Submission to

Consumer Affairs Australia and New Zealand (CAANZ)

Subject

Australian Consumer Law Review

Interim Report

Date

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1. Introduction

The Interactive Games and Entertainment Association (**IGEA**) welcomes the opportunity to respond again to the Australian Consumer Law Review (the **ACL Review**), being undertaken by Consumer Affairs Australia and New Zealand (**CAANZ**). IGEA has reviewed the ACL Review Interim Report (the **Interim Report**). By way of background, IGEA refers to our previous submission to the ACL Review Issues Paper (the **Issues Paper**), which is attached at **Appendix A**. This attached submission is intended to form an important basis of IGEA's submission to the Interim Report.

The following submission has focused on the subject matters that IGEA addressed in our previous submission, those being: digital content, online shopping price disclosure, consumer access to data, the clarity of the ACL, and Australia's consumer policy framework and objectives.

2. Executive Summary

By way of executive summary, IGEA is of the view that:

1. **Digital content**
    a. CAANZ should reconsider its conclusion on the topic of "digital content" (i.e. to simply continue to monitor the area closely).
    b. CAANZ should reexamine IGEA's arguments in response to the question of whether the Australian Consumer Law (**ACL**) should be tailored for digital content, and:
        i. Undertake an analysis that answers the following question: "What might a tailored regime for digital content practically look like under the ACL?"; or
        ii. Failing that, provide firm guidance on when CAANZ intends to further review reform in this area.
2. **Online purchases and total minimum price**
    a. There should not be a positive obligation on businesses to disclose all components of a price upfront, especially if this would extend to more than just pre-selected options.
    b. The minimum price requirement should not be amended to include either contingent fees commonly paid by consumers or all optional fees/charges, as:
        i. This is an ill-defined concept that would very likely cause confusion; and
        ii. It could impose almost impossible disclosure obligations on businesses, particularly those in the video games industry.

3. **Consumers' access to data and the ACL**
    a. The *Privacy Act 1988* (Cth) (**Privacy Act**) is arguably the more appropriate platform to regulate the area of consumer access to data, as opposed to the ACL.
    b. The Productivity Commission is the best placed to consider the issues around consumers' access to data, and its inquiry into "Data Availability and Use" has allowed the topic to be explored in much more detail.
4. **Clarity of the ACL and consumer guarantees**
    a. CAANZ should revisit the examples of complexity involved in the current concept of "major failure" under the ACL as highlighted by IGEA.
    a. The ACL can be improved by:
        i. Providing a more tailored definition of "major failure" for digital content; and
        ii. Offering further guidance on what constitutes a major failure and in what circumstances consumers' can seek a refund over a repair or replacement.
    b. Any future provisions in the ACL that specify "multiple 'non-major failures' could trigger a 'major failure'" need to be consulted further with stakeholders:
        i. The concept is ill-defined and vague at this stage;
        ii. Many questions and issues need to be considered by CAANZ, including the number of non-major failures that would need to occur before a major failure is triggered and how the approach would operate in practice with regards to digital content; and
        iii. Exceptions or qualifications are likely required to ensure that the law remains reasonably flexible and an appropriate balance is struck between the interests of consumers and the impact on businesses.
    c. It must be understood that the short-term and final rights to reject goods under the UK *Consumer Rights Act 2015* are not available to contracts for digital content:
        i. If CAANZ is concerned about Australian consumers putting up with multiple attempts at repair, this is another opportunity to revisit the question of whether the ACL should incorporate a distinct regime for digital content.
        ii. A distinct regime would allow more tailored guarantees and remedies to be introduced, not just for digital content, but also for physical goods.
5. **Australia's consumer policy framework**
    a. The national consumer policy framework's overarching and operational objectives could be updated to reflect international standards and approaches to consumer law and consumer protection.

3. Digital Content

"…[T]he increasing availability of 'smart' products and streamed content (where there is no executable data) indicates that CAANZ should continue to monitor this area closely."

Interim Report

In IGEA's previous submission, the evolution of digital content in the video games industry was explained in detail. To reiterate, the sale and distribution of digital games and related game content has steadfastly increased and continues to do so. Almost all major game platforms (i.e. game consoles, computers, mobile phones, etc.) allow users to easily purchase and download products over the internet. During the 2016 financial year in Australia alone, over 300,000 video game titles were published for digital distribution, compared to the just over 400 games (approximately) published for physical distribution in the same period. In fact, the digital video game market in Australia has surpassed the traditional physical retail goods market in terms of revenue generated.[1] And it is not just the sheer quantity of sales that is noteworthy, but so too are the large number of alternate and innovative business models that have thrived in the online games environment, including subscription services, episodic games, free-to-play, demos and early access games.

It is encouraging that the Interim Report recognises this evolution of digital content and how consumers are increasingly buying digital content and associated devices. The Interim Report also does a satisfactory job in outlining some of the main issues and concerns that have arisen with regards to the Australian Consumer Law's (**ACL**)[2] treatment of digital content. Specifically, it highlights that the fast-paced innovation of digital technology has raised questions as to whether the ACL is equipped to appropriately address consumer law issues around digital goods and services. Many of the issues with the ACL's treatment of digital content, particularly those highlighted by IGEA in our previous submission, were also explicitly recognised by CAANZ. These include:

- The difficulties in applying the ACL definition of "goods" to digital content;
- The associated applicability of the consumer guarantees and remedies;
- Determining whether a piece of digital content is subject to a non-major or major failure; and
- The ACL's effectiveness in addressing new online-based business models and selling practices.

[1] See Appendix B.
[2] *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*').

CAANZ then also makes clear that several stakeholders, including IGEA, pushed for the introduction of a more tailored and specific regime for digital content under the ACL. The UK *Consumer Rights Act 2015*[3] (**UK CRA**) was cited heavily in support of this approach.

Conclusion on Digital Content

However, disappointingly, CAANZ concluded its initially promising analysis simply by stating: "while many stakeholders considered the ACL to be flexible enough to adapt to emerging issues, the increasing availability of 'smart' products and streamed content…*indicates that CAANZ should continue to monitor this area closely*". Even after recognising some of the important and legitimate concerns and issues raised by stakeholders such as IGEA, no tangible solution or indication as to potential reform was provided. The conclusion reached was merely a "wait and see" approach that, unfortunately, will only delay addressing the abovementioned problems to a much later date.

IGEA strongly urges CAANZ to reconsider its stance on whether a specific and tailored regime for digital content should be introduced into the ACL. The notion that digital technology, digital content and the issues surrounding them are 'emerging issues' is naïve – the issues are very clearly in existence now and are already impacting significantly on consumers and the industry. If there were any better time to explore the potential for reform, it is now. This is the first wholesale review of the ACL and it took over 5 years to just be initiated. It is therefore very unlikely for a further review, let alone change itself, to eventuate in the near future. We can't afford to 'shelve' an issue simply because it is difficult to traverse. Digital technologies and content are front and centre of today's consumer experience. IGEA therefore encourages CAANZ to again take into consideration the recommendations of IGEA and other stakeholders on the topic of digital content, and either:

- Undertake an analysis that answers the following question: "What might a tailored regime for digital content practically look like under the ACL?"; or
- Failing that, provide guidance on when CAANZ intends to further review reform in this area.

As IGEA outlined previously, the incredibly high levels of innovation and change in the video games industry (and other digital/technology based industries, for that matter), will simply continue to showcase the difficulties that the ACL demonstrates in attempting to service consumer law needs in the online world.

[3] *Consumer Rights Act 2015* (UK).

Stakeholder Comments

Furthermore, IGEA would like to note that some of the "opposing" stakeholder opinion that CAANZ cited in its Interim Report are not inconsistent with IGEA's view. Specifically, IGEA agrees that a cautious approach needs to be taken and that reform in this area needs to be appropriate and not create uncertainty, though uncertainty in the current scheme does need to be acknowledged. CAANZ has an obligation, we believe, to carefully examine how the ACL could be improved by amending its framework, structure, definitions, consumer guarantees, remedies and terms generally, in order to ensure that the legislation appropriately accounts for the nature and peculiarities of digital content. The current conclusion reached by CAANZ offers no solution to any of the problems that CAANZ itself recognised earlier in the Interim Report. While the concerns about creating uncertainty by initiating reform too fast are well-founded, the reality is that uncertainty exists right now with the ACL in its current state and the rapid change in consumers' experience in the digital economy will only further exacerbate this. Simply reaching the conclusion to "monitor this area closely" does not provide any reassurance to stakeholders that anything will improve soon.

Goods, Computer Software and ACCC v Valve

IGEA also looks to CAANZ to provide further clarification of its discussion on page 200 of the Interim Report with regards to the definition of "goods" in the ACL. IGEA is confused as to why it was CAANZ expressly mentioned that the ACL definition of "goods" already includes computer software, and thereafter discussed the outcome of the recent *ACCC v Valve Corporation (No 3)* case.[4] This paragraph seems to imply that CAANZ believes because the ACL definition of "goods" already includes computer software, there is no real need at this stage for the ACL to be specifically tailored for digital content.

If this is indeed true, it should be noted it was never in doubt that the ACL applied to computer software. This is made quite clear by the definition of "good" in section 2 of the ACL. The *ACCC v Valve* case also never questioned whether this was the case or not. The contentious issue that underpinned *ACCC v Valve* was, given that the term "good" under the ACL clearly extended to computer software and video games, whether *in fact* there was a supply of goods from the company, Valve, to its consumers, according to the specific facts of the case. The reason IGEA mentioned the *ACCC v Valve* judgment in its previous submission was only to highlight some of the difficulties that have occurred in the past when the ACL's definition of "goods" is attempted to be applied to new digital offerings. To

[4] [2016] FCA 196.

reiterate the point, the existing definitions of "goods" and "services" under the ACL did not easily fit with the digital content distributed in the case, a problem which was further exacerbated due to fact that the product in question was distributed as part of an overall digital service. Not only did this leave consumers' in doubt about their rights under the consumer law (i.e. whether they were entitled to a refund), but the supplier was also equally confused as to its consumer law obligations. It was for reasons such as these that the dispute escalated to the Federal Court in the first place.

