

App development legal issues

With the high penetration of smart phones, tablets and other mobile devices in the Australian market, applications for mobile devices (apps) are increasingly becoming part of everyday life for all age groups. It is no wonder therefore that Australian Government agencies are looking at how they can use apps to reach new audiences, provide information in new and engaging ways, lower costs and provide services with significantly greater convenience and simplicity.

This fact sheet discusses some of the challenges that agencies face when becoming involved in app development projects and how they can solve the issues that can arise.

What is involved in developing and launching an app?

Risks

To successfully develop, launch and publicise an app, an agency needs to marshal more than just technical skills. Apps by their nature are highly public-facing agency initiatives. Problems of any kind with an app can be reported very quickly via social media and develop into an issue that is difficult to manage. Apps thus involve a level of potential reputational and/or legal risk that is generally much more significant than the costs incurred and resources used for the project might indicate.

Without special policies in place, agencies might find that app development projects reach an advanced stage (and where the minister's and the public's expectations of release may have been raised) without necessarily going through the types of internal agency stakeholder consultation, approval processes and other checks and balances that would normally be expected for projects that involve legal and reputational risk.

Governance

App projects need a sound governance structure that brings together the business focus and objectives, communications skills, user perspective, creative design, project management and legal skills necessary to identify and manage issues in an integrated manner so that the project will not strike unexpected problems or delays.

A sound approach is to ensure that app development proposals, no matter how they arise and whether internal or external, are subject to approval by an agency app project board as well as the normal agency project approval and management process. Oversight should continue across the development process, from the creation of a minimum viable product to more polished iterations, and throughout the full period during which the app is being made available to users. The app project board should ideally include representatives from ICT, legal and media/communications areas and would ensure that app projects of all descriptions can be rapidly assessed and properly governed on their own merits in a consistent and cost-effective manner.

App development environment

Platforms

One of the first decisions faced by those involved in any app development project is what platforms will be supported. The 2 dominant platforms at the moment are the Apple iOS platform and the Google Android platform. Having versions of your app for both these platforms will maximise take up. It is wise to ensure that versions of the app are launched simultaneously for both platforms as failure to do this can lead to vocal supporters of the unsupported platform claiming they are being discriminated against or that the agency is 'playing favourites'.

A secondary decision is what application marketplaces will be used to distribute the app. In addition to the Apple App Store and Google Play Store, there is the Amazon Appstore and a variety of mobile manufacturer specific stores – for example the Samsung Galaxy Store.

Ensuring 'app equality' across platforms and marketplaces may become even more complex if other platforms and marketplaces begin to attract significant market share.

Maintaining your app's ecosystem

Releasing an app is not a one-off project. Rather, it is the first step in an ongoing investment in a new channel that is likely to involve constant development and management.

Agencies need to decide what types of devices will be supported (different versions may be needed to account for different screen sizes, resolutions and device capabilities) and the degree of compatibility that they wish to achieve across the different platforms, device types and operating system versions. Maintaining reasonable compatibility can be technically complex. An agency may need to develop, support and coordinate many different versions of the app. As new devices come onto the market and new versions of each platform are released, new versions of the app will be required.

App development legal environment

Terms and conditions

The legal environment of app development is particularly complex. For example, in the Apple iOS development environment, an agency needs to consider at least 65 different sets of terms and conditions and other documents from a legal perspective. The Google Android platform involves at least 35 sets of terms and conditions and related documents that need to be considered.

There are potentially many more sets of licences and terms and conditions that might be involved on both platforms where (as is typically the case) third party development tools and services are used in the app's development and testing or are integrated into the app's functionality or are relevant to its ongoing operations and management.

Agreements in relation to app platforms generally require an agency to provide unlimited indemnities and a wide variety of warranties to the app platform and third party affiliates. Similarly, these agreements often contain comprehensive exclusions of any potential liability which agencies must also carefully consider. Terms of this nature will involve consideration and approvals according to the Commonwealth resource management framework relevant to risk, liability and indemnities.

Managing legal arrangements over the life of the app

Managing your obligations under the myriad legally binding agreements and technical specifications is made even more complex by the fact the platform owners can generally change the terms and conditions any way they want simply by notifying you of replacement terms and conditions. Technical personnel need to get on top of the latest developments quickly and, faced with a constant stream of updates, they can be under considerable pressure to just accept the new terms and conditions without checking the changes.

Even if the technical personnel do read and understand the terms and conditions, the platform developers are very adept at arranging the terms and conditions in multiple layers (for example, by embedding links to further terms in a set of terms and conditions), making it difficult for the casual reader to comprehend the nature and implications of the arrangement from a legal perspective.

Because of the complexity and rapidly changing nature of the legal arrangements relating to app development environments, typically the most effective way to identify and deal with legal issues is to obtain specialist legal advice. A legal adviser will:

- identify and assess legal risks relevant to the particular app development process
- identify ways in which those risks can be managed given the size and nature of the project
- help to ensure that all necessary approvals and sign-offs are obtained within the timeframe for the launch
- ensure that legal review of the app environment is undertaken at appropriate intervals during its life span.

Intellectual property issues

Needs analysis

Just like any software development, when developing an app the intellectual property (IP) rights relevant to the process must be dealt with properly.

