E-commerce and jurisdictional issues: an overview

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1 Introduction

This paper seeks to outline the process by which the law has adapted to facilitate e-commerce in Australia, based on a "light-handed" legislative approach consistent with the international community. The paper then turns to consider the current uncertainty plaguing questions of jurisdiction in e-commerce. The urgency of resolving questions of jurisdiction is acute considering the global nature of the medium and the ease of cross-border transactions over the Internet. Furthermore, the question of jurisdiction exemplifies the problematic nature of regulating the Internet and e-commerce and throws open the debate as to whether old law can be stretched over new mediums. The paper concludes that the relationship between law and e-commerce is a two way dynamic, and that while there has been no revolution to deal with the new medium, the slow evolution of the legal system is moving towards a body of law which is of an inherently international and hybrid character.

(a) What is e-commerce?

It can be broadly stated that e-commerce encompasses all commercial transactions that are conducted electronically.[1] With the increasing use of the Internet and Web, the boundaries of e-commerce are rapidly expanding. Recent e-commerce developments reveal the infinite array of possibilities. Take, for example, the most recent advancements in digital payments systems, such as stored value smart cards ("SVCs"), virtual banks; digital payments, internet prospectuses, and payment system automation (eg cheque imaging). The potential of "m-commerce", or mobile commerce, has also attracted attention.

From a commercial perspective the advantages of e-commerce include reducing transaction costs, reducing entry barriers, and increased accessibility to name but a few.[2]

(b) What are the legitimate needs of e-commerce?

There are a multitude of legal and commercial issues arising out of e-commerce. However, four main concerns emanate from the abundance of literature in this area:

1. the ability of e-commerce to create binding electronic contracts;
2. privacy;
3. security; and
4. jurisdiction

Underlying these concerns is the desire for consistency and predictability to enhance consumer confidence in e-commerce.

(c) The legal response

In adapting and evolving to meet the needs of e-commerce, the law has acted in a dual capacity, by both facilitating and constraining e-commerce. Recognising the beneficial potential of e-commerce and riding on the wings of international efforts, Federal and State governments have taken legislative steps to remove legal obstacles to the uptake of e-commerce. The steps taken to facilitate e-commerce are reflected, for example, in the *Electronic Transactions Act* 1999 (Cth) (discussed further below). The law is also taking a constraining role as governments around the globe are increasingly realising that in some areas, the law must intervene to restrict certain activities and to protect property rights.[3] This realisation is embodied for example, in the recent amendments to the *Privacy Act* 1988 (Cth)[4] and the *Copyright Act* 1968 (Cth)[5], or in consumer protection legislation.[6] Thus it can be seen that the law plays a constraining role when it steps in to protect important values upheld by the law, such as property rights. Underpinning the facilitative approach, on the other hand, is the notion of freedom of contract. In both its facilitative and constraining role, the law is attempting to meet the needs of e-commerce (valid contract formation, privacy, security and clear jurisdictional principles) and by doing so instilling confidence in the e-commerce market.

2 The challenge posed to the law: legal revolution or evolution?

(a) A general look at the policy of the Australian Government and the role of the courts

The very nature of e-commerce - its ephemeral and borderless qualities - poses a challenge to the static and traditionally jurisdictional nature of law. As one commentator has remarked "if you are trying to legislate for information technology, it is many years, some will say light years, ahead of the capacity of law makers to comprehend and then address the problems."[7] Underlying e-commerce legislation is an attempt to accommodate the two competing policy demands of 1) providing a comprehensive and prescriptive framework of rules to foster certainty and predictability; and 2) the desire not to stifle technological and commercial innovation. A third concern reflected is the need for a uniform international approach to the regulation of e-commerce, to prevent the cyber chaos that would ensue if every jurisdiction enacted different laws.

