INTERNATIONAL LAW AND TECHNOLOGY

The Extraterritorial Operation of Australian E-Commerce Legislation

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I. INTRODUCTION

The Internet can perhaps be best characterised as "an international network of interconnected computers."[1] The technological nature of the Internet is diverse, capable of supporting a number of services including e-mail, the World Wide Web (WWW), and newsgroups. Today, the use of the Internet has become synonymous with the WWW, the most

1. Reno v. ACLU, 521 U.S. 844, 849 (1997). See PRESTON GRALLA, HOW THE INTERNET WORKS (7th ed. 2003), for a comprehensive introduction to the Internet.

commonly used form of technology supported by the Internet.[2] The WWW consists of a series of "Web pages" which are files of information stored in remote computers worldwide that anyone who supports the Internet may access.[3] The WWW provides users with a "graphical user interface" facilitating full text, sound, graphical, and multimedia elements.[4]

The explosive nature of the WWW has caused social and economic activity on the Internet to grow and expand exponentially.[5] The advent of the change from a land-based commerce environment to an electronic one has been described as

> so startling in its economic implications that it may reasonably be considered a watershed in the way we do business . . . an abrupt and irrevocable turning point, one that signals a shift in historical direction by obliterating an established set of business practices and replacing them with a new commercial paradigm.[6]

Simply, e-commerce may be characterised as the buying and selling of goods and services, including the transfer of funds, through digital communications such as the Internet.[7] Thus, as a corollary, the Internet has the ability to congregate the world into one, single market.

The expressed desire of states throughout the world to regulate the land-based commercial activities of their residents is not dissimilar to their equal desire to regulate the same activities in an electronic environment. For the most part, states maintain a desire to regulate the activities of their residents, regardless of the medium by which those activities are conducted. Under either environment, policies and laws made by states are often grounded upon a balance of competing considerations, such as protecting the public from fraud, organised crime,

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2. The usage of the World Wide Web represents almost all Internet traffic. BRYAN PFAFFENBERGER, INTERNET IN PLAIN ENGLISH 473 (2d ed. 1996).

3. *ACLU*, 521 U.S. at 852.

4. KATIE HAFNER & MATTHEW LYON, WHERE WIZARDS STAY UP LATE: THE ORIGINS OF THE INTERNET 258 (1996).

5. NAT'L OFFICE OF THE INFO. ECON., ADVANCING AUSTRALIA—THE INFORMATION ECONOMY PROGRESS REPORT 2002, Nov. 1, 2002, Department of Communications, Information Technology and the Arts, *available at* http://www2.dcita.gov.au/__data/assets/file/4214/NOIE_AA_S.pdf.

6. THOMAS M. SIEBEL & PAT HOUSE, CYBER RULES: STRATEGIES FOR EXCELLING AT E-BUSINESS 1 (1999).

7. Kris Gautier, *Electronic Commerce: Confronting the Legal Challenge of Building E-dentities in Cyberspace*, 20 MISS. C. L. REV. 117, 117 (1999).

and social harms,[8] while at the same time seeking to promote economic benefit and public welfare.[9]

Unlike land-based commerce, e-commerce is, in essence, a borderless activity that poses regulatory and enforcement challenges for states. The technological environment in which e-commerce activity is conducted, principally the capability for businesses to transcend geographic boundaries and reach consumers throughout the world, has the potential to exacerbate possible economic and social harms that may be endured by consumers as a result of the often unregulated nature of commercial activities that may be undertaken.[10]

The Australian Commonwealth Government (Commonwealth) is especially concerned with the unregulated aspects inherent in e-commerce transactions because many parties to these transactions operate outside of its territorial boundaries and are, therefore, ostensibly beyond its jurisdictional reach.[11] These concerns were recently highlighted by the Commonwealth Parliament's promulgation of a number of e-commerce legislative instruments, including the Cybercrime Act of 2001 (Austl.), the Interactive Gambling Act of 2001 (IGA) (Austl.) (including the possibility of making regulations under the IGA (Regulations)), and the Spam Act of 2003 (Austl.), each of which purport to have extraterritorial effect.[12]

The purpose of this Article is to evaluate whether the Commonwealth may apply and enforce its e-commerce legislation extraterritorially. On the basis that it is impractical to undertake an examination in sufficient detail of each relevant Commonwealth e-commerce legislative instrument, this Article conducts, by way of

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8. See, for example, 143 CONG. REC. S2553 (daily ed. Mar. 19, 1997) (statement of Sen. Kyl), in which United States Senator Jon Kyl contends generally that the Internet may result in the proliferation of "inappropriate activities such as gambling, pornography, and consumer fraud."

9. For example, a state may wish to regulate the activities of its residents conducted via the Internet for public policy, consumer protection, and taxation reasons.

10. *See, e.g.*, AUSTRALIAN SEC. & INVS. COMM'N, ASIC: INTERNET AND E-COMMERCE INITIATIVES 2003, Sept. 2003, *at* http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ecom_sum.pdf/$file/ecom_sum.pdf.

11. Other jurisdictions such as the European Union have addressed these concerns by promulgating laws that deal with e-commerce and jurisdictional issues arising via Internet activity. *See, e.g.*, Council Directive 1999/93 of 13 December 1999 on a Community Framework for Electronic Signatures, pmbl. paras. 8, 23, 1999 O.J. (L 13) 12, 13, *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_013/l_01320000119en00120020.pdf; Council Regulation 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, arts. 22-23, 2001 O.J. (L 12) 7, 8, *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_012/l_01220010116en00010023.pdf.

12. Criminal Code Act, 1995, §§ 15.1, 476.1-476.3 (Austl.), *amended by* Cybercrime Act, 2001, pt. 10.7 (Austl.); Interactive Gambling Act, 2001, § 15 (Austl.); Spam Act, 2003, § 14 (Austl.).

illustrative example, an in-depth analysis of the Regulations, for the following reasons:

1. it remains open as to whether or not the Commonwealth will ultimately promulgate Regulations, and the form such Regulations will take;[13] and
2. a primary purpose of the Regulations is to target certain types of mischief undertaken by financial institutions and payment system participants domiciled overseas, and therefore, as a corollary, if the Regulations are unable to operate extraterritorially, it is likely that policy objectives of the Commonwealth in respect to its regulation of interactive gambling will be frustrated.[14]

Therefore, in order to evaluate the effectiveness of the extraterritorial operation of Commonwealth e-commerce legislation, this Article undertakes an assessment of whether the Federal Court of Australia (FCA) is likely to be satisfied that it has appropriate jurisdiction to adjudicate a matter under the Regulations involving a foreign element, and whether any judgment rendered by that Court is capable of being practically enforced or satisfied in a foreign jurisdiction.[15]

II. CYBERSPACE JURISPRUDENCE AND COMMONWEALTH REGULATION OF E-COMMERCE

Given that the focus of this Article is to evaluate the effectiveness of the Commonwealth's extraterritorial regulation of e-commerce activities, it is useful to first briefly examine the nature of cyberspace jurisprudence and the parameters within which states must operate when regulating e-commerce and, second, to consider the approach and legislative trend exhibited by the Commonwealth in its regulation of e-commerce activities.

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13. *See infra* Part III.C.

14. DEP'T OF COMMUNICATIONS, INFO. TECH. & THE ARTS, *Review of Issues Related to Commonwealth Interactive Gambling Regulation: Call for Submissions*, *at* http://www.dcita.gov.au/broad/online_content_and_gambling_regulation/online_gambling/review_of_the_iga/review_of_the_operation_of_the_interactive_gambling_act_2001/review_of_issues_related_to_commonwealth_interactive_gambling_regulation_-_call_for_submissions (last updated Oct. 20, 2004) [hereinafter *Review of Issues*]; *see infra* Part III.B.

15. The FCA has inherent jurisdiction over the laws of the Commonwealth of Australia, including the IGA and any interactive gambling regulations. *See* AUSTL. CONST. § 76; FED. CT. R. 8 (Austl.).

A. State Regulation and Cyberspace Jurisprudence

Generally, regulatory regimes may be delineated according to the regulating authority, the regulatory tools used, and the manner in which the rules are enforced.[16] Regulatory authorities include governments, professional groups, and private groups, each of which implement their respective rules by way of a different regulatory tool.[17] The ability for a regulatory authority to enforce or prescribe its rules upon a person or a particular form of conduct will often depend on the relationship that exists between the regulatory authority and the person or conduct in question.[18]

Conceivably, each form of regulatory regime highlighted above is capable of applying to e-commerce on either an exclusive or concurrent basis. For example, the IGA provides for government regulation of interactive gambling, but it also endorses regulation by an industry body under an appropriate code and standard.[19] The suitability of a particular regulatory regime to a regulatory authority in the context of e-commerce will largely depend upon the following three principal sensitivities:

1. whether or not traditional regulatory regimes are capable of having an application to commercial activities conducted in an electronic environment;
2. the general interplay of political attitudes and pressures exerted during the legislative or rulemaking process; and
3. the perceived impacts and weight given by the regulating authority to the identified benefits and burdens associated with the relevant e-commerce activity.

For the most part, the sensitivities enumerated above are not necessarily unique to regulatory regimes whose subject matter deals exclusively with a technological medium. However, the applicability of traditional regulatory regimes to the Internet is a principal concern with respect to its regulation, as well as the regulation of e-commerce activities.

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16. Fridolin M.R. Walther, *Internet Gambling Related Regulatory Questions and Enforcement Problems: A Comparative U.S.-Swiss Perspective*, STAN. TECH. L. REV. pt. 1 (2000), *at* http://stlr.stanford.edu/STLR/Events/gambling/index.

17. For example, governments typically enact statutes, professional groups use codes of conduct, and private groups regulate by establishing social norms.

18. For example, a professional group may impose a pecuniary penalty on a member for noncompliance with the professional group's rules. Alternatively, private groups may regulate users of the Internet through the behavioural norm of "Netiquette" (referring to acceptable etiquette required by users of the Internet). *See generally* VIRGINIA SHEA, NETIQUETTE (1994), *available at* http://www.albion.com/netiquette/book/index.html.

19. Interactive Gambling Act, 2001, pt. 4 (Austl.).

Jurisprudence on the regulation of e-commerce is closely aligned with the general jurisprudence surrounding the regulation of the Internet. The borderless nature of the Internet gives rise to many jurisprudential questions as to how, if at all, states should regulate the activities of its residents conducted via the Internet.

In recent years, many scholars have debated whether cyberspace is a unique environment that requires a new set of legal rules.[20] The debate has largely been directed towards whether cyberspace is in fact a unique place that is capable of developing and sustaining rules for its own self governance[21] or whether existing or *sui generis* legislation can be translated to the cyberspace world.[22] As a result, two jurisprudential schools of thought have emerged as to how, if at all, cyberspace may be regulated.

The first jurisprudential school of thought, advocated by Professors David Johnson and David Post, submits that cyberspace has its own inherent jurisdiction and is capable of self-regulation outside the scope of states' laws.[23] Conversely, the second jurisprudential school of thought, advocated by Professor Jack Goldsmith, submits that cyberspace is not a special place and current technological and legal tools are sufficient to resolve jurisdictional conflicts arising from e-commerce transactions, as those that arise from business transactions in the physical environment.[24]

It may be argued that the second jurisprudential school of thought of Internet regulation is the correct and prevailing view. It is submitted that Professor Jack Goldsmith accurately asserts that Internet transactions "involve people in real space in one territorial jurisdiction transacting with people in real space in another territorial jurisdiction in a way that sometimes causes real-world harms."[25] Moreover, it has been submitted that "the Internet is just another communications medium—not much different from the telephone, the telegraph or smoke signals," and, therefore, there is no reason why a state's laws are incapable of

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20. *See, e.g.*, Lawrence Lessig, *Path of Cyberlaw*, 104 YALE L.J. 1743, 1743-44 (1995).

21. *See generally, e.g.*, Electronic Transactions Act, 1999 (Austl.).

22. *See generally, e.g.*, Corporations Act, 2001 (Austl.).

23. *See* David Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996) (arguing cyberspace must be regulated outside of the realm of traditional law because traditional law relies on territorial borders).

24. Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1250 (1998).

