



Submission to

**Senate Environment and Communications
References Committee**

Subject

**Gaming micro-transactions for
chance-based items**

Date

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1. Introduction

The Interactive Games and Entertainment Association (**IGEA**) welcomes the opportunity to respond to the “Gaming micro-transactions for chance-based items review” (the **Review**) being conducted by the Senate Environment and Communications References Committee (the **Committee**).

2. About IGEA

IGEA is the leading industry association representing the business and public policy interests of Australian and New Zealand companies in the interactive games industry. IGEA’s members publish, market, develop and/or distribute interactive games and entertainment content and related hardware. The following list represents IGEA’s current members:

- 18point2
- Activision Blizzard
- All Interactive Distribution
- Big Ant Studios
- Electronic Arts
- Five Star Games
- Fiveight
- Gameloft
- Google
- Namco Bandai Entertainment
- Microsoft
- Nintendo
- Nnooo
- Sony Interactive Entertainment
- Take 2 Interactive
- Total Interactive
- Ubisoft
- Well Placed Cactus
- Wicked Witch
- ZeniMax Australia

3. Executive Summary

By way of executive summary, IGEA is of the view that:

- **Loot boxes are simply one form of optional micro-transaction that will always provide players with in-game items.** They are not necessary or required to enjoy, progress in or complete a video game.
- **Loot boxes do not constitute a form of gambling under current Australian law.** Virtual items obtained in loot boxes are not money or considered “other consideration of value” because they are only useable in-game and can’t be cashed-out or exchanged for real-world money. They do not have value outside of the video game in the real-world.
- **Video game publishers, developers and platforms typically do not allow loot boxes, virtual items or game points to be traded, exchanged, sold or gambled on external websites and services.** Secondary markets that attempt to allow players to sell and gamble their virtual items are entirely unauthorised and potentially illegal external operations that are not involved with, or approved by, game publishers, developers or platforms. Where a party, other than the video game publisher, developer or platform, offers a mechanism to “cash out”, purchase or gamble virtual items, they are also likely acting in violation of Terms of Service and End-User License Agreements. Accordingly, game companies actively try to prevent these practices. If external websites and services are operating in such a manner without the authority of the game publisher, developer or platform, the legal responsibility to comply with Australian legislation, including gambling legislation, falls solely on the external websites and services.
- **Loot boxes utilise the same “surprise and delight” mechanics that trading cards, Kinder Surprises and many other consumer products have been using for years.** All these products, including loot boxes, are subject to a vast range of consumer protections and regulations and it would not be appropriate to impose a special regulation on the video game industry.
- **The video game industry takes its responsibility to its players, parents and guardians very seriously.** As such, video game consoles and platforms provide parents and guardians with extensive and robust tools that they can use to ensure that children and younger users are not allowed to make any in-game purchases without obtaining approval first. These tools extend to the purchase of any game content and micro-transactions, including loot boxes.

4. Background Information

This Review seeks to examine “gaming micro-transactions for chance-based items”, sometimes referred to as “loot boxes”. At the outset, IGEA believes it will be helpful for the Committee to understand the video game mechanics and business models at issue. Should the Committee need any further information in this regard, IGEA is always happy to be of assistance.

Micro-transactions

Many video games incorporate “micro-transactions”, which is a broad concept extending to any model that provides a consumer with the option of making small or “micro” purchases within a game or other application. Micro-transactions are typically made using “game points”, real-world money or both.

Micro-transactions may involve the direct purchase of specific in-game content or features, including items (i.e. outfits, vehicles, weapons, tools, etc.), mission or quest packs, new game modes and extra play time, among other things. Micro-transactions may also involve the purchase of a virtual item that contains a variable selection of other virtual items, which are sometimes called “loot boxes,” “loot crates,” “mystery boxes,” “prize crates” and other similar names.

“Chance-based items” or loot boxes

This Review relates only to micro-transactions for “chance-based items,” which it explains are referred to as “loot boxes.” For purposes of this submission, we will refer to these simply as **loot boxes**.

