.

Note: If you are under age 13, you may use the Game only under the supervision of your parent or legal guardian, except where prohibited by law.

Summary

This summary is provided only for convenience. Please review the EULA below in its entirety for important information and legal conditions that apply to your use of this Beline mobile application ("Game").

The EULA below is a legal agreement between you and Beline that governs whether and how you may use the Game. We may change the EULA at any time. Use of the Game is also subject to our Privacy Policy.

If you are under age 13, you may use the Game only under the supervision of your parent or legal guardian, except where prohibited by law. If you are age 13 or over but under age 18, you may use the Game only with the consent of your parent or legal guardian.

The Game is owned by Beline and its licensors. You may only use the Game for personal use. You may not sell or transfer the Game, or any content or digital items within the Game, to anyone else.

OK

The terms of this EULA will govern any upgrades provided by Beline that replace and/or supplement the original Game, unless such upgrade is accompanied by a separate license, in which case the terms of that license will govern. You acknowledge that this EULA is concluded solely between you and Beline, and not with the provider of your device (for example, Apple and Android), and that Beline is solely responsible for the Game and the content thereof, except as otherwise provided in this EULA. If you have an Apple device and this EULA is less restrictive than, or in conflict with, the terms of service for such device, the terms of service for such device will govern.

Intellectual Property

All content included in the Game, including text, design, graphics, logos, user interfaces, button icons, images, photographs, audio clips, video clips, digital downloads, data compilations and software (but not including any content posted by users) is owned by Beline or our licensors and protected by applicable copyright laws. The Game may include registered and unregistered trademarks owned by or licensed to Beline, which may not be copied, imitated or used, without the prior written permission of Beline.

Charges

If there is a charge associated with the Game, you agree to pay that charge. If the Game is free, there may still be charges for additional content within the Game, including virtual currency and virtual goods (both defined below), and you agree to pay those charges. You may be able to prevent purchase of such additional content by adjusting your device's settings.

The Apple iPhone, iPad and other devices may keep you logged on for a period of time after you download the Game for after you make a purchase through the Game. This may allow a user (for example, a child) to incur charges without entering your password. This is a function of the software of these devices and not within our control.

OK

Minor Users

If you are under age 13, you may use the Game only under the supervision of your parent or legal guardian, except where prohibited by law. If you are age 13 or over but under age 18, you may use the Game only with the consent of your parent or legal guardian.

Beline relies upon parents and guardians to determine if the Game is appropriate for the viewing, access or purchase by persons under the age of 18.

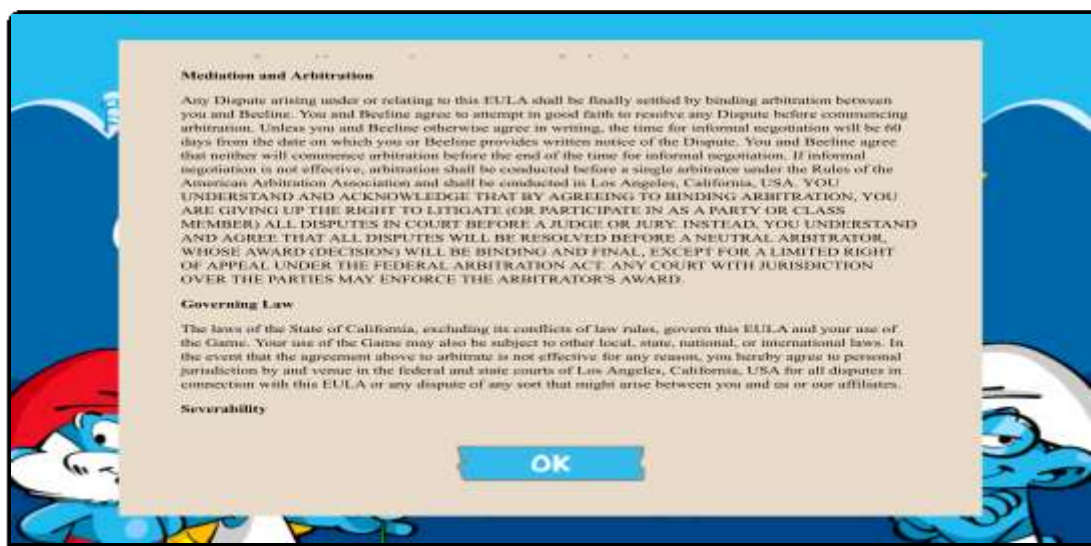
You agree to monitor use of your account by persons younger than the age of 18. You agree to accept full responsibility for any unauthorized use of your account by persons under the age of 18, including responsibility for any use of your credit card or other payment instrument.

Virtual Currency and Virtual Goods

The Game may include "virtual currency," consisting of coins, points or similar items that may be earned or obtained through the Game or otherwise purchased by you for actual ("real-world") currency, subject to applicable law. The Game may also include "virtual goods," consisting of digital items such as commodities, abilities or other goods that may be earned or obtained through the Game or otherwise purchased by you for actual currency, or for virtual currency, subject to applicable law.