25. *Id.* at 1200; *accord* Adrian Goss, *Jay Cohen's Brave New World: The Liability of Offshore Operators of Licensed Internet Casinos for Breach of United States' Anti Gambling Laws*, 7 RICH. J. L. & TECH. para. 32 (2001) (quoting Professor Goldsmith), *at* http://law.richmond.edu/jolt/v7i4/article2.html.

applying or adapting to this new technological medium.[26] Therefore, based on the proposition that existing and *sui generis* legislation can apply to the Internet, a state may adopt a regulatory regime for the regulation of e-commerce activities in similar terms as it would in the case of non-Internet based commerce activities.

B. Commonwealth Regulation of E-Commerce

The Commonwealth has responded to its expressed desire to regulate e-commerce by adopting a varied and integrated regulatory framework.[27] It may be contended that the Commonwealth spanned the regulatory spectrum when legislating in respect to e-commerce through the effective utilisation of a number of regulatory techniques, each of which is briefly considered below.[28]

First, the Commonwealth has amended existing legislation to expand its regulatory purview to expressly include e-commerce subject matter. For example, the Cybercrime Act of 2001 (Austl.), which amended the Criminal Code Act of 1995 (Austl.), inserted new computer-based offences into the Criminal Code.[29] Under this approach, the Commonwealth is seeking to build upon and enhance its existing legislative framework so that such legislation is equally capable of dealing with e-commerce subject matter.

Secondly, the Commonwealth has enacted *sui generis* legislation for the purpose of expressly regulating e-commerce subject matter. For example, the Spam Act of 2003 (Austl.), seeks to regulate the transmission of unsolicited commercial e-mail, otherwise known as "SPAM."[30] Under this approach, the Commonwealth recognises that existing legislation, should any such legislation exist, is incapable of dealing with particular technological aspects unique to the e-commerce environment.

Thirdly, the Commonwealth has adopted a hybrid approach to the regulation of e-commerce by incorporating industry self-regulation, such as industry codes of practice, within an existing or *sui generis* e-

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26. Carl Kaplan, *How to Govern Cyberspace: Frontier Justice or Legal Precedent?*, CYBER LAW J., Mar. 27, 1998, *available at* http://www.nytimes.com/library/tech/98/03/cyber/cyberlaw/27law.html.

27. *Supra* Part I.

28. Perhaps with the exception of any deliberate or accidental nonregulation of e-commerce subject matter, such as maintaining the legal status quo. See *supra* Part II.A for a discussion on regulatory methods.

29. The Criminal Code (Austl.) is promulgated under the Criminal Code Act, 1995 (Austl.).

30. Spam Act, 2003, § 16 (Austl.).

commerce legislative framework. For example, the Broadcasting Services Amendment (Online Services) Act of 1999 (Austl.), which amended the Broadcasting Services Act of 1992 (Austl.) with respect to the regulation of Internet content, inserted a new complaints system and a scheme for the development of industry codes of practice, each to be administered by or registered with the Australian Broadcasting Authority.[31]

While it is difficult to comment with any authority as to the Commonwealth's preferred legislative approach to the regulation of e-commerce, it appears there is a trend towards a coregulatory approach. For example, the Honourable Richard Alston, MP, commended the coregulatory approach to the regulation of Internet content adopted under the Broadcasting Services Amendment (Online Services) Act of 1999 (Austl.), when he stated that "[t]he Government believes that the co-regulatory framework, including the industry codes of practice, is a pragmatic and workable approach to regulating Internet content."[32] Seemingly, a coregulatory approach is desirable because it affords the Commonwealth a conciliatory way to balance the growth of the information economy, including e-commerce, and the Commonwealth's expressed desire for its regulation.[33]

While the Commonwealth's legislative approach to the regulation of e-commerce subject matter will vary, one common theme has been the conceptual and legal difficulties with the regulation of activities which occur extraterritorially by virtue of the Internet. This concern was recently highlighted by the Honourable Bernie Ripoll, MP, when commenting on the then Spam Bill of 2003 and Spam (Consequential Amendments) Bill of 2003:

> One of the biggest problems we have in trying to deal with [the issue of SPAM] legislatively is international law. It is fine for us to pass laws in Australia and pursue those laws against Australian citizens or people operating out of Australia or Internet service providers in Australia, but we

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31. Broadcasting Services Act, 1992 (Austl.).

32. The Honourable Richard Alston, *The Government's Regulatory Framework*, 23 U. NEW S. WALES L.J. 192, 197 (2000). Alston was then the Commonwealth Minister for Communications, Information Technology and the Arts. DEP'T OF COMMUNICATIONS, INFO. TECH. & THE ARTS, *Broadcasting and Online Regulation: Online Content and Gambling Regulation: Background*, *at* http://www.dcita.gov.au/broad/online_content_and_gambling_regulation/online_gambling/background (last updated Oct. 20, 2004) [hereinafter *Online Content and Gambling Regulation*].

33. In a similar fashion to the coregulatory approach to the regulation of Internet content under the Broadcasting Services Act, 1992 (Austl.), the IGA also provides for a complaints system and the development of industry codes and standards. Interactive Gambling Act, 2001, pts. 3-7 (Austl.).

> know that the problem does not necessarily originate here; the problem quite often originates in other countries and in other jurisdictions.[34]

In recognition of the fact that e-commerce activities may be ostensibly beyond the legislative reach of the Commonwealth, the Commonwealth has increasingly sought to extend its legislative purview to include extraterritorial matters. The Commonwealth Attorney General, the Honourable Daryl Williams, MP, supported this view when commenting on the then Cybercrime Bill of 2001 (Austl.), by stating that "[a]ll the proposed offences [under the Cybercrime Bill of 2001] are supported by extended extraterritorial jurisdiction in recognition of the fact that computer crime is often perpetrated remotely from where it has effect."[35]

As a general proposition, the legislative scope conferred by the Commonwealth Parliament to its e-commerce legislation has, for the most part, been broad, extending to "acts, omissions, matters and things outside Australia."[36] However, the Commonwealth Parliament has, in some cases involving offences committed under certain e-commerce legislation, elected to vary the extent to which such offences may extend extraterritorially. For example, there are different degrees of extended geographical jurisdiction set out under the Criminal Code that apply to offences under the Cybercrime Act of 2001 and the IGA. In respect to the Cybercrime Act of 2001, only Category A geographical jurisdiction applies, thus extending jurisdiction to include proscribed conduct where:

1. the conduct constituting the offence occurs partly in Australia or on board an Australian ship or aircraft;
2. the result of the conduct constituting the offence occurs partly in Australia or on board an Australian ship or aircraft; or
3. the person committing the offence is an Australian citizen or an Australian corporation.[37]

Conversely, Category D geographical jurisdiction applies to the IGA, thus extending jurisdiction more broadly to include proscribed conduct:

1. whether or not the conduct constituting the alleged offence occurs in Australia; and
2. whether or not a result of the conduct constituting the alleged offence occurs in Australia.[38]

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34. Austl., H of R, *Debates*, 9 Oct. 2003, at 20980 (Austl.).
35. Austl., H of R, *Debates*, 27 June 2001, at 28641 (Austl.).
36. Spam Act, 2003, § 14 (Austl.); Interactive Gambling Act, 2001, § 14 (Austl.).
37. Criminal Code Act, 1995, § 15.1 (Austl.).
38. *Id.* § 15.4.

It appears that the prevailing approach of the Commonwealth Parliament to confer broad, extraterritorial operation to its e-commerce legislation, as discussed above, has continued prima facie in respect to the Regulations.[39] Accordingly, by way of illustrative analysis, Part IV of this Article will evaluate whether the Commonwealth, through its promulgation of the Regulations, is capable of effectively legislating commercial activities that may occur outside of Australian territory via the Internet.

III. THE REGULATIONS

The purpose of this Part of the Article is to provide the reader with a suitable political, regulatory, and technical backdrop of the Regulations prior to undertaking a more detailed analysis of its purported extraterritorial operation. To achieve this purpose, this Part first briefly explores the history and political background of the IGA, including the Regulations. Second, this Part highlights the policy objectives of the IGA, including the Regulations. Third, this Part undertakes an evaluation of the structure of the Regulations, in respect to their development and relationship with the IGA. Finally, this Part examines the fundamental activities and concepts that constitute "illegal interactive gambling" under the IGA, including the Regulations.[40]

A. Historical and Political Background of the IGA and the Regulations

"Historically, Australian gaming regulation has been the province of the various Australian State and Territory Governments because the Commonwealth Constitution does not give the Commonwealth power in respect to gaming."[41] However, in respect to interactive gambling, the Commonwealth has power to legislate by virtue of Section 51(v) of the Australian Constitution.[42] This power gives the Commonwealth the responsibility for "[p]ostal, telegraphic, telephonic, and other like services," and forms the basis for Commonwealth regulation of communication services, including broadcasting, telecommunications, and the Internet.[43]

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39. *See infra* Part IV.
40. Interactive Gambling Act, 2001, § 69A (Austl.).
41. Goss, *supra* note 25, para. 8.
42. AUSTL. CONST. § 51(v).
43. *See infra* Part IV.B.1; AUSTL. CONST. § 51(v).

It was not until December 1999 that the Commonwealth made its first regulatory movements in relation to interactive gambling in Australia. On December 16, 1999, the Prime Minister released a report by the Productivity Commission of Australia which concluded that the availability of gambling services on the Internet represents a "quantum leap" in the accessibility of gambling and "presents new risks for problem gambling" in Australia.[44] Following the release of the Productivity Commission of Australia's report, the Prime Minister announced that the Commonwealth would investigate the feasibility and consequences of banning interactive gambling, and he established the Ministerial Council on Gambling to undertake this role.[45]

Since the establishment of the Ministerial Council on Gambling, the Commonwealth has taken an aggressive, politically motivated position on the prohibition of interactive gambling culminating in the eventual enactment of the IGA. By way of summary, intermediary measures employed by the Commonwealth included:

1. the enactment of the Interactive Gambling (Moratorium) Act of 2000 (Austl.), which introduced a moratorium on the provision of new interactive gambling services provided after May 19, 2000, up to and until May 18, 2001.[46] The purpose of the Interactive Gambling (Moratorium) Bill of 2000 (Austl.) was to "pause the development of the Australian-based interactive gambling industry while an investigation into the feasibility and consequences of banning interactive gambling is conducted";[47]
2. the commissioning of the now former Senate Select Committee on Information Technologies to conduct an inquiry into interactive gambling in Australia;[48]

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44. PRODUCTIVITY COMM'N, AUSTRALIA'S GAMBLING INDUSTRIES, 2 Report No. 10, § 18.9 (1999), *at* http://www.pc.gov.au/inquiry/gambling/index.html (last modified Oct. 7, 2004).

45. *Online Content and Gambling Regulation*, *supra* note 32 ("The first meeting of the Ministerial Council on Gambling took place on 19 April 2000 and was co-chaired by Senator Jocelyn Newman, then Minister for Family and Community Services, and Senator Richard Alston, [then-]Minister for Communications, Information Technology and the Arts.").

46. Interactive Gambling (Moratorium) Bill, 2000, pt. 2 (Austl.).

47. Explanatory Memorandum, Parliament of the Commonwealth of Australia, Interactive Gambling (Moratorium) Bill, 2000 (Austl.), *available at* http://parlinfoweb.aph.gov.au/piweb/Repository/Legis/oldEms/Linked/23010160.pdf.

48. SENATE SELECT COMM. ON INFO. TECH., *Netbets: A Review of Online Gambling in Australia: Australian Democrats Supplementary Comments* (Comments of Senator Stott Despoja) (Mar. 2000), *available at* http://www.aph.gov.au/SENATE/COMMITTEE/it_ctte/gambling/report/d03.pdf.

3. the commissioning of the National Office for the Information Economy (NOIE) to conduct a study into the feasibility and consequences of banning interactive gambling;[49] and
4. the facilitation of other supplementary studies and surveys in relation to the social and economic impacts of banning interactive gambling.