The Intellectual property principles for Commonwealth entities state that an IP 'needs analysis' should be performed to identify what IP rights the agency needs to obtain to ensure that it can fully and properly achieve its objectives for the project. In many cases, obtaining IP rights under a licence will be sufficient – the agency does not always need to own all relevant IP – but the nature, type, extent and duration of licensed rights that the agency needs to obtain must be identified in the needs analysis.

Internal app development

For internal app development, proper records need to be kept at all stages of the development and subsequent support phases of the project in order to ensure a sound evidence base to support the agency's IP rights and, if necessary, enforcement action.

Where an agency is developing an app internally, it should consider what action is appropriate to minimise the risk that the development might inadvertently infringe any software and business method patents. It would generally be useful to perform some due diligence research, even if that consists of broad and basic searches of Australian patents to determine if there are any obvious danger areas in relation to what is being developed.

External app development

For external development projects, contracts need to be legally vetted to make sure that the agency obtains the IP rights it expects and that the external developer appropriately indemnifies the agency against any claims that might be made if the app infringes third party IP rights. Care should be taken to ensure that there is no exclusion or limitation in respect to patents in the indemnity. Confidentiality and security should also be carefully considered as part of any external developer agreement.

Third party IP rights in content

Given the multi-media nature of many apps, it is likely that many other types of IP rights – for example, for artwork, pictures, video and music and other sounds – will need to be acquired and managed as part of the app development. Obtaining and keeping proper records of rights clearances can be a complex process.

Trade mark protection

Conducting appropriate trade mark, business name and other relevant searches is an important part of developing the branding strategy for an app. Releasing and promoting an app with a name that infringes or causes confusion with an existing name will create legal and reputational issues for the agency. Once an appropriate app name and other branding is decided on, agencies often register them as trade marks to protect the marks and ensure that strong action can be taken against any party that may attempt engage in any misleading conduct in relation to the mark.

Licensing use of the app content

An agency also needs to consider the basis on which it wishes to make the source code and the content in the app available for further use by the public. Agencies should consider the Guidelines on Licensing Public Sector Information for Australian Government entities when making these decisions.

Open source software

If your app might be developed using open source software or if you believe that you might want to release all or specific components of your app's source code under an open source software licence, there are a range of legal issues you need to think through and arrangements you need to have in place before the app development commences. Where an external app developer has retained any IP rights, releasing the app's source code under an open source software licence will be difficult.

Privacy and data issues

Personal information

Most apps involve the collection or distribution of personal information of some sort, even if it is not visible to the user – for example, usage information can be collected to analyse the profile of users to improve the service. This is regulated by the *Privacy Act 1988* which contains the Australian Privacy Principles (APPs). The app development project needs to carefully identify all potential use of personal information relevant to the app and ensure that the use is in accordance with all relevant privacy laws. A comprehensive privacy policy will most likely need to be drafted and included in the app, and appropriate informed consent should be obtained from the user and other potentially relevant data subjects in accordance with the APPs.

Use or disclosure of app data required or authorised by law

Agencies should also be aware that in some circumstances, the Australian Government could access personal information in apps for law enforcement or national security purposes. Under APP 6, information can be used or disclosed for another purpose (than that which it was collected for) where the 'use or disclosure of the information is required or authorised by or under an Australian law or a court/tribunal order'.

Notifiable data breaches

App data may be the subject of a notifiable data breach. Generally speaking, a data breach happens when personal information is accessed or disclosed without authorisation or is lost. If the Privacy Act 1988 covers your agency, you must notify affected individuals and the Office of Australian Information Commissioner when a data breach involving personal information is likely to result in serious harm and the agency hasn't been able to prevent the likely risk of serious harm with remedial action.

OAIC better practice guide

To assist with these privacy issues, agencies should be aware of the OAIC 'better practice guide for mobile app developers', available at <https://www.oaic.gov.au/privacy/guidance-and-advice/mobile-privacy-a-better-practice-guide-for-mobile-app-developers/>.

Overseas users and data sovereignty

Complex issues arise where app users or data storage/processing is based overseas. A particular issue for agencies to consider is where and how their data will be stored. This will be informed by considerations and requirements under the Protective Security Policy Framework including the Australian Government Information Security Manual. If app users are based within the European Union (EU), agencies should consider whether the EU General Data Protection Regulation may apply. This is a complex question and agencies are encouraged to seek their own legal advice.

Australian Consumer Law

Where the app is paid or facilitates e-commerce, it may be subject to the Australian Consumer Law (ACL). The ACL provides consumers with product guarantees and protections against unfair contractual terms and conditions; false or misleading representations and unconscionable conduct.

How we can help

While the legal landscape for app development is complex, having a legal adviser that understands that environment will make the job of developing apps in a low-risk way much simpler.

AGS understands the pressure on agencies to develop apps to promote policy aims or to obtain efficiencies in the spending of public money. We have a team of experienced lawyers that regularly advises on the development of apps, social media projects, IT contracts and intellectual property as well as associated data management, information and privacy issues. We have advised a wide range of agencies on the best and most cost-effective way to successfully release an app without generating negative reputational and legal consequences. If we can assist you, please contact us.

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