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GAMBLING LAW & REGULATION

Recent developments in Australian gambling law

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OVERVIEW

In this newsletter, we address the implications of the report of the recent inquiry into online and interactive gambling conducted by the Parliamentary Joint Select Committee on Gambling Reform on both the Australian wagering sector and the regulation of online gaming in Australia.

Also included are some comments on the impact of cloud computing on the online gambling sector. Although widely considered in connection with other industry sectors, this article considers the ramifications of the cloud for the gambling sector.

Finally, we have been asked on a number of occasions about the legal treatment of virtual gaming under Australian law. We comment on a recent response issued by the Australian Communications and Media Authority on this topic to a query of Senator Nick Xenophon.

We wish our readers an enjoyable holiday season and a prosperous 2012.

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“Remote” Remote Gambling: Cloud Computing and Online Gambling Operators

No buzzword is more prevalent in IT circles than “cloud computing”. But what is it, what are the risks and how can you take advantage of it?

What is Cloud Computing?

In its simplest sense, cloud computing is the use of “remote” computing resources (hard disks, databases, CPUs) to perform tasks that are typically done by “local” resources. In computer terms, something is “remote” (as opposed to “local”) if it is accessed over a network. While relatively simple cloud computing services like Hotmail or Gmail have existed for years, the phenomenal increase in the speed of networks allows a far broader range of “remote” resources to behave as well as (and in some cases better) than “local” resources.

Because cloud computing allows for the centralisation of the resources being used (be they the hard disk, database, etc), it makes it easier to more efficiently use those resources. In the traditional model of computing, each resource is utilised only by the particular PC to which it is attached. Centralisation allows for resources to be shared and, as a result, used more effectively. Moreover, because all the resources are centralised, they are easier to maintain and to expand.

Effective sharing and easier maintenance allows for “scalability” (that is, the ease with which you can increase or decrease the resources used), one of the key attractions of cloud computing. It generally means a lower cost and more flexibility, allowing companies to deal more effectively with fluctuations in business, such as varying customer demand.

Some members of the online gambling sector has already begun to make use of the cloud. The betting exchange Betfair was reported as having moved some of its research and development operations to cloud computing provider Rackspace.[1]

However, there are also risks. For online gambling operators, outsourcing computing resources to the cloud can bring some serious potential legal risks if they use a cloud from another provider, instead of maintaining it themselves.[2] The risks include choice of law, security, data protection, privacy and regulatory issues.

Choice of Law

Cloud computing providers usually include a “choice of law” clauses in their contracts with cloud users. These clauses specify which jurisdiction’s laws will govern the contract between the cloud provider and the customer and potentially which jurisdictions have the authority to hear any dispute that subsequently arises between the parties. Typically, this is the jurisdiction where the cloud computing provider’s server is located, or a jurisdiction with laws favourable to the provider.

A choice of law clause in a contract can make it difficult for any online business to ascertain precisely at a particular time which laws govern the activities of the business. In addition, some laws may potentially have adverse ramifications for certain online businesses, as their activities may not be lawful in all jurisdictions. This is especially so for online gambling operators as laws regulating online gambling vary greatly between jurisdictions. Certain types of online gambling are illegal in Australia under the *Interactive Gambling Act 2001* (Cth) (**IGA**), so an overseas gambling

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[1] Anh Nguyen, “Betfair moves R&D testing to the cloud”, 26 January 2011, URL: http://www.computerworlduk.com/news/cloud-computing/3258252/betfair-moves-rd-testing-to-the-cloud/.

[2] Some of the risks discussed in this paper can be mitigated through the use of a “private” cloud. A private cloud involves the same centralisation of resources and their provision over a network with the difference being that the resources are placed in a location under the control of the relevant business.

operator providing services accessible by Australians needs to be careful about where its data is located. If the server hosting its data is located in Australia, this could potentially breach Australian law.