B. Policy Objectives of the Regulations[50]

As a matter of statutory construction, the Regulations must reflect and be consistent with the intention of the Commonwealth Parliament at the time it passed the IGA.[51] Broadly, it is the policy objective of the IGA to "limit the development of this newly emerging [interactive gambling] industry and minimise the scope for problem gambling among Australians."[52] The IGA "balances the protection of Australians with a sensible and enforceable regulatory regime."[53]

As a key policy objective, the Commonwealth was concerned that "the interactive gambling industry has the potential to expand rapidly in Australia, and that any further expansion of interactive gambling could exacerbate problem gambling."[54] The Commonwealth was especially concerned with the potentially negative social and economic consequences that may arise from an increase in the number of problem gamblers in correlation to an increase in the accessibility of interactive gambling services. However, the Commonwealth acknowledged that the achievement of its key policy objective must not be at odds with its overarching goal of technology neutrality, with the Commonwealth

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49. NAT'L OFFICE FOR THE INFO. ECON., *Report of the Investigation into the Feasibility and Consequences of Banning Interactive Gambling* (Mar. 27, 2001), Department of Communications, Information Technology and the Arts, *at* http://www.dcita.gov.au/Article/0,,0_1-2_10-3_481-4_113202,00.html.

50. Portions of Part III.B through D are based upon the author's previous article, *A New Role as Regulator—Australian Financial Institutions and the Interactive Gambling Regulations (Cth)*, 15 J. BANKING & FIN. L. & PRAC. 41, 43-44, 48, 61-62 (2004). Reproduced with permission from the Journal of Banking and Finance Law and Practice, March 2004, Vol. 15(1), © Lawbook Co., part of Thomson Legal & Regulatory Limited, www.thomson.com.au.

51. D.C. PEARCE & R.S. GEDDES, STATUTORY INTERPRETATION IN AUSTRALIA 20 (5th ed. 1996).

52. Explanatory Memorandum, Parliament of the Commonwealth of Australia, Senate, Interactive Gambling Bill, 2001 (Austl.), *available at* http://parlinfoweb.aph.gov.au/piweb/Repository/Legis/oldEms/Linked/31070102.pdf.

53. *Id.*

54. Revised Explanatory Memorandum, Parliament of the Commonwealth of Australia, House of Representatives, Interactive Gambling Bill, 2001 (Austl.), *available at* http://dcita.gov.au/download/0%2C6183%2C4_113200%2C00.pdf.

seeking a "strategy for restricting Australian's [sic] access to interactive gambling while balancing the interests of the information economy."[55]

C. Structure of the Regulations

Section 69A(2) of the IGA requires the Commonwealth Minister for Communications, Information Technology and the Arts (Minister) to take all reasonable steps to ensure regulations are promulgated for the purposes of section 69A of the IGA by February 2002.[56] However, the Minister has yet to promulgate regulations in accordance with section 69A(2) of the IGA as a result of the findings of an earlier consultation conducted by the NOIE.[57]

In 2001, the NOIE conducted a consultation to examine the feasibility of three different options for the regulation of agreements made in connection with the payment of illegal interactive gambling services.[58] The NOIE consultation concluded that the Commonwealth's ability to effectively render agreements for the payment of unlawful interactive gambling services unenforceable was unclear.[59] In particular, the NOIE consultation recognised that both legal and practical considerations may serve to ultimately limit the Commonwealth's capacity to achieve the policy objectives of the IGA.[60]

Section 68(1) of the IGA requires the Minister to conduct a review of a wide range of issues relating to the Commonwealth's regulation of

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55. Interactive Gambling Act, 2001 (Austl.). The Commonwealth of Australia Government is committed to e-commerce, fostered by its adoption of a technologically neutral approach to regulation. Generally, "[t]echnology neutrality means that the law should not discriminate between different forms of technology," thereby directly influencing the technology choices of e-commerce participants. Explanatory Memorandum, Parliament of the Commonwealth of Australia, House of Representatives, Electronic Transactions Bill, 1999 (Austl.), *available at* http://www.aph.gov.au/parlinfo/billsnet/1e99131.pdf.

56. Interactive Gambling Act, 2001, § 69A(2) (Austl.).

57. DEP'T OF COMMUNICATIONS, INFO. TECH. & THE ARTS, *Broadcasting and Online Regulation: Online Content and Gambling Regulation: Summary*, *at* http://www.dcita.gov.au/broad/online_content_and_gambling_regulation/online_gambling/summary (last updated Sept. 30, 2004).

58. The three regulatory options proposed by the National Office for the Information Economy include:

1. maintaining the status quo, under which it is contended that the common law already voids agreements relating to unlawful interactive gambling services;
2. making regulations in the terms proposed in section 69A of the IGA; and
3. making regulations in the terms proposed in section 69A of the IGA and confining the effect of the operation of those regulations to financial service providers.

See Review of Issues, *supra* note 14; *see also* Interactive Gambling Act, 2001 (Austl.) (listing "Regulations about unenforceability of agreements relating to illegal interactive gambling services").

59. *Review of Issues*, *supra* note 14.

60. *Id.*

interactive gambling under the IGA, and the growth of the interactive gambling industry generally, by July 1, 2003.[61] The Minister instructed the Department of Communications, Information Technology and the Arts (DCITA) to undertake a review in the terms as set out in section 68(1) of the IGA.[62] The DCITA subsequently released an issues paper and made a call for submissions from interested stakeholders.[63] The DCITA review sought to expand on the work previously undertaken by the NOIE in its earlier consultation and requested submissions from stakeholders in relation to, among other things, the feasibility of, and capacity for, regulating financial transactions associated with the provision of unlawful interactive gambling services.

The DCITA review considered that there are two broad approaches that might be available for the development of the Regulations:

1. requiring Australian financial institutions or payment systems (AFIPS) to block credit card transactions that relate to the provision of "illegal interactive gambling services";[64] or
2. making regulations in the terms as set out in section 69A of the IGA, including:

> "a. that an agreement has no effect to the extent to which it provides for the payment of money for the supply of an illegal interactive gambling service; and
> b. that civil proceedings do not lie against a person [a customer of an interactive gambling service provider] to recover money alleged to have been won from, or paid in connection with, an illegal interactive gambling service."[65]

In July 2004, the DCITA published its findings under the review and tabled the same with the Commonwealth.[66] Among other things, DCITA opined that the Regulations were

> unlikely to achieve the outcome intended by Parliament, which was to discourage the provision of interactive gambling services to customers in

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61. Interactive Gambling Act, 2001, § 68(1) (Austl.).

62. The Minister instructed the Department of Communications, Information Technology and the Arts to conduct a statutory review on January 16, 2003. *Id.*

63. *Id.*

64. *Id.* Curiously, section 69A of the IGA, which sets out the regulatory form of the Regulations, does not contemplate the blocking of credit card transactions. Interactive Gambling Act, 2001, § 69A (Austl.).

65. Interactive Gambling Act, 2001, § 69A(1)(a)-(b) (Austl.); *Review of Issues*, *supra* note 14.

66. DEP'T OF COMMUNICATIONS, INFO. TECH. & THE ARTS, *Review of Operation of the Interactive Gambling Act 2001 (Austl.)*, *at* http://www.dcita.gov.au/__data/assets/pdf_file/10950/Review_of_the_Operation_of_the_Interactive_Gambling_Act_2001_Report.pdf (last updated July 2004).

> Australia . . . [and that] the likely result of the [R]egulations would be that Australian card-issuing financial institutions would be liable for any dishonoured gambling-related debts under . . . the major credit card associations.[67]

Unfortunately, the Commonwealth has failed to endorse the findings made by the DCITA in relation to the Regulations and, as a result, has left the issue open as to whether or not it will seek to regulate the funding of illegal interactive gambling services under the IGA in the future.[68]

Therefore, under either form of the Regulations, as suggested by the DCITA review, it still remains possible that:

1. AFIPS may be required to implement new procedures to block or invalidate the use of credit cards to fund unlawful interactive gambling services;
2. AFIPS may be unable to debit a customer's account where that customer has purchased unlawful interactive gambling services via the AFIPS;
3. if the AFIPS have already debited the customer's account, the AFIPS may have to refund the money back to the customer; and
4. AFIPS may be required to undertake their new obligations while at the same time being subject to possible criminal or civil liability for any failure to properly carry out their new role as regulator.[69]

Naturally, AFIPS remain extremely concerned about the current state of their regulatory environment.[70]

D. Illegal Interactive Gambling Services

The operation of either form of the Regulations suggested by the DCITA review is predicated upon what activities constitute "illegal

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67. *Id.*; *see also* Gavin R. Skene, *A New Role as Regulator-Australian Financial Institutions and the Interactive Gambling Regulations (Cth)*, 15 J. BANKING & FIN. L. & PRAC. 41, 52-55 (Austl.).

68. The Commonwealth only decided not to take any specific regulatory action in relation to betting exchanges following the review of the IGA by DCITA. *See* The Honourable Daryl Williams, *News Release: Interactive Gambling Act Tabled*, Department of Communications, Information Technology and the Arts, *at* http://www.dcita.gov.au/Article/0,,0_7-2_4011-4_119525,00.html (last updated July 16, 2004).

69. *See* Skene, *supra* note 67, at 49-50, 54-55.

70. *See, e.g.*, Letter from Tony Burke, Director, Australian Bankers' Association, ABA Comments on DCITA Review of Issues Related to Commonwealth Interactive Gambling Regulation (Apr. 28, 2003), *at* http://www.dcita.gov.au/Article/0,,0_1-2_10-3_481-4_114123,)).html.

interactive gambling services" under the IGA.[71] For the most part, the Commonwealth has largely adopted the taxonomy of interactive gambling services suggested by the Productivity Commission of Australia when separately and exhaustively defining "interactive" and "gambling service" in the IGA.[72] While a detailed analysis of the definitional characteristics of interactive gambling services under the IGA is beyond the scope of this Article, it is necessary to properly characterise what activities constitute "illegal interactive gambling services," as this expression is used throughout this Article, especially to distinguish what services are subject to the provisions of the Regulations.

Therefore, a reference in this Article to "illegal interactive gambling services" means the provision of interactive gambling services by an interactive gambling service provider (IGSP) located in Australia or a foreign jurisdiction to a customer,[73] which creates an offence under the IGA.[74] Specifically, the term "illegal interactive gambling services" is subject to the following qualifications:

1. it is an offence to provide an interactive gambling service to a person physically present in Australia.[75] Interactive gambling services that are likely to create an offence under the IGA are those characterised as interactive, casino-style gambling and usually involve the use of the Internet to play games of chance, such as interactive slot machines, or games of mixed chance and skill, such as Blackjack;[76]
2. it is an offence to provide an interactive gambling service to a person physically present in a country that is designated under the IGA.[77] At present, there are no countries designated under the IGA;[78]

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71. *Review of Issues*, *supra* note 14.

72. The Productivity Commission of Australia tends to adopt a threefold taxonomy of interactive gambling, including:

1. "interactive casino style" gambling (such as electronic Blackjack);
2. interactive sports betting or wagering (such as on-line horse racing); and
3. other interactive games of chance or mixed skill, including lotteries and competitions (such as 'Keno' offered in licensed premises).

See PRODUCTIVITY COMM'N, *supra* note 44; *cf.* Interactive Gambling Act, 2001, §§ 4-5 (Austl.).

73. *See* Interactive Gambling Act, 2001, § 5 (Austl.). See also *infra* Part IV, for a discussion on the extraterritorial operation of the IGA.

74. Interactive Gambling Act, 2001, § 14-15(1) (Austl.).

75. *Id.* § 15(1).

76. *Id.* §§ 4-5.

77. *Id.* § 15A(1). The Minister may declare in writing that a country is a designated country for the purposes of section 9A of the IGA.

78. While at present there are no designated countries under the IGA, the Danish Ministry of Taxation expressed some interest in Denmark becoming a designated country should

3. an IGSP will not be guilty of an offence if it did not know and could not have ascertained with reasonable diligence that its service was acquired by an Australian customer or a customer of a designated country.[79] The IGA provides a nonexhaustive list of factors that indicate whether an IGSP has exercised reasonable diligence;[80] and
4. it is not an offence under the IGA for an IGSP to provide:
   a. interactive wagering, except where interactive wagers are accepted after a sporting event has commenced;[81]
   b. interactive lotteries;[82] and
   c. interactive gambling services in a public place, such as a licensed premises.[83]

Therefore, as a general distinction and by way of example, it would be an offence under the IGA for an IGSP to provide an electronic Blackjack service to an Australian resident, but it would not be an offence for an IGSP to provide an electronic sports wagering service to an Australian resident, provided that the relevant wager had not been placed after the sporting event had commenced.

