FEDERAL COURT OF AUSTRALIA

Valve Corporation v Australian Competition and Consumer Commission [2017] FCAFC 224

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| Appeal from: | *Australian Competition and Consumer Commission v Valve Corporation (No 3)* [2016] FCA 196  *Australian Competition and Consumer Commission v Valve Corporation (No 7)* [2016] FCA 1553  *Australian Competition and Consumer Commission v Valve Corporation (No 8)* [2016] FCA 1584 |
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| File number: | NSD 176 of 2017 |
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| Judges: | **DOWSETT, MCKERRACHER AND MOSHINSKY JJ** |
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| Date of judgment: | 22 December 2017 |
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| Catchwords: | **PRIVATE INTERNATIONAL LAW** – operation of “conflict of laws” provision in s 67 of the Australian Consumer Law – whether consumer guarantees in Div 1 of Pt 3-2 of the Australian Consumer Law apply to supplies of goods or services under a contract where the objective proper law of the contract (the law with which the contract has its closest and most real connection) is the law of a country other than Australia  **CONSUMER LAW** – misleading or deceptive conduct – false or misleading representations – where alleged contraventions based on representations made on the internet by foreign company – where company had large number of Australian customers – where statements on internet were addressed to customers – whether representations made in Australia  **CONSUMER LAW** – meaning of “carrying on business within Australia” within s 5(1)(g) of the *Competition and Consumer Act 2010* (Cth) – where foreign company had large number of customers in Australia, earned significant revenue from those customers on an ongoing basis, owned valuable personal property in Australia and incurred significant expenses on a regular basis in Australia – whether company was carrying on business in Australia |
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| Legislation: | *Acts Interpretation Act 1901* (Cth), s 13  *Competition and Consumer Act 2010* (Cth), ss 4, 5, 47, 48, 131, Sch 2, Australian Consumer Law, ss 2, 11, 18, 29, 51-68, 259-277  *Corporations Act 2001* (Cth)  *Insurance Contracts Act 1984* (Cth), s 8  *Trade Practices Act 1974* (Cth), s 5 |
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| Cases cited: | *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) 42 FCR 470  *Akai Pty Ltd v People’s Insurance Company Ltd* (1996) 188 CLR 418  *Australian Competition and Consumer Commission v Chen* (2003) 132 FCR 309  *Barcelo v Electrolytic Zinc Company of Australasia Ltd* (1932) 48 CLR 391  *Bray v F Hoffman-La Roche Ltd* (2002) 118 FCR 1  *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592  *Campbell v Gebo Investments (Labuan) Ltd* (2005) 190 FLR 209; 54 ACSR 111  *Cordoba Shipping Co Ltd v National State Bank* [1984] 2 Lloyd’s Rep 91  *Corporate Affairs Commission (NSW) v Transphere Pty Ltd (No 2)* (1985) 9 ACLR 1005  *Diamond v Bank of London and Montreal Ltd* [1979] QB 333  *Director of Consumer Affairs Victoria v The Good Guys Discount Warehouses (Australia) Pty Ltd* (2016) 245 FCR 529  *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458  *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575  *Forrest v Australian Securities and Investments Commission* (2012) 247 CLR 486  *Gibson Battle & Co Ltd v James King and Sons* [1915] SALR 14  *Hope v Bathurst City Council* (1980) 144 CLR 1  *Jackson v Spittall* (1870) LR 5 CP 542  *Jumbunna Coal Mine, No Liability v Victorian Coal Miners’ Association* (1908) 6 CLR 309  *Medical Benefits Fund of Australia Ltd v Cassidy* (2003) 135 FCR 1  *Okura & Co Ltd v Forsbacka Jernverks Aktiebolag* [1914] 1 KB 715  *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191  *Pearce v Tower Manufacturing and Novelty Company* (1898) 24 VLR 506  *Pioneer Concrete Services Ltd v Galli* [1985] VR 675  *Re Norfolk Island Shipping Line Pty Ltd* (1988) 6 ACLC 990  *St Lukes Health Insurance v Medical Benefits Fund of Australia Ltd* [1995] ATPR 41-428  *Thiel v Commissioner of Taxation (Cth)* (1990) 171 CLR 338  *Tran v Commonwealth* (2010) 187 FCR 54  *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538  *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581  *Ward Group Pty Ltd v Brodie & Stone plc* (2005) 143 FCR 479  *Wentworth Securities Ltd v Jones* [1980] AC 74  *Western Australian Planning Commission v Southregal Pty Ltd* (2017) 259 CLR 106 |
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| Date of hearing: | 10 and 11 August 2017 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Regulator and Consumer Protection |
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| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 225 |
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| Counsel for the Appellant: | Mr RG McHugh SC with Mr ADB Fox |
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| Solicitor for the Appellant: | PricewaterhouseCoopers |
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| Counsel for the Respondent: | Mr JK Kirk SC with Ms NL Sharp |
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| Solicitor for the Respondent: | Thomson Geer |

ORDERS

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|  | | NSD 176 of 2017 |
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| BETWEEN: | VALVE CORPORATION  Appellant | |
| AND: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSION  Respondent | |
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| AND BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSION  Cross-Appellant | |
| AND: | VALVE CORPORATION  Cross-Respondent | |

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| JUDGES: | DOWSETT, MCKERRACHER AND MOSHINSKY JJ |
| DATE OF ORDER: | 22 DECEMBER 2017 |

THE COURT ORDERS THAT:

1. The appeal be dismissed with costs.
2. The cross-appeal be dismissed with costs.

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

REASONS FOR JUDGMENT

THE COURT:

## Introduction

1. The appellant (**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” (**Steam**). This network contains approximately 4,000 video games. Valve has more than two million Australian subscriber accounts.
2. 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” (**Steam Support**), which is accessible from Steam or the Steam website.
3. The respondent (the **ACCC**) alleged at trial that Valve had contravened: (a) s 18 of the Australian Consumer Law, being Sch 2 to the *Competition and Consumer Act 2010* (Cth) (the **Australian Consumer Law**), by engaging in conduct that was misleading or deceptive or likely to mislead or deceive; and (b) s 29(1)(m) of the Australian Consumer Law by making false or misleading representations concerning the existence, exclusion or effect of a condition, warranty, guarantee, right or remedy. Both claims were based on alleged misrepresentations concerning the existence, exclusion or effect of the consumer guarantees contained in the Australian Consumer Law, in particular the acceptable quality guarantee in s 54. It was alleged that Valve had misrepresented the position by making statements such as the following statement, which was contained in the Steam Subscriber Agreement (the **SSA**) between Valve and its customers, in capital letters: “ALL STEAM FEES ARE PAYABLE IN ADVANCE AND ARE NOT REFUNDABLE IN WHOLE OR IN PART.”
4. The ACCC alleged that Valve had made misrepresentations as follows:
   1. in the SSA, in relation to which three misrepresentations were alleged;
   2. in the Steam refund policy (the **Steam Refund Policy**), in relation to which two misrepresentations were alleged; and
   3. during online “chats” between three Australian consumers (Mr Miller, Mr Miles and Mr Phillips) and Steam Support staff, in relation to which four misrepresentations were alleged.
5. In order to understand some of the arguments, it is necessary to explain in more detail how the ACCC alleged the provisions of ss 18 and 29 of the Australian Consumer Law had been contravened. In simple terms, the steps in the ACCC’s case were as follows:
   1. Valve supplied goods (namely, computer games) to consumers in Australia;
   2. the supplies were subject to the consumer guarantees contained in Div 1 of Pt 3-2 of the Australian Consumer Law, and the associated remedies, which gave consumers the right to a refund in certain circumstances;
   3. by representing that the fees payable by a consumer were not refundable, Valve made representations that were false, misleading or deceptive, or likely to mislead or deceive, as to the existence or effect of the consumer guarantees; and
   4. sections 18 and 29(1)(m) were applicable either:
      1. on the basis that the representations were made (and thus the conduct occurred) in Australia; or
      2. on the basis that Valve was carrying on business within Australia (relying on s 5(1)(g) of the *Competition and Consumer Act*, which relevantly provides that the Australian Consumer Law, other than Pt 5-3, extends to the engaging in conduct outside Australia by bodies corporate carrying on business within Australia).
6. Valve defended the proceeding at first instance on a number of grounds, including the following:
   1. Valve contended that the consumer guarantees in the Australian Consumer Law (and hence the refund provisions associated with those guarantees) did not apply to the supplies. It contended that, on the proper construction of the Australian Consumer Law, and having regard in particular to the conflict of laws provision in s 67 of the Australian Consumer Law, the consumer guarantees do not apply where a supply is made pursuant to a contract and the objective proper law of the contract (ie, the law with which the contract has its closest and most real connection) is the law of a country other than Australia. Here, it was contended (and the primary judge accepted) that the law with which the SSAs had their closest and most real connection was the law of Washington State, United States of America. Hence, it was submitted, the consumer guarantees did not apply to the supplies. On this basis it was submitted that the representations, if made, were not false or misleading.
   2. Valve further contended that ss 18 and 29(1)(m) of the Australian Consumer Law were inapplicable. It contended that the representations, if made, were not made in Australia and therefore its conduct fell outside the ordinary operation of the statutory provisions. Valve also contended that it did not carry on business within Australia and therefore s 5(1)(g) of the *Competition and Consumer Act* did not apply.
7. The primary judge rejected each of these contentions (apart from the contention regarding the proper law of the SSAs).
8. In relation to whether the alleged representations were made and, if made, whether they were misleading, the primary judge found, in summary, that:
   1. all three of the alleged representations based on the SSA had been made and were misleading;
   2. one of the two alleged representations based on the Steam Refund Policy (namely, the fourth representation alleged by the ACCC) had been made and was misleading; and
   3. the ACCC’s case based on the four alleged chat room representations had not been made out.
9. The primary judge imposed a pecuniary penalty of $3 million for the contraventions of s 29(1)(m) of the Australian Consumer Law. He also made declarations and orders for an injunction, publication of a corrective notice and the implementation of a compliance program. He ordered Valve to pay 75% of the ACCC’s costs of the trial and all the ACCC’s costs relating to the relief hearing (the issues of liability and relief having been heard separately).
10. Valve appeals from the whole of the judgment below. The ACCC cross-appeals in relation to the primary judge’s rejection of its case based on two of the alleged chat room representations (namely, the seventh and eighth alleged representations).
11. The appeal and cross-appeal raise six broad issues, which we summarise as follows:
    1. Whether the primary judge erred in concluding that the consumer guarantees in Div 1 of Pt 3-2 of the Australian Consumer Law, and the associated remedies, applied to supplies of computer games by Valve to consumers in Australia.
    2. On the assumption that the relevant representations were made, whether the primary judge erred in concluding that Valve made those representations (and thus engaged in conduct) in Australia.
    3. Whether the primary judge erred in concluding that Valve was carrying on business within Australia within the meaning of s 5(1)(g) of the *Competition and Consumer Act*.
    4. Whether the primary judge erred in concluding that Valve had made the three representations based on the SSA and the fourth alleged representation (based on the Steam Refund Policy) and that they were misleading.
    5. Whether the primary judge erred in concluding that Valve did not make the seventh and eighth alleged representations (based on the online “chats”).
    6. Whether the pecuniary penalty of $3 million imposed by the primary judge was manifestly excessive, and whether the primary judge erred in relation to the other relief ordered.
12. For the reasons that follow, we would dismiss both the appeal and the cross-appeal.

## Background facts

1. The following statement of the background facts is drawn substantially from the reasons for judgment on liability: *Australian Competition and Consumer Commission v Valve Corporation (No 3)* [2016] FCA 196 (the **Reasons**).

### Valve

1. Valve is a foreign corporation, based in Seattle, Washington State. It carries on an online games distribution business under the brand name “Steam”. We were told by senior counsel for Valve that it has about 118 million active subscribers around the world, of which about 2.2 million are located in Australia.
2. Valve’s business premises and staff are all located outside Australia. Valve holds no real estate in Australia. However, it owns servers in Australia. At the time of acquisition, these servers had a retail value of US $1.2 million. Valve’s Australian servers were initially configured by an employee who travelled to Australia.
3. Valve provides support services outside Australia, including to the 2.2 million subscriber accounts in Australia.
4. Payments for subscriptions are made in United States dollars and processed in Washington State. These include payments made by Australian consumers to Valve. Valve’s expenses include payments of tens of thousands of dollars per month to the Australian bank account of an Australian company, Equinix Australia Pty Ltd (**Equinix**), whose role is discussed in our reasons below.

### The process of installing Steam and purchasing a video game

1. There are three discrete processes that a consumer must follow to obtain the video games that 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.
2. 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. The Steam Client is a software program without which video games cannot be played.
3. During the installation process, the consumer is taken to a window entitled “License Agreement”, with the text of the agreement appearing beneath (the **Licence 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”.
4. 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.
5. 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 Valve’s servers in Washington State. The SSA is published (and made accessible to customers) in 21 different languages.
6. The second step towards obtaining and using a Steam game is that the consumer must create 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.
7. 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, and read 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.
8. In addition to credit card and other methods of payment, subscribers can also pay for games using “Steam Wallet”. Steam Wallet is an account that a subscriber can use to store value for later use for Steam purchases.
9. 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 that 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.
10. 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.
11. To access the offline mode, the consumer double clicks on the Steam Client icon. 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”. If this mode is selected, the consumer can see his or her Library offline and can play some games offline. While the consumer is offline, he or she (a) cannot interact with other players in multi-user games, (b) cannot download updates to the game, and (c) cannot save progress, score or achievements to the Steam Cloud for use on another computer.

### The Steam games

1. 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.
2. 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 that it pays to the third party developer.
3. 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.
4. The top three games developed by third party developers are Grand Theft Auto V (a single or multi-player game 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 Civilization V (a single or multi-player strategy game to become Ruler of the World, priced at US $69.99).
5. 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 we 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. At trial, senior counsel for Valve gave examples of such content as a digital “hat” or digital “sword”.
   3. Steam subscribers have a licence to make modified versions of Valve’s games and to distribute them for free.
   4. Steam Curators are individuals or organisations who make recommendations to other players about video games.
   5. Steam Wishlist 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 across different platforms.
   8. Steam Cloud is a feature that 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

1. 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 into 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: used to enable 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 enable the authentication of subscribers and, in this role, were sometimes referred to during the trial as “authentication servers”.
   3. Steam content servers: used to 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. These content servers provide content to Australian customers as well as other customers, particularly in the Asian region.
2. 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.
3. 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 (Valve’s Business Development, Infrastructure and Operations Manager) explained at trial, the Steam Client knows how to download from multiple sources, including content servers and content delivery networks.
4. 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.
5. 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.
6. 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.
7. The content server that 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 content would be to use a server in Australia.
8. 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.
9. Steam game servers are servers that host specific multi-player 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.
10. 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 the Steam Refund Policy

1. There were three relevant SSAs:

(a) the SSA applicable during the period 1 January 2011 to 2 August 2012 (the **2011-2012 SSA**);

(b) the SSA applicable during the period 3 August 2012 to 2 July 2013 (the **2012-2013 SSA**); and

(c) the SSA applicable during the period 3 July 2013 to 10 November 2014 (the **2013 SSA**).

1. The relevant versions of the Steam Refund Policy were as follows:
   1. the policy that was presented on the website during the period 1 January 2011 to April 2013 (the **2011-2013 Refund Policy**);
   2. the policy that was presented during the period April 2013 to 23 July 2014 (the **2013-2014 Refund Policy**); and
   3. the policy that was presented during the period 24 July 2014 to 18 March 2015 (the **2014-2015 Refund Policy**).