Other gambling operators (such as wagering and betting operators) which allow bets to be placed over the Internet also need to be careful about which jurisdiction governs their data when using cloud servers. The jurisdiction specified in a choice of law clause may not be the same jurisdiction in which the gambling operator is licensed (for example, online wagering and sports betting activities may fall foul of the *Interstate Wire Act* in the United States). Gambling operators should research the law of the jurisdiction specified in such clauses, so that they do not expose themselves to potential risks if they do not have a licence in that jurisdiction.

Security

Security concerns are a key concern in connection with cloud computing for two reasons. First, the fact that a public network is utilised in the provision of most forms of cloud computing means that malicious users have an additional avenue of attack. Second, since the user of a cloud service does not control directly their own data, the user is entirely dependent on the security practices of the provider. (In practice, most providers employ more sophisticated security measures than most businesses but the lack of control over these measures can lead to an understandable level of anxiety on the part of the business.)

There are two types of adverse consequences for a gambling operator that can arise from a security breach. The first is the damage to that operator's brand. This can be particularly acute for gambling operators where the years that are spent building trust with a customer can evaporate in minutes once a problem arises.

The second factor is the potential liability of a gambling operator to its customers. While cloud computing allows for the outsourcing of computer resources, the legal responsibility to the end customer remains with the gambling operator. When taking advantage of cloud computing opportunities, it is important that gambling operators ensure they are not exposed to unnecessary risk in the event of a security breach.

If gambling operators store sensitive information within an external cloud, they need to review carefully the level of security promised by the cloud provider. This is especially important if the data stored includes customers' personal information, such as credit card details or bank information. In addition, online gambling operators should ensure that the cloud provider is required to notify them if any security breaches occur.

Files in the cloud might be stored in multiple locations on multiple servers. In such cases, gambling operators should check where their files are stored, as levels of security may vary between the different file servers. Many providers, particularly those aimed more at the consumer segment, are reluctant to release such information and this may factor into the attractiveness of one provider over another.

Standard contracts of cloud service providers generally contain clauses under which the cloud computing provider seeks to exclude liability in the event of a security breach. Also, it is not uncommon to see a provider refusing to warrant the security, reliability or data integrity of its cloud service.

Where gambling operators are not able to negotiate the terms of clause service contracts, care should be taken to ensure that the contract (usually in the form of a terms of use agreement) that governs the relationship between the operator and the customer is drafted to take this into account.

Data Protection

While terms of use can be drafted to limit the liability of a gambling operator to its customers (even in the event of data breach), data protection laws may exist in the jurisdiction (either of the operator or the cloud computing provider) which prevent businesses from contracting out of the legal obligations that arise under these laws.

Typically, data protection laws impose obligations on persons collecting or transferring personal information to ensure that it is protected. While this does not prevent a business from using a cloud computing provider, it means that security breaches may have wider ramifications. Even for businesses based in jurisdictions which do not yet have

strong data protection laws in place (eg. Australia), the provisions of overseas legislation, particularly in Europe, may need to be considered if cloud computing resources are utilised.

Also, in some jurisdictions, there is a requirement to give notice to customers of any security breach which has occurred.

Privacy

With data potentially residing in multiple locations, it can be difficult for cloud users to protect their privacy or the privacy of their customers. Users of the cloud still need to comply with the privacy laws of their own country, even if their data is stored in a cloud server overseas.

For Australian operators, consideration should be given to ensuring compliance with the *Privacy Act 1988* (Cth). Although Australia's privacy laws are not as constrictive as those of overseas countries (particularly in Europe), operators need to ensure that they understand their obligations. If data is being sent overseas, Australian operators must ensure that the country where the data will reside has privacy protections that are at least as good as those under the Privacy Act.

Australian businesses should also ensure that they are aware of the impact proposed changes to the *Privacy Act* may have as a result of the Government's response to a recent Australian Law Reform Commission inquiry into privacy protection.

As with the other issues noted above, when services based overseas are used, gambling operators need to check to ensure that the overseas laws that may apply are understood.

Other Regulatory Issues

For online gambling operators, a further concern is the effect the extent to which the conditions of a gambling licence inhibit the manner in which the business is conducted. Most gambling regulators require the computing resources that are going to be used in the provision of gambling services to be audited prior to the grant of the licence (and on further request). A change to the existing licensed systems, particularly one that affects the core gambling operations of the operator, is likely to require approval of the regulator.