United Kingdom Consumer Rights Act 2015

Lastly, IGEA would like to further encourage CAANZ to closely look towards the UK's consumer law regime when revisiting the topic of digital content and answering the question "...whether the [ACL's] remedies are appropriate, or should be tailored, for digital content".[5] IGEA's previous submission goes into much more detail on how adopting the UK CRA's treatment of digital content would resolve many of the current problems under the ACL. But it is now important to make clear why lessons can and should be learnt from the reasons the UK altered its consumer law in the way it did.

The UK Government's push to introduce a distinct consumer law scheme for "digital content" was borne out of a different set of legal circumstances to the current Australian context. The UK CRA's treatment of digital content was, in part, a direct response to the uncertainty surrounding the 1979 *Sale of Goods Act*.[6] In short, there were very large doubts as to whether the implied terms contained in the consumer law legislation, which long offered protection to consumers purchasing physical products, applied to contracts for digital products in the first place. Stakeholders were unsure whether pure digital products were even considered "goods" at all, which therefore created confusion as to the applicability of the various consumer rights and protections. To ensure that consumer rights in relation to digital products were undoubtedly clear, the UK Government correctly decided to treat "digital content" as a bespoke category within its consumer law regime, with a distinct set of definitions, provisions and consumer protections.[7] However, the ACL takes the alternative, rudimentary approach of simply including "computer software" within its definition of "goods".

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[5] Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review Issues Paper* (March 2016), page 22 <http://consumerlaw.gov.au/files/2016/03/ACLreview_issues_paper.pdf>.

[6] Robert Bradgate, *Consumer Rights in Digital Products: A research report prepared for the UK Department for Business, Innovation and Skills', Department for Business, Innovation and Skills* (10 September 2010) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31837/10-1125-consumer-rights-in-digital-products.pdf>.

[7] United Kingdom, *Draft Consumer Rights Bill*, House of Commons: Business, Innovation and Skills Committee, 23 December 2013, Sixth Report of Session 2013–14, vol 1.

Admittedly, the current Australian context is not quite as severe as that previously in the UK. But nevertheless, this does not mean that the uncertainties associated with the ACL's application towards digital content are dissimilar to those previously experienced in the UK, nor that that the fundamental shift to treat digital content separately to physical goods wasn't a necessary change for the better. It is very clear that the ACL applies to transactions for computer software, such as video games. That is not where the uncertainty lies – rather, it is where stakeholders attempt to apply the terms of the ACL to digital content, such as when asking the question of whether a certain digital product is a "good" or "service". Confusion can also arise in many other instances, such as when attempting to:

- Determine what consumer guarantees and remedies apply in a digital transaction;
- Apply certain ACL remedies to contracts for digital goods (i.e. the right to reject a good[8] could easily be abused in the case of digital content – **see Appendix A** for more information); and
- Ask whether a digital product is subject to a major failure (noting the definition for "major failure"[9] doesn't consider that digital content (especially video games) can be very complex, subject to bugs on launch, and are usually followed by updates post-release to fix most issues).

Moreover, as argued in IGEA's previous submission, new and emerging pieces of digital content continue to blur the distinction between "good" and "service" that the ACL attempts to define collectively for physical and digital products. This uncertainty matters because it goes on to cause confusion as to the consumer guarantees and remedies that apply in any one instance. As a result, consumers are often uncertain as to the rights and protections they have, while businesses are equally unsure as to the obligations and responsibilities they owe.

When considered from this perspective, the uncertainties that Australian consumers experience today are similar to what consumers previously experienced in the UK. It is true in both cases that confusion exists, albeit to different extents, over what "legal rights the purchaser of digital content has if the content proves defective or fails to live up to expectations" and therefore "what rights to quality and what remedies are available to consumers for digital content".[10] As further mentioned by the UK Department for Business & Innovation in its impact assessment of consumer rights,[11] this kind of legal uncertainty causes the following problems:

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[8] *Australian Consumer Law* s 259(2)-(3).
[9] Ibid ss 260, 268.
[10] Department for Business Innovation & Skills, *Consumer Rights Bill: Supply of Digital Content – Revised Impact Assessment: Final* (January 2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/274853/bis-13-1356-consumer-rights-bill-supply-of-digital-content-impact-final.pdf>.
[11] Ibid.

- Consumers may be less willing and therefore less active in trying to address problems experienced with digital products; and
- Businesses may not think they are obliged to provide remedies that consumers believe they are in fact entitled to, which risks dispute and potential litigation, costing time and money for both parties. This may also go on to affect the reputation of businesses across digital industries as a whole and, subsequently, undermine consumer confidence in digital products.

But this is where the crucial difference lies: the approach taken by the UK CRA removes most of this uncertainty and potential consumer detriment by making a firm distinction between "goods" and "digital content", and thereafter providing a separate set of statutory rights and remedies. Conversely, the ACL simply leaves room open for confusion by attempting to treat physical goods and digital content in the exact same manner, when it is self-evident that they are very different concepts and that this is not always practically appropriate. For more information as to why this is the case, please refer to the section in IGEA's previous submission, entitled: "United Kingdom Consumer Rights Act 2015" (**see Appendix A**). To summarise, the UK CRA:

- Provides a clear, easy to-understand and easy-to-apply definition of "digital content"; and
- Provides a separate and appropriate set of statutory rights and remedies for digital content, where, among other things:
    - There is no restriction on the number of times digital content can be repaired or replaced before a consumer is entitled to a remedy (because digital content can be updated quite easily with a simple download, and usually require multiple patches and fixes due to the inherently complex nature of computer software and code); and
    - There is no short-term or final right of rejection for digital content (which reduces the potential for abuse, whereby consumers may download a product, copy the software to another storage location, and then attempt to return it and obtain a refund).

Accordingly, IGEA trusts that CAANZ will see the sense in reconsidering its stance on this issue, bearing in mind both the above comments and IGEA's previous submission to the Issues Paper.

4. Online Purchases and Total Minimum Price

"There may be opportunities to consider more targeted approaches to address the specific issue of pre-selected options"

Online Price Disclosure

IGEA notes stakeholders indicated concern about the disclosure of pricing information at the point of sale for products online. While there are other issues at play, CAANZ's focus is on pre-selected options. Several solutions are suggested by stakeholders, such as by having a positive obligation to disclose all components of a price upfront (more than just pre-selected options) or specifying that the minimum price requirement includes contingent fees commonly paid by consumers or all optional charges.

Firstly, IGEA agrees with CAANZ that there may be challenges in determining what the majority of consumers are likely to pay in contingent fees. This is a very broad approach that would very likely cause confusion for businesses and consumers alike. How could businesses reliably and consistently determine what fees or charges a consumer would commonly accept, let alone what a "contingent" fee truly is? Delivery fees and credit card surcharges are obviously clear examples. However, if the wording of any drafted provisions is too vague and unclear, there is a real risk that businesses may be required to disclose a whole suite of fees as part of the minimum price, which could impose onerous and perhaps unintended and impractical obligations.

Secondly, a positive obligation to disclose all components of a price upfront (noting this would include much more than just pre-selected options) may also be very onerous for businesses. The same would apply if the minimum price requirement was altered to include "all optional fees and charges". To reiterate IGEA's previous submission with regards to the video games industry, a single video game title may eventually come with tens if not hundreds of individual pieces of purchasable additional content (such as in-game items or other content), which are entirely optional and not compulsory to play. Simply the sheer number of optional content that single games can contain today would likely make full and absolute disclosure at the point-of-purchase not only impractical, but also impossible. In many cases, when a video game is first sold, developers and publishers have yet to determine the details, volume or prices of all additional content that will be purchasable for the game in the future. This then raises the legitimate concern of whether "all components of a price" or "all optional fees and charges" would only include charges in place at the time of purchase or also extend to optional fees that may be implemented in the future. This is a real concern that must be considered by CAANZ.

Accordingly, requiring suppliers of games to disclose the price of every single optional purchasable item or additional piece of content would impose incredibly onerous, and likely practically impossible, disclosure requirements. This reality for video games would also make the question of what the "usual" or "common" final purchase price of a game almost impossible to answer, as consumers in the industry are diverse and have varying desires as to the optional content they each purchase for a title. IGEA also acknowledges the comments of stakeholders and CAANZ here that there are already many protections in the ACL that can help protect consumers in circumstances of insufficient price disclosure, such as the general protections (i.e. the prohibitions on misleading and deceptive conduct) and specific protections (i.e. the prohibition on false or misleading practices, and the pricing and disclosure provisions). Therefore, to summarise, IGEA is of the opinion that:

- There should not be a positive obligation on businesses to disclose all components of a price upfront, especially if this would extend to more than just pre-selected options; and
- The minimum price requirement should not be amended to include either contingent fees commonly paid by consumers or all optional fees/charges.

Options for Consultation

It seems CAANZ has considered practical business considerations such as those outlined above, as the options for consultation in the Interim Report are focused solely on combatting issues around pre-selected options, as opposed to more general approaches that attempt to regulate optional fees and charges as a whole. Bearing in mind the above, IGEA would like to conclude by providing the following responses to "Option 1 – Introduce measures to enhance transparency in online shopping":

- An option to include an outright prohibition on using pre-selected options during booking or payment processes is perhaps too drastic of an approach. IGEA recommends that CAANZ undertakes a thorough analysis and properly balances consumer needs with current business practices before it makes any final recommendations on this option.
- In the alternative, a requirement to disclose additional fees or charges tied to pre-selected options as part of the up-front price arguably strikes a better balance between consumer needs and current business practices. If this were implemented, businesses that rely heavily on pre-selected options would not need to make the drastic change of entirely removing that purchasing method, which (as CAANZ itself recognised) would reduce the need to extensively alter websites, mobile apps and other purchasing platforms to become compliant.

