

Protecting Consumers Online - Australian Initiatives

There is a growing need to protect consumers online. John Dyson of the Department of Treasury reports.

Business to consumer electronic commerce has the potential to offer a wide range of social and economic benefits to consumers: convenience; access to information; and lower prices resulting from reduced costs and more competitive markets.

The ability of electronic commerce to deliver these benefits is being challenged by the lack of trust online between retailers and consumers. Consumer concerns are focussed on areas like privacy and security but uncertainties about more basic issues such as whether businesses will fulfill orders are also important considerations. A recent survey by Consumers' International¹ provided empirical evidence that these concerns are justified; of the goods ordered as part of the survey, approximately one in ten failed to arrive; in any case the disclosure of information by retailers, including about privacy and security, was generally poor.

Governments around the world are examining what changes need to be made to existing consumer protection regimes to take into account the unique characteristics of the online environment so that consumers have adequate and effective protection. However, there is also pressure on governments to avoid interfering in the online marketplace lest regulation stifle the development of electronic commerce and forfeit the economic efficiencies that it promises.

In relation to electronic commerce, consumer protection poses two questions. What additional protection, if any, is needed to address the unique characteristics of online shopping, such as the speed with which transactions can be completed and the distance between the consumer and the retailer?

Second, how can governments and businesses offer effective protection for consumers engaging in cross-jurisdictional transactions? It is interesting to look at how these issues are being addressed in Australia and internationally. There is a commercial incentive for business to promote consumer confidence in electronic

commerce and, in this context, it is important to look at consumer protection initiatives in the private sector.

AUSTRALIA

In Australia, government policy in relation to offline consumer protection is well established. Legislative protection for consumers is provided by the *Trade Practices Act 1974 (Cth)*, the *Australian Securities and Investments Commission Act 1989 (Cth)* in relation to financial services, and State and Territory fair trading legislation.

Where problems emerge in specific industry sectors, government generally adopts a self-regulatory approach that involves working with consumers and business to reach agreement on how to resolve these difficulties, often resulting in the creation of a voluntary code of conduct. The development of codes of conduct for Direct Marketing and Electronic Funds Transfer illustrate the operation of this process.

The Australian Government's policy for online consumer protection takes the same approach, and is detailed in *A Policy Framework for Consumer Protection in Electronic Commerce* released by the Minister for Financial Services and Regulation, the Hon Joe Hockey MP, in October 1999 ("**Policy Framework**").² The Policy Framework recognises that the existing strong regulatory framework will protect consumers in the majority of cases that emerge online. Issues specific to electronic commerce are being addressed through a range of self-regulatory initiatives.

The prominence given to industry self-regulation is in line with the approach being taken by many governments in relation to a whole range of online issues. Self-regulation provides a degree of flexibility which is particularly important online where the change is very rapid. The role of government is to facilitate the development of self-regulation by engaging in dialogue with both business and consumer representatives so that mutually beneficial solutions are

developed that will promote the growth of electronic commerce while providing a safe environment for consumers.

The Policy Framework also embraces the principle of functional equivalence: that, wherever possible, the online and offline environments should be treated similarly. Ideally, consumers should enjoy a similar level of protection online as they do offline. Government action has also focussed on areas where electronic commerce raises new concerns for consumers so that, to the extent that it replicates offline commerce, it is governed by the same rules.

The principles in the Policy Framework can be seen in the major government initiative in this area, the development of a model code of conduct for businesses, called *Building Consumer Confidence in Electronic Commerce: A Best Practice Model for Business* ("**Best Practice Model**").³ The purpose of the Best Practice Model is to provide guidance on the practices that online businesses should adopt, particularly in relation to information disclosure, to provide adequate protection for consumers online. The adoption of this model should alleviate consumer concerns thus increasing the consumer uptake of electronic commerce and providing benefits for both consumers and business. The model will assist industry associations, individual businesses and independent seals of assurance schemes to develop appropriate standards.

