

Regulating Interactive Gambling – How (not) to do it?

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Introduction

The gaming and betting industries have consistently been amongst the most proactive in embracing new forms of technology. Internet offerings, peer-to-peer betting exchanges, interactive television services and fixed odds betting terminals represent just a few of the innovations adopted by gambling service providers. The deployment of new and increasingly sophisticated technologies has been a particular challenge for regulators struggling under antiquated statutes, and authorities have adopted substantially differing responses in various jurisdictions. In Australia, for instance, the Interactive Gambling Act 2001 (Cth) (the IGA) lays down legislative prohibitions on the provision of Internet gambling services.

This article will focus on attempts by the UK government to respond to new technologies in the gaming and betting sectors. Unlike the Australian experience, the UK authorities have selected an approach which seeks to regulate, rather than prohibit, interactive gambling.¹ Whilst that strategy arguably represents a more commercial view than that taken by the IGA, there are concerns as to whether the pragmatism of the UK government's proposed changes will have an undesirable social side-effect. Regardless of their ultimate success, the legal debate surrounding the proposals in the UK offers useful lessons for Australian lawyers operating in the gaming and betting sector.

The UK Gambling Bill – the English Approach

The proposed laws regulating interactive gambling in the UK are contained within the UK Gambling

Bill (the UK Bill). Unlike the IGA, which was introduced in direct response to the spread of interactive gambling technologies, the UK Bill represents the culmination of several years of debate over the reform of English gaming and betting laws and canvasses wide-sweeping reforms aimed at modernising regulations across the sector.² Consequently, the interactive gambling provisions have been treated almost as a side-issue.³

The UK government's approach with respect to interactive gambling is simply that any activity which falls within the definition of "remote gambling" is not prohibited, but can only be carried on pursuant to a "remote operating licence". Section 4 of the UK Bill defines "remote gambling" as follows:

"remote gambling" means gambling in which persons participate by the use of remote communication; and

"remote communication" means communication using:

- (a) *the internet;*
- (b) *telephone;*
- (c) *television;*
- (d) *radio; or*
- (e) *any other kind of electronic or other technology for facilitating communication.*

The provisions are intentionally broad and are aimed at ensuring that any manner of non face-to-face gambling activity is caught by the UK Bill and must be licensed. So far, few details have been released regarding the licensing process and it is expected that this will be dealt with under delegated legislation, and administered by the new Gambling Commission.

In addition, to ensure that the legislative structure can adapt with new technologies, the Secretary of

State reserves to herself the power to specify in regulations specific systems or methods which are to be included or excluded from the definition of "remote communication".

Analysis of the English Approach

The provisions relating to remote gambling in the UK Bill represent the first time that authorities in the UK have attempted to license this kind of activity. The advantages of the structure selected by the UK authorities are twofold:

- (a) At first glance, the laws appear easy to apply – that is, if a person offers services which allow customers to engage in "remote gambling", then he or she must apply to the Gambling Commission for a licence. Whilst few details have been released regarding the licensing process to date, it is expected that applications for "remote operating licences" will undergo the same licensing process as for applications in respect of traditional betting and gaming activities.
- (b) The regulatory approach is arguably a practical one. The UK government has argued that, since prohibiting interactive gambling is effectively impossible, the next best option is to provide consumers with a regulated alternative. In other words, by establishing a licensing structure to cover remote gambling, consumers will have the option to open an account with a licensed service provider, and will have the comfort of knowing the provider has been vetted by the Gambling Commission. It is expected, for instance, that the Commission would review licence

applications against criteria such as ensuring the service provider has good financial standing (and therefore pay returns on stakes), ensuring casino games employ certified random number generators, or ensuring that licence-holders within the service providers organisation do not have criminal records.

These are persuasive reasons to support the UK Bill's provisions on remote gambling. A closer inspection of the UK Bill's drafting highlights some additional advantages in the English approach which may prove enlightening for Australian regulators.

Definition of "remote gambling"

The definition of "remote gambling" adopted by the UK Bill has an important carve-out. Unlike the structure adopted under the IGA, the definition of gambling in the UK Bill does not capture ancillary activities, the most important being advertising which would remain regulated by codes of practice. By contrast, the IGA's definition of "gambling service" specifically includes "a service the sole or dominant purpose of which is to introduce individuals who wish to make or place bets to individuals who are willing to receive or accept those bets" which appears to cover advertising and promotional activities.

The approach adopted by the UK Bill is, in the author's view, the more sensible. Codes of practice generally offer greater flexibility and are arguably more appropriate for activities such as advertising. Advertising codes in the UK, for instance, establish separate regimes for print and broadcasting, and also contain flexible rules on sponsorship as well as content regulation. The provisions on advertising in Part 7A of the IGA comprise a heavy-handed list of permitted and prohibited publications. It is suggested that a regime which provides for codes of practice administered by industry bodies is more appropriate than the imposition of strict legislative prohibitions.