5. Consumers' Access to Data and the ACL

"…[T]he Productivity Commission is best placed to consider the issues around consumers' transaction data"

Consumer Access to Data

In IGEA's previous submission, it was deemed appropriate to reserve a stance on consumer access to data until the Productivity Commission completed its inquiry into "Data Availability and Use". The Commission has since released a Draft Report and is seeking feedback.[12] Nevertheless, IGEA would like to provide a more in-depth explanation now as to why the *Privacy Act 1988* (Cth) (**Privacy Act**) is the most appropriate platform to regulate the area of consumer access to data, as opposed to the ACL.

Role of the Australian Consumer Law

In its Issues Paper, CAANZ posed the following question: "What is the role of the ACL and the regulators in supporting consumers' access to data?" It seems CAANZ has itself provided a response to the first part of this question, when stating that "…the Productivity Commission is best placed to consider the issues around consumers' transaction data". IGEA agrees with this for the following reasons. First, the Privacy Act is arguably the more appropriate framework to address the topic of consumer access to data, simply because of the following objectives of the Privacy Act:[13]

- To provide the basis for nationally consistent regulation of privacy and the handling of personal information; and
- To promote responsible and transparent handling of personal information by entities.

It is the notion of "the handling of personal information" that is important. The Privacy Act is making a concerted effort to ensure that it is the main driving force for ensuring nation-wide legislative and regulatory consistency for the handling of personal and consumer information. While "consumption" or "transactional" data is not expressly encompassed within the definition of "personal information" under the Privacy Act, the two concepts are arguably related enough to conclude that the Privacy Act is the most appropriate legislative framework to address the issue of consumer access to consumption

[12] Productivity Commission, *Data Availability and Use: Productivity Commission Draft Report* (October 2016) <http://www.pc.gov.au/inquiries/current/data-access/draft> [accessed 6 December 2016].
[13] *Privacy Act 1988* (Cth) s 2A.

and transactional data. Importantly, the Privacy Act already provides consumers with the power to access data about themselves held by businesses.[14] This power is expressed within Australian Privacy Principle 12,[15] which states "If an APP entity [including a body corporate] holds personal information about an individual, the entity must, on request by the individual, give the individual access to the information". Therefore, the Privacy Act already plays a leading role in this regulatory space.

Now while the Productivity Commission believes that a new *Data Sharing and Release Act* should be enacted to strengthen provisions on access to data by individuals,[16] it also stated that the Privacy Act should remain a principal piece of legislation governing privacy and that a definition of consumer data should be introduced that includes "personal information" as defined by the Privacy Act. Thus, whether it is the Privacy Act, a new piece of legislation, or a mix or both, what is at least clear is that the ACL is not the most appropriate framework to improve consumer access to data. By sitting under the *Competition and Consumer Act 2010* (Cth), the ACL plays a different role, that being, "to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection".[17] Consumer access to data may be an incidental or related component of this objective, but the Privacy Act, Australian Privacy Principles and potentially a *Data Sharing and Release Act,* are the more appropriate mechanisms through which future regulatory reform should be driven.

Draft Report into "Data Availability and Use"

Second, the Productivity Commission's "Data Availability and Use" inquiry will allow, and has already allowed, issues around consumer access to data to be explored in much more detail. It is important here to refer to the Commission's recently released Draft Report, and particularly the chapter entitled: "A framework for Australia's data future".[18] This chapter recommends a new regulatory framework, designed to overhaul the way Australian governments, business and individuals handle data. There are four key elements underpinning this approach, one of which intends to give individuals more control over data held on them by introducing a **Comprehensive Right** over personal data. Several draft recommendations (9.1-9.3 and 9.11) are presented to help achieve this, all of which are relevant to the questions around consumer access to data initially posed by CAANZ in its Issues Paper. IGEA notes that it will be creating a separate response to these draft recommendations.

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[14] Productivity Commission, above n 12, page 347.
[15] *Privacy Act 1988* (Cth) sch 1.
[16] Productivity Commission, above n 12, page 368.
[17] *Competition and Consumer Act 2010* (Cth) s 2.
[18] Productivity Commission, above n 12, page 339-352.

6. Clarity of the ACL and Consumer Guarantees

"Stakeholders provided various examples of where they saw unnecessary complexity in determining whether or not a failure to comply is 'major'"

While CAANZ did recognise that stakeholders provided various examples of difficulties and complexities in determining the existence of a "major failure" to comply with consumer guarantees, it seems that the specific examples outlined by IGEA in our previous submission were not discussed to any extent. IGEA will be addressing some of the presented options for consultation relevant to major failures, such as whether multiple non-major failures should constitute a major failure. But first, IGEA would like to reemphasise the following examples of complexity involved in the current concept of "major failure" under the ACL, as these are all very relevant to the option posed for consultation that suggests clarifying the law on what can trigger a major failure. IGEA strongly encourages CAANZ to revisit these examples for its final report.

Difficulties with the current concept of "major failure"

Firstly, the ACL's equal treatment of digital content and physical or tangible goods can be very unclear at times and cause confusion for businesses and consumers. To reiterate relevant examples, the ACL's definition of "major failure"[19] does not square nicely with the reality that pieces of digital content can be updated, patched and/or resupplied quite easily in order to rectify failures potentially considered as "major" under the ACL. Additionally, the ACL's distinction between "goods" and "services"[20] can be difficult to apply towards digital content. While, as highlighted in the Issues Paper, regulators can (and do) issue guidance for businesses and consumers, ranging from information about the law to enforcement policies and regulatory guides on specific issues, these tend to be geared towards the supply of physical or tangible goods and services delivered "offline" rather than digital content and the software and/or technology industries more generally.

Secondly, from the experience of some of our members, when a supplier or business fails to comply with the consumer guarantees, consumers tend to believe that they are always entitled to a refund, regardless of whether the failure was "major" or "non-major". This may be caused by a number of factors, including the wording of the ACL provisions and also information that is published by the ACCC

[19] *Australian Consumer Law* ss 260, 268.
[20] Ibid s 2.

towards consumers about these kinds of situations. As a result, some retailers and suppliers may feel obligated to provide refunds when rectifying failures in all cases, when they actually have the right to choose between repairing, replacing or refunding money paid if the failure is "non-major".[21] This may prevent manufacturers from being able to rectify failure(s) by undertaking repairs. Unfortunately, while only "major" failures allow consumers to reject goods and seek a refund,[22] this has not been communicated particularly well to consumers, suppliers and stakeholders more generally.

There also seems to be uncertainty as to what actually constitutes a "major failure" under the ACL, particularly because of the provision that states a major failure has occurred where "the goods [supplied] would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure".[23] The ACL provides little clarification or guidelines to help determine how this provision operates practically. On its face, it could easily be suggested that a reasonable consumer would never acquire a good if it contained a flaw or defect of any kind, whether in practice the flaw or defect was in fact minor or not, and therefore any product defect could be considered to be a "major failure". As a result, again, suppliers often feel obligated to always provide a refund for a product in the first instance, even though repair or replacement could easily be a reasonable response. This might even occur after a consumer has already used and enjoyed the product substantially. We therefore suggest that the ACL be amended to ensure that a failure to comply with a guarantee is not a major failure where the failure in question could reasonably be remedied by repair or replacement. Additionally, as addressed above, it should be the case that repair or replacement is the first right that consumers can utilise before any other remedies are enforceable.

Thirdly, there is a lack of clarity about areas of the ACL that refer to the concept of a "reasonable" time or period. For example, the rejection period for goods is defined as "the period from the time of the supply of the goods to the consumer within which it would be reasonable to expect the relevant failure to comply with a guarantee".[24] However, while the ACL lists some factors that can be taken into account in calculating the length of the rejection period, there are no guidelines or examples to further assist businesses and suppliers. Additionally, while the guarantee as to repairs and spare parts[25] stipulates that a manufacturer will ensure that facilities for the repair of the goods (and parts for the goods) are available for a reasonable period after the goods are supplied, the ACL doesn't provide any assistance or guidance as to how long the "reasonable period" is supposed to be, nor of any criteria

[21] Ibid ss 259(2), 267(2).
[22] Ibid ss 259(3), 267(3).
[23] Ibid ss 260(a), 268(a).
[24] Ibid s 262(2).
[25] Ibid s 58.

that may be used to calculate the length of such a period. To ensure that there is greater certainty and clarity for businesses and consumers, it would be beneficial for the ACL to clarify the time and duration elements of the ACL. Specifically, in consultation with relevant industry groups, guidelines and criteria should be developed for the ACL (including the consumer guarantees) that, for instance, help identify what a "reasonable period" might be in practice (particularly for digital content).

IGEA therefore believes that the clarity of the ACL should be improved in the ways suggested above.

Whether multiple "non-major failures" should trigger a "major failure"

If the ACL were to be amended to specify that multiple "non-major failures" could trigger a "major failure", IGEA stresses that any provisions drafted to achieve this need to be consulted with stakeholders. The concept is ill-defined and vague at this stage, particularly in terms of how many non-major failures would actually be required to trigger a major failure. In other words, what is meant by the word "multiple"? Would just two failures to comply with consumer guarantees be sufficient? Or three? Could one failure to comply be severe enough (without yet constituting a major failure) to reduce the number of other non-major failures required to trigger the provision? What if, even in the instance of several non-major failures, it is still not the case that any one of the pre-requisites listed in sections 260 and 268 of the ACL are activated? What if there are several non-major failures, but some of them are rectified by the supplier before the consumer takes action? With regards to certain comments made other stakeholders,[26] how long would any "defined period" or "short period of time" be, within which multiple non-major failures can trigger a major failure? Would this period of time be fixed or could it be flexible enough to change to suit the specific good or service being supplied? Questions such as these are very important and need to be considered by CAANZ, otherwise businesses may become even more confused as to their obligations under the ACL.