We can manage, regulate, control, modify or eliminate virtual currency and/or virtual goods, including the price thereof, at our discretion, and will have no liability to you or any third party for any of such actions. You have no right, title or interest in or to any virtual goods or virtual currency except the following: a limited, personal, non-transferable, non-sublicensable, revocable license to use, solely within the Game, virtual goods and virtual currency that you have earned, purchased or otherwise obtained in a manner authorized us.

OK



Where to Next?

As previously noted, there are a number of avenues that one can take to remedy an app related situation on the basis of misleading and deceptive conduct. However, none really regulate this area in its entirety. There exists much debate presently as to how exactly these digital content stores should be regulated, by what legislation and by whom. Nevertheless, presently these are our options:

- The *Electronic Transaction Act 1999* (Cth): Provides that a transaction is not invalid simply because it took place wholly or partly by means or one or more electronic communication (s 8(1));
- The *National Consumer Credit Act 2009* (Cth): Provides a set of legal schema relating to consumer credit and its associated obligations and protections;
- The 2006 *Australian Guidelines for Electronic Commerce*⁴²: Seeks to “enhance consumer confidence in electronic commerce by providing guidance to businesses or how to deal with consumers when in engaged in business-to-consumer electronic commerce.” Although applicable to the business rather than the consumer it is still useful to see the official guidelines of conduct. Please note these are only guidelines and are by no means mandatory. Also note that the guidelines make direct reference to the relevant sections of the Australian Consumer Law that cover misleading and deceptive conduct, however, it is made in reference to the *Trade Practices Act 1974* which has since been repealed. The only major difference is that the TPA limited such conduct to corporations whereas the ACL provides a much wider scope making the relevant provision applicable to all persons.
- The Telecommunications Industry Ombudsman (TIO): The TIO, whilst able to hear some disputes in this area is still limited to very particular disputes. According to a recent paper released by the TIO in February of this year (2013),

⁴²http://archive.treasury.gov.au/documents/1083/PDF/australian_guidelines_for_electronic_commerce.pdf

it can only consider disputes, which involve members of the TIO Scheme. As it currently stands, TIO membership is mandatory for all carriers and eligible carriage service providers (CSP's) under the *Telecommunications (Consumer Protection and Service Standards) Act 1999*. However, in the case of Apple and iOS, apps are not purchased from the telcos 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 speaking however, if the app has been billed to a consumer by a TIO member and was provided by means of a carriage service (which the TIO gives the example of – downloaded via the internet) then the TIO will have jurisdiction. If jurisdiction can be established the TIO can look to misleading and deceptive conduct provisions found in the ACL and will investigate cases of inadequate disclosure prior to entering into a contract. This is in reflection 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.*" Specifically in regards to in-app content disputes the TIO has recognized that it will conduct an investigation considering:

- An app not performing in accordance with pre-sale information
- Unexpected or excessive charges for 'in-app' purchases
- Other concerns which are not relevant to this area of interest.⁴³

The main issue here is that because the App Store is not a carriage service provider and apps are not billed to customers phone bills there is little help the TIO can offer presently. This is, however, something that providers could look into to remedy the situation – either billing apps to CSP's or making App Stores fall within the ambit of CSP's and thus coming within the jurisdiction of the TIO.

- Australian Competition & Consumer Commission (ACCC): The ACCC is an independent statutory authority that enforces the *Competition and Consumer Act 2010*, which is where the misleading and deceptive conduct provisions are found. This industry body covers relationships between suppliers/retailers and consumers with the purpose of "enhancing the welfare of Australians by promoting fair trading and competition through the provision of consumer protections."⁴⁴ As of September 10 of this year (2013) the ACCC has joined a "concerted international effort to identify smartphone and tablet apps that may mislead young children into making unauthorized in-app purchases."⁴⁵ They note that "Consumers need to be aware that 'free' may not mean free." Presently, the ACCC advises consumers who have a complaint to contact them or alternatively the TIO should the purchases be billed directly to a mobile bill.
- Australian Communications and Media Authority (ACMA)

⁴³ 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.

⁴⁴ 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.

⁴⁵ ACCC, above n 16.

Summing Up: So How Does this All Intersect?

As things currently stand the App Store is rife with apps that are clearly misleading and deceptive. They entice children to make purchases, make it unclear that real money is being spent and above all con hard working parents out of their hard earned money. Of course not all in-app purchases are made without consent or without knowledge of the true price tag, however, being that this issue exists and its relative prevalence in the community something needs to be done. At this current moment this issue appears to be quite topical for policy makers, with all key bodies preparing papers in response. The main lesson to be learned here is always read the terms and conditions of everything before you actually use them. Also, never give a young child an App Store password that would allow them to have access to credit facilities. The best thing anyone could do would be to make a secondary account with an attached store voucher with finite amount of money that way there is less risk of an economical backfire and children can learn the value of a dollar.