In addition to performing audits on systems, many regulators wish to ensure that the systems which are used by an operator under their purview are located within the jurisdiction. Because cloud computing providers typically place resources in locations with strong communication links (eg. the United States, Ireland and Singapore). These locations may not be those where the licence is granted and so regulators may be reluctant to have systems in jurisdictions where they cannot easily be accessed by the regulator.

In both of these cases, the regulator may not be opposed to certain resources being provided via the cloud and what is required is for operators to explain the types of resources that are being placed into the cloud and the controls that will exist to ensure compliance with the rules of the relevant gambling licensing regime.

Conclusion

Online gambling operators that are looking to use cloud computing services to improve their service delivery to customers need to be aware of the risks associated with cloud computing. Just as with more traditional resources, resources provided via the cloud still need to be protected from security risks, comply with data protection and privacy laws and be consistent with any regulatory requirements which apply to gambling licences. Although online gambling operators are particularly well suited to taking advantage of the benefits of cloud computing, there are nevertheless a number of issues they need to consider in any attempt to make the move.

Do Virtual Games Constitute Gambling? - The Australian Position

Introduction

The Australian Communications & Media Authority (the **ACMA**) has published a letter expressing its view that a "free" online game available on Facebook which offers games such as blackjack and roulette is not in breach of the *Interactive Gambling Act 2001* (Cth) (the **Act**).[3] The ACMA is the Federal agency responsible for the initial investigation of complaints relating to possible contraventions of the Act.

This is the first time that there has been any official guidance given in Australia on the legality of virtual games. The ACMA's letter provides guidance to the suppliers of similar games, as well as the platforms (such as Facebook) used to distribute these games, that the supply of such games to Australian residents is not prohibited by the Act.

Background

In October of this year, the ACMA was contacted by Senator Nick Xenophon (an Australian politician who is frequently involved in discussions of gambling regulation and who generally takes an activist stance in the protection of problem gamblers) expressing concern about the legality of the "free" online game DoubleDown Casino, which is available on Facebook and other social media sites. DoubleDown Casino provides "free" casino-style games such as blackjack and roulette (the **DoubleDown Games**).

DoubleDown Games are free to play and users are issued with virtual currency to play the game. Virtual currency can be used to activate game features. Users are able to purchase additional virtual currency using "real world money" to enhance their playing experience in some way. This may include the purchase of credits to extend playing time.

The Act prohibits the supply of interactive gambling services to persons resident in Australia. For a virtual game, such as a DoubleDown Game, to constitute a gambling service (which is one of the key element of an "interactive gambling service" in the Act), it must:

a) be a game of chance or of mixed chance and skill; and
b) involve consideration; and
c) be played for money or anything else of value.

Senator Xenophon's Complaint

Senator Xenophon's complaint related to the facility provided by DoubleDown Games to allow users to exchange real money for virtual currency. Accordingly, he suggested that the DoubleDown slogan, "just for fun – not real gambling", was misleading, and that the DoubleDown Games constituted a breach of the Act.

The ACMA's response

In its response, the ACMA informed Senator Xenophon of its view that the DoubleDown Games are not in breach of the Act because they do not constitute gambling. Accordingly, the ACMA will not refer the DoubleDown Games to the Australian Federal Police (the **AFP**).[4]

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[3] Correspondence available under the heading "Additional Information Received":
http://www.aph.gov.au/Senate/committee/gamblingreform_ctte/interactive_online_gambling_advertising/submissions.htm
[4] Although the ACMA is responsible for conducting initial investigations into complaints regarding breaches of the Act, it has no enforcement powers of its own in respect of interactive gambling services. It must instead refer matters it deems a breach to the AFP.

Addisons' Comment

It is possible that DoubleDown Games may satisfy each of the first and second requirements of a "gambling service" as set out above. However, the ACMA has confirmed that the DoubleDown Games does not meet the third requirement. This view is taken on the basis that it is not possible to win "money or anything else of value" through playing the DoubleDown Games and there is "no facility to convert or cash out the 'virtual' currency accumulated during game play into 'real' currency". If an operator were to allow "virtual currency" to be exchanged for "real currency", it is very likely a different view would be taken.