Reflecting these concerns, and consistently with the international position, the Australian government has adopted a minimalist approach to regulating e-commerce. This "light-handed" legislative approach leaves the door open for courts to develop precedent to keep pace with the changing face of commerce. The

legislation in a number of areas relating to e-commerce is not comprehensive and has created legal ambiguity, or is simply non-existent. The extent to which this enhanced discretion that the courts will have to fashion the emerging body of law in relation to e-commerce is desirable, is debatable. Some would argue that it creates uncertainty in the commercial arena and threatens to undermine an internationally consistent approach. However, considering the fluid and evolving nature of the medium, the judicial process allows for necessary flexibility. It is generally recognized that this judicial flexibility must also be paired with a degree of international regulation, to facilitate consistency and thus the efficacy of e-commerce.

(b) Australian legislation facilitating e-commerce

The key piece of Australian legislation facilitating e-commerce is the *Electronic Transactions Act* 1999 (Cth) (the *Act*), which came into effect in March 2000. The *Act* is the culmination of a series of government reports[8], and mirrors the recommendations of the Federal Attorney General's Electronic Commerce Expert Group's (ECEG) report entitled *Electronic Commerce: Building the Legal Framework*. The ECEG's recommendations, in turn, reflect the UNCITRAL Model Law[9], which is recognized as the international template for e-commerce. The *Act* is intended as framework legislation, setting the overarching policy for the states to implement, and creating a light handed regulatory regime.[10]

The *Act* is based on two principles, in line with the Model Law: functional equivalence and technological neutrality. That is, that paper and electronic transactions should be treated equally, and that the law should not discriminate between different forms of technology.[11] The *Act* settles to a large extent the uncertainty surrounding the validity of e-commerce transactions by removing existing impediments to the recognition of electronic transactions at law. The *Act* addresses: 1) legal recognition of electronic communications[12]; 2) requirements for writing, signatures, production of documents and record retention[13]; 3) provisions for exemptions; 4) provisions relating to time and place of dispatch and receipt of electronic communications; and 5) the attribution of electronic communications.[14]

The *Act* has been criticized for being ambiguous in places and leaving key terms undefined. However, in many cases this was seen as necessary for flexibility, and for long-term viability.[15]

Ultimately, new tests based on the *Act* will be determined by the courts.

While the *Act* facilitates e-commerce on the national level, the international dimension of e-commerce is not addressed. The legal uncertainty surrounding important questions of jurisdiction[16] has an urgent practical impact and threatens to undermine principles of international consistency and confidence that have underpinned developments in e-commerce so far.

3 A borderless world: e-commerce in the global marketplace

> "global computer-based communications cut across territorial borders, creating a new realm of human activity and undermining the feasibility – and legitimacy – of laws based on geographic boundaries."[17]

The international "virtual contract" poses significant challenges to traditional questions of jurisdiction and enforcement and points to the possibility of employing alternative forms of dispute resolution, such as arbitration.[18] Disputes that arise on and about the Internet can be legally problematic and factually complex. This is because of the inherently problematic nature of stretching traditional territorial based jurisdictional rules to a borderless cyberspace.

International businesses have long been confronted with problems of jurisdiction in cross-border transactions. However the increasing ease and frequency with which the Internet allows cross-border transactions, and the expansion of these international transactions to consumers through virtual shopping malls, has brought the issue into the international legal domain with practical urgency.

(a) Differing views on international e-commerce and the problem of jurisdiction

Four main streams of thought have emerged to address the complex problem that a borderless medium poses to traditional rules of jurisdiction:

1. The first view is that traditional private international law rules on jurisdiction need to adapt or be replaced, as current rules threaten the development of e-commerce. Proponents of this view argue that traditional rules premised on the notion of national sovereignty are redundant in a global marketplace where the Internet knows no boundaries. Rules that operate by reference to concepts such as the place where the contract is formed, the place where a person is resident or a place where the transaction has its closest connection do not fit comfortably with the dynamic and expansive nature of the Internet.[19] One solution, under this approach, could be the establishment of an international governing body.
2. The second view is much more minimalist in approach. Supporters of this view hold that the development of new principles is unnecessary. They argue that the courts are the appropriate mechanism to develop rules of application over time, and that this allows for necessary flexibility.[20]
3. A more libertarian view is developed by commentators that argue for self-regulation of cyberspace. Scholars such as David Post argue that cyberspace must be treated as a separate jurisdiction.[21] Indeed, some commentators argue that an informal separate jurisdiction already exists. This is evidenced by the fact that laws are being created and enforced by "cybercommunities", and that these laws are generally

inapplicable outside of the cybercommunity. [22]

