

# THE LONG ARM OF THE AUSTRALIAN CONSUMER LAW REACHES OFFSHORE

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Legal Briefings - By **Chris Jose, Peter Strickland, Felicity Lee**

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On 24 March 2016, the Federal Court held that Valve Corporation (**Valve**) - a company based in the United States that operates an online game distribution network known as Steam - had engaged in misleading or deceptive conduct and made false or misleading representations to Australian consumers about the operation of the consumer guarantee regime under the Australian Consumer Law (**ACL**).

## IN BRIEF

This decision has significant implications for businesses based outside Australia that supply goods to Australian consumers. Importantly, it clarifies that cross-border transactions over the internet to Australian consumers are subject to the consumer guarantee regime under the ACL. This means that Australian consumers are able to enforce their rights under the ACL even if the business is in a foreign jurisdiction, and even if the proper law of the contract is a foreign jurisdiction.

Valve defended these proceedings on a variety of grounds, including that the consumer guarantee regime did not apply to Valve on the basis that Valve's contract was governed by Washington State Law, and that Valve did not carry on business in Australia. But this decision confirms that, notwithstanding a company may be based outside Australia, if it supplies goods to Australian consumers, it is likely to be engaging in conduct in Australia and therefore required to comply with the ACL.

## BACKGROUND

Valve is a company based in the State of Washington in the United States that owns and operates Steam, an online game distribution platform with approximately 4,000 video games and over 65 million users worldwide, including more than 2 million subscribers in Australia.

Section 54 of the ACL provides that if a person supplies, in trade or commerce, goods to a consumer, there is a guarantee that the goods are of acceptable quality, which means that they are fit for all the purposes for which goods of that kind are commonly supplied, acceptable in appearance and finish, free from defects, and are safe and durable, as a reasonable consumer fully acquainted with the state and condition of the goods would regard as acceptable.

On 29 August 2014, the Australian Competition and Consumer Commission (**ACCC**) commenced proceedings against Valve, alleging that Valve had made false or misleading representations concerning its refund policy and the application of the consumer guarantees under the ACL, in contravention of sections 18(1) and 29(1)(m) of the ACL. Specifically, the ACCC alleged that Valve made misrepresentations regarding the ACL's acceptable quality guarantee (in section 54) which, by section 64, could not be modified or excluded.<sup>1</sup>

The issues were, firstly, whether the consumer guarantees and prohibitions in the ACL apply to Valve, and if so, whether the representations made by Valve constituted misleading or deceptive conduct and false or misleading representations in contravention of the ACL. In particular, Valve contended that:

1. the Steam Subscriber Agreement (**SSA**) that Valve had entered into with consumers was not a contract to which the consumer guarantee regime applies because the law which has the "*closest and most real connection*" to the SSA is the law of Washington State, not Australian law,<sup>2</sup>
2. Valve's conduct did not occur in Australia and that it does not carry on business in Australia, so the ACL did not apply to it,<sup>3</sup>
3. Valve does not 'supply goods' within the meaning in section 2(1) of the ACL and, as a consequence, the acceptable quality guarantee did not apply (there is no equivalent guarantee for service), and
4. although the definition of 'goods' in the ACL expressly includes 'computer software', Valve provided a 'service' (by a Licence Agreement) rather than 'goods', and that the supply to consumers of computer software was part of its 'service'.<sup>4</sup>

Relevantly, Valve sells games through Steam to Australian consumers but does not have a physical presence in Australia. The ACCC argued that this in itself is sufficient to constitute 'conduct in Australia' and therefore that the ACL would apply.

A hearing on relief will be held on a date to be fixed by the Court. The ACCC has sought declarations, injunctions, pecuniary penalties, disclosure orders, adverse publicity orders, non-party consumer redress, a compliance program order and costs.<sup>5</sup>

## **ISSUES ADDRESSED IN THE DECISION**

### **'Conflict of laws' issue**

The 'conflict of laws' provisions in the ACL did not carve out an exception for conduct by foreign corporations like Valve governed by a different contractual proper law. Section 67(b) of the ACL provides that if a contract for the supply of goods or services to a consumer contains a term that purports to substitute, or has the effect of substituting, the provisions of the law of a country other than Australia, then the consumer guarantee provisions apply in relation to the supply under the contract despite that term.