The Best Practice Model will include provisions relating to fair business practices, advertising and marketing, identification of businesses, contractual information, applicable law and forum and conclusion of contracts, complaint handling, dispute resolution, privacy, payment and security and authentication.

Initiatives such as this allow the Australian Government to influence the development of online retailing without imposing onerous and costly regulatory burdens on businesses. Although the Government generally reserves the right to intervene directly in the marketplace to address serious market failure or to

achieve a particular social policy objective, there is a presumption that competitive market forces deliver greater choice and benefits to consumers. In the case of electronic commerce, it would be difficult to draft and enforce regulation that could be easily adapted to changes in technology and apply across a range of different business sectors. Self-regulation is more adaptable and can be tailored, where necessary, to the needs of particular industries.

The Electronic Funds Transfer ("EFT") Code of Practice is also being reviewed to take into account the emergence of new payment mechanisms including Internet banking and smart cards.⁴ One of the most significant issues that the code will deal with is the liability of consumers for unauthorised transactions.

INTERNATIONAL

Previously, consumer transactions across borders were relatively uncommon as markets for consumer products were generally confined to relatively small geographic areas within a particular jurisdiction. However, online retailers and consumers are usually physically distant and often in different jurisdictions.

The vast increase in cross-jurisdictional transactions poses a number of problems. These become apparent when considering the type of redress available to consumers. As far as redress through the courts is concerned, there is still uncertainty about the appropriate jurisdiction (that of the consumer or the business) for resolving disputes. There is no easy solution to this problem. If the jurisdiction of the consumer is chosen, businesses need to be aware of the consumer protection requirements of every jurisdiction where they do business. However, if the jurisdiction of the business is chosen, it is then consumers who face the challenge of understanding their rights in the jurisdiction of every business with which they transact. Clearly either choice places a substantial burden on one party and is an impediment to the uptake of electronic commerce.

One possible response is to consider substantively harmonising consumer protection laws. This would effectively remove the jurisdictional problem. Consumer markets are more likely to be subject to government intervention than other commercial transactions. The level of intervention varies significantly from one country to another and often reflects different societies' perceptions of what is the appropriate role of government in

society and the extent to which a free market can be allowed to function. For example, the United States generally prefers a more liberal approach to market regulation than many European countries. In Scandinavian countries, for instance, there is substantial regulation of advertising to children which most other countries, including Australia, do not have. In addition, restrictions on the availability of products also vary between countries.

What this means for consumer protection and electronic commerce is that global agreement on the appropriate protection that should be applied online is extremely difficult. However, while complete harmonisation of all the rules applicable to consumer transactions is a long term - if not impossible - objective, there may still be substantial agreement on many of the basic protections that should be available.

In December 1999, the OECD released *Guidelines for Consumer Protection in the Context of Electronic Commerce* ("OECD Guidelines").⁵ These voluntary guidelines describe the type of protection that should be available online in areas such as fair business practice, with particular emphasis on information disclosure about the business and details of transactions, including the availability

of refunds. The OECD Guidelines also encourage alternative dispute resolution and further co-operation between governments. Australia played a significant role in the drafting of the OECD Guidelines. While nothing in the OECD Guidelines prevents governments from going further, it is likely that in most countries they will be implemented through government encouraging business to abide by them voluntarily.

MARKET RESPONSE

The effective implementation of the OECD Guidelines would establish a base level of accepted consumer protection principles for electronic commerce. However, it would not solve the problem of ensuring adequate redress. There is much discussion about the possibility of setting up online courts or tribunals but it is likely that many of these will be voluntary industry self-regulatory schemes.

