FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Valve Corporation (No 3)

[2016] FCA 196

File number:	NSD 886 of 2014
Judge:	**EDELMAN J**
Date of judgment:	24 March 2016
Catchwords:	**PRIVATE INTERNATIONAL LAW** – Meaning of proper law of a contract – operation of "conflict of laws" clause in s 67(a) of *Australian Consumer Law* – whether Division 1, Part 3-2 (Chapter 3) of *Australian Consumer Law* applies to contracts where the real and closest connection is not the law of any part of Australia **CONSUMER LAW** – meaning of "goods" in s 4(1) of the *Australian Consumer Law* – whether provision of computer software by contract involving a licence for provision of computer software is a supply of goods **CONSUMER LAW** – meaning of "conduct in Australia" in s 131(1) of the *Competition and Consumer Act 2010* (Cth) – whether there is a requirement that representations be "directed" at Australians to be conduct in Australia – whether representations made on websites are "directed" **CONSUMER LAW** – meaning of "carry on business in Australia" is s 5(1)(g) of the *Australian Consumer Law* – whether respondent "carries on business in Australia" when it has 2.2 million Australian subscriber accounts, generates large Australian revenues, has valuable personal property in Australia, has business relationships in Australia, and incurs tens of thousands of dollars of monthly expenses in Australia **CONSUMER LAW** – representations in consumer agreements, in chat logs and on website – whether representations contravened s 18(1) or s 29(1)(m) of the *Australian Consumer Law* – misrepresentations contained within contractual terms – extent to which qualifications in the same or other contractual terms alter the otherwise misleading representation
Legislation:	*Australian Consumer Law (Schedule 2 of the Competition and Consumer Act 2010* (Cth)) Sch 2; Div 1 of Pt 3-2; Chs

2, 3, 4; ss 2, 2(1), 2(2), 3, 4(1), 4(2)(a), 5, 5(1), 5(1)(a), 5(1)(g), 5(2), 5(3), 5(5), 8(2), 11(c), 11(d), 18, 18(1), 18(1)(m), 21, 23, 29(1)(m), 47, 48, 51, 54, 54(2), 54(3), 54(6), 64, 67, 67(a), 67(b), 131, 131(1), 236, 259, 259(1), 259(3), 263(4), 276

Common Law Procedure Act 1899 (NSW) s 18(4)

Contracts Review Act 1980 (NSW) s 17(3)

Corporations Act 2001 (Cth) s 21

Electronic Transactions (Victoria) Act 2000 (Vic) s 13B

Electronic Transactions Act (Queensland) 2001 (Qld) s 25(1)(b)

Electronic Transactions Act 1999 (Cth) s 14B

Electronic Transactions Act 2000 (NSW) s 13B

Electronic Transactions Act 2000 (SA) s 13B

Electronic Transactions Act 2000 (Tas) s 11B

Electronic Transactions Act 2001 (ACT) s 13B

Electronic Transactions Act 2001 (NT) s 13B

Electronic Transactions Act 2011 (WA) s 15

Insurance Contracts Act 1984 (Cth) ss 8, 8(2), 52, 54

Mental Health Act 1959 (Vic) s 42

Trade Practices Act 1974 (Cth) ss 52, 67, 68

Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010 (Cth)

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Amlink Technologies Pty Ltd v Australian Trade Commission [2005] AATA 359; (2005) 86 ALD 370

ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1) (1990) 27 FCR 460

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Castlemaine Tooheys Ltd v Williams & Hodgson Transport Pty Ltd (1985) 7 FCR 509

Castlemaine Tooheys Ltd v Williams & Hodgson Transport Pty Ltd [1986] HCA 72; (1986) 162 CLR 395

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Conagra Inc v McCain Foods (Aust) Pty Ltd (1992) 33 FCR 302

Cowell v Rosehill Racecourse Co Ltd [1937] HCA 17; (1937) 56 CLR 605

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Equuscorp Pty Ltd v Haxton [2012] HCA 7; (2012) 246 CLR 498

Fleming v Marshall [2011] NSWCA 86; (2011) 279 ALR 737

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Sub-area:	Regulator and Consumer Protection
Category:	Catchwords
Number of paragraphs:	341
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Counsel for the Respondent:	Mr RG McHugh SC with Mr ADB Fox
Solicitor for the Respondent:	PricewaterhouseCoopers

Table of Corrections

4 April 2016	In paragraph 143, "and a property right" in the second sentence has been replaced with "was not a property right".
4 April 2016	In paragraph 145, "consistency with the text" has been replaced with "inconsistency with the text".
18 April 2016	In paragraphs 40 and 233, "10 November 2013" has been replaced with "10 November 2014".

ORDERS

NSD 886 of 2014

BETWEEN:	**AUSTRALIAN COMPETITION AND CONSUMER COMMISSION** Applicant
AND:	**VALVE CORPORATION** Respondent

JUDGE: **EDELMAN J**

DATE OF ORDER: **24 MARCH 2016**

THE COURT ORDERS THAT:

1. The matter be listed for a hearing as to remedies.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

EDELMAN J:

Introduction

1 The respondent, **Valve**, is a company based in the State of Washington in the United States of America. Valve operates an online game distribution network known as **Steam**. The Steam online game distribution network contains approximately 4,000 video games with names ranging from "Plants vs Zombies GOTY Edition" to "Thirty Flights of Loving". Valve has more than 2 million Australian subscriber accounts. Many customers buy or download multiple games from Valve. Valve operates and controls a website (the **Steam website**), an online video game delivery platform (the "**Steam Client**"), and an online support assistance service known as "**Steam Support**" which is accessible from Steam or the Steam website.

2 The applicant, the **ACCC**, alleges that Valve made misrepresentations in relation to the acceptable quality guarantee in s 54 of the *Australian Consumer Law* which, by s 64, could not be modified or excluded. The ACCC says that Valve (i) contravened s 18(1) of the *Australian Consumer Law* by making representations which were misleading or deceptive or likely to mislead or deceive, and (ii) contravened s 29(1)(m) by making false or misleading representations about the existence or effect of the consumer guarantees. At the heart of these alleged misrepresentations were statements by Valve, such as the statement in its terms and conditions in capital letters: "ALL STEAM FEES ARE PAYABLE IN ADVANCE AND ARE NOT REFUNDABLE IN WHOLE OR IN PART".

3 Valve defended these proceedings on a variety of grounds. Three of the grounds involved submissions that the consumer guarantees of acceptable quality in s 54 of the *Australian Consumer Law* did not apply to Valve.

4 **First**, Valve said that its conduct did not occur in Australia and that it does not carry on business in Australia so the *Australian Consumer Law* did not apply to it. There are some difficult issues involved in determining whether "conduct" is in Australia, but even if Valve's conduct was not conduct in Australia, the *Australian Consumer Law* would apply if Valve carried on business in Australia. Valve said that it does not carry on business in Australia despite Valve (i) having more than 2 million user accounts in Australia, (ii) generating potentially millions of dollars in revenue from Australia, (iii) owning, and using, servers in Australia, with original retail value of US $1.2 million, (iv) having relationships with

businesses in Australia, and (v) paying tens of thousands of dollars monthly to Australian companies in expenses for running its business in Australia.

5 **Secondly**, Valve submitted that the Steam Subscriber Agreement (**SSA**) it entered with consumers was not a contract to which the consumer guarantees in the *Australian Consumer Law*, Division 1 of Part 3-2 (Chapter 3) apply because the law which has the closest and most real connection to the SSA is the law of Washington State. There is no express provision which limits the operation of Division 1 in this way. Valve effectively submitted that such an implication derived from the conflict of laws provision, s 67, which contains terms to *prevent* a consumer from attempting to contract out of the Division by choosing a foreign proper law. The effect of Valve's submission is that if it contracted with Australian consumers, but (possibly unknown to the consumer) made the supply through an Australian subsidiary supplier, then the consumer guarantees would be *impliedly* excluded by Division 1 because of the connection between the contract and Washington State. In other words, by implication but not by express terms, Division 1 would not apply even where an Australian consumer received a supply of Australian goods from an Australian subsidiary in Australia.

6 **Thirdly**, Valve submitted that it does not "supply goods" within the meaning in s 2(1) of the *Australian Consumer Law.* The definition of "goods" in the *Australian Consumer Law* includes "computer software". The core of the supply by Valve was computer software. Valve said that it provided a "service" (by a Licence Agreement) rather than "goods" and that its supply to consumers of software was part of its service. Valve also said that a licence agreement for a use of goods is a service not a supply of goods even though (i) the term "supply" is defined to include a hire and an agreement to hire and (ii) the *Australian Consumer Law* expressly provides that a reference to a supply of goods includes goods supplied with services.

7 For the reasons below, each of these submissions must be rejected. The issue then becomes whether the representations made by Valve contravened ss 18(1) and 29(1)(m) of the *Australian Consumer Law*.

8 The misleading representations were said to have been made in (i) the SSAs, (ii) the Steam Refund Policies displayed on the Steam website from 1 January 2011, and (iii) during online "chats" between three Australian consumers (Mr Miller, Mr Miles, and Mr Phillips) and Steam Support staff. The ACCC said that the alleged misleading representations were all displayed to consumers on computer screens or electronic devices in Australia.

9 Valve said that it did not contravene the *Australian Consumer Law* because the ACCC did not prove that the representations as pleaded were made and even if they were made they were not false, misleading or deceptive or likely to mislead or deceive. In relation to all of the statements in the SSAs and all but one of the representations concerning Valve's refund policy I accept that the statements amounted to misleading representations within s 18(1) and s 29(1)(m). But the statements in chats with the three Australian consumers, who were reasonably well informed of their rights, did not involve these contraventions.

The witnesses

10 The ACCC relied upon evidence from four people. The first was an investigator and ACCC employee, Ms Liskov. A key part of her affidavit evidence concerned how she obtained various terms and conditions, and policies used by Valve. She also described the process by which games are purchased from Valve. The other three witnesses relied upon by the ACCC were Australian consumers who had experienced problems with games that they had purchased from Valve and used. None of the ACCC's witnesses was cross examined. Their evidence was not disputed, although its legal effect was contested.

11 Valve relied upon evidence from two witnesses. The first was its Business Development, Infrastructure and Operations Manager, Mr Dunkle. The second was its General Counsel, Mr Quackenbush. Both gave evidence honestly and with a genuine effort to assist the court. Their answers were clear. Their evidence was reliable.

12 Since there was no clash in any evidence and, after rulings on objections, no submission was made that any evidence should be rejected, it is convenient for me to set out my findings of fact independently of the witnesses. However, in my discussion below, I rely particularly upon the evidence of Ms Liskov as to what a consumer would have seen or done (including her careful inclusion of screenshots of many of these steps). For the technical detail behind each step, I rely particularly upon the evidence of Mr Dunkle. Although he was not an expert independent from Valve, he has worked in the gaming industry for 14 years and, previously in the semiconductor and telecommunications industry for 10 years. He was one of the original members of the team at Valve which developed what he described as the "online game distribution network" known as Steam.

Valve's provision of video games to consumers

The process of installing Steam and purchasing a video game

13 There are three discrete processes that a consumer must follow to obtain games Valve offers on Steam. First, they must download and install the Steam Client. Secondly, they must create a Steam account. Thirdly, they must download and install a game.

14 The **first step** in obtaining games from Valve is that a consumer goes to the Steam website and clicks on the hyperlink "Install Steam". A process then follows by which the consumer installs the **Steam Client** to the consumer's computer. Steam Client is a software program without which video games cannot be played (ts 97).

15 During that process the consumer is taken to a window entitled "License Agreement". The preamble to the **Licence Agreement** contains a reference to the SSA, which appears as a blue hyperlink. To continue the installation, the consumer must click on a box beside the words "I accept the licence agreement AND I am 13 years of age or older".

16 After installation, a pop up window appears notifying the consumer that Steam has been installed. An icon also then appears on the consumer's desktop.

17 Consumers can also access the SSA online by a link on the Steam website. When they click on this link, they are taken to a webpage which holds the terms and conditions of the SSA. This webpage is stored on the Washington Servers. The SSA is published (and made accessible to customers) in 21 different languages.

18 The **second step** towards obtaining and using a Steam game is that the consumer must have a Steam account. A consumer can create a Steam account either on the Steam website or through the Steam Client. When the Steam Client is used to open an account, a new window opens containing the SSA. The consumer must agree to the SSA before being taken to a window entitled "Create a Steam Account". From there, the consumer can choose an account name and password, and must enter an email address. Clicking the "Next" button will take the consumer back to their desktop.

19 The **third step** towards obtaining and using a Steam game is to download a game. By opening the Steam Client, the consumer will be taken to their "Library" within Steam. This displays all the Steam video games that the consumer has purchased and downloaded. Within the consumer's library, there is a "Store" where games can be purchased or downloaded. The consumer can search through the games in the Store, access game developer information,

read peer or community group reviews and reviews of games. The consumer can then select games to download, after purchasing the game if it is not free. There is a "Review + Purchase" page where the consumer must accept the SSA before they can click "Purchase". The SSA can be read before being accepted by clicking on the words "Steam Subscriber Agreement". During the purchase the consumer is required to inform Steam of the country in which the consumer is located (ts 120).

20 In addition to credit card and other methods of payment, subscribers can also pay for games using "Steam Wallet". Steam Wallet is an account which a subscriber can use to store value for later use for Steam purchases (ts 120).

21 Once a consumer has purchased a video game, a link to that game will appear in their Library. The game must then be installed. But no further agreement to the SSA is required before installation. During the installation process of a game which has been authored by a third party, the consumer may be required to accept an end-user licence agreement and any separate account registration requirements required by the third party.

22 Once a game is installed on a consumer's computer, the consumer can play it online or, if the publisher of the game has created it in that way, in "offline mode". When the game is run online for the first time, Steam checks to confirm that the user owns a subscription to the game. And after a subscriber quits an online Steam session, on the next online occasion the subscriber must login again to authenticate himself or herself. The Steam Client also checks for, and downloads, any updates to the games on these subsequent online occasions.

23 To access the offline mode, the consumer double clicks on the Steam Client. If the computer has no internet connection, a "Connection Error" message will appear on their screen, which contains a button entitled "START IN OFFLINE MODE". The consumer can see his or her Library offline and can play some games offline. If the consumer is offline then he or she (i) cannot interact with others in multi-user games, (ii) cannot download updates to the game, and (iii) cannot save progress, score or achievements to the Steam Cloud for use on another computer.

The Steam games

24 Steam offers more than 4,000 games. But only around 26 of these games are authored by Valve. Almost all of them are authored by third party developers who receive a royalty from any sales of their game by Valve. Valve does not receive any of the source code of the video

games from third party game developers. Instead, the game developers provide Valve with executable file software for the games to be uploaded in Washington State.

25 When a problem arises with a game developed by a third party, Valve often puts the customer in contact with the third party developer. If Valve ultimately chooses to give a refund to the customer, then Valve will ordinarily deduct the refund from the royalties which it pays to the third party developer.

26 The top three games developed by Valve are all multi-player games. They have a common theme of either battle (Dota 2, a free game), terrorism (Counter-Strike Global Offensive, priced at US $14.99) or shooting (Team Fortress 2, a free game). The consumer who downloads a free game commonly discovers that there are opportunities for purchases of digital items within the game.

27 The top three games developed by third party developers are Grand Theft Auto V (single or multi-player which needs no further description, priced at US $74.99), the Elder Scrolls V (a fantasy video game, priced at US $34.99), and Sid Meier's Civilisation V (a single or multi-player strategy game to become Ruler of the World, priced at US $69.99).

28 Apart from the approximately 4,000 games available for purchase or free download, the Steam Client also provides consumers with many other functions including friends lists, chat, user groups, community groups, Steam cloud, Steam music player, video driver updates, and user profiles. Valve's evidence referred to many of these other functions and many Steam products in detail. It is sufficient to observe that many of Steam's non-game offerings are very closely associated with Steam's core provision of games. Some examples follow.

(1) Steam Wallet, as I have explained, is a method of paying for Steam games.

(2) Steam subscribers can "create content" that can be used in Valve's games and sold to other subscribers, for which Steam receives a portion of the sale proceeds. Senior counsel for Valve gave examples of such content as a digital "hat" or digital "sword" (ts 199).

(3) Steam subscribers have a licence to make modified versions of Valve games and to distribute them for free.

(4) Steam curators are individuals or organisations who make recommendations to others about video games.

(5) Steam Wish list is an ability for subscribers to add games on to a wishlist.

(6) Steam Greenlight is a forum where Steam subscribers can submit an unreleased game for the Steam community to rate according to whether they would like to see the game on Steam.

(7) Steam Play is a feature that allows subscribers to purchase subscriptions to games.

(8) Steam Cloud is a feature which stores the game data of a subscriber when a game is concluded so that when the subscriber goes online again, from any computer, he or she can access this information including for sharing with friends online. Steam Cloud is made available by third party service providers such as Microsoft Azure or Amazon Web Services.

(9) Steam Support has a website published to the world at large for inquiries by way of a ticket received in servers located in Washington State.

The operation of the Steam servers

29 Steam is supported by a global network of servers and associated information technology. Nearly a thousand servers are located in Washington State. The servers can broadly be classified in the following groups.

(1) **Steam website servers** in Washington State: used to host and support the Steam website and Steam store.

(2) **Steam Client Software and subscription servers** in Washington State: the communications which permit a subscriber located in Australia to download the Steam Client software (including any updates) onto his or her local computer, create a Steam account, select a game subscription, and pay the purchase price. These servers also include the authentication of subscribers and, in this role, were sometimes referred to during the trial as "authentication servers".

(3) **Steam content servers:** host the content of Valve's video games and all third party video games and other content available on Steam. Steam has content servers in Washington State as well as other locations around the world including Australia. The three of Valve's content servers that are in Australia are located in commercial rack spaces leased from Equinix Australia Pty Ltd (**Equinix**). These content servers provide content to Australian customers as well as other customers, particularly in the Asian region.

30 The way that the Steam content servers in Australia (like others outside Washington State) operate is that when a consumer seeks to download a game, the servers in Washington State provide the content to the Australian content server. If that content is not requested again within a limited period of time (ranging from about 1 to 18 days in Australia, depending upon the server), it is automatically removed from the Australian content server.

31 One reason why Steam uses content servers in Australia and elsewhere in addition to its Washington State servers is efficiency. Steam aims to ensure that a consumer can download content as fast as possible. In fact, as Mr Dunkle explained (ts 107), the Steam Client knows how to download from multiple sources, including content servers and **content delivery networks**.

32 The content delivery networks are commercial third parties with whom Valve has business arrangements. These third parties permit Steam to have access to their networks to deliver Steam content to subscribers all around the world at agreed bandwidth and delivery capacity. Members of content delivery networks obtain the advantage of being able to provide their customers with fast, direct downloads without having to obtain the download from Washington State or other servers. Some of these third parties, such as a "key partner" called **Highwinds**, have servers in Australia.

33 In addition to Valve's contracts with global content delivery network providers, Valve also has arrangements with smaller providers throughout the world. Two of those in Australia are **Internode** and **ixaustralia**.

34 Steam's content servers, and the content delivery networks, hold a mirror image, or "proxy cache" of the software. However, a foreign content server (such as an Australian content server) will still need to communicate with the servers in Washington State to obtain authentication of the subscriber in relation to its communications with a subscriber (ts 109).

35 The content server which is chosen for a download by the Steam Client depends on an algorithm. The algorithm is designed to calculate the most efficient means of downloading based on available server capacity and to project download speed of available servers within the global network. Mr Dunkle said that it was "possible but not guaranteed" that the most efficient method for an Australian subscriber to obtain contention would be to use a server in Australia (ts 112).

36 Although Steam's algorithm selects the server calculated to be the most efficient server to deliver the content, the algorithm can be overridden by a choice by the Steam subscriber of a particular server. The subscriber might choose a server which that subscriber knows to be located close to him or her or which is known to have a large bandwidth.

37 **Steam game servers** are servers that host specific multiplayer games and connect users who play against each other. Valve owns 4,341 of these game servers. There are also game servers operated by users independently of Valve but using Valve's software. Some of the game servers are operated by third party developers of games sold or available for free download on Steam. A user anywhere in the world can choose whichever game server he or she wants to use anywhere in the world, or the user can let the game's software choose the server.

38 Eighty of Valve's game servers and supporting equipment are located in Australia. The original retail value of Valve's Australian servers was US $1.2 million. The servers are stored within rack spaces leased in Australia from Equinix and host two specific Valve developed multi-player games (previously a third was also hosted). From September 2012, Valve has paid Equinix for floor space and server racks, power, connectivity, and exchange linkages to Equinix's exchange. Valve pays Equinix approximately US $26,000 per month.

Valve's SSAs and Refund Policies

39 Later in these reasons I consider in much more detail the terms of Valve's SSAs and Refund Policies. It suffices at this point to explain that there are three relevant SSAs and Refund Policies to these proceedings.

40 As to Valve's SSAs, the three relevant SSAs are as follows:

(1) the **2011/2012 SSA** (1 January 2011 to 2 August 2012) (Court Book pp 483-486);

(2) the **2012/2013 SSA** (3 August 2012 to 2 July 2013) (Court Book pp 493-497); and

(3) the **2013 SSA** (3 July 2013 to 10 November 2014) (Court Book pp 529-533).

41 As to the Steam Refund Policies, the three relevant versions of those refund policies are as follows:

(1) the **2011-2013 refund policy** (1 January 2011 to April 2013) (Court Book p 553);

(2) the **2013-2014 refund policy** (April 2013 to 23 July 2014) (Court Book p 555); and

(3) the **2014-2015 refund policy** (24 July 2014 to 18 March 2015) (Court Book p 349).