In a report released in September 2011, entitled *Cheating at Gambling*[5] (which considered various matters relating to gambling including the treatment of gambling and whether match-fixing should be criminalised), the New South Wales Law Reform Commission (the **NSWLRC**) discussed whether similar types of games available through Facebook constitute gambling. The NSWLRC came to the view that the virtual currency which could be won using such games was akin to the free balls that are released when a certain score is reached in a pinball machine game. It concluded, like the ACMA, that these free balls are not a thing of value. The NSWLRC, did however, express a concern that such games encourage young people to use illegal online gambling.

Conclusion

While this conclusion is not binding on the ACMA and does not constitute a legal precedent, it suggests that the ACMA will not refer similar matters to the AFP for further investigation. When considered with the NSWLRC's view, it would appear that the provision of DoubleDown Games and similar virtual games do not constitute gambling for the purposes of the Act.

However, there remains a concern, as expressed by the NSWLRC, that the widespread availability of these games on social media, such as Facebook encourages minors to gamble (many such sites allow any user 13 years or older to register). Accordingly, there remains a risk that a stronger stance from Australian regulators will be taken in relation to the availability of virtual games if the Australian community becomes sufficiently concerned.

[5] http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/vwFiles/R130.pdf/$file/R130.pdf see page 49.

JSCOGR Inquiry into Online Gambling - What does it mean for wagering operators in 2012?

Introduction

A myriad of complex issues will need to be considered by the wagering sector in 2012. These include the decisions in the pending High Court appeals in the Sportsbet and Betfair applications, the much anticipated report of the Department of Broadband, Communications and the Digital Economy (**DBCDE**) concerning its review of the *Interactive Gambling Act 2001* (Cth) (the **DBCDE Review**), as well as the manner in which broader community concerns over match fixing and the proliferation of sports betting advertising will be addressed.

A precursor to these developments is the report of the Parliamentary Joint Select Committee on Gambling Reform Inquiry into Interactive and Online Gambling and Gambling Advertising (the **JSCOGR Report**) released on 8 December 2011. The JSCOGR Report covers a number of these issues and its recommendations, although not binding, will be considered by the DBCDE Review and politicians in determining future policy affecting the wagering sector.

Product Fees and Sports Integrity

Product fee litigation in Australia has been going on since the first legislation came into force in 2007. However, to date, this has centred on the racing sector. While all State and Territory jurisdictions have in place race fields regimes (with the exception of the Northern Territory), only Victoria has legislation requiring agreements between wagering operators and sports administrators to be in place to enable a fee to be paid to the sport.

The JSCOGR Report supports the principle of a nationally consistent legislative framework in which sporting administrators and wagering operators will be required to agree to share information, and under which sporting administrators will be able to veto categories of bets. The JSCOGR Report also suggests that betting operators adopt an industry standard for information exchange by July 2012. Finally, it recommends that codes of conduct be adopted for smaller sports to ensure integrity (with government funding to those sports being contingent on the adoption of such codes in order to encourage adoption).

Increased regulation of sports betting has been on the national agenda for the past year. Indeed, Federal and State/Territory Attorneys General and Ministers for Sport are currently reviewing proposals for the introduction of nationally consistent match fixing laws and the formation of a National Sports Integrity Unit.

Although the focus to date of these discussions has been on protecting the integrity of sport, it seems unlikely that legislation to restrict the use of sporting fixture information would be introduced without conferring on sports administrators the right to levy a fee or require an operator to enter into a contribution agreement (as is the case under Victorian legislation).

If legislation of this nature were to be introduced in a manner which is not coordinated, sport may face the same issues encountered by the racing sector in the past 3 years, namely duplication, inconsistency and the potential for ongoing litigation.

Moreover, if the Betfair and Sportsbet High Court appeals are dismissed (which would be viewed as an effective endorsement of the approach taken by Racing NSW), it is possible that some sports administrators may seriously consider moving away from the existing gross profits-based product fees that they have voluntarily entered into with wagering operators to turnover-based fees.