4. Some scholars have suggested a "hybrid" solution that sits comfortably between the two extremes of comprehensive regulation and private regulation.[23] This view posits that the relationship between public and private regulation must be expressed by public law defining the roles of different [public or private] institutions in hybrid regulatory regimes. Public law is subject to national frontiers, but private entities are not. Accordingly private institutions, in devising and applying rules, can overcome the jurisdictional uncertainties associated with transnational commerce on the Internet, where public institutions cannot. However, private regulation has long been criticized for not being democratically legitimate. Some commentators argue that the privatization of disputes merely serves already powerful interests.[24] A hybrid solution would however combine the "jurisdictional strengths of private regulation, and the greater political legitimacy of public regulation."[25] Public law can set minimum standards of conduct and provide residual enforcement, establishing the boundaries within which a multitude of private regulatory regimes can work out detailed rules, dispute resolution and enforcement mechanisms.[26]

(b) The role of the courts in developing principles

Most of the jurisprudence in this area comes from the United States. However, as commentators point out, the developing case law may be of little assistance as the decisions often conflict, and if anything merely reveal the difficulty that courts have in extending the existing criteria for jurisdiction into an electronic environment.[27]

There are few decided cases in Australia, however while not binding, the United States approach may be persuasive. It is beyond the scope of this paper to provide a thorough analysis of the United States jurisprudence in this area, however traditionally the American courts have tended to have a more expansive jurisdictional reach. Briefly, commentators have pointed to the developing trend of United States courts applying a modified version of the personal jurisdiction test. In examining whether the minimum contacts needed for personal jurisdiction are satisfied, the courts have utilized a "sliding scale" test to quantify the commercial activity occurring over the Internet.[28]

Under Australian law jurisdiction rests on valid service of the defendant. The court has discretion to decline jurisdiction where the forum selected is "clearly inappropriate."[29] In deciding whether the forum is appropriate, the courts look to various "connecting factors."[30] However, these connecting factors, such as where the transaction occurred, are rendered meaningless or at best indeterminate by the borderless nature of the Internet. The uncertainty that this causes may be more pronounced for business-to-consumer transactions, however businesses-to-business e-commerce is not immune. This is because while businesses may seek to minimize risk and uncertainty by including a choice of law and forum clause in the contract, this may not always be effective. A clause specifying a particular jurisdiction is not decisive. Parties to a dispute can always seek to establish an alternate forum as more appropriate.[31]

(c) Alternative dispute resolution and Internet courts

The problems faced by businesses undertaking cross-border transactions and the cumbersome and slow process of enacting multilateral conventions has led some commentators to suggest that alternative dispute resolution is a favourable alternative to lengthy and complicated jurisdictional disputes in the courts. Some advantages include: preserving the business relationship; avoiding uncertainty, as arbitration clauses contain agreed upon jurisdictional and enforcement mechanisms; and allowing sufficient flexibility.[32]

Arbitration is also undergoing a technological makeover in the form of the "virtual magistrate" project and other online dispute resolution mechanisms. This development over the Internet involves adapting arbitration features to the specific demands of the Internet.[33] It may prove that for businesses, more flexible dispute resolution mechanisms such as these may be more appropriate to the unique nature of Internet than uncertain and disparate legal regimes.