Sections 18(1) and 29(1)(m) of the *Australian Consumer Law*

The terms of ss 18(1) and 29(1)(m)

42 Section 18(1) provides:

> **Misleading or deceptive conduct**
>
> (1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

43 Section 29(1)(m) provides:

> **False or misleading representations about goods or services**
>
> (1) A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:
>
> ...
>
> (m) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (including a guarantee under Division 1 of Part 3-2)…

The dependency of the representations upon s 54

44 The conduct and representations alleged by the ACCC to contravene ss 18(1) and 29(1)(m) concerned matters arising where goods are not of "acceptable quality". The ACCC also pleaded that the representations were misleading for reasons including that s 64 prevents consumer guarantees from being modified or excluded. The ACCC accepted that ss 18(1) and 29(1)(m) could only apply in this case if the s 54 guarantee of acceptable quality was capable of applying to a supply by Valve. Section 54 falls within in Division 1 of Part 3-2 (Chapter 3) of the *Australian Consumer Law*. The ACCC assumed that s 54 must apply because the alleged misrepresentations related to acceptable quality (the concern of s 54). The assumption was that if s 54 did not apply then the alleged representations could not be misleading conduct or false representations concerning whether goods were of acceptable quality. I also proceed on that assumption.

45 Section 54(1) provides for a guarantee that goods are of acceptable quality if (other than a sale by auction) a person supplies, in trade or commerce, goods to a consumer.

46 Section 54(2) provides that:

> Goods are of *acceptable quality* if they are as:
>
> (a) fit for all the purposes for which goods of that kind are commonly supplied; and

(b) acceptable in appearance and finish; and

(c) free from defects; and

(d) safe; and

(e) durable;

as a reasonable consumer fully acquainted with the state and condition of the goods (including any hidden defects of the goods), would regard as acceptable having regard to the matters in subsection (3).

47 There are separate provisions concerning when goods will not fail to be acceptable quality, and matters to which regard must be had in determining acceptable quality. I will refer to those later in these reasons.

48 Section 259 is concerned with failures of compliance. Different conditions are imposed on whether the goods can be rejected for major, or non-major, failures of compliance. Section 259 provides:

Action against suppliers of goods

(1) A consumer may take action under this section if:

(a) a person (the ***supplier***) supplies, in trade or commerce, goods to the consumer; and

(b) a guarantee that applies to the supply under Subdivision A of Division 1 of Part 3-2 (other than sections 58 and 59(1)) is not complied with.

(2) If the failure to comply with the guarantee can be remedied and is not a major failure:

(a) the consumer may require the supplier to remedy the failure within a reasonable time; or

(b) if such a requirement is made of the supplier but the supplier refuses or fails to comply with the requirement, or fails to comply with the requirement within a reasonable time–the consumer may:

(i) otherwise have the failure remedied and, by action against the supplier, recover all reasonable costs incurred by the consumer in having the failure so remedied; or

(ii) subject to section 262, notify the supplier that the consumer rejects the goods and of the ground or grounds for the rejection.

(3) If the failure to comply with the guarantee cannot be remedied or is a major failure, the consumer may:

(a) subject to section 262, notify the supplier that the consumer rejects the goods and of the ground or grounds for the rejection; or

(b) by action against the supplier, recover compensation for any reduction in the value of the goods below the price paid or payable by the consumer for the goods.

(4) The consumer may, by action against the supplier, recover damages for any loss or damage suffered by the consumer because of the failure to comply with the guarantee if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure.

(5) Subsection (4) does not apply if the failure to comply with the guarantee occurred only because of a cause independent of human control that occurred after goods left the control of the supplier.

(6) To avoid doubt, subsection (4) applies in addition to subsections (2) and (3).

(7) The consumer may take action under this section whether or not the goods are in their original packaging.

49 If the consumer is entitled to reject the goods, s 263 applies and makes relevant a right to refund:

Consequences of rejecting goods

(1) This section applies if, under section 259, a consumer notifies a supplier of goods that the consumer rejects the goods.

(2) The consumer must return the goods to the supplier unless:

(a) the goods have already been returned to, or retrieved by, the supplier; or

(b) the goods cannot be returned, removed or transported without significant cost to the consumer because of:

(i) the nature of the failure to comply with the guarantee to which the rejection relates; or

(ii) the size or height, or method of attachment, of the goods.

(3) If subsection (2)(b) applies, the supplier must, within a reasonable time, collect the goods at the supplier's expense.

(4) The supplier must, in accordance with an election made by the consumer:

(a) refund:

(i) any money paid by the consumer for the goods; and

(ii) an amount that is equal to the value of any other consideration provided by the consumer for the goods; or

(b) replace the rejected goods with goods of the same type, and of similar value, if such goods are reasonably available to the supplier.

(5) The supplier cannot satisfy subsection (4)(a) by permitting the consumer to acquire goods from the supplier.

(6) If the property in the rejected goods had passed to the consumer before the rejection was notified, the property in those goods revests in the supplier on the notification of the rejection.

50 The ACCC does not allege that there was a major failure in compliance. Instead, it says that the representations were made to consumers concerning their rights whether or not there was a major failure in compliance.

The integers of ss 18(1) and 29(1)(m)

51 There are two integers within these two sections which are, uncontroversially, satisfied. The first is that Valve is a corporation, and therefore a person to whom the *Australian Consumer Law* applies (see s 131 *Competition and Consumer Act 2010* (Cth)). The second is that Valve was acting in trade or commerce.

52 However, there are four matters that are controversial:

(1) Whether ss 18(1) and 29(1)(m) have any application where the alleged conduct or representation concerned matters relating to s 54 and any supply of goods occurred in the context of an agreement which had an objective proper law which was not the law of any part of Australia?

(2) Whether Valve "supplied goods" such that s 54 could be engaged?

(3) Whether Valve's conduct was in Australia? (The ACCC assumed that it was necessary for it to prove that Valve's conduct was in Australia for s 29(1)(m) as well as s 18(1)) or if Valve's conduct was not in Australia, whether Valve was "carrying on business within Australia" under the extended application of the *Australian Consumer Law*?

(4) Whether ss 18(1) and 29(1)(m) were contravened?

53 Each of these issues is addressed separately below.

(1) Issue 1: The proper law of Division 1, Part 3-2 (Chapter 3) of the *Australian Consumer Law*

The terms of s 67

54 The first significant issue raised by the parties was whether ss 18(1) and 29(1)(m) have any application in this case. As I have explained, the ACCC accepted that ss 18(1) and 29(1)(m) could only apply in this case if s 54 was applicable. Valve's submission that s 54 did not apply was based upon its construction of s 67 of the *Australian Consumer Law*.

55 Sections 54 and 67 both appear in Division 1 (consumer guarantees) of Part 3-2 (consumer transactions) of the *Australian Consumer Law*. Section 67 provides:

> **Conflict of laws**
>
> If:
>
> (a) the proper law of a contract for the supply of goods or services to a consumer would be the law of any part of Australia but for a term of the contract that provides otherwise; or
>
> (b) 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 following provisions for all or any of the provisions of this Division:
>
> (i) the provisions of the law of a country other than Australia;
>
> (ii) the provisions of the law of a State or a Territory;
>
> the provisions of this Division apply in relation to the supply under the contract despite that term.

56 In its written submissions, Valve submitted that the proper construction of s 67 required that "the guarantee in s 54 has no application where … any 'supply' takes place pursuant to a contract the proper law of which is [not the law of any part of Australia]".

The meaning of the "proper law of a contract"

57 The terms of s 67(a) are very similar to those of s 8(2) of the *Insurance Contracts Act 1984* (Cth) which were considered by the High Court of Australia in *Akai Pty Ltd v People's Insurance Co Ltd* [1996] HCA 39; (1996) 188 CLR 418. In *Akai*, a Singaporean insurer had refused a claim by an insured New South Wales company. The insured commenced proceedings in New South Wales and in England. In the New South Wales proceeding, the insured relied upon s 54 of the *Insurance Contracts Act* which restricted the circumstances in which the insurer could refuse payment of the claim. The insurer sought to have the New South Wales proceedings stayed pending the determination of the English action. The insurer relied upon cl 9 of the policy which contained a choice of English law and an English jurisdiction clause.

58 The High Court considered the effect of s 8(2) of the *Insurance Contracts Act* which provided that:

> … where the proper law of a contract … would, but for an express provision to the contrary … be the law of a State or of a Territory in which this Act applies … then, notwithstanding that provision, the proper law of the contract is the law of that State or Territory.

59 The High Court also considered the effect of s 52 of the *Insurance Contracts Act* which provided that:

> (1) Where a provision of a contract of insurance (including a provision that is not set out in the contract but is incorporated in the contract by another provision of the contract) purports to exclude, restrict or modify, or would, but for this subsection, have the effect of excluding, restricting or modifying, to the prejudice of a person other than the insurer, the operation of this Act, the provision is void.
>
> (2) Subsection (1) does not apply to or in relation to a provision the inclusion of which in the contract is expressly authorized by this Act.

60 A majority of the High Court (Toohey, Gaudron, and Gummow JJ) held that the New South Wales proceedings should not be stayed. Their Honours held that effect should not be given to the choice of jurisdiction in cl 9 of the policy, which was the courts of England and Wales. This was for two reasons. The first reason was the "policy" of the *Insurance Contracts Act*, independently of any express or implied statutory prohibition (447). The second reason was that the text of s 52 rendered the jurisdiction clause void (447-448). It is necessary to return later to each of these reasons.

61 In the course of their reasons, the majority explained the way in which s 8(2) of the *Insurance Contracts Act* operated. Their Honours explained, at 440-442, that the process of identification of the proper law of the contract is twofold.

62 The first stage involves considering "the system of law by reference to which the contract was made". That requires consideration of the express or the "inferred" choice of law in the contract. This involves one question: "whether, upon the proper construction of the contract … the court may conclude that the parties exercised liberty given by the common law to choose a governing law for their contract" (442).

63 The reference to an "inferred choice" as part of the process of construction was said by their Honours not to be a question of implying a term as to choice of law (442). That statement should not be understood as suggesting that implication is irrelevant to the overall question at the first stage. The question at the first stage is whether, as part of the process of construction, applying "the ordinary rules of the common law relating to the construction of contracts" (441), the words of the contract express a choice of law to a reasonable person in the position of the parties a choice of law. As French CJ, Bell and Keane JJ observed in *Commonwealth Bank of Australia v Barker* [2014] HCA 32; (2014) 253 CLR 169, 186-188 [22]-[25], implications can be part of the process of construction.

64 On the majority's approach, if there is no answer to the first question, because no express or inferred choice can be identified, then the second stage involves considering the system of

law with which the transaction has its closest and most real connection. As their Honours described the second stage, "the law itself will select a proper law" (442).

65 The test for "the system of law with which the transaction has its closest and most real connection" (438) is usually attributed to the speech of Lord Simonds in *Bonython v Commonwealth* [1951] AC 201, 219 although it was used earlier in the writings of Professors Westlake and Cheshire, and Dr Morris. Whilst the language of "closest and most real connection" trips off the tongue, the underlying concept is far from clear.

66 The second stage ("closest and most real connection") is commonly contrasted with the first stage on the basis that the first concerns the "objective intention of the parties" but the second is just an "objective test". That was how Valve approached the test in this case. In at least one sense, this is a false distinction. "Objective intention" is an oxymoron. Although it is commonly used in the law of contract, "intention" is a word which involves subjectivity of decision making. If the question is one of construction of a contract then, in truth, the question has nothing to do with the "intention" of the parties in the sense of their subjective decisions. The question of "objective intention" really involves the (objective) *meaning* of the contract, by the process of construction. The second stage of the test is also an objective test but, on the authority of *Akai*, it must be concerned with something other than solely considering the *meaning* of terms of the contract.

67 It was not always the case that there were two stages involved in the determination of the proper law of the contract. As Dr Mann observed, a debate raged for some time concerning which stage was the *only* test (Mann FA, "The Proper Law in the Conflict of Laws" (1987) 36 *Int'l & Comp LQ* 437, 444). Dr Mann said:

> The problem was whether in the absence of an express or implied choice the presumed intention of the parties had to be ascertained by construing the contract, i.e. by objective means as opposed to evidence about the subjective intentions of the parties, or whether it was for the court to ascertain the country with which the contract was most closely connected. (Footnotes omitted)

Dr Mann continued, explaining that "the practice had followed the former course" (ie objective meaning of the contract) until the decision of Lord Denning in *Boissevain v Weil* [1949] 1 KB 482, 490-491, which was then followed by Lord Simonds in *Bonython v Commonwealth* [1951] AC 201, 219. Dr Mann considered that the rise of the closest connection test was, in part, due to the influence of Dr Morris who had asserted that the only single test that could be applied to determine the proper law of the contract was the question

of the closest and most real connection: Morris JHC, "The Proper Law of a Contract: A Reply" (1950) 3 *Int'l & Comp LQ* 197.

68 The question of "closest and most real connection" is a question which is usually further deconstructed when considering the "conflict of laws". Indeed, as Dr Mann said at 438, at a high level of generality the "whole of the conflict of laws is concerned with the question: which, in a given situation, is the legal system closely or most closely connected with the matter in issue?"

69 Without further deconstruction into the nature of the enquiry, a difficulty with the second stage of the test (the "closest and most real connection" with the transaction) is that different factors will often point in different directions. Some of those factors are said to be of little weight. Some are said to be of substantial weight. But without a governing principle it is difficult to determine why some matters are more important for a close connection than others. For instance, one factor relied upon by the ACCC was the presence of proxy servers in Australia which create a "mirror" of the data contained on servers in Washington State. But how much weight should this factor have in determining the closest and most real connection with the transaction? Without the subsequent conduct by Valve which gave the consumer a choice of proxy server for download, at the time of contracting it is very unlikely that any consumer would know, or could reasonably know, of the existence of Australian proxy servers. And if this factor were ultimately the decisive matter that made the difference, would the proper law of the series of transactions subsequently change if the proxy servers were relocated or abandoned?

70 Professor Briggs has argued that in the assessment of the different weight given to different connecting factors, the "common law developed an unarticulated reflection of how far, if at all, each allowed the court to read something of the parties' minds as regards intended proper law": Briggs A, *The Conflict of Laws* (3rd ed, Oxford University Press, 2013) 242. The reference to reading something of the parties minds has an echo of the words of Lord Wright in *Mount Albert Borough Council v Australasian Temperance and General Mutual Life Assurance Society Ltd* [1938] AC 224, 240:

> the Court has to impute an intention, or to determine for the parties what is the proper law which, as just and reasonable persons, they ought or would have intended if they had thought about the question when they made the contract.

71 It may be that, eventually, the common law rules concerning the proper law of the contract will come full circle and the test for "closest and most real connection" will be seen as

involving, at its core, questions of construction of the contract (ie the meaning which reasonable persons in the positions of the parties would give to the words of the contract). But the basis upon which s 67(a) of the *Australian Consumer Law* was enacted, and the decision of the majority of the High Court in *Akai,* requires the question of closest and most real connection to be considered as an objective question, separate from the question which is concerned with construction of the contract. It must be approached independently from the construction question, as an evaluative exercise which takes into account all of the relevant matters connected with the transaction with the exception of those matters prohibited by s 67(a).

The law which has the closest and most real connection to the SSA is Washington State

72 The various versions of the SSA contained jurisdiction and choice of law clauses which chose the jurisdiction and proper law as Washington State. For instance, cl 14 of the 2011/2012 SSA provided as follows:

> 14 APPLICABLE LAW/JURISDICTION
>
> The terms of this section may not apply to European Union consumers.
>
> You agree that this Agreement shall be deemed to have been made and executed in the State of Washington, and any dispute arising hereunder shall be resolved in accordance with the law of Washington. You agree that any claim asserted in any legal proceeding by you against Valve shall be commenced and maintained exclusively in any state or federal court located in King County, Washington, having subject matter jurisdiction with respect to the dispute between the parties and you hereby consent to the exclusive jurisdiction of such courts…"

73 Both the ACCC and Valve proceeded on the assumption that this Court should disregard each of (i) the choice of law, (ii) the choice of jurisdiction, and (iii) the deeming of place where the SSA was made. This assumption was consistent with the approach of the majority in *Akai* that the words "but for an express provision to the contrary" in the *Insurance Contracts Act* "embrace those provisions of the contract from which, or by recourse to which, it would be determined that the parties to the contract had selected or chosen a proper law which was not the law of a State or a Territory" (436). Otherwise, as the majority concluded, there would be "an extreme artificiality in first, as required by the statute, disregarding that express choice, and then proceeding by analysis of other provisions in the contract to infer the making by the parties of a choice of governing law" (440).

74 The assumption by the ACCC and Valve is also supported by the history of amendment of s 67. When the *Australian Consumer Law* was enacted, the predecessor provision to s 67,

which was s 67 of the *Trade Practices Act 1974* (Cth), referred to the Division applying to the contract notwithstanding "a term that it should be the law of some other country or a term to like effect". That wording was amended to use similar language to that considered in *Akai.* The amended words had the effect that the Division would apply despite "a term of the contract that provides otherwise" than the law of any part of Australia: see *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* (Cth).

75 The majority in *Akai* explained that in determining the law which has the closest and most real connection with the transaction, it is proper to have regard to matters including (i) the places of residence or business of the parties, (ii) the place of contracting, (iii) the place of performance, and (iv) the nature and subject matter of the contract (437). Each of these is considered in turn.

76 As for (i), the places of residence and business of the parties, the Australian consumers who gave evidence in this proceeding were located in New South Wales, Victoria, and Tasmania. The ACCC made no submission about which of these jurisdictions was said to be the proper law.

77 In contrast with the divergent places of residence of the consumers, although Valve conducts business in Australia, its residence and the locus of its business is in Washington State. That is where its registered office is located. It owns no subsidiary in Australia. The importance of Valve's residence as the locus of connection with the contract is bolstered by the fact that any reasonable person in the position of a consumer would realise that Valve was entering into contracts on the same, or nearly the same, terms with consumers in countries other than Australia including the United States and the European Union to which reference is made in the SSA.

78 As to (ii), the place of formation of a contract, this must be determined by reference to the characterisation rules of the forum. If it were necessary to determine this point, I would conclude that the place at which the contract was formed was where the consumers' electronic acceptances were received (Washington State) rather than the place from which they were sent (Victoria, Tasmania, and New South Wales). As a matter of basic principle any bilateral contract generally requires the receipt of a communication of acceptance in order to be effective: *Tallerman & Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd* [1957] HCA 10; (1957) 98 CLR 93, 111 (Dixon CJ and Fullagar J). The basis of this general principle is the usual expectation of reasonable persons in the position of contracting parties

that they will be told whether an offer has been accepted. The various versions of the SSA contained cl 1 which provided that the SSA (offer) takes effect "as soon as you indicate your acceptance of these terms".

79 The conclusion that the contract was formed where electronic communication is received is consistent with, and (importantly for the principle of coherence) provides coherence with, the provisions in Australian legislation concerning electronic transactions, based upon the United Nations Commission on International Trade Law, *UNCITRAL Model Law on Electronic Commerce 1996 with additional article 5 bis as adopted in 1998* (adopted 12 June 1996, United Nations), which provides for the place of receipt of electronic communications which is generally where the addressee has its place of business: *Electronic Transactions Act 1999* (Cth) s 14B; *Electronic Transactions Act 2000* (NSW) s 13B; *Electronic Transactions (Victoria) Act 2000* (Vic) s 13B; *Electronic Transactions Act 2000* (SA) s 13B; *Electronic Transactions Act 2000* (Tas) s 11B; *Electronic Transactions Act (Queensland) 2001* (Qld) s 25(1)(b); *Electronic Transactions Act 2001* (ACT) s 13B; *Electronic Transactions Act 2001* (NT) s 13B; *Electronic Transactions Act 2011* (WA) s 15.

80 However, this conclusion that the SSA became binding at the place of receipt of acceptance says nothing about questions concerning whether, and when, electronic (and usually near-instantaneous) communication is received and the timing of such receipt: see Christensen S, "Formation of Contracts by Email – Is it Just the Same as the Post?" (2001) 1(1) *Queensland University of Technology Law and Justice Journal* 22. See also see *Olivaylle Pty Ltd v Flottweg GMBH & Co KGAA (No 4)* [2009] FCA 522; (2009) 255 ALR 632, 642 [25] (Logan J).

81 Although I would, if necessary, conclude that Washington State is the place where the contract was formed, this factor has very little weight. In *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50, 62, Lord Diplock remarked that the place of contracting was of little weight in an age of modern telecommunications. In *Nygh's Conflict of Laws* the authors remark that this proposition is even more pronounced four decades later: Davies M, Bell AS and Brereton P, *Nygh's Conflict of Laws in Australia* (9th ed, LexisNexis Butterworths, 2014) 454 [19.33]. In particular, in *Fleming v Marshall* [2011] NSWCA 86; (2011) 279 ALR 737, 751 [64], Macfarlan JA said that in general in the case of a transactional contract "the place of contracting will only be of real significance where a

transnational contract has been concluded at a face-to-face meeting at the place of residence or business of one of the parties."

82 As to (iii), the place of performance of the contract, the data emanates from servers in Washington State, including the SSA (whether it comes through the Steam website or the Steam Client: ts 93) although there is also use of servers located in Australia and elsewhere. The authentication process occurs in Washington State. Subscriber complaints and enquiries are dealt with in Washington State. All client information is held on servers in Washington State. Payment is made in United States dollars. It is received on servers in Washington State. In contrast with these strong links with Washington State, the video games are purchased, downloaded and played all over the world. Even in this litigation alone, performance of the contract occurred in Tasmania, Victoria, and New South Wales.

83 As to (iv), the nature and subject matter of the contract, although the video game is played in various different jurisdictions in Australia and abroad, a significant aspect of the core subject matter is the ability for multi-player engagement which can take place anywhere in the world. The SSA is a standard form contract. The nature of that contract favours a single proper law (Washington State) rather than a proper law of many different jurisdictions throughout the world.

84 For these reasons, even but for the terms of the contract that provide otherwise, the proper law of the contract for the supply of goods or services by Valve to a consumer is the law of Washington State.