## The representations alleged at trial

1. At trial, the ACCC relied on nine alleged representations. There was overlap between those representations, but submissions were made on each representation individually and the primary judge considered each separately. The representations derive from three separate sources: (a) the various versions of the SSA; (b) the various versions of the Steam Refund Policy; and (c) online chats between representatives of Steam Support and Australian consumers. The primary judge set out in the Reasons the following summary of the alleged representations (based on a chart provided by the ACCC):

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| **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] |

### Representations 1, 2 and 3 (in the SSAs)

1. The first alleged representation was 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.
2. The second alleged representation was that Valve had excluded statutory guarantees and/or warranties of acceptable quality.
3. The third alleged representation was expressed as further, or in the alternative, to the second. It was that Valve had restricted or modified statutory guarantees and/or warranties of acceptable quality.
4. The representations in the three SSAs were relied upon by the ACCC as having been made to Australian consumers (a) 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 (b) who accessed the SSAs through the Steam Client (such as when setting up a Steam account or purchasing a computer game).
5. Valve submitted at trial, and the primary judge accepted, that the mode in which an Australian consumer accessed the SSAs could not change the content of the representation. The primary judge said that, on the evidence before the Court, it might be inferred that very few of the many consumers who had accessed the SSAs would have read them. His Honour noted that: the three consumers who gave evidence in the proceeding had all insisted, to different degrees, upon rights to a refund; none of those consumers had made any reference to any terms of an SSA in any correspondence with Steam representatives; and it appeared 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 he tried to do so anyway).
6. The primary judge found that 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. The primary judge accepted a submission by Valve that such a meticulous consumer must be assumed to have read the whole contract, although not necessarily in close detail. His Honour found that: such a consumer would take more notice of those parts of the terms and conditions which were in capital letters; the reasonable consumer who was reading the SSAs would also understand that the terms and conditions in the SSAs were not directed only to consumers in Australia; and 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.
7. The 2011-2012 SSA included the following statements that were highlighted by the parties in their oral submissions on the appeal:

**STEAM® SUBSCRIBER AGREEMENT**

This Steam Subscriber Agreement (“Agreement”) is a legal document that explains your rights and obligations as a Subscriber. Please read it carefully.

…

4. 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. Valve reserves the right to change our fees or billing methods at any time and Valve will provide notice of any such change at least thirty (30) days advance. All changes will be posted as amendments to this Agreement or in the Rules of Use (e.g. Steam release notices) and you are responsible for reviewing the billing section of Steam to obtain timely notice of such changes. Your non-cancellation of your Account or an affected Subscription thirty (30) days after posting of the changes on Steam means that you accept such changes. If any change is unacceptable to you, you may cancel your Account or a particular Subscription at any time as described below, but Valve will not refund any fees that may have accrued to your Account before cancellation of your Account or Subscription, and Valve will not prorate fees for any cancellation. If your use of Steam is subject to any type of use or sales tax, then Valve may also charge you for any such taxes, in addition to the Subscription or other fees published in the Rules of Use. The European Union VAT (“VAT”) tax amounts collected by Valve reflect VAT due on the value of any Software or Subscription as well as import VAT collected which is to be paid to the tax authorities for the importation of Merchandise.

As the Account holder, you are responsible for all charges incurred, including applicable taxes, and all purchases made by you or anyone that uses your Account, including your family or friends. Information on how to cancel your Account or a particular Subscription can be found at http://www.steampowered.com/. Valve reserves the right to collect fees, surcharges or costs incurred before you cancel your Account or a particular Subscription. In the event that your Account or a particular subscription is terminated or canceled, no refund, including any Subscription fees, will be granted. Any delinquent or unpaid Accounts must be settled before Valve will allow you to register again.

C. Steam Wallet.

ALL STEAM FEES ARE PAYABLE IN ADVANCE AND ARE NOT REFUNDABLE IN WHOLE OR IN PART. Steam may make available an account balance associated with your Account (the “Steam Wallet”). You may place funds in your Steam Wallet up to a maximum amount determined by Valve, by credit card, prepaid card, promotional code or any other payment method accepted by Steam. You may use Steam Wallet funds to purchase Subscriptions or make transactions within Subscriptions, where Steam Wallet transactions are enabled. Funds added to the Steam Wallet are non-refundable and non-transferable. Steam Wallet funds have no value outside Steam and can only be used to purchase Subscriptions and related content via Steam (including but not limited to games offered on the Steam Store). To the maximum extent permitted by applicable law, Steam Wallet funds that are deemed abandoned or unused by law will not be returned or restored.

When your account uses your Steam Wallet to fund a purchase, you authorize Valve to deduct the amount of the purchase from your Steam Wallet. If you do not have sufficient funds in your Steam Wallet to make a purchase and you have previously entered your credit card information, we may automatically charge your credit card a minimum amount determined by Valve to make the purchase, even if such minimum amount exceeds the cost of your purchase. Any difference between the minimum charge and the cost of the purchase will be credited to your Steam Wallet.

…

9. DISCLAIMERS; LIMITATION OF LIABILITY; NO GUARANTEES

A. DISCLAIMERS.

THE ENTIRE RISK ARISING OUT OF USE OR PERFORMANCE OF STEAM, THE SOFTWARE, AND MERCHANDISE REMAINS WITH YOU, THE USER. VALVE EXPRESSLY DISCLAIMS (I) ANY WARRANTY FOR STEAM, THE SOFTWARE, AND THE MERCHANDISE, AND (II) ANY COMMON LAW DUTIES WITH REGARD TO STEAM, THE SOFTWARE, AND THE MERCHANDISE, INCLUDING DUTIES OF LACK OF NEGLIGENCE AND LACK OF WORKMANLIKE EFFORT. STEAM, THE SOFTWARE, THE MERCHANDISE, AND ANY INFORMATION AVAILABLE IN CONNECTION THEREWITH 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. ANY WARRANTY AGAINST INFRINGEMENT THAT MAY BE PROVIDED IN SECTION 2-312(3) OF THE UNIFORM COMMERCIAL CODE AND/OR IN ANY OTHER COMPARABLE STATE STATUTE IS EXPRESSLY DISCLAIMED. ALSO, THERE IS NO WARRANTY OF TITLE, INTERFERENCE WITH YOUR ENJOYMENT, OR AUTHORITY IN CONNECTION WITH STEAM, THE SOFTWARE, MERCHANDISE OR INFORMATION AVAILABLE IN CONNECTION THEREWITH. THIS SECTION WILL APPLY TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW.

B. LIMITATION OF LIABILITY.

NEITHER VALVE, ITS LICENSORS, NOR THEIR AFFILIATES SHALL BE LIABLE IN ANY WAY FOR LOSS OR DAMAGE OF ANY KIND RESULTING FROM THE USE OR INABILITY TO USE STEAM, YOUR ACCOUNT, YOUR SUBSCRIPTIONS AND THE SOFTWARE INCLUDING, BUT NOT LIMITED TO, LOSS OF GOODWILL, WORK STOPPAGE, COMPUTER FAILURE OR MALFUNCTION, OR ANY AND ALL OTHER COMMERCIAL DAMAGES OR LOSSES. IN NO EVENT WILL VALVE BE LIABLE FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL, PUNITIVE, EXEMPLARY DAMAGES, OR ANY OTHER DAMAGES ARISING OUT OF OR IN ANY WAY CONNECTED WITH STEAM, THE SOFTWARE, MERCHANDISE THAT YOU ACQUIRE VIA STEAM, ANY INFORMATION AVAILABLE IN CONNECTION THEREWITH, OR THE DELAY OR INABILITY TO USE MERCHANDISE OR ANY INFORMATION, EVEN IN THE EVENT OF FAULT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, BREACH OF CONTRACT, OR BREACH OF VALVE’S WARRANTY AND EVEN IF VALVE HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THESE LIMITATIONS AND EXCLUSIONS REGARDING DAMAGES APPLY EVEN IF ANY REMEDY FAILS.

IF YOU ARE A RESIDENT OF A EUROPEAN UNION COUNTRY, THE ABOVE PARAGRAPH MAY NOT APPLY TO YOU.

C. NO GUARANTEES.

VALVE DOES NOT GUARANTEE CONTINUOUS, ERROR-FREE, VIRUS-FREE OR SECURE OPERATION AND ACCESS TO STEAM, THE SOFTWARE, YOUR ACCOUNT AND/OR YOUR SUBSCRIPTIONS(S).

…

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. In any dispute arising under this Agreement, the prevailing party will be entitled to attorneys’ fees and expenses.

15. MISCELLANEOUS

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. This Agreement constitutes and contains the entire agreement between the parties with respect to the subject matter hereof and supersedes any prior oral or written agreements. You agree that this Agreement is not intended to confer and does not confer any rights or remedies upon any person other than the parties to this Agreement.

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.

…

1. As the primary judge noted, in the 2011-2012 SSA, the statements that Steam fees were not “refundable in whole or in part” were:

(a) expressed without any qualification;

(b) contained in clause 4, which was entitled “BILLING, PAYMENT AND OTHER SUBSCRIPTIONS”;

(c) set out in capital letters that stood out strongly against the rest of the clause in lower case; and

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

1. In the 2012-2013 SSA and the 2013 SSA, the billing, payment and other subscriptions clause (now numbered clause 3) was amended. The new form of words included a statement, also in capital letters, that fees were not refundable in whole or in part “EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT”. Also, these SSAs contained a specific exclusion for European Union customers (in clause 3). The following extracts from the 2012-2013 SSA were highlighted by the parties in their oral submissions on the appeal. (It appears that the 2013 SSA was relevantly in substantially the same terms.)

3. BILLING, PAYMENT AND OTHER 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 AND WITHOUT GIVING ANY REASON UNTIL DELIVERY OF SUCH CONTENT HAS STARTED OR PERFORMANCE OF THE SERVICE HAS COMMENCED. YOU DO NOT HAVE A RIGHT TO WITHDRAW FROM A TRANSACTION OR OBTAIN A REFUND ONCE DELIVERY OF THE CONTENT HAS STARTED OR THE PERFORMANCE OF THE SERVICE HAS COMMENCED, AT WHICH POINT YOUR TRANSACTION IS FINAL. YOU AGREE THAT DELIVERY OF DIGITAL CONTENT, AND THE ASSOCIATED SUBSCRIPTION, AND/OR PERFORMANCE OF THE ASSOCIATED SERVICE, COMMENCES AT THE MOMENT THE DIGITAL CONTENT IS ADDED TO YOUR ACCOUNT OR INVENTORY OR OTHERWISE MADE ACCESSIBLE TO YOU FOR DOWNLOAD OR USE.

…

7. DISCLAIMERS; LIMITATION 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 STEAM, THE SOFTWARE, AND THE SUBSCRIPTIONS, AND (II) ANY COMMON LAW DUTIES WITH REGARD TO STEAM, THE SOFTWARE, AND THE SUBSCRIPTIONS, INCLUDING DUTIES OF LACK OF NEGLIGENCE AND LACK OF WORKMANLIKE EFFORT. STEAM, THE SOFTWARE, THE SUBSCRIPTIONS, AND ANY INFORMATION AVAILABLE IN CONNECTION THEREWITH 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. ANY WARRANTY AGAINST INFRINGEMENT THAT MAY BE PROVIDED IN SECTION 2-312 OF THE UNIFORM COMMERCIAL CODE AND/OR IN ANY OTHER COMPARABLE STATE STATUTE IS EXPRESSLY DISCLAIMED. ALSO, THERE IS NO WARRANTY OF TITLE, NON-INTERFERENCE WITH YOUR ENJOYMENT, OR AUTHORITY IN CONNECTION WITH STEAM, THE SOFTWARE, THE SUBSCRIPTIONS, OR INFORMATION AVAILABLE IN CONNECTION THEREWITH. THIS SECTION WILL APPLY TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW.

B. LIMITATION OF LIABILITY.

TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, NEITHER VALVE, ITS LICENSORS, NOR ITS OR THEIR AFFILIATES, NOR ANY OF VALVE’S SERVICE PROVIDERS, SHALL BE LIABLE IN ANY WAY FOR LOSS OR DAMAGE OF ANY KIND RESULTING FROM THE USE OR INABILITY TO USE STEAM, YOUR ACCOUNT, YOUR SUBSCRIPTIONS AND THE SOFTWARE INCLUDING, BUT NOT LIMITED TO, LOSS OF GOODWILL, WORK STOPPAGE, COMPUTER FAILURE OR MALFUNCTION, OR ANY AND ALL OTHER COMMERCIAL DAMAGES OR LOSSES. IN NO EVENT WILL VALVE BE LIABLE FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL, PUNITIVE, EXEMPLARY DAMAGES, OR ANY OTHER DAMAGES ARISING OUT OF OR IN ANY WAY CONNECTED WITH STEAM, THE SOFTWARE, THE SUBSCRIPTIONS, AND ANY INFORMATION AVAILABLE IN CONNECTION THEREWITH, OR THE DELAY OR INABILITY TO USE THE SOFTWARE, SUBSCRIPTIONS OR ANY INFORMATION, EVEN IN THE EVENT OF VALVE’S OR ITS AFFILIATES’ FAULT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, BREACH OF CONTRACT, OR BREACH OF VALVE’S WARRANTY AND EVEN IF VALVE HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THESE LIMITATIONS AND EXCLUSIONS REGARDING DAMAGES APPLY EVEN IF ANY REMEDY FAILS TO PROVIDE ADEQUATE RECOMPENSE.

BECAUSE SOME STATES OR JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR THE LIMITATION OF LIABILITY FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, IN SUCH STATES OR JURISDICTIONS, VALVE, ITS LICENSORS, AND ITS AND THEIR AFFILIATES’ LIABILITY SHALL BE LIMITED TO THE FULL EXTENT PERMITTED BY LAW.

C. NO GUARANTEES.

NEITHER VALVE NOR ITS AFFILIATES GUARANTEE CONTINUOUS, ERROR-FREE, VIRUS-FREE OR SECURE OPERATION AND ACCESS TO STEAM, THE SOFTWARE, YOUR ACCOUNT AND/OR YOUR SUBSCRIPTIONS(S) OR ANY INFORMATION AVAILABLE IN CONNECTION THEREWITH.

…

11. APPLICABLE LAW/JURISDICTION

For Subscribers other than EU Subscribers:

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. Subject to Section 12 (Dispute Resolution/Binding Arbitration/Class Action Waiver) below, 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. In any dispute arising under this Agreement, the prevailing party will be entitled to attorneys’ fees and expenses.

For EU Subscribers:

You agree that this Agreement shall be deemed to have been made and executed in the Grand Duchy of Luxembourg and that it is subject to the laws of Luxembourg, excluding the law of conflicts and the Convention on Contracts for the International Sale of Goods (CISG). However, where the laws of Luxembourg provide a lower degree of consumer protection than the laws of your country of residence, the consumer protection laws of your country shall prevail. In any dispute arising under this Agreement, the prevailing party will be entitled to attorneys’ fees and expenses.

…

13. MISCELLANEOUS

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. This Agreement constitutes and contains the entire agreement between the parties with respect to the subject matter hereof and supersedes any prior oral or written agreements. You agree that this Agreement is not intended to confer and does not confer any rights or remedies upon any person other than the parties to this Agreement.

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.

…

### Representation 4 (in the Steam Refund Policy)

1. The fourth alleged representation was 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.
2. 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 the Steam Client. Please review Section 3 of the Steam Subscriber Agreement for more information. |

1. As noted by the primary judge, there was no evidence that any consumer read the 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. His Honour did not consider it 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”.

### Representation 5 (in the Steam Refund Policy)

1. It is unnecessary to consider the fifth alleged representation for present purposes. The primary judge concluded that this representation was not false and was not misleading, and this finding is not challenged in the cross-appeal.

### Representations 6, 7, 8 and 9 (in the online chats)

1. Representations 6, 7, 8 and 9 were alleged to have been made in online chats between three Australian consumers and Steam support representatives. It is unnecessary to consider representations 6 and 9 for present purposes. There is no challenge in the cross-appeal to the primary judge’s conclusions in relation to these representations.
2. The seventh alleged representation 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.
3. The eighth alleged representation 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.
4. The facts in relation to these alleged representations are set out later in these reasons.

## Key legislative provisions

1. In order to provide context for the discussion that follows, we set out some of the key legislative provisions. Section 131(1) of the *Competition and Consumer Act* provides that the Australian Consumer Law (set out in Sch 2 of the Act) applies as a law of the Commonwealth to the conduct of corporations, and in relation to contraventions of Ch 2, 3 or 4 of the Australian Consumer Law by corporations.
2. Section 18(1) of the Australian Consumer Law 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.