IV. EXTRATERRITORIAL OPERATION AND ENFORCEMENT OF THE REGULATIONS

Under the IGA, an Australian resident, Australian corporation, or resident of a designated country is not prohibited from purchasing an illegal interactive gambling service from an IGSP.[84] The offence rests with the IGSP who is prohibited from supplying an illegal interactive

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the Commonwealth of Australia Government make the provision of all interactive gambling services unlawful under the IGA by dispensing with the current regulatory carve-out for interactive wagering. *See* DANISH MINISTRY OF TAXATION, *Submission on the Review of the Interactive Gambling Act 2001*, May 5, 2003 (expressing interest in the "on-going debate on gaming legislation in Australia"), *at* http://www.dcita.gov.au/__data/assets/word_doc/10949/114172.doc.

79. Interactive Gambling Act, 2001, §§ 15(3), 15A(3) (Austl.).

80. For example, whether prospective customers were informed that Australian law prohibits the provision of the service to persons who are physically present in Australia. *Id.* §§ 15(4), 15A(4).

81. *Id.* § 8A. Also known as "micro-event wagering."

82. *Id.* § 8D.

83. *Id.* § 8B.

84. In this Part of the Article and elsewhere where the context requires, a reference to an "Australian resident" means a natural person who is an Australian national or ordinarily domiciled in Australia, as such terms mean according to the laws of Australia. *See* discussion *supra* Part III.D. *See generally* EDWARD I. SYKES & MICHAEL C. PRYLES, AUSTRALIAN PRIVATE INTERNATIONAL LAW (3d ed. 1991) (discussing the significance of domicile and residence and the role of persons in private international law); Interactive Gambling Act, 2001, §§ 15(1), 15A(1).

gambling service to an Australian resident, an Australian corporation, or a resident of a designated country.[85] Thus, while the IGA does not make it unlawful to purchase illegal interactive gambling services, the Regulations may prohibit the use, facilitation, or acceptance by any person of any financial instrument, agreement, payment system, or other transaction to fund the payment of illegal interactive gambling services.[86]

A regulatory prohibition in the terms suggested above would necessarily include the Commonwealth Parliament legislating in respect to a foreign resident or corporation, such as a foreign IGSP or financial institution or payment system, or other foreign element, such as a financial instrument governed by foreign law. Therefore, it would appear that the desired regulatory outcomes of the Regulations are predicated upon, and may only be achieved if, the Regulations have extraterritorial operation and are capable of being effectively enforced by the FCA in a foreign jurisdiction.

There are many issues concerning the extraterritorial regulation of foreign financial institutions and payments systems connected with the funding of interactive gambling services. Banking and finance law expert L. Richard Fischer expressed this view when testifying before a United States Senate Subcommittee in relation to the Unlawful Internet Gambling Funding Prohibition Act of 2003.[87] He stated that "intrastate and international jurisdictional and choice of law questions present complex and politically sensitive issues, but these are policy issues for Congress, the Administration and their counterparts in the states and in other countries, rather than for payment system participants."[88]

While it is clearly beyond the scope of this Article to undertake a detailed discussion of the complex areas of Australian private international law, the next Part of the Article seeks to evaluate the practical issues associated with the extraterritorial operation and enforcement of the Regulations.

A. The Regulations and Personal Jurisdiction

For the FCA to exercise jurisdiction over a foreign element under the Regulations, the FCA must be satisfied that it has both subject matter

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85. Interactive Gambling Act, 2001, §§ 15A(a), 15A(1).

86. For example, an Australian resident, a resident of a designated country, a foreign interactive gambling service provider, an Australian financial institution and payment system, or a payment intermediary.

87. Statement from L. Richard Fischer before the Committee on Banking, Housing, and Urban Affairs, United States Senate, 108th Cong., Mar. 18, 2003, *available at* http://banking.senate.gov/03_03hrg/031803/fischer.htm.

88. *Id.*

and personal jurisdiction to adjudicate the matter before it.[89] "Personal jurisdiction refers to the . . . capacity [of the FCA] to exercise authority over a defendant."[90] In the context of an action under the Regulations involving a foreign element, the applicant or informant, as the case may be, will usually request the FCA to exercise personal jurisdiction over a foreign corporation and not a foreign natural person.[91] This request will arise on the basis that most, if not all, foreign IGSPs, financial institutions, or payment systems are corporations organised under the laws of a foreign jurisdiction. Therefore, this Part of the Article directs its analysis to personal jurisdiction as it relates to corporations.

The process under which the FCA may exercise personal jurisdiction over a foreign corporation defendant is wholly dependant upon whether the Regulations are civil or criminal in nature. In addition, the manner under which service can be effected in each case will depend upon whether the law considers the defendant to be physically present within or outside of Australia. This Part of the Article examines the ability of the FCA to exercise personal jurisdiction over a foreign corporation defendant under Regulations that are both civil and criminal in nature, while placing particular emphasis on effecting service under Regulations that are civil in nature.

1. Personal Jurisdiction in Civil Proceedings Under the Regulations

The civil jurisdiction of the FCA can be defined by reference to the common law and partly by reference to statute. At common law, service of the writ or originating process is the foundation of personal jurisdiction. As a general proposition, unless a foreign corporation defendant is validly served with process or voluntarily submits to the jurisdiction of the court, the FCA cannot exercise jurisdiction over it.[92]

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89. Flaherty v. Girgis, (1987) 162 C.L.R. 574 (Austl.).

90. Goss, *supra* note 25, at 53. While it is possible that the Regulations may be civil or criminal in nature, for ease of reference, this Part of the Article uses the term "defendant" in preference to the word "respondent."

91. Generally, a foreign corporation is a corporation organised under the laws of a foreign jurisdiction. Corporations Act, 2001, § 9 (Austl.).

92. The submission of a person or corporation to the jurisdiction of a court may be established in two ways:

1. where a defendant enters an unconditional appearance in an action, such as an appearance to contest the merits of the claim and not the issue of jurisdiction. Perkins v. Williams, (1900) 17 N.S.W.W.N. 135, 136 (Austl.); or
2. where a defendant has entered into a contract agreeing to submit any disputes of the courts to the forum. *See* Richard Garnett, *Private International Law and Electronic Commerce*, AUSTRALIAN NATIONAL REPORT TO THE EUROPEAN COMMISSION 2000, 3.

However, if jurisdiction cannot be established over the foreign corporation defendant under common law principles, then the statutory "long arm" rules of jurisdiction must be examined.[93]

In addition, certain legal rules require a court to regard notions of "reasonableness" when making a determination of personal jurisdiction over a foreign defendant. For example, in the case of a tort committed within Australia or where damage caused by the tort wherever occurring was suffered in Australia, it is clear that an Australian court has competence to adjudicate the matter before it.[94] This rule has equal application to a cause of action brought under a statute or legislative instrument such as the IGA or Regulations.[95]

This Part of the Article examines the ability of the FCA to exercise personal jurisdiction with respect to civil proceedings initiated under the Regulations over a foreign corporation defendant in circumstances where the foreign corporation defendant is either physically present within or outside of Australia.

a. Service of a Foreign Corporation Defendant Within Australia

The traditional common law approach to personal jurisdiction is that it is intrinsically connected with the amenability of the defendant to be served with a writ or originating process. The High Court of Australia stated this principle in *Laurie v. Carroll*: "The defendant must be amenable or answerable to the command of the writ. His amenability depended and still primarily depends upon nothing but presence within the jurisdiction."[96] Determination of the issue of whether a foreign corporation defendant is "present" within the jurisdiction of the FCA so as to be served with a writ will vary depending upon whether the defendant is registered as a foreign corporation in Australia under the Corporations Act of 2001 (Austl.) (Corporations Act) or is otherwise considered to be "present" within Australia at common law.

The Corporations Act provides that where a foreign corporation is "carrying on business in Australia," it must register with the Australian

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Altertext Inc. v. Advanced Data Communications Ltd., 1 All E.R. 395, 398 (Eng. 1985); ANZ Grindlays Bank plc v. Hussein Salah Hussein Abdul Fattah, (1991) 4 W.A.R. 296, 299-300 (Austl.).

93. *See, e.g.*, *Rules of the Supreme Court 1965* (Tas.) O 11 (Austl.).

94. *See, e.g.*, *Supreme Court (General Civil Procedure) Rules 1996* (Vic.) r 7.01 (Austl.).

95. Commonwealth Bank of Austl. v. White, (1999) 2 V.R. 681 (Austl.).

96. (1958) 98 C.L.R. 310, 323 (Austl.).

Securities and Investments Commission.[97] A foreign corporation will be considered to be "carrying on business in Australia" where it:

> (a) establish[es] or us[es] a share transfer or registration office in Australia;[98]
> (b) administer[s], manag[es] or otherwise deal[s] with, property situated in Australia . . . as an agent, legal personal representative or trustee, whether by employees or agents or otherwise;[99]

or where it:

> (a) offers debentures . . . ; or
> (b) is a guarantor body for debentures offered in [Australia].[100]

Conversely, a foreign corporation does not carry on business in Australia merely because it becomes a party to litigation, invests or holds property, "maintains a bank account," or engages in "an isolated transaction."[101]

Upon registration, a foreign corporation must nominate a registered office and appoint a local agent who is authorised to accept service on behalf of the foreign corporation.[102] Section 601CX of the Corporations Act provides that a document, such as a writ, may be served on a foreign corporation by leaving it at or sending it by post to the registered office or the address of the local agent.[103] However, where a foreign corporation defendant does not have sufficient contacts with Australia so as to constitute "carrying on business" for the purposes of registration pursuant to section 601CD of the Corporations Act, or it fails to register itself in contravention of section 601CD, it is still possible for the foreign corporation defendant to be considered physically present in Australia under the common law for the purposes of accepting service.[104] In *National Commercial Bank v. Wimborne*, the New South Wales Supreme Court held that a corporation will be present within the jurisdiction where it satisfies three conditions:

> First, it must be carrying on its business here and this it can only do by an agent and will not be doing so unless the agent has authority on behalf of the corporation to make contracts with persons in New South Wales binding on the corporation. Secondly, the business must be carried on at

97. Corporations Act, 2001, §§ 9, 21, 601CD (Austl.).
98. *Id.* § 21(2).
99. *Id.*
100. *Id.* § 601CD(2).
101. *Id.* § 21(3).
102. *Id.* §§ 601CF, 601CG, 601CJ, 601CT.
103. *Id.* § 601CX.
104. BHP Petroleum Pty v. Oil Basins Ltd., (1985) V.R. 725 (Austl.).

> some fixed and definite place within the State. Thirdly, the business must have continued for a sufficiently substantial period of time.[105]

Australian courts continue to have recourse to the common law in circumstances where a foreign corporation falls outside the legislative ambit of the Corporations Act.[106] Therefore, while it is beyond the scope of this Article to consider the possible application of the common law to a foreign corporation defendant in further detail, it is possible that the FCA may be able to exercise jurisdiction over a foreign corporation defendant notwithstanding that it is not registered in Australia.[107]

b. Service of a Foreign Corporation Defendant Outside of Australia

Where a foreign corporation defendant is not amenable to service within Australia, it is permissible for the FCA to serve the defendant outside of the jurisdiction provided the FCA is satisfied that there is a sufficient connection between the cause of action or its subject matter and the forum. An originating motion brought under the Regulations that is civil in nature may only be served upon a foreign corporation defendant outside of the jurisdiction where service is effected pursuant to Order 8 of the Federal Court of Australia Rules of 1979 (FCA Rules).[108] Broadly, Order 8 of the FCA Rules has expanded and codified the common law principles of personal jurisdiction to extend to the service of a defendant outside of the jurisdiction. However, importantly, Order 8 is confined to civil proceedings and does not authorise service out of the jurisdiction in the case of criminal matters.[109]

Order 8 sets out a number of grounds upon which service out of the jurisdiction may be authorised in civil matters. While it is beyond the scope of this Article to discuss and evaluate each circumstance under which the FCA may permit the service of a defendant outside of the jurisdiction, the following grounds may be relevant to an applicant seeking to effect the service of an originating motion under the Regulations:

1. where the proceeding is for the construction, rectification, setting aside or enforcement of a deed, will, or other

105. (1979) 11 N.S.W.L.R. 156, 165 (Austl.).
106. *BHP Petroleum Pty*, (1985) V.R. at 725 (Austl.).
107. P.E. NYGH & MARTIN DAVIES, CONFLICT OF LAWS IN AUSTRALIA 656 (7th ed. 2002).
108. *Federal Court of Australia Rules 1979* (Cth) O 8 r 2.
109. *Id.*; Thompson v. Noall, (1980) 30 A.L.R. 162 (Austl.).

instrument, or a contract, obligation, or liability affecting property in the jurisdiction;[110]

2. "where the proceeding is founded on a breach of an Act, where the breach is committed in the Commonwealth";[111]
3. where "the proceeding is founded on a breach, wherever occurring, of an Act, and is brought in respect of, or for the recovery of, damage suffered wholly or partly in Commonwealth";[112]
4. where the "subject matter of the proceeding, so far as concerns the person to be served is property in the Commonwealth";[113]
5. where the "proceeding concerns the construction, effect or enforcement of an Act or a regulation or other instrument having or purporting to have effect under an Act";[114] or
6. where the "proceeding concerns the effect or enforcement of an executive, ministerial or administrative act done or purporting to be done under an Act or regulation or other instrument having or purporting to have effect under an Act."[115]

In order to effect the service of a foreign corporation defendant outside of Australia, an applicant must either seek leave of the FCA prior to effecting service upon the defendant[116] or have service confirmed by the FCA after it has been effected.[117]

An application for leave to serve out of the jurisdiction is made ex parte.[118] Broadly, the FCA may only grant leave where it is satisfied that:

1. it has jurisdiction in the proceeding;
2. the proceeding falls within one or more of the grounds for service out of the jurisdiction;
3. the applicant has a prima facie case;[119] and

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110. In the case of the Regulations, property may include the proscribed financial instrument. An action in relation to property, including real property and chattels, must have some direct effect on the property itself, its possession, or title. Victoria v. Hansen, (1960) V.R. 582, 586 (Austl.).