Additionally, how would this approach square with the reality that digital goods are inherently complex products, typically subject to multiple bugs or other issues at launch that are usually resolved soon after with updates or patches? Video games in particular are some of the most intricate forms of digital content available today, containing a plethora of in-game assets (i.e. pictures, graphics, music, audio files, videos, levels, character models, user interfaces, online features, etc.) that are all required to work together effectively for a game to be playable. Games also contain thousands and sometimes millions of lines of code, and because many flaws or defects in games are caused due to problems in a

[26] Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review: Interim Report,* October 2016 <http://consumerlaw.gov.au/review-of-the-australian-consumer-law/have-your-say/> page 54.

game's code, discovering, understanding and fixing coding issues can be very difficult and time consuming. It is not always possible to resolve all coding issues before a game is released, particularly because many issues may only arise after a game has been released for many weeks or even months. No amount of quality assurance or testing will be able to result in the discovery of all issues or bugs in a game. Typically, this can only occur once a game has been released into the wild and is subject to the scrutiny and experimentation of thousands or millions of players. Even more so, attempts at fixing code with updates can also easily cause other unforeseen issues, which would then require further patches or fixes.

Would every such instance of a bug, glitch or other issue in a game constitute a solitary non-major failure that could combine with others to trigger a major failure? What if one failure to comply with a consumer guarantee is rectified while others have yet not? Would this mean that a major failure has been "un-triggered" until another non-major failure occurs? If a non-major failure with a digital product were to be rectified by an update or patch, would this reset the "defined period" of time within which multiple non-major failures could trigger a major failure? Would there be any safeguards in place? Could any exceptions or qualifications reduce the likelihood of regulatory or compliance costs for businesses in the digital economy being blown out of proportion? How could businesses operating in the digital word be able to confidently and consistently determine whether a series of non-major failures have taken place in any one instance?

Accordingly, while IGEA is not opposed in-principle to an approach whereby multiple non-major failures could trigger a major failure, any provisions that are drafted need to strike an appropriate balance between the interests of consumers and the impact on businesses. It is likely true that, as suggested by CAANZ itself, "exceptions or qualifications are required to ensure that the law remains reasonably flexible". IGEA therefore strongly recommends that CAANZ first consider the questions and issues covered above (particularly those relevant to digital content and video games), further clarify the uncertainties currently present (i.e. the meaning of "multiple", the length of any "defined period", etc.), describe how the approach would operate in practice, craft potential exceptions or qualifications that temper the operation of the provision, and subsequently consult further with stakeholders.

Multiple attempts at repair

In its Interim Report, CAANZ discusses comments made by several stakeholders on the topic of "the cycle of failed repairs",[27] whereby goods continue to break despite being repaired or replaced. While CAANZ did not seem to provide any formal recommendations or options for consultation in response to this issue, IGEA would still like to clarify several aspects of this discussion.

It is stated in the Interim Report that there are provisions in the UK *Consumer Rights Act 2015* (**UK CRA**) which allow refunds after failed or impossible repair or replacement. These provisions do of course exist, and Box 6 of the Interim Report, entitled "UK rights to refunds (rejections) after a failed repair or replacement", describe them well. To reiterate, consumers in the UK are entitled to a short-term right to reject and final right to reject goods (thereby treating a contract as at an end) if the goods do not conform to the contract.[28] This could be in the case of goods not being of satisfactory quality or not fitting a particular purpose, terms of which are implied to every contract for the supply of goods by the legislation.[29] The short-term right to reject is only available for 30 days from the time of purchase and delivery.[30] Once this 30 day period has expired, consumers that are subject to a contractual breach are still entitled to a final right to reject but only in certain circumstances, such as where goods do not conform to the contract after one repair or one replacement.[31]

However, IGEA would like to stress that *the short-term right to reject and final right to reject do not extend to digital content* – these rights are only available for contracts involving the supply of "goods", which are defined to mean "any tangible moveable items"[32]. Therefore, contracts for the supply of digital content, such as video games, are not afforded with either the short-term right to reject or the final reject to reject. Unfortunately, the discussion in the Interim Report seems to gloss over this fact, but it is very important to appreciate as the UK CRA does this for the crucial reason that these rights to reject would not be appropriate for digital content. IGEA's previous submission goes into more detail as to why this is the case, under the heading entitled "United Kingdom Consumer Rights Act 2015" (**see Appendix A**), but for the benefit of CAANZ, the arguments contained therein will be summarised below.

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[27] Ibid 55.
[28] *Consumer Rights Act 2015* (UK) s 19(3).
[29] Ibid ss 9, 10, 11, 13 and 14.
[30] Ibid s 22.
[31] Ibid s 24.
[32] Ibid s 2(8).

The lack of a one repair "limit" for digital content reflects the reality that these products can be patched easily with a simple download, which generally fix bugs and faults universally for all consumers that have purchased the product. For video games in particular, many flaws or defects can be caused due to problems in the game's code, often requiring several patches or updates to be rectified. Therefore, imposing a strict rule on the number of repairs would simply not practical. Additionally, by only extending the rights to reject to physical goods, the UK CRA implicitly acknowledges that these rights in and of themselves would not be appropriate for digital content. When rejecting or returning physical or tangible goods, consumers are forced to physically give the product in question back to the supplier or manufacturer. This is just not practical for digital content and games, as suppliers would have to try and determine whether the consumer has deleted all copies of the digital content from the device in question and also other storage devices. This would simply be impossible. The open nature of digital content means that it is easy to make copies of digital products any number of times. Consumers could therefore abuse a right to reject a piece of digital content by making a separate copy and then attempting to reject the product to obtain a refund.

Accordingly, while IGEA is not suggesting that CAANZ does in fact believe the ACL should incorporate a short-term and final right to reject for both physical goods and digital content, we simply wanted to ensure that the approach taken under the UK CRA was properly understood. The discussion in the Interim Report just does not seem to acknowledge that "goods" has a very different meaning under the UK CRA compared to ACL, such that the short-term and final rights to reject only apply to physical goods and not digital content. If CAANZ were indeed concerned about consumers putting up with multiple (failed) attempts at repair, this is another opportunity to revisit the question of whether the ACL should incorporate a distinct regime for digital content that is separate from physical goods. This would allow more tailored remedies to be introduced, not just for digital content, but also for physical products, including short-term and final rights to reject physical goods. However, because the ACL currently attempts to provide one set of consumer guarantees and remedies for both physical products and digital content, any such tailored approach will be difficult to implement.

7. Australia's Consumer Policy Framework

"Future issues to consider may be the extent to which the ACL objectives should be aligned with international norms and developments"

IGEA agrees with CAANZ that an issue which must be considered is the extent to which the ACL objectives should be aligned with international norms and developments. Reiterating the arguments presented in IGEA's previous submission, the national consumer policy framework's overarching and operational objectives should be updated to reflect international standards and approaches to consumer law and protection. Many businesses, particularly those in the video games industry, operate on a global sale. We now truly live in a digital economy, wherein the proliferation of online distribution platforms and digital content has completely changed the way many companies conduct business across different markets and geographies. Goods and services are able to be sold internationally with relative ease, and therefore levels of consumer protection for international transactions should not discourage international businesses from engaging with Australian consumers. Any national consumer law should therefore complement and align with consumer protection laws and associated objectives in international regimes. IGEA therefore encourages CAANZ to begin this process and take into account relevant international developments, not just in dispute resolution, but also in consumer law and consumer protection as a whole.

8. Conclusion

IGEA would again like to thank CAANZ for the opportunity to respond to the ACL Review. We trust that this submission has been clear and detailed enough to highlight the importance of all of the abovementioned recommendations. We look forward to all other opportunities in the future to provide further comments and feedback on how the ACL is working in practice, and also how it might be changed to ensure that the framework is appropriately tailored and fit-for-purpose for the digital marketplace and all digital content industries and, more importantly, our consumers.

APPENDIX A – IGEA SUBMISSION TO ACL REVIEW ISSUES PAPER

1. Introduction

The Interactive Games and Entertainment Association (**IGEA**) welcomes the opportunity to respond to the Australian Consumer Law Review (the **ACL Review**) being undertaken by Consumer Affairs Australia and New Zealand (**CAANZ**).

IGEA has reviewed the ACL Review Issues Paper (the **Issues Paper**) and the accompanying fact sheets. In our submission, we provide an overview of IGEA and the interactive games industry in Australia, followed by responses to specific questions and issues raised in the Issues Paper.

2. Executive Summary

By way of executive summary, IGEA is of the view that:

1. **Digital content**
    a. The characteristics of digital content and physical goods differ in many important respects, such that the separate treatment of digital content and physical goods under the Australian Consumer Law (**ACL**) is justified.
    b. Difficulties arise from the ACL's treatment of digital content. For example:
        i. The definitions of "goods" and "services" are difficult to apply to digital content, which causes confusion for businesses and consumers. This is especially so in the case of video games, as the games industry is highly innovative and is regularly creating new business models that blur the distinction in the ACL between "goods" and "services".
        ii. The ACL provides the same set of consumer guarantees and remedies to both digital content and physical goods, which in many cases is inappropriate and impractical for the digital content industries. The issues that arise are especially problematic for video games, as they are some of the most complex forms of digital content available.
    c. The ACL should incorporate a separate scheme for digital content, providing distinct definitions, consumer guarantees and remedies that are appropriate, tailored and

practical for digital content. In doing so, the *United Kingdom Consumer Rights Act 2015* should be examined closely as a useful example in this regard.

d. The ACL should also be amended in a number of other respects, which include increasing the threshold level as to what does not constitute "acceptable quality" for complex forms of digital content such as video games, and also raising the "reasonable time" required for repairing or replacing these kinds of digital products before additional remedies are available.