1. 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); or …

1. As explained above, the ACCC alleged that the representations were false, misleading or deceptive, or likely to mislead or deceive, in circumstances where (it was alleged) supplies of computer games by Valve to consumers in Australia were subject to the consumer guarantees and associated remedies in the Australian Consumer Law. The consumer guarantees are set out in Div 1 of Pt 3-2. Division 1 is headed “Consumer guarantees” and comprises ss 51-68. In particular, the ACCC relied on the consumer guarantee as to acceptable quality in s 54.
2. Section 54(1) provides for a guarantee that goods are of acceptable quality if (other than by way of a sale by auction) a person supplies, in trade or commerce, goods to a consumer. 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).

1. There are separate provisions concerning when goods will not fail to be of acceptable quality, and the matters to which regard must be had in determining acceptable quality.
2. Sections 64 and 67 (both of which are contained in Div 1 of Pt 3-2) are relevant to Valve’s contentions as to the application of the consumer guarantees. Section 64 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.

1. 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.

1. The remedy provisions relating to the consumer guarantees are contained in Pt 5-4, which is headed “Remedies relating to guarantees”. That Part comprises ss 259-277.
2. 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 the 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.

1. 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.

1. Section 276, also contained in Pt 5-4, complements s 64. It provides as follows:

**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 … 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).

1. Section 5 of the *Competition and Consumer Act* provides for the extended operation of certain provisions. Section 5 provides in part:

(1) Each of the following provisions:

…

(c) the Australian Consumer Law (other than Part 5-3);

…

extends to the engaging in conduct outside Australia by:

(g) bodies corporate incorporated or carrying on business within Australia; or

…

(2) 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.

## The judgment below

1. For the purpose of the appeal and cross-appeal, it is relevant to consider three separate reasons for judgment given by the primary judge in support of the declarations and orders made. These were: the reasons for judgment on liability, which we are referring to as “the Reasons”; the reasons for judgment on relief, *Australian Competition and Consumer Commission v Valve Corporation (No 7)* [2016] FCA 1553 (the **Relief Reasons**); and the reasons for judgment on costs, *Australian Competition and Consumer Commission v Valve Corporation (No 8)* [2016] FCA 1584.
2. His Honour dealt with the issue of whether the consumer guarantees applied to supplies of computer games by Valve to consumers in Australia at [54]-[125] of the Reasons. His Honour noted, at [54], that the ACCC had accepted that ss 18 and 29(1)(m) could only apply in this case if s 54 was applicable. His Honour also noted that Valve’s submission (that s 54 did not apply) was based upon its construction of s 67 of the Australian Consumer Law. As his Honour noted at [56] of the Reasons, Valve’s submission was to the effect that the consumer guarantee in s 54 was not applicable where a supply takes place pursuant to a contract the proper law of which is not the law of any part of Australia.
3. The primary judge discussed the decision of the High Court of Australia in *Akai Pty Ltd v People’s Insurance Company Ltd* (1996) 188 CLR 418, which concerned provisions of the *Insurance Contracts Act 1984* (Cth), including s 8(2) of that Act, which his Honour considered to be in “very similar” terms to s 67(a) of the Australian Consumer Law. His Honour outlined the two-stage approach to the determination of the proper law of a contract adopted by the majority in *Akai*, the second stage of which involves identification of the system of law with which the transaction has its closest and most real connection. His Honour held (at [71]) that the basis upon which s 67(a) of the Australian Consumer Law was enacted, and the decision of the majority 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”.
4. In the next section of the Reasons (at [72]-[84]), his Honour considered which system of law had the closest and most real connection to the SSAs between Valve and consumers in Australia and concluded that this was the law of Washington State. This conclusion is not challenged on appeal or cross-appeal.
5. The primary judge next considered (at [85]-[89]) a submission by the ACCC that, if the law with the closest and most real connection to the SSAs was the law of Washington State, then s 67(b) had the effect that Div 1 of Pt 3-2 would still apply. His Honour concluded, with one assumption, that: the inclusion of a Washington State choice of law clause in the SSAs purported to substitute Washington State law for all or any of the provisions of Div 1 of Pt 3-2; and, accordingly, s 67(b) had the effect that “the provisions of this Division [1] apply in relation to the supply under the contract despite that term”. The assumption underlying this conclusion was that the Division was not 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. His Honour went on to consider whether this assumption was correct in the next section of the Reasons.
6. His Honour considered, at [90]-[125], Valve’s submission to the effect that s 67 limited the operation of Div 1 of Pt 3-2, by confining its operation to cases where the law with the closest and most real connection to the contract is the law of a part of Australia. His Honour rejected Valve’s submission for four reasons: it was inconsistent with the text of s 67; it was inconsistent with the context of s 67; it was inconsistent with the history and purpose of s 67; and it was inconsistent with the policy of the Australian Consumer Law. In relation to the history of the relevant provisions, his Honour explained that, 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 Div 1 of Pt 3-2. However, under the *Trade Practices Act* those consumers guarantees were imposed as statutory implications into a contract. His Honour referred to the explanatory memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth), which explained that one of the “features of the current law which contribute[s] to its uncertainty” was that “the existing statutory implied terms regime is based on the law of contract” (at [25.28], quoted in the Reasons at [109]). 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, “[i]f a person supplies goods to a consumer, the following guarantees apply”. His Honour observed, at [111], that there was no suggestion that the guarantees would only apply if a person supplied goods to a consumer where the law with which the supply had its closest and most real connection was the law of a part of Australia.
7. His Honour next dealt, at [126]-[157] of the Reasons, with an issue as to whether there had been a “supply of goods” by Valve. His Honour concluded, contrary to Valve’s submissions, that it had supplied “goods” (the inclusive definition of which refers to “computer software”). This conclusion is not challenged on appeal.
8. In the next part of the Reasons, at [158]-[205], the primary judge considered whether Valve’s conduct was in Australia and whether Valve carried on business in Australia. His Honour noted, at [159], that the parties had conducted the 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 relevant provisions of the *Competition and Consumer Act* applied to extend the operation of the Act to conduct outside Australia. In light of the conclusions he reached on the issues, and in the absence of argument on the point, his Honour proceeded on that assumption.
9. His Honour stated that the conduct that needed to be characterised (to determine whether it was conduct in Australia) was the conduct that was alleged to contravene ss 18 and 29(1)(m) of the Australian Consumer Law. The core of that conduct involved representations by Valve on its website, in “chat logs” to consumers, and through the Steam Client. As the chat log representations and the Steam Client representations had been specifically made to consumers in Australia, they were taken to be made in Australia. In relation to the website representations, his Honour said (at [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 … The consumer might be told by Valve that “This item is currently unavailable in your region” …

For these reasons, the primary judge concluded that the website representations also involved conduct in Australia.

1. At [189] of the Reasons, the primary judge stated that the issue of whether Valve carried on business in Australia would arise only if he had concluded that Valve’s conduct was not in Australia. However, as the parties had addressed the issue in comprehensive detail, his Honour expressed his views about the issue. His Honour stated, at [197], that the ordinary meaning of “carrying on business” usually involves (by the words “carrying on”) a series or repetition of acts; and 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 Commissioner of Taxation (Cth)* (1990) 171 CLR 338 at 350 per Dawson J; *Pioneer Concrete Services Ltd v Galli* [1985] VR 675 at 705; *Hope v Bathurst City Council* (1980) 144 CLR 1 at 8-9 per Mason J (Gibbs, Stephen and Aickin JJ agreeing). The primary judge concluded, at [198], that in this ordinary sense of carrying on business, “Valve undoubtedly carried on a business in Australia” for six reasons, set out at [199]-[204]. Thus, his Honour held that, even if Valve did not engage in the conduct in Australia, the Australian Consumer Law was engaged because Valve was an incorporated body that was carrying on business in Australia.
2. His Honour then considered, at [206]-[339], whether the alleged representations were made and, if made, whether Valve had contravened ss 18 and 29(1)(m). His Honour concluded, in summary, as follows:
   1. In relation to the first alleged representation (namely, 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), the primary judge found that all three iterations of the SSA conveyed this representation and that it was misleading. The primary judge found that the representation was misleading because ss 259(3) and 263(4) of the Australian Consumer Law provided that consumers were entitled to refunds in certain circumstances.
   2. In relation to the second and third alleged representations (namely, that Valve had excluded or, alternatively, restricted or modified statutory guarantees and/or warranties of acceptable quality), the primary judge found that these representations were made by all three iterations of the SSA. The primary judge held that these representations were misleading on the basis that s 64 of the Australian Consumer Law precluded a supplier of goods from excluding, modifying or restricting the consumer guarantee of acceptable quality.
   3. In relation to the fourth alleged representation (namely, 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), the primary judge found that this representation was made in two iterations of the Steam Refund Policy (namely, the 2011-2013 Refund Policy and the 2013-2014 Refund Policy). This representation was held to be misleading on the basis that, contrary to ss 259(3) and 263(4) of the Australian Consumer Law, the representation conveyed that consumers had no entitlement to a refund in any circumstances.
   4. The primary judge held that the ACCC’s case based on the fifth alleged representation was not made out.
   5. The primary judge held that the ACCC’s case based on the sixth, seventh, eighth and ninth alleged representations (being the representations made in online chats between three Australian consumers and Steam Support representatives) was not made out.
3. In the course of the primary judge’s discussion of the applicable principles, he noted, at [220], that an incorrect statement of the law can constitute misleading or deceptive conduct, referring to the decision of the High Court in *Forrest v Australian Securities and Investments Commission* (2012) 247 CLR 486. The primary judge also noted, at [222], that since “engaging in conduct” includes “the making of, or the giving effect to a provision of, a contract or arrangement” (see s 4(2) of the *Competition and Consumer Act*), representations contained within a contract are capable of constituting misleading or deceptive conduct. His Honour referred to *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) 42 FCR 470, in which Lockhart and Gummow JJ said (at 506) that it is “no objection to relief [under provisions for breach of the equivalent of s 18] that the misleading conduct is found in the making of a contractual provision, and the complainant does not have contractual privity with the defendant”.
4. In the Relief Reasons, the primary judge dealt with the various categories of relief that were sought by the ACCC. His Honour noted that: the vast majority of the parties’ submissions had concerned pecuniary penalties; Valve had submitted that the appropriate penalty was $250,000; and Valve’s counsel had accepted that this amount was, in all the circumstances, “next to nothing”. His Honour decided to order a total pecuniary penalty of $3 million.
5. The primary judge made declarations and orders on 23 December 2016, including as follows:

**THE COURT DECLARES THAT:**

1. Between 1 January 2011 and 28 August 2014, the respondent, in trade or commerce, in connection with the supply of goods, represented to consumers located in Australia (**Australian Consumers**) in the Steam Subscriber Agreement (**SSA**), which was displayed on http://store.steampowered.com (**Steam Website**) and on the Steam delivery platform (an application that an Australian Consumer can download from the Steam Website and install on their computer (**Steam**)), that the respondent had no obligation to offer a refund for digitally downloaded video games they had purchased:

1.1 when, in fact, by s 259(3) and s 263(4) of the *Australian Consumer Law*, those consumers had an entitlement to a refund at the consumer’s election in the event of a major failure in complying with the consumer guarantee of acceptable quality in s 54 of the *Australian Consumer Law* and where the consumer had rejected the goods, and by s 64 of the *Australian Consumer Law* that consumer guarantee and the rights to which it gave rise could not be excluded, restricted or modified by contract,

1.2 and thereby:

(a) engaged in conduct which was misleading or deceptive or likely to mislead or deceive in contravention of s 18 of the *Australian Consumer Law*; and

(b) made false or misleading representations concerning the existence, exclusion or effect of a consumer guarantee in contravention of s 29(1)(m) of the *Australian Consumer Law*.

2. Between 1 January 2011 and 28 August 2014, the respondent, in trade or commerce, in connection with the supply of goods, being digitally downloaded video games, represented to Australian Consumers in the SSA, which was displayed on the Steam Website and on Steam, that it had excluded statutory guarantees and/or warranties of acceptable quality:

2.1 when, in fact, by s 64 of the *Australian Consumer Law* it is not possible for a supplier of goods toexclude the consumer guarantee of acceptable quality in s 54 of the *Australian Consumer Law*,

2.2 and thereby:

(a) engaged in conduct which was misleading or deceptive or likely to mislead or deceive in contravention of s 18 of the *Australian Consumer Law*; and

(b) made misleading representations concerning the existence, exclusion or effect of a consumer guarantee in contravention of s 29(1)(m) of the *Australian Consumer Law*.

3. From around 1 January 2011 to around July 2014, the respondent, in trade or commerce, in connection with the supply of goods, represented to Australian Consumers on the Steam Website through the Steam Refund Policy that the respondent had no obligation to offer those consumers a refund for digitally downloaded video games they had purchased from the respondent:

3.1 when, in fact, by s 259(3) and s 263(4) of the *Australian Consumer Law*, those consumers had an entitlement to a refund at the consumer’s election in the event of a major failure in complying with the consumer guarantee of acceptable quality in s 54 of the *Australian Consumer Law* and where the consumer had rejected the goods, and by s 64 of the *Australian Consumer Law* that consumer guarantee and the rights to which it gave rise could not be excluded, restricted or modified by contract,

3.2 and thereby:

(a) engaged in conduct which was misleading or deceptive or likely to mislead or deceive in contravention of s 18 of the *Australian Consumer Law*; and

(b) made misleading representations concerning the existence, exclusion or effect of a consumer guarantee in contravention of s 29(1)(m) of the *Australian Consumer Law*.

**THE COURT ORDERS THAT:**

1. In respect of the contraventions of s 29(1)(m) of the *Australian Consumer Law* (as set out in the *Competition and Consumer Act 2010* (Cth), Sch 2) and the subject of declarations 1, 2 and 3 above, the respondent pay to the Commonwealth within 30 days the sum of $3 million by way of pecuniary penalty under s 224(1) of the *Australian Consumer Law*.

2. The respondent, whether by itself, its servants, agents, or otherwise, is restrained for a period of 3 years from the date of these orders in connection with the supply or possible supply of digitally downloaded video games, from representing in communications to Australian Consumers, in trade or commerce, whether in the Steam Subscriber Agreement or on the Steam Website, that the respondent:

(a) is under no obligation to offer refunds to Australian Consumers for video game subscriptions acquired from the respondent;

(b) is under no obligation to refund the subscription fee paid for any video games made available to Australian Consumers which are not of acceptable quality;

(c) does not, with respect to its dealings with Australian Consumers, regard itself as being subject to the consumer guarantees of acceptable quality in s 54 of the *Australian Consumer Law*; or

(d) is able, with respect to its dealings with Australian Consumers, to exclude, restrict or modify the consumer guarantee of acceptable quality in s 54 of the *Australian Consumer Law*.

3. For a period of 12 months after 20 February 2017, for the benefit of Australian Consumers logging onto the Steam Website from a computer with an Australian IP address (based on the IP look up table available to the respondent current as at the consumer’s login), the respondent will publish on the home page of the Steam Website a link, in a typeface of at least 14 point Times New Roman, reading “IMPORTANT NOTICE ABOUT CONSUMER RIGHTS IN AUSTRALIA”, which directs them to a notice in the terms set out in **Annexure A1** (“**Consumer Rights Notice**”).

4. Pursuant to s 246(2) of the *Australian Consumer Law*, the respondent is:

(a) within 90 days of this order, to establish and implement an Australian Consumer Law Compliance Program to be undertaken by each employee of the respondent or other person involved in the respondent’s business who deals or who may deal with Australian Consumers, being a program designed to minimise the respondent’s risk of future contraventions of s 18 and s 29 of the *Australian Consumer Law* in relation to the operation of the consumer guarantees under Part 3-2, Division 1 of the *Australian Consumer Law*; and

(b) for a period of 3 years from the date of this order, maintain and continue to implement the Australian Consumer Law Compliance Program referred to in order 4(a) above.