111. *Federal Court of Australia Rules 1979* (Cth) O 8 r 1(b) (Austl.).

112. *Id.* at O 8 r 1(c).

113. *Id.* at O 8 r 1(h); *see also Victoria*, (1960) V.R. at 585 (Austl.).

114. *Federal Court of Australia Rules 1979* (Cth) O 8 r 1(l).

115. *Id.* at O 8 r 1(m).

116. *Id.* at O 8 r 2(2).

117. *Id.* at O 8 r 2(4). Where an applicant seeks to have service confirmed, the FCA must apply similar considerations to those had leave been sought by the applicant prior to service.

118. An ex parte application must be made with full and frank disclosure.

119. A prima facie case may be established if there is placed before the FCA material from which inferences are open which, if translated into findings of fact, would support the relief claimed. Merpro Montassa Ltd. v. Conoco Specialty Prods. Inc., (1991) 28 F.C.R. 387, 390 (Austl.); W. Austl. & Anor v. Vetter Trittler Pty, (1991) 4 A.C.S.R. 795, 801-02 (Austl.).

4. the proceedings would not be subsequently stayed on the grounds of forum non conveniens or for other reasons.[120]

2. Personal Jurisdiction in Criminal Proceedings Under the Regulations

Australian criminal law is applicable to foreign residents and corporations in respect of offences they committed in Australia.[121] Section 4B(1) of the Crimes Act of 1914 (Austl.) provides that Commonwealth law relating to indictable and summary offences applies to corporations.[122] Liability is generally attributed to a corporation through the conduct of its employees or agents acting within the scope of their employment or authority and the mental states of its senior officers.[123] However, with respect to an offence committed under the IGA, including any Regulations, specific rules in relation to imputing the conduct or state of mind of the directors, employees, or agents to the defendant corporation are provided for in section 63 of the IGA.[124]

While corporations are subject to prosecution, there remain procedural difficulties in prosecuting a corporation for an indictable offence on presentment.[125] In addition, on the basis that a corporation is incapable of imprisonment, legislation often sets fines for corporations at a much higher level than for natural persons committing identical offences.[126]

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120. The FCA should decline to deal with the proceedings if it can be shown that the court is a clearly inappropriate forum for the resolution of the dispute between the parties. Voth v. Mandildra Flour Mills Pty, (1990) 171 C.L.R. 538, 564 (Austl.).

121. *See, e.g.*, McNabb v. T. Edmondson & Co., (1941) V.R. 193, 194-95 (Austl.). However, it is noted that a court may grant some foreign residents or corporations many varying degrees of immunity, such as diplomatic immunity, because of their special legal status within the jurisdiction.

122. The Crimes Act, 1914, § 4B(1) (Austl.) is applicable to the Regulations because it is a Commonwealth instrument.

123. Comprising the actus reus (bad act) element of the purported crime. Criminal Code Act, 1995, pt. 2.5 (Austl.). Comprising the mens rea (guilty mind) element of the purported crime. *Id.*

124. Interactive Gambling Act, 2001, § 63 (Austl.). The rules set out in section 63 of the IGA largely echo the common law.

125. *See generally* The Honourable Mr. Justice Gowans, *Some Experiences in Criminal Trials in Relation to Company Offences*, 39 AUSTL. L.J. 328 (1966) (Austl.) (discussing his experience with criminal trials of corporations).

126. Crimes Act, 1914, § 4B(3) (Austl.).

As a matter of procedure, if the Regulations are criminal in nature,[127] the relevant informant[128] may file an indictment with the FCA alleging that a foreign corporation defendant committed an offence under the Regulations.[129] Ordinarily, upon the valid filing of an indictment with the FCA, the registrar must either issue a summons to the defendant or a warrant for arrest. A summons calls the defendant to appear on a specified date before the FCA to meet the allegation. Unlike a warrant for arrest, it is noncoercive in that the person summoned may ignore it without criminality.[130] The FCA may, however, proceed to judgment in the defendant's absence, or it may issue an arrest warrant to bring the defendant to the FCA compulsorily. Conversely, a warrant of arrest orders the defendant to be arrested and brought before the FCA, where the court may remand the defendant into custody or release him on bail.[131]

This Part of the Article examines the ability of the FCA to exercise personal jurisdiction in respect to criminal proceedings initiated under the Regulations, including the satisfaction of a summons or a warrant for arrest, over a foreign corporation defendant in circumstances where the foreign corporation defendant is either physically present within or outside of Australia.

a. Summons or Warrant of Arrest of a Foreign Corporation Defendant Within Australia

A foreign corporation defendant is equally amenable to service in criminal proceedings as it is in civil proceedings provided that the foreign corporation is considered to be present in Australia. Therefore, the rules examined in Part IV.A.1.a of the Article in relation to whether a foreign corporation must register under the Corporations Act or is otherwise considered present in Australia at common law will apply.

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127. An originating motion under the IGA will be criminal in nature if the "proceeding, even in the shape of a civil suit, . . . has for its object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches." Huntington v. Attrill, [1893] A.C. 150, 156-58 (U.K.).

128. The informant will be the government agency of the Commonwealth of Australia's government agency responsible for prosecutions under the Regulations. This may include the Commonwealth Director of Public Prosecutions or the Australian Prudential and Regulation Authority, which is responsible for the prudential supervision of financial entities in Australia.

129. In this Article, it is assumed that any offence under the Regulations will be indictable and not summary in nature. On that basis, an indictment and not a charge will be filed with the FCA.

130. Plenty v. Dillon, (1991) 171 C.L.R. 635 (Austl.).

131. *See* RICHARD FOX, VICTORIAN CRIMINAL PROCEDURE: STATE AND FEDERAL LAW 116 (9th ed. 1997).

If a foreign corporation defendant is not present in Australia for the purposes of the Corporations Act or the common law, it may still be possible to effect service upon an agent of the foreign corporation who is physically present in Australia. Section 64 of the IGA provides that a summons or process in relation to any criminal proceedings under the IGA, including any Regulations, may be effected by serving it on the Australian agent of that corporation provided that the corporation is incorporated outside of Australia and does not have a registered or principal office in Australia.[132] Therefore, section 64 may only be invoked where the originating process under the Regulations is criminal in nature and the defendant is a foreign corporation that is not registered under the Corporations Act. It is also arguable that service may still be effected upon the Australian agent of a foreign corporation under section 64 even if the foreign corporation is present in Australia for the purposes of the common law.

b. Summons or Warrant of Arrest of a Foreign Corporation Defendant Outside of Australia

Where a foreign corporation defendant is not physically present in Australia, it is unlikely that a summons or warrant of arrest issued by the FCA will be effective. In these circumstances, the FCA will not have personal jurisdiction over the foreign corporation defendant. Accordingly, the only practical solution that may be available to the informant under the Regulations is to seek and secure the extradition of a senior officer of the foreign corporation defendant. This is predicated upon the senior officer being severally liable for the offence under the Regulations.

The informant under the Regulations may seek the extradition of a senior officer of the foreign corporation defendant in two ways. First, extradition may be sought under the Extradition Act of 1988 (Austl.).[133] Broadly, the Extradition Act of 1988 (Austl.) provides for the arrest and international extradition of a person who is alleged to have committed offences punishable by twelve months or more imprisonment by a foreign state with whom Australia has entered into an extradition treaty.[134] For example, if the Commonwealth sought to extradite the operator of a U.S. IGSP, it would require the cooperation of the U.S. government "under The Treaty on Extradition between Australia and the United

132. Interactive Gambling Act, 2001, § 64 (Austl.).

133. Extradition Act, 1988 (Austl.).

134. *See generally* R.J. McCabe, *Extradition to and from Australia*, 34 AUSTL. POLICE J. 211 (1980).

States of America, which, pursuant to the Extradition (United States of America) Regulations, is enforceable in Australia under the Extradition Act 1988."[135]

To effect an extradition of a senior officer of a foreign corporation defendant under the Extradition Act of 1988 (Austl.), the extradition must not offend the principle of "double criminality," as codified under section 19(2)(c) of the Extradition Act of 1988 (Austl.).[136] The purpose of the "double criminality" principle is to "ensure[] that a State with custody of an individual is not forced to extradite him or her in respect of acts made criminal by the requesting State but which it itself does not consider criminal."[137]

If the indictment under the Regulations does not constitute a crime under the laws of the state under which the foreign corporation defendant is organised, such as where the conduct of the defendant is sanctioned by way of licence of the relevant state, it is unlikely that the government of the relevant state will agree to any extradition sought by the Commonwealth, notwithstanding the existence of any treaty between Australia and that jurisdiction.

Second, the Extradition Act of 1988 (Austl.) does not displace the prerogative power of the Commonwealth to seek and accept from a nontreaty state the surrender of a fugitive.[138] To effect the extradition of a person from a nontreaty state, the Commonwealth may seek to rely upon the "doctrine of comity," which refers to "diplomatic niceties performed by states out of a sense of international etiquette rather than binding obligations."[139]

There is no fixed rule in relation to the application or adherence to a request made by one state of another under the doctrine of comity in the case of extradition. The success of a request may ultimately depend upon the overarching attitude of international and diplomatic relations between the two states. However, as with the case of an extradition under the Extradition Act of 1988 (Austl.), it is unlikely that the government of a foreign state would accede to a request for extradition made by the

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135. Treaty on Extradition Between the United States of America and Australia, May 8, 1976, arts. 1-2, 10 A.T.S., *amended by* Protocol Amending the Treaty on Extradition Between Australia and the United States of America (Sept. 4, 1990); Goss, *supra* note 25, at 79.

136. Extradition Act, 1988, § 19(2)(c) (Austl.).

137. Gráinne Mullan, *The Concept of Double Criminality in the Context of Extraterritorial Crimes*, CRIM. L. REV. 17, 20 (1997) (Austl.).

138. Barton v. Commonwealth, (1974) 131 C.L.R. 477 (Austl.); David Lanham, *Informal Extradition in Australian Law*, 11 CRIM. L.J. 3, 6-7 (1987) (Austl.).

139. Brian Pearce, *The Comity Doctrine as a Barrier to Judicial Jurisdiction: A U.S.-E.U. Comparison*, 30 STAN. J. INT'L. L. 525, 527 (1994).

