Extraterritorial Application of Australian Law

Enforcement against Foreign Companies and Risk of Extradition in respect of Gambling Offences

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Overview

Foreign companies sometimes overlook the importance of considering how Australian law applies to their business when dealing with Australian customers or establishing a presence in Australia (Australian Link). There is a common misconception that, because foreign companies are not located in Australia, they are not subject to Australian law. However, this is not the perspective of Australian governmental authorities nor the law, and foreign companies should be aware that Australian law applies where the relevant law has extraterritorial effect.

In an environment where various Australian jurisdictions enact laws to regulate the Internet and the provision of goods and services to Australian customers by foreign companies, it is important for foreign companies with an Australian Link to consider whether their conduct is prohibited expressly by Australian law, and if so, whether the relevant law applies extraterritorially.

If Australian law is contravened and the relevant law applies extraterritorially, the contravening entity will be at risk of:

a) facing enforcement action by the relevant enforcement body; and/or
b) having its directors or officers extradited to Australia for criminal prosecution (where the prohibited conduct constitutes a criminal offence and liability extends to directors or officers).

Extraterritorial Application of Australian Statutes

Australian statutes are restricted generally in their operation to activities that take place within the relevant jurisdiction. In effect, this means that statutes are presumed to have no extraterritorial application. Unless, either by express words or necessary implication a statute applies beyond the boundaries of the relevant jurisdiction, it must be construed as limited in its operation to the relevant jurisdiction and not applicable to any person, thing or circumstance not within the relevant jurisdiction. For example, in Kay's Leasing Corporation Pty Ltd v Fletcher, it was held that the provisions of the Hire Purchase Act (NSW) only apply to contracts entered into in New South Wales.

However, the presumption against extraterritorial application may be rebutted if:

a) by express words, the statute applies extraterritorially; or
b) the statute implies a contrary intention, which may be achieved by demonstrating that, if the statute were only to apply within the territorial limits of the jurisdiction, its object would be defeated.

Foreign citizens are clearly subject to a jurisdiction’s laws when present in the jurisdiction, subject to special rules such as sovereign immunity. However, where extraterritorial application has been implied into the legislation (rather than being provided expressly in the statute), it will only have the effect of applying to foreign citizens outside the jurisdiction if the acts of the foreign citizen have some harmful connection with the jurisdiction.

If a statute has extraterritorial application, it means that the relevant enforcement body has jurisdiction over the person who engaged in the prohibited conduct, even if that person is located outside the relevant jurisdiction. It also means that the relevant enforcement body may take any enforcement action allowed under the statute against the contravening entity, including seeking monetary penalties.
In the gambling context, relevant legislation exists at both the Australian Federal and State/Territory levels which purports to have extraterritorial application. For example, the Federal gambling legislation, the Interactive Gambling Act 2001 (Cth) (the IGA), extends specifically its application to conduct overseas by stating the following:

“[u]nless the contrary intention appears, this Act extends to acts, omissions, matters and things outside Australia”.

As the IGA applies extraterritorially, the prohibitions contained in the IGA in respect of the provision and advertising of interactive gambling services to Australian customers, also apply to companies located overseas which provide or advertise interactive gambling services to Australian customers.

Enforcement Action

While many pieces of Federal, State and Territory legislation purport to apply extraterritorially, there are a number of practical difficulties which exist in commencing proceedings against companies outside Australia, namely:

a) whether the contravening entity can be compelled to appear in an Australian court; and

b) whether the relevant enforcement body is able to meet the pre-conditions required to serve validly a foreign company (such as permission from the Federal Attorney-General).

There are other ways in which enforcement bodies may take action against the contravening entity. In the gambling law context, the following types of enforcement actions have been taken by various gambling authorities:

a) notifying approved providers of family friendly filters of the website hosting prohibited internet gambling content so that the website is blocked for people using family friendly filters (this right is specific to the Australian Communications and Media Authority, the regulatory body responsible for administering the IGA);

b) issuing warning letters to companies perceived to be contravening the relevant gambling law; and

c) adding websites hosting prohibited gambling content to scam alerts.

Extradition

If the relevant statute has extraterritorial application and extends liability for the offence to the executives or officers of the contravening entity, those executives or officers face the risk of extradition.

The Extradition Act 1988 (Cth) (EA) governs the process of extradition of persons located overseas to Australia. A person may only be extradited to Australia for an “extraditable offence”. An “extraditable offence” is an offence for which the penalty is imprisonment for a period of not less than 12 months, although this term may be increased or reduced by regulations. While there are no provisions under the IGA for imprisonment, there are provisions in various State and Territory unlawful gambling legislation which provide for imprisonment as a penalty.