Loot boxes are included in some video games to provide players with a way to obtain virtual items for in-game use. The items in loot boxes vary, but typically include collectibles, character outfits, game points, player bonuses and weapon camouflages or “skins.” Some virtual items are functional “side-grades” or upgrades that players may use functionally in game play (i.e. useful tools, armour, weapons or abilities), whereas others are simply cosmetic items. Game developers refer to loot boxes as “surprise and delight” mechanics. Like traditional “surprise and delight” products, such as football trading cards or Kinder Surprises, the contents of loot boxes are variable, and players do not know exactly what items are contained within loot boxes until they are opened. However, loot boxes will **always** provide players with an item or items.

Loot boxes are also an optional feature and are not necessary to enjoy, progress in or complete a video game. Where games offer loot boxes, there are typically a range of other means by which players can

obtain virtual items, such as by simply playing the game, completing missions or objectives, and purchasing items directly either with game points and/or real-world money.

Loot boxes are not new to video games – they have been around for many years. In fact, loot boxes use the same “surprise and delight” mechanics that trading cards, Kinder Surprises and many other consumer products have also been using for years. When you purchase a pack of trading cards, say for the NRL or AFL, you are not sure what cards you will get: you may get common cards or very rare cards. When you purchase a Kinder Surprise, you might receive a prize you already own or one that you do not. Loot boxes operate in the same way, as they too offer a variety of different items. A loot box may contain common items (i.e. a new victory animation or weapon camouflage) or rare items (i.e. a powerful item). The same element of surprise in these other consumer products has simply been adopted with loot boxes. And just like with trading card packs or Kinder surprises, loot boxes will always provide players with items.

Importantly, **virtual items obtained via loot boxes are only useable in-game and can’t be “cashed-out” for real-world money**. These items do not have value outside of the game in the real world. While some secondary markets attempt to allow players to sell and gamble their items, these are entirely unauthorised (and often illegal) external websites and services that aren’t involved with, or approved by, game developers, publishers or the platforms on which games and loot boxes are distributed.

Simulated gambling games

Whilst not the direct remit of this Review, some comments mentioned in the Senate prior to the introduction of this Review mentioned gambling games, so we believe it is useful to distinguish between simulated gambling games and traditional video games.

Simulated gambling games are games that involve virtual currency and items, but which are intended to simulate real-world gambling, such as casino-style card games (i.e. Texas hold ’em, Black Jack, etc.), lotto, slots, roulette and others. These games, which look and feel like traditional gambling, are only one genre of games that are **very different** to other genres (i.e. action, action-adventure, role-playing, sports, strategy, etc.). While some limited research has been undertaken into the harms of simulated gambling games (**see Appendix A**), IGEA is not aware of any research that has specifically considered the impact of loot boxes, including in games outside of the gambling genre.

Online gambling, which may involve a “game” such as poker, but which involves the betting of real money, falls outside of the scope of video games completely.

5. Terms of Reference

The remainder of this submission will focus on addressing the specific Terms of Reference for this Review.

A. Whether the purchase of chance-based items, combined with the ability to monetise these items on third-party platforms, constitutes a form of gambling

Interactive Gambling Act

The *Interactive Gambling Act 2001* (Cth) states that a “gambling service” is “(e) a service for the conduct of a game, where:

- (i) the game is played for money or anything else of value; and
- (ii) the game is a game of chance or of mixed chance and skill; and
- (iii) a customer of the service gives or agrees to give consideration to play or enter the game; ...”

Together with State and Territory gambling legislation, a number of common elements for a “gambling service” arise, including:

- Payment of money or other consideration of value to play;
- Prizes of money or other consideration of value; and
- Elements of chance.

Loot boxes are not gambling

Loot boxes, as provided by video game makers, do not constitute a form of gambling under current Australian law, primarily because items obtained in a loot box are not money or considered “anything else of value”. The Terms of Reference for this Review implicitly accepts this, as they only ask whether the purchase of chance-based items, **combined with the ability to monetise these items on “third-party platforms”** (or more correctly referred to as “external websites and services”), constitutes a form of gambling. There is no suggestion that loot boxes in and of themselves constitute gambling.