2. Online purchases and total minimum price

a. Sellers should only be required to advertise the minimum price of a good and/or service, and to only disclose compulsory (not optional) fees or charges upfront.

3. Consumers accessing consumption and transactional data

a. It is appropriate to reserve comments on this issue until the Productivity Commission has completed its investigation into the availability and use of public and private sector data.

4. Clarity of the ACL and consumer guarantees

a. The ACL can be improved in a number of ways, such as by:

i. Providing a more appropriate and tailored definition of "major failure" for digital content;

ii. Offering further guidance as to what constitutes a "major failure" and in what circumstances consumers are able to seek a refund over a repair or replacement in the first instance; and

iii. Clarifying the concept of a "reasonable" time or period in the ACL, such as with regards to the rejection period for goods and the guarantee as to repair and spare parts.

5. Administering and enforcing the ACL

a. Regulators need to be more collaborative with businesses.

b. The involvement of Regulators in the enforcement of the ACL should be underpinned by an appropriate evidence and risk-based approach.

6. Australia's consumer policy framework

a. The national consumer policy framework's overarching and operational objectives could be updated to reflect international standards and approaches to consumer law and consumer protection.

3. About IGEA

IGEA is the industry association representing the business and public policy interests of Australian and New Zealand companies in the interactive games industry. IGEA's members publish, market, develop and/or distribute interactive games and entertainment content and related hardware. The following list represents IGEA's current members:

- 18point2
- Activision Blizzard
- All Interactive Distribution
- Big Ant Studios
- Disney Interactive Studios
- Electronic Arts
- Five Star Games
- Fiveight
- Gamewizz Digital Entertainment
- Mindscape Asia Pacific
- Namco Bandai Entertainment
- Google
- Microsoft
- Nintendo
- Sony Computer Entertainment
- Take 2 Interactive
- Total Interactive
- Ubisoft
- VR Distribution
- Well Placed Cactus
- ZeniMax Australia

4. Overview of the Interactive Games Industry

By way of overview, and in order to demonstrate the levels of engagement with interactive games by the Australian population, we would first like to highlight the results of IGEA's Digital Australia 2016 Report (**DA16 Report**) released on 28 July 2015.[33] In particular, the Report found that:

- 98 percent of Australian homes with children under the age of 18 have a device for playing interactive games
- 68 percent of Australians play interactive games, with 78 percent of the game playing population aged 18 years or older
- Older Australians continue to make up the largest group of new players over the past four years. Australians aged 50 and over now make up 23 percent of the interactive game playing population - increasing their essential digital literacy for the digital economy
- The average age of those engaged in Australian interactive games has increased from 32 to 33 years old since 2013 and nearly half (47 percent) of this population is female

[33] IGEA, *Digital Australia Report 2016* (28 July 2015) <http://www.igea.net/wp-content/uploads/2015/07/Digital-Australia-2016-DA16-Final.pdf> [accessed 15 January 2016].

- As part of the normal media usage, the daily average time spent playing interactive games by Australians is 88 minutes
- 27 percent of players have tried making interactive games using software and 9 percent have studied or plan to study interactive games subjects

The DA16 Report also states that digital software sales in Australia's game market reached AU$1.589 billion in 2015 (up by 27% compared to 2014), with physical software sales generating only $579 million in 2015. Accordingly, digital software sales of games made up 73% of total software sales in Australia in 2015. Consumers are increasingly turning to digital goods as their preferred medium of purchase, particularly due to the relative ease of purchasing, accessing and enjoying such content.

For further Australian video game market data in 2015, including additional data from IGEA's DA16 Report, please refer to **Appendix A** of this submission.

5. Digital Content

"...whether the remedies are appropriate, or should be tailored, for digital content (such as music and app downloads)"[34]

Nature of digital content in the interactive games industry

The proliferation of the sale and distribution of digital content over recent times has been noteworthy. Particularly with regards to the video games industry, consumers are now able to access a huge range of games and game content over the internet. All game platforms (including computers, consoles, handheld devices and smart phones) allow users to purchase, download, install and play games and associated content. Moreover, a growing category of platforms (including smart phones, tablets, smart TVs and even newer laptops) do not have hardware components such as CD, DVD and Blu-ray drives. As a result, many current and popular platforms are unable to read, install and process video games on physical media, and thus can only receive and play digitally distributed video games. While these games may include downloadable versions of games that are also released as physical or "boxed"

[34] Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review Issues Paper* (March 2016), page 22 <http://consumerlaw.gov.au/files/2016/03/ACLreview_issues_paper.pdf>.

games, there is an increasingly growing range of games that are exclusively digitally distributed.[35] For example, since 19 March 2015, there have been more than 460,000 different games created and published for digital distribution in Australia, compared to approximately 500 games that have been published for physical distribution.[36]

There is also a wide array of new and exciting business models in the video games industry that have been enabled by, and have thrived within, this digital distribution environment.[37] These include:

- **Point of sale digital downloads** – digital downloads that can be purchased at traditional, "bricks and mortar" retailers through point of sale activation (**POSA**) cards.
- **Subscription services** – where users pay a periodic fee to gain access a certain game or a regularly changing selection of games. This is a concept known as "games as a service" and it is very much now a fundamental part of the video games industry.
- **Episodic games** – where games are broken down and sold in separate parts, each of which can be purchased and played individually or as an entire package. For example, rather than selling one game for $100, an episodic game could be distributed in five separate parts costing $20 each.
- **Free-to-play or "freemium" games** – where games are provided to the consumer for free (or at a nominal fee), with revenue being derived from alternative sources such as in-game advertising and/or in-game purchases (i.e. that provide in-game items, unlock further levels, offer additional features, etc.)
- **Early access games** – where games are distributed prior to the traditional retail launch of the game in an "as-is" state (i.e. the game is still in development but is provided early in an incomplete state, without the full feature set, and likely with many bugs and glitches). This business model allows consumers to experience a video game earlier than the rest of the public and potentially enables them to shape the development of the final retail product.

The digital video games market in Australia continues to grow strongly and has now in fact surpassed the traditional physical retail goods market in terms of revenue generated. To reiterate the above, with regards to game software, digital software sales in Australia's game market reached AU$1.589

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[35] IGEA, *Emerging Issues and Solutions for the Classification of Computer Games in Australia* (2 December 2013) <http://igea.wpengine.com/wp-content/uploads/2013/12/IGEA-Classification-Issues-and-Solutions-Paper.pdf> [accessed 24 May 2016].

[36] These estimated figures are based on the number of games classified by the Classification Board since 19 March 2015, obtained from the Classification database and the Classification Board's annual reports. See <http://www.classification.gov.au/pages/search.aspx> and <http://www.classification.gov.au/About/AnnualReports/Pages/Annual-reports.aspx>.

[37] IGEA, above n 3, pages 7-9.

billion in 2015 (up by 27% compared to 2014), with physical software sales generating only $579 million in 2015. Accordingly, digital software sales of games made up 73% of total software sales in Australia in 2015.[38] As can be seen, consumers are increasingly turning to digital goods as their preferred medium of purchase, particularly due to the relative ease of purchasing, accessing and enjoying such content.

Digital content differs from physical goods in a number of important ways. At a simple level, physical goods are tangible products that can only be distributed physically, whereas digital content is produced, stored and used in a digital and intangible format, and is supplied electronically over the internet. As a result of differences such as these, difficulties can and do arise when attempting to apply the Australian Consumer Law (**ACL**)[39] to digital content, particularly because the definitions and provisions of the ACL treat digital content and physical goods in an equal manner. These issues can be especially problematic in the case of video games as they are some of the most complex forms of digital content. Games are incredibly intricate products, containing thousands and sometimes millions of lines of code. Therefore, it is important that Australia's consumer legislation deals with digital products in a more tailored and appropriate manner.

Issues with digital content and the ACL

The existing structure and framework of the ACL does not recognise the vastly different nature of digital content and its great importance to Australia's economy, and therefore does not cater for the many needs of both businesses and consumers in the digital marketplace. The Issues Paper correctly points out a number of practical issues regarding the treatment of digital content under the ACL, particularly where the existing definitions of "goods" and "services" are difficult to apply to digital content. There exists a grey area when attempting to distinguish digital goods and services under the ACL, which therefore results in uncertainty about the consumer rights/guarantees and remedies that apply. We essentially have an analogue piece of legislation trying to have currency in a digital marketplace.[40]

By way of example, in the recent case of *ACCC v Valve*,[41] the Federal Court had to consider whether a supplier of digitally delivered computer games provided a "good" or a "service" as defined in the ACL.

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[38] IGEA, above n 1.
[39] *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*').
[40] Commonwealth of Australia, *Official Committee Hansard*, Senate, Legal and Constitutional Affairs References Committee, Thursday, 7 April 2011, page 32.
[41] *Australian Competition and Consumer Commission v Valve Corporation* (No 3) [2016] FCA 196 ('*ACCC v Valve*').

While the Court ultimately concluded that, in the specific circumstances of the case, the supplier had indeed provided "goods" to Australian consumers, it is clear from the judgment that this decision required extensive technical legal analysis of the facts. In essence, the existing definitions of "goods" and "services" in the ACL simply did not fit easily with the digital content distributed in the case, a problem which was further exacerbated due to fact that the digital content in question was distributed as part of an overall digital service.

As new forms of digital content are created and as distribution models further mature, similar and more complex difficulties and disputes are likely to arise again in the future. This will especially be so within the video games industry, given its high rate of experimentation and innovation with emerging business models. In fact, issues are already arising for the video game business models outlined above, such as game subscription services, episodic games and free-to-play games. These forms of digital content are very complex offerings that are often underpinned by many services, including monthly subscriptions for online gameplay and "cloud-gaming" services for renting access to a game online. These types of content often fall between the ACL's binary definition of either "good" or "service".

