(c) calls on the Government:

i) to immediately address the concerns raised by industry and the community about the unworkability of the Government's approach, and the Act in general,

ii) to urgently revisit aspects of the Act, prior to its commencement on 1 January 2000, and

iii) to table a report on the effectiveness and consequences of the Act in the Senate at 6-month intervals from the date of implementation of the regulatory regime.

The text of the Act is available from http://scaleplus.law.gov.au/html/comact/10/6005/rtf/No90of1999.rtf.

# And Now to Regulate Internet Gaming —A Gamble in Itself

*John Lambrick, RMIT University, Melbourne*

## INTRODUCTION

Enthusiasm for online gaming appears to be gaining significant momentum in Australia, and it is estimated that last year 86,000 Australians used the Internet to bet on sports and casino games[1]. This is hardly surprising given that gambling, and now Internet use, are firmly engrained in Australian popular culture. It also comes as no surprise that Australian legislatures have rushed headlong into regulating Internet gaming activity.

With the exception of New South Wales and Western Australia, the remaining Australian states have passed or have indicated an intention to pass legislation to regulate online gaming. The Northern Territory has also enacted such legislation. For the purposes of this article, I propose to make comparisons between the Queensland Interactive Gambling (Player Protection) Act 1998 and the Victorian Interactive Gaming (Player Protection) Act 1999.

## WILL THE LEGISLATION SUCCEED?

Whether or not the legislation will succeed depends upon the purpose of the legislation. If the purpose of the legislation is to regulate Internet gaming activity in Australia, then it will be a dismal failure. Unfortunately, many politicians and lawyers have still not come to grips with the fact that it is impossible to effectively regulate Internet activity through legislation. If, on the other hand, the purpose of the legislation is to facilitate Internet gaming and to give players a greater opportunity to gamble online with a solvent body and with a reasonable likelihood that any winnings will be paid, then I suggest that the legislation has some prospects of success.

## THE JURISDICTION ISSUE

Legislation which attempts to regulate Internet activity must recognise the jurisdictional limitations involved in doing so. The legal issues relating to jurisdiction and the Internet have been extensively and well argued elsewhere[2], and it is the writer's opinion that for a government to effectively regulate any activity, the following are necessary criteria:

- The government must have jurisdiction to regulate the activity. Jurisdiction is geographically determined, and ultimately the jurisdiction of a government depends upon its recognition by other governments. Therefore, attempts to assert jurisdiction need to be credible. A government will only have jurisdiction over persons and things which have some nexus or relationship with the relevant state or country administered by that government. Thus, for example, the Victorian state government would not be recognised by other governments as having jurisdiction to legislate with respect to kiwi breeding in New Zealand.
- The government must also be in a position to exercise power over or control breaches of the activity which the government seeks to regulate. Law-making requires some mechanism for law-enforcement which in turn depends on the ability to exercise physical control over law violators[3].

Attempts to create effective regulation of the Internet fail on both counts. The Internet is so geography-averse that in any instance it may be impossible to determine an Internet user's physical location or the location in which Internet activity occurred. For example, I may register an address in the "com.au" domain, but I do not need to have my operations based in Australia to enable me to do so. Furthermore, there is nothing to stop me transferring my host computer and my Internet address (or either of them) to any other location in the world. Persons dealing with me would have no idea that such transfers had taken place.

Just as it is impossible to confidently assert where an Internet operator is located, it is impossible to confidently assert where Internet activity has taken place at any given time. This is because of the protocols which determine the way the Internet works and the Internet's functionality, including:

- packet-switching whereby information is broken up into packets which can be routed through any number of nodes around the world until they reach the recipient;
- the use of "caching" copies of frequently accessed material to avoid continual reference back to the originating server;
- in the case of the world wide web, the use of hyperlinking, in-lining links and framing by an Internet host such that the user may not be able to determine the source of origin of the original material.

The geography-averse nature of the Internet makes Internet activity impossible to effectively regulate. Internet activity can be anywhere and almost everywhere!

Whilst governments will lose credibility if they unrealistically attempt to *regulate* Internet activity, there is considerable merit in governments enacting legislation to *facilitate* Internet transactions. In the writer's opinion, both the Queensland and the Victorian legislation attempt to both facilitate and regulate Internet gaming. The Queensland legislation attempts to regulate more so than the Victorian legislation.

## SHORTCOMINGS IN LEGISLATION

There are a number of provisions in the legislation which lack credibility in that they create jurisdictional uncertainty. These are:

- Sections 7(1) and (2) of the Victorian Act and Sections 8 (1) and (2) of the Queensland Act. In essence, those sections provide that the legislation applies both within and outside the state and "to the full extent of the extraterritorial legislative power of the Parliament".

This seems to be an acknowledgment by the states that they will push the limits of their jurisdiction as far as they can in order to regulate Internet gaming. State and federal legislatures must exercise extreme caution when attempting to regulate activity beyond their boundaries, as such attempts can raise grave questions regarding sovereignty and jurisdiction[4].

