Online business and Australia: Do Australian Consumer Laws Apply?

The extent to which the *Australian Consumer Laws* affect online trade and commerce has been a particular area of uncertainty. The Federal Court of Australia's recent ruling in *Australian Competition and Consumer Commission v Valve Corporation (No 3)*[1] has provided some answers but also raised further questions for those running an online business with Australian customers.

The Valve Case

The case involved the video game distribution network 'Steam' run by Valve Corporation ('Valve') based in Washington State. Valve was accused by 'consumer watchdog' the Australian Competition and Consumer Commission ('ACCC'), for breaching the *Australian Consumer Law* ('ACL') in regards to refunds of its products. Specifically, the ACCC alleges that Valve contravened s 18(1), the provision against making representations that are misleading or deceptive or likely to mislead or deceive, by stating in its Steam policy that products were not refundable in whole or in part. As s 54 of the ACL provides consumers in Australia with a guarantee that products are of acceptable quality, it was submitted that Valve's statements misrepresented the legal entitlements of Australian Consumers.

Valve argued that the s 54 guarantees did not apply as:

1. The law of Washington State was the appropriate law to apply;
2. Valve did not 'supply goods' within the meaning of the ACL; and
3. Valve did not carry on business in Australia.

The Federal Court of Australia rejected Valve's arguments and found that a breach of the ACL had occurred.

Appropriate Law

Valve argued that the law with the closest and most real connection their agreements with customers was that of Washington State. Section 67 of the ACL provides that where the proper law of a contract of the supply of a good is the law of any part of Australia, the ACL cannot be contracted out through Conflict of Laws provisions. Valve argued that in their case, Australian law was not the proper law and thus s 67 should operate to limit the application of the ACL. The Federal Court rejected this argument, noting that s 67 does not operate to restrict the application of the ACL but rather its intention is to ensure that consumer guarantees cannot avoided by agreeing to the application of the law of another country.

The meaning of 'supply goods'

Valve submitted that they did not engage in the 'supply of goods' as they provided a 'service' through a licence Agreement rather than 'goods'. The ACL explicitly includes 'computer software' within its definition of goods, however expert evidence suggested that the definition of 'software' was executable data and non-executable data, such as music and html image, did not fit that

[1] [2016] FCA 196

definition. Nevertheless, it was accepted that at least some executable data (or software) was required for the non-executable data to operate. It was also noted that the agreements and policies from Valve refer to their products as 'software'.

The Court rejected Valve's argument that the software was not supplied but licenced, noting that the definition of 'supply' includes by way of sale, exchange, lease, hire or hire-purchase. While Valve's products could not be accessed without verification with Valve's servers in Washington State, the Court noted the ability for consumers to play games offline and that Valve's ability to terminate a licence does not prevent a good being 'supplied'. The Court interestingly did note that not everything supplied by Valve was a supply of a good, noting that the non-executable data referenced above did not fall within the ACL definition of a good.

Carrying on business in Australia

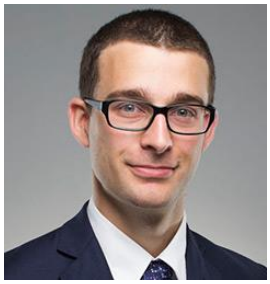
Valve submitted that it did not engage in conduct in Australia as it was a foreign corporation, with business premises and staff all located outside of Australia, its website is hosted outside of Australia and its payments are made in United States dollars that are processed in Washington State. The Court found that Valve did carry on a business in Australia for six reasons:

1. Valve had many Australian customers, with approximately 2.2 million Australian accounts;
2. Steam content was temporarily deposited on servers held within Australia;
3. Valve held significant personal property and servers in Australia with a retail value of approximately $1.2 million. These servers were operated by an employee who visited Australia. It also paid significant amounts to an Australian company (towards its Australian bank account) for server equipment;
4. Valve pays tens of thousands of dollars per month of expenses in Australia for rack space and power to its servers, again to an Australian company with an Australian bank account;
5. Valve has relationships with third party members of content delivery providers in Australia, such as Internet Service Providers, for proxy caching for Valve in Australia; and
6. Valve has contracted with Content Delivery Providers who have servers in Australia.

Considerations for Online Businesses

The provisions of the ACL are by no means particularly onerous, but may require specific attention where some consumer protections differ from the jurisdiction where a business is located. Given the broad definition of 'supply', online businesses should be cognisant of the factors that might indicate that they carrying on business in Australia, such as a large Australian customer base, property held within Australia and contracting with Australian businesses.

The digital gaming industry in Australia is currently worth over $1.5 billion and the interaction between the industry and Australian Consumer Law such as with the Valve case can be significant. The fact that non-executable data such as music and video was found not to be 'goods' under the ACL could turn out to be highly significant, given that this includes services from international giants such as Netflix and Spotify.



With degrees in science and geography, Alex Collie is an invaluable member of the Commissions of Inquiry and Litigation Teams at Carroll & O'Dea Lawyers.

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