

From the editors...

In this issue, Richard Flitcroft, James North, James Wallace and Carly Chenoweth consider the implications of the recent *ACCC v Valve* decision and what it means to be “conducting business in Australia” under Australian consumer law. The view taken in that decision that the Australian Consumer Law applied to Valve, a foreign internet company without any physical presence in Australia, will be particularly relevant for similar foreign companies that sell to Australian consumers over the internet.

The risk of cyber attack has steadily risen to one of the foremost concerns across the business landscape, accentuated by numerous high profile incidents that have caused significant commercial and reputational damage to major companies. James North and James Wallace set out practical tips for General Counsels for assisting their company’s preparedness for cyber-risk, including how to respond if and when a cyber attack occurs.

Dakshina Chandra looks at the potential for big data technologies to be applied to and improve legal practice, and discusses trends and companies behind the development of quantitative prediction technology in legal practice.

Sylvia Song provides a useful overview of regulatory developments in Europe targeting anti-competitive practices of technology companies that may result in customer ‘lock-in’, including discussion of numerous technology cases and the developments in cloud industry standards.

an overseas online platform. The Federal Court has confirmed the ACCC’s broad view on the application of the ACL.

2. Implications

Specifically, this decision confirms that:

1. the ACL applies to transactions involving sales to Australian consumers by an online overseas provider regardless of the proper law of the contract;
2. a foreign company operating outside of Australia will be regarded as carrying on business in Australia if the company makes repeated sales, generates revenue and has business relationships in Australia; and
3. the supply of computer software will be considered the supply of goods for the purposes of the ACL. This is the case even when the software is provided on a licensed basis.

We address each of these issues in more detail below.

The Federal Court’s decision reinforces that foreign based businesses selling goods and/or services to Australian consumers can be subject to ACL obligations, including the consumer guarantees. In response to this decision, businesses (especially online and international businesses) should consider whether they are carrying on business in Australia and subject to the ACL. If so, businesses should amend their customer agreements accordingly to ensure compliance with the ACL.

3. What about the proper law of the contract?

Valve submitted that the Steam Subscriber Agreement (SSA) is not a contract to which the consumer guarantees

in the ACL applied because the proper law is the law of Washington State in the USA, not Australia.

Section 67 of the ACL provides:

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.

Valve submitted that, by implication and not by express words, section 67 of the ACL excludes the consumer guarantees where the proper law of the contract is not the law of an Australian jurisdiction.

While the Court accepted that the proper law of the contract is Washington State, it rejected Valve’s construction of section 67 of the ACL. The Court focussed on subsection 67(b) to find that the ACL was extended to a consumer contract, regardless of the proper law of the contract. Further, the Court held that Valve’s position was contrary to the context, history and purpose of the section.