- Section 16(1) of the Queensland Act provides that a person must not conduct an interactive game wholly or partly in Queensland or allow another person to do so unless the game is authorised and the person is authorised under the Act to conduct the game. What exactly does this mean? If I was legitimately conducting an online gaming business in the Netherlands Antilles and my web page and service were accessed by a Queensland resident, I would no doubt be considered to be at least "partly" carrying on an interactive game in Queensland. Would I be arrested if I subsequently happened to set foot in Queensland? The scenario is not as unlikely as may first appear. In April this year an Adelaide-based holocaust revisionist, Dr Frederick Toben was arrested in Mannheim, Germany over material posted on his Adelaide Institute website[5]. Because the material was accessed in Germany, it was treated as a German publication and breached German laws which prohibit denial of the holocaust.
- The Victorian Act renders such a scenario equally likely through its prohibition on advertising of interactive games by unlicensed providers. Section 9(1)(c) provides that a person must not offer or advertise in Victoria the playing of interactive games. The web page of the provider who operates an Internet gaming business substantially outside Victoria would certainly contain such an "offer" or "advertisement" and would be readily accessible in Victoria. (Technically the provider could endeavour to deny access to Victorians by programming its server to refuse requests originating at the .au domain, but of course there will be Victorians with Internet addresses which are not in the .au domain.) A similar prohibition exists in Queensland under Section 164 of the Queensland Act.
- Section 17(2) of the Queensland Act prohibits a person from participating as a player in an authorised game unless that person is registered with the authorised provider. If I, as a Victorian, failed to register as a player and participated in an authorised Queensland interactive game, would I risk extradition or risk arrest when I next set foot in Queensland? At least the Victorian Act recognises the absurdity of imposing sanctions upon players, whether resident in Victoria or otherwise, and contains no corresponding provision.

## WHAT SHOULD THE ROLE OF GOVERNMENT BE IN INTERNET REGULATION?

Whilst Internet activity is difficult to effectively regulate, attempts at regulation can result in serious and often unintended consequences. In the case of Internet gaming, the writer has no doubt that the governments of Queensland and Victoria are well-intentioned in imposing certain prohibitions in respect of Internet gaming activity. But those governments have failed to recognise the consequences of purporting to regulate the activities of persons located outside their geographical borders. (Of course, it is not only legislation specifically enacted to regulate Internet activity which can create jurisdictional uncertainty.

Such problems can arise where any regulated activity takes place in an online environment).

Sensible legal opinion advocates a system of self regulation in respect of Internet activity rather than attempting to overcome jurisdictional problems through the establishment of international laws[6]. However, in view of the problems which arise when a government purports to regulate the activities of persons located beyond geographical borders of that government, some attempt needs to be made to reach an international consensus on the extent to which governments can do so. This will be no easy task given the glacial speed of the international treaty process, but it is a task which must be undertaken as the Internet will be with us forever in one form or another. The urgency of this task will become more acute if, as seems likely, governments of other Australian states and of other countries continue to attempt regulation of Internet activity.

1 "The Age" (Melbourne) 20 July 1999 "Net betting set to soar"
2 Bernadette Jew "Cyber Jurisdiction - Emerging Issues & Conflicts of Law When Overseas Courts Challenge Your Web" "Computers & Law" No 37, December 1998, p 24
3 See David R Johnson and David G Post in "Law and Borders - The Rise of Law in Cyberspace" http://www.cli.org/X0025_LBFIN.html
4 Dan Burk "Jurisdiction in a World Without borders", at par 5, http://vjolt.student.virginia.edu/graphics/vol1/vol1_art3.html
5 "Holocaust Web site in legal debate" "The Age" (Melbourne) 17 April 1999
6 Bernadette Jew, op.cit. n (i)

# Understanding the Technology Legislation Onslaught

*Rita Chowdhury & Christopher Wood, Young Lawyers Information Technology Committee*

Computers and the Internet have received little legislative attention in the past. Traditionally, Governments have applied band-aids to existing legislative regimes rather than deal with the specific legal challenges thrown up by new technology. Suddenly, the rate at which the Commonwealth Government is introducing technology legislation makes it hard for practitioners to keep up. This article sets out the status and effect of the technology legislation that has recently been proposed or passed and looks at some of the implications of that legislation.

## BROADCASTING SERVICES (ONLINE SERVICES) ACT 1999

Following a great deal of media attention, the changes to the Broadcasting Services Act to regulate 'adult material' on the Internet became law on 16 July 1999. The legislation is based on the premise that 'what is illegal offline should be illegal online'. The amendments come into effect on 1 January 2000.

Under the new scheme the Australian Broadcasting Authority (ABA) will have the power to order parties to remove or block Internet content of an adult nature. Classification of Internet material will be done by the Classification Board under the National Classification Board standards that are currently used for television, film and video games. Material that is classified Xor Refused Classification (RC) or classified R without a mechanism for verifying that the reader is an adult can be the subject of an order under the scheme (called 'prohibited content'). The Classification Board is required to take into account the literary, artistic and educational merit of the material, its general character (including whether it is of a medical, legal or scientific character) and the persons or class of persons to or amongst whom it is published. It is not just pornographic material that will be caught by the scheme, for example an article explaining how to get away with shoplifting was refused classification by the Board.

The legislation only covers content that is stored electronically and accessible to the public (both within and outside Australia). This means that it will cover technologies such as the World Wide Web, but not email, Internet telephony or chat rooms. Importantly, there is no onus on Internet Service Providers (ISP's) to actively monitor content being accessed through their service. Instead, the Act provides for a complaints-based regime where the ABA will investigate complaints about Internet content and make orders under the Act if the material is found to be prohibited.

The manner in which the ABA will deal with prohibited content will depend firstly on whether the material is stored in Australia or overseas and secondly on whether it has already been classified. Where prohibited content is stored in Australia and its classification brings it within the meaning of prohibited content, the ABA will have the power to issue an order (referred to as a 'take-down notice') requiring the host to remove the material. Where the material has not been classified but the ABA believes it would be likely to be prohibited content if classified, it