The role of independent certification schemes in providing protection to consumers, particularly redress, will be important. The emergence of these schemes online has been very rapid. There are already a large number operating (many based in the United States). They usually involve an operator who has an existing offline reputation as

thechangeroomwitha
doublesidedmirror.com

OUR HIDDEN WEB CAM SERVICE
ESTABLISHED WAY BACK IN 1999
HAS BEEN SPYING ON PEOPLE SAFELY
AND SECURELY FOR THE ENJOYMENT
OF OUR CUSTOMERS FOR WELL OVER
12 WHOLE MONTHS
PRIVACY ON OUR SITE
IS NOT AN ISSUE

smile your information's
safe on secret web cam



CREDIT DETAILS

SUBMIT



Pierre

a trustworthy organisation (such as a bank, auditor or business association) allowing those traders who meet their conditions or code of practice to place a logo on their site. Currently some of these schemes offer a dispute resolution mechanism.

Industry-based schemes will be particularly important in cross-border transactions. Already some schemes are operating in a number of countries, with the potential to build confidence across borders by providing a mechanism to deal with disputes quickly, at low cost. As such schemes are self-regulatory in nature they are not effected by differences in substantive laws between countries.

The market for these services is still very new and it is difficult to speculate about their future, but they do face a number of problems and they do not overcome many of the complexities mentioned earlier in relation to significant differences in

countries' regulatory approaches. At present, and for the foreseeable future, they offer the best opportunity for consumers to have access to basic protection and dispute resolution.

CONCLUSION

Clearly online consumer protection poses challenges for governments. In Australia the application of the existing consumer protection framework coupled with self-regulation carried out in consultation with business and consumers will provide an excellent basis for protecting consumers online.

The issue of cross-border transactions poses particular problems to which there is no simple solution. The OECD has made significant progress towards international agreement on the fundamental business practices that provide adequate protection. Further co-

operation amongst governments together with the development of self-regulatory schemes will be necessary to provide comprehensive protection for consumers in online transactions.

¹ <http://www.consumersinternational.org>

² <http://www.treasury.gov.au/ecommerce>

³ <http://www.treasury.gov.au/ecommerce>

⁴ <http://www.asic.gov.au/page-612.html>

⁵ <http://www.oecd.org>

John Dyson is a Policy Analyst with the Department of Treasury in Canberra. He has advised the Minister for Financial Services and Regulation, the Hon Joe Hockey MP, on business-to-consumer electronic commerce - particularly in relation to the development of the Government's Policy Framework for Consumer Protection in Electronic Commerce and the OECD Guidelines for Consumer Protection in the Context of Electronic Commerce.

Datacasting - The Long and Winding Road That Leads....???

Luke Waterson critiques the recent government datacasting decision.

On 21 December 1999, the Government announced its long awaited and eagerly anticipated decision on the permitted scope of datacasting services. The media release of the Minister for Communications, Information Technology and the Arts, *Digital - new choices, better services for Australians*, contained the following statement:

The Government is confident that its decisions will ensure that Australians enjoy the best broadcasting in the world while introducing new information and entertainment options through the establishment of a thriving and viable datacasting industry.

The purpose of this article is to determine whether the Government's confidence in the effect of its decision is justified.

EXISTING DATACASTING REGIME

A "datacasting service" is currently defined in section 2 of Schedule 4 to the *Broadcasting Services Act 1992* (Cth) ("BSA") as follows:

A service (other than a broadcasting service) that delivers information (whether in the form of data, text, speeches, images or in any other form) to persons having equipment appropriate for receiving that information, where the delivery of the service uses the broadcasting services bands.

The legislative concept of datacasting services in Australia was introduced in 1998 as part of the regime regulating the transmission of commercial and public free-to-air television services in digital

mode¹ ("Digital Act"). Although some services currently transmitted in analog mode are essentially datacasting services (such as the "Teletext" service), it is the spectrum efficiency and convergence technology of digital transmission that provides the opportunity for the establishment of a commercially significant terrestrial datacasting industry.

As this article will illustrate, the resolution of datacasting policy issues are inexorably linked to the existing digital broadcasting framework reflected in the Digital Act. In summary, the salient features of the digital regime most relevant to datacasting are:

- a wide definition of datacasting (as set out above) covering any information content service (other than broadcasting service)