1. His Honour also made costs orders to the effect indicated earlier in these reasons.

## The appeal and cross-appeal

1. Valve’s notice of appeal raises the following 12 grounds:

***As to liability:***

1. Having found that the objective proper law of the Appellant’s Steam Subscriber Agreements (**the SSAs**) (in the sense of the system of law with which the SSAs had the closest and most real connection) was the law of Washington State in the United States, the primary judge erred in concluding that the guarantee in s 54 of the Australian Consumer Law (**ACL**) applied to any supply of goods made by the Appellant pursuant to the SSAs.

2. The primary judge erred in construing Division 1 of Part 3-2 of the ACL by:

(a) failing to hold that, either as a matter of the proper construction of s 67 or as a necessary implication, s 54 did not apply to any supply of goods made pursuant to contracts the objective proper law of which is the law of a place outside Australia;

(b) misconstruing the words “*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*” in s 67(b) as engaging s 67 where, in the absence of the term, the objective proper law of the contract was in any event the law of a country other than Australia.

3. The primary judge erred in finding that the Appellant carried on business within Australia within the meaning of s 5(1)(g) of the *Competition and Consumer Act 2010* (Cth).

4. The primary judge erred in finding that the Appellant had engaged in conduct in Australia.

5. As to the alleged representations made by the Appellant, the primary judge erred in finding that:

(a) Representation 1 in all three forms of the SSAs in issue was made and was misleading, contrary to s 18(1) and s 29(1)(m) of the ACL;

(b) Representation 1 in the “*2011/2012 SSA*” was made and was false, contrary to s 18(1) and s 29(1)(m) of the ACL;

(c) Representations 2 and 3 in all three forms of the SSA were made and were misleading, contrary to s 18(1) and s 29(1)(m) of the ACL; and

(d) Representation 4 in the 2011-2013 and 2013-2014 Steam Refund Policies was made and was misleading, contrary to s 18(1) and s 29(1)(m) of the ACL.

6. The primary judge erred in finding that the Appellant had contravened s 18 and s 29(1)(m) of the ACL, and in making declarations to that effect.

***As to remedies:***

The following grounds of appeal arise to the extent that the Appellant’s grounds of appeal with respect to liability are not upheld.

7. The primary judge erred in making the following findings, alternatively in taking into account the following irrelevant matters or in giving them excessive weight:

a. that the Appellant’s contravening conduct had a substantial effect on consumers (RR [ie, Relief Reasons] [25]) and that the misrepresentations made by the Appellant were a significant part of its business process involved in making profits (RR [37]), particularly in light of:

i. the absence of any finding, allegation or evidence that any of the Appellant’s video games was in fact not of acceptable quality or that any consumer was in fact entitled to a refund under the ACL;

ii. the metaphysical distinction the primary judge drew at RR [26] between contribution and causation;

iii. the findings at RR [35] and [95] that the Appellant’s contraventions did not cause any profit to the Appellant or loss to consumers;

iv. the findings at RR [28] that the Appellant’s conduct was unlikely to have induced any consumer to make a purchase that he or she would not otherwise have made, and that if the Appellant’s conduct had any effect, it would have had the opposite effect on consumer behaviour; and

v. his Honour’s failure to acknowledge at RR [24] that these were matters on which the Respondent bore the onus of proof.

b. that the Appellant had lacked a culture of compliance with Australian law (RR [38], [41], [49], [77]), particularly given his Honour’s finding that the Appellant had believed that it was not subject to Australian law (RR [47]) and the absence of any finding or evidence that the Appellant’s policies were inconsistent with the laws of Washington State (where it resided and from where it operated);

c. that the Appellant’s co-operation in the proceedings was “extremely” or “very” minimal (RR [62]-[63]), and that the Appellant had “contested liability on almost every imaginable point” (RR [59]), particularly in:

(i) erroneously finding that the Appellant’s conduct in respect of discovery was deficient (RR [60]-[61]);

(ii) failing to take into account that the Appellant had successfully defended a significant proportion of the Respondent’s allegations as to misleading and deceptive conduct under the ACL;

(iii) failing to take into account that the Appellant’s arguments that it was not subject to the ACL were reasonable and responsibly made; and

(iv) failing, when considering the Appellant’s conduct in the litigation, to give sufficient weight to the Respondent’s approach to the matter (RR [63]­[64]) namely, that notwithstanding the Appellant’s efforts to negotiate with the Respondent to resolve the matter, the Respondent had decided to pursue a court-based outcome.

8. The primary judge erred in failing to take into account the following relevant matters, alternatively, in failing to give them sufficient weight:

a. that the Appellant believed that it was not subject to local law (RR [47]), and in particular the reasonableness of that belief in light of the express choice of law provisions in the SSAs and his Honour’s finding in the Liability Reasons that the system of law with which the SSAs had the closest and most real connection was the law of Washington State;

b. the absence of any prior contraventions by the Appellant of Australian consumer protection laws (RR [65]); and

c. that, on his Honour’s findings at RR [33], the Appellant in fact gave refunds to a substantial number of its Australian customers who may have sought refunds in the relevant period.

9. The primary judge erred in ordering the Appellant to pay any pecuniary penalty, alternatively a penalty of $3 million, which was manifestly excessive.

10. The primary judge erred in concluding that any injunction was appropriate.

11. The primary judge erred in ordering the Appellant to publish on its Steam Website a Consumer Rights Notice in the form of Annexure A1 to the Orders.

12. The primary judge erred in ordering the Appellant to establish and implement an Australian Consumer Law Compliance Program.

1. By its amended notice of cross-appeal, the ACCC relies on the following grounds:

1. The primary judge erred in failing to find that:

(a) the “No Obligation to Refund Representation” had been made to each of Andrew Phillips, Byron Miles and Caleb Miller; and

(b) the appellant thereby:

i. engaged in conduct which was misleading or deceptive or likely to mislead or deceive in contravention of section 18 of the Australian Consumer Law (ACL); and/or

ii. made false or misleading representations concerning the existence, exclusion or effect of a consumer guarantee in contravention of section 29(1)(m) of the ACL.

2. The primary judge erred in failing to find that:

(a) the “Non-Applicability of Statutory Guarantee Representation” had been made to each of Andrew Phillips, Byron Miles and Caleb Miller; and

(b) the appellant thereby:

i. engaged in conduct which was misleading or deceptive or likely to mislead or deceive in contravention of section 18 of the ACL; and/or

ii. made false or misleading representations concerning the existence, exclusion or effect of a consumer guarantee in contravention of section 29(1)(m) of the ACL.

3. In failing to find that the No Obligation to Refund Representation and the Non-Applicability of Statutory Guarantee Representation had been made to each of Andrew Phillips, Byron Miles and Caleb Miller (at LJ [ie, the Reasons] [329]-[333] and [339]), the primary judge erred in law in failing to consider the representations to which the conduct gave rise at the time and in the context in which each was made and by instead proceeding on the basis that the online communications could be “treated as a single (ongoing) conversation” (at LJ [316]).

4. In failing to find that the No Obligation to Refund Representation and the Non-Applicability of Statutory Guarantee Representation made to each of Andrew Phillips, Byron Miles and Caleb Miller were misleading (at LJ [329]-[333] and [339]), the primary judge erred in law in applying a requirement that the recipient of the representation must be misled or be likely to be misled (at LJ [321]-[322] and [326], cf [227]-[228]).

5. The primary judge erred in finding at [4] of the Costs Judgment that the Respondent (**ACCC**) was unsuccessful in relation to a substantial part of the outcome of the liability proceeding and consequently erred in determining at [5] of the Costs Judgment that the Appellant (**Valve**) should only pay 75% of the Respondent’s costs of the liability hearing.

1. At the hearing of the appeal, the ACCC was granted leave (which was not opposed) to include ground 5, as set out above, in its notice of cross-appeal. Senior counsel for the ACCC stated that this ground arose only if the ACCC was successful in its cross-appeal.
2. The issues raised by the appeal and cross-appeal have been summarised in [11] above. We now deal with each of these issues in turn.