For example, an individual episodic video game could be considered a "good" as it is a piece of computer software. However, this single episodic title would only be one component of the consumer's experience – the supplier or publisher in question is actually supplying a series of video game "episodes" over time in an iterative manner via a digital distribution service, similar to how a TV show is provided episodically as part of a digital service such as Netflix or Foxtel Go. As a result, digital suppliers and distributors of episodic games would understandably have many difficulties in attempting to discern whether a "good" or a "service" is being delivered.

This confusion also exists in the case of game subscription services that, as described above, involve the payment of periodic subscription fees to gain access to either one game or multiple games. Such services typically involve the provision of many other online features including customer support, community forums and groups, friend lists, in-game chat, music players, user profiles and groups, user-generated content facilities, review pages and many other "non-game" and social offerings. However, as a result of the ACL's treatment of "goods" and "services", in such circumstances there is likely to be an extreme amount of confusion and uncertainty as to whether it is a "good" or "service" being supplied. Very similar difficulties arose in the above-mentioned *ACCC v Valve* case, where the supplier operated a platform from which games were sold but that also offered many of the aforementioned "non-game" services. While the Court ultimately reached the conclusion that "goods" were supplied, this decision was based on the very specific facts of the case. In other circumstances where different

forms of digital video game content are at issue, particularly game subscription services, it is very much the case that such content could still be considered a "service" rather than a "good".

Importantly, because the ACL imposes a different set of consumer guarantees depending on whether a supplier is delivering a "good" or "service", it is crucial for suppliers to be able to easily understand what they are actually supplying to consumers. For suppliers of goods, there exists guarantees as to title, undisturbed possession, acceptable quality, fitness for disclosed purpose, repairs and spare parts, express warranties, and also guarantees relating to the supply of goods by description and by sample or demonstration model.[42] For suppliers of services, there exists a smaller number of guarantees, including those as to due care and skill, fitness for a particular purpose, and reasonable time for supply.[43] As a result, suppliers and distributors of digital content in particular are likely to be unclear about their obligations under the ACL, especially where the product supplied could be defined as both a good and/or a service.

Moreover, the provisions relating to remedies for goods and services under the ACL can be problematic for digital content as they are not sufficiently tailored. For example, the right to reject a good[44] could easily be abused in the case of digital content, because once a digital good is downloaded, consumers could easily copy the software onto a separate hard drive and then attempt to reject the product and obtain a refund. Furthermore, whilst the definition for "major failure" [45] may be appropriate for physical or tangible goods, it does not take into account the fact that frequent updates and patches often follow the release of digital content, which in most cases would address many failures that could be considered "major" under the ACL. Yet, even in such circumstances, consumers are simply able to reject the product outright without even providing the supplier an opportunity to rectify the fault. Note that issues such as these are discussed in much further detail in the below section concerning the *United Kingdom Consumer Rights Act 2015* (**CRA**).[46]

Accordingly, IGEA recommends that the ACL's consumer guarantees and remedies are appropriately tailored for digital content by introducing "digital content" as a separate category of supply with a distinct set of consumer guarantees and remedies.

[42] *Australian Consumer Law* sub-div A.
[43] Ibid sub-div B.
[44] Ibid s 259(2)-(3).
[45] Ibid ss 260, 268.
[46] *Consumer Rights Act 2015* (UK).

Recommendations

IGEA recommends that the ACL should be amended to implement a separate and distinct scheme purely for "digital content". In doing so, it should not be the case that suppliers, distributors and manufacturers of digital content are imposed with obligations greater than those which currently exist for physical or tangible goods. Rather, the scheme should be designed in a manner that is appropriate for digital content and appreciative of the nature and characteristics of these kinds of products.

Specifically, we believe it would be beneficial for the ACL to incorporate a separate definition of "digital content" and a new chapter or division that establishes a separate list of consumer guarantees and associated remedies that are specific and proportionate to digital content. The differences in the nature and characteristics of digital content and physical or tangible goods are large enough to justify this dual-approach, particularly because of the aforementioned challenges that can arise when applying the pre-existing ACL provisions to digital content.

Introducing a new scheme that provides carefully tailored rules for digital content would help resolve a number of the aforementioned issues that exist with the ACL, thereby providing more certainty to both consumers and businesses. Consumers would better understand the rights they hold with regards to digital products and therefore be more confident in their purchases, whereas businesses would better understand the obligations they hold with regards to the digital products they supply. In effect, having clear guidelines on what stakeholders can expect will be very helpful in situations when problems occur. This certainty may also make Australia a more attractive market for international businesses, especially because a separate scheme for digital content would be something more properly aligned with existing best practice globally.

After acknowledging the unique challenges for digital content, the United Kingdom has already implemented this kind of "two-pronged" system, wherein different rules and provisions apply to physical goods and digital content.[47] We believe that the ACL should adopt a similar approach. Because digital content and video games in particular are offered and sold internationally over the internet, the rules around online commerce and consumer law should not fall too far out of line with global practices.

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[47] See Mark Fisher, *Consumer Rights Act 2015: What has changed?* (17 September 2015) <http://www.fieldfisher.com/publications/2015/09/consumer-rights-act-2015-what-has-changed#sthash.9eECkcub.BofVXrop.dpbs> [accessed 24 May 2016]; Department for Business Innovation & Skills, *Consumer Rights Act: Digital Content* (September 2015) <https://www.businesscompanion.info/sites/default/files/Digital%20content_ALL_BIS_DIGITAL_GUIDANCE_SEP15.pdf>.

United Kingdom Consumer Rights Act 2015[48]

The *United Kingdom Consumer Rights Act 2015* (**CRA**) makes a firm distinction between "goods" and "digital content". "Goods" are defined to mean: "any tangible moveable items, but that includes water, gas and electricity if and only if they are put up for supply in a limited volume or set quantity". "Digital content" is defined as: "data which are produced and supplied in digital form".[49] We believe that it would be beneficial for the ACL to also provide two separate definitions for digital content and physical or tangible goods, as opposed to the current approach whereby "goods" are simply defined to include "computer software".

The CRA then goes on provide a separate set of statutory rights and remedies for "goods" and "digital content".[50] The statutory rights and standards of quality for digital content are generally similar to those applicable to physical goods, in that both digital content and goods must be of satisfactory quality, fit for a particular purpose, and as described. However, there are certain distinctions that are reflective of the inherent differences between physical goods and digital content. For example, whereas physical goods must match any sample or model of the goods that were seen by the consumer and also installation of the goods (if required under the contract) must be correct,[51] similar provisions do not exist for digital content. In the case of matching samples or models, it is appropriate that digital video games are not imposed with such requirements, in part due to the fact that game demonstration models or "demos" are not used just to give consumers a small taste of the full game but rather to simply introduce themes and/or concepts.

With regards to remedies under the CRA, there exists a three-tier structure for goods, where the following remedies are available:[52]

- Short-term right to reject;
- Right to repair or replacement; and
- Right to a price reduction or final right to reject.

For digital content, a two-tier remedy structure is instead provided, wherein the following remedies are available:[53]

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[48] *Consumer Rights Act 2015* (UK).
[49] Ibid s 2(8)-(9).
[50] Ibid chs 2, 3.
[51] Ibid ss 14-15.
[52] Ibid ss 19-24.
[53] Ibid ss 42-45.

- Right to a repair or replacement; and
- Right to a price reduction.

As can be seen, there are a number of differences in the remedies that are available for physical goods and digital content under the CRA. Specifically:

- There is no restriction on the number of times digital content can be repaired or replaced before a consumer is able to obtain a price reduction. For goods, there exists a cap or limit of only one repair or replacement before the right to a price reduction is available.[54]
    - This provision reflects the reality that digital content is able to be updated or "patched" easily with a simple download, which generally fix bugs and faults universally for all consumers that have purchased the product. This is simply not the case for physical goods, where defects usually impact a small percentage of goods manufactured and are required to be fixed physically by hand.
    - Furthermore, the provision also understands that imposing a strict rule in the number of repairs is not practical for the digital content industry. For example, with regards to video games, many flaws or defects can be caused due to problems in the game's code. Discovering, understanding and fixing coding issues can be very difficult and time consuming. Because games contain thousands if not millions of lines of code, it is inevitable that a relatively high number of flaws or defects exist on the release of a game. In fact, many issues may only arise after the game has been released for many weeks or months and has already received a number of patches or updates. Even more so, attempts at fixing code can very easily cause other unforeseen issues in the code, which then may require further patches or fixes. Therefore, placing a strict limit on the number of times a developer can "repair" a digital product is just not a flexible or appropriate approach for the digital content industry.
- The right to short-term rejection and final right to reject both only exist for goods and not for digital content. Therefore, for physical goods, if statutory rights are not met within 30 days of purchase and delivery, consumers are able to exercise the right to reject by treating the contract as having come to an end, returning the good or making it available for collection by the trader, and receiving a refund.[55] These provisions do not apply to digital content.

[54] Ibid s 24(5)(a).
[55] Ibid ss 20-24.