Commonwealth under the doctrine of comity where the principle of double criminality cannot be satisfied.[140]

3. Summary and Application of Personal Jurisdiction Under the Regulations

While the FCA may be capable of finding subject matter jurisdiction in proceedings brought under the Regulations,[141] the FCA may experience a more difficult task of finding personal jurisdiction over a foreign corporation defendant for the following reasons:

1. it is unlikely that a foreign corporation defendant would voluntarily submit to the jurisdiction of the FCA and thereby expose itself to civil or criminal proceedings under the Regulations;[142]
2. it is unlikely that a transaction between a foreign corporation defendant and an Australian resident conducted via the Internet that involves an illegal interactive gambling service or the funding of such service will in and of itself constitute the "carrying on of business" for the purposes of registration under the Corporations Act or being otherwise physically present in Australia. However, it is likely that a foreign financial institution, such as Citibank, N.A., or a foreign payment system participant, such as MasterCard, will already be registered under the Corporations Act on the basis that it conducts other business activities in Australia and is thereby capable of accepting service;
3. where the Regulations are civil in nature:
    a. it is uncertain whether the FCA would grant leave for the service of a foreign corporation defendant outside of the jurisdiction given its discretionary nature. However, if the originating motion under the Regulations concerns a cause of action in respect to property located in Australia, the FCA may be inclined to permit ex juris service of a foreign corporation defendant.[143] For example, property considered the subject of a cause of action under the Regulations may

140. Mullan, *supra* note 137, at 20.

141. *See* discussion *infra* Part IV.B.

142. *See Federal Court of Australia Rules 1979* (Cth) O 8 1(f) (Austl.).

143. *See Federal Court of Australia Rules 1979* (Cth) O 8 r 1(a)-(e), (h); Pilkington v. McArthur Trust Ltd., [No 2] [1938] N.Z.L.R. 564 (N.Z.) (finding an action to enforce a deed executed in New Zealand and purporting to transfer certain debentures held in that country to be an action to enforce a deed affecting property within the jurisdiction).

include money used to fund the payment of an unlawful interactive gambling service that is located in a bank account physically situated in Australia; and

b. from a practical perspective, even if the FCA were to grant leave for the service of a foreign corporation defendant outside of the jurisdiction, it may be costly and problematic for an applicant to properly give effect to service in the manner prescribed by the FCA Rules;[144]

4. where the Regulations are criminal in nature:
   a. given that it is unlawful to provide interactive gambling services to an Australian resident under the IGA, it is unlikely that a foreign IGSP defendant would have an agent in Australia for the purposes of conducting its business activities and thereby subject itself to accepting service under section 64 of the IGA; and
   b. it would ordinarily appear that the informant under the Regulations would be unsuccessful in extraditing a senior officer of a defendant corporation unless Australia has a treaty on extradition with the relevant foreign state and the indictment under the Regulations also constitutes a crime in that foreign state. Accordingly, in the absence of extradition of a senior officer of a foreign corporation defendant, the FCA will be unable to exercise personal jurisdiction over the foreign corporation defendant or its officers.

B. The Regulations and Subject Matter Jurisdiction

In addition to establishing personal jurisdiction, the FCA must also determine whether it has subject matter jurisdiction over an action brought under the Regulations. Specifically, subject matter jurisdiction refers to the competency of a court to adjudicate the matter before it.[145]

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144. For example, it may be difficult to locate and effect service upon a foreign IGSP corporation resident in Belize, a small Central American country.

145. This Article prefers the use of the term "subject matter jurisdiction" to describe the competency of a court to adjudicate the subject matter of a cause of action brought, whether wholly or partly, under statute or legislative instrument, such as the Regulations. In this context, subject matter jurisdiction may refer to the ability of a court to adjudicate a matter based on the jurisdictional scope of the statute or legislative instrument in question. *But see Flaherty*, 162 C.L.R. at 598:

> [T]he jurisdiction of a court of unlimited jurisdiction does not depend upon subject-matter but upon the amenability of the defendant to the writ . . . jurisdiction over the

This Part of the Article first considers the jurisdictional scope of the IGA, including the Regulations, and specifically evaluates whether the Commonwealth Parliament intended for the Regulations to have extraterritorial operation. Second, while intrinsically connected to the discussion undertaken earlier in this Part, an examination is made of whether a financial instrument or transaction for the funding of an illegal interactive gambling service is sufficiently connected with Australia, involves an Australian resident or corporation, or otherwise falls within the purview of the jurisdictional scope of the Regulations. Finally, this Part draws upon the experience of U.S. courts when confronted with questions of establishing subject matter jurisdiction in an interactive gambling context.

1. Power to Legislate Extraterritorially

The Commonwealth Parliament is not capable of legislating for the whole world.[146] The limits of the Commonwealth Parliament's jurisdiction are defined by reference to its own sovereignty.[147] In a broad sense, the sovereignty of the Commonwealth Parliament depends upon its own inherent constitutional power to legislate and any internationally accepted customs and practices.[148]

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subject-matter of the action, once service has validly been effected, derives from the same source whether or not the service is extraterritorial.

146. Mynott v. Barnard, (1939) 62 C.L.R. 68, 73 (Austl.).

147. COMMON MARKET AND AMERICAN ANTITRUST: OVERLAP AND CONFLICT 371 (James A. Rhal ed., 1970).

> The authority of a state to exert its will on others finds its ultimate limit in notions of sovereignty, not only of the acting state, but also of those states which would be affected by an act in excess of jurisdiction. In one sense, "jurisdiction" is a measure of the *limits* within which one state may prescribe and enforce rules of law without violating or infringing the sovereignty of another state. In a more positive sense, jurisdiction is a "manifestation of state sovereignty," an expression of the inherent power to govern.

Id.

148. Statute of Westminster, 1931 (IMP); Australia Act, 1986, §§ 1-2 (Austl.). Brownlie states:

> Extra-territorial acts can only lawfully be the object of jurisdiction if certain general principles are observed:
> (i) that there should be a substantial and *bona fide* connection between the subject matter and the source of jurisdiction;
> (ii) that the principle of non-intervention in the domestic or territorial jurisdiction of other states should be observed; and
> (iii) that a principle based on elements of accommodation, mutuality and proportionality should be applied. Thus nationals resident abroad should not be constrained to violate the law of the place of residence.

IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 302 (2d ed. 1973).

As a matter of constitutional law, a Commonwealth statute will be valid provided that the legislative power of that statute may be properly characterised under a head of power conferred by the Australian Constitution.[149] As previously established, it is possible to characterise the IGA and any Regulations under section 51(v) of the Australian Constitution, which states, "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: . . . [p]ostal, telegraphic, telephonic, and other like services."[150] Interactive gambling may be aptly characterised as being conducted via telegraphic, telephonic, and other like services such as the Internet or other forms of satellite communications, and, consequently, this Article assumes that the IGA and any Regulations are constitutionally valid.

The legislative scope of section 51(v) of the Australian Constitution is not necessarily limited to natural persons, corporations, property, or other matters that arise within the territory of Australia.[151] It is an established principle of law that the Commonwealth Parliament may enact legislation that purports to have an application outside the territory of the Commonwealth of Australia provided that such legislation:

1. does not offend any territorial limits on the Commonwealth's legislative powers, which may be expressed or implied in the Australian Constitution; and

149. PETER HANKS, CONSTITUTIONAL LAW IN AUSTRALIA 394 (1991).

150. AUSTL. CONST. § 51(v).

151. The Commonwealth of Australia currently consists of "six constituent States, two self-governing internal Territories, one internal non-self-governing Territory, and seven external territories of which only three are inhabited." NYGH & DAVIES, *supra* note 107, at 8. In respect of matters governed by state or territory law, each state or territory is a distinct "law area." McKain v. R.W. Miller & Co., (1991) 174 C.L.R. 1, 36 (Austl.). However, where the law is unified at the federal level, such as interactive gambling under the IGA, the Commonwealth of Australia constitutes one "law area." Lloyd v. Lloyd, (1962) V.R. 70, 71 (Austl.). The term "law area" refers to a territory that has a unitary system of law. A "unitary system of law" is one in which the following applies:

> the substantive rule or rules applicable to determine the lawfulness and the legal consequences or attributes of conduct, property[,] or status at a particular time in a particular part of the national territory will be the same regardless of whereabouts in that territory[,] questions concerning those matters or their legal consequences[,] may arise.

NYGH & DAVIES, *supra* note 107, at 8 (quoting Breavington Austl. v. Godleman, (1988) 169 C.L.R. 41, 121 (Austl.); Attorney-Gen. v. Australian Agric. Co., (1934) 34 N.S.W. St. R. 571, 577 (Austl.); *see also* P.H. LANE, A MANUAL OF AUSTRALIAN CONSTITUTIONAL LAW (5th ed. 1991).

2. has a sufficient connection between the extraterritorial activity sought to be regulated and the "peace, order and good government" of the Commonwealth.[152]

Therefore, subject to the qualifications outlined above, there would appear to be no restriction upon the Commonwealth Parliament from enacting the IGA, including the making of Regulations under it, for the purpose of legislating in respect of matters that may arise, whether wholly or partly, outside the Commonwealth of Australia.

2. The Intention to Legislate Extraterritorially

Having considered the apparent power of the Commonwealth Parliament to legislate extraterritorially, it is necessary to determine whether the Commonwealth Parliament intended for the IGA, including any Regulations, to have extraterritorial operation.[153] This Part of the Article examines the methods commonly utilised by courts to determine the extraterritorial operation and territorial scope of a statute, and it will apply such methods to the IGA, including any Regulations that may be promulgated under it.

a. Methods to Determine the Extraterritorial Operation of a Statute

Generally, when presented with an issue of determining the extraterritorial operation of a statute, a court must consider two distinct but related questions. First, "does the statute have extraterritorial operation?"[154] Second, "what is the territorial scope of the statute?"[155] In practice, if a court, in its analysis of a statute which purports to have extraterritorial operation, addresses the first question of whether the statute has extraterritorial operation, then whatever the determination is, even if by simple determination of "yes" or "no," the court will usually, "whether explicitly or implicitly, determine the territorial scope of the statute."[156]

A statute that prima facie purports to have an extraterritorial operation may usually be delineated as either:

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152. Union S.S. Co. of Austl. Pty v. King, (1988) 166 C.L.R. 1 (Austl.); *see also* Mark Moshinsky, *State Extraterritorial Legislation and the Australia Acts 1986*, 61 AUSTL. L.J. 779, 781-83, 785 (1987) (Austl.).

153. *See* discussion *supra* Part IV.B.1.

154. Stuart Dutson, *The Territorial Application of Statutes*, 22 MONASH U.L. REV. 69 (1996) (Austl.).

155. *Id.*

156. *Id.* at 70.

1. a statute which by express words evinces an intention by Parliament that the statute is to have extraterritorial operation; or
2. a statute which by general words, such as "all contracts," "any agreement," "any will," or "any conduct," evinces an intention by Parliament that the statute is to have extraterritorial operation.[157]

The degree of analysis that a court must undertake when considering the extraterritorial operation of a statute will vary depending upon the language and intention of the relevant Parliament that may be prima facie elicited from the statute in question. Generally, the courts have utilised three methods, in conjunction with the ordinary canons of statutory interpretation, to determine the extraterritorial operation and territorial scope of a statute as evaluated below.[158]

The first method, the "presumption against extraterritorial legislation," is "based on the presumption that every statute is to be interpreted and applied so as not to be inconsistent with the comity of nations or with the established rules of public international law."[159] In other words, it is a rebuttable presumption that a legislature only intends for its statutes to operate on persons and matters within its territory and that its statutes must be construed accordingly.[160] However, this presumption may be rebutted where the court is satisfied that it was the legislature's intention that the statute is to have extraterritorial operation by reason of the express words of the statute or by necessary implication in cases where the policy, object, or purpose of the statute so requires.[161]

The second method, the "purposive approach to statutory interpretation," is a variation and development of the old common law

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157. *Id.* at 69.

158. Each method is not mutually exclusive and may be employed by a court concurrently. Pugh v. Pugh, [1951] P. 482, 484 (Eng.) (applying the "purposive" and "private international law" methods); *In re* Perkins, (1958) 58 N.S.W.L.R. 1 (Austl.) (applying the "private international law" method and rejecting the "presumption against extraterritoriality" and the "purposive" methods). The "literal rule" is a "fundamental rule" of statutory construction requiring the interpretation of a statute according to the intention of parliament, which is "to be found by an examination of the language used in the statute as a whole" and nothing else. Amalgamated Soc'y of Eng'rs v. Adelaide S.S. Co., (1920) 28 C.L.R. 129, 161-62 (Austl.).