Harm Minimisation

Due to the rapid growth of sports betting activity in Australia over recent years, and the perceived proliferation of sports betting advertising and sponsorships, the JSCOGR Report notes the commensurate increase of community concern about the potential harmful consequences. It also suggests significant growth in the number of problem gamblers reported as a result of involvement in sports betting activity.

The concern mainly arises from the exposure of children to gambling practices, and the JSCOGR Report notes in particular the blurring of the boundaries between sports betting and the game.

The JSCOGR Report also recommends a total ban on live odds promotion at venues and during broadcasts, and a total ban on gambling advertising during times that children are watching (regardless of whether this is during a sporting match or not). A mandatory national code of conduct is recommended covering advertising (which would include inducements to bet), credit betting, harm minimisation measures, a ban on display of gambling companies' logos on sports uniforms and restrictions on give-aways of merchandise with logos of betting companies.

While the JSCOGR Report recommends that further research be conducted broadly in relation to sports betting, it also contains more specific suggested areas that should be researched, such as the risks of online in-play betting and the 90-day verification time frame currently provided to confirm a customer's identity (with a view to reducing it to 72 hours). The JSCOGR Report suggests that nationally consistent requirements be adopted so that gambling messages counterbalance effectively messages for the promotion of gambling.

Liberalisation?

Much discussion has taken place relating to the possible liberalisation of the current restrictions on in-play betting. Prior to the JSCOGR Report, there were various media reports indicating that, in addition to wagering operators, a number of sporting administrators had come to the view that the liberalisation of in-play betting would allow greater scrutiny of these betting markets. (While the current prohibitions prevent Australian wagering operators from offering in-play betting, numerous overseas bookmakers offer this product to Australian customers. These overseas operators do not have information sharing arrangements with sporting administrators and, as a result, it can be difficult for administrators to investigate the betting participants and betting patterns that are occurring on these markets.)

However, the JSCOGR Report expresses considerable concern as to whether liberalisation of online wagering (primarily in the area of in-play betting) would simply expand the gambling market and encourage the development of problem gamblers. JSCOGR took the view that the prohibition against in-play betting should remain in place until better data is available to indicate the likely consequences of a relaxation of the existing ban.

In addition, the JSCOGR Report recommended DBCDE commission research as part of its review. While there is no indication that DBCDE has instigated any research as a result of the JSCOGR Report, politicians opposed to any change to the existing IGA may point to this as a precondition before any amendments were to be considered.

Conclusion

The recommendations of the JSCOGR are likely to be considered by DBCDE and taken into account in the course of the DBCDE Review. We anticipate that sports betting operators, and other interested stakeholders (for example, sporting administrators and broadcasters) will want to ensure that their views on the recommendations are taken into account.

Also, we anticipate that considerable efforts will be taken by DBCDE to ensure that the views of all interested parties are considered properly.

The DBCDE Review will be awaited with interest by the wagering sector.

JSCOGR Inquiry into Interactive Gambling - What does it mean for the online gaming sector?

Introduction

Online gaming regulation in Australia has been in a state of flux since the enactment of the *Interactive Gambling Act 2001* (Cth) (the **IGA**) in 2001. Unfortunately, the latest report, the report of the Parliamentary Joint Select Committee on Gambling Reform Inquiry into Interactive and Online Gambling and Gambling Advertising (the **JSCOGR Report**), has not assisted in clarifying the position.

The JSCOGR Report was released on 8 December 2011 and covers a variety of issues. It follows the Productivity Commission's Inquiry into Gambling in 2010.

Although the report is the work of a parliamentary committee and, therefore, not binding on the Federal Government, its recommendations and views will be considered by the Department of Broadband, Communications and the Digital Economy's (**DBCDE**) in the context of its ongoing review of the IGA (the **DBCDE Review**)[6] and are likely to form the basis of arguments both for and against the liberalisation of the IGA.