4 Conclusion

Traditional commercial law involves using legal tools to meet the legitimate needs of the market. The developments in the field of e-commerce both exemplify and rework this dynamic. As has been illustrated in the issue of jurisdiction, law and e-commerce are entwined in a reciprocal evolution. The law both facilitates and constrains e-commerce. On the reverse side of the relationship, it must not be forgotten the profound way in which e-commerce is shaping the future of the law. While there has been no legal revolution to deal with the new medium, the slow evolution of the law is moving towards a body of law which is of an inherently international and hybrid character.

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1 See A McCullagh "Legal Aspects of Electronic Contracts and Digital Signatures" in A Fitzgerald, B Fitzgerald, P Cook & C Cifuentes (ed.) *Going Digital: Legal Issues for Electronic Commerce, Multimedia and the Internet* (1998) at 115.

2 Report of the Electronic Commerce Expert Group to the Attorney General, *Electronic Commerce: Building the Legal Framework* (March 1998) <http://www.law.gov.au.ag home/advisory/eceg/single.htm>.

3 For a discussion of the evolving legal structure to deal with information as a product see R Nimmer and P Krauthaus "Information as a Commodity: New Imperatives of Commercial Law" 55-SUM *LCPR* 103.

4 The *Privacy Amendment (Private Sector) Act* came into effect on 21 December 2001.

5 The *Copyright Amendment (Digital Agenda) Act 2000* came into effect in March 2001. The Act employs technology neutral terminology and extends to the Internet.

6 See C Connolly "The Law and Policy of Consumer Protection in Electronic Commerce, Part 1" 3 (7) *INTLB* (2000) at 100; C Connolly "The Law and Policy of Consumer Protection in Electronic

Commerce, Part 2" 3 (8) *INTLB* (2000) at 112.

7 M Thatcher, "Challenges Facing the 21st Century", paper delivered to the XI World Congress on Information Technology, Washington, June 1998.

8 *Building the Information Economy: A Progress Report on Enabling Legal and Regulatory Framework;* and *Towards an Australian Strategy for the Information Economy.* The Department of Foreign Affairs and Trade has also produced two reports, *Driving on the New Silk Road* and *Creating a Clearway on the New Silk Road* at <http://www.dfat.gov.au/nsr/>.

9 The Model Law is intended to act as a set of internationally accepted guidelines on how to remove legal obstacles to e-commerce, by adopting a "functional equivalent" approach. See <http://www.uncitral.org/en-index.htm>

10 Most states have enacted complimentary legislation: The *Electronic Transactions Act* 2000 (NSW) commenced on 7 December 2001; the *Electronic Transactions Act* 2000 (Vic) came into effect on 1 September 2000; the Electronic Transactions Act (QLD) came into effect in June 2001; the *Electronic Transactions Act* 2000 (Tas) came into effect in June 2001. The *Electronic Transactions Act 2000* (SA) was assented to on 7 December 2000.]

11 EGEG Report (Recommendation 4 and 5) above n2 at 7.

12 Section 8 of the Act is a default provision expressing the principle of functional equivalence. It was modeled on Art 5 of the Model Law, which provides that a transaction is not invalid merely because it was conducted by electronic means.

13 sections 9, 10, 11 and 12 respectively.

14 sections 13, 14 and 15 respectively.

15 S Barber "Electronic Transactions Bill Takes Shape" 18(1) *Communications Law Bulletin* (1999) 1 at 1.

16 Jurisdiction encompasses four aspects: 1) governing law; 2) the jurisdiction of a court to hear a dispute; 3) forum conveniens and; 4) enforcement of judgments. See B Jew "Cyber Jurisdiction – Emerging Issues and Conflicts of Law when Overseas Courts Challenge your Web" 24 *Computers and Law* (1998) 24 at 26.

17 D Johnson and D Post "Law and Borders: The Rise of Law in Cyberspace" (1996) 48 *Stanford Law Review* 1367 at 1367.

18 D Beard "International Virtual Contract" 28 *ABLR* (2000) 206 at 208.

19 International Jurisdiction and the Recognition and Enforcement of Foreign Judgments in Civil Matters, Issues Paper 3 *International Electronic Commerce* (Nov 2000) <http://law.gov.au/publications/hagueissues3.html> at 2.