159. *See, e.g.*, Alcom Ltd. v. Republic of Colom., A.C. 580 (1984) (Eng.) (declaring that statutes are presumed not to be inconsistent with international law); *see also* Barcelo v. Electrolytic Zinc Co. of Australasia Ltd., (1932) 48 C.L.R. 391, 423-24 (Austl.).

160. *See, e.g.*, Attorney-Gen. for Alberta v. Huggard Assets Ltd., A.C. 420 (1953) (Eng.) (declaring that legislation is presumed not to have an extraterritorial effect); Morgan v. White, (1912) 15 C.L.R. 1, 13 (Austl.).

161. Clark v. Oceanic Contractors Inc., [1983] 2 A.C. 130, 151 (Can.); Goliath Portland Cement Co. v. Bengtell, (1994) 33 N.S.W.L.R. 414, 428 (Austl.).

"mischief rule"[162] which has now been codified in statute and is therefore entrenched in the Australian legal system as the fundamental test of statutory interpretation.[163] Accordingly, the purposive approach is preferred as the preeminent method of determining the territorial scope of a statute.[164]

Under the purposive approach to statutory interpretation, a court may attempt to interpret a statute in light of its subject matter, object, or purpose, so as to read into it territorial limitations that the legislature would have expressed had it addressed itself to the matter, so as to determine whether or not a statute has extraterritorial operation.[165] However, when determining the territorial scope of a statute, the purposive approach need not be used by a court in isolation, but it may be used parallel to or in conjunction with alternative methods of statutory interpretation or characterisation, such as the presumption against extraterritorial legislation.[166]

Under the third method, a court may attempt to interpret a statute with regard to the rules of private international law.[167] Broadly, private international law is a body of principles dealing with conflicts between the domestic laws of two or more states, and it is concerned with private matters arising in an international context.[168] This method of interpretation was clearly formulated in *Wanganui-Rangitikei Electric Power Board v. Australian Mutual Provident Society*, where Justice Dixon stated that "in the absence of any countervailing consideration, the principle is, I think, that general words should not be understood as

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162. The classic statement of the "mischief rule" is found in *Heydon's case*. 76 Eng. Rep. 637, 638 (1584) (Eng.). In simple terms, legislative intent is sought by examining the "mischief" it is believed Parliament intended to overcome.

163. Acts Interpretation Act, 1901, § 15AA (Austl.); Interpretation of Legislation Act, 1984, (Vic) § 35(a) (Austl.).

164. See *Goliath Portland Cement Co.*, N.S.W.L.R. at 428, stating the following:

> The principle of territorial interpretation competes with the more general rule that courts should give an ample construction to the language used by the legislature in order to achieve the purpose of parliament disclosed by that language . . . the authority of this Court cautions against an unduly rigid application of a construction of statutes to require strict territorial connection. As in all tasks of statutory construction, the duty of the court is to seek faithfully to give meaning to the presumed purpose of parliament.

165. Wanganui-Rangitikei Elec. Power Bd. v. Austl. Mut. Provident Soc'y, (1934) 50 C.L.R. 581, 596 (Austl.).

166. DAVID ST. LEGER KELLY, LOCALISING RULES IN THE CONFLICT OF LAWS 85 (1974).

167. NYGH & DAVIES, *supra* note 107, at 4.

168. Private international law is more appropriately called "conflict of laws" as it governs the choice of law or forum in cases of private rights. CONCISE AUSTRALIAN LEGAL DICTIONARY 347 (2d ed. 1998).

extending to cases which, according to the rules of private international law administered in our Courts, are governed by foreign law."[169]

Accordingly, upon application of this method, the statute in question may be read down by a process of judicial interpretation so as to operate only within the rules set by the conflict or choice of law rules.[170] "In other words, the operation of the statute is to be confined to those situations and transactions which according to the rules of private international law are to be governed by the law of the forum."[171]

b. Extraterritorial Operation of the IGA and the Regulations

Having considered the methods commonly utilised by courts to determine the extraterritorial operation and territorial scope of a statute, this Part of the Article determines whether the Commonwealth Parliament intended for the IGA and the Regulations to have extraterritorial operation. However, while a related issue, it is beyond the scope of this Article to consider the wider question of whether the legislative intent elicited by the Commonwealth Parliament offends public international law or other intrinsic presumptions against legislating extraterritorially.

Principally, section 14 of the IGA states, "Unless the contrary intention appears, this Act extends to acts, omissions, matters and things outside Australia."[172] Without the need to have recourse to the specific methods of determining the extraterritorial operation of a statute, it

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169. *Wanganui-Rangitikei Elec. Power Bd.*, 50 C.L.R. at 601 (Austl.), where the court stated the following:

> [A]n enactment describing acts, matters or things in general words, so that, if restrained by no consideration lying outside its expressed meaning, its intended application would be universal, is to be read as confined to what, according to the rules of international law administered or recognized in our Courts, it is within the province of our law to affect or control. The rule is one of construction only, and it may have little or no place where some other restriction is supplied by context or subject matter. But, in the absence of any countervailing consideration, the principle is, I think, that general words should not be understood as extending to cases which, according to the rules of private international law administered in our Courts, are governed by foreign law.

170. The terms "conflict of laws" and "choice of law" are often used interchangeably, however the Australian Law Reform Commission appears to have used the expression "choice of law" in a much narrower sense. It states that choice of law rules "need to be distinguished from the rules conferring jurisdiction." This appears to suggest that the rules governing choice of laws can be distinguished from those governing choice of jurisdiction; however, both would seem to fall within the wider sphere of "choice of laws rules." AUSTRALIAN LAW REFORM COMMISSION, CHOICE OF LAW, REPORT NO. 58, paras. 1.3-1.4, 2.12 (1992) (Austl.). In this Part of the Article the narrower meaning of "choice of laws" is to be preferred.

171. SYKES & PRYLES, *supra* note 84, at 242.

172. Interactive Gambling Act, 2001, § 14 (Austl.).

would appear, upon application of ordinary statutory interpretation principles such as the "literal rule," that the language of section 14 clearly evinces an intention by the Commonwealth Parliament that the IGA is to have extraterritorial operation and that the territorial scope of that section is sufficiently broad pursuant to its terms.[173] As a corollary, the express words of section 14 also appear to be adequate to rebut the common law presumption against the extraterritorial operation of a statute.

In addition to the apparent extraterritorial character of the IGA pursuant to section 14, sections 15(5) and 15(A)(5) of the IGA purport to confer the offences created under sections 15(1) and 15A(1) of the IGA, respectively, with separate and specific extraterritorial operation.[174] As a matter of statutory construction, it is likely that a court will determine that section 15.4 of the Criminal Code, incorporated by reference under sections 15(5) and 15(A)(5), clearly evinces an intention by the legislature that the offences under sections 15(1) and 15A(1) of the IGA are to have extraterritorial operation and that the territorial scope of these sections is broad and in the terms set out in section 15.4 of the Criminal Code (Austl.).

The conferral of separate extraterritorial jurisdiction in the case of the offences under the IGA is in addition to the general extraterritorial operation of the IGA under section 14 and appears to be superfluous, given the similarities in the practical operation and territorial scope of each provision. However, the specific reference of the offences under the IGA to the extraterritorial operation of the Criminal Code (Austl.) may be the legislature's further attempt to rebut the stronger common law presumption against the extraterritorial operation of a criminal statute.

In summary, it appears evident that the IGA generally, and the offences under sections 15(1) and 15A(1) specifically, have extraterritorial operation and broad territorial scope, conceivably extending to all contemplations within the purview of the IGA.

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173. *Amalgamated Soc'y of Eng'rs*, 28 C.L.R. at 161-62 (Austl.).

174. Sections 15(5) and 15(A)(5) of the IGA are identical in their wording and state:

> Section 15.4 of the *Criminal Code* (extended geographical jurisdiction—category D) applies to an offence under subsection (1).

Section 15.4 of the Criminal Code states:

> If a law of the Commonwealth provides that this section applies to a particular offence, the offence applies:
> (a) whether or not the conduct constituting the alleged offence occurs in Australia; and
> (b) whether or not a result of the conduct constituting the alleged offence occurs in Australia.

However, the question arises as to whether a court would afford the same extraterritorial operation and scope to the Regulations that may later be promulgated in accordance with the IGA.

The Regulations constitute a form of delegated or subordinate legislation and must be made in accordance with sections 69A and 70 of the IGA.[175] As a general proposition, delegated legislation has the force of its empowering legislation but is also confined in its scope to the purview of its empowering legislation.[176] In other words, the empowering legislation can only confer upon its delegated legislation the legislative powers conferred to it.[177] If there is an irreconcilable conflict between the delegated legislation and its empowering legislation, the empowering legislation must prevail.[178]

While speculation is required to determine the exact legislative character and scope that the Regulations may ultimately adopt,[179] prima facie, it may be argued that, as a matter of statutory construction, the Regulations import the same extraterritorial operation to that set out in section 14 of the IGA, unless the Regulations either expressly or, possibly, by implication provide that section 14 does not apply.[180]

Therefore, it can be concluded that it was the intention of the Commonwealth Parliament, through its enactment of section 14 of the IGA, that the Regulations have extraterritorial operation and that a court should construe the Regulations accordingly.

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175. Delegated legislation is legislation made by an administrator (in this case, the Governor-General upon recommendation of the Minister) in the exercise of a power conferred by statute (in this case, section 70 of the IGA). CONCISE AUSTRALIAN LEGAL DICTIONARY 120 (2d ed. 1998). Section 70 of the IGA provides that the Governor-General may make regulations prescribing matters:

(a) required or permitted to be prescribed by this Act; or
(b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

176. For example, the delegation itself must not be so wide as to be uncertain or amount to an abdication of legislative power. Victorian Stevedoring & Gen. Contracting Co. Pty v. Dignan, (1931) 46 C.L.R. 73, 101, 120 (Austl.).

177. For example, the powers under the IGA that relate to its extraterritorial operation.

178. Foster v. Aloni, (1951) V.L.R. 481 (Austl.).

179. For the purposes of this Article, it is assumed that the Regulations are properly made and do not offend the laws relating to delegated legislation or expressly or impliedly limit its territorial operation to Australia.

180. However, it is possible that any inference that section 14 of the IGA does not apply to the Regulations will be prima facie inconsistent with section 14 of the IGA and read down accordingly. *Victorian Stevedoring*, 46 C.L.R. at 101, 120.

3. Locus of Activity

As a general proposition, it is possible for the FCA to exercise subject matter jurisdiction over a cause of action brought under the Regulations provided that the financial instrument or transaction for the funding of an illegal interactive gambling service concerns an Australian resident or corporation or has a sufficient connection with the territory of Australia. The FCA is justified in exercising jurisdiction in this manner on the basis of the "territorial" and "nationality" principles of public international law.[181] Broadly, the territorial principle of jurisdiction recognises a state's power to exercise authority over the acts of all persons performed in its territory.[182] On the other hand, the nationality principle is based upon the allegiance that a person owes to a state of which they are a national, permitting that state to claim jurisdiction over its national without territorial limit.[183]

Assuming that the jurisdictional scope of the Regulations extends to extraterritorial acts or matters as discussed under Part IV.B.2.b, this Part of the Article considers the analysis required by the FCA to determine whether a financial instrument or transaction has a sufficient nexus with Australia and what constitutes a person or corporation being resident in Australia.

a. Financial Instrument or Transaction Sufficiently Connected with Australia

Based on the territorial principle, the FCA can assert subject matter jurisdiction over a financial instrument or transaction for the funding of an illegal interactive gambling service provided that such instrument or transaction is sufficiently connected with Australia. What will amount to a sufficient connection or nexus between the financial instrument or transaction at issue and Australia is often a question of fact to be determined by the FCA pursuant to the rubric of private international law and with regard to all the circumstances.

As a starting point, the FCA may look to the relevant provisions of the Regulations upon which the cause of action is based and consider these against the subject matter at issue, such as a financial instrument or transaction. Moreover, given the contractual nature of the subject matter, the FCA may also consider, on a nonexhaustive basis, other factors such

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181. BROWNLIE, *supra* note 148, at 302.