## Issue 1

1. The first issue is whether the primary judge erred in concluding that the consumer guarantees in Div 1 of Pt 3-2 of the Australian Consumer Law, and the associated remedies, applied to supplies of computer games by Valve to consumers in Australia. This issue is raised by grounds 1 and 2 of the notice of appeal. Consistently with the approach taken in the parties’ submissions, it is convenient to address these grounds together.
2. Valve submits that, should the Court find that Valve’s supply took place in Australia or that s 5(1)(g) applied (matters discussed under issues 2 and 3 below), then on the proper construction of Div 1 of Pt 3-2, and particularly s 67, of the Australian Consumer Law, s 54 did not apply to supplies made pursuant to the SSA because the objective proper law of that contract was the law of Washington State. By the expression “objective proper law of the contract”, Valve refers to the system of law with which the contract has its closest and most real connection. As noted above, the primary judge found that this was, in the case of the SSAs between Valve and Australian consumers, the law of Washington State, and there is no challenge to that finding on the appeal or cross-appeal.
3. Valve submits that s 67 “preserves and respects” the objective proper law of the contract, in the sense of the system of law with which the contract has its closest and most real connection. It submits that where the objective proper law of the contract is foreign, the Division – either as a matter of the proper construction of s 67, or else as a necessary implication – does not apply to supplies under that contract.
4. Valve submits that s 67, which has the heading “Conflict of laws”, takes as its premise the proposition that where the objective proper law of a contract is not Australian law, the Division will not apply. It submits that this is necessarily implicit in the words “would be the law of any part of Australia *but for a term* of the contract that provides otherwise” in s 67(a) and the words “the provisions of this Division apply in relation to the supply under the contract *despite that term*” at the end of the section. Valve submits that: the choice s 67 makes is that where it is only because of such a term that the proper law of the contract is foreign law, the Division applies to the supply under the contract regardless; it is necessarily implicit in the scheme of the section that where, in the absence of such a term, the objective proper law of the contract would be foreign law in any event, the Division does not apply; otherwise, the drafting of s 67(a) would make no sense; after all, the section does not lay down a blanket rule that the Division applies regardless of the objective proper law of the contract; and if that had been the Parliament’s intention, it would have been easy to say so, but the Parliament did not.
5. Valve submits that once this premise is accepted (ie, that the Division does not apply to supplies under contracts the objective proper law of which is foreign) the operation of s 67 is clear. That is, the section is concerned only with contracts the objective proper law of which is Australian law, but which contain two classes of “terms” that attempt to put supplies under the contract beyond the reach of the Division. In this respect, Valve submits:
   1. The first class of term is described in s 67(a). This is where the offending “term” is directed to the whole of “*the proper law of* [the] contract”. The choice of language matters. The words “proper law” signify the entire system of law governing the contract. Section 67(a) operates where the proper law of the contract is objectively Australian, but the offending term stipulates that the whole system of law governing the contract is foreign law. Clearly, given his Honour’s finding that the objective proper law of the SSA was that of Washington State, s 67(a) could not operate to render the Division applicable to supplies under the SSA.
   2. The second class of term is described in s 67(b). This is expressed in narrower language, and again the choice of language matters. It is directed to terms that attempt to “*substitute*”*:* (i) “*the provisions* of the law of a country other than Australia”, or (ii) “*the provisions* of the law of a State or Territory”, “for all or any of *the provisions* of this Division”. Two matters of construction should be noted.
   3. First, the word “substitute” necessarily involves change: the replacement of the otherwise applicable set of provisions (“this Division”) with a different set of provisions. One cannot substitute a thing for the thing itself. The use of the word is required by the premise from which s 67 proceeds: that the Division applies only to contracts the objective proper law of which is Australian. Only in respect of such contracts can any possibility of “substitution” arise. Where the objective proper law of the contract is foreign, “the provisions of this Division” do not apply to supplies under the contract in the first place and no question of substitution, purported or otherwise, can arise. Since the objective proper law of the SSA was that of Washington State, the primary judge erred in construing s 67(b) as operating to render the Division applicable to supplies under the SSA.
   4. Secondly, the words “the provisions” are evidently directed to something more specific than s 67(a)’s “the proper law of a contract”, and the way in which the words “the provisions” are specifically used in s 67(b) demonstrates that this must be so. A clause that provided, for example, that the proper law of a contract was the law of Western Australia could never fall foul of s 67(b). By providing that the system of law governing the contract was the law of Western Australia, the clause would not “substitute” or purport to substitute “the provisions of the law of [that] State” for “the provisions of this Division”, because the Australian Consumer Lawis part of the system of law that applies in Western Australia. (Indeed, so much is assumed by the use of the words “the law of any *part* of Australia” in s 67(a): so long as the law of the contract is that of some part of Australia, the intention and effect of the cooperative scheme is that theAustralian Consumer Law will apply.)
   5. It follows that the words “*the provisions* of the law of a State or a Territory” in paragraph (b)(ii), and the same words “*the provisions* of the law of a country other than Australia” in paragraph (b)(i), must be construed as limiting the scope of s 67(b) to “terms” in contracts which, on their proper construction, specifically attempt to replace the “provisions of this Division” with a specific set of “provisions”, such as a statute or code, of a State, Territory or country other than Australia. Where the term at issue does no more than stipulate the parties’ express choice of the proper or governing law by reference to the system of law of a particular jurisdiction, and makes no (even indirect) reference to Div 1 of Pt 3-2, it is s 67(a), not s 67(b), which regulates the enforceability of the parties’ choice. For this reason, too, the primary judge erred in construing s 67(b) as applying the Division to supplies under the SSA.
6. As to the primary judge’s textual and contextual analysis of s 67, Valve makes the following submissions:
   1. First, the primary judge held that Valve’s construction would require additional words to be read in at the end of both ss 67(b)(i) and (ii). That is, the italicised words would need to be added: “the provisions of the law of a country other than Australia *where the proper law would include Division 1*”. Similarly, the primary judge held that Valve’s construction required the implication of the following italicised words at the end of s 67: “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*”. The primary judge held that such a large implication of words was unwarranted and proceeded to consider the requirements in *Wentworth Securities Ltd v Jones* [1980] AC 74 at 105-106 for the implication of words into a statute, holding that Valve had not satisfied those demanding requirements.
   2. However, there is no such requirement or need for words to be implied into the text of s 67 to give effect to Valve’s submitted construction. Valve’s construction is apparent from the words of s 67 as they appear in the statute. In order to have a “substitution”, the provisions of Div 1 have to be the applicable law in the first place so that they can be substituted out and replaced by something else. Once a determination has been made that the proper law of a contract is that of a foreign state, such a substitution cannot occur.
   3. Further, the primary judge’s reading in of hypothetical additional words disregards certain words and phrases in s 67, which must be given work to do. Section 67 concludes that “the provisions of this Division apply” if the circumstances described in s 67(a) or (b) are found to exist. This makes it plain that there are circumstances where the provisions of Div 1 do not apply to certain supply contracts. Further, s 67 uses the words “*but for* a term of the contract” (in s 67(a)) and “*despite* that term” (at the end of s 67). These direct attention to identifying the proper law of the contract between the consumer and supplier, *disregarding* any terms contained in the contract which may purport to impose another law as the governing law of the contract. Those words would be unnecessary if a lengthy explanation was added at the end of s 67 along the lines posited by the primary judge.
   4. Secondly, the primary judge compared s 67 of the Australian Consumer Law with s 8 of the *Insurance Contracts Act*, without having regard to the differences in the context and application of those different statutes. Unlike the Australian Consumer Law, s 8(1) of the *Insurance Contracts Act* expressly provides that the Act applies to contracts of insurance the proper law of which is Australia.
   5. Thirdly, the primary judge held that there was no other provision of Div 1 that supports Valve’s submission. To the contrary, Valve’s submission is consistent with the existence of s 64 within Div 1, as well as s 276 of the Australian Consumer Law and s 5 of the *Competition and Consumer Act*. The headings of ss 64 and 67 must be given work to do when construing those provisions in the context in which they both appear (*Acts Interpretation Act 1901* (Cth), s 13; see *Tran v Commonwealth* (2010) 187 FCR 54 at 69-71 and the authorities cited therein). The purpose of s 67 is apparent from its heading – it provides a framework for resolving “conflict of laws” issues. By contrast, s 64 is headed “Guarantees not to be excluded etc. by contract” and that section renders void any provision of a contract which purports to exclude, restrict or modify the application of the consumer guarantees. That presupposes that the proper law of the contract in question is the law of Australia, or would be but for a term of the contract which purports to nominate the law of another country as the governing law. If the primary judge’s construction is correct, there would be no reason for s 67 to exist as it would only duplicate the work of s 64. Similarly, s 276 performs the same function in respect of remedies.
   6. Fourthly, the primary judge had regard to the fact that Div 1 is not limited to contracts but also covers supplies more generally. While this is true, the provision in question, s 67, itself only refers to contracts and supplies under those contracts.
   7. Fifthly, the primary judge’s findings as to construction were based on what was described as a concession by Valve that “*in the absence of* s 67, Division 1 would apply to any contract irrespective of its proper law” (Reasons, [102]). There was no such concession in these terms. What was accepted was expressly premised on the relevant conduct occurring “in Australia” or being subject to the “extended operation of the Act.” But more fundamentally, his Honour’s reasoning process is unsustainable. In construing s 67, the necessary premise is that the section is present in the Division, not that it is “absent”. It makes no sense to construe a provision on the basis that it adds nothing to the statute. The only rational conclusion to draw from the legislative decision to include a conflict of laws provision is the opposite: that the proper law of the contract matters to the application of the Division.
7. Valve also makes the following submissions in relation to the history and purpose of s 67 and policy considerations:
   1. The primary judge noted that unlike the previous consumer protection regime of the *Trade Practices Act*, which implied terms into contracts for supply, the Australian Consumer Law sought to establish a simpler regime of statutory consumer guarantees. However, the mere change in the statutory method for providing consumer guarantees (from implication into contract to statutory guarantees of general application) did not necessitate any change as to the circumstances in which those guarantees would apply. Valve submits that s 67 was consciously re-introduced by Parliament into the Australian Consumer Law in 2011 to preserve the objective proper law of the contract as the correct guide in determining whether or not the consumer guarantees under Div 1 apply to the supply of goods or services under contracts.
   2. In considering the policy considerations behind s 67, the primary judge referred to some hypothetical scenarios in which it was said that suppliers might set up arrangements to avoid the Australian Consumer Law if Valve’s construction were accepted. Valve submits that its construction does not defeat the legislative scheme and that his Honour’s examples are unrealistic.
8. In our view, for the reasons that follow, Valve’s contention to the effect that the consumer guarantees in Div 1 of Pt 3-2 of the Australian Consumer Law do not apply to a supply that takes place under a contract the objective proper law of which is the law of a country other than Australia is to be rejected.
9. Division 1 of Pt 3-2 contains a series of guarantees, referred to in the heading to the Division as “consumer guarantees”, that apply to the supply of goods and services in a variety of circumstances. Subdivision A deals with guarantees relating to the supply of goods; Subdivision B deals with guarantees relating to the supply of services; Subdivision C contains provisions to the effect that the guarantees are not to be excluded etc by contract; and Subdivision D deals with miscellaneous matters. The guarantees apply to the *supply* of goods or services. The word “supply” is defined in s 2 of the Australian Consumer Law as including, in relation to goods, “supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase” and, in relation to services, “provide, grant or confer”.
10. Applying general principles of statutory construction, the substantive provisions of Div 1 of Pt 3-2 are presumed to regulate only conduct in Australia: see *Jumbunna Coal Mine, No Liability v Victorian Coal Miners’ Association* (1908) 6 CLR 309 at 363 per O’Connor J; *Barcelo v Electrolytic Zinc Company of Australasia Ltd* (1932) 48 CLR 391 at 423-425 per Dixon J; *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581 at 600-601 per Dixon J. This is, of course, subject to contrary provision, such as s 5 of the *Competition and Consumer Act*, which extends the operation of the Australian Consumer Law to conduct engaged in outside of Australia in certain circumstances.
11. It is apparent on the face of Div 1 of Pt 3-2 that it adopts the mechanism of providing that certain consumer guarantees apply to certain transactions, in contrast to the mechanism (adopted by the predecessor provisions) of implying terms into a contract. The consumer guarantee provisions are therefore capable of application whether or not there is a contract. It is unnecessary to consider, for example, whether terms are too uncertain to constitute a contract, in determining whether the guarantees apply.
12. The evident purpose of s 64 is to ensure that parties cannot ‘contract out’ of the consumer guarantees. If, for example, parties to a contract for the supply of goods purport to agree that one or more of the consumer guarantees will not apply, that term of the contract would be void by force of s 64.
13. In this context, s 67 appears to be another provision designed to ensure that the operation of the consumer guarantees cannot be avoided. It is directed at two particular situations involving a contractual term – one is described in paragraph (a), the other in paragraph (b). In each case, as set out in the concluding words of the section, “the provisions of this Division apply in relation to the supply under the contract despite that term”. The first situation (paragraph (a)) is where “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”. This paragraph would cover a situation where a contract that is closely connected to Australia contains a term providing, for example, that the contract is governed by the law of another country. In the situation to which paragraph (a) is directed, s 67 makes clear that the provisions of Div 1 of Pt 3-2 apply in relation to the supply under the contract despite the term. (In the present case, paragraph (a) has no application because the system of law with which the SSAs between Valve and Australian consumers had the closest and most real connection was the law of Washington State.)
14. The second situation (paragraph (b)) is where a contract for the supply of goods or services to a consumer contains a term that “purports to substitute, or has the effect of substituting” the provisions of the law of a country other than Australia, or the provisions of the law of a State or Territory, for all or any of the provisions of Div 1 of Pt 3-2. This paragraph would cover a situation, for example, where a term of a contract provides that an alternative consumer guarantees regime, found in the law of another country, is to apply in lieu of the provisions in Div 1 of Pt 3-2 of the Australian Consumer Law. In such situations, s 67 again makes clear that the provisions of Div 1 of Pt 3-2 apply in relation to the supply under the contract despite that term.
15. It is important to emphasise that no provision of the Australian Consumer Law expressly limits the operation of Div 1 of Pt 3-2 in the way contended for by Valve. That is to say, no provision expressly states that, where the supply of goods or services is made pursuant to a contract, the provisions of the Division apply only if the law with which the contract has its closest and most real connection is the law of Australia or of a part of Australia. It follows that Valve’s contention depends upon an implication to be drawn, either from s 67 or from the provisions of the Division more generally.
16. There does not appear to be a sound basis upon which to draw such an implication. The provisions in Subdivisions A and B are expressed in terms of the *supply* of goods or services. They do not draw a distinction between a supply pursuant to a contract and other supplies. Neither the text of these provisions, nor their consumer protection purpose, suggest that they are limited in the way contended for by Valve. Further, given the legislative move away from contractual implications to direct guarantees, it would make little sense if the guarantees applied (at least as regards contracts) only where the proper law of any contract of supply was that of Australia or a part of Australia.
17. Valve’s contentions would have the effect of elevating s 67 to a provision that specifies the scope of application of Div 1 of Pt 3-2. But the role of s 67 is more limited. As we have indicated above, s 67 is one of a number of provisions (including ss 64 and 276) designed to prevent certain attempts by parties to ‘contract out’ of, or otherwise avoid, the consumer guarantees. It may be accepted that there is some overlap between ss 64 and 67. Such overlap sometimes occurs: see, eg, *Western Australian Planning Commission v Southregal Pty Ltd* (2017) 259 CLR 106 at [44]-[55] per Kiefel and Bell JJ. But s 67 does not merely duplicate the work of s 64. It is directed to particular types of terms relating to the applicable law.
18. We do not accept that, in the context of Div 1 of Pt 3-2 as a whole, the premise of s 67(a) is that the consumer guarantee provisions apply only where the objective proper law of a contract of supply is the law of Australia or part of Australia. Granted, s 67(a) is directed to this particular situation. That may be explained in part by the legislative history of the provision. But in the context of the Division as it now stands, s 67(a) should be seen as being directed to a particular attempt to avoid the operation of the consumer guarantees, rather than resting on the premise suggested by Valve.
19. In summary, s 67 is designed to ensure the full reach of Div 1 of Pt 3-2. It would be inconsistent with the statutory scheme and the statutory purpose to read s 67 as *limiting* the scope of operation of the Division such that a supply of goods or services is not covered where the supply is pursuant to a contract the objective proper law of which is the law of another country.
20. For these reasons, which are substantially the same as those of the primary judge, we would reject grounds 1 and 2 of the notice of appeal.
21. It is convenient to note here a discrete submission by Valve to the effect that its supply of goods (computer games) to Australian consumers occurred outside Australia and, therefore, the consumer guarantee in s 54 of the Australian Consumer Law did not apply (in accordance with the principles set out in [105] above). Although this submission seems to go beyond grounds 1 and 2 of the notice of appeal, it is arguably covered by ground 4. It is not clear whether such a submission was made to the primary judge. In any event, we are prepared to deal with it. Valve submits that: its supply of computer software subscriptions, including games, to consumers was made in accordance with the SSA; this supply was effected in Washington State, on the basis that a reference to the “supply” of goods includes a reference to agreeing to supply goods (see s 11(b) of the Australian Consumer Law); and, applying this, Valve’s supply of goods took place where Valve agreed to supply consumers with computer software, including games (namely, in Washington State). In our view, this submission should be rejected. Although the definition of supply includes an agreement to supply, it does not follow that the supply in this case is to be located where the agreement was made. In the present case, the supply of computer games by Valve to customers in Australia took place where the customer downloaded the computer game on his or her computer. Further, by virtue of s 5(1) of the *Competition and Consumer Act*, Div 1 of Pt 3-2 of the Australian Consumer Law also applied to conduct outside Australia by bodies corporate carrying on business within Australia. For the reasons set out in relation to issue 3 below, the consumer guarantees in the Australian Consumer Law applied on this basis also.

## Issue 2

1. The second issue is whether, on the assumption that the relevant representations were made, the primary judge erred in concluding that Valve had made those representations (and thus engaged in conduct) in Australia. This issue is raised by ground 4 of the notice of appeal. The parties proceeded on the basis that it was necessary for the ACCC to establish *either* that Valve engaged in the relevant conduct for the purposes of ss 18 and 29(1)(m) of the Australian Consumer Law in Australia *or* that Valve carried on business in Australia and was thus subject to the extended operation of the Australian Consumer Law pursuant to s 5 of the *Competition and Consumer Act*. The second of these alternatives is discussed under issue 3, below.
2. Valve highlights the facts that: Valve is based in, and conducts its business from, the US; Valve’s business involves making products available for download from a website that is hosted in Washington State; and the website is an international website accessible by the world at large.
3. Valve submits that customers throughout the world who wish to deal with Valve need to use their internet web browser (either directly or via Steam Client) to navigate to Valve’s servers in Washington State in order to download webpages (such as the SSA or the Steam Refund Policy) from Valve’s website; that is, customers elect to digitally access material hosted by Valve in Washington State – they come to Valve rather than Valve going to its customers.
4. Valve submits that, contrary to the view taken by the primary judge, the test in *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 (***Voth***), which is used to determine the place to be assigned to a statement initiated in one place and received in another, does assist in determining where the relevant conduct occurred. Valve notes that in *Voth*, Mason CJ, Deane, Dawson and Gaudron JJ stated (at 567) that “it is some act of the defendant, and not its consequences, that must be the focus of attention”. Valve submits that, consistently with this, the Court must focus on Valve’s acts of uploading material in Washington State, not the consequences of these acts in Australia or any other jurisdiction.
5. Valve relies on the judgment of Merkel J in *Ward Group Pty Ltd v Brodie & Stone plc* (2005) 143 FCR 479 (***Ward***), in which it was held that the uploading of an advertisement (including a trade mark) on a website hosted outside Australia was published to the world at large and did not constitute a use by the website proprietor of the trade mark in each jurisdiction where the mark was downloaded (at [43]). Valve submits that the primary judge erred in failing to place weight on *Ward*, and by later distinguishing *Ward* on the basis that it was concerned with the characterisation of different conduct for the purposes of a different statute with different underlying norms. Valve submits that the test stated in *Ward* is the correct approach and does assist the Court in analysing where website publications are made to determine where the relevant conduct connected with those website publications occurred.
6. Valve submits that *Australian Competition and Consumer Commission v Chen* (2003) 132 FCR 309, which was referred to by the primary judge as an example of a case that had emphasised that it is not necessary that conduct be directed at a particular person, is distinguishable.
7. Valve submits that the primary judge erred by failing properly to apply the decision of *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575 (***Dow Jones***) in which it was held that in cases like trespass and 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” (at [43]).
8. In relation to the website representations, Valve submits that the primary judge applied an incorrect test by focusing on a pre-existing relationship instead of determining where Valve’s conduct took place (which Valve submits was Washington State).
9. In relation to representations made on the Steam Client, Valve submits that the primary judge erred in holding that the representations were made specifically to Australian customers who had downloaded the Steam Client in Australia and who had accepted the terms of the Licence Agreement and the SSA. Valve submits that: the relevant representations were made to the world at large and did not change depending upon the location from which a customer accessed them; and having regard to Valve’s conduct as a whole, and the principles in *Ward*, *Voth* and *Dow Jones*, it did not engage in conduct in Australia.
10. The question to be determined is where, for the purposes of ss 18 and 29(1)(m) of the Australian Consumer Law, the relevant conduct took place. Section 18 refers to conduct that is misleading or deceptive or likely to mislead or deceive. Section 29(1)(m) refers to the making of a false or misleading representation concerning certain matters. In the present case, the relevant conduct is the same for both provisions; it involves the making of representations.
11. Principles discussed in cases concerning service out of the jurisdiction or the choice of law rules for tort are not necessarily transposable to determining the place of conduct for the purposes of ss 18 and 29(1)(m) of the Australian Consumer Law. Nevertheless, the cases do identify some general themes which may assist, at least by way of analogy.
12. In *Voth*, the principal issue was whether a proceeding in the Supreme Court of New South Wales should be stayed. A majority of the High Court held that the proceeding should be stayed on the basis that New South Wales was a clearly inappropriate forum. In the course of their joint judgment, Mason CJ, Deane, Dawson and Gaudron JJ considered whether the tort alleged was a foreign tort. Their Honours stated (at 568-569) that: the tort could be described as a failure to advise (ie, an omission) or as a negligent misstatement of fact (ie, a positive act); strictly, the complaint was one of negligent omission, namely, failure to do various things, including failure to draw the attention of Manildra Milling Corporation (**MMC**) and the members of the Manildra Group to the requirement to pay withholding tax on MMC’s interest payments to the first respondent; in substance, the cause of complaint was the act of providing professional accountancy services on an incorrect basis; the same was true if the matter was approached as an omission, for the omission took its significance from the same act of providing the services; the act of providing accountancy services was an act complete in itself or, if not complete in itself, was one that was initiated and completed in the one place; and that place was Missouri. Thus, as their Honours characterised it, the situation was not comparable to one in which an act had passed across space to be completed in a place different from the place where it was initiated (cf *Diamond v Bank of London and Montreal Ltd* [1979] QB 333 (***Diamond***) and *Cordoba Shipping Co Ltd v National State Bank* [1984] 2 Lloyd’s Rep 91 (***The “Albaforth”***)).
13. Earlier in their judgment, at 566-568, Mason CJ, Deane, Dawson and Gaudron JJ discussed *Jackson v Spittall* (1870) LR 5 CP 542, *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458 (***Distillers***) and *Diamond*. It was noted that: in *Jackson v Spittall*, it was held that 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”; the authority of *Jackson v Spittall* was expressly affirmed in *Distillers*; in the latter case, Lord Pearson had said that “[t]he right approach is … to look back over the series of events … and ask … where in substance did this cause of action arise?”; and that one thing that was clear from *Jackson v Spittall* and from *Distillers* is that “it is some act of the defendant, and not its consequences, that must be the focus of attention”. It was in this context that Mason CJ, Deane, Dawson and Gaudron JJ observed that: in some cases an act passes across space or time before it is completed; and communicating by letter, telephone, telex and the like provided examples of this. After referring to *Diamond* and *The “Albaforth”*, their Honours said (at 568):

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. 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.