Section 67(b) prevents Valve relying upon Washington State law

85 The ACCC submitted that if the law with the closest and most real connection to the SSA was the law of Washington State then s 67(b) had the effect that Division 1 of the *Australian Consumer Law* would still apply. The submission by the ACCC (ts 72, 151) was as follows:

(1) in the absence of s 67(b), the provisions of Division 1 would apply to the supply under the SSA (this was common ground: ts 181); and

(2) the choice of law clause in the SSAs *purports to substitute* Washington State law for the provisions of Division 1 or, alternatively, has the *effect of substituting* Washington State law in light of Mr Dunkle's evidence that Washington State law (i) does not prohibit a clause of an agreement making non-refundable the subscriber purchases of

video game content, and (ii) leaves consumers free to enter contracts that disclaim all guarantees for online services or software.

86 The question raised by the ACCC is whether the SSA clause involving a choice of Washington State law "purports to *substitute*" or "has the effect of *substituting*" Washington State law for the provisions of Division 1 of Part 3-2 (Chapter 3) of the *Australian Consumer Law*. If s 67(b) is read literally then it may be satisfied. A provision of the SSA has substituted Washington State law for the law of Division 1 which would otherwise have applied.

87 Valve submitted that s 67(b) was concerned only with circumstances where the proper law of the contract is a law of some part of Australia in the sense of the law with the closest and most real connection. Senior counsel for Valve submitted that s 67(b) was "dealing with simply some terms of some system of law that is to be substituted for the provisions of this division … So the parties could [not provide that] 'The proper law of this contract is otherwise Australia but, in respect of consumer protection [some other law]…'" (ts 164).

88 The difficulty with this submission by Valve is that it requires s 67(b) to be read as though it were conditioned upon the proper law of the contract being Australian law. Section 67(b) would need to be read, on Valve's submission, as if the following words in italics were included when the section refers to the provisions being substituted: "(i) the provisions of the law of a country other than Australia *where the proper law would include Division 1*; (ii) the provisions of the law of a State or a Territory *where the proper law would include Division 1*". There is no warrant for such a large implication for three reasons. The first reason is that (as I explain below) the criterion of operation of Division 1 is no longer the proper law of the contract. The second reason is that the purpose of s 67(b) is to form part of a scheme together with s 67(a); it would defeat that scheme to read down s 67(b) in the manner that Valve submitted. The third reason is that such an implication would contrast sharply with s 67(a) where that condition was *expressly* included.

89 I conclude, with one assumption, that the inclusion of a Washington State choice of law clause purported to substitute Washington State law for all or any of the provisions of Division 1. The effect of s 67(b) is that, as it says, "the provisions of this Division [1] apply in relation to the supply under the contract despite that term": see also *Laminex (Aust) Ltd v Coe Manufacturing Co* [1999] NSWCA 370 [32] (Meagher JA; Cole AJA agreeing). The assumption underlying this conclusion, however, is that the Division is not otherwise limited

to apply only to instances where the law with the closest and most real connection to the contract is the law of a part of Australia. I turn then to that issue.

Reasons why s 67 does not limit Division 1 of the Australian Consumer Law

90 Contrary to Valve's submission, s 67 does not limit the operation of Division 1 of the *Australian Consumer Law* by confining its operation only to cases where the closest and most real connection to the contract is the law of a part of Australia. There are four reasons why Valve's submission must be rejected. It is inconsistent with the text of s 67. It is inconsistent with the context of s 67. It is inconsistent with the history and purpose of s 67. And it is inconsistent with the policy of s 67.

(i) The text of s 67 is contrary to Valve's submission

91 The first reason why Valve's submission should not be accepted is that it is inconsistent with the text of s 67. Valve essentially submitted that the concluding words of s 67 should be read as though they contained the words in italics: "the provisions of this Division apply in relation to the supply under the contract despite that term *but they do 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."* Valve submitted that this conclusion arose by construction rather than implication. But this is a false dichotomy. Implications can be part of the process of construction: *Commonwealth Bank of Australia v Barker* [2014] HCA 32; (2014) 253 CLR 169, 186-188 [22]-[25] (French CJ, Bell and Keane JJ).

92 The submission by Valve must be concerned with an implication into the *Australian Consumer Law* rather than an express term. Division 1 of Part 3-2 (Chapter 3) of the *Australian Consumer Law* contrasts with the *Insurance Contracts Act* where the joint judgment of the majority in *Akai* described the latter Act as being "so framed that its application to any other particular contract of insurance turns upon the treatment by the Act of the governing law of the contract in question" (432). The *Insurance Contracts Act*, s 8(1), provided that

> the application of this Act extends to contracts of insurance and proposed contracts of insurance the proper law of which is or would be the law of a State or the law of a Territory in which this Act applies or to which this Act extends.

93 There is no express provision in Division 1 of Part 3-2 (Chapter 3) of the *Australian Consumer Law* which is equivalent to s 8(1). Nor is there a provision such as that contained in s 17(3) of the *Contracts Review Act 1980* (NSW) which is otherwise in near-identical form

to the original version of s 67 of the *Australian Consumer Law*: "This Act applies to and in relation to a contract only if the law of the State is the proper law of the contract". The *Australian Consumer Law*, Division 1 of Part 3-2 (Chapter 3), like the legislation considered in *Freehold Land Investments Ltd v Queensland Estates Pty Ltd* [1970] HCA 31; (1970) 123 CLR 418, is an example where, as Walsh J (with whom Barwick CJ agreed) said (at 440) "the Act does not contain any express statement by which its general words are confined by some territorial limitation".

94 In *Taylor v Owners - Strata Plan No 11564* [2014] HCA 9; (2014) 253 CLR 531, French CJ, Crennan and Bell JJ said that "it should not be accepted that purposive construction may never allow of reading a provision as if it contained additional words (or omitted words) with the effect of expanding its field of operation" (548 [37]). But their Honours continued (548 [38], footnotes omitted)

> The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. It is answered against a construction that fills "gaps disclosed in legislation" or makes an insertion which is "too big, or too much at variance with the language in fact used by the legislature".

95 One decision to which their Honours referred was *Marshall v Watson* [1972] HCA 27; (1972) 124 CLR 640. In that case, s 42 of the *Mental Health Act 1959* (Vic) contained express powers for the admission of a person to a psychiatric hospital including on the recommendation of a medical practitioner. But this did not impliedly permit the police officer to move the plaintiff under compulsion to a psychiatric hospital. Justice Stephen (with whom Menzies J agreed) said (at 649):

> Granted that there may seem to be lacking in the legislation powers which it might be thought the Legislature would have done well to include, it is no power of the judicial function to fill gaps disclosed in legislation…

96 The joint judgment in *Taylor* referred to the three matters identified by Lord Diplock in *Wentworth Securities Ltd v Jones* [1980] AC 74, 105-106 (as reformulated in *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586, 592 (Lord Nicholls). Those matters may be more in the nature of guidelines, which might not be sufficient even if they are established ([39]-[40]). Specifically:

(1) the court must be able to identify the precise purpose of the provision(s) in question;

(2) the court must be satisfied that the drafter and Parliament inadvertently overlooked an eventuality that must be dealt with if the provision is to achieve its purpose; and

(3) the court must be abundantly sure of the substance of the words that Parliament would have used had the deficiency been detected before enactment.

97 The implication sought by Valve is very significant. None of the guidelines from *Wentworth Securities* is met. And even if they were, the implication would be little more than an attempt to fill a perceived gap in the legislation.

98 As to the first of the guidelines, it is hard to understand the purpose for implying the words sought to be implied by Valve. Why would the legislation go to such lengths to extend the operation of provisions including Division 1 by techniques such as those in s 5 for conduct outside Australia, only to cut back the reach of Division 1 for all contracts with the closest and most real connection to an overseas jurisdiction? And why would this restriction apply only to contracts and not to all other arrangements and understandings covered by Division 1?

99 As for the second guideline referred to in *Wentworth Securities*, the implication could not be inadvertent in circumstances in which the draftsperson chose to refer to the proper law of the contract in s 67(a) but not in s 67(b) or in the closing words of s 67.

100 Further, there is no separate provision that provides that Division 1 is concerned only with contracts governed by the proper law of a State or Territory of Australia. In circumstances in which s 67 was re-enacted with changes in 2011, it is material that such a separate provision existed in s 8 of the *Insurance Contracts Act* which was considered in the leading decision on a comparable provision, namely the *Akai* decision.

(ii) The context of s 67 is contrary to Valve's submission

101 There are four matters of context which militate against Valve's submission that Division 1 of Part 3-2 (Chapter 3) 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.

102 **First**, not only does s 67 contain no such express provision but no other provision of Division 1 supports this submission. As senior counsel for Valve conceded, in the absence of s 67, Division 1 would apply to any contract irrespective of its proper law (ts 181). That concession should be accepted. The same point has been made about the application of s 52, in a different Division of the former *Trade Practices Act* which contained no provision

concerning conflict of laws. In *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways* (1996) 39 NSWLR 160, 164, Gleeson CJ (Meagher and Sheller JJA agreeing) said:

> The fact that the proper law of the contract is the law of a foreign country does not prevent the conduct of one party to the contract from falling within the purview of section 52, if it would otherwise do so. The conduct of a party to a contract can amount to a contravention of section 52 even though the proper law of the contract is foreign law, provided it is conduct in trade or commerce as defined. There is nothing in the *Trade Practices Act 1974* (Cth) which, in the case of trade or commerce carried on under a contract, limits the application of the Act to cases where the relevant contract has local law as its proper law.

103 **Secondly**, an important matter of context is that Division 1 is not limited to contracts. The Division extends to supplies generally, whether by contract, or arrangement, or understanding or even by gift. For instance, s 51 provides that if a person supplies goods to a consumer other than by limited title, "there is a guarantee that the supplier will have a right to dispose of the property in the goods when that property is to pass to the consumer". This provision would extend to circumstances where goods are supplied to a consumer as a gift for promotional purposes (s 5(1)(a)) or where there is a failure of consideration arising from a supply in anticipation of a contract or where a contract is void. This context makes it extremely difficult to see why s 67 would exclude the s 51 guarantee in a case where there is a contract with the closest and most real connection to Washington State, but not in any other instance where it is also the case that "the *lex causae* will generally be the law of the place with which the failure of consideration has its closest and most real connection": Panagopoulos G, *Restitution in Private International Law* (Hart Publishing, Oxford, 2000) 171.

104 **Thirdly**, another matter of context is the breadth of operation provided in the *Australian Consumer Law* for its provisions, including Division 1 of Part 3-2 (Chapter 3). Section 5 of the *Competition and Consumer Act* extends the operation of the *Australian Consumer Law* (other than Part 5-3 "Country of origin representations") to the engaging in conduct outside Australia by (i) bodies incorporated within Australia, (ii) bodies carrying on business within Australia, (iii) Australian citizens, and (iv) persons ordinarily resident within Australia. As I explain later in these reasons, these are provisions of considerable breadth. This extended operation militates significantly against a construction of Division 1 that would disapply the operation that the Division would otherwise have in all of these categories wherever there was a contract with the closest and most real connection to an overseas jurisdiction.

105 The extended operation of the *Australian Consumer Law* by s 5 of the *Competition and Consumer Act* is a context which also militates against Valve's submission for another reason. One of the few exceptions to the breadth of s 5(1), and a rare instance in which the breadth of the *Competition and Consumer Act* is constrained by reference to the state of a foreign law, is where a person seeks damages under s 236 of the *Australian Consumer Law*. In such a case, the consent of the Minister is needed (s 5(3)) but consent will be given unless it is not in the national interest or "the law of the country in which the conduct concerned was engaged in required or specifically authorised the engaging in of the conduct" (s 5(5)). That exception by reference to a foreign law is narrowly confined (only to s 236). Again, this militates against an implication of a broad, unarticulated, foreign law exemption in s 67.

106 **Fourthly**, the context of s 67 also includes the provisions discussed below: ss 64 and 276. As counsel for the ACCC rightly submitted, those provisions must be read together. When they are read together they establish a legislative scheme to restrict any attempt to reduce the scope of operation of the Division. It would defeat that scheme if s 67 were read as *imposing* a restriction on the operation of the Division.

(iii) The history and purpose of s 67 is contrary to Valve's submission

107 Prior to 1 January 2011 (when the *Australian Consumer Law* came into operation) the predecessor legislation to the *Australian Consumer Law* (the *Trade Practices Act 1974* (Cth)) provided for similar consumer guarantees to those contained within Division 1. However, under the *Trade Practices Act* those consumer guarantees were imposed as statutory implications into a contract.

108 As statutory implications into a contract, a question that might arise would be whether those statutory implications could be excluded by the contract. The *Trade Practices Act* created a regime in similar terms to the regime of the *Insurance Contracts Act* considered in *Akai*. Like the *Insurance Contracts Act*, that regime was twofold. First, it prevented a term of the contract from excluding or modifying the statutory implied terms. Secondly, it provided in s 67 that the Division would apply notwithstanding a term of the contract that applied a foreign law or that purported to substitute, or had the effect of substituting, other provisions for the operation of the Division.

109 The *Australian Consumer Law* departed from the scheme of implication of terms into contracts. As the Explanatory Memorandum explained, one of the "features of the current law which contribute to its uncertainty" was that "the existing statutory implied terms regime is

based on the law of contract": *Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010* (Cth) 600 [25.28].

110 The Explanatory Memorandum explained that (at 602 [25.33]):

> It may, therefore, come as a surprise to many consumers to learn that, in the event of a dispute with a retailer, they are currently required to enforce their contract rather than seek redress under the law. Many consumers lack sufficiently comprehensive knowledge of the law of contract to know how to enforce their rights, or lack the resources to obtain expert advice to do so.

111 The Explanatory Memorandum explained that the new regime was intended to be simpler. It compared the previous scheme of implications with the new scheme which was described as one in which "If a person supplies goods to a consumer, the following guarantees apply". There was no suggestion that the guarantees would only apply if a person supplied goods to a consumer where the law which is the real and closest connection to the supply is a part of Australia. Given the emphasis on simplicity and clarity, this is unsurprising.

112 With this goal, the *Australian Consumer Law* maintained the two-part scheme which had existed in the *Trade Practices Act.* The two sections are ss 64 and 67. As the Explanatory Memorandum that introduced the *Australian Consumer Law* described these two sections (184 [7.17]):

> The guarantees cannot be excluded by contract […section 64]. This ensures that consumers cannot be pressured or tricked into surrendering their rights by agreeing that the guarantees do not apply. It is also not possible to avoid providing consumer guarantees by agreeing that the law of another country applies […section 67].

113 Section 64 (which had previously been s 68 of the *Trade Practices Act*) provides:

> **Guarantees not to be excluded etc. by contract**
>
> (1) A term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) is void to the extent that the term purports to exclude, restrict or modify, or has the effect of excluding, restricting or modifying:
>
> (a) the application of all or any of the provisions of this Division; or
>
> (b) the exercise of a right conferred by such a provision; or
>
> (c) any liability of a person for a failure to comply with a guarantee that applies under this Division to a supply of goods or services.
>
> (2) A term of a contract is not taken, for the purposes of this section, to exclude, restrict or modify the application of a provision of this Division unless the term does so expressly or is inconsistent with the provision.

114 The *Australian Consumer Law* also introduced a new provision, s 276, in the Part concerned with remedies related to guarantees. Section 276 further complements s 64 by providing as follows, subject to various exceptions which are not relevant in this case:

> **This Part not to be excluded etc. by contract**
>
> (1) A term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) is void to the extent that the term purports to exclude, restrict or modify, or has the effect of excluding, restricting or modifying:
>
> (a) the application of all or any of the provisions of this Part; or
>
> (b) the exercise of a right a conferred by such a provision; or
>
> (c) any liability of a person in relation to a failure to comply with a guarantee that applies under Division 1 of Part 3-2 to a supply of goods or services.
>
> (2) A term of a contract is not taken, for the purposes of this section, to exclude, restrict or modify the application of a provision of this Part unless the term does so expressly or is inconsistent with the provision.
>
> (3) This section does not apply to a term of a contract that is a term referred to in section 276A(4).

115 In summary, the history and purpose of s 67 shows that it was included in the *Australian Consumer Law* as part of an amendment process designed, in part, to make consumers' rights simpler and more transparent. The consumer guarantees no longer had to be implied into a contract. They applied generally to a supply of goods to a consumer. And s 67 was explained as part of a scheme, together with s 64, to ensure that it was not possible to exclude the consumer guarantees by contract. That scheme was further strengthened in the *Australian Consumer Law* by the addition of s 276 which makes a term of a contract void to the extent that it attempts to modify or exclude a remedy for breach of a consumer guarantee.

(iv) The policy of the Australian Consumer Law is contrary to Valve's submission

116 As I have explained, in *Akai* the majority of the High Court gave "the policy of the *Insurance Contracts Act"* as one reason for the refusal to give effect to a jurisdiction clause. The reference by the High Court to the "policy" of the legislation as a matter to be taken into account independently of the express or implied terms of the legislation was not, and is not, new. It was relied upon in various judgments in *Nelson v Nelson* [1995] HCA 25; (1995) 184 CLR 538, 552 (Deane and Gummow JJ) 611 (McHugh J) (referred to by the majority in *Akai* at 447). More recently, it was relied upon in *Equuscorp Pty Ltd v Haxton* [2012] HCA 7; (2012) 246 CLR 498, 514 [25] (French CJ, Crennan and Kiefel JJ).

117 In *Akai* (at 433), the majority explained the policy of the *Insurance Contracts Act* in the course of describing the relationship between s 8(2) and s 52 of the *Insurance Contracts Act* (footnotes omitted):

> Taken together, ss 52 and 8 manifest a legislative intent not only that there should be no power to contract out of the provisions of the Act, but also that the regime established by the Act should be respected as regards contracts the proper law of which is, or but for selection of another law would be, that of a State or Territory. This defeats evasion of the legislative regime by the choice of some other body of law as the governing law of the contract. "In the language of conflict-of-laws specialists, the policy of [this statute] has been made part of [Australian] ordre public interne and ordre public international".

118 At 434, the majority explained that the *Insurance Contracts Act* was designed to operate upon contracts of insurance which had "the law of a State or a Territory as the proper law". The point being made by the majority in the quotation in the paragraph above was that the legislative regime, which operated on contracts with a proper law of some part of Australian law, was designed to be complete. The legislation operated to ensure that there could be no departure from it. In other words, without s 8(2), the criterion of operation of the *Insurance Contracts Act* ("the proper law of the contracts") "would give scope to evasion" (443).

119 Like the "legislative intent" of the *Insurance Contracts Act* underlying ss 52 and 8 to which the High Court referred in *Akai,* the legislative intent underlying ss 64, 67, and 276 was to comprise a "legislative regime" to ensure that the operation of the provisions in Division 1, Part 3-2 (Chapter 3) are within the reach of the *Australian Consumer Law.* It was a scheme introduced for reasons including simplicity and clarity. Section 67 is not a redundant part of this regime. And I do not accept Valve's submission that s 67 has no effect unless it is construed as limiting the operation of Division 1. Rather, the section does exactly what it says. It ensures that there can be no possibility of varying the operation of the Division by contractual terms. If there is such a term, s 67 requires that the provisions in the Division "apply in relation to the supply under the contract despite that term".

120 In *Kay's Leasing Corporation Pty Ltd v Fletcher* [1964] HCA 79; (1964) 116 CLR 124, 143, Kitto J said that:

> Where a provision renders an agreement void for non-compliance by the parties or one of them with statutory requirements, especially where the requirements can be seen to embody a specific policy directed against practices which the legislature has deemed oppressive or unjust, a presumption that the agreements in contemplation are only those of which the law of the country is the proper law according to the rules of private international law has no apparent appropriateness to recommend it, and

> indeed, for a reason of special relevance here, it would produce a result which the legislature is not in the least likely to have intended. It would mean that provisions enacted as salutory reforms might be set at nought by the simple expedient adopted in the present case of inserting in an agreement a stipulation that validity should be a matter for the law of some other country.

121 Although these remarks were made in the context of considering avoidance of a statutory policy by express agreement, if Valve's submission were accepted then the policy of Division 1 of the *Australian Consumer Law* would also be defeated. It might enable suppliers to avoid the effect of Division 1 by using one of the very provisions which was included to prevent them avoiding the operation of the *Australian Consumer Law*.

122 For instance, if Valve's construction were correct there is a real prospect that companies could, by careful drafting of their contracts and arrangement of their business affairs, ensure that the *Australian Consumer Law* guarantees in Division 1 did not apply. As Mr J L R Davis said in 1980 in relation to the *Contracts Review Act 1980* (NSW), a New South Wales corporation might be able to cause the proper law of a contract to be that of a different jurisdiction by setting up a subsidiary to enter contracts with consumers. His example concerned a different Australian State or Territory. But the same point could be made about contriving to ensure that the closest and most real connection to a transaction is an overseas jurisdiction. As Mr Davis explained "it is a simple matter of drafting to ensure that it is the customer … who makes the offer, and the acceptance is made by the subsidiary company at its place of business" (572). He also suggested that it would be a relatively simple drafting matter to require that performance of obligations, delivery of goods such as to an agent (and, I would add, passage of risk) and payment for goods would take place at the place of business of the subsidiary: see Davis JLR, "The Contracts Review Act 1980 (NSW) and the Conflict of Laws" (1980) 54 *Australian Law Journal* 572-573.

123 Valve's submission would also introduce considerable complexity to a provision which was included in a Division of the *Australian Consumer Law* aimed at simplicity.

124 Finally, if Valve's submission were correct it could also have other surprising results contrary to the policy of the *Australian Consumer Law*. If Valve contracted with Australian consumers, but (unknown to them) operated through an Australian subsidiary supplier, then, on Valve's approach, the consumer guarantees would be *impliedly* excluded by Division 1 because of the connection between the contract and Washington State. In other words, by implication but not by express terms, Division 1 would not apply even where an Australian consumer received a supply of Australian goods from an Australian subsidiary in Australia.