- By limiting the right to reject to only physical goods and not to digital content, the UK's CRA acknowledges the inherent nature and characteristics of digital content.
- When rejecting or returning physical or tangible goods, consumers are forced to physically give the product in question back to the supplier or manufacturer. However, this is just not practical for digital content. Suppliers would have to try and determine whether the consumer has deleted all copies of the digital content from the device in question and also all other external hard drives. This is simply impossible. The open nature of digital content means that it is incredibly simple and easy to make copies of digital products any number of times. As a result, consumers could easily abuse a right to reject a piece of digital content by making a separate copy, and then attempting to reject the product and obtain a refund. This would likely create a detrimental trend of consumers being able to easily obtain free games and associated content. This clearly shows that providing a right to reject digital products fails to reflect the realities of digital content markets.
- This potential for abuse is even more pressing when considering that a lot of bugs or flaws in video games are caused by problems in the game's code. As a result, problems that exist for one consumer will be very likely present for every other consumer of the game. Therefore, any right to reject/refund would be universal. In other words, if every single consumer was able to reject a video game and obtain a refund without first giving the trader or supplier the chance to repair the digital product, refunds would have to be offered to every single customer of the game. This means that traders or suppliers would potentially have to refund the entirety of the revenue obtained from a game, thereby creating a large disincentive to sell games in the first place.
- Therefore, rather than allowing consumers to simply reject digital content and obtain refunds, the CRA first provides consumers with the right to have digital products either repaired or replaced.[56] If a repair or replacement is either not possible or not provided by the trader within a "reasonable time" and without significant inconvenience to the consumer, consumers may then exercise the right to a "price reduction". In this scenario, a trader or supplier must reduce the price of a digital product by an appropriate amount that reflects the impact or level of the faults. In other words, this enables consumers to obtain compensation (i.e. reductions in price)

[56] Ibid ss 43-44.

to cover elements of the digital product which has failed, and also allows a reduction to the full amount of the purchase price if it is appropriate to do so. It also means that repairs or replacements must be pursued by consumers in the first instance when attempting to rectify failures.

In summary, we believe that it is imperative, in a maturing digital economy, that the ACL should adopt a similar approach to the CRA and treat digital content and physical or tangible goods differently, particularly with regards to the definitions, consumer guarantees and remedies. There are, however, a number of further recommendations we would like to suggest.

Further Recommendations

First, with regards to the guarantee of acceptable quality, the bar or threshold level as to what does not constitute "acceptable quality" for video games should be set quite high. As alluded to above, video games are incredibly complex pieces of digital content that require thousands if not millions of lines of code to run, with many in-game assets including pictures, graphics, music, audio files, levels, character models, user interfaces, online features and various other aspects being required to all work effectively together. Therefore, expectations as to quality and remedies are very different for video games in comparison to other forms of digital content (let alone physical or tangible goods).

As a result, consumers in the games industry generally accept that bugs are an unavoidable aspect of video games, especially after the release or "launch" of a game, and that developers will usually fix any issues in due course. In these circumstances, it may be the case that reasonable consumers still consider such games to be of "acceptable quality". It would only really at the stage where a game contains major "game-breaking" bugs or a very large number of minor bugs that reasonable consumers would consider the title to be fundamentally unplayable and therefore not of "acceptable quality", at which stage a remedy may wish to be sought.

Second, if the ACL were to adopt the aforementioned CRA two-tier remedy structure for digital products, the "reasonable time" required for a supplier to repair or replace digital content before the right to a price reduction exists should be appropriately tailored for digital content and video games in particular. Generally, it should be the case that the calculation of a "reasonable time" to remedy any failure(s) to comply with the consumer guarantees takes into account the inherent nature of video games and, as a result, be longer than what a "reasonable time" may be for other forms of digital content and especially physical or tangible goods.

Many faults or defects in video games will be caused by issues or problems in the underlying code of the game. This means that if a particular consumer experiences bugs in a game, then it is highly likely that every other consumer that has purchased the game is also facing the same or similar problems. Therefore, developers are required to release patches or updates universally to all consumers in order to fix any such issues, as opposed to offering individual support. Moreover, many faults in games can emerge due to factors that are largely not the fault of the developer, including conflicts with third party software, incompatible hardware, and operating system updates. As a result of issues such as these, and in combination with the highly complex nature of games and underlying code, developers will require sufficient time to identify, understand, resolve and fix coding issues. This reality needs to be taken into account in the ACL when determining what a "reasonable time" is for remedying a failure to comply with the consumer guarantees with regards to video games.

6. Online Purchases and Total Minimum Price

"Is it sufficient for a business to disclose the total minimum price before making a payment, or should optional fees and charges also be disclosed upfront?"[57]

IGEA does not believe that optional fees and charges should have to be disclosed upfront. While price transparency is important to ensure that consumers can avoid having to pay more than an advertised price that is not truly representative of the minimum total price payable, a balance needs to be struck with practical business considerations.

For example, a single video game title may eventually come with hundreds of different pieces of purchasable additional content, such as in-game items or other downloadable content, which are entirely optional and not compulsory to play the game. In many cases, when the video game is initially sold or downloaded, developers and publishers may not have yet determined the details, volume or prices of the additional content that will eventually be purchasable for the game in the future. Therefore, requiring sellers or suppliers of games to disclose the price of every optional purchasable item or additional piece of content would impose incredibly onerous, and likely practically impossible, disclosure requirements. Moreover, it also has the potential to be misleading to consumers who may never purchase all the options.

[57] Consumer Affairs Australia and New Zealand, above n 2, page 53.

Accordingly, we agree with the Issues Paper's intention to only require sellers to advertise the minimum price of a good or service and to only disclose compulsory fees or charges upfront (not those that are optional).

7. Consumers' Access to Data and the ACL

"Do consumers want greater access to their consumption and transactional data held by businesses? What is the role of the ACL and the regulators in supporting consumers' access to data? Is there anything in the ACL that would constrain efforts to facilitate access?"[58]

At this early stage, it is very difficult to determine the role(s) that the ACL should have with regards to consumers accessing their consumption and transactional data, if any, especially given the applicability of the *Privacy Act 1988* (Cth) and the role and powers of the Office of the Australian Information Commissioner. The Australian Privacy Principles also play a role in this area, whereby APP entities must provide consumers with access to their personal information when requested. IGEA believes that it is appropriate to reserve our stance on this topic until the Productivity Commission has completed its investigation into the availability and use of public and private sector data, which is due by March 2017.

8. Clarity of the ACL and Consumer Guarantees

"Is the language of the ACL clear and simple to understand? Are there aspects that could be improved?"[59]

While the language of the ACL is generally clear and simple to understand, there are a number of aspects that could be improved. In particular, it would be beneficial for businesses, consumers and stakeholders to be provided with more clarity on the ACL consumer guarantees and remedies, including how they operate in practice.

Firstly, as stressed in section 5 above, the ACL's equal treatment of digital content and physical or tangible goods can be very unclear at times and cause confusion for businesses and consumers. To reiterate relevant examples, the ACL's definition of "major failure"[60] does not square nicely with the

[58] Ibid page 59.
[59] Ibid page 8.
[60] *Australian Consumer Law* ss 260, 268.

reality that digital content is able to be updated, patched and/or resupplied quite easily in order to rectify failures potentially considered as major under the ACL. Additionally, the ACL's distinction between "goods" and "services"[61] can be quite difficult to apply towards digital content. While, as highlighted in the Issues Paper, regulators can (and do) issue guidance for businesses and consumers, ranging from information about the law to enforcement policies and regulatory guides on specific issues, these tend to be geared towards the supply of physical or tangible goods and services delivered "offline" rather than digital content and the software and/or technology industries more generally.

Secondly, from the experience of some of our members, when a supplier or business fails to comply with the consumer guarantees, consumers tend to believe that they are always entitled to a refund, regardless of whether the failure was "major" or "minor". This may be caused by a number of factors, including the wording of the ACL provisions and also information that is published by the ACCC towards consumers about these kinds of situations. As a result, some retailers and suppliers may feel obligated to provide refunds when rectifying failures in all cases, when they actually have the right to choose between repairing, replacing or refunding money paid for the good if the failure is "minor".[62] Consequentially, this may prevent manufacturers from being able to rectify failure(s) by undertaking repairs. Unfortunately, while only "major" failures allow consumers to reject goods and seek a refund,[63] this has not been communicated particularly well to consumers, suppliers and stakeholders more generally.

There also seems to be uncertainty as to what actually constitutes a "major failure" under the ACL, particularly because of the provision that states a major failure has occurred where "the goods [supplied] would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure".[64] The ACL provides little clarification or guidelines to help determine how this provision operates practically. Simply on its face, it could easily be suggested that a reasonable consumer would never acquire a good if it contained a flaw or defect of any kind, whether in practice the flaw or defect was in fact minor or not, and therefore any product defect could be considered to be a "major failure". As a result, again, suppliers often feel obligated to always provide a refund for a product, even though repair or replacement could easily be a reasonable response. Importantly, this might even occur after a consumer has already used and enjoyed the product substantially. Accordingly, we suggest that the ACL be amended to ensure that a failure to comply with a guarantee

[61] Ibid s 2.
[62] Ibid ss 259(2), 267(2).
[63] Ibid ss 259(3), 267(3).
[64] Ibid ss 260(a), 268(a).

is not a major failure where the failure in question could reasonably be remedied by repair or replacement. Additionally, as addressed above, it should be the case that repair or replacement is the first right that consumers can utilise before any other remedies are enforceable.

Thirdly, there is a lack of clarity about areas of the ACL that refer to the concept of a "reasonable" time or period. For example, the rejection period for goods is defined as "the period from the time of the supply of the goods to the consumer within which it would be reasonable to expect the relevant failure to comply with a guarantee".[65] However, while the ACL lists some factors that can be taken into account in calculating the length of the rejection period, there are no guidelines or examples to further assist businesses and suppliers. Additionally, while the guarantee as to repairs and spare parts[66] stipulates that a manufacturer will ensure that facilities for the repair of the goods (and parts for the goods) are available for a reasonable period after the goods are supplied, the ACL doesn't provide any assistance or guidance as to how long the "reasonable period" is supposed to be, nor of any criteria that may be used to calculate the length of such a period.

In order to ensure that there is greater certainty and clarity for businesses and consumers, it would be beneficial for the ACL to clarify the time and duration elements of the ACL. Specifically, in consultation with relevant industry groups, guidelines and criteria should be developed for the ACL (including the consumer guarantees) that, for instance, help identify what a "reasonable period" might be in practice (particularly for digital content).

Accordingly, IGEA believes that the clarity of the ACL can be improved in the ways suggested above.