1. In relation to this passage, we would make the following observations. First, the first sentence merely provides an example of when a statement that passes across space will be taken to have been made at the place where it is received. It does not lay down a requirement that a statement must be directed to the place where it is received before it will be taken to have been made there. Secondly, although the context was different, we consider that the principles expressed in the above passage are of assistance in considering the place where a representation that passes across space is taken to have been made for the purposes of ss 18 and 29(1)(m).
2. In *Dow Jones*, the issue was whether service out of the jurisdiction (being Victoria, Australia) was authorised by the relevant rules of court and whether jurisdiction should be declined on the basis that Victoria was a clearly inappropriate forum. The action was one for defamation. The respondent (plaintiff) resided and conducted business in Victoria. He alleged that he had been defamed by an article in *Barron’s Online* that was available on the website, WSJ.com. The appellant (**Dow Jones**) printed and published the *Wall Street Journal* newspaper and *Barron’s* magazine. It also operated WSJ.com, which was a subscription news site on the World Wide Web. Those who paid an annual fee could have access to the information to be found at WSJ.com. Those who had not paid a subscription could also have access if they registered, giving a user name and a password. Dow Jones had its editorial offices in the city of New York. Material was transferred from the New York editorial offices to six servers maintained by Dow Jones at South Brunswick, New Jersey (see [17]).
3. As noted by Gleeson CJ, McHugh, Gummow and Hayne JJ at [9], argument in the case focussed on where was the place of publication of the statements of which the plaintiff complained. As their Honours noted at [18], the principal burden of the argument advanced by Dow Jones was that articles published on *Barron’s Online* were published in South Brunswick, New Jersey, when they became available on the servers which it maintained at that place. Their Honours said (at [24]) that in considering where the tort of defamation occurs it is important to recognise the purposes served by the law regarding the conduct as tortious. Their Honours noted at [26] that harm to reputation is done when a defamatory publication is comprehended by the reader, the listener, or the observer. At [38], it was noted that, in the course of argument, much emphasis was given to the fact that the advent of the World Wide Web was a considerable technological advance. Their Honours then stated: “So it is. But the problem of widely disseminated communications is much older than the Internet and the World Wide Web.” At [43], their Honours said that decisions such as *Jackson v Spittall, Distillers* and *Voth* “show that locating the place of commission of a tort is not always easy”. Attempts to apply a single rule have proved unsatisfactory, their Honours said, “because the rules pay insufficient regard to the different kinds of tortious claims that may be made”. In the end, their Honours said, the question is: “where in substance did this cause of action arise?” As noted in Valve’s submissions, it was said that in 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”. In relation to the tort of defamation, their Honours held (at [44]) that ordinarily defamation is to be located at the place where the damage to reputation occurs. In particular: “In the case of material on the World Wide Web, it is not available in comprehensible form until downloaded on to the computer of a person who has used a web browser to pull the material from the web server. It is where that person downloads the material that the damage to reputation may be done.”
4. While these conclusions related to the tort of defamation, they illustrate the need to focus on the nature of the cause of action or claim in determining where conduct takes place.
5. In light of the above statements of principle, we consider that where it is alleged that a respondent has, by making representations on the internet, engaged in conduct that is misleading or deceptive or likely to mislead or deceive in contravention of s 18 of the Australian Consumer Law, or made false or misleading representations in contravention of s 29 of the Australian Consumer Law, and an issue arises as to the place of the representations, it is necessary to ask where in substance the representations were made. If the respondent is based overseas and has a relationship with customers in Australia, it is likely that representations addressed to those customers will be taken to have been made in Australia, being the place where the customer accesses and reads the representations on his or her computer. This is likely to be the case even if the representations are available to be accessed by consumers in other countries around the world. A distinction is to be drawn between the conduct proscribed by ss 18 and 29 and the causation of loss or damage. It is not necessary, for the purposes of these provisions, to establish loss or damage. It follows that, for the purposes of determining the place where the representations were made, it is not necessary to determine whether any loss or damage was suffered and, if so, the place of that loss or damage. The approach we have outlined is both consistent with the general principles discussed in the cases and reflective of the consumer protection purpose of the statutory provisions.
6. In the present case, the first, second and third representations (based on the SSA) were made both on the Steam website and the Steam Client. While the SSA was uploaded in Washington State and could be accessed and read by people anywhere in the world, the context in which it was available to be accessed and read by consumers in Australia included that: Valve had approximately 2.2 million subscribers in Australia; consumers had to establish an account with Steam before they could purchase a game; and, as part of the process of establishing an account and purchasing a game, the consumer had to agree to the SSA. Thus, in the present case, there was a direct relationship between Valve and consumers in Australia, and the SSA was a document that Valve required consumers to agree to before they could open an account and purchase a game. We do not consider that a distinction should be drawn between accessing the SSA on the Steam website and accessing it on the Steam Client. In circumstances where Valve had a direct relationship with a large number of Australian consumers, and Valve required consumers to agree to the SSA before they could open an account and purchase a game, the first, second and third representations were made in Australia when consumers in Australia accessed and read the SSA on their computers. This is where, in substance, for the purposes of ss 18 and 29(1)(m), the representations were made.
7. The same reasoning applies, in our view, to the fourth representation. This representation (based on the Steam Refund Policy) was made on the Steam website. By this policy, Valve informed subscribers of the circumstances in which it would offer a refund. In circumstances where Valve had a large number of subscribers in Australia, and the policy was in effect addressed to subscribers, the fourth representation was made in Australia when consumers accessed and read the Steam Refund Policy on their computers in Australia.
8. We do not consider *Ward* to be of assistance for present purposes. Valve relies on observations made in the context of a claim for trade mark infringement. But these statements do not assist in determining, for the purposes of ss 18 and 29(1)(m) of the Australian Consumer Law, the place where a representation on the internet was made.
9. In light of our conclusions, below, in relation to issue 5, it is unnecessary to consider the alleged representations based on the online chats.
10. For these reasons, which are substantially the same as those of the primary judge, we would reject ground 4 of the notice of appeal.

## Issue 3

1. The third issue is whether the primary judge erred in concluding that Valve was carrying on business in Australia within the meaning of s 5(1)(g) of the *Competition and Consumer Act*. The issue is raised by ground 3 of the notice of appeal. In light of our conclusion in relation to issue 2, it is unnecessary to consider this issue. However, as the issue was the subject of full argument, we express our views on the issue.
2. Valve submits that it does not carry on business in Australia within the meaning of s 5(1)(g). Valve submits that the primary judge erred by failing to take into account, or by giving insufficient weight, to the following significant facts:
   1. Valve is a United States corporation based in Washington State;
   2. Valve operates a website that is hosted and fully supported by servers located in Washington State;
   3. Valve’s website provides a worldwide subscription service, enabling customers throughout the world to access content that Valve has uploaded to its website from servers located in Washington State;
   4. game subscriptions are processed by Valve in Washington State in US dollars;
   5. Valve is not registered in Australia as a foreign corporation and has no registered office or other place of business in Australia; and
   6. Valve has no subsidiaries or employees in Australia.
3. Valve submits that s 5(1)(g) “requires that a particular nexus with Australia exist” (*Bray v F Hoffman-La Roche Ltd* (2002) 118 FCR 1 (***Bray***) at [60]) and that its business lacks the necessary geographical nexus with Australia. Valve relies on the decision of Barrett J in *Campbell v Gebo Investments (Labuan) Ltd* (2005) 190 FLR 209; 54 ACSR 111 (***Gebo Investments***) in which it was held that “[t]here is a need for some physical activity in Australia through human instrumentalities, being activity that itself forms part of the course of conducting business” (at [33]). Valve submits that this physical presence would ordinarily be evident where the foreign corporation has:
   1. a place of business within Australia (*Corporate Affairs Commission (NSW) v Transphere Pty Ltd (No 2)* (1985) 9 ACLR 1005);
   2. any members of the corporation’s management resident within Australia;
   3. a subsidiary within Australia through which the foreign corporation transacts; or
   4. employees or agents regularly acting on its behalf within Australia (*Re Norfolk Island Shipping Line Pty Ltd* (1988) 6 ACLC 990; *Gibson Battle & Co Ltd v James King and Sons* [1915] SALR 14.

Valve submits that none of these physical connecting factors is evident in this case.

1. As set out above, s 5(1)(g) of the *Competition and Consumer Act* provides that the Australian Consumer Law extends to the engaging in conduct outside Australia by bodies corporate “carrying on business within Australia”. The expression “carrying on business” is not defined in the Act, but “business” is defined in s 4(1) as including a business not carried on for profit. The meaning of the expression “carrying on business” in the context of s 5(1) of the *Trade Practices Act* (which was in similar terms to the current provision) was considered in *Bray*. In that case, Merkel J said at [60]:

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) 133 CLR 164 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 [*Trade Practices Act*], requires that a particular nexus with Australia exist (that is, 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 [*Trade Practices Act*] 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* [*Pty Ltd v China Navigation Company Ltd* (1966) 115 CLR 10] it was open to the legislature, as a matter of power and comity, to impose a lesser nexus requirement (for example, 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.

1. After noting that the expression has often been considered in the context of service of process on, or enforcement of a foreign judgment against, a company that has a presence in or is carrying on business within the jurisdiction, Merkel J said (at [62]) that carrying on business will usually involve “a series or repetition of acts” (citing *Thiel v Commissioner of Taxation* (1990) 171 CLR 338 at 350 per Dawson J). Merkel J then quoted with apparent approval the following passage from *Pioneer Concrete Services Ltd v Galli* [1985] VR 675, in which the Full Court of the Supreme Court of Victoria said (at 705):

The word “business” frequently poses difficulties for the courts. As Lord Diplock said in *Town Investments Ltd v Department of the Environment* [1978] AC 359, at p 383: “The word ‘business’ is an etymological chameleon; it suits its meaning to the context in which it is found. It is not a term of legal art and its dictionary meanings, as Lindley LJ pointed out in *Rolls v Miller* (1884) 27 Ch D 71, at p 88 embrace ‘almost anything which is an occupation, as distinguished from a pleasure – anything which is an occupation or duty which requires attention is a business’.”

Recently Mason J attempted to define the word “business” in its ordinary or popular meaning for the purpose of certain rating sections in the *Local Government Act 1919* (NSW). In *Hope v Bathurst City Council* (1980) 144 CLR 1, at pp 8-9; 29 ALR 577, at pp 582-3, in a judgment which was concurred in by Gibbs, Stephen and Aickin JJ, Mason J accepted meaning No 19 from the *Shorter Oxford Dictionary*: “A commercial enterprise as a going concern”, as the definition which came closest to the popular meaning, although he considered that: “it is the words ‘carrying on’ which imply the repetition of acts (*Smith v Anderson* (1880) 15 Ch D 247, at pp 277-8) and activities which possess something of a permanent character”. Referring to the particular activities in question he said that the word “business” denoted “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”.

1. After setting out the above passage, Merkel J said at [63] that while the purpose of profit is unnecessary in the present context (by reason of the definition of “business” in s 4(1)), the definition set out above could otherwise be adopted as sufficient for the purposes of the case before him without adopting it as a definition that is necessarily applicable in all cases. We would take the same approach. His Honour went on to say that: in the context of s 5(1), he saw no reason for importing the additional requirement that to carry on business in the jurisdiction the foreign company must also have a place of business in the jurisdiction; a place of business is not a requirement of comity; and importing such a requirement would impermissibly supplement the corporate requirement of carrying on business with the additional requirement of corporate presence or residence. We agree with these observations.
2. In *Gebo Investments*, Barrett J considered whether the mere solicitation of business transactions by the internet constituted carrying on business in Australia in the context of the winding up provisions of the *Corporations Act 2001* (Cth) that give the Court jurisdiction to wind up a “Part 5.7 body” where the body “has ceased to carry on business in this jurisdiction”. The circumstances in which the issue arose were described at [28] of his Honour’s judgment. The evidence showed that more than 2,000 persons resident in Australia responded to solicitation through the LifeWealth 8 website and became licensees for the purposes of simulated stock market activity by making credit card payments by means of the website. The solicitation was, in each case, part of a systematic plan and was received and acted upon in Australia. Based on these facts, it was contended that some corporate entity associated with the LifeWealth 8 activity carried on business in Australia. Justice Barrett proceeded on the assumption that the acts of uploading to the website occurred outside Australia (at [30]). This raised the question “whether physical acts outside Australia which result in business communication with persons in Australia are, by reasons of the territorial quality of the receipt of the communication, properly regarded as carrying on business in Australia”. His Honour considered that this question applied equally to a situation where a person outside Australia telephones persons in Australia or sends messages by post or email to persons in Australia and, as a result of those acts performed outside of Australia, receives responses that amount to or lead to transactions forming part of some undoubted business activity.
3. Justice Barrett expressed the view (at [31]) that the circumstances outlined were, of themselves, insufficient to constitute the carrying on of business in Australia. His Honour said: “Case law makes it clear that the territorial concept of carrying on business involves acts within the relevant territory that amount to or are ancillary to transactions that make up or support the business.” His Honour referred to the distinction drawn in the cases between a situation where an agent within the jurisdiction has authority to bind the principal to dealings there, and a situation where the agent is empowered to do no more than receive proposals or orders within the jurisdiction (often, no doubt, in response to solicitation there) and retransmit them to the principal, referring to *Okura & Co Ltd v Forsbacka Jernverks Aktiebolag* [1914] 1 KB 715 at 721. His Honour continued (at [32]) that, by the same reasoning, the mere employment by a foreign company of a commercial traveller in Victoria to receive orders on commission and to forward them to its office abroad, was held not to be carrying on business in Victoria, referring to *Pearce v Tower Manufacturing & Novelty Co Ltd* (1898) 24 VLR 506. His Honour then said (at [33]):

Advances in technology making it possible for material uploaded on to the Internet in some place unknown to be accessed with ease by anyone in Australia with Internet facilities who wishes (or chances) to access it cannot be seen as having carried with them any alteration of principles as to the place of carrying on business developed at times when such communication was unknown. It has never been suggested that someone who by, say, letters posted in another country and addressed to recipients in Australia, seeks to interest those persons in business transactions to be entered into in the other country and in fact succeeds in concluding such transactions with some of them thereby carries on business in Australia, even though, depending on precise circumstances, the solicitation may contravene some other Australian law. There is a need for some physical activity in Australia through human instrumentalities, being activity that itself forms part of the course of conducting business.