This view is also shared by the Australian Communications and Media Authority (ACMA), Senator the Hon Mitch Fifield and the Department of Communications and the Arts (the Department). In November 2017, ACMA issued the following stance:

“In general, online video games, including games that involve ‘loot box’ features, have not been regarded as ‘gambling services’ under the Interactive Gambling Act 2001, because they are not ‘played for money or anything else of value’. That is, the game is not played with the object of winning money or other valuable items”.¹

Senator the Hon Mitch Fifield, on advice from the Department, then stated that:

“The IGA does not capture video games as they are considered a game of skill, though there may be some chance element in the game. In general, loot boxes and similar services are not considered interactive gambling services under the IGA.”²

Because items from loot boxes cannot lawfully be cashed out or exchanged for real world money, they do not involve an offer of prizes of money or “other consideration of value” and so do not constitute gambling. Similar conclusions have been reached by gambling regulators in other countries, including the United Kingdom,³ New Zealand⁴ and France.⁵

Moreover, loot boxes will **always** provide players with in-game content. Players will not encounter a scenario where the purchase of a loot box does not result in the player obtaining an in-game item. This is distinguishable from gambling services such as poker machines, where users are not guaranteed to receive anything in return for their consideration.

Monetisation on external websites and services

The Terms of Reference for this review ask whether the purchase of chance-based items, **combined with the ability to monetise these items on “third-party platforms”** (i.e. external websites and services), constitutes a form of gambling.

¹ Alex Walker, *Australia's Telco Regulator Is Keeping An Eye On Loot Boxes* (24 November 2017) Kotaku <<https://www.kotaku.com.au/2017/11/australias-telco-regulator-is-keeping-an-eye-on-loot-boxes-too/>>.

² Senator The Hon Mitch Fifield, *Online gambling and video game loot box systems* (16 November 2017) EN0267 Minister Response.

³ Seth G. Macy, UK Gambling Commission Determines Loot Boxes Aren't Gambling Under British Law (25 November 2017) IGN <<http://au.ign.com/articles/2017/11/25/uk-gambling-commission-determines-loot-boxes-arent-gambling-under-british-law>>.

⁴ Eddie Makuch, *Loot Boxes Are Not Gambling, New Zealand Says* (12 December 2017) GameSpot <<https://www.gamespot.com/articles/loot-boxes-are-not-gambling-new-zealand-says/1100-6455608/>>.

⁵ Andy Chalk, *French gambling regulator determines that loot boxes are not legally gambling* (5 July 2017) PC Gamer <<https://www.pcgamer.com/french-gambling-regulator-determines-that-loot-boxes-are-not-legally-gambling/>>.

Video game publishers and developers typically do not allow loot boxes, virtual items or game points to be traded, exchanged, sold or gambled outside of the game on external websites and services, and actively seek to prevent this. Where a party, other than the video game publisher, developer or platform, offers a mechanism to “cash-out”, purchase or gamble virtual items, it is unauthorised, potentially unlawful, and likely acting in violation of Terms of Service (**ToS**), End-User License Agreements (**EULAs**) and similar contractual terms. Accordingly, any players that utilise these external websites and services to purchase, sell, trade or gamble virtual items are also in breach of ToS and EULAs. Video game companies do not receive any benefit or remuneration from these external websites and services, and nor do they have any relationships with the companies that operate them.

The owners of these “black” secondary markets typically deploy a number of underhanded tactics to be able to operate, including setting up fake accounts to facilitate external trades, hacking or exploiting vulnerabilities in a game environment, or even transferring ownership of accounts to other players by password sharing (which is also usually prohibited by ToS and EULAs). Video game companies will undertake several additional actions to try and curb the operation of unauthorised external websites and services that set up secondary markets, such as by implementing technical measures, monitoring activity in their game environment for unusual transactions, suspending or banning accounts involved, sending legal demands, and even seeking the assistance of law enforcement. Unfortunately, as the Government would understand with the enforcement of the *Interactive Gambling Act* (Cth), this can become a game of whack-a-mole and be very difficult due to jurisdictional issues.

IGEA accepts that if game publishers or developers authorised players to cash out, transfer or gamble items acquired through loot boxes for real currency, whether directly or via external websites and services, the element of “offering prizes of money or other consideration of value” would likely be satisfied and current Australian gambling laws may be activated. This might also implicate the gambling laws of other countries and anti-money laundering legislation. However, IGEA is not aware of any video games that engage in this practice.