Conclusion on the first issue

125 In summary, Valve's submissions on this first issue must be rejected for these textual, contextual, purposive, and policy reasons. As Buchanan JA said in *The Society of Lloyd's v White* [2004] VSCA 101 [19], in a dispute about jurisdiction but in remarks which are equally applicable in this case:

> When it entered a foreign jurisdiction Lloyd's was required to deal with the legal system it found. In my view, names in markets without effective consumer protection laws have no legitimate complaint about the operation of laws in other jurisdictions simply because they may produce different results. It is one thing to require claims to be determined by the courts of one country; it is another to require all claims to be determined by the same laws whether or not they are the appropriate laws to govern the transaction giving rise to a claim.

(2) Issue 2: Whether there was a "supply of goods"

126 The second issue is whether there was a "supply of goods" by Valve. Valve accepted that if "goods" were provided by it to consumers then the goods had been "supplied" (ts 218). The question of whether there was a "supply of goods" can, and (in light of the statutory definitions) should, be considered as a single question.

The proper approach to the definitions of goods and services

127 Section 2(1) of the *Australian Consumer Law* defines "goods" with an inclusive definition in the following way:

> ***goods*** includes:
>
> (a) ships, aircraft and other vehicles; and
>
> (b) animals, including fish; and
>
> (c) minerals, trees and crops, whether on, under or attached to land or not; and
>
> (d) gas and electricity; and
>
> (e) computer software; and
>
> (f) second-hand goods; and
>
> (g) any component part of, or accessory to, goods.

128 The definition of "goods" is inclusive. It supplements the ordinary meaning of "goods": *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1990) 27 FCR 460, 468 (the Court). The definition emphasises an important aspect of a "good". That aspect is sometimes described in theoretical studies as "thinghood": eg Penner J, *The Idea of Property in Law* (Clarendon Press, Oxford, 1997). The legal meaning of "goods" can be analogised to the strict definition of "property" which is "a description of a legal relationship with a thing":

Yanner v Eaton [1999] HCA 53; (1999) 201 CLR 351, 365-366 [17] (Gleeson CJ, Gaudron, Kirby, and Hayne JJ describing the word "property"). This explains why a chose in action, such as a debt, is not a "good". A chose in action is a right against a person. It is not a right in relation to a thing. The notion of rights to the various "things" in the inclusive definition complements the definition of "supply" in s 2(1) of the *Australian Consumer Law*. That section incorporates the concept of legal rights in relation to things by providing that when "supply" is used as a verb a "supply of goods" includes "supply (including re-supply) by way of sale, exchange, lease, hire or hire purchase".

129 Services is also defined in the same section in an inclusive way as follows:

> ***services*** includes:
>
> (a) any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce; and
>
> (b) without limiting paragraph (a), the rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred under:
>
> (i) a contract for or in relation to the performance of work (including work of a professional nature), whether with or without the supply of goods; or
>
> (ii) a contract for or in relation to the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction; or
>
> (iii) a contract for or in relation to the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction; or
>
> (iv) a contract of insurance; or
>
> (v) a contract between a banker and a customer of the banker entered into in the course of the carrying on by the banker of the business of banking; or
>
> (vi) any contract for or in relation to the lending of money;
>
> but does not include rights or benefits being the supply of goods or the performance of work under a contract of service.

130 The definition of "services" begins with a very broad inclusive definition as "any rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce". That definition, if read literally with the definition of "goods" would create an odd situation in which the supply of some thing (say, a car) by way of sale would involve a supply of goods but the provision of the rights to the car would be a service. That oddity is avoided by the exclusionary words at the conclusion of the definition of service: a service "does not *include* rights or benefits being the supply of goods". Nevertheless, it is possible

for a transaction to involve *both* a supply of goods and the provision of services. This is clear from the reference to services including "a contract for or in relation to the performance of work" where the contract can include "the supply of goods". Other provisions, such as s 3 (and see also s 11(c)) of the *Australian Consumer Law* also involve the notion of a "mixed supply" where "goods or services are purchased or acquired together with other property or services, or together with both other property and other services".

131 Although it is possible for a contract for the provision of services also to include the "supply of goods", the effect of the exclusionary words at the end of the definition of services requires that the transaction first be characterised to determine whether it involves a "supply of goods". This is why s 11(c) provides that a reference to a supply of goods includes goods supplied with services but s 11(d) does *not* extend a reference to the supply of services to include a supply of goods. This is also why the Full Court of the Federal Court said, of the definitions, that an agreement could be one for services "unless the subscribers are to be characterised as the purchasers of 'goods'": *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1990) 27 FCR 460, 467.

132 If, properly characterised, the whole of the transaction involves the supply of goods then the exclusionary words in the definition of 'services' will mean that none of the supply will involve a service. This point was made by Wilson J in *Castlemaine Tooheys Ltd v Williams & Hodgson Transport Pty Ltd* [1986] HCA 72; (1986) 162 CLR 395, 402:

> The Act clearly contemplates that services may accompany the supply of goods in such a way as to constitute a single transaction properly described as a supply of goods. It follows that an act or series of acts, once characterized for the purposes of the Act as a supply of goods, cannot also be a supply of services: see Taperell, Vermeesch & Harland, *Trade Practices and Consumer Protection*, 3rd ed. (1983), p. 163. Thus a contract for the supply and fitting of a windscreen to a motor vehicle has been held to fall within a market in which persons supply goods rather than services: *Cool & Sons Pty. Ltd. v. O'Brien Glass Industries Ltd.* [(1981) 35 ALR 445, at p 460] (upheld on appeal [[1983] FCA 191; (1983) 48 ALR 625, at pp 635, 646)]. It may not always be easy to make the characterization, the task being to identify, from all the circumstances of the case, the precise legal obligation undertaken by the supplier of the goods.

133 Similarly, if a contract, properly construed, involves no supply of goods then the breadth of the definition of services might make the conclusion simple that the contract involved the provision of services. For instance, in *E v Australian Red Cross Society* (1991) 31 FCR 299, the Full Federal Court considered whether there had been a contract for the supply of blood plasma in the context of a claim alleging breach of terms which had been implied into the

contract as a result of the *Trade Practices Act*. The appellant in that case had a contract with a hospital for the provision of nursing services and possibly also for medical attention (305 (Lockhart J)). But Lockhart J (with whom Sheppard and Pincus JJ agreed on this point) held that there was no contract for the supply of blood plasma which was intended to be supplied, if necessary, free of charge. His Honour held that since there was no contract for the supply of blood plasma, there was no contact for the supply of goods. He concluded at 306 that:

> To the extent that goods were provided to him such as food, sleeping tablets, antibiotics, dressings and things of this nature, they were provided as an incident to the contract for the provision of services. There was no contract for the supply of goods. The contract between the [hospital] and the appellant was one for services and is not divisible into a contract for services and for the supply of goods.

134 The remarks about whether food, sleeping tablets, or antibiotics were a "supply of goods" were not necessary for the decision. The decision did not concern any alleged defects in food, sleeping tablets, or antibiotics. No complaint had been made about any of these supplies. Further, it might be doubted whether this reasoning would apply to the new *Australian Consumer Law* regime which does not require a *contract* to be divided into services and goods but requires an initial enquiry into whether the respondent has obtained "rights or benefits being the supply of goods". It might now be questioned whether the conclusion could be reached that there was no supply of goods if, in the course of treatment, the appellant had been given defective antibiotics. However, even if it were the case that the mere incidental provision of goods is not a supply of goods, as I explain below, the goods supplied in this case were a core part of the supply, not an incidental part.

The application of the definitions

135 The starting point, therefore, is to determine whether part, or all, of a transaction involves a supply of goods. As a matter of law I reject Valve's submission that the "substance" of its transaction is one for the supply of services and therefore it does not supply goods. Not only does this introduce a gloss ("substance of the transaction") upon the words of the statute but it also reverses the proper enquiry: the first question is whether there is a supply of goods *not* whether there is a supply of services. And in any event, for the reasons below, I also reject Valve's submission as a matter of fact.

136 The ACCC makes three alternative submissions:

(1) the supply is a good; or

(2) the principal element of the supply is a good so that the substance of what Valve supplies should be characterised as a good; or

(3) Valve supplies a bundled service and good and the consumer guarantee of acceptable quality attaches to the good component which is the computer software for the game.

137 Valve supplied consumers with a good. The definition of "goods" was extended when the *Australian Consumer Law* was enacted on 1 January 2011 to include "computer software". This extension avoided debate about whether executable bits of digital data might fit with the idea of thinghood which would otherwise be an essential requirement for a "good". Prior to this extension, cases had recognised that computer software that was supplied on a physical medium such as a CD-Rom was a good but, perhaps controversially, that digitally downloaded computer software was not: compare *Amlink Technologies Pty Ltd v Australian Trade Commission* [2005] AATA 359; (2005) 86 ALD 370 with *Gammasonics Institute for Medical Research Pty Ltd v Comrad Medical Systems Pty Ltd* [2010] NSWSC 267.

138 Mr Dunkle's evidence, which I accept, was that computer software is instructions or programs that make hardware work. The video games provided by Steam required computer software to make them work. The material downloaded by consumers included non-executable data such as music and html images. Mr Dunkle's uncontested evidence on this point was that this non-executable data was not computer software. But he accepted that the computer software made that non-executable data work.

139 In other words, one of the most fundamental things that Valve provided to its customers, more than 4,000 games, contained an essential component of "computer software". The Steam Client used to access those games involves software. As Mr Dunkle said, the games consist of software and a number of other assets (eg music, images). Mr Dunkle also explained (ts 108) that the content in Steam's vital "content servers" is the software for the game.

140 The importance of the games and the computer software as part of Valve's supply to consumers is also vividly apparent from the SSA and its Refund Policies. Clause 1 of the 2013 SSA defines software as "Valve or third-party video games". In a frequently asked questions section of Valve's website, Valve describes the transaction as "Buying Games through Steam". One topic included is "How do I purchase games through Steam?" Valve's material is also replete with references to "games" and "software". Valve refers to "Buying Games through Steam" (Court Book p 345), "purchase [of] a game" (Court Book p 347),

"Steam is a broadband platform for direct software delivery" (Court Book p 598), "Steam… [a]llows you to purchase and immediately download games via the internet" (Court Book p 598). Steam provides a "software product" (Court Book p 164), "[a]s with most software products…" (Court Book p 199).

141 Valve submitted that there was no supply of goods to any consumer because consumers require 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.

142 This submission omits relevant facts and, in any event, cannot be accepted. The facts omitted are that a consumer can play Steam video games without a connection to the internet, and without verification of his or her account or subscriptions. As I have explained, a consumer can choose "offline" mode in the Steam Client and can play any games in his or her library without any communication with Steam's servers. Communication would be needed if the games were to be updated or if the consumer wished to play against another player on the internet. But the significance of the "offline" mode is that it shows that the consumer has been provided with software which can be used without any further communication with Valve's servers. A particular example is the game "Legends of Dawn" which was purchased by Mr Miles, a witness who gave affidavit evidence for the ACCC, to play as a single player game, locally on his computers, without a requirement for access to a server.

143 Valve's submission essentially relies upon a distinction between a licence to use and a property right. Valve submitted that the Licence Agreement (which, by cll 1 and 3, confers only a non-exclusive licence to install copies of the program for personal use until termination) was not a property right. Similarly, Valve pointed to each version of the SSA (cl 2) which confers "a limited, terminable, non-exclusive license and right to use the Software…" . Each version of the SSA, in the same clause, also provides that the software is licensed and not sold. Valve asserted that a mere licence could not be a "supply of goods".

144 It was not in dispute that the Licence Agreement when a consumer downloaded Steam Client and the SSA conferred a contractual licence upon consumers. A contractual licence was described by Dixon J as operating "as a bare permission to do what would otherwise by an invasion of the licensor's rights. If the permission is terminated, further continuance of the acts it authorized becomes wrongful": *Cowell v Rosehill Racecourse Co Ltd* [1937] HCA 17;

(1937) 56 CLR 605, 630-631. In Hohfeldian terms, a contractual licence is not a mere privilege. It confers claim rights against the licensor not to act contrary to the terms of the licence. But the licence itself does not confer any property right. As Vaughan CJ said in *Thomas v Sorrell* (1673) Vaugh 330, 351; (1673) 124 ER 1098, 1109, "[a] dispensation or licence properly passeth no interest, nor alters or transfers property in any thing, but only makes an action lawful, which without it had been unlawful".

145 I reject Valve's submission that goods supplied by licence are not a "supply of goods" for two reasons corresponding to inconsistency with the text of the *Australian Consumer Law* and inconsistency with its purpose.

146 **First**, this submission is inconsistent with the definition of "supply". The inclusive definition of supply is contained in s 2 of the *Australian Consumer Law*. That definition provides that when "supply" is used as a verb it *includes*:

> (a) in relation to goods–supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase

147 Section 11(b) provides that "a reference to the supply or acquisition of goods or services includes a reference to *agreeing to supply* or acquire goods or services" (emphasis added).

148 A contractual licence to use goods is, essentially, a hire without a bailment. In *TRM Copy Centres (UK) Ltd v Lanwall Services Ltd* [2009] UKHL 35; [2009] WLR 1375, 1380 [9] Lord Hope (with whom Lords Hoffmann, Rodger, Walker, and Baroness Hale agreed) said that a "hire", without the accompanying baggage of "bailment" of the thing was "a contract by which the temporary use of a subject, or the work or service of a person, is given for an ascertained hire". He quoted a definition from Bell GJ, *Commentaries on the Law of Scotland* (McLaren's ed, (7th ed, T & T Clark, 1870)), Vol I, 481:

> The contract of hiring, or *locatio conductio*, is that by which the one party agrees, in consideration of a certain hire or rent which the other engages to pay, to give to that other, during a certain time, the use or occupation of a thing; or personal service and labour; or both combined.

149 The reference to a *locatio conductio* or, more accurately here, *locatio conduction rei* is to the Roman law concept of hire where the use and occupation of the thing gave no possessory right but only "detention" of the thing as a personal right against the hirer. Apart from examples of *agreement to hire*, another example in English law of a hire that has no possessory effect is the hire of a ship (which is included in the inclusive list of goods in s 2).

The hire of a ship is shorn from any association with bailment: *Port Line Ltd v Ben Line Steamers Ltd* [1958] 2 QB 146 (Diplock J).

150 There may be controversy about whether a hire of goods ever gives the hiree anything more than a contractual licence. The better position is that the hiree does not obtain any proprietary right by the hire. In relation to goods (but not land) English and Australian law does not recognise a property right of "exclusive control for a fixed period": McFarlane B, *The Structure of Property Law* (Hart Publishing, Oxford, 2008) 148-149; see also Swadling W, "The Proprietary Effect of a Hire of Goods" in Palmer N and McKendrick E, *Interests in Goods* (2nd ed, LLP, London, 1998) Ch 20. But this controversy cannot be used to restrict the meaning of a "supply" of goods because, on any view, a mere agreement to hire an ordinary chattel gives the hiree no more than a personal right against the hirer to the hire of the chattel.

151 Further, the statutory definition of supply is only an inclusive definition. As Logan J said in *Australian Competition and Consumer Commission v Flight Centre (No 2)* [2013] FCA 1313; (2013) 307 ALR 209, 241 [130] (on a point not raised on appeal with reference to the broad concept of supply: *Flight Centre Limited v Australian Competition and Consumer Commission* ([2015] FCAFC 104; (2015) 324 ALR 202, 219-220 [78]-[80]):

> Such is the breadth of the ordinary meaning of the word "supply", "[t]o provide, or provide with, something. a. *trans;* to furnish or provide (a person) with something; (in early use) to satisfy the wants of, provide for; (now usually) to furnish with regular supplies of a commodity. Freq. with *with*" (Oxford English Dictionary, online edition, accessed 14 Nov. 2013), I doubt that the inclusive quality of the s 4 definition [identical to the definition in s 2 of the *Australian Consumer Law*] adds much, if anything, to the meaning of the word for the purposes of the TPA. It has long been regarded as a word of wide import: *Commonwealth of Australia v Sterling Nicholas Duty Free Pty Ltd* [1972] HCA 19; (1972) 126 CLR 297 at 309. That said, statutory context and subject matter, scope and purpose of the Act and the provision in which a term appears are always relevant considerations when considering its meaning.

152 Similarly, Lockhart J said in *Castlemaine Tooheys Ltd v Williams & Hodgson Transport Pty Ltd* (1985) 7 FCR 509, 532 that "'Supply' is a word of wide import". Although the decision was reversed in the High Court, the High Court did not remark upon what Lockhart J had said about the breadth of this definition of supply. His Honour's remarks were not expressed in a way that excluded the provision of goods by way of a licence.

153 **Secondly**, if the *Australian Consumer Law* were to apply Valve's restricted construction of supply of goods the consequences would be very surprising indeed. For instance, unconscionable conduct provisions such as s 21, or unfair term provisions such as s 23,

would apply to sales but not to contracts involving provision of a licence. Or a person would be prohibited from selling or even "offering for supply" any goods which do not comply with a safety standard (ss 106, 194) but not from actually providing those goods by licence.

154 Valve pointed to the verification element involved in its provision of computer software to a consumer. It submitted that the digital bits in the computer software provided to a consumer are not playable without authentication from Valve because they are not executable until communication occurs with Valve's servers in Washington State. It also submitted that when the consumer's licence was terminated the consumer could no longer play any game.

155 Again, this submission ignores the possibility of playing games offline, at least until the consumer goes online and the licence terminates. But, in any event, the verification requirement that Valve imposes upon consumers who wish to play Steam games *when they connect to the internet* does not prevent the computer software from being "supplied". Almost every imaginable hire or licence of a good is conditional upon some event. A person who enters a licence agreement to hire a car agrees to comply with many conditions. And the hire of a car by licence does not cease to be a supply of goods if the hire company has a right to terminate the licence upon any event such as failure to pay the hire fee or mistreatment of the car.

156 I do not accept the ACCC's primary submission that *everything* that was supplied by Valve under the SSA was a supply of a good. As I have explained, some matters provided were not goods. For instance, the non-executable data which accompanied, and was incidental to, the computer software was not a good although it is hard to see how it could be decoupled from the computer software. It may also be that Valve provided a number of services which did not involve the provision of any "thing" which could fall within the definition of a good. On the evidence before the Court, it is difficult to assess whether the extent to which, if at all, any of the non-game matters provided by Steam involved the provision of a service rather than computer software. For instance, Steam Guard (security protection for a customer's account) or Steam Play (a feature that allows customers to play games on different platforms) or Steams Videos (which allows subscribers to watch videos) might all require software to be operational.

157 Although not *everything* Valve supplied was a good, the important point for the purposes of this case is 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. It is

noteworthy that the three consumers who gave evidence for the ACCC all said that they considered that the basic thing that they were purchasing was computer software. Of these three, Mr Miles had considerable knowledge and expertise in this area. As I explain later in these reasons, he is a 31 year old computer programmer and software developer who has played video games since he was 8. He has worked as a research assistant and software developed in the computer science department of the University of New England. He participates in tests for new games and often plays games around 3 times a week.

(3) Issue 3: Whether Valve's conduct was in Australia or whether Valve carries on business in Australia

158 This issue raises the question of whether the *Australian Consumer Law* applies at all to these circumstances. It is necessary to consider first whether Valve's conduct was "in Australia" before considering whether Valve "carries on a business in Australia". This is because this trial proceeded on the basis that the latter question only arises by the extended operation of the *Competition and Consumer Act* if Valve's conduct was not in Australia.

The test for whether Valve's conduct was in Australia

159 The parties conducted this litigation on the basis that it was necessary for the ACCC to prove that Valve's conduct was in Australia or, if not, that the extended provisions of the *Competition and Consumer Act* applied to extend the operation of that Act to conduct outside Australia. That assumption appears to have been based upon the provision in s 131(1) of the *Competition and Consumer Act* which provides that the *Australian Consumer Law* "applies as a law of the Commonwealth to the conduct of corporations, and in relation to contraventions of Chapter 2, 3 or 4 of Schedule 2 by corporations". It seems that the assumption of the parties is that the "and" in s 131(1) is not a disjunctive application of two circumstances in which the *Australian Consumer Law* applies as a law of the Commonwealth. In other words, the parties assumed that it was necessary for the ACCC to prove *both* that there was "conduct of a corporation" *and* that the conduct was "in relation to contraventions of Chapter 2, 3 or 4 of Schedule 2 by the corporation" even if the contravening conduct implicitly involved a separate connection with Australia (such as a supply of goods in Australia). In light of the conclusions I have reached on this issue, and in the absence of argument on this point, it suffices to proceed also on that assumption.

160 Section 4(2)(a) of the *Competition and Consumer Act* provides that a reference in the Act to "engaging in conduct" shall be read as

> a reference to doing or refusing to do any act, including the making of, or the giving effect to a provision of, a contract or arrangement, the arriving at, or the giving effect to a provision of, an understanding or the requiring of the giving of, or the giving of, a covenant…

161 The relevant conduct in this case which must be characterised to determine whether it is conduct "in Australia" is the conduct which amounted to alleged contraventions of ss 18(1) and 29(1)(m). As I explain in more detail in relation to issue (4) below, the core of that conduct involved representations by Valve on its website, in chatlogs to consumers, and through Steam Client.

162 Valve submitted that it did not engage in conduct in Australia. In written submissions it said that it is a foreign corporation, with business premises and staff all located outside Australia. It said that it holds no real estate in Australia and hosts its website outside Australia. It said that it provides support services outside Australia. It said that the Steam content is not "pre-loaded or stored" on Valve's servers in Australia. It said that payment for subscriptions is made in United States dollars and processed in Washington State.

163 All of these matters can be accepted. But it is curious that Valve's written submissions made no mention of all the connections that it *did* have to Australia, including in relation to each of these matters:

(1) Although it has no real property in Australia, it has significant personal property, namely servers in Australia which, at the time of acquisition, had a retail value of $1.2 million.

