Of Hints, Cheats, and Walkthroughs – The Australian Consumer Law, The Digital Economy, and International Trade

By Dr Benjamin Hayward

Those who enjoy playing video games as a pastime (though certainly not in the competitive esports environment) might take advantage of different forms of assistance when they find themselves stuck. Once upon a time, they might have read up on tips and tricks printed in a physical video game magazine. These days, they are more likely to head online for help. They might seek out hints – tidbits of information that help point the gamer in the right direction, but that still allow them to otherwise work out a solution on their own. They might use cheats – which allow the gamer 'to create an advantage beyond normal gameplay'. Otherwise, they might use a walkthrough – which, as the name suggests, might walk a player through the requirements of perhaps even 'an entire video game'.

Despite initial appearances, these definitions do more than just tell us about recreation in general, and gaming culture in particular. They also help us understand the state of play in relation to the Australian Consumer Law's application to the digital economy, and, in turn, the ACL's implications for international digital economy trade.

This video game analogy is actually very apt: gaming set the scene for recent litigation confirming the ACL's application to off-shore video game vendors. In the *Valve* case concerning the Steam computer gaming platform, decisions of the Federal Court of Australia and (on appeal) its Full Court confirmed that reach, via interpretation of the ACL's s 67 conflict of laws provision. The High Court of Australia denied special leave for any further appeal. In the subsequent Sony Europe case, concerning the PlayStation Network, liability was not contested. On the other hand, there was a live issue in Valve – at least at first instance – as to whether or not video games constitute 'goods' for the purposes of the ACL's consumer guarantees. The ACL's statutory definition of goods includes 'computer

software'. Expert evidence, not contested and accepted by the Federal Court, treated computer software as equivalent to executable files; which may work with reference to non-executable data, which is not computer software in and of itself.

Understanding the ACL's definition of 'goods' has significant implications. The 'goods' concept is a gateway criterion: it determines whether or not the ACL's consumer guarantees apply, and in turn, whether it is possible to mislead consumers about the existence of associated rights. So far as digital economy trade is concerned, case law addressing Australia's regular Sale of Goods Acts confirms that purely-digital equivalents to traditional physical goods are not 'goods' at common law. Any change to this position, according to the New South Wales Supreme Court, requires statutory intervention. Such intervention did occur when the *Trade Practices Act 1974* (Cth) transitioned into the *Competition and Consumer Act 2010* (Cth). Now, 'computer software' constitutes a statutory extension to the common law definition of 'goods' that would otherwise apply.

It is against all this context that a very recent decision of the Federal Court of Australia – *ACCC v Booktopia Pty Ltd* [2023] FCA 194 – is of quite some interest. Whilst most of the decision is uncontroversial, one aspect stands out: the Court held, consistently with Booktopia's admission, that eBooks fall within the scope of the ACL's consumer guarantee protections. This finding contributed to an AUD $6 million civil pecuniary penalty being imposed upon Booktopia for a range of breaches of the ACL. But is it actually correct? Whether or not that is so depends upon whether the statutory phrase 'computer software' extends to digital artefacts other than traditional desktop computer programs. There is actually good reason, based upon the expert evidence tendered and accepted in the Valve litigation, to think not.

So what does the Booktopia case represent? It could be a hint – an indication that will eventually lead us to a fully-explained understanding of the ACL's wide reach across the digital economy. In this sense, it might be a pointer that helps us to eventually solve this interpretative problem on our own. Or it could be a cheat – a conclusion possibly justified in the context of this individual case given Booktopia's admissions, but not generalisable to the ACL's normal operation. Either way, given the ACCC's expressed view (not necessarily supported by the ACL's actual text) that '[c]onsumers who buy digital products … have the same rights as those who shop in physical stores', what we really need now is a walkthrough: a clear and reasoned explanation of exactly what 'computer

software' actually means for the purposes of the ACL. This will ensure that traders have the capacity to know their legal obligations, and will also allow Parliament to extend the ACL's digital economy protections if its reach is actually limited in the way that my own scholarship suggests.

All of this has significant implications for international trade, as 'many transfers' of digital assets 'are made between participants internationally'. The increasing internationalisation and digitalisation of trade makes it imperative that this ambiguity be resolved at the earliest possible opportunity. Since, in the words of the Booktopia judgment, ACL penalties 'must be of an appropriate amount to ensure that [their] payment is not simply seen as a cost of doing business', traders – including international traders – do need to know with certainty whether or not they are subject to its consumer protection regime.

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