9. Administering and Enforcing the ACL

"Does the ACL promote a proportionate, risk-based approach to enforcement?"[67]

IGEA understands that, as part of examining the ACL's approach towards administration and enforcement, a further independent assessment of the "multiple regulator" model will be undertaken, which will also seek stakeholder feedback on the issue. IGEA looks forward to giving feedback at the time this assessment is commissioned. In the meantime, we would like to provide some general comments about the role of regulators in administering and enforcing the ACL.

[65] Ibid s 262(2).
[66] Ibid s 58.
[67] Consumer Affairs Australia and New Zealand, above n 2, page 36.

In order to ensure that Regulators are continuously kept informed of changing technologies, business practices and models, Regulators need to be more collaborative with businesses. Furthermore, the involvement of Regulators in the enforcement phase should be underpinned by an appropriate evidence and risk-based approach. When investigating and responding to an alleged breach of the ACL by a business, Regulators should consider the actual damage caused to consumers, subsequent changes in business practices and policies after a breach has occurred, and the likelihood of consumer harm moving forward into the future.

There are a number of overseas initiatives that could help achieve the above goals. For example, IGEA is open to the option of adopting an ombudsmen scheme similar to that of the United Kingdom that is outlined in the Issues Paper at case study 14. Examples such as these should be looked at closely when the aforementioned independent assessment of the "multiple regulator" model is undertaken.

10. Australia's Consumer Policy Framework

Do the national consumer policy framework's overarching and operational objectives remain relevant? What changes could be made?[68]

IGEA believes that the consumer policy framework's overarching and operational objectives are relevant, however they could be updated to reflect international standards and approaches to the issue of consumer law and consumer protection. Importantly, levels of consumer protection for international transactions should be realistic and not discourage international businesses from engaging with Australian consumers. A national approach for consumers and businesses with a single, national consumer law is certainly important. However, we now live in a digital economy where businesses can sell goods and services internationally with relative ease. Any "national" law should therefore complement and align with consumer protection laws and associated objectives in international regimes.

[68] Ibid page 5.

11. Conclusion

IGEA would again like to thank CAANZ for the opportunity to respond to the ACL Review. We hope that this submission has been clear and detailed enough to highlight the importance of all the abovementioned recommendations. We look forward to all opportunities in the future to provide further comments and feedback on how the ACL is working in practice and how it can be improved, in order to ensure that the legislative regime is appropriately tailored and fit-for-purpose for the digital marketplace and all digital content industries.

APPENDIX B – AUSTRALIAN MARKET DATA

The IGEA's commissioned research from NPD Group Australia showed that, in 2015:[69]

- Video games industry growth has been led by the console sector, with current generation (Microsoft Xbox One, Nintendo Wii U and Sony PlayStation 4) consoles increasing in sales volume compared to 2014 by 9 per cent
- Console software was the best performing category, experiencing 13 per cent growth in revenue over last year
- Strong platform sales had a flow on effect to other areas, as the console accessories market grew in value by 12.2 per cent over 2014 data
- Over half (59 per cent) of game units sold were classified as G, PG or M

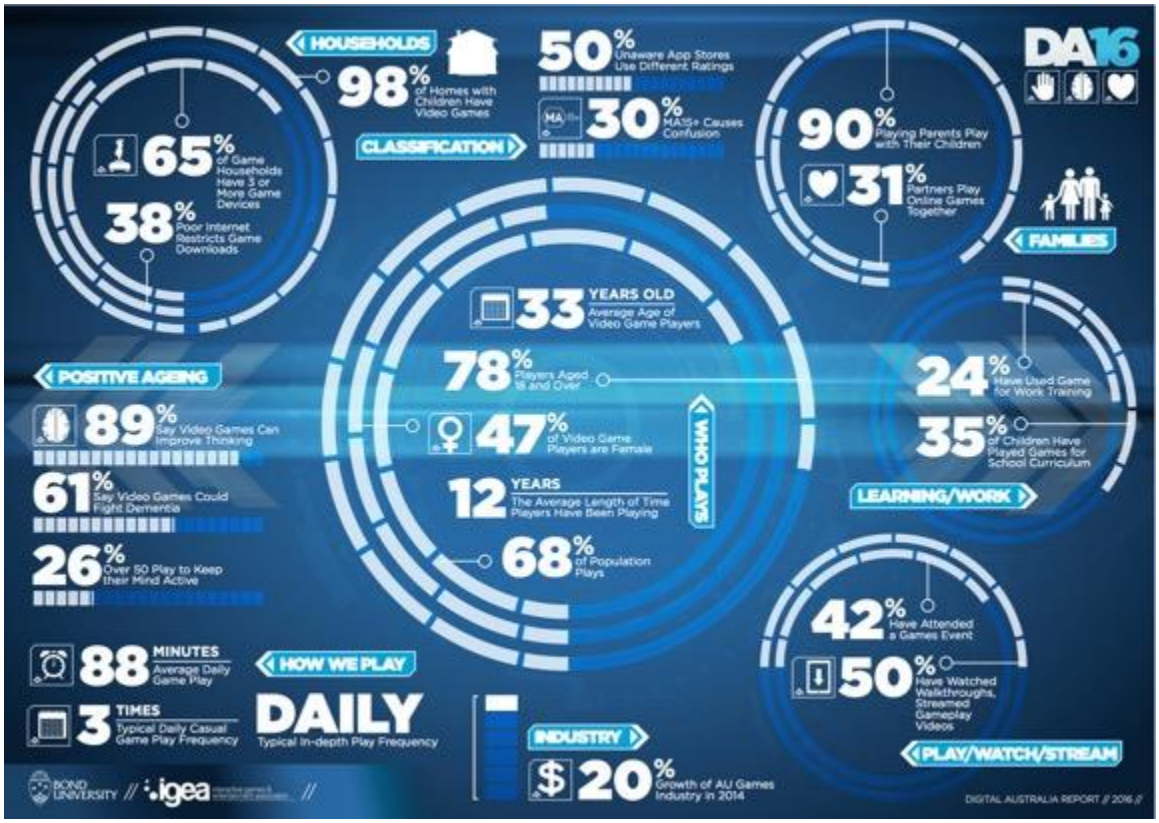
Further industry key highlights by independent research firm Telsyte evidenced:[70]

- Digital is now greater than half of the total games market, accounting for 56 per cent of sales
- Digital extras, which include season passes, map packs and game expansions, boomed with 53 per cent growth in 2015
- Games publishers are increasingly adopting the in-game purchase business model which is greatly contributing to the growth of digital extras market
- Physical products in the games market remain important with consumers indicating a preference for physical copies when purchasing as a gift or as a collectable or where there might be technical limitations such as download speeds or data caps

[69] Research based on The NPD Group Australia, Time period 2014 and 2015 calendar year, and Telsyte, cited at IGEA, "Australian video game industry strides towards $3 billion", *Media Release*, 2 March 2016, at http://www.igea.net/2016/03/australian-video-game-industry-strides-towards-3-billion/ (accessed 2 March 2016).
[70] Ibid.


igea
interactive games & entertainment association
AUSTRALIA
TOTAL INDUSTRY VALUE
UP 15%
$2.832 BILLION
TRADITIONAL RETAIL
NPD DATA*
UP 2%
$1.243 BILLION
DIGITAL SALES
TELSYTE DIGITAL MARKET MONITOR**
UP 27%
$1.589 BILLION
npd
Telsyte
IGEA commissioned research from:
*The NPD Group Australia
Time period January 5 2015 – January 6 2016
**Telsyte – IGEA Digital Market Monitor, Q1 – Q4 2015
CONSOLE SOFTWARE
UP 13%
$579 MILLION
CURRENT GEN HARDWARE
UP 9% UNITS
CONSOLE ACCESSORIES
UP 12%
$166 MILLION
MOBILE
UP 24%
$870 MILLION
DIGITAL DOWNLOADS
UP 33%
$603 MILLION
XBOX LIVE
PlayStation. Plus
Nintendo eShop
SUBSCRIPTIONS
UP 29%
$116 MILLION

Key Findings: Digital Australia 2016



// Key Findings //

Games Households
- 98% of homes with children have computer games.
- 65% of game households have three or more game devices.
- 38% choose not to download games due to data limits.

Who Plays
- 68% of Australians play video games.
- 47% of video game players are female.
- 33 years old is the average age of video game players.
- 78% of players are aged 18 years or older.
- 39% of those aged 65 and over play video games.
- 12 years is the average length of time adult players have been playing.

How We Play
- 88 Minutes is the average daily total of all game play.
- 10 Minutes, three times a day is typical for casual game play.
- 1 Hour, daily is typical for in-depth game play.

Why We Play
- To keep the mind active is the main reason older adults play.
- To have fun is the primary reason PC and console players play.
- To pass time is the main reason mobile players play.

Families and Play
- 90% of playing parents play with their children.
- 31% play online games with partners.
- 57% of adults are "Always present" for purchase of games for children.
- 66% are familiar with parental controls on game systems.

Classification and Media Concerns
- 30% indicate MA 15+ causes most confusion.
- 28% indicate M causes most confusion.
- 50% are unaware that app stores have different rating systems.
- 41% say ratings have "a lot of influence" on games purchased for children.

Game Play Culture
- 50% have watched walkthroughs or streamed gameplay videos.
- 42% have attended a games event.

Games and Benefits
- 89% say video games can improve thinking skills - health.
- 79% say video games can improve coordination and dexterity - health.
- 76% say video games increase mental stimulation - positive ageing.
- 61% say video games could figth dementia - positive ageing.

Learning and Work
- 24% have used video games at work for training.
- 35% say their children have used video games for school curriculum.

Game Business
- 20% is the amount of growth in the Australian game industry in 2014.

Methodology

Digital Australia 2016 (DA16) is a study of 1274 Australian households and 3398 individuals of all ages in those households. Participants were drawn randomly from the Nielsen Your Voice Panel in May 2015; research was designed and conducted at Bond University. The margin of error is ±2.7%.