If external websites and services are operating in such a manner without the authority of the relevant game publisher or developer, besides being in breach of ToS and EULAs, the legal responsibility to comply with Federal, State and Territory legislation, including gambling legislation, falls solely on those external websites and services.

B. The adequacy of the current consumer protection and regulatory framework for in-game micro transactions for chance-based items, including international comparisons, age requirements and disclosure of odds.

Surprise and delight mechanics in consumer products generally

Loot boxes are not the first or only version of a “surprise and delight” mechanic in the market. There are many other examples of consumer products that involve “variable rewards”:

- For decades, children and adults have enjoyed trading card games (i.e. for the NRL or AFL) utilising identical mechanics. When consumers purchase a card booster pack, the packaging is completely sealed and non-see-through. Even though consumers understand that they are buying a pack containing a certain number of cards, prior to purchase they remain unsure as to the specific cards they will obtain and also the rarity of the cards contained within.
- Kinder Surprises operate on the premise that consumers don’t know the toy contained inside the chocolate – it may be a toy the consumer already owns or one that they do not.
- Loot Crate⁶ products are similar – consumers subscribe to a service whereby they pick their preferred crate (i.e. pop culture, film & TV, gaming or sci-fi & fantasy crates) which will contain a random and unknown assortment of collectibles, apparel and figures based on a new theme each month, and then a crate will be delivered directly to those consumers monthly. As explicitly stated on the Loot Crate website, “what you get is a surprise until you open it”.
- Funko Mystery Minis⁷ provide consumers with mini figurines on a random basis – each “Blind Box” contains one figurine but is completely sealed and in “blind packaging”, so consumers will not know which exact figurine they are purchasing until they open the box.

Retail and toy stores also stock a significant number of products that allow consumers to purchase sealed, non-transparent boxes or crates that provide unknown items on a variable basis (i.e. Best Furry

⁶ <<https://www.lootcrate.com/how-it-works>>.

⁷ <<https://www.funko.com/products/all/brands/mystery-minis>>.

Friends Mystery Single Packs,⁸ Domez Mini Figures,⁹ LOL Surprise Big Surprise,¹⁰ Ooshies Blind Bag,¹¹ Zuru 5 Surprise,¹² Baby Secrets Packs,¹³ Party Popteenies Surprise Popper,¹⁴ etc.).

The use of surprise and delight mechanics in consumer products is pervasive and thus is not something unique to loot boxes. Additionally, these other consumer products and toys, once purchased, could also be “monetised” on external websites and services or secondary markets such as eBay. These collectible items frequently sell at prices that are marked-up much higher than their initial recommended retail prices. Does this mean that these products also constitute a form of gambling or require additional regulation, simply because the initial purchase involved an element of variableness and surprise?

Adequacy of current consumer protection and regulatory framework

Loot boxes are no different than the many other “surprise” reward consumer products that already exist in the market, all of which are subject to the current consumer protection and regulatory framework. It would not be appropriate to impose a special regulation on the video game industry.

The *Competition and Consumer Act 2010* (Cth), including the Australian Consumer Law, provide consumer protections that would apply to the sale of loot boxes in video games. In particular, game publishers must ensure that they do not engage in conduct that is misleading or deceptive (or conduct that is likely to mislead or deceive).¹⁵ If there are concerns about the advertising and operation of loot boxes, including that such advertising and operation are misleading or deceptive, Australia’s current consumer protection laws are well placed to address such concerns. The penalties for contravening the Australian Consumer Law are very significant (particularly thanks to recent reforms) and thus operate as an effective deterrent to misleading and deceptive practices.

There are also a number of other laws, enforcement options and initiatives that too would apply to in-game transactions for surprise and delight items, including:¹⁶

⁸ <<https://www.bigw.com.au/product/best-furry-friends-mystery-single-pack-assorted/p/670592/>>.

⁹ <<https://www.bigw.com.au/product/domez-dc-comics-mini-figures-assorted/p/574778/>>.

¹⁰ <<https://www.bigw.com.au/product/lol-surprise-big-surprise-assorted/p/631948/>>.

¹¹ <<https://www.bigw.com.au/product/tmnt-ooshies-blind-bag-assorted/p/492045/>>.

¹² <<https://www.bigw.com.au/product/zuru-5-surprise-series-1-boys-assorted/p/672081/>>.