Justice Edelman reasoned that, while the proper law of the contract for the supply of goods or services by Valve to a consumer is the law of the Washington State, section 67(b) prevents Valve from relying on a choice of law clause that substitutes Washington State law (which lacks equivalent consumer protection provisions) for Australian law. His Honour rejected Valve's submission that the consumer law regime does not apply if the law with the 'closest and most real connection' to the contract is other than the law of a part of Australia. Such a conclusion would be contrary to the history and purpose of section 67.<sup>6</sup>

### **When is a business 'carrying on business' in Australia?**

Despite Valve's submissions that it did not engage in conduct in Australia or carry on business in Australia, the Federal Court found that the representations involved conduct in Australia and Valve carried on business in Australia. Relevantly, the Court did not find it necessary to consider whether the *supply* occurred in Australia, or was engaged in by a person carrying on a business in Australia, because the relevant conduct is the *representations* relating to the supply of goods.<sup>7</sup>

Valve submitted that it did not engage in conduct in Australia because it is a foreign corporation with its registered office, business premises and staff all located outside Australia. In rejecting Valve's submission that the conduct occurred in Washington State, Justice Edelman held that the background involves a significant Australian context,<sup>8</sup> the chat log representations were specifically made to individual Australian consumers concerning the supply of goods in Australia, and therefore that each of the classes of representation involved conduct in Australia.<sup>9</sup>

The Court ultimately held that, even if Valve did not engage in conduct in Australia, the ACL applies because Valve was an incorporated body which was carrying on business in Australia.<sup>10</sup> Justice Edelman concluded that Valve 'undoubtedly carried on a business in Australia' because Valve:<sup>11</sup>

1. had many customers in Australia, with approximately 2.2 million Australian accounts, and earned significant revenue from Australian customers on an ongoing basis,
2. 'deposited' Steam content on its three servers in Australia when requested by a subscriber,
3. has significant personal property and servers located in Australia,
4. incurs tens of thousands of dollars per month of expenses in Australia for the rack space, and power to its servers, which are paid by Valve to the Australian bank account of an Australian company,
5. relies on relationships with third party members of content delivery providers in Australia who provide proxy caching for Valve in Australia, and
6. had entered into contracts with third party service providers who provide content around the world, including in Australia.

This is an important part of the decision, particularly for those involved in web-based trades who often do not have business premises or staff employed in Australia. The Court's approach makes it clear that businesses that supply goods to Australia and have operations that involve a significant Australian context should ensure that they comply with the ACL in their dealings with Australian consumers.

### **Supply of 'computer software' is a supply of a 'good' under the ACL**

The Federal Court's decision also clarifies that the consumer guarantee regime applies to the supply of computer games to Australian consumers through online distribution networks.

Valve contended that its business comprises of a supply of services, not goods, to Australian consumers because consumers acquire a non-assignable licence to access and use the video games and they must log on to Steam to verify their account and subscriptions to the game. Valve also submitted that the provision of any licence for the use of computer software is not the provision of computer software.<sup>12</sup> The implication of this argument, if successful, is that section 54 would not apply to the contract between Valve and Australian consumers because those provisions apply only to the supply of goods, not services (noting that there is no equivalent consumer guarantee for services).

Justice Edelman held that this submission omits the fact that consumers can play Steam video games "offline" and without verification of their account or subscriptions. This indicates that the consumer has been provided with software which can be used without any further communication with Valve's services.<sup>13</sup>

His Honour concluded that “at the core of Steam’s supply to its subscribers was the provision of games”, and “at the heart of the provision of games was the supply of computer software”.<sup>14</sup>

The Federal Court’s decision thus clarifies that the ACL applies to the supply of digital goods to consumers through online platforms and that the consumer guarantees that apply to goods will apply to those supplies.

### **When are representations about consumer guarantees misleading or deceptive?**

In considering whether representations about consumer guarantees are likely to be false or misleading, the Court’s decision emphasises the need to consider the representations in context of any qualifiers made by the business that would reasonably have been understood by a consumer, any documents which are incorporated into the representation that provide further information about the consumers’ rights, and the context in which the representations were made to consumers.