Paucity of Research

When the IGA was first passed, Australia was at the forefront of online gaming regulation. In the late 90s, the States and Territories had developed model legislation to create a harmonised national regime for online gaming regulation. Each State or Territory planned to introduce its own legislation but these statutes were, as much as possible, to be in fairly similar terms. Indeed, Victoria, Queensland, the Northern Territory and the ACT introduced legislation of this nature (and licences had been granted in some jurisdictions) before the Federal Government passed a law creating a moratorium on the provision of any online gaming service while the appropriate legislative stance was considered. Subsequently, the IGA was enacted.

Once the IGA was enacted, the pre-eminence in the regulation of online gaming that Australia held was lost and the further development of gambling regulation was taken up in other jurisdictions, notably Europe, where many reputable online operators are now licensed. While Australians are not prohibited from using online gaming services, no Australian operator is permitted to offer these services to Australian residents.

As most operators which provide online gaming services are located overseas, it is difficult for Australian researchers to gain access to this data and, to date, there has been limited research conducted on the impact of online gaming from an Australian perspective.

It is perhaps unsurprising then that the central finding of the JSCOGR Report is that the lack of research in Australia in understanding the ramifications of online gaming makes it difficult to formulate policy. As a result, the central recommendation of the JSCOGR Report is that research should be commissioned by the DBCDE and that it was unable to make recommendations to liberalise the IGA.

[6] For background to the DBCDE Review, see our previous issue of Addisons Gambling Law & Regulation at http://www.addisonslawyers.com.au/focuspaper/222.

Differing Points of View

The JSCOGR Report covers both gaming and wagering and the report makes recommendations in respect of each.[7] In the case of wagering, JSCOGR seems largely in agreement. Its recommendations appear to have been reached unanimously and it was relatively clear in its approach.

The situation is not as straightforward in relation to gaming. In addition to considering online gambling more generally, the inquiry considered a private member's bill that Senator Nick Xenophon had introduced into the Senate and which was referred to JSCOGR. Among other things, Senator Xenophon's bill attempts to make Australian residents less attractive to overseas gambling operators by allowing Australians to, in essence, avoid the obligation to pay credit card payments made to overseas operators.

A majority of JSCGOR rejected Senator Xenophon's bill on the basis that it would cause considerable difficulties in implementation and may have the perverse incentive of encouraging Australians to begin using online gambling websites under the impression that there would be no risk of loss. Unsurprisingly, Senator Xenophon, a member of JSCOGR, disagreed with this conclusion and, in a comment at the end of the report, criticised the decision.

More surprising were the additional comments of the Chairman of JSCOGR, Andrew Wilkie. Mr Wilkie has risen to prominence in Australia as the lead advocate for a pre-commitment system for electronic gaming machines (poker machines). Notwithstanding his strict position on the dangers which he believes poker machines pose, Mr Wilkie believed that JSCOGR should have followed the advice of the Productivity Commission and recommended the managed liberalisation of online gaming, beginning with poker.

DBCDE Review

Although the JSCOGR Report specifically recommended that DBCDE commission research as part of its review, we are not aware of DBCDE acting on this proposal and, in our opinion, consider it unlikely. The DBCDE Review is due to report in the first half of 2012 and that would present little time for any meaningful research to be conducted.

That said, the recommendation in the JSCOGR Report for any liberalisation to be delayed until further research has been carried out provides a counterpoint to the recommendation of the Productivity Commission's inquiry for managed liberalisation of poker (the Commission recommended liberalisation of one type of gaming activity partly so as to allow for study of the consequences). If DBCDE is reluctant to recommend liberalisation, it may point to the JSCOGR Report for support.

Conclusion

Attention will now focus on the DBCDE Review. While the discussion paper that DBCDE released seemed to indicate that serious consideration would be given to the liberalisation of online gaming, the JSCOGR Report illustrates the difficulties that the liberalisation of online gaming presents.

Relatively widespread agreement amongst policymakers that the existing regulatory regime for online gaming is not working is one thing, moving to amend the IGA and allowing a more liberalised approach which involves the licensing of online gaming operators is another.

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[7] For more detail on what the JSCOGR Report means for the wagering sector see Addisons our previous story JSCOGR Inquiry into Online Gambling - What does it mean for wagering operators in 2012?.