(2) Although it has no staff in Australia, it had approximately 2.2 million subscriber accounts in Australia. Its Australian servers were initially configured by an employee who travelled to Australia (ts 122).

(3) Although its support services are provided outside Australia, those support services provide support for subscribers including the 2.2 million accounts in Australia.

(4) Although the Steam content is not "pre-loaded or stored" on Valve's servers in Australia, Mr Dunkle's evidence was that it is "deposited" on Valve's three servers in Australia when requested by a subscriber and will stay on the server if it is requested again in a particular period of time.

(5) Although payment for subscriptions is in United States dollars and processed in Washington State, the payments include those made by Australian consumers *to* Valve and, against that revenue are expenses including payments of tens of thousands

> of dollars per month *by* Valve to the Australian bank account of an Australian company (Equinix).

164 These matters are the background to the core focus which is upon whether Valve's representations can be described as having been made in Australia.

165 Valve's submission that its representations were not made in Australia relied heavily upon a submission that the representations were not *directed* to anyone in Australia. In this regard Valve referred to the decision of Merkel J in *Bray v F Hoffman-La Roche Ltd* [2002] FCA 243; (2002) 118 FCR 1.

166 In *Bray*, a representative proceeding was brought for breach of s 45 of the *Trade Practices Act* as a consequence of cartel conduct. The respondents denied that the Court had jurisdiction. They sought to set aside service of the originating process on them. One question was whether the respondents had engaged in conduct in Australia. Counsel for both parties in this case referred to various passages of the decision of Merkel J and it was not suggested that anything said on the appeal to the Full Federal Court had affected these passages (*Bray v F Hoffmann-La Roche Ltd* [2003] FCAFC 153; (2003) 130 FCR 317).

167 In the course of considering whether the conduct of the respondents was "in Australia", Merkel J, at 45 [145]-[147], considered the location of communications implementing the cartel arrangement. His Honour referred to the decision in *Voth v Manildra Flour Mills Pty Ltd* [1990] HCA 55; (1990) 171 CLR 538, 567-568. In that case, a joint judgment of Mason CJ, Deane, Dawson, and Gaudron JJ in the majority said at 568:

> But in every case the place to be assigned to a statement initiated in one place and received in another is a matter to be determined by reference to the events and by asking, as laid down in *Distillers*, where, in substance, the act took place.

168 The reference to *Distillers* was a reference to the decision of Lord Pearson, speaking for the Judicial Committee of the Privy Council on appeal from the Court of Appeal of the Supreme Court of New South Wales, in *Distillers Co (Biochemicals) Ltd v Thompson* [1971] 2 WLR 441; [1971] AC 458. That case concerned the meaning of "cause of action" in s 18(4) of the *Common Law Procedure Act 1899* (NSW). The Privy Council held that it meant "the act on behalf of the defendant which gave the plaintiff his cause of complaint" (468). In applying this test, the Privy Council in *Distillers* affirmed the approach in *Jackson v Spittall* (1870) LR 5 CP 542. In that case, five judges of the Court of Common Pleas considered the meaning of the words "cause of action that arose within the jurisdiction". At 552, their Honours

concluded that, in the words of the joint judgment in *Voth* (at 567), "the question whether a cause of action is to be classified as local or foreign is to be answered by ascertaining the place of 'the act on the part of the defendant which gives the plaintiff his cause of complaint".

169 Valve submitted that the same approach should apply to the characterisation, for the purposes of s 131(1) of the *Competition and Consumer Act*, of whether there was "conduct of a corporation" in Australia. There are some parallels, but an approach developed in the context of determining where a common law cause of action arose should not be automatically transplanted when the relevant question is a different statutory question. As French J said of s 5 of the *Trade Practices Act* in *Paper Products Pty Ltd Tomlinsons (Rochdale) Ltd (No 2)* (1993) 44 FCR 485, 493, "it is necessary to consider not where the cause of action arose but where the conduct relied upon took place". This question of where the conduct relied upon took place focuses only upon the representations made by the ACCC on its website, on Steam Client, and on chat logs. This question is also quite different from the jurisdiction with the closest and most real connection to the consumers' contract.

Where the conduct relied upon took place

170 Although the common law cause of action approach in *Voth* should not be automatically transplanted to the question of application of a statutory test for where the conduct took place, the decision in *Voth* has been relied upon in a number of cases as informing the statutory approach. For that reason it is necessary to consider it in further detail.

171 The decision in *Voth* concerned whether New South Wales was a clearly inappropriate forum such that a stay of proceedings would be ordered. An action had been brought in New South Wales by a New South Wales company against a Missouri accountant for professional negligence. It was alleged that the accountant had been negligent by failing to draw to the attention of the company the possibility of a withholding tax liability. It was in the context of this question that the High Court of Australia considered whether the tort of negligence was a foreign tort.

172 In the course of addressing the concern that the receipt of a statement might differ from the place where it is acted upon, the joint judgment in *Voth* said that an act can pass "across space or time before it is completed". Their Honours continued (at 568) saying that:

> If a statement is directed from one place to another place where it is known or even anticipated that it will be received by the plaintiff, there is no difficulty in saying that the statement was, in substance, made at the place to which it was directed, whether

> or not it is there acted upon. And the same would seem to be true if the statement is directed to a place from where it ought reasonably to be expected that it will be brought to the attention of the plaintiff, even if it is brought to attention in some third place.

173 I will refer to the circumstance where a statement is "directed from one place to another place where it is known or even anticipated that it will be received by the plaintiff" as the "directed" element. Valve essentially relied upon these remarks, and their approval in other cases, concerning this directed element. However, the joint judgment in *Voth* did not *require* that a statement or representation be directed at a recipient. Their Honours were considering whether the negligence of the accountant was committed outside Australia, and rejecting the suggestion that the substance of the tort of negligent misstatement is always committed where the statement is received and acted upon. They said that there was no such general rule, "for a statement may be received in one place and acted upon in another" (at 568).

174 The point being made in *Voth* was that where a statement which is directed to, or known or anticipated to be received by a person, there will be no difficulty in saying that the statement is made at that place rather than where the statement is acted upon. Another way of putting this point is to say that the remarks about "directing" a statement to a person reflected the usual essence of liability for negligent misrepresentation which is an assumption of responsibility to a person: see *Swick Nominees Pty Ltd v Leroi International Inc (No 2)* [2015] WASCA 35; (2015) 48 WAR 376, 443-446 [368]-[381].

175 Even if the joint judgment had insisted upon such a "directed requirement" for negligent misstatement (which it did not), this "directed" requirement should not be transplanted to the test for the location of the conduct relied upon in an action for contravention of very different statutory norms in ss 18(1) and 29(1)(m) which do not have an assumption of responsibility as a usual indicator of liability. Further, the cases in relation to characterising various different conduct under the *Trade Practices Act* have emphasised that it is not necessary that it be directed at a particular person. For instance, in *Australian Competition and Consumer Commission v Chen* [2003] FCA 897; (2003) 132 FCR 309, it was sufficient for a conclusion that website representations were made in Australia where they suggested a connection between American websites and the Sydney Opera House. See also *Ward Group Pty Ltd v Brodie & Stone plc* [2005] FCA 471; (2005) 143 FCR 479, 490 [40] (Merkel J); *Australian Competition and Consumer Commission v Yellow Page Marketing BV* [2010] FCA 1218 [22] (Gordon J).

176 Although there is no "directed" requirement in *Voth* and although such a requirement cannot be transplanted to the characterisation of different statutory norms in ss 18(1) and 29(1)(m), it is important to note that the joint judgment did *not* say that the negligent misstatement was made in the place where it was uttered. The reason why such a general rule should be rejected is not merely because actionable negligence requires proof of loss. It is also because negligence in thin air is meaningless. In his famous decision in *Palsgraf v Long Island Railroad Co* 162 NE 99, 101 (NY CA, 1928), a judgment described by Professor Beever as one which vies for "the greatest single judgment in the history of the law of negligence", Cardozo CJ explained that "Negligence, like risk, is thus a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all": Beever A, *Rediscovering the Law of Negligence* (Hart Publishing, Oxford, 2007) 125-126.

177 The same can be said of the conduct in this case. As counsel for the ACCC colourfully submitted, if she were to stand in a soundproof room and scream at the top of her lungs that she was not applying the consumer guarantees in Australia then nobody would be misled or likely to be misled (ts 283). That is not the conduct upon which the norms in ss 18(1) or 29(1)(m) of the *Australian Consumer Law* attach. Instead, the relevant conduct upon which the ACCC rely is representations relating to the supply of goods. Throughout this trial Valve contended, and the ACCC conceded, that an essential element of the conduct upon which the ACCC relied was that the representations concern the supply of goods.

178 I do not accept Valve's submission that the conduct upon which the ACCC relied occurred in Washington State. The background to the conduct was described above at [163]. That background involves a significant Australian context.

179 The chat log representations were specifically made to individual Australian consumers. They concerned the supply of goods in Australia.

180 The Steam Client representations also concerned the supply of goods in Australia and were also made specifically to the consumers who had downloaded the Steam Client in Australia and in the course of doing so had accepted the terms of the Licence Agreement and SSA. Again, when those consumers purchased a game they would have chosen Australia as their country. But even without specifically being told that the consumer was in Australia, the downloading of Steam Client in Australia and the agreement to Steam's terms and conditions established a direct relationship between Valve and the Australian customer. This is in a context in which Valve had established game servers in Australia, it had content delivery

networks in Australia, and it knew it had approximately 2.2 million subscribers in Australia. It intended to make representations to each Australian consumer who downloaded Steam Client.

181 The website representations are less simple. Considered by themselves, they were general representations to the world at large. They are not representations to any person or to any Australian consumer. Until the representations were accessed, the representations were meaningless and could not be the subject of any alleged contravening conduct. But, by the time a consumer had purchased a game or downloaded Steam Client the consumer had a relationship with Valve and representations were made in Australia. The purchase of a game also required a consumer to click on a box that agreed to the terms of the SSA. The consumer provided Valve with his or her location as Australia at the time of purchase. Indeed, Valve priced some games differently in Australia (ts 120-121). The consumer might be told by Valve that "This item is currently unavailable in your region" (Court Book 347).

182 For these reasons I conclude that each of the classes of representation involved conduct in Australia. However, for completeness, I explain below two further decisions upon which the parties made substantial submissions.

183 The first of these decisions is the decision of Merkel J in *Ward Group Pty Ltd v Brodie & Stone plc* [2005] FCA 471; (2005) 143 FCR 479. In that case, the applicant had registered Australian trade marks which it alleged had been infringed by the advertising and sale of products on the internet by the respondents. The advertising targeted potential purchasers anywhere in the world. And apart from "trap purchases" by the applicant's solicitors there was no evidence of any purchases in Australia. Justice Merkel considered claims for passing off and for trade mark infringement. This decision can be distinguished on the basis that it was concerned with the characterisation of different conduct for the purposes of a different statute with different underlying norms. But, in any event, in relation to his conclusion, the approach taken by the primary judge is consistent with the reasoning I have set out above.

184 Senior counsel for Valve referred only to the claims for trade mark infringement in *Ward Group*. But, in relation to the claim for passing off, the primary judge said that although no representations were made in Australia because the website did not target Australian consumers and no innocent consumer had made a purchase (at 488 [33]), the "trap purchasers" who did make purchases *were* persons to whom the representations were specifically directed once they had read the website. His Honour said (at 488 [34]):

> the trap purchasers, being the persons who procured the representations to be made in Australia *and being the only persons in Australia to whom the representations were specifically directed*, were well aware that the Restoria mark used on the websites was, and was intended to be, related to the UK Restoria products and not the Australian Restoria products. (Emphasis added).

185 The passing off claim ultimately failed because no damage had been proved. And the trade mark infringement claim failed because the use of a trade mark on the internet merely by uploading on a website outside Australia was not a use by the website proprietor in every jurisdiction in which the mark is downloaded. Hence, in the absence of any evidence of innocent purchases, there was no infringing use of the trade mark by any innocent person, although his Honour concluded that an occasion of specific use was when the trap purchasers were informed that their orders had been accepted (491 [44]).

186 The second further decision to which Valve referred was *Dow Jones and Company Inc v Gutnick* [2002] HCA 56; (2002) 210 CLR 575. The principal issue in that case, as Gleeson CJ, McHugh, Gummow and Hayne JJ explained in the joint judgment (at 595 [4]), was whether the Supreme Court of Victoria was a clearly inappropriate forum for the trial of a defamation action concerning material published on the internet. This raised the question: "where was the material of which Mr Gutnick complained published"?

187 As senior counsel for Valve rightly submitted, the decision in *Dow Jones* is of limited assistance in relation to characterising the conduct for the purposes of the statutory norms in ss 18(1) and 29(1)(m). This is because the focus of the law of defamation is damage by publication. As their Honours said in the joint judgment (600 [26]):

> Harm to reputation is done when a defamatory publication is comprehended by the reader, the listener, or the observer. Until then, no harm is done by it. This being so it would be wrong to treat publication as if it were a unilateral act on the part of the publisher alone. It is not. It is a bilateral act - in which the publisher makes it available and a third party has it available for his or her comprehension.

188 Later in their Honours' reasons, after explaining the significance of damage in defamation cases (as the gist of the action), their Honours explained that this required rejection of the submission that the publication of defamatory material occurred in a single place (ie the place of uploading by the publisher to its servers). Their Honour's contrasted this rejection (at 606 [43]) with cases, like trespass or negligence, "where some quality of the defendant's conduct is critical, it will usually be very important to look to where the defendant acted, not to where the consequences of the conduct were felt". Equally, in this case, the concern of the conduct in ss 18(1) and 29(1)(m) is not where the consequences of misleading or false representations

might be felt (such as loss suffered). The concern is where Valve *acted.* And the relevant acts to which ss 18(1) and 29(1)(m) are directed is the representations to consumers who (i) downloaded Steam Client in Australia, or (ii) entered contractual relationships with Valve through agreeing to the terms and conditions of the SSA, involving representations concerning the supply of goods, or (iii) corresponded with Valve representatives on chat logs. The same point can be made about these acts as the joint judgment made about harm in *Dow Jones* (at 600 [26]) quoted above: they are bilateral acts.

Whether Valve carries on business in Australia

189 The next issue would only arise if I had concluded that Valve's conduct was not in Australia. However, since the parties dealt with this issue in comprehensive detail I will express my views about it. It was a submission put eloquently by Valve but it can be quickly dismissed: see *Popov v Hayashi* (Cal Super Ct, No 400545, 18 December 2002) fn 6 (McCarthy J).

190 Section 5(1)(g) of the *Competition and Consumer Act* provides that the provisions of the *Australian Consumer Law* relevant to this litigation extend to "the engaging in conduct outside Australia by… bodies corporate incorporated or carrying on business within Australia". Valve submitted that this extended operation did not apply to it because it was not "carrying on business within Australia". There is no definition of that phrase.

191 Valve submitted that the mere supply of goods or services to persons within Australia for profit cannot be sufficient to amount to "carrying on business within Australia". This was said to be because s 5(2) provided for a further extension concerning matters of mere supply, but only in relation to ss 47 and 48. I do not accept this submission.

192 Section 5(2) of the *Competition and Consumer Act* provides that:

> In addition to the extended operation that sections 47 and 48 have by virtue of subsection (1), those sections extend to the engaging in conduct outside Australia by any persons *in relation to* the supply by those persons of goods or services to persons within Australia. (Emphasis added).

193 Section 5(2) is not merely an extension to the "supply of goods or services to persons within Australia". The important words in s 5(2) are "in relation to". Those words are an "expression of wide and general import": *Fountain v Alexander* [1982] HCA 16; (1982) 150 CLR 615, 629 (Mason J); *O'Grady v Northern Queensland Co Ltd* [1990] HCA 16; (1990) 169 CLR 356, 374 (Toohey and Gaudron JJ).

194 The point of s 5(2) is to extend the operation of s 47 (exclusive dealing) and s 48 (resale price maintenance) to conduct which might be engaged in by persons who do not supply goods or services within Australia but who engage in conduct outside Australia *in relation to* a supply of goods or services within Australia.

195 There is little direct authority on the meaning of "carrying on business within Australia" within s 5(1)(g) of the *Australian Consumer Law* or its predecessor. Although the parties referred to numerous authorities, those cases concerned different legislation which sometimes had very different definitions (eg s 21 of the *Corporations Act 2001* (Cth)). In circumstances where courts have considered the definitions in the same terms as "carrying on business within Australia" the concepts have been applied according to their ordinary meaning, and the cases say little more than this.

196 For instance, in *Bray* at 17-18 [59]-[60], Merkel J referred to the parties' acceptance that expression "carrying on business in Australia" should be broadly interpreted in light of its purposes of consumer protection to enable the *Trade Practices Act* to apply to conduct that is intended to have, and has, an adverse effect on competition in Australia. His Honour continued, saying that:

> The expression "carrying on business" is not defined although s 4(1) defines "business" as including a business not carried on for profit. As was pointed out by Gibbs J in *Luckins v Highway Motel (Carnarvon) Pty Ltd* [1975] HCA 50; (1975) 133 CLR 164 ("*Luckins*") at 178 the expression "may have different meanings in different contexts". The present context is s 5(1), which gives effect to the legislature's view that comity, for the purposes of the TPA, requires that a particular nexus with Australia exist (ie citizenship or residence by a person or incorporation or the carrying on of business in the case of a body corporate) if certain Parts of the TPA are to apply to conduct engaged in outside of Australia by those persons or bodies corporate. As is clear from the judgments in *Meyer Heine* it was open to the legislature, as a matter of power and comity, to impose a lesser nexus requirement (eg intended and actual anti-competitive consequences in Australia) but it chose not to do so. In that context the expression should be given its ordinary or usual meaning.

197 As his Honour concluded, the ordinary meaning of "carrying on business" usually involves (by the words "carrying on") a series or repetition of acts. Those acts will commonly involve "activities undertaken as a commercial enterprise in the nature of a going concern, that is, activities engaged in for the purpose of profit on a continuous and repetitive basis": see *Thiel v Federal Commissioner of Taxation* [1990] HCA 37; (1990) 171 CLR 338, 350 (Dawson J); *Pioneer Concrete Services Ltd v Galli* [1985] VicRp 68; [1985] VR 675, 705 (the Court); *Hope v Bathurst City Council* [1980] HCA 16; (1980) 144 CLR 1, 8-9 (Mason J; Gibbs, Stephen and Aickin JJ agreeing).

198 In this ordinary sense of carrying on a business, Valve undoubtedly carried on a business in Australia for six reasons.

199 **First**, as I have explained, Valve had, and has, many customers in Australia with approximately 2.2 million Australian accounts. It earned significant revenue from Australian customers on an ongoing basis.

200 **Secondly**, Steam content is "deposited" on Valve's three servers in Australia when requested by a subscriber. It will stay on the server if it is requested again in a particular period of time.

201 **Thirdly**, Valve has significant personal property and servers located in Australia which, at the time of acquisition, had a retail value of $1.2 million. Its Australian servers were initially configured by an employee who travelled to Australia (ts 122). They were updated in 2013 by another employee who visited Australia. Valve paid invoices including, in one case $436,389, to an Australian company (Equinix) into its Australian bank account for equipment involving servers (Court Book pp 676-677).

202 **Fourthly**, Valve incurs tens of thousands of dollars per month of expenses in Australia for the rack space, and power to its servers. Those expenses are paid by Valve to the Australian bank account of an Australian company (Equinix).

203 **Fifthly**, Valve relies on relationships with third party members of content delivery providers in Australia (such as Internode or ixaustralia) who provide proxy caching for Valve in Australia.

204 **Sixthly**, Valve has entered into contracts with third party service providers, including companies such as Highwinds, who provide content around the world, including in Australia. Valve is aware that Highwinds has servers in Australia (ts 111) and that it is sometimes more efficient for customers in Australia to be provided content from servers in Australia (ts 112).

205 For these reasons, even if Valve did not engage in conduct in Australia, the *Australian Consumer Law* was engaged because it was an incorporated body which was carrying on business in Australia.

(4) Issue 4: Did the representations contravene s 18(1) or s 29(1)(m)?

206 The ACCC's statement of claim pleaded numerous separate representations across three different forums. Many of the representations pleaded were very similar. Many representations were pleaded where the representations formed part of the same course of

conduct. These are matters that can be addressed at the remedies hearing. However, it may be that this overly cautious pleading by the ACCC was justified because (i) the different media in which the representations were made became a focus of some of Valve's submissions concerning whether its conduct was in Australia, and (ii) Valve's submissions focused very closely upon the particular words of every representation even where some representations differed from others only in very minor respects. It is therefore necessary to consider each pleaded representation individually.

The legal principles concerning s 18(1) and s 29(1)(m)

207 Counsel for the ACCC summarised a number of relevant legal rules relevant to this case concerning the approach to s 18(1) of the *Australian Consumer Law*. Some of those helpful submissions require qualification but they were not generally in any dispute. With the exception of the seventh matter below, most of the principles are now well known. The relevant rules are set out briefly below.

208 The legal rules concerning s 18(1) are generally similar to those concerning s 29(1)(m). But there are important differences. Some of the differences were not material in this case. Three examples can be given.

209 First, there was no suggestion that anything in this case turned upon any distinction between a "representation" and "conduct". The ACCC relied in each case only upon representations said to derive expressly, or by implication, from various statements.

210 Secondly, other than the issue discussed above concerning whether goods were supplied, Valve did not dispute that the alleged representations were "*in connection with* the supply or possible supply of goods" or that they concerned "the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (including a guarantee under Division 1 of Part 3-2".

211 Thirdly, and possibly relevant to the representations to individual consumers, the ACCC made no submission to explain how any of the representations might be false (within s 29(1)(m)) even if they were not misleading (within s 18(1) and s 29(1)(m)). It is necessary to return to this point later in these reasons. With that context, the relevant legal rules are set out below concerning conduct or representations that are misleading or deceptive or likely to mislead or deceive.