The false or misleading representations as alleged by the ACCC were:

1. consumers were not entitled to a refund from Valve in any circumstances.<sup>15</sup> The Court found that this was misleading because, under the ACL, consumers were entitled to elect to have a refund in the event of a failure to comply with the consumer guarantee of acceptable quality that cannot be remedied or that constitutes a major failure, and where the consumer had rejected the goods. Section 64 of the ACL had the effect that this consumer guarantee could not be excluded or restricted,<sup>16</sup>
2. Valve had excluded, restricted or modified statutory guarantees and/or warranties of acceptable quality.<sup>17</sup> Similarly, the Court held these representations to be misleading,<sup>18</sup>
3. consumers had no entitlement to a refund for digitally downloaded video games purchased from Valve via the Steam website or through the Steam Client, Valve’s online video game delivery platform.<sup>19</sup> The Court found that this representation was misleading but not false, because when read with the SSA which it incorporated, the representation was literally true, although it was misleading,<sup>20</sup>
4. consumers had no entitlement to a refund or replacement unless required by local law.<sup>21</sup> The Court found that this representation was not false or misleading due to the inclusion of the qualifier “*unless required by local law*”, which was in the same clause where the representation was made, in the same typeface and font, and would reasonably have been understood by a consumer to mean the laws in which the consumer was located,<sup>22</sup> and
5. representations made in online chats between three Australian consumers and Steam Support representatives concerning their entitlement to a remedy for goods that were

not of acceptable quality in various circumstances.<sup>23</sup> Interestingly, the Court concluded that “no-one was misled or even likely to be misled” and “with only minor exceptions, none of the pleaded representations was made”.<sup>24</sup> Justice Edelman reasoned that the statements must be considered in the context that the ACCC did not allege that there was any right to a refund under the ACL, and that each consumer was engaged in a chat with a Steam Support Representative concerning whether that consumer was entitled to a refund in those circumstances.<sup>25</sup>

## IMPLICATIONS FOR BUSINESSES

This decision has significant implications for businesses within and outside of Australia that supply goods to Australian consumers, namely that:

1. businesses outside of Australia supplying goods to Australian consumers are subject to the obligations under the ACL, including the consumer guarantee provisions. This means that even in respect of digital goods purchased online from an overseas company, consumers are entitled under the ACL to elect to have a refund in the event of a failure to comply with the consumer guarantee of acceptable quality that cannot be remedied or a major failure, and where the consumer has rejected the goods within the 'rejection period',
2. in particular, businesses supplying games to Australian consumers across borders through online platforms must ensure that they comply with the ACL,
3. businesses cannot exclude or restrict the operation of the consumer guarantee regime, for example, by inserting a clause in a contract (including a choice of law clause) or making a representation that seeks to prevent consumers from seeking remedies in the event of a failure to comply with the consumer guarantee of acceptable quality, and
4. the statutory consumer guarantees exist independently of the law that governs the relevant contract and businesses should therefore ensure that they comply with the ACL when supplying goods into Australia, even if the business is located overseas and the contract is governed by the laws of a country other than Australia.

Further, this is especially pertinent at present, given that a compliance and enforcement priority for the ACCC in 2016 is consumer guarantees, with a focus on representations made by large retailers about express and extended warranties.<sup>26</sup> ACCC Chairman Rod Sims has cautioned, “consumer issues in the online marketplace are a priority for the ACCC and we will continue to take appropriate enforcement action to hold businesses accountable for breaches of the ACL.”<sup>27</sup>

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## ENDNOTES

1. *ACCC v Valve Corporation* (No 3) [2016] FCA 196, at [2].
2. *Ibid*, at [5].
3. *Ibid*, at [4].
4. *Ibid*, at [6].
5. ACCC, 'Full steam ahead: ACCC institutes proceedings against Valve for making alleged misleading consumer guarantee representations' ([Media Release](#), MR 219/14, 29 August 2014).
6. Above note 1, at [84]-[125].
7. *Ibid*, at [177].
8. *Ibid*, at [178].
9. *Ibid*, at [179]-[182].
10. *Ibid*, at [205].
11. *Ibid*, at [198]-[205].
12. *Ibid*, at [141].
13. *Ibid*, at [142].
14. *Ibid*, at [157].
15. *Ibid*, at [237].
16. *Ibid*, at [242].
17. *Ibid*, at [247] and [248].
18. *Ibid*, at [256].
19. *Ibid*, at [257].

20. Ibid, at [264].
21. Ibid, at [265].
22. Ibid, at [270].
23. Ibid, at [316]-[320].
24. Ibid, at [321] and [339].
25. Ibid, at [327].
26. ACCC, 2016 ACCC Compliance and Enforcement Policy, February 2016, p 3.
27. ACCC, 'Federal Court finds Valve made misleading representations about consumer guarantees' ([Media Release](#), MR 35/16, 29 March 2016).

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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