¹³ <<https://www.bigw.com.au/product/baby-secrets-merbabies-single-pack-assorted/p/678708/>>.

¹⁴ <<https://www.bigw.com.au/product/party-popteenies-surprise-popper-assorted/p/683983/>>.

¹⁵ Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law') s 18.

¹⁶ The Treasury, *App purchases by Australian consumers on mobile and handheld devices – Inquiry Report* (July 2013) <http://ccaac.gov.au/files/2013/07/M-commerce-Final-Issues-Paper_publications.pdf> page 27.

- The common law of contract, including in relation to the legal capacity of minors and children to enter contracts;
- The law relating to electronic transactions (*Electronic Transactions Act 1999* (Cth));
- State and territory sale of goods laws (for example, the *Goods Act 1958* (Vic));
- State and territory laws relating to minors who enter into contracts (for example, the *Minors (Property and Contracts) Act 1970* (NSW));
- Laws relating to pre-contractual conduct and disclosure obligations which may apply when accessing payment facilities on mobile devices (*National Consumer Credit Protection Act 2009* (Cth)); and
- The law protecting personal information collected by companies (*Privacy Act 1988* (Cth)).

Government agencies and industry ombudsmen, such as the *Australian Competition and Consumer Commission (ACCC)* and the Australian Communications and Media Authority (**ACMA**), also have responsibilities for ensuring appropriate industry conduct.

Moreover, in 2013, the Commonwealth Consumer Affairs Advisory Council released its report, “App purchases by Australian consumers on mobile and handheld devices”.¹⁷ This report did not identify the need for additional regulation and acknowledged that the existing consumer laws and other regulatory frameworks were adequate to address any potential issues with in-game purchases, including micro-transactions (and by extension, loot boxes). Since this report, the video game industry has continued to improve the use of micro-transactions in games, including through the use of parental controls, disclaimers and detailed disclosures.

Parental tools

The video game industry takes its responsibility to players, parents and guardians very seriously. Major video game consoles and platforms provide users with an array of tools to ensure that their experience with games is a fun, safe and enjoyable one. In addition to a range of other tools and parental controls, parents and guardians are able to ensure that children and young users are not allowed to make any in-game purchases without obtaining approval first or even set spending limits that prevent children from spending over a pre-determined amount. These tools extend to the purchase of any in-game microtransactions, including loot boxes.

¹⁷ Ibid.

The Nintendo Switch game console allows parents and guardians to set up purchase restrictions for the Nintendo eShop, which is the online store where users can purchase video games and additional content. These purchase restrictions can be utilised via a parent or guardian Nintendo Account that administers a Nintendo “family group”. A Nintendo Account family group allows up to 8 other users to connect together into one group, where the parent or guardian manages the group as the admin and the children or other accounts are regular members. To manage purchase restrictions for any Nintendo Account that is part of the family group, admins simply need to follow [these](#) instructions. Purchases on the Nintendo Switch and the online Game Store can simply be disabled outright, or specific content can be automatically hidden altogether based upon the player’s age, which will also prevent the purchase of this content.

The Xbox One also [allows](#) parents and guardians to prevent unauthorised purchases by children. While families are able to use one console and share the benefits of a single Xbox Live Gold membership (which enables online play), this does not mean that children can simply use the linked credit or debit card to make purchases without obtaining permission first. Parents or carers can create a passkey and require it to be entered when making any purchases, which would include purchases for loot boxes and other microtransactions. If children want to make a purchase, then they’ll be unable to do so until that passkey is inputted by the parent or guardian. Additionally, Xbox gift cards, which are capped at a specified purchase limit (i.e. \$25, \$50, etc.), can be used as an alternative method to allow children to purchase additional content in a one-off fashion without using a credit or debit card.

Similarly, the PlayStation 4 [allows](#) parents and guardians to stop children from spending money on the PlayStation Network, including on purchases for microtransactions and loot boxes. To do so, children must have a sub account that is attached to the master account of a parent or guardian. Those who administer a master account don’t necessarily have to use the PlayStation Network themselves – they simply need to register with an email address, which will ensure full visibility of any purchases made by children with an attached sub account. Master account holders are then able to set spending limits on any sub accounts. By default, monthly spending limits will be set at zero when sub accounts are created, effectively preventing any purchases altogether. This spending limit can then be increased, allowing children to spend up to a certain amount each month on the PlayStation store. Children can only spend funds that have been loaded into the master account wallet. Debit or credit cards will not be charged automatically even if the wallet does not have the required funds, regardless of the monthly spending limit set on the sub account. Master account holders are also able to permit sub accounts to make one-off purchases.