212 **First**, the process of characterising whether conduct addressed to the public at large is misleading or deceptive or likely to mislead or deceive generally requires consideration of whether "the impugned conduct *viewed as a whole* has a tendency to lead a person into error" (emphasis added): *Campbell v Backoffice Investments Pty Ltd* [2009] HCA 25; (2009) 238 CLR 304, 319 [25] (French CJ). This is assessed objectively. Although evidence that a particular person has been misled or deceived might be taken into account, that evidence is not necessary nor is it always sufficient. The objective characterisation also means that conduct which is only misleading for a temporary period might still amount to misleading or deceptive conduct when viewed as a whole. Further, it is unnecessary to establish that any actual or potential consumer has taken or is likely to take any positive step in consequence of the misleading or deception.

213 The need for objective assessment of the conduct in light of all circumstances, and as a whole, was emphasised by Gummow, Hayne, Heydon and Kiefel in *Campbell v Backoffice Investments Pty Ltd* [2009] HCA 25; (2009) 238 CLR 304, by reference to *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60; (2004) 218 CLR 592, 625 [109] (McHugh J) (footnotes omitted):

> The question whether conduct is misleading or deceptive or is likely to mislead or deceive is a question of fact. In determining whether a contravention of s 52 has occurred, the task of the court is to examine the relevant course of conduct as a whole. *It is determined by reference to the alleged conduct in the light of the relevant surrounding facts and circumstances. It is an objective question that the court must determine for itself. It invites error to look at isolated parts of the corporation's conduct. The effect of any relevant statements or actions or any silence or inaction occurring in the context of a single course of conduct must be deduced from the whole course of conduct.* Thus, where the alleged contravention of s 52 relates primarily to a document, the effect of the document must be examined in the context of the evidence as a whole. The court is not confined to examining the document in isolation. It must have regard to all the conduct of the corporation in relation to the document including the preparation and distribution of the document and any statement, action, silence or inaction in connection with the document.

214 One consequence of the need to consider the conduct in light of all relevant circumstances is that any allegedly misleading representation must be read together with any qualifications and corrections to that statement. Hence, although a qualification to a statement might be effective to neutralise an otherwise misleading representation, this might not always be so, particularly if the misleading representation is prominent but the qualification (often linked to the representation by an asterisk) is not: *Medical Benefits Fund of Australia Limited v Cassidy* [2003] FCAFC 289; (2003) 135 FCR 1, 17 [37] (Stone J). As Keane JA expressed

the point, the qualifications must have "the effect of erasing whatever is misleading in the conduct": *Downey v Carlson Hotels Asia Pacific Pty Ltd* [2005] QCA 199 [83].

215 **Secondly**, and flowing from the need to examine the alleged conduct in the light of the relevant surrounding facts and circumstances, the question of whether the effect of the conduct complained of answers the statutory description is one of fact to be answered in the context of the evidence. Conduct must be characterised by considering what was said and done against the background of all surrounding circumstances. The relevant context in which the conduct must be considered encompasses both:

(a) internal context such as surrounding words including the context which some words give to others; and

(b) external context such as the type of market, the manner in which such goods are sold, and the habits and characteristics of reasonable purchasers in such a market: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; (2013) 250 CLR 640, 656 [52]; *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* [1982] HCA 44; 149 CLR 191, 199 (Gibbs CJ); *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 634 [41] (Allsop CJ).

216 **Thirdly**, a respondent can be liable for misleading or deceptive conduct (or conduct likely to mislead or deceive) without intending to mislead or deceive: *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* [1978] HCA 11; (1978) 140 CLR 216, 228 (Stephen J, Jacobs J agreeing) 234 (Murphy J). There is also no need to prove fault: *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* [1982] HCA 44; (1982) 149 CLR 191, 197 (Gibbs CJ). Nor is there any requirement to prove knowledge of the misleading character of the conduct, nor a lack of good faith. Indeed, where, as in this case, the allegations of misleading or deceptive conduct consist of statements of past or present fact rather than a promise, prediction or opinion, the representor's state of mind is irrelevant to whether the representations were misleading or deceptive or likely to mislead or deceive: *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82, 88 (the Court).

217 **Fourthly**, where the conduct in issue consists of an "express representation" which is "demonstrably false", "it is not usually necessary to go beyond that finding" to conclude that it is misleading or deceptive: *Conagra Inc v McCain Foods (Aust) Pty Ltd* (1992) 33 FCR 302, 380 (French J). Further, as the Full Federal Court said in *Global Sportsman Pty Ltd*

(above), it is not merely an express false representation that will generally be contravening conduct. There can also be a contravention by "a statement which is literally true [but] may contain or convey a meaning which is false".

218 **Fifthly**, representations to the public must be considered by reference to the class of customers likely to be affected by the conduct: *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 202 (Mason J). It is necessary to isolate by some criterion a representative, reasonable, member of that class and the effect of the conduct must be tested against that representative member: *Campomar Sociedad Limitada v Nike International Ltd* [2000] HCA 12; (2000) 202 CLR 45, 85 [103] (the Court).

219 Plainly, this approach does not apply where the conduct is directed to a single person. In that circumstance, attention must be directed to the relationship between the two persons, the context in which the statement is made, the reasonably known characteristics of the recipient of the statement, and the effect on a reasonable person in the position of the recipient of the statement. In the context of discussing a required causal link in cases where a representation was made to an individual, Gleeson CJ said in *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60; (2004) 218 CLR 592, 604 [37]

> it is necessary to consider the character of the particular conduct of the particular agent in relation to the particular purchasers, bearing in mind what matters of fact each knew about the other as a result of the nature of their dealings and the conversations between them, or which each may be taken to have known.

220 **Sixthly**, an incorrect statement of the law can constitute misleading and deceptive conduct. In *Forrest v Australian Securities and Investments Commission* [2012] HCA 39; (2012) 247 CLR 486, the High Court considered the effect of representations by letters to the Australian Stock Exchange Ltd and media releases, including that a company "has entered into a binding contract". In the joint judgment of French CJ, Gummow, Hayne and Kiefel JJ, their Honours considered, as one possibility, that the representations "conveyed some message about 'legal enforceability'" (603 [32]). Their Honours said that although it was to be doubted whether the statements were statements of "fact", (603 [33])

> it is ultimately unprofitable to attempt to classify the statement according to some taxonomy, no matter whether that taxonomy adopts as its relevant classes fact and opinion, fact and law, or some mixture of these classes. It is necessary instead to examine more closely and identify more precisely what it is that the impugned statements conveyed to their audience.

221 The High Court concluded that the representations, in the context they had been made and to the audience that they were addressed, did not convey "a lawyer's question" about "what could or would happen in a court if the parties to the agreement fell out at some future time" such as relief that the court might grant. In the circumstances including the intended audience they did not convey a meaning that "the agreements the parties had made were not open to legal challenge in an Australian court". Rather, they conveyed "a statement of what the parties to the agreements understood that they had done and *intended* would happen in the future" (604 [37], 606 [43]).

222 Senior counsel for Valve submitted that the "caution" that emerges from the *Forrest* decision is that before a conclusion is reached that representations have been made about legal rights, "one really has to look at the context of what is said very closely" (ts 222). That can be readily accepted in a context such as that in which the representations in *Forrest* were made, by letters and media releases. The submission has less cogency when the representations are contained in a contract. Since "engaging in conduct" includes the "the making of, or the giving effect to a provision of, a contract or arrangement", representations contained within a contract are capable of being misleading or deceptive conduct: see *Competition and Consumer Act* s 2(2). Indeed, a contractual provision can constitute misleading conduct even towards persons who are not party to the contract. In *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia* (1993) 42 FCR 470, 506, Lockhart and Gummow JJ said that it is "no objection to relief [under provisions for breach of the equivalent of s 18(1)] that the misleading conduct is found in the making of a contractual provision, and the complainant does not have contractual privity with the defendant".

223 **Seventhly**, it is possible (and I put it no higher than that) that conduct can be likely to mislead even if it is directed towards a single person who is not misled. The opposite conclusion is sometimes thought to derive from the decision in *Taco Company of Australia Inc v Taco Bell Pty Ltd* [1982] FCA 136; (1982) 42 ALR 177, 197-199. In that case, the Full Court of the Federal Court observed that "no conduct can mislead or deceive unless the representee labours under some erroneous assumption" (200). Importantly, their Honours spoke only of conduct which "can mislead or deceive" rather than conduct which is *likely to* mislead or deceive. They continued, saying that the

> nature of the erroneous assumption which must be made before conduct can mislead or deceive will be a relevant, and sometimes decisive, factor in determining the factual question whether conduct should be characterised as misleading or deceptive

> or likely to mislead or deceive.

224 These observations were taken further by Ipp JA in *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* [2008] NSWCA 206 [610], although in the context also of considering the different question of "indirect causation" (as to which see, more recently, *Caason Investments Pty Ltd v Cao (No 2)* [2015] FCAFC 192). In *Ingot Capital*, Ipp JA said:

> In a case based on misleading conduct directed against identified individuals, and the person alleged to have been misled is not induced by the conduct in question to act or refrain from acting, there is no "erroneous assumption" in the sense required to establish misleading or deceptive conduct. The absence of an erroneous assumption is fatal to the cause of action based on misleading conduct. That is so irrespective of whether that absence is regarded as a failure to prove that the conduct is misleading or as a failure to prove causation.

225 The other members of the Court of Appeal in *Ingot Capital*, although agreeing generally with Ipp JA, did not express agreement on this point. Justice Hodgson reserved his opinion on this point. And in a separate judgment, Giles JA said at [43]:

> At its widest, if the representor reasonably believed that the individuals knew the truth and the individuals did know the truth, it would be difficult to find that making the representation was misleading or deceptive or likely to mislead or deceive.

226 His Honour considered (at [44]) that there may be misleading conduct (or, more strictly, conduct likely to mislead the individual) even if the individual was not in fact misled.

227 In this case, Valve did not seek to rely upon a proposition that conduct directed to an individual could never be misleading unless the individual was misled. I am therefore content to proceed on the same basis as Giles JA. As a matter of abstract concept I consider it to be correct. Conduct is not misleading merely because the person to whom it was directed was actually misled. Similarly, conduct does not lose the character of being *likely to* mislead merely because the person to whom it was directed was *not* actually misled.

228 Although there is a possibility that conduct towards an individual might be misleading even though that individual was not misled, this notion requires, at the least, some abstraction from the individual. The further that abstraction from the individual the more surreal will be the submission that conduct might be likely to mislead when it did not actually mislead. For instance, in what respect was the knowledge or response of the individual beyond that which a reasonable person in that individual's circumstances? What characteristics held by that individual would have been unexpected so that the representation was likely to mislead even though the individual was not misled. These matters were not addressed in this case.

Summary of the alleged representations

229 The ACCC made nine allegations of representations amounting to conduct which contravened s 18(1) and s 29(1)(m) of the *Australian Consumer Law*. As I have explained, there was overlap between those representations but submissions were made on each representation individually and it is necessary to consider each separately.

230 The representations derive from three separate sources: (i) the various versions of the SSA, (ii) the various versions of the Steam Refund Policy, and (iii) online chats between representatives of Steam Support and Australian consumers. The ACCC provided a chart which helpfully summarised the nine representations.

No.	Representation	Source	FASOC ref
1	No Entitlement to Refund Representation	SSA	[15]
2	Contractual Exclusion of Statutory Guarantee Representation	SSA	[19]
3	Contractual Modification of Statutory Guarantee Representation *[further or in the alternative to Representation 2]*	SSA	[21]
4	No Refund Policy Representation	Steam Refund Policy	[24]
5	No Entitlement to Refund or Replacement Unless Required by Local Law	Steam Refund Policy	[28]
6	No Obligation Where No Recourse to Developer Representation	Steam Support Rep	[62]
7	No Obligation to Refund Representation	Steam Support Rep	[64]
8	Non-Applicability of Statutory Guarantee Representation	Steam Support Rep	[66]
9	No Remedy Where Goods Used Representation	Steam Support Rep	[68]

231 One general submission made by Valve in relation to all these representations was that it changed its refund policy from 2 June 2015 and that the new refund policy has not been the subject of any complaint by the ACCC. Valve submitted that as far as it was concerned "that has resolved four of the nine alleged "representations" raised by the ACCC". It is unclear whether this submission in relation to representations 1, 4, 5, and 7 was intended to suggest that the change to the policy could prevent any contravention from having arisen or whether it was raised as a significant matter which might later be relevant to penalty. If the intention

was to make the former submission then it should be rejected. If the policy involved contravening conduct by representations 1, 4, 5, and 7 until 2 June 2015 then those contraventions would not be retrospectively extinguished by a subsequent change in Valve's terms and conditions, policy, and approach by its support representatives.

232 Valve also submitted that the SSA representations and the Steam Refund Policy representations would not have been understood by any consumer as making any representation concerning Australian legislation affecting their contractual rights. As I explain below, although the reasonable consumer would appreciate that the terms and conditions were directed to customers all over the world, the terms and conditions in the SSAs and the 2011-2013 and 2013-2014 Steam Refund policies (which also referred to those terms) were expressed in absolute terms. Those terms would have been consulted by a consumer wishing to know if he or she could obtain a refund. They conveyed the representation that no refunds would be, or were required to be, made in any location in the world. The 2012/2013 SSA and the 2013 SSA both also provided for a specific exception for customers in EU countries which further emphasises the unlimited geographic scope that the representations otherwise had.

The SSA representations

233 As I have explained, the three SSAs relevant to these proceedings were as follows: (1) the **2011/2012 SSA** (1 January 2011 to 2 August 2012); (2) the **2012/2013 SSA** (3 August 2012 to 2 July 2013); and the **2013 SSA** (3 July 2013 to 10 November 2014).

234 The representations in the three SSAs were relied upon by the ACCC as having been made to Australian consumers (i) who accessed the SSAs on the Steam website (including consumers who did so to set up an account or purchase a computer game on the website), or (ii) who accessed the SSAs through the Steam Client (such as when setting up a Steam account or purchasing a computer game).

235 Valve correctly submitted that the mode in which an Australian consumer accessed the SSAs could not change the content of the representation. On the evidence before the Court, it might be inferred that very few of the many consumers who accessed the SSAs would have read them. The three consumers who gave evidence in these proceedings all insisted, to different degrees, upon rights to a refund. But none of those consumers made any reference to any terms of an SSA in any correspondence with Steam representatives. It appears that only Mr

Miller may have read the terms of the SSA and formed the opinion that he was not able to obtain a refund, but tried to do so anyway.

236 The Australian consumers who were likely to be misled by representations in the SSAs could only be those few consumers who conscientiously read the terms and conditions of the SSAs, including the consumers who did so because they wished to know whether they could obtain a refund for a game that they considered to be defective. I accept the submission by Valve that such a meticulous consumer must be assumed to have read the whole contract, although not necessarily in close detail. That consumer would take more notice of those parts of the terms and conditions which were in capital letters. The reasonable consumer who is reading the SSAs would also understand that the terms and conditions in the SSAs were not directed only to consumers in Australia. It would not make any difference to that consumer's understanding of the SSA whether it was being read by the consumer through the Steam Client, or on the Steam website.

Representation 1 (in the SSAs)

237 The first alleged representation is that consumers had no entitlement to a refund from Valve for digitally downloaded video games they had purchased from Valve via the Steam website or Steam in any circumstances (**No Entitlement to Refund Representation**).

238 The ACCC relied upon the following statements in clauses of the SSAs:

2011/2012 SSA (1 January 2011 to around 4 August 2012)	Clause 4	9. BILLING, PAYMENT AND OTHER SUBSCRIPTIONS … B. Charges to Your Credit Card ALL STEAM FEES ARE PAYABLE IN ADVANCE AND ARE NOT REFUNDABLE IN WHOLE OR IN PART ... C. Steam Wallet ALL STEAM FEES ARE PAYABLE IN ADVANCE AND ARE NOT REFUNDABLE IN WHOLE OR IN PART ...
2012/2013 SSA and 2013	Clause 3	3. BILLING, PAYMENT AND OTHER

SSA (August 2012 to commencement of proceedings)		SUBSCRIPTIONS ALL CHARGES INCURRED ON STEAM, AND ALL PURCHASES MADE WITH THE STEAM WALLET, ARE PAYABLE IN ADVANCE AND ARE NOT REFUNDABLE IN WHOLE OR IN PART, REGARDLESS OF THE PAYMENT METHOD, EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT. IF YOU ARE AN EU SUBSCRIBER YOU HAVE THE RIGHT TO WITHDRAW FROM A PURCHASE TRANSACTION FOR DIGITAL CONTENT WITHOUT CHARGE ...

239 In the 2011/2012 SSA, the statements that Steam fees were not "refundable in whole or part" were:

(1) expressed without any qualification;

(2) contained in clause 4 which was entitled "BILLING, PAYMENT AND OTHER SUBSCRIPTIONS";

(3) were set out in capital letters which stood out strongly against the rest of the clause in lower case; and

(4) were repeated in relation to credit card and Steam Wallet purchases.

240 Valve submitted that this representation that fees were not refundable would be reasonably understood by consumers who read the SSA to mean that the fees are "not refundable *as a matter of contract*" but that "you have a different regime that is overlaid on top" of the contractual regime (ts 229-230). Senior counsel for Valve relied upon a separate provision, cl 15 at the conclusion of the SSA, entitled "Miscellaneous" which was not in capitals and which read:

> In the event that any provision of this Agreement shall be held by a court or other tribunal of competent jurisdiction to be unenforceable, such provision will be enforced to the maximum extent permissible and the remaining portions of this Agreement shall remain in full force and effect.

241 I do not accept that any reasonable consumer in the position of a user of Valve games who read the 2011/2012 SSA would reach the conclusion asserted by Valve. There is no reference to any possibility of any "different regime". The contractual term did not convey the message

to a reasonable consumer that "as a matter of contract you cannot claim a refund, although you might be able to obtain a refund as a result of legislation or some other regime". A reasonable consumer would be unlikely to attempt to reconcile the capitalised terms in the billing section of the 2011/2012 SSA with the possibility adverted to in the final (uncapitalised) cl 15 of the SSA that a provision of the SSA might be unenforceable (but would be enforced to the maximum extent possible). The message conveyed by the SSA to the reasonable Australian consumer was that Steam fees were "not refundable in whole or in part" under any conditions.

242 The No Entitlement to Refund Representation was misleading because, pursuant to ss 259(3) and 263(4) of the *Australian Consumer Law*, consumers were entitled to elect to have a refund in the event of (i) a failure to comply with the consumer guarantee of acceptable quality in s 54 of the *Australian Consumer Law* that cannot be remedied or a major failure and (ii) where the consumer had rejected the goods. Section 64 of the *Australian Consumer Law* had the effect that this consumer guarantee could not be excluded or restricted.

243 As to the 2012/2013 and 2013 SSAs, there are three relevant differences in the text. But none of these differences causes a different conclusion to be reached. The first two differences are as follows:

(1) These two SSAs contain the additional statement, also in capitals in the relevant clause that fees are not refundable in whole or in part "except as expressly set forth in this agreement". This militates further against Valve's submission. It emphasises to the reasonable consumer that unless an express exception can be found in the agreement then fees will not be refunded. A reasonable consumer also would be unlikely to consider the general, uncapitalised, miscellaneous clause in the final paragraph, which does not expressly refer to any possibility of a refund, as an exception "expressly set forth in this agreement".

(2) The two SSAs contain specific exclusions for EU customers. They provide (in the cl 3 "billing" clause) that if the consumer is an EU subscriber the consumer has a right to withdraw from the purchase without charge until a particular time, and also in a separate clause "Disclaimers: Limitation of Liability: No Guarantees" that the section does not reduce the EU consumers' mandatory consumers' rights under the laws of a local jurisdiction. There is no such provision for any other jurisdiction, including Australia. This further reinforced the message that no refunds would be provided.

244 The third matter is relied upon most heavily by Valve. The two SSAs contained an additional relevant sentence in the final (miscellaneous) clause that "Valve's obligations are subject to existing laws and legal process and Valve may comply with law enforcement or regulatory requests or requirements notwithstanding any contrary term". It is unlikely that a reasonable consumer would read this clause as qualifying the dominant message from (i) the (capitalised) denial of refunds, (ii) with an exception only for EU customers. It is too much of a strain for the reasonable Australian consumer of Valve games to read the dominant message to be subject to an implied qualification to be found in cl 15 that the clause also permitted refunds for Australian customers under the conditions permitted by their local laws.

245 It should also be noted that cl 15 is a step further removed from the "asterisk" cases because the asterisk cases directly link the asterisked words to the qualification to the dominant representation (see *Medical Benefits Fund of Australia Limited v Cassidy*, and *Downey v Carlson Hotels Asia Pacific Pty Ltd* above). As Jacobson and Bennett JJ noted in *National Exchange Pty Ltd v Australian Securities and Investments Commission* [2004] FCAFC 90 [55]; (2004) 49 ACSR 369, 381 [55]:

> Where the disparity between the primary statement and the true position is great it is necessary for the maker of the statement to draw the attention of the reader to the true position in the clearest possible way.

246 Representation 1 was misleading, contrary to s 18(1) and s 29(1)(m). It was also false in the 2011/2012 SSA but I am not satisfied that, as a legal proposition and read in the contract as a whole, it was false in the other SSAs. Although I do not place great weight upon it, as the evidence of only a single consumer, it is also pertinent to the misleading nature of representation 1 that Mr Miller (a 28 year old university student who has played video games for two decades) looked at the SSA in January 2013 and formed the view that he would not be able to obtain a refund.

Representations 2 and 3 (in the SSAs)

247 The second alleged representation is that Valve had excluded statutory guarantees and/or warranties of acceptable quality (**Contractual Exclusion of Statutory Guarantee Representation**).

248 The third alleged representation is expressed as further, or in the alternative, to the second. It is that Valve had restricted or modified statutory guarantees and/or warranties of acceptable quality (**Contractual Modification of Statutory Guarantee Representation**).

