



1. The recent Federal Court decision in *Australian Competition and Consumer Commission v Valve Corporation (No 7)* [2016] FCA 1553 highlights, amongst other things, the increasingly contentious absence of “digital content” clauses in the Australian Consumer Law (**ACL**). Unlike the UK’s *Consumer Rights Act 2015*, the ACL does not currently include specific provisions for consumer guarantees with respect to “digital content”.
2. Valve, a United States based company, is one of the world’s largest online game retailers, with over 100 million subscribers worldwide (including 2.2 million subscribers in Australia) to its “Steam” game distribution platform.
3. In March 2016, the Federal Court found that Valve had breached sections 18(1) and 29(1)(m) of the ACL by making the following representations to Australian consumers:
  - a. Valve had no obligation, under any circumstances, to offer a refund for digitally downloaded video games purchased by Australian consumers from Valve, through the “Steam” platform; and
  - b. statutory guarantees and/or warranties of acceptable quality were excluded, which were deemed to be false or misleading because:
    - c. an entitlement for a refund in the event of a major failure in complying with the consumer guarantee of acceptable quality is provided for in the ACL as part of consumer guarantees (s259(3) and s263(4) ACL); and
    - d. consumer guarantees cannot be excluded, modified or restricted by contract (s54 and s64 ACL).
4. Following its findings in March, on 23 December 2016, the Federal Court ordered that Valve:
  - a. pay a pecuniary penalty in the amount of \$3 million;
  - b. be restrained for 3 years from making representations to Australian consumers that there is no obligation to offer refunds and that consumer guarantees do not apply or are excluded;

- c. publish a “Consumer Rights Notice” for Australian consumers visiting the Steam website (based on access from Australian IP addresses) for a period of 12 months informing, Australian consumers of Valve’s breach of the ACL and advising consumers of their rights under the ACL; and
  - d. establish and implement an Australian Consumer Law Compliance Program for a period of 3 years.
5. In a recent submission to the Australian Consumer Law Review Interim Report (<http://consumerlaw.gov.au/review-of-the-australian-consumer-law/have-your-say/interim-report/>), the Interactive Games and Entertainment Association, submitted that the ACL should, like the UK’s *Consumer Rights Act 2015*, incorporate a separate scheme for digital content, providing distinct definitions, consumer guarantees and remedies that are appropriate, tailored and practical for “digital content”.
6. Such submissions are gaining momentum as the divide between traditional “goods” and “digital content” becomes increasingly apparent, particularly when assessing appropriate remedies for minor and major defects with “digital content” that can be repaired, for example, with a digital patch.
7. The final Australian Consumer Law Review Report is due to be released in March 2017.

## **Contacts**

Resolve Litigation Lawyers are Competition and Consumer Law experts. For more information, please visit our website ([www.rllawyers.com.au](http://www.rllawyers.com.au)) or contact us to discuss further.

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