1. His Honour concluded (at [34]) that, unless there was evidence of activities in Australia of placing material on the internet, or processing and dealing with inquiries or applications received by internet, the question whether the relevant company (LifeWealth Labuan) carried on business in Australia needed to be addressed by reference to the elements of the evidence that went beyond internet solicitation of persons to be licensees. (His Honour then went on to consider those other facts and matters, concluding (at [113]) that LifeWealth Labuan carried on business in Australia.)
2. Although *Gebo Investments* concerned different statutory provisions, we consider the discussion of principles regarding carrying on business generally to be of assistance for present purposes. We do not, however, see the reference to “human instrumentalities” in the last sentence of [33] as laying down an inflexible rule or condition as to the circumstances in which an overseas company may be taken to be carrying on business in Australia. We would instead place emphasis on the statement at [31] of *Gebo Investments* that the case law makes clear that the territorial concept of carrying on business involves acts within the relevant territory that amount to, or are ancillary to, transactions that make up or support the business.
3. Applying these principles in the present case, we do not consider any error to be shown in the primary judge’s conclusion that Valve was carrying on business in Australia for the purposes of s 5(1)(g) of the *Competition and Consumer Act*. His Honour concluded that Valve carried on business in Australia for the following six reasons (at [199]-[204]):
   1. Valve had many customers in Australia, with approximately 2.2 million Australian accounts. It earned significant revenue from Australian customers on an ongoing basis.
   2. Steam content was “deposited” on Valve’s three servers in Australia when requested by a subscriber. That content would stay on the Australian server if a subscriber requested it again in a particular period of time.
   3. Valve had 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. 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.
   4. Valve incurred tens of thousands of dollars per month of expenses in Australia for rack space and power for its servers. Those expenses were paid by Valve to the Australian bank account of an Australian company (Equinix).
   5. Valve relied on relationships with third party members of content delivery providers in Australia (such as Internode or ixaustralia) who provided proxy caching for Valve in Australia.
   6. Valve had entered into contracts with third party service providers, including companies such as Highwinds, who provided content around the world, including in Australia. Valve was aware that Highwinds had servers in Australia and that it was sometimes more efficient for customers in Australia to be provided content from servers in Australia.
4. These facts and matters establish that Valve had a business presence in Australia. Not only did Valve engage in transactions with a large number of Australian consumers, it owned servers in Australia upon which Steam content was “deposited” when requested by its Australian customers. There was a series or a repetition of acts in Australia that formed part of the conduct of Valve’s business.
5. We note for completeness a submission by Valve based on s 5(2) of the *Competition and Consumer Act* (set out above). Valve submits that: in light of s 5(2), the mere fact that a foreign corporation engages in conduct outside Australia in relation to the supply of goods or services to persons within Australia will not suffice to establish the “carrying on” of “business within Australia”; and, if this were not the case, it would have been unnecessary to extend the operation of ss 47 and 48 by reference to activity which is distinct from, but additional to, business activity of the type contemplated in s 5(1)(g). We do not accept this submission. Section 5(2) further extends the operation of ss 47 and 48 to the engaging in conduct outside Australia “in relation to” the supply by persons of goods or services to persons within Australia. This extension applies to conduct that is distinct from and potentially broader than that contemplated by s 5(1)(g). It does not provide a basis for confining the meaning of the expression “carrying on business” in s 5(1)(g).
6. For these reasons, we reject ground 3 of the notice of appeal.

## Issue 4

1. The fourth issue is whether the primary judge erred in concluding that Valve had made the first, second and third alleged representations (based on the SSA) and the fourth alleged representation (based on the Steam Refund Policy) and that they were misleading. This issue is raised by grounds 5 and 6 of the notice of appeal. Ground 5 also challenges a conclusion by the primary judge that the first alleged representation, as made in the 2011-2012 SSA, was *false*. We will also deal with this aspect in this section of our reasons.
2. Valve submits that the primary judge erred by not construing the words of the SSA and Steam Refund Policy correctly by reference to what those words conveyed to a reasonable person in the position of a consumer reading the terms of the SSA or Steam Refund Policy. For each of the four representations the subject of this appeal, Valve contends that the primary judge erroneously attributed additional scope to the terms of the SSA and Steam Refund Policy that went beyond the ordinary meaning of the words used in the SSA and Steam Refund Policy when construed in context.
3. It will be convenient to deal with each representation in turn.
4. In relation to the first representation (to the effect 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), Valve submits that the primary judge erred in finding that the representation was made in all three forms of the SSA and that it was misleading. Valve submits, in summary, as follows:

(a) The terms of the SSA made no such representation because, when properly construed, they do not purport to describe or determine a consumer’s rights under the local laws prevailing in various jurisdictions around the world and no reasonable consumer would think otherwise. It would be impossible and impractical for the SSA to comprehensively address and reconcile every set of local laws throughout the world. The SSA simply articulates Valve’s default global contractual position in a manner that is consistent with its corporate policy not to offer refunds.

(b) The SSAs recognised that consumers may have rights under the statutory regime applicable in their local jurisdiction. This was clear from the words of the SSAs. The references in the SSAs to fees not being refundable were expressly qualified. In the 2011-2012 SSA, cl 15 stated that “Valve’s obligations are subject to existing laws and legal process”. Clause 15 of the 2011-2012 SSA also included the following words:

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.

(c) In the 2012-2013 SSA and the 2013 SSA, the references to fees not being refundable in cl 3 were immediately followed by the words “except as expressly set forth in this Agreement”. Those words explicitly invoked other provisions of the SSA, including cl 13, which acknowledged 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.”

(d) The primary judge found that a reasonable consumer would be unlikely to consider the “miscellaneous” clause, which appeared towards the end of the SSAs and which did not expressly refer to refunds, to be an exception “expressly set forth in this Agreement”. Valve submits that, in making this finding, the primary judge erred in not taking into account, or not attributing sufficient weight to, the following matters: the requirement that representations to the public must be considered by reference to the class of customers likely to be affected by the conduct (Reasons, [218], citing *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 202); the characteristics of the reasonable consumer viewing the SSA, as found by the primary judge at Reasons, [236]; and the primary judge’s finding that Mr Miller, the only one of the ACCC’s witnesses who may have read the SSA, was not misled as he knew he had rights under Australian law.

(e) Expressed another way, the primary judge did not have sufficient regard to the totality of the SSA terms, the global market, the manner in which the relevant games are supplied, and the habits and characteristics of reasonable purchasers in such a market.

(f) The primary judge placed considerable emphasis on the fact that the provision which stated that fees were “not refundable” was capitalised, whereas the qualifying words in later clauses were not capitalised or proximate to the words “not refundable”. It is submitted that the primary judge erred by placing too much weight on this factor, establishing a hierarchy of terms not provided for in the SSA, rather than construing the effect that all of the provisions of the SSA, taken as a whole, would have conveyed to the reasonable consumer.

1. We note that no issue is taken with the primary judge’s statement of the applicable principles at [207]-[228] of the Reasons. Valve takes issue, rather, with his Honour’s application of those principles in relation to the first alleged representation. In our view, no error is shown in his Honour’s conclusion that the first representation was made by each of the SSAs and that it was misleading. Relevant extracts from the SSAs are set out at [53] and [55] above. We reject Valve’s submission that the SSAs made no such representation because they only purported to describe Valve’s “default global contractual position”. We do not consider that a reasonable consumer would read the SSAs in that limited way. Further, we do not accept Valve’s submissions based on cl 15 of the 2011-2012 SSA. As the primary judge said at [241], 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 might be unenforceable (but would be enforceable to the maximum extent possible). In relation to the 2012-2013 SSA and the 2013 SSA, we do not consider the differences in wording highlighted by Valve to lead to a different conclusion. Indeed, as the primary judge observed at [243], the addition of the words “except as expressly set forth in this agreement” militates against Valve’s submission, as it emphasised to the reasonable consumer that unless an express exception could be found in the agreement then the fees would not be refundable. The presence in the later SSAs of the express exclusion for EU customers (without mentioning Australian customers) further reinforced the message that no refunds would be provided.
2. Valve also challenges the primary judge’s conclusion that the first representation, as made in the 2011-2012 SSA, was *false*. It does not appear that anything turns on this point in circumstances where we have concluded that no error is shown in the conclusion that it was misleading. In any event, it was open to his Honour to conclude that the statement “ALL STEAM FEES ARE PAYABLE IN ADVANCE AND ARE NOT REFUNDABLE IN WHOLE OR IN PART” in cl 4 of the 2011-2012 SSA was false given the unqualified terms in which it was expressed and notwithstanding the presence of the other terms in the SSA.
3. In relation to the second and third representations, Valve submits that the primary judge erred in finding that these representations were made in all three forms of the SSA and that they were misleading. The second alleged representation was that Valve had excluded statutory guarantees and/or warranties of acceptable quality. The third alleged representation was that Valve had restricted or modified statutory guarantees and/or warranties of acceptable quality. Valve submits, in summary:
   1. The relevant terms of the SSA (cl 9 in the 2011-2012 SSA and cl 7 in the 2012-2013 SSA and the 2013 SSA) do not refer to excluding, restricting or modifying the consumer guarantee of acceptable quality in s 54 of the Australian Consumer Law. They cannot reasonably be construed as purporting to do so. That is apparent from the words of the relevant clauses: “This section will apply to the maximum extent permitted by applicable law”. This qualification implicitly conveys to a reasonable consumer that any disclaimers or exclusions only operate to the extent permitted by applicable law, and as such, Valve submits no misrepresentation was made. The reference in the SSA to “applicable law” is equivalent to the reference to “local law” in the Steam Refund Policy (from July 2014), which the primary judge accepted would have been understood by a reasonable consumer to refer to the law governing the consumer in his or her location. If the Australian Consumer Law applies to the SSA, the Australian Consumer Law is an “applicable law” and the Australian Consumer Law does not permit Valve to exclude, restrict or modify the s 54 guarantee. Thus, any exclusions, restrictions or modifications stated in the relevant clauses of the SSA would not apply by reason of the qualifying words used in those clauses.
   2. The exclusions in the relevant SSA clauses are confined to: (a) any express or implied warranty; (b) any common law duties, including duties of lack of negligence and lack of workmanlike effort; and (c) implied warranties of merchantability, fitness for a particular purpose or non-infringement.
   3. It is open to a corporation not to offer any express warranty as to merchantability, fitness for a particular purpose or non-infringement, and to exclude any implied warranty as to such matters. It is also open to exclude liability for negligence. A corporation may lawfully not offer any express guarantee, so there is nothing untoward or misleading for Valve to provide that “Valve does not guarantee continuous, error-free, virus-free or secure operation and access to … the software” in section C of cl 9 of the 2011-2012 SSA.
   4. The primary judge erred by not distinguishing between a supplier’s freedom to exclude express and implied contractual warranties and a supplier purporting to exclude mandatory guarantees imposed by local laws. The primary judge’s approach poses real practical difficulties for suppliers. It is common in commercial practice to exclude or limit liability by contract.
4. In our view, no error is shown in his Honour’s conclusion that the second and third representations were made by each of the SSAs and that they were misleading. In particular, his Honour considered that, notwithstanding the inclusion of the words “[t]his section will apply to the maximum extent permitted by applicable law” in the relevant clause, considering the SSA as a whole it remained misleading. The primary judge gave the following reasons:
   1. 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”.
   2. 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.
   3. The expression “applicable law” was not defined in the SSA. A reasonable consumer, even though reading the SSA with the knowledge that it was expressed to the world at large, would not know whether the expression “applicable law” meant the law of a local jurisdiction.
   4. The qualification applied only to subclause A and not to subclause C.

These reasons provide support for the primary judge’s conclusions in relation to the second and third representations.

1. In relation to the fourth representation (to the effect 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), Valve submits that the primary judge erred in finding that the representation was made in the 2011-2013 Refund Policy and the 2013-2014 Refund Policy and that it was misleading. Valve submits, in summary:
   1. Given the primary judge’s finding that a reasonable consumer would have understood the Steam website to be a worldwide website available to customers all over the world, that reasonable consumer would not understand the Steam Refund Policy to be a representation about the law in a particular place or to be detracting from any statutory rights applicable in that particular place.
   2. In addition, the words displayed on Valve’s website are critical. The most pertinent are the words “… we do not offer refunds …”. The primary judge found that the statement on Valve’s website including these words carried the inference that Valve was not required to provide a refund. Valve submits that the primary judge erred in drawing this inference because, given their natural and ordinary meaning, the words displayed on the website simply reflected Valve’s usual practice that it did not offer refunds or exchanges and the representation, on its face, was not misleading. It would have been a different matter had Valve stated “we *are not required to* offer refunds or exchanges” or “you *are not entitled to* refunds or exchanges” as the natural and ordinary meaning of those statements would have been inconsistent with the Australian Consumer Law (if it applied) and could have misled consumers as to their rights under the Australian Consumer Law.
2. We consider that no error is shown in the primary judge’s conclusions that the fourth representation was made by the 2011-2013 Refund Policy and the 2013-2014 Refund Policy (set out at [57] above), and that the representation was misleading. In particular, we do not accept the submission that the Steam Refund Policy should be read as merely a statement about Valve’s *practice*. Rather, in the circumstances in which it was made, a reasonable consumer would have read the policy as a statement to the effect that Valve was *not required* to provide a refund. Moreover, as the primary judge noted at [263], the Steam Refund Policy referred in terms to the SSA and, for the reasons given above, no error is shown in the conclusion that the SSA conveyed a similar representation.
3. We note for completeness that Valve also challenges the terms of the third declaration (set out at [90] above). Valve notes that the declaration is to the effect that Valve “represented to Australian Consumers on the Steam Website through the Steam Refund Policy that [it] had *no obligation* to offer those consumers a refund for digitally downloaded video games they had purchased from [Valve]” (emphasis added). Valve submits that, in fact, the Steam Refund Policy on Valve’s website was silent as to whether or not Valve was under a legal obligation under any particular law to offer consumers a refund; it merely stated Valve’s global company policy that Valve did not offer refunds. For the same reasons as indicated in the preceding paragraph, we reject this submission. A reasonable consumer would have read the policy as a statement to the effect that Valve was *not required* to provide a refund.

## Issue 5

1. The fifth issue is whether the primary judge erred in concluding that Valve did not make the seventh and eighth alleged representations (based on the online chats). The seventh alleged representation 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. The eighth alleged representation 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. This issue is raised by grounds 1 to 4 of the cross-appeal.
2. We will first set out the facts relating to the online chats (based on the Reasons) and then consider the ACCC’s submissions.

### Facts – Mr Phillips

1. 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 two or three 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 four hours on one occasion and two hours on another. He described a number of troubleshooting techniques that he tried to apply.
2. 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.

1. 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.

1. 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

1. 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.

1. 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://www.metacritic.com/game/pc/x-rebirth/critic-reviews). Both the official Egosoft (See: http://forum.egosoft.com/viewforum.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.

1. 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.

1. Mr Phillips replied, explaining that he had not played X-Rebirth for four hours but, rather, had attempted for four hours to make it work. Again, he asked for his request for a refund to be “escalated”.
2. 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

1. 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.

1. 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.
2. 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.

### Facts – Mr Miles

1. 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 eight. He participates in tests for new games and often plays games around three 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.
2. 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

1. 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

1. 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 crashes, 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

1. 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.

1. 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

1. 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 by 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

1. 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.

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

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

1. 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 for “Legends of Dawn”.

### Facts – Mr Miller

1. Mr Miller is a 28 year old man, living in Tasmania. He has played video games since he was seven 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, and incorrect menu options.
2. 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.
3. 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

1. 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.

1. 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.

1. 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

1. 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

1. 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.

1. 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.

1. 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 $55 AU. 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.

1. On 25 January 2013, there was a further response 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.

1. 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

1. A response was provided 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.

1. 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 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

1. 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.

1. 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.

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

Yes that will be fine thank you

Caleb

1. 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.

### Consideration

1. It is convenient to start with the ACCC’s contention that the primary judge erred in treating the statements in the chat logs, which continued over a period of days (and in some cases weeks), as “a single (ongoing) conversation” (Reasons, [316]). The ACCC submits, in summary:

(a) The primary judge’s approach was a misapplication of the principle in *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 (***Butcher***) at [109] that, in discerning what representation was made, the Court must have regard to context, including, when a representation is made to an individual, the knowledge of that individual. Contrary to the primary judge’s statement at [316], it was not “common ground” that “all the statements needed to be read together, rather than independently”. Rather, it was common ground that the *Butcher* approach applied.

(b) *Butcher* was a case where a representation was made at a single point in time. It was in this context that McHugh J said at [109] that a court “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”.

(c) Here, there were messages going back and forth. No doubt each message had to be read in the context in which it was communicated, including past messages in the exchange. But many of the messages were plainly meant to deter the consumer from pursuing refunds and be relevantly final – not to continue discussion on the point.

(d) Support for this proposition is found in the following cases, which distinguish the point in time that particular statements are made from later corrective statements: *St Lukes Health Insurance v Medical Benefits Fund of Australia Ltd* [1995] ATPR 41-428 at 40,823 per Northrop J; *Medical Benefits Fund of Australia Ltd v Cassidy* (2003) 135 FCR 1 at [43] per Stone J.

(e) Accordingly, in discerning what representations were made, the primary judge applied an incorrect approach, which led to error in the characterisation of the representations. This error was manifest both in relation to the finding that the representations had not been made, and the finding that none of the consumers were liable to be misled.