APPENDIX A – LITERATURE ON SIMULATED GAMBLING GAMES IS LIMITED

Research on whether loot boxes are harmful to players and whether the mechanic risks the “normalisation” of gambling is limited. The current evidence on simulated gambling games is also far from conclusive; a fact which is frequently admitted by researchers and academics.¹⁸ One of the most recent literature reviews on this topic was published by Marissa Dickins and Anna Thomas for the Australian Gambling Research Centre in 2016.¹⁹ While this paper closely examined simulated gambling games (not loot boxes specifically), it nevertheless broached the more general question of whether the use of gambling mechanics in video games harmed players and risked the “normalisation” of gambling. After examining over 60 journal articles and other research, the paper concludes that: **“Research into simulated gambling is in its infancy.** Therefore the findings presented within this paper should be taken as preliminary, and these must be reinforced by further research”.

A paper by Gainsbury, Hing, Delfabbro and King stated the following:²⁰ “The primary aim of this study was to explore potential interrelationships between social casino games, gambling, and problem gambling, as well as examine any similarities between social casino gaming experiences with video gaming and gambling. **Given that research in this area is in its infancy** (King, Delfabbro, Kaptsis & Zwaans, 2014), the focus of this study was to obtain in-depth qualitative information to guide and inform larger and more directed empirical studies of simulated gambling in both normal and vulnerable populations, such and young people and problem gamblers.”

Another paper by Wohl, Salmon, Hollingshead and Kim also stated that:²¹ “To be clear, the current paper serves a dual function. The first function is to discuss the current state of theory and empirical research on the link between social casino gaming and gambling. **As this area of research is in its infancy,** we have done our best to search both the academic and grey literature for relevant information”. Finally, a background document prepared by the Institute of Games for the Victorian Responsible Gambling Foundation (which is not finalised but IGEA was kindly provided a draft version), which examined 23 international research papers and online resources, also concluded: **“Research into the convergence of gambling and gaming is in its infancy.** Further research is needed to clearly

¹⁸ King, D. L., Delfabbro, P. H., Kaptsis, D., & Zwaans, T. (2014), *Adolescent simulated gambling via digital and social media: An emerging problem*, Computers in Human Behavior, 31, 305-313.

¹⁹ Marissa Dickins and Anna Thomas, *Is it gambling or a game? Simulated gambling games*, AGRC Discussion Paper No. 5 (April 2016) <<https://aifs.gov.au/agrc/publications/is-it-gambling-or-game>>.

²⁰ Gainsbury, S., Hing, N., Delfabbro, P., Dewar, G., & King, D. (2015), *An exploratory study of interrelationships between social casino gaming, gambling, and problem gambling*, International Journal of Mental Health and Addiction, 13(1), 136-153. DOI: 10.1007/s11469-014-9526-x.

²¹ Wohl, Michael & Salmon, Melissa & Hollingshead, Samantha & Kim, Hyoun S (2017), *An Examination of the Relationship Between Social Casino Gaming and Gambling: The Bad, The Ugly, and The Good*. Journal of Gambling Issues, 35. 1-23. 10.4309/jgi.2017.35.4.

identify the current practices and the impact they're having, particularly on children and young people".

Furthermore, research into loot boxes specifically is even more in a stage of infancy. The above paper by Dickins and Thomas also admitted that: **"The current evidence primarily relates to social gambling games and practice games;** further explorations into the other types of simulated gambling would broaden the knowledge base and allow meaningful comparisons between the different types of simulated gambling". In other words, the limited amount of research conducted so far predominantly relates to simulated gambling games, which as described above, are video games that are very much designed to look, feel and play like traditional gambling games. Loot boxes are **not** designed to mimic traditional gambling activities in the same way that simulated gambling games are, yet even when it comes to these more overt forms of gambling games, research into "normalisation" is still inconclusive.