249 At the relevant times, the SSA contained terms which included the following statements

1 January 2011 to around August 2012	Clause 9	"DISCLAIMERS; LIMITATION OF LIABILITY; NO GUARANTEES A. DISCLAIMERS THE ENTIRE RISK ARISING OUT OF USE OR PERFORMANCE OF … THE SOFTWARE … REMAINS WITH YOU, THE USER. VALVE EXPRESSLY DISCLAIMS (I) ANY WARRANTY FOR … THE SOFTWARE ..., AND (II) ANY COMMON LAW DUTIES WITH REGARD TO ... THE SOFTWARE … INCLUDING DUTIES OF LACK OF NEGLIGENCE AND LACK OF WORKMANLIKE EFFORT … THE SOFTWARE ... ARE PROVIDED ON AN 'AS IS' AND 'AS AVAILABLE' BASIS, 'WITH ALL FAULTS' AND WITHOUT WARRANTY OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NONINFRINGEMENT. … THIS SECTION WILL APPLY TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW. … C. NO GUARANTEES VALVE DOES NOT GUARANTEE CONTINUOUS, ERROR-FREE, VIRUS FREE, OR SECURE OPERATION AND ACCESS TO … THE SOFTWARE ...
August 2012 to commencement of proceedings	Clause 7	"DISCLAIMERS; LIMITATIONS OF LIABILITY: NO GUARANTEES FOR EU CUSTOMERS, THIS SECTION 7 DOES NOT REDUCE YOUR MANDATORY CONSUMERS' RIGHTS UNDER THE LAWS OF YOUR LOCAL JURISDICTION. A. DISCLAIMERS

		VALVE AND ITS AFFILIATES AND SERVICE PROVIDERS EXPRESSLY DISCLAIM (I) ANY WARRANTY FOR ... THE SOFTWARE ... (II) ANY COMMON LAW DUTIES WITH REGARD TO ... THE SOFTWARE ... INCLUDING DUTIES OF LACK OF NEGLIGENCE AND LACK OF WORKMANLIKE EFFORT. ... THE SOFTWARE ... ARE PROVIDED ON AN "AS IS" AND "AS AVAILABLE" BASIS, "WITH ALL FAULTS" AND WITHOUT WARRANTY OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NONINFRINGEMENT ... THIS SECTION WILL APPLY TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW. … C. NO GUARANTEES NEITHER VALVE NOR ITS AFFILIATES GUARANTEE CONTINUOUS, ERROR-FREE, VIRUS FREE, OR SECURE OPERATION AND ACCESS TO … THE SOFTWARE ...

250 Section s 64 of the *Australian Consumer Law* had the effect that it was not possible for a supplier of goods to exclude, modify or restrict the consumer guarantee of acceptable quality in s 54 of the *Australian Consumer Law*.

251 Valve submitted that the inclusion of the words "this section will apply to the maximum extent permitted by applicable law" had the effect that the representation was not false or misleading. However, considering the clause as a whole, it remains misleading for several reasons.

252 First, the qualification was expressed in general terms at the conclusion of a strong and broadly worded exclusion which included the express statement in the heading "No Guarantees".

253 Secondly, the qualification did not expressly make the exclusion subject to other laws. Instead, to the extent that it did so, it did so impliedly and in the course of representing that the section would be applied to the maximum extent possible.

254 Thirdly, the expression "applicable law" is not defined in the SSA. A reasonable consumer, even though reading the SSA with the knowledge that it is expressed to the world at large, would not know whether the expression "applicable law" meant the law of a local jurisdiction.

255 Fourthly, the qualification applied only to subclause A and not to subclause C.

256 Although the qualification might, as a matter of legal construction, have had the effect, by implication, that the representations were not false as a matter of strict legal construction (a point on which I received limited legal argument), each of the two pleaded representations was misleading.

Representation 4 (in the 2011-2013 and 2013-2014 Steam Refund Policy) 553, 555, 349

257 The fourth alleged representation is that, from about 1 January 2011, a consumer had no entitlement to a refund for digitally downloaded video games purchased from Valve via the Steam website or through the Steam Client (**No Refund Policy Representation**).

258 From 1 January 2011 to July 2014, the Steam website included the following statements:

2011-2013 Refund Policy (1 January 2011 to around April 2013)	Steam Refund Policy As with most downloadable software products, we do not offer refunds for purchases made through Steam – please review Section 4 of the Steam Subscriber Agreement for more information.
2013-2014 Refund Policy (April 2013 to about July 2014)	Steam Refund Policy As with most software products, we do not offer refunds or exchanges on games, DLC or in-game items purchased on our website or through Steam Client. Please review Section 3 of the Steam Subscriber Agreement for more information.

259 There is no evidence that any consumer read this Steam Refund policy. However, the Steam Refund Policy was easily accessible and some consumers were likely to have viewed it if they had problems with games. I do not conclude that it is likely that this would have occurred on many occasions. The general accessibility of the Steam Refund Policy can be seen by a specific link "Steam Refund Policy" on the Steam Support section of Steam's website concerned with "General Purchasing Questions" (p 347).

260 If an inference from the statements could be drawn by a reasonable consumer that Valve was representing a lack of entitlement to a refund, then this representation was misleading for the

reasons I have explained above concerning the circumstances of entitlement to refunds under the *Australian Consumer Law*.

261 Valve submitted that the Steam Refund Policy involved no representation of entitlement, as the ACCC pleaded. Valve submitted that the policy was merely a statement of Valve's *practice*. Valve submitted that the situation was analogous to that in *Forrest*, considered above, where the High Court concluded that representations would not have been understood by their readers as representations of legal rights or what a court might do in the future. Instead, in *Forrest*, the High Court held that the representations that the company had entered into a binding contract conveyed only what the company had done and what it intended to do in the future. Valve's submission, and this analogy, should not be accepted for two reasons.

262 First, the statement of policy concerned Valve's intended conduct *in relation to the consumers to whom it was addressed.* The representations were made in a context in which a consumer would enquire about his or her *rights* by looking at "General Purchasing Questions". As Valve would have known, and as such an enquiring consumer knew, the representation concerned Valve's practice *in relation to any rights a consumer might assert to a refund.* The representations were expressed without any qualification that suggested Valve might be required to depart from its practice in relation to consumer rights by the laws of a particular jurisdiction. Valve's unqualified statement, in the circumstances in which it was made, carried the inference which would be drawn by a reasonable consumer that Valve was not required to provide a refund.

263 Secondly, each version of the Steam Refund Policy refers to the clause of the SSA which is concerned with Billing. It was a mark of Valve's careful submissions in relation to the SSA that consumers would not read some clauses and ignore others. The same is true of the Steam Refund Policy. A consumer would not ignore, or treat as meaningless, the words of the policy which refer to the SSA. Those clauses, as I have explained, provide that fees and charges are not refundable in whole or in part. As I have explained, that clause in a contractual document, was an assertion of a lack of rights. It may be that this is another example of the same representation being repeated, with the addition of words of policy. But it suffices at this liability hearing to treat each pleaded representation separately for the reasons I have explained. In this case, when a reasonable consumer read the policy together with that provision of the SSA, he or she would conclude that the Steam Refund Policy was also a statement of a lack of entitlement by the consumer.

264 The fourth representation was misleading, contrary to s 18(1) and s 29(1)(m) of the *Australian Consumer Law*. I do not conclude that it was false. The representation when read with the SSA which it incorporated was literally true for the reasons explained above, although it was misleading.

Representation 5 (in the 2014-2015 Steam Refund Policy)

265 The fifth alleged representation is that in the 2014-2015 Refund Policy, Valve represented that consumers had no entitlement to a refund or replacement for digital downloaded video games they had purchased from Valve via the Steam website or Steam unless required by local law (**No Entitlement to Refund or Replacement Unless Required by Local Law Representation**).

266 From July 2014 to the commencement of proceedings, the Steam website contained content which included the following statements:

July 2014 to commencement of proceedings	Steam Refund Policy As with most software products, unless required by local law, we do not offer refunds or exchanges on games, DLC or in-game items purchased on our website or through Steam Client. Please review section 3 of the Steam Subscriber Agreement for more information.

267 The material difference between representation 5 and representation 4, considered above, is the words "unless required by local law". Valve submitted that those words had the effect that the representations were not misleading because they were expressly made subject to local laws.

268 Although the expression "local law" is not defined anywhere in the Steam Refund Policy (or the SSA) a reasonable consumer would have understood that Valve's games were provided worldwide and that the website was worldwide. A reasonable consumer would have inferred that "local laws" was a reference to the laws governing the consumer in his or her location.

269 In particular, it was not stated expressly anywhere on the Steam website, on Steam or in the SSA that "local law" in the case of Australian consumers, being the *Australian Consumer Law*, conferred upon Australian Consumers an entitlement to a refund or replacement where the computer game did not meet the consumer guarantee of acceptable quality in s 54 of the *Australian Consumer Law*.

270 I conclude, not without hesitation, that the inclusion of the words "unless required by local law" meant that representation 5 was not false and was not misleading. In particular the "local law" qualification was (i) in the same clause where the representation was made, (ii) in the same typeface and font, and (iii) would reasonably have been understood by a consumer to mean the laws in which the consumer was located.

Representations 6, 7, 8, and 9 (in the online chats): the ACCCs case and the statements made

271 Representations 6, 7, 8, and 9 were all made in online chats between three Australian consumers and Steam Support representatives. For the reasons below, I consider that none of the pleaded representations in relation to these consumers was misleading.

272 Although the ACCC's case in relation to these representations was pleaded on the basis that these statements were "false or misleading" the case was never run as one involving alternatives. The ACCC focused upon the common element to contraventions of s 18(1) and s 29(1)(m) which was that the representations were misleading. Separate cases were not made for s 18(1) and s 29(1)(m). In other words, the ACCC did not suggest that a contravention might occur because Valve representatives made false statements that were not misleading. No submissions were made about whether the Steam Support representatives were (i) expressing opinions about the operation of legal rules in the SSAs or Valve's policies or opinions about the Valve's representations, or (ii) stating facts and making independent representations of fact. It is wholly understandable why the ACCC ran its case in this way. It would be extraordinary for a case for pecuniary penalties to be prosecuted only on the basis of allegations of false representations to three people, none of whom was misled or likely to be misled.

273 Another important part of the context to the representations in the online chats is that the ACCC did not allege that any of the online video games that it offered were not of acceptable quality or that a "major failure" occurred". Section 54(2) was set out above. It concerns the circumstances in which goods are of acceptable quality. Section 54(3) provides for the matters to consider for the purposes of s 54(2) to determine whether the goods are not of acceptable quality, including the nature of the goods, the price of the goods (if relevant), any statements made about the goods on any packaging or label on the goods; and any representation made about the goods by the supplier or manufacturer of the goods. Issues might also arise in relation to s 54(6) that goods do not fail to be of acceptable quality if "the consumer to whom they are supplied causes them to become of unacceptable quality, or fails

to take reasonable steps to prevent them from becoming of unacceptable quality". None of these matters was an issue at trial.

274 The online chat representations alleged by the ACCC were made on statements made in the course of written, online "chats" between three Australian consumers and Steam Support representatives. Each of those chats is described below.

275 **Mr Phillips.** The first chat was between Mr Phillips and Steam Support (Court Book 163-164).

276 Mr Phillips is a 31 year old man who lives in Victoria. He has played computer games and custom built computers for 20 years. He plays once or twice a week for 2 or 3 hours each time. On 24 November 2013, he purchased a game for US $49.99. The game was called "X-Rebirth". He wanted to use it on his computer. On the same day, he experienced problems with the game which he described as "game breaking bugs". These included that the game crashed every second or third time that he tried to play it. He would get black screens when launching the game, the sound would cut in and out, and the game ran at a low frame rate like watching a slide show rather than a moving image. Mr Phillips attempted to play and to troubleshoot the game for 4 hours on one occasion and 2 hours on another. He described a number of troubleshooting techniques that he tried to apply.

277 The online chat between Mr Phillips and Steam Support commenced on 24 November 2013, with a message sent by Mr Phillips as follows:

> I would like a refund in full to a purchase I made for X- Rebirth.
>
> X-Rebirth
>
> 49.99 USD
>
> Subtotal:
>
> 49.99 USD
>
> Tax:
>
> 0.00 USD
>
> Total:
>
> 49.99 USD
>
> Payment Info:
>
> Visa ending with****
>
> 49.99 USD

> Confirmation Number:
>
> 1715039517851395657
>
> Date confirmed:
>
> Sun Nov 24 19:34:32 2013
>
> This software does not work as advertised.
>
> The purchase of this software and any refund request is protected under Australian law via rules set down by the ACCC (http:/www.accc.gov.au). If I don't receive a refund within 7 working days. I will put forward a complaint with the ACCC.

278 On 26 November 2013, a response was sent by "Support Tech Robbie" which began as follows:

> Hello
>
> Thank you for contacting Steam Support.
>
> Unfortunately, we cannot offer a refund for this transaction.
>
> Please review Section 3 of the Steam Subscriber Agreement for more information http://www.steampowered.com/index.php?area=subscriber_agreement
>
> Please try the following to troubleshoot any issues.

279 After making a number of troubleshooting suggestions, Support Tech Robbie then said:

> **IMPORTANT**
>
> Support for this title is handled by a third party support department, please follow the instructions below to contact the support provider to troubleshoot this issue
>
> Egosoft Support
>
> http://www.egosoft.com/support/faq/index_en.php
>
> As an alternate resource, please check Steam Discussions for other users that may have resolved this issue:
>
> http://steamcommunity.com/app/2870/discussions

280 Mr Phillips then replied on 26 November 2013:

> Thank-you for the response; however this is an unacceptable resolution. The reality is this product was released in a dysfunctional and incomplete state while being advertised as a complete final version. I am willing to accept either a) a full refund of the product or b) a steam store credit for the total cost of the product resulting in the removal of this product from my Steam library. Please escalate this issue.
>
> I will in the meantime begin the initial proceedings of making a complaint with the ACCC.

281 On 29 November 2013, after having received no reply, Mr Phillips sent another message:

> Hi

> I still haven't received a response since I asked for my X-Rebirth refund request to again be looked at. I have noticed that other persons have successfully been awarded a refund for this product. As I mentioned in the previous post I will be happy for a Steam store credit rather than a full refund in cash.
>
> X-Rebirth is still unplayable even after several patches, and in some cases is actually worse. The release quality of X-Rebirth is unacceptable to be called a full final release and professional reviews backup this claim (See: http://wvw.metacritic.com/game/pc/x-rebirth/critic-reviews). Both the official Egosoft (See http://forum.egosoft.com/viewfonum.php?f=127) and Steam (See: http://steamcommunity.com/app/2870/discussions/0/) forums are full of complaints about the release quality from people who have purchased and have attempted to play X-Rebirth. The head developer of Egosoft has also made a public comment about the release status of the game….
>
> Please consider my request as soon as possible. As an Australian consumer my request is fair under my local laws according to the ACCC.

282 On 2 December 2013, a response was sent by "Support Tech Robbie" as follows:

> Hello
>
> As with most software products, we do not offer refunds or exchanges for purchases made on our website or through the Steam Client. This includes, but is not limited to, games, Early Access Games, software, gifted or traded purchases, downloadable content, subscriptions, and in-game items/currency.
>
> Please review Section 3 of the Steam Subscriber Agreement for more information. http://www.steampowered.com/index.php?area=subscriber_agreement
>
> Additionally, you installed and played the game purchased in this transaction for 4 hours, in effect using the product.

283 Mr Phillips replied, explaining that he had not played X-Rebirth for 4 hours but, rather, had attempted for 4 hours to make it work. Again, he asked for his request for a refund to be "escalated".

284 On 6 December 2013, a response was sent by "Support Tech Robbie" as follows:

> Hello
>
> As stated, this title has been played for over 4 hours. We are unable to assist you with a refund or credit for this purchase.
>
> Unfortunately we will be unable to assist you further with this issue.
>
> Support for this title is handled by Egosoft Support - please follow the instructions below to contact the support provider to troubleshoot any issues.
>
> Egosoft Support
>
> http://www.egosoft.com/support/faq/index_en.php
>
> Thank you for contacting Steam Support

285 On 6 December 2013, Mr Phillips sent a message as follows:

> Hi
>
> My support ticket requesting a refund or store credit for X-Rebirth was closed by Support Tech Robbie on Fri 6th Dec 2013 11.00am.
>
> See http://support.steampowered.com/view.php?ticket=4325-YUOL-7064. Having my refund request denied is unacceptable due to the technical condition of the software. As previously stated the ACCC has confirmed that I have a fair reason to obtain a refund for this software. Please review the decision.

286 On 12 December 2013, Mr Phillips lodged a written complaint with the US Federal Trade Commission, but he never received a reply to that complaint.

287 Also on 12 December 2013, a response was sent by "Support Tech Robbie" as follows:

> Hello
>
> As a one time exception to our policy, the title has been removed from your account and a credit has been applied to your Steam Wallet. The credit can be used for future Steam purchases.
>
> To view your current available Steam Wallet balance
>
> - Log into your Steam account
> - The current available balance will be listed in the upper right hand corner next to '(Your username)'s Account
> - In most cases, the new funds will automatically be displayed in your account
> - If this has not happened, please allow two hours for the transaction to fully complete.
>
> Please note in the future that Steam purchases, per the Steam Subscriber Agreement, are not refundable.

288 **Mr Miles**. Mr Miles is a 31 year old computer programmer and software developer. He was in New South Wales at the relevant times. He has played video games since he was 8. He participates in tests for new games and often plays games around 3 times a week. On 28 June 2013, Mr Miles purchased a video game called "Legends of Dawn" on Steam for US $15.99. After downloading the game, Mr Miles discovered that (i) the frame rate at which the game ran was too slow to make the game effective, (ii) the game frequently paused for a split second in game play, and (iii) the game would crash randomly and at different times and locations in the game. Mr Miles tried to play the game for a couple of weeks but found that the game was "virtually unplayable". On 8 July 2013, he downloaded a patch for the game but experienced the same problems.

289 On 16 July 2013, Mr Miles sent a written complaint to Steam via the online Steam Support about "Legends of Dawn" as follows:

Hi

I know your general policy is no refunds, but this game is in no way fit for release and should have been (and still should be) marked as 'Alpha' 'Beta' or early access. I have been patient and waited for several patches but major bugs and technical issues still exist that make the game virtually unplayable: as such I feel I must demand a refund.

The confirmation number for my purchase is 1586673785671858962.

Regards

Byron

290 On 26 July 2013, a response was sent by "Support Tech Grant":

Hello Byron

Thank you for contacting Steam Support.

We apologize for the delay.

As with most software products, we do not offer refunds or exchanges for purchases made on our website or through the Steam Client. This includes, but is not limited to games, Early Access Games, software, gifted or traded purchases, downloadable content, subscriptions, and in-game items/currency.

We will make an exception and refund titles that are still listed as available for Pre-Purchase on our website. The refund request must be received prior to the official release date for the item. You can see when a pre-purchased title is scheduled to officially unlock by viewing the green information bar on its store page.

This only applies to preorders purchased from your account, preordered titles received or sent thought the Steam Trading system cannot be refunded. We do not offer refunds for Early Access Games.

Please review Section 3 of the Steam Subscriber Agreement for more information. http://www.steampowered.com/index.php?area=subscriber_agreement

291 On 26 July 2013, Mr Miles sent a further message as follows:

Hi

Thank you for telling me what I already knew, but my point is you advertised this game as being ready for release, and clearly it isn't, it's barely playable (extremely poor performance, constant crashers, major bugs, etc.) and I would NOT have purchased it had it been appropriately labelled. I'm not a lawyer, but I do know there are laws regarding this sort of thing: at the very least I consider it unethical (both on the part of the developer / publisher and steam) and would greatly appreciate a refund in this particular instance.

Kind regards

Byron Miles

292 On 29 July 2013, a response was sent by "Support Tech Grant" as follows:

Hello Byron

The regulations you are citing do not apply to digital distribution subscriptions, electronic games, or downloadable content.

Additionally you installed and played the game purchased in this transaction for over 5 hours, in effect using the product.

We are happy to continue troubleshooting any issues you are having with this title, however we will not issue a refund for this purchase.

293 On 29 July 2013, Mr Miles sent a message as follows:

Hi

Well I am very disappointed to hear that, but it's only $16 so I won't push the issue, however I will take two lessons from this, namely

- Steam has no quality control, don't trust anything on it especially indie games.

- Steam does not act in good faith, nor does it compel those who distribute through it to do so, look elsewhere first.

Regards

Byron Miles

294 On 30 July 2013, Mr Miles sent a message as follows:

Hi

Actually I've decided not to let this drop as I now see you are also selling Realms of Arkania: Blade of Destiny, which my many reports is also of less than "acceptable quality" and is not marked as 'Early Access'.

I've been doing some research with regard to consumer law here in Australia (http://www.consumerlaw.gov.au/content/the_acl/downloads/consumer_guarantees_guide.pdf) and a few things in particular stand out.

"Which goods are covered?

Goods are covered by the consumer guarantees as long as they are sold in trade or commerce and bought by a consumer".

So the law DOES apply to digital goods (including electronic games).

"Signs and statements that limit, or seem to limit, consumers' rights are unlawful – including 'no refund' signs. Suppliers and manufacturers cannot:

> limit, restrict or exclude consumer guarantees, or

> avoid their obligations by getting the consumer to agree that the law of another country applies to the contract or to any dispute.

"Signs that state 'no refunds' are unlawful, because they imply it is not possible to get a refund under any circumstance – even when there is a major problem with the goods."

Your 'no refund' policy is unlawful here in Australia, and Australia law applies, as this is the territory in which I purchased the goods in questions, namely 'Legends of Dawn' and I know refunds are technically possible, as they are not unprecedented.