1. In our view, no error is shown in the primary judge’s approach, namely to treat the online chats as a single (ongoing) conversation for the purposes of determining whether each of the four pleaded representations was made. We consider this to be consistent with authority, including *Butcher*. Although the online chats continued over a period of days or weeks, it was appropriate in the circumstances to have regard to the whole of the conversation as this formed the context in which to assess particular statements that were made by the Steam Support staff.
2. The ACCC challenges the primary judge’s conclusion that the seventh and eighth alleged representations were not made in the chats.
3. In relation to the seventh alleged representation, the ACCC submits that: the primary judge placed weight on the fact that Steam Support made the statements in the context of “this transaction”; in other words, the primary judge characterised the representation as one that Valve was not prepared to give a refund *in the particular circumstances of the case*; but in context it was clear that the statements were a representation of Valve’s general policy (a no refund policy) since there was repeated reference to cl 3 of the SSA with hyperlinks to the SSA; and the last statement to Mr Phillips commenced with: “As a one time exception to our policy”.
4. In relation to the eighth alleged representation, the ACCC submits that: the primary judge failed to construe each of the statements in their overall context as at the point in time each was made; and the context was that each complainant had asserted his rights under Australian law. In particular, the ACCC submits:

(a) Mr Phillips twice asserted an entitlement to a refund under Australian law. In response, on 26 November 2013 and on 2 December 2013, Steam Support conveyed a general policy position by saying that a refund could not be offered and then referring to cl 3 of the SSA. Thus, Mr Phillips asserted a right under Australian law and Steam Support rejected the applicability of that right.

(b) After previously requesting a refund, Mr Miles asserted on 26 July 2013 that the video game was “barely playable” and that he would not have purchased it if it was appropriately labelled. He continued: “I’m not a lawyer but I do know there are laws regarding this sort of thing”. Steam Support replied on 29 July 2013 that: “The *regulations you are citing* do not apply to digital distribution subscriptions, electronic games, or downloadable content” (emphasis added). Later, on 30 July 2013, Mr Miles wrote that he had researched consumer law in Australia and the consumer law applied to digital goods. He stated: “Your ‘no refund’ policy is unlawful here in Australia”. The 5 August 2013 response from Steam Support was: “Unfortunately, we will be unable to assist you further with this issue”. In the context of a clear assertion of a right to a refund under Australian law, both replies are appropriately understood as an assertion that the Australian law did not apply.

(c) Mr Miller wrote to Steam Support on 2 May 2013 stating: “Under the Australian consumer rights laws you are immediately required to refund purchases that do not meet adequate standards or function as promised”. He also said: “As an American … based company, it’s my understanding you’ve breached the Fair Credit and Billing Act & Consumer Protection Act”. Steam Support responded on 2 May 2013 by saying: “*The regulations you are citing* do not apply to digital distribution subscriptions, electronic games, or downloadable content” (emphasis added). Mr Miller replied the same day that: “In Australia law, you are definitely in the wrong, hopefully the FTC will find the same”. Steam Support responded on 3 May 2013: “Unfortunately, we will be unable to assist you further with this issue”. It is clear that Mr Miller was asserting a right under Australian law and the response conveyed a message that that right did not apply in the transaction.

1. In our view, no error is shown in the primary judge’s conclusions that the seventh and eighth alleged representations were not made. The primary judge reasoned, correctly in our view, that the statements relied upon by the ACCC must be considered in the context of two matters (at [327]). 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 the primary judge explained, a right to a refund only arises if the various conditions in ss 54, 259 and 263 of the Australian Consumer Law are 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 the circumstances. Further, in relation the seventh alleged representation, we consider that the primary judge was correct to conclude (at [329]) that the statements relied upon by the ACCC concerned the availability of refund in the context of *the particular transaction*. In relation to the eighth alleged representation, we agree with the primary judge’s textual analysis at [331]-[333] of the Reasons.
2. The ACCC contends that, in holding that the representations were not misleading or likely to be so because none of the three complainants was actually misled, the primary judge elided characterisation of the representations with causation: cf *Director of Consumer Affairs Victoria v The Good Guys Discount Warehouses (Australia) Pty Ltd* (2016) 245 FCR 529 at [152]. It submits that causation was not relevant to the ACCC’s case as no damages claim was made. But this aspect of the primary judge’s reasoning needs to be considered in the context of the Reasons as a whole. In his Honour’s discussion of the applicable principles, particularly at [223]-[228], he did not exclude the possibility that conduct may be likely to mislead where it is directed towards a single person who is not misled. Proceeding on this basis, his Honour nevertheless took into account, in characterising the statements relied upon by the ACCC, the fact that none of the three consumers was actually misled or (when the chats were read as a whole) likely to be misled. This formed part of the context in which to undertake the task of characterisation. We see no error in this approach.
3. For these reasons, we reject grounds 1-4 of the cross-appeal. In these circumstances, it is unnecessary to deal with ground 5 of the cross-appeal.

## Issue 6

1. The sixth issue is whether the pecuniary penalty of $3 million imposed by the primary judge was manifestly excessive, and whether the primary judge erred in relation to the other relief ordered. This issue is raised by grounds 7-12 of the notice of appeal. These grounds were raised by Valve in the event that its grounds relating to liability were not upheld. In light of our conclusions, above, it is necessary to consider the grounds relating to relief. The focus of the appeal submissions in relation to these grounds was on the pecuniary penalty amount.
2. Valve submits that, in all the circumstances, the pecuniary penalty of $3 million was manifestly excessive. Valve submits that the primary judge erred in making four findings that were not supported by the evidence or, alternatively, by giving those findings manifestly excessive weight. In particular, Valve submits, in summary, as follows:

(a) First, the primary judge found that “Valve’s conduct had a substantial effect on consumers”. Valve submits that there was no proper basis for this finding, given that there was no finding, allegation or evidence that any of the games or digital content purchased by consumers through Steam were in fact not of acceptable quality, or that any consumer was in fact entitled to a refund under the provisions of the Australian Consumer Law, but was denied a refund by Valve.

(b) Secondly, the primary judge found, as a corollary to the first finding, that “the misrepresentations were a significant part of Valve’s business process involved in making profits”. However, the primary judge stated elsewhere that he was “not satisfied that any profit to Valve or loss to the consumers was proved to have been *caused* by these contraventions” (emphasis in original). As to this, the primary judge drew a metaphysical distinction between causation and contribution, but then did not make the necessary finding of causation to link Valve’s contraventions with loss suffered by consumers or profit gained by Valve. To the contrary, the primary judge found (Relief Reasons, [28]) that:

… the misrepresentations by Valve were unlikely to induce any consumer to make a purchase that he or she would not otherwise have made. If they had any effect prior to a purchase, which I doubt, it would have been the opposite. A consumer who read and relied upon the misrepresentations might not have made a purchase.

(c) The ACCC bore the onus of proof in relation to both damage to consumers and profit to Valve that was alleged to have been caused by the contraventions, which the ACCC did not attempt to discharge. This overarching obligation is not reflected in the primary judge’s reasons for decision. The primary judge also failed to take into account or give sufficient weight to the following relevant matters: Valve gave refunds to two of the three complainants whose evidence the ACCC relied upon at the liability hearing; and Valve gave refunds to 15,127 Australian subscribers during the relevant period.

(d) Thirdly, the primary judge found that Valve lacked a culture of compliance with Australian law, placing weight on the fact that Valve did not obtain legal advice about its position under Australian law. However, the primary judge found elsewhere that Valve believed it was not subject to Australian law. There was no finding that this belief was not genuine or was unreasonable. Valve was based in Washington State, it had no subsidiary in Australia and the primary judge found that the proper law of the SSA was that of Washington State, being the system of law with which the SSA had the closest and most real connection, consistent with the express choice of law provisions within the SSA. There was no finding or evidence that Valve’s policies were inconsistent with the laws of Washington State in the US, where Valve resided and from which it operated.

(e) Further, after Valve was approached by the ACCC in relation to the potential application of the Australian Consumer Law to Valve’s conduct, Valve obtained legal advice and provided training to its support staff on compliance with the Australian Consumer Law. There was no finding that the training given to support staff was inadequate, or that, following the training, Valve’s support staff were unable to deal with Australian consumers in a manner consistent with the Australian Consumer Law. There was no evidence or finding that any Australian consumer was denied a refund to which they were entitled pursuant to the Australian Consumer Law. It is also relevant to the exercise of discretion on this issue that Valve has not been the subject of any prior contraventions of the Australian Consumer Law.

(f) Fourthly, the primary judge found that Valve’s co-operation in the proceedings was “extremely” or “very” minimal, with Valve having “contested liability on almost every imaginable point, including jurisdictional issues”. Valve submits that this was not a fair summation of Valve’s approach to the litigation. There is no suggestion that any point taken by Valve was unreasonable or plainly unarguable. To the contrary, many of the points taken raised difficult (and, in many cases, novel) questions of law and fact. These matters were dealt with efficiently in a liability trial contained to three days. Valve was successful in defending a significant portion of the ACCC’s allegations. Five of the nine alleged misrepresentations were found either not to have been made or not to have been misleading or deceptive or false. When the ACCC first raised concerns about Valve’s conduct, Valve offered to take steps to resolve the ACCC’s concerns, but was informed in blunt terms by the ACCC that the ACCC was “of the view that a court based outcome is appropriate in this case and has made a formal decision to institute proceedings”. The finding that Valve’s conduct in respect of discovery was “obstructive”, or otherwise deficient, was erroneous in failing to take into account important differences in the wording of subsequent and supplementary discovery categories, with which Valve fully complied. In any event, the primary judge gave excessive weight to this factor, given Valve’s otherwise reasonable conduct of the litigation, which included acceptance of service in Australia, participating in Court-ordered mediation in Sydney (which the ACCC opposed), and putting forward witnesses who “gave evidence honestly and with a genuine effort to assist the court”.

(g) The primary judge also erred in assessing the size of Valve by reference to its population of subscribers, as this placed disproportionate emphasis on only one dimension of its business, rather than as a company with only 325 employees working from a single office within Washington State.

1. We note that Valve does not challenge the primary judge’s discussion of the legal principles at [8]-[13] of the Relief Reasons. The challenge is to his Honour’s application of those principles on the facts of the present case. But in our view, no error is shown in his Honour’s approach. His Honour had regard to all the relevant factors and did not take into account matters that were extraneous to the exercise of the penalty discretion. In particular, his Honour properly had regard both to specific and general deterrence.
2. One relevant aspect was the size of the contravenor. At [53] of the Relief Reasons, the primary judge stated, correctly, that Valve’s revenue and net income worldwide is “massive”. The primary judge found that the approximate net income (ie, income after expenses), in United States dollars, derived from all source between 2011 and August 2014 (very roughly approximated by dividing the income for 2014 in half) was a figure as there set out. (The figure has been redacted for confidentiality reasons in the publicly-available version of the judgment.) The primary judge also said that, while the “massive” net income of Valve worldwide was a relevant factor, it was also relevant that the contravening conduct all occurred in Australia where its net income was much smaller. The primary judge found that Valve’s approximate net income, calculated on the same basis, arising from purchases by Australian subscribers between 2011 and August 2014 was a figure as there set out (again, the figure has been redacted for confidentiality reasons in the publicly-available version of the judgment). The primary judge, in our view correctly, had regard to the size of Valve and the size of its business in Australia in considering the appropriate penalty to impose.
3. Another relevant factor was Valve’s culture of compliance. As his Honour noted at [39] of the Relief Reasons, prior to, or during, the period of contraventions until the involvement of the ACCC in April 2014, Valve did not obtain legal advice about its position in Australian law. In his evidence before the primary judge, Mr Quackenbush said that Valve “certainly could have afforded that advice” and that Valve could have sought it “if it had occurred to us”. However, he said that he did not turn his mind to whether Australian legal guarantees applied to Valve because of the “way we think about our legal position in the world”. The primary judge then said (at [40]):

Mr Quackenbush had therefore formed his view about the applicability of Australian law, and Valve had reached conclusions about its “legal position in the world” including Australia, without having obtained any legal advice in Australia. Mr Quackenbush went further. He said that he was not even sure that Valve would have done anything different even if it had received legal advice that Valve was subject to Australian law … Even in hindsight, Mr Quackenbush did not accept that it would have been prudent to obtain legal advice about Valve’s position in Australian law …

1. On the basis of this evidence, the primary judge considered (rightly, in our view) that “[t]his bespeaks a very poor culture of compliance in relation to Australian operations” (at [41]).
2. Further, even after the publication of the Reasons (on 24 March 2016), Valve appears to have done relatively little to train its support staff about Australian legal requirements. As described in [44] of the Relief Reasons, on 11 August 2016 the ACCC issued Valve with a notice to produce documents recording directions or instructions given by Mr Quackenbush to Steam Support staff in relation to the rights of Australian consumers. Valve’s response was that it had nothing to produce. Mr Quackenbush said in evidence before the primary judge that he had given the support staff only oral compliance instructions (which had been based on legal advice that he received from K&L Gates) because: “They’re a pretty efficient bunch. A very mature bunch”. In written submissions before the primary judge, Valve maintained that it did not need to provide any written guidance about the Australian Consumer Law to its 50 support staff because “verbal [by which was meant oral] tuition is a perfectly valid and effective means of providing staff training”.
3. We do not consider that Valve has established error in relation to the four findings by the primary judge highlighted in Valve’s submissions, summarised above. It was open to the primary judge to find (at [25] of the Relief Reasons) that Valve’s conduct had a substantial effect on consumers, and to have regard to this in exercising the penalty discretion. This finding is unsurprising given the large number of subscriber accounts in Australia, the significance of the SSAs in the process of establishing an account and purchasing a computer game, and the relevance of the Steam Refund Policy if a customer was experiencing problems and considering seeking a refund. It was also open to the primary judge to find (at [37] of the Relief Reasons) that the misrepresentations were a significant part of Valve’s business process in making profits. Again, the SSA formed a significant part of the process of establishing an account with Valve and purchasing a computer game from Valve. Valve highlights, in its submissions, [28] of the Relief Reasons. But that passage needs to be read with the following paragraph, in which the primary judge noted that “a loss that might have been suffered, and profit that Valve might have made from its contraventions, arose if a consumer was deterred from seeking a refund to which he or she might otherwise have been entitled” and that the primary judge was satisfied, based on the combination of evidence at the liability hearing and the penalty hearing, that a significant number of consumers would have read either the terms and conditions in the SSA or the terms of the Steam Refund Policy. In relation to Valve’s co-operation in the proceeding, we consider that his Honour’s observations were open to him.
4. For these reasons, we do not consider that any error has been shown in the primary judge’s approach to the determination of the appropriate penalty, and we do not consider the penalty that he imposed to be manifestly excessive.
5. In relation to the non-pecuniary remedies, Valve submits the primary judge erred in concluding that non-pecuniary penalties (including an injunction, publication of a consumer rights notice and implementation of an Australian Consumer Law compliance program) were appropriate in circumstances where there was no reason to apprehend a continuing or future breach of the Australian Consumer Law given that Valve had changed the terms of the SSA and statements on its website. Valve notes that the ACCC had made no complaint about the current terms and submits that the primary judge’s reference to a “dispute” between the parties about this was erroneous. Valve submits that, insofar as the injunction and the order for implementation of a compliance program were based on the finding that Valve lacked a culture of compliance, these orders were erroneous for the reasons submitted in relation to the pecuniary penalty. We do not consider that any error has been shown in the non-pecuniary remedy orders. The Relief Reasons provide a proper basis for the making of such orders. Insofar as these orders were predicated on the primary judge’s finding as to culture of compliance, we consider these findings to be supported by the evidence, for the reasons indicated above.

## Conclusion

1. For these reasons, the appeal and the cross-appeal are to be dismissed. There is no apparent reason why costs should not follow the event. Accordingly, we will order that the appeal be dismissed with costs, and the cross-appeal be dismissed with costs.

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| I certify that the preceding two hundred and twenty-five (225) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Dowsett, McKerracher and Moshinsky. |

Associate:

Dated: 22 December 2017