All Steamed Up: Global Reach of Australian Consumer Law

Introduction

Video game companies and other foreign companies selling products or services online should be mindful of Australian Consumer Law (ACL), particularly regarding rights to refunds, in view of the appellate decision in *Valve Corporation v ACCC* **[2017] FCAFC 224**. The Full Court upheld a trial decision that Valve had engaged in misleading or deceptive conduct under s18 of the ACL. Valve had allegedly misled Australian consumers by representing that they had no right to a refund and that the Steam Subscriber Agreement (SSA) was subject to Washington State law, not Australian law, which would have meant that Australian consumers were not covered by the consumer guarantees under the ACL for inoperative video games purchased through Steam.

The dispute arose from complaints by three Australian video gamers to the ACCC about their correspondences with Steam regarding their rights to a refund for inoperative games. Steam is both an online video store and a video game delivery platform, where game developers upload their games through Steam and Valve receives a portion of the revenue from sales. In the event of a dispute, Steam would connect the players to the game developer. Games that are run by Steam must be purchased through Steam, which requires a Steam account and for the user to accept the terms of the SSA.

Were the alleged misrepresentations made in Australia?

The Full Court agreed with the trial judge that, although not based in Australia, Valve did make the alleged misrepresentations in Australia. This was due to the substantial number of Australian customers and their ongoing relationship with Valve. They acknowledged that it was necessary to determine where the misrepresentations were made, stating that "if the respondent is based overseas and has a relationship with customers in Australia, it is likely that representations addressed to those customers will be taken to have been made in Australia, being the place where the customer accesses and reads the representations on his or her computer." The implications are that any representations made online which are accessed by Australians may be found to have been made in Australia.

Was Valve engaged in business in Australia?

The case addressed issues of conflict of laws and how s67 of ACL is meant to be applied. Section 67 provides that if a foreign company supplies goods or services to an Australian consumer under an agreement that either has a governing law clause stating that any law other than Australia applies to the contract, or seeks to substitute or override the consumer guarantees, the consumer guarantees still apply despite that term. In order for this provision to apply, the court had to determine whether Valve was engaging in business in Australia under s5(1)(g) of the Competition and Consumer Act. The Full Court considered that a physical presence was not required to satisfy the "in Australia" requirement under s5(1)(g). In applying the *Gebo Investments* case, this requirement includes "acts within the relevant territory that amount to, or are ancillary to, transactions that make up or support the business".

Valve argued unsuccessfully that it did not carry on business in Australia because it had no substantial assets or employees in Australia and that business operations on the internet are not sufficient to qualify for carrying on business in Australia. The Full Court accepted the trial judge's reasoning that Valve was conducting business in Australia. The trial judge considered the following factors as relevant:

- there were 2.2 million Australian customers.
- there were servers established in Australia.
- expenses were incurred in Australia for rack space and power.
- there were business arrangements with third parties in Australia for servers.

This reasoning establishes an activities-based test for the "in Australia" requirement under s5(1)(g). However, it leaves open the question whether smaller video platform operators overseas would be considered to be carrying on business in Australia merely because Australia consumers buy their products online. If similar companies have established third party arrangements regarding server storage or transactions processes in Australia, it is likely that they will be found to be engaging in business in Australia, regardless of how small that activity is.

Some misleading conduct findings affirmed

There were nine misrepresentations alleged against Valve. The sixth alleged misrepresentation concerned whether a customer had a right of recourse through to the game developer, which Valve denied. The ninth misrepresentation concerned a denial of remedy. The court did not think it necessary to review the findings in relation to these alleged misrepresentations.

The first alleged misrepresentation was that customers were not entitled to a refund for any downloaded video games they had purchased from Valve. The Full Court upheld the trial judge's decision that the first misrepresentation was misleading and noted the fact that Valve had used unqualified terms such as "ALL STEAM FEES ARE PAYABLE IN ADVANCE AND ARE NOT REFUNDABLE IN WHOLE OR IN PART" in the SSA which is likely to mislead consumers into believing that they have no right to a refund whatsoever. Companies

that operate on a similar platform to Steam should consider qualifying these terms to avoid falling foul of s18(1) of the ACL.

The second and third alleged misrepresentations were contractual exclusions of statutory guarantees. Although Valve stated that they qualified these terms with phrases such as "to the maximum extent permitted by applicable law", this was still considered misleading. As the applicable law was not defined, consumers would be confused as to whether this was Australian law or Washington state law. The SSA also had broadly worded exclusions of "No Guarantees" as headings. The Full Court affirmed the trial judge's finding that these were misleading.

The fourth alleged misrepresentation was that consumers had no entitlement to a refund through Steam's Refund Policy. The policy in general was that Valve does not offer refunds which Valve argued contained an inference that it was not required to give a refund. The language however suggests that customers of Valve have no right to a refund at all and that even if they did, Valve would not give them one. The Full Court agreed that this misrepresentation was misleading.

Other misleading conduct allegations rejected

The seventh, eighth and ninth alleged misrepresentations occurred by communications between customers and Steam Support staff. The seventh alleged misrepresentation was that Valve was not required to provide a refund for games of unacceptable quality. The eighth alleged misrepresentation was that the Australian consumer guarantees did not apply to "digital subscriptions, electronic games or downloadable content" [211]. The trial judge held and the Full Court agreed that the alleged misrepresentations were not misleading under s18 of the ACL because the comments made by Support staff were only regarding a "particular case in the circumstances" as to whether the customer was eligible for a refund. In applying *Butcher v Lachlan Elder Realty*, the online chats were considered as a single ongoing conservation, rather than as ACCC argued a reference to Steam's Refund Policy. These alleged misrepresentations never had any misleading effect, as Valve was simply stating its own legal position, rather than that of its customers. The court recognized that Valve can still exclude liability and guarantees for products made by third party developers that contain errors, bugs or viruses.

Penalty Upheld

At trial, Valve was fined $3 million for breaching s18 of the ACL and ordered to place a consumer rights notice on its webpage. The Full Court rejected Valve's submission that the penalty was excessive. The trial judge had assessed the penalty according to the amount of revenue Valve was generating in Australia, which was rather small. However, the main factor that contributed to the fine being assessed at $3M was because Valve had never considered its legal position in Australia. The trial judge described Valve's conduct as arrogant and showed a poor culture of compliance.

Conclusion

Any foreign business providing goods or services online which can be accessed in Australia should be mindful of Australian Consumer Law and its application to agreements with Australian consumers and also to the configuration of arrangements with suppliers in Australia.

Chris Goddard

Principal

chris.goddard@chrisgoddardsolicitors.com.au

Paul Goddard

Graduate