> "Suppliers and manufacturers guarantee that goods are of acceptable quality when sold to a consumer."
>
> I, and many others, do not consider Legends of Dawn to be of "acceptable quality", not when I purchased it and not now.
>
> As to the 5 hours played, I wanted to give the game a fair and honest assessment, not just have a knee jerk reaction.
>
> As I originally said, I demand a refund and am well within my rights and the law to do so.
>
> Regards
>
> Byron Miles

295 On 5 August 2013, a response was sent by "Support Tech Grant" as follows:

> Hello Byron
>
> Unfortunately, we will be unable to assist you further with this issue.
>
> Thank you for contacting Steam Support.

296 On 5 August 2013, Mr Miles sent a message as follows:

> Right well then we will see what the ACCC has to say.

297 On 6 August 2013, Mr Miles sent a written complaint to the ACCC via email about his experience. Mr Miles has not received a refund from Steam or Valve Corporation for "Legends of Dawn".

298 **Mr Miller.** Mr Miller is a 28 year old man, living in Tasmania. He has played video games since he was 7 years old. He plays video games daily. He has extensive knowledge of computers and computer software. The list of games that he has purchased or downloaded from Steam runs to 20 pages of closely spaced typescript. In 2012 and 2013, he purchased three video games called "NyxQuest: Kindred Spirits", "Plants vs Zombies GOTY Edition" and "Anna". He experienced various problems with those games including, on different occasions, failures to load properly, lack of audio, no text or images, incorrect menu options.

299 On 2 May 2013, after Mr Miller previously bought two additional games, he downloaded those games which were called "Thirty Flights of Loving" and "Dear Esther". He experienced problems with both of them including no video, no audio, and, in the case of "Dear Esther" an inability to play the game.

300 On 7 January 2013, Mr Miller decided to request a refund for the first tranche of three games. He sent a message to the Steam Support as follows:

> Today I tried a few of my games for the first time with various issues that make the games unplayable.
>
> Anna (For Mac) - Game doesn't display in the center of the screen, and mouse sensitivity is so high that it's impossible to move. Because the game doesn't display in the center I can't see the options screen to change resolution or mouse sensitivity.
>
> NyxQuest (For Mac) - Crashes on startup, no visuals or audio displayed.
>
> Plants VS Zombies: Game of the Year (For Mac) - Game loads a blank window on startup and sound can be heard but doesn't display any visuals.
>
> According to the system requirements for these games, they should work.
>
> I'd like refunds for all 3 games since I haven't been able to play any of them. I was just reading through some forums regarding refunds and read that steam doesn't offer refunds? Can you please make an exception? I own the majority of mac games on steam, and don't want to waste my time jumping through 3rd party game support forums for 3 different games. Since the games aren't playable they should qualify for a refund regardless of Steams regular terms and conditions.
>
> My username is Macsak88

301 On 17 January 2013, a response was sent by "Support Tech Cannon" as follows:

> Hello
>
> Thank you for contacting Steam Support. We apologize for the long delay in getting a response to you.
>
> Steam Support has recently had a higher volume of tickets and we are working to respond to everyone.
>
> We have found that many users have resolved their issues since submitting their ticket.

302 After suggesting some solutions, Support Tech Cannon then said:

> If you are experiencing issues with this game after it has been installed, launched and is running you will need to contact the developer's support department. They will be able to help you with in game issues, performance problems, and other similar bugs.
>
> You can find the contact information for the third party Support on the store page for the game or through the following link:
>
> http://support.steampowered.com/kb_cal.php?id=88
>
> If we don't receive a response from you, this ticket will automatically close. We really appreciate your understanding and patience while we continue to work with the increased ticket volume.

303 On 21 January 2013, Mr Miller replied as follows:

> Hello
>
> I'm not interested in looking for possible solutions for why the games don't work, which would likely take hours of my time and possibly not help anything. I'd simply like a refund for these games since I haven't been able to use them.

Thank you

Caleb

304 On 22 January 2013, a response was sent by "Support Tech Cannon" as follows:

Hello Caleb

The best technical support for in-game issues with this title is provided by its original developer or publisher. Please refer to the following article for more information on contacting the support team for this title:

Title: Anna

Link: http://support.steampowered.com/kb_article. php?ref=5385-PAFH-6160

Title: NyxQuest: Kindred Spirits

Link: http://support.steampowered.com/kb_article.php?ref=7655-IPSF-4228

Title: Plants vs. Zombies

Link: http://support.steampowered.com/kb_article.php?ref=7860-AKZB-2873

It is recommended that you complete any applicable steps on the page linked above. If you are still unable to resolve the issue, click tile blue "technical support" link provided in the article to contact the support department for this title.

As an alternate resource, please check Steam Discussions for other users that may have resolved this issue. You can find this game by using the search box near the top of the page:

http://steamcommunity.com/discussions/#games

305 On 22 January 2013, Mr Miller replied:

This is getting ridiculous. You are not listening to what I'm saying. I'd like a refund for the games that don't work. The refund I'm legally entitled to. You are starting to really piss me off with your terrible lack of customer service sending me these generic bullshit answers and wasting my time.

Do not send me another one of these generic answers. Listen to me.

306 On 23 January 2013, a response was sent by "Support Tech Cannon" as follows:

Hello Caleb

It appears you have not attempted to troubleshoot your issue with the third party support team.

Please contact this support team and attempt to troubleshoot the issue you are experiencing.

Please send me a copy of this conversation with the third party support team, which outlines what steps you have taken to try to get the game working on your computer and I will investigate this matter further.

307 On 23 January 2013, Mr Miller replied:

> Hello
>
> Are you telling me that unless go through 3 third party supports for the 3 games you will not refund me for the games that aren't working?
>
> I cannot afford the time waste to do that and I am not interested in doing that. However I am still legally entitled to a refund. It's a digital download, you won't lose any stock by refunding me. If you would like me go through these 3rd party support channels you will need to pay me as contractor for the time I am using to do so.
>
> My hourly rate is $55AU. Let me know if you still like me to do this or give me the refund for the faulty products. If you don't comply I will do all in my power to involve the ombudsman, consumer watch, news channels so that I can at least publicise how you've treated me after two weeks of correspondence. Hopefully one of these avenues will apply enough pressure for you to do the right thing and refund me my 20ish dollars. Have you even checked how much this is worth? Can you tell me the total price for the faulty products? (which you might as well have stolen from me?)
>
> I am now completely angry and frustrated by your terrible service and will be telling as many people as I can about this negative experience with Steam support.

308 On 25 January 2013 by "Support Tech Cannon" as follows:

> Hello Caleb
>
> Unfortunately, we will be unable to assist you further with this issue.
>
> Thank you for contacting Steam Support.

309 On 2 May 2013, Mr Miller sent another complaint to Steam Support concerning the two additional games he had downloaded that day called "Thirty Flights of Loving" and "Dear Esther":

> Hello Steam Support
>
> These are the games I'd like refunds for as they do not work (except Bard's Tale, that item functions). My system meets the requirements for all of these games. Please deactivate these games (except Bard's Tale) from my account and refund me. I am legally entitled to a refund according to consumer rights.
>
> Under the Australian consumer rights laws you are immediately required to refund purchases that do not meet adequate standards or function as promised. I have made the Australian Competition & Consumer Commission aware of your actions and responses to refund claim, and they promised to investigate this issue breach of Australian consumer rights.
>
> As an American company based company, it's my understanding you've breached the Fair Credit Billing Act & Consumer Protection Act and for this reason I have made complaints to the Federal Trade Commission.
>
> Total $13.35
>
> Please refund me immediately.
>
> Caleb

Username-Macsak88

310 A response was received on 2 May 2013 by "Support Tech Cannon" as follows:

> Hello Caleb
>
> The regulations you are citing do not apply to digital distribution subscriptions, electronic games, or downloadable content.
>
> Additionally, you installed and played the game purchased in this transaction, in effect using the product.
>
> Please contact the developer's support and troubleshoot the issues you are having.

311 Mr Miller sent a further message that day on 2 May 2013 as follows:

> Hello
>
> I know that I installed and tried to use these products. That's how I know they don't work, please re-read my initial support submission.
>
> I did not notice any clause saying that digital downloads were excluded from these laws. In Australia law, you are definitely in the wrong, hopefully the FTC will find the same.
>
> The issue isn't my creditability. They don't work. I'm unable to play them. I've got 140 steam games, 5 of which don't work. That's about 3% right? I wonder if the 3% of your entire catalog [sic] doesn't function for other customers? Let's say you've sold 10 million games, that's 300,000 products that don't function - 3% of your customers are unsatisfied, possibly having to deal with your terrible support department, basically being stolen from, in that they can't use products you've sold them. If they were to band together and sue it would be in the hundreds of millions of dollars area. Under Australian law, we have the ACCC who would do that for us, they are unsure how much pull they would have on an American company. If I get this into the Australian news would that have any affect on your immoral if not unlawful policies?
>
> Obviously that huge amount of customer dissatisfaction doesn't scare you, but I'm surprised you just don't care about doing the right thing. It blows me away to see this level of customer service from such a large company. I'm a great customer, owning over a hundred of your products. Yet you are trying to weasel out of refunding products that don't work, even to repeat customers. You are trying to quote that laws of customer protection don't apply to you thanks to the mediums you use and the country you are in. Is your CEO aware that his company does this? Are you aware that your customers don't know you don't give refunds until they try to get one? Can you see how immoral and (i pray) unlawful that is?
>
> What's stopping you from just doing the right thing?
>
> Caleb

312 On 3 May 2013, a response was sent by "Support Tech Cannon" as follows:

> Hello Caleb
>
> Unfortunately, we will be unable to assist you further with this issue.
>
> Thank you for contacting Steam Support.

313 However, later on 3 May 2013, a further response was sent by "Support Tech Tony" as follows:

> Hello Caleb
>
> Upon reviewing your ticket I can see that you want a refund for the following titles: NyxQuest, Anna, Dear Esther, Plants vs. Zombies and Thirty Flights of Loving. I was also able to confirm that they have had no significant play time, so a refund should not be a problem. I can refund these purchases and the funds will be deposited into your Steam Wallet. Please confirm if this will be satisfactory.

314 On 3 May 2013, a message was sent by Mr Miller as follows:

> Yes that will be fine thank you
>
> Caleb

315 On 3 May 2013, a message was sent by "Support Tech Tony" as follows:

> Hello Caleb
>
> Your wallet has been credited $13.35 and the licenses for those games have been removed from your account. Please let us know if you require further assistance.

Representations 6, 7, 8, and 9: the submissions and conclusions

316 Although the ACCC pleaded these final four representations separately and made submissions about them separately there is significant artificiality in this approach. The four "representations" were alleged to have been made in the course of online chats which can be treated as a single (ongoing) conversation. Some of the statements alleged to give rise to one representation appear to contradict another. For instance, when the conversation is read as a whole, it makes little sense for Valve to be representing that it had no obligation to make a refund until recourse was had to a developer at the same time as it was allegedly representing that it had no obligation to make a refund at all. Further, it was common ground that all the statements needed to be read together, rather than independently, when considering each representation.

317 The sixth representation, as alleged by the ACCC was that Valve was under no obligation to repair, replace or refund video games it supplied that were not of acceptable quality unless the consumer had first attempted to troubleshoot the problems with the video game developer (**No Obligation Where No Recourse to Developer Representation**).

318 The seventh representation, as alleged by the ACCC, was that Valve was under no obligation to provide a refund to a consumer in any circumstances where the computer games it had supplied were not of acceptable quality (**No Obligation to Refund Representation**).

319 The eighth representation alleged was that statutory guarantees and/or warranties of acceptable quality did not apply in relation to the supply by Valve of video games to consumers in Australia (**Non-Applicability of Statutory Guarantee Representation**). This was false or misleading as the consumer guarantee of acceptable quality in s 54 of the *Australian Consumer Law* did apply in relation to the supply by Valve of video games.

320 The ninth representation alleged was that Valve was under no obligation to repair, replace or refund computer games that it had supplied that were not of acceptable quality where the consumer had installed and played the video game (**No Remedy where Goods Used Representation**).

321 In the case of all pleaded representations there are two essential reasons why the ACCC's submissions should not be accepted. First, no-one was misled or even likely to be misled. Secondly, with only minor exceptions, none of the pleaded representations was made.

322 **First**, although I have proceeded on the basis that it is possible that a consumer can be likely to be misled even if the consumer was not misled, it is apparent from the conversations as a whole that none of the three consumers was misled or likely to be misled by any of the alleged representations even if they had been made.

323 In relation to Mr Phillips, his very first comment in the chat asserted that "Title purchase of this software and any refund request is protected under Australian law via rules set down by the ACCC (http:/www.accc.gov.au). If I don't receive a refund within 7 working days. I will put forward a complaint with the ACCC". He made similar points, and references to the ACCC, throughout the exchanges.

324 In relation to Mr Miller, after a series of exchanges in which the Steam Support representative did little more than make suggestions for how to resolve the problems Mr Miller was encountering, Mr Miller responded by saying "You are not listening to what I'm saying. I'd like a refund for the games that don't work. *The refund I'm legally entitled to* (emphasis added)". Later he explained "Under the Australian consumer rights laws you are immediately required to refund purchases that do not meet adequate standards or function as promised".

325 In relation to Mr Miles, the first statement by the Steam Support representative would have been misleading to any reasonable consumer. It was that "we do not offer refunds or exchanges for purchases made on our website or through the Steam Client", and later

involved a reference to cl 3 of the SSA which also contained a misleading representation to this effect. Mr Miles was not misled. He responded by saying that he knew "there are laws regarding this sort of thing: at the very least I consider it unethical (both on the part of the developer / publisher and steam) and would greatly appreciate a refund in this particular instance". And when the Steam Support representative replied, falsely, that the "regulations you are citing do not apply to digital distribution subscriptions, electronic games, or downloadable content", Mr Miles did not accept that statement. He replied, in his second response, with a summary of his rights which would have been an admirable submission by a lawyer in this litigation.

326 None of Mr Phillips, Mr Miller or Mr Miles was misled or (when the chats are read as a whole) was likely to be misled, by any statement that they were not entitled to a refund where the computer games were not of acceptable quality, or that statutory guarantees did not apply or that they needed to have recourse to a developer first or could not use the goods if they wanted a refund.

327 **Secondly**, when the statements in the chats are read in context, the statements did not amount to the pleaded representations. The statements must be considered in the context of two matters. The first was that the ACCC did not allege that there was any right to a refund that arose under the *Australian Consumer Law.* As I have explained, a right to a refund only arises if the various conditions in ss 54 259 and 263 of the *Australian Consumer Law* were met. The second matter of context was 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. Each pleaded representation can be considered in turn.

328 As to the alleged No Obligation Where No Recourse to Developer Representation, none of the statements, read in context, was capable of amounting to a representation that Valve was under no obligation to repair, replace or refund video games *even if they were not of acceptable quality* unless the consumer had first attempted to troubleshoot the problems with the video game developer. The ACCC alleged that such representations had been made in the chats with Mr Miller and Mr Phillips. But in both cases, the statements about troubleshooting could not be construed as requiring troubleshooting as a condition of a refund for the following reasons:

(1) None of the statements was capable of being construed as referring to any *obligation* of Valve at all. The statements made suggestions for troubleshooting with the

developer in the context of alleged problems, not as part of a representation about obligations; and

(2) perhaps the high water mark for this representation which was relied upon by the ACCC was Mr Miller's statement that "Are you telling me that unless go through 3 third party supports for the 3 games you will not refund me for the games that aren't working?" But this statement was made with sarcasm and in obvious frustration at the failure of the Steam Support Representative to address Mr Miller's constantly reiterated requests for a refund. His concern was that his requests were being ignored and Valve was constantly replying with suggestions for ways to fix the game rather than refund his money.

329 As to the No Obligation to Refund Representation, none of the statements in any of the chats amounted to a representation that *even if the goods were not of acceptable quality* a refund would not be given. The closest any statement came to this representation was the statement to Mr Phillips that "we cannot offer a refund for *this transaction*" (emphasis added) and then referring Mr Phillips to the SSA. By itself, and particularly without the words "this transaction" this could have amounted to the pleaded representation. But this statement was made in the general context described above as well as the particular context that:

(1) Mr Phillips had already insisted that he was entitled to a refund under Australian law, and the Steam Support representative did not deny this but referred to "this transaction"; and

(2) the remainder of the statements by the Steam Support representative in that part of the chat concerned implicit suggestions that the problem could be fixed by troubleshooting that Mr Phillips could undertake, including contacting a third party developer for support.

330 The ACCC also relied particularly upon the statements to Mr Phillips that "as with most software products, we do not offer refunds or exchanges for purchases made on our website or through the Steam Client" and which later referred to cl 3 of the SSA. By itself, and putting to one side the possibility that this might have been a statement of opinion about Valve's policy, this statement involved an implied representation that Mr Phillips was not entitled to a refund even if the goods were not of an acceptable quality. But the statement cannot be read in isolation. The remainder of the statement must be considered. The Steam Support representative also relied, when refusing a refund, upon Mr Phillips having installed

and played the game for four hours. Any representation, from the statement as a whole, was that Mr Phillips was not entitled to a refund because Steam did not offer refunds *and* Mr Phillips had been able to play the game for four hours. The possibility was plainly open that a refund might be offered if Mr Phillips had not played the game. Mr Phillips appreciated this and responded to explain that the four hours was spent trying to troubleshoot the game. Then the Steam Support representative repeated the four hour statement as the sole reason for denying a refund. Subsequently a refund was given.

331 As to the Non-Applicability of Statutory Guarantee Representation, the ACCC alleged that this representation was made in statements to Mr Miller that "[t]he regulations you are citing do not apply to … downloadable content" and similar statements to Mr Miles. The ACCC also relied upon the statements to Mr Phillips which I have already addressed in the paragraph immediately above.

332 As to the statement to Mr Miller, this was not a representation that Australian consumer protection statutory guarantees did not apply. The statement that the regulations relied upon by Mr Miller do not apply to downloadable content was a response to a statement by Mr Miller that as "an American company based company" Valve had "breached the Fair Credit Billing Act & Consumer Protection Act". It is apparent that he was referring to United States legislation. He concluded by saying that he had "made complaints to the Federal Trade Commission".

333 As to the statement to Mr Miles from the Steam Support representative, this was in response to Mr Miles' statement that "I do know there are laws regarding this sort of thing". Mr Miles did not actually "cite any regulations". The statement by the Steam Support representative would be capable of giving rise to confusion about the regulations to which he was referring but it is not a representation that Australian consumer protection laws do not apply. Indeed, when Mr Miles later referred to "consumer law here in Australia", the Steam Support representative simply responded that he was unable to assist any further.

334 As to the No Remedy where Goods Used Representation, the ACCC relied upon the statements by the Steam Support representative to each of Mr Miller, Mr Miles, and Mr Phillips that referred to the time that each had spent allegedly playing the games as a reason for refusing a refund.

335 In each case, there was a representation that no refund would be given because of the use of the goods but the representation was not in the absolute terms pleaded by the ACCC. In each case, it was not a representation that a remedy would never be given when there had been *any* use of the goods. It was, instead, a representation that the amount of use in those cases prevented a refund. Those representations contrast with the statement to Mr Miller on 3 May 2013 by the Steam Support representative that he "was also able to confirm that [the games purchased] have had no *significant* play time, so a refund should not be a problem. I can refund these purchases and the funds will be deposited into your Steam Wallet" (emphasis added).

336 It was common ground that the effect of s 262(1) of the *Australian Consumer Law* was that a consumer was not entitled, under s 259, to reject goods if the "rejection period" for the goods had ended. The rejection period is "the period from the time of the supply of the goods to the consumer within which it would be reasonable to expect the relevant failure to comply with a guarantee to become apparent", having regard to various factors, including "the length of time for which is it reasonable for them to be used".

337 Valve submitted, and I accept, that it was entitled to have a system in place to determine whether the failure is a major failure or whether it can be remedied. This litigation did not concern whether Valve's system was proper or whether the relevant periods of 4 hours or 5 hours of use were a sufficient basis upon which Valve could have refused a refund. Such a result, in this case, might not have been difficult if the evidence of the consumers were accepted. In particular, the factors relevant to a consideration of the rejection period also include "the use to which a consumer is likely to put them" which, in this case, was said to be troubleshooting.

338 In circumstances in which Valve was entitled to have a system in place to determine whether a rejection period had ended, and since the statements of the Steam Support representatives were tailored to the period during which the games were asserted to have been used, I do not accept that there was an absolute representation that there was no refund remedy available whenever the goods had been used.

339 In summary, I conclude that Valve did not contravene s 18(1) or s 29(1)(m) by the statements of Steam Support representatives in the online chats. Those statements did not mislead any of the consumers and they did not involve the pleaded representations.

Conclusion

340 A heavy focus of this trial was upon whether the *Australian Consumer Law* applied to transactions of this nature involving the sale to Australian consumers from a foreign corporation of products, the essence of which was computer software. Each of Valve's challenges to the applicability of the *Australian Consumer Law* fails. The conflict of laws provisions in the *Australian Consumer Law* did not essentially carve out an exception for conduct by foreign corporations like Valve governed by a different contractual proper law. Valve supplied goods (which are defined as including computer software). And Valve's conduct was in Australia and it was carrying on business in Australia.

341 Valve's conduct contravened s 18(1) and s 29(1)(m) of the *Australian Consumer Law* by the terms and conditions in its SSAs and also by the statements in two of its Refund policies which broadly concerned availability of refunds. However, the conduct of Valve's Steam Support representatives in online chats did not contravene the *Australian Consumer Law.* This latter conclusion applies only to the particular three Australian consumers in this litigation. It is a conclusion based on the particular representations alleged by the ACCC. In particular, the conclusion is based upon the pleaded allegation that statements made by the Steam Support representatives involved implied representations which, in turn, were misleading. The ACCC did not bring a case that the statements themselves were misleading. In light of the conclusions I have reached about the SSAs and two of the Refund policies, the different circumstances of other consumers seeking refunds, including particular questions asked by those consumers and answers given, might well have led to a different result.

I certify that the preceding three hundred and forty one (341) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Edelman.

Associate:

Dated: 24 March 2016