Jurisdictional Issues

Gaming and betting service providers typically employ complicated structures. It is not uncommon for providers to operate through an offshore entity, locating their server in one legal jurisdiction, with back-office and administrative functions at another site, and customers domiciled in several different countries. The territorial application provisions of the UK Bill state that the legislation applies where one piece of remote gambling equipment used in the provision of gambling facilities is situated in Great Britain, regardless of whether the facilities are provided for use wholly or partly in the UK.

Section 25 defines "remote gambling equipment" as follows:

"remote gambling equipment" means...electronic or other equipment used by or on behalf of a person providing facilities for remote gambling:

- (a) *to register a person's participation in the gambling;*
- (b) *to present, to persons who are participating or may participate in the gambling, a virtual game, virtual rave or other virtual event or process by reference to which the gambling is conducted;*
- (c) *to determine all or part of a result or of the effect of a result; or*
- (d) *to accept payment in respect of gambling.*

The breadth of the definition is intended to capture any hardware or system used by a service provider in the remote gambling process. Section 25 has two significant advantages over the structure established under Australian law.

Firstly, the jurisdictional provisions are aimed at ensuring that the principal liability for ensuring remote gambling activity is licensed will fall on the service provider. Accordingly, the Section 25 definition of "remote gambling equipment" includes equipment used on behalf of a provider, which seems to suggest that it will be the provider – as opposed to

their contractors – which are deemed to be providing the service. In addition, Section 25 goes on to exclude end user equipment from the definition of "remote gambling equipment". This is a much more preferable situation to that set up under the IGA where not only gambling service providers are caught, but also ISPs who would need to comply with industry codes, and could be affected by the Part 3 complaints system.

Secondly, the English approach to territoriality is easier to understand with all the relevant provisions contained in Section 25. By contrast, the IGA has jurisdictional references scattered throughout the legislation. A "prohibited Internet gambling service" is defined as a gambling service which: (i) is provided in the course of carrying on a business; (ii) is provided to customers using an Internet carriage service (defined as a "listed carriage service, as defined under the *Telecommunications Act 1997*, which allows users to access the Internet); and (iii) an individual who is physically present in Australia is capable of becoming a customer of the service. In addition, the concept of an "Australian-customer link" features in Parts 2 and 2A in relation to the offence of providing an interactive gambling service to customers in Australia or in designated countries. It is suggested that the consolidated jurisdictional approach is more preferable to the Australian legislation which relies on several interlocking provisions.

The UK Bill – a Flawed Solution?

The UK Bill offers some useful lessons in its approach to ancillary activities, in particular advertising, and also in its consolidated territoriality wording. These are initiatives which, it is suggested, could work in the Australian environment just as well, allowing practitioners to avoid the complicated structures of the IGA.

Regardless of the practicality of its structure, the UK Bill has also drawn significant criticism. In particular, commentators have pointed at the UK Bill's ambivalent stance on issues of

social policy. Whilst there are provisions within the UK Bill which aim to “root out” organised crime from gambling, and to restrict access to gambling services from minors and addicts, the UK Bill will also have the effect of permitting licensed Internet gambling. Community groups have argued that, even if regulations and licensing obligations are rigorously enforced (which itself is debateable), the UK Bill will lead to increased gambling activity.

The Australian government has taken a much stronger stance on public policy issues, clearly stating its position that the social risk of interactive gambling justifies its prohibition. The social basis of the UK Bill is harder to identify. On the one hand, the UK authorities advocate various public policy considerations, while at the same time, legalise online gambling. Despite this uncertainty in relation to the UK government’s position on social issues, it is the

author’s view that the UK Bill represents a courageous attempt to regulate remote gambling. Rather than attempt to place prohibitions on the Internet, the UK government has opted to offer consumers a “safe” licensed gambling option.

By the end of March, the UK Bill will have progressed to its second reading before the House of Lords. To date, the remote gambling provisions have survived both parliamentary debate and academic scrutiny relatively unscathed, and it is expected that these sections of the UK Bill are likely to pass into law later this year. How the structure operates in practice remains to be seen. At the very least, however, its success (or lack thereof) will undoubtedly hold valuable lessons for Australian lawyers and regulators alike.⁴

¹ Section 15 of the IGA makes it an offence to intentionally provide an interactive gambling service which has an “Australian-customer link”, that is one or more of its customers are in Australia. In addition, section 16 of the IGA allows complaints to

be made to the Australian Broadcasting Authority by a person where any end-user in Australia is able to access Internet gambling services

- 2 The first provisions of the UK Bill were introduced for public comment in November 2003. The government, however, has been considering reform of gaming and betting laws as far back as 2001 when the Budd Report was commissioned by the UK Treasury.
- 3 The parts of the UK Bill that have attracted most of the debate have related to new provisions which propose to relax existing restrictions on the establishment of casinos. Under the proposed new laws, casinos would be able to operate independently of a private club, to offer any legal form of gambling and to be of any size (subject to local authority regulations). There has also been substantial discussions regarding the UK government’s recommendation that existing gaming and betting boards be replaced by the Gambling Commission with jurisdiction to supervise all gaming and betting activities.
- 4 For more information on the UK Bill, please visit: http://www.culture.gov.uk/gambling_and_racing/gambling_bill/

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