20 *International Electronic Commerce* above n19 at 3.

21 Johnson & Post above n17 at 25.

22 J Oberding and T Norderhaug "A Separate Jurisdiction For Cyberspace" <http://www.ascusc.org/jcmc/vol2/issue1/juris.html#jurisdiction>.

23 H Perritt "Hybrid Regulation as a Solution to Internet Jurisdiction Problems: Beyond the Hague Convention Draft" <http://www.ilpf.org/confer/present00/perritt_pr/index.htm.>

24 Elizabeth Thornburg "Going Private: Technology, Due Process, and Internet Dispute Resolution" <http://www.cptech.org/ecom/jurisdiction/hague.hmtl.>

25 Perritt above n23.

26 Perritt above n23.

27 B Jew above n16 at 27.

28 C McWhiney, S Wooden, J McCown, J Ryan and J Green "The "Sliding Scale" of Personal Jurisdiction Via the Internet" <http://stlr.stanford.edu/STLR/Events/personal_jurisdiction/contents_f.html#note6>. For example, *Zippo Mfg. Co. v. Zippo Dot Com, Inc.* 952 F. Supp. 1119 (WD Pa. 1997), was concerned with whether an Internet website provided the minimum contacts necessary to establish jurisdiction. *Zippo* introduced a sliding scale to analyze the contacts of potential defendants created by Internet websites. In determining the constitutionality of exercising jurisdiction, the court focused on the nature and quality of commercial activity that an entity conducts over the Internet.

29 *Voth v Manilda Flour Mills Pty Ltd* (1990) 171 CLR 538 at 565.

30 Various factors have been established in the case law to determine if a forum is appropriate. These include whether there is a connection between: the court and the subject matter and/or the parties residence; the place of business; the place where the conduct occurred; where the subject matter is situated (*Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 245 per Deane J); whether there is any legitimate juridical advantage to the plaintiff (*Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460 at 482-4); and whether the law of the forum will apply the substantive law to resolve the dispute (*Voth v Manilda Flour Mills Pty Ltd* (1990) 171 CLR 538 at 565).

31 B Jew above n16 at 27.

32 D Beard above n18 at 212.

33 D Beard above n18 at 213.

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Domain Names - liverpoolfc.com

On 4 April, the WIPO Arbitration and Mediation Centre held that the domain name liverpoolfc.com should be transferred to LiverpoolFC.TV Limited. The respondent, Mr Hetherington, was the owner of the domain name liverpoolfc.com, which he had bought from the Liverpool Flying Club of America allegedly for use as the domain name for a fashion club that he intended to set up under the name Liverpool Fashion Club. His website comprised a single page and for a period of time he advertised on that page that the domain name was for sale. The claimants were Liverpool Football Club and Athletic Grounds plc, which, operates the Liverpool Football Club and an affiliate, LiverpoolFC.TV Limited which operates the official Liverpool Football Club website liverpoolfc.tv. Liverpool Football Club owns various trade marks including an application in the UK for LiverpoolFC.com, which Mr Hetherington opposed in October 2001 on the ground that he owned the domain name. After a number of attempts to settle, during which Mr Hetherington sought £125,000 for the transfer of the domain, the claimants referred the matter to WIPO. They laimed that the fashion website was a cybersquatting sham.

The WIPO Panellist found that the domain name was confusingly similar to the claimants' trade marks. In the light of the fame of the Liverpool Football Club and of the primary meaning of the abbreviation FC, generally standing for Football Club, the Panellist accepted that Mr Hetherington had no right or legitimate interest in the domain name. His efforts to sell it for large amounts of money constituted prima facie evidence that he had purchased and used it in bad faith. . He noted that Liverpool Fashion Club was a far more appropriate name for the fashion club than liverpoolfc and that the loss of the domain name would not hinder the development of this business. He therefore ordered the transfer of the domain name.