This means that, where a person has committed an offence under the gambling legislation which has extraterritorial effect and gives rise to a potential imprisonment of a term of two years or more, the relevant Commonwealth, State or Territory law enforcement agency may secure an arrest warrant and make an extradition request to the Australian Attorney-General or the Australian Minister for Justice and Customs to prosecute the person in Australia.

If the extradition request is approved by the Australian Attorney-General or the Australian Minister for Justice and Customs, the request will be submitted to the relevant government body in from which extradition is requested, which will then decide whether or not to surrender the person. One of the factors that may be taken into account by the extraditioning country is whether the offence in question has ‘dual criminality’, which requires the alleged offence to also be a criminal offence under the laws of the extraditing country. Many of the extradition arrangements to which Australia is a party impose a requirement of ‘dual criminality’.

If the extraditing country surrenders the person, the Australian law enforcement agency will escort the person to Australia, where they would be prosecuted for the offence. A person who has been extradited for committing an extraditable offence (“extraditable person”) may only be detained or tried in Australia for that offence.

Detailed regulations exist for almost each country with which Australia has entered an extradition treaty. This means that the specific process to be followed in any given extradition request will depend heavily on the citizenship and location of the executives or officers of the contravening entity.

Implications

While it is rare for authorities in Australia to take action against persons located overseas in respect of gambling offences and we are not aware of any extradition requests that have been granted in respect of gambling offences committed in Australia, it does not mean that enforcement or extradition will not occur in the future. (Other offences have been the subject of successful extradition requests, for example, fraud/theft offences, drug offences, and bribery/corruption offences.) As the regulatory landscape changes constantly, there is always the possibility that, if the enforcement of gambling offences becomes a law enforcement priority in the future, gambling authorities in Australia are likely to pursue relevant contraventions vigorously.

Accordingly, to assess the risks that might arise in providing goods and services to Australian customers or
establishing a presence in Australia in breach of Australian gambling laws, foreign companies should consider three key issues:

a) whether the relevant goods or services, or the way they conduct their business, are allowed in Australia;

b) if not allowed, whether the relevant law prohibiting the conduct applies extraterritorially; and

c) whether liability in respect of the company’s actions could extend to executives, officers, employees or other related parties.

Please contact Addisons if you have any questions concerning the legality of the services provided to Australian customers, or require further legal advice as to managing the risk of doing business in Australia.

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1 Acts Interpretation Act 1901 (Cth), s 21(1); Interpretation Act 1987 (NSW), s 12(1); Interpretation of Legislation Act 1984 (Vic), s 48; Acts Interpretation Act 1931 (Tas), s 27; Acts Interpretation Act 1954 (Qld), s 35; Legislation Act 2001 (ACT), s 122; Interpretation Act 1978 (NT), s 38.
2 Commissioner of Stamps (Qld) v Weinholt (1915) 20 CLR 531.
3 (1964) 116 CLR 124.
4 Jumbunna Coal Mine NL v Victorian Coal Miners’ Association (1908) 6 CLR 309 (O’Connor J).
7 On the State/Territory level, see the Interactive Gambling (Player Protection) Act 1998 (Qld), s 8; the Interactive Gambling Act 1998 (ACT), s 8 and the Gambling Regulation Act 2003 (Vic), s 7.1.6.
8 Interactive Gambling Act 2001 (Cth), s 14.
9 Listed in Schedule 1 to the IGA Industry Code.
10 Extradition Act 1988 (Cth), s 5.
11 For example, the Extradition (Commonwealth Countries) Regulations 2010 (Cth) has amended the definition of ‘extradition offence’ so that they encompass only those offences where the penalty for contravention is greater than or equal to two years imprisonment.
12 Offences relating to gambling which carry penalties of imprisonment include: Unlawful Gambling Act 1998 (NSW), ss 8, 9, 10, 11, 11A, 12, 13, 14, 15, 18, 19; Gambling Regulation Act 2003 (Vic), ss 7.2.2, 7.4.1, 7.4.3, 7.4.8, 7.4.10; Interactive Gambling (Player Protection) Act 1998 (Qld), ss 16, 17; Interactive Gambling Act 1998 (ACT), s 14.
13 Extradition Act 1988 (Cth), s 40.
14 Extradition Act 1988 (Cth), s 6; 42.