182. Vishnu D. Sharma, *Approaches to the Issue of Extra-Territorial Jurisdiction*, AUSTL. J. CORP. L. 5, 12-13 (1995).

183. *Id.* at 12.

as where the financial instrument or transaction was made, where the obligations are to be performed, where any damage was incurred, where the services are to be delivered, or where payment is to be made.[184] In addition, a determination by the FCA as to the locus of activity of a financial instrument or transaction proscribed under the Regulations is further complicated due to its likely delivery via the Internet. As a general proposition, Australian courts have yet to establish a concrete dichotomy for determining where the locus of activity occurs in cyberspace.[185]

In *Macquarie Bank v. Berg*, the New South Wales Supreme Court refused to grant an injunction to restrain the posting of material on a Web site based in the United States, the contents of which were accessible in New South Wales, on the grounds that, among other things, the effect of any restraint on publication would be "to superimpose the law of New South Wales relating to defamation on every state, territory, country of the world" and thus injurious to the relations between countries.[186]

In its recent decision in *Dow Jones & Co. v. Gutnick*, the High Court of Australia did not follow the reasoning of the New South Wales Supreme Court in *Macquarie* as to the question of jurisdiction involving activities conducted using the Internet.[187] In *Gutnick*, the High Court of Australia held on appeal that the Victorian Supreme Court was the proper forum to adjudicate a defamation cause of action on the basis that the defamatory material at issue was held to be published at the place where it was downloaded from the Internet, which was in the territory of the forum, and not at the place where it was uploaded to the Internet or the location of the relevant server, which was in the State of New Jersey in the United States.[188]

Some commentators have argued that the reasoning adopted by the High Court of Australia to the question of jurisdiction in *Gutnick* was

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184. With respect to instantaneous communications, Australian law considers that a contract is prima facie made at the place where acceptance was received rather than the place where it was issued. Mendelson-Zeller Co. v. T&C Providores Pty. Ltd., (1981) 1 N.S.W.L.R. 366, 369 (Austl.).

185. See, for example, J.J. FAWCETT & PAUL TORREMANS, INTELLECTUAL PROPERTY AND PRIVATE INTERNATIONAL LAW 160-61 (1998), for a discussion of cyberspace jurisdiction relating to intellectual property rights.

186. (1999) NSWSC 526 (Unreported, Simpson J., June 2, 1999) (Austl.), *available at* http://www.austlii.edu.au/au/case/nsw/supreme_ct/1999/526.html; *see* Richard Garnett, *Are Foreign Internet Infringers Beyond the Reach of the Law?*, 23 U. NEW S. WALES L.J. 105, 123 (2000) (quoting Macquarie Bank v. Berg, (1999) NSWSC 526 (Austl.)).

187. (2002) HCA 56 (Austl.); Dow Jones & Co. v. Gutnick, (2001) V.S.C. 305 (Austl.).

188. *See generally* Brian Fitzgerald, Dow Jones & Co. Inc. v. Gutnick*: Negotiating 'American Legal Hegemony' in the Transnational World of Cyberspace*, 27 MELB. U. L. REV. 590, 591 (2003).

expansive and may require inferior Australian courts to assert jurisdiction in matters involving activity on the Internet where only a tacit connection exists between the activity or subject matter and the forum.[189] Therefore, pursuant to the doctrine of precedent and upon application of the reasoning in *Gutnick*, the FCA may find jurisdiction in cases concerning a financial instrument or transaction proscribed under the Regulations and delivered via the Internet provided that there is some connection between the financial instrument or transaction and the territory of Australia, notwithstanding that the financial instrument or transaction may have some other connection with another forum by virtue of its delivery via the Internet.

In conclusion, it is likely that the FCA would find subject matter jurisdiction to adjudicate a cause of action under the Regulations where a payment for illegal interactive gambling services is funded, or its funding is facilitated, within the territory of Australia, even in circumstances where such instrument or transaction is delivered via the Internet and has some connection with other forums.[190] The express legislative extension of the jurisdictional scope of the Regulations to matters and things occurring or subsisting within and outside of Australia supports this conclusion.[191]

b. Australian Resident or Corporation

Based on the nationality principle, the FCA may assert subject matter jurisdiction over an Australian resident, or a corporation organised under the laws of Australia or otherwise registrable or carrying on business in Australia, that is sufficiently connected with or participates in a financial instrument or transaction for the funding of an illegal interactive gambling service.

In respect to an Australian resident, the nationality principle is encapsulated under the jurisprudential notion of "personal law." "Personal law" refers to the applicable law that follows a person "rather than [the laws of] the place where that person may be from time to time or where that person's property may happen to be."[192] The personal law of a natural person will usually be conferred on the basis of that person's domicile. Justice Holmes described the function of domicile in

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189. Richard Garnett, Dow Jones & Co. Inc. v. Gutnick*: An Adequate Response to Transitional Internet Defamation?*, 4 MELB. J. INT'L L. 196, 200-01, 216 (2003).

190. See discussion *infra* Part IV.B.4 for examples of where U.S. courts have found jurisdiction to adjudicate interactive gambling cases involving foreign elements.

191. *See supra* Part IV.B.2.b.

192. NYGH & DAVIES, *supra* note 107, at 247.

Williamson v. Osenton in the following terms: "The very meaning of domicil is the technically preëminent headquarters that every person is compelled to have in order that certain rights and duties that have attached to it by the law may be determined."[193]

While it is beyond the scope of this Article to discuss the laws relating to the domicile, nationality, or residence of a natural person in detail, it is possible that, by virtue of a person having his or her domicile in Australia, the FCA may exercise subject matter jurisdiction over that person under the Regulations provided that they are sufficiently connected with or participate in a financial instrument or transaction for the funding of an illegal interactive gambling service.[194]

Similarly, the FCA is able to exercise subject matter jurisdiction over a corporation organised under the laws of Australia or otherwise registrable or carrying on business in Australia, subject to the same qualifications that apply to an Australian resident. The laws relating to whether a foreign corporation must register under the Corporations Act or is otherwise considered to be carrying on business in Australia at common law are detailed in Part IV.A.1.a of this Article.

In conclusion, it is likely that the FCA would find subject matter jurisdiction to adjudicate a cause of action under the Regulations where an Australian resident or a corporation registrable or carrying on business in Australia, such as a customer or AFIPS, funds or facilitates the funding of a payment for an illegal interactive gambling services. This conclusion is directly supported by the express legislative extension of the jurisdictional scope of the Regulations to matters and things occurring or subsisting within and outside of Australia.[195]

4. U.S. Experience—Subject Matter Jurisdiction in Interactive Gambling Cases

U.S. jurisprudence has developed rapidly to accommodate a growing number of disputes concerning activities conducted via the Internet.[196] As a general proposition, U.S. courts generally show a lack of timidity when extending their competence to adjudicate matters that may

193. 232 U.S. 619, 625 (1914).

194. NYGH & DAVIES, *supra* note 107, ch. 13.

195. *See supra* Part IV.B.2.b.

196. Zippo Mfg. Co. v. Zippos Dot Com Inc., 952 F. Supp. 1119 (W.D. Pa. 1997); Panavision Int'l L.P. v. Toeppen, 945 F. Supp. 1296 (C.D. Cal. 1996); Playboy Enters. Inc. v. Chuckleberry Publ'g Inc., 939 F. Supp. 1032 (S.D.N.Y. 1996).

involve interstate or foreign residents whose only or substantial contact with the forum arises by virtue of the Internet.[197]

The expansive approach to jurisdiction by U.S. courts is not confined to traditional forms of online disputes, with courts actively extending the operation of U.S. anti-interactive gambling laws extraterritorially.[198] Accordingly, it is instructive to consider the approach taken by U.S. courts regarding the question of subject matter jurisdiction in an interactive gambling context.[199] In particular, it is useful to evaluate the reasoning U.S. courts adopt on the issue of whether an interactive gambling transaction involving a foreign resident has a sufficient nexus with the United States.

However, it is important to note that courts in the United States apply a different methodology to that of courts in Australia to questions concerning the subject matter of an action involving foreign elements. Under the "effects test," which is yet to be endorsed by Australian courts, U.S. courts may exercise jurisdiction over proscribed conduct that results in a demonstrated, actual, or presumed effect in the United States.[200] When applying the effects test to cases involving the Internet, U.S. courts usually adopt what is known as the "sliding scale" test of interactivity measuring the quantity and intensity of a defendant's contacts with the forum, such as via a Web site.[201]

This Part of the Article discusses three relevant U.S. interactive gambling cases from the perspective of the courts' analyses and findings of subject matter jurisdiction in each case. Importantly, however, in each

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197. *Zippo Mfg.*, 952 F. Supp. at 1119; *Panavision Int'l*, 945 F. Supp. at 1296; *Playboy Enters.*, 939 F. Supp. at 1032.

198. For example, consumer fraud, domain name disputes, or copyright infringement. Minnesota v. Granite Gate Resorts, Inc., 568 N.W.2d 715 (Minn. App. 1997); New York v. World Interactive Gaming Corp., 714 N.Y.S.2d 844 (N.Y. Sup. Ct. 1999); United States v. Cohen, 260 F.3d 68 (2d Cir. 2001), *cert. denied*, 122 S. Ct. 2587 (2002).

199. U.S. courts do not always properly delineate between personal and subject matter jurisdiction, and they often merge the analysis of both separate but related issues. *Contra* Goss, *supra* note 25, at 59 (suggesting that some of the U.S. cases discussed in this Part of the Article were determined on the basis of personal jurisdiction using the "effects test" indoctrinated under *United States v. Aluminium Co. of America* (*Alcoa*), 148 F.2d 416, 443-444 (2d Cir. 1945)).

200. Australian jurisprudence prefers the common law protective presumptions in respect to the extraterritorial operation of statute. *Supra* Part IV.B.2.a. *But see* Bray v. F. Hoffmann-La Roche, Ltd., (2002) 190 A.L.R. (Austl.):

> In an era of e-commerce, electronic funds transfers, internet trading and information technology there may be much to be said for the view that, absent a contrary statutory intention, the time might have come to move to an "effects" doctrine of jurisdiction developed in the United States which was considered in *Trade Practices Commission v. Australia Iron and Steel Pty Ltd* (1990) 22 FCR 305 at 319.

See, e.g., Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945); *Alcoa*, 148 F.2d at 443-44.

201. *Zippo Mfg.*, 952 F. Supp. at 1124.

case the court did not address the issue of finding personal jurisdiction because each relevant defendant was either physically present or had property located in the United States.[202]

In the case of *Minnesota v. Granite Gate Resorts, Inc.*, the Minnesota Attorney General brought proceedings against Granite Gate Resorts, a Nevada corporation, for "deceptive trade practices, false advertising, and consumer fraud."[203] Granite Gate Resorts provided Internet advertising services via a Web site entitled WagerNet, which facilitated and advertised a particular interactive gambling service. The WagerNet Web site was designed by Granite Gate Resorts; however, the site stated that it was owned by a corporation in Belize.[204] In addition, the WagerNet Web site was hosted by a server located in Belize.[205] The WagerNet Web site promoted the interactive gambling service by inviting people to enter themselves on a mailing list and providing a U.S. toll-free telephone number and a Nevada telephone number to call for more information.[206]

The Court was satisfied that it could exercise jurisdiction in this case, stating that "through their Internet advertising, [the defendants] have demonstrated a clear intent to solicit business from markets that include Minnesota and, as a result have had multiple contacts with Minnesota residents."[207] The Court found that "[a]dvertising in the forum state, or establishing channels for providing regular advice to customers in the forum state, indicates a defendant's intent to serve the market in that state."[208] Accordingly, the Court held that the defendants were subject to Minnesota jurisdiction purely as a result of advertising into Minnesota. It was immaterial that the corporation was based in Nevada and that the physical location from which the Web site's server was hosted was outside the United States in Belize.

In another case, *New York v. World Interactive Gaming Corp.*, the New York Supreme Court considered whether the State of New York could enjoin a foreign corporation, licenced in a foreign jurisdiction, from carrying on the business of an IGSP and from offering interactive gambling services to New York residents.[209] The World Interactive

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202. *Supra* Part IV.A.
203. *Granite Gate Resorts*, 568 N.W.2d at 717.
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.* at 721.
208. *Id.* at 719 (citing Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 112 (1987)).
209. 714 N.Y.S.2d 844, 845 (1999).

Gaming Corp. (WIGC) contended that, because it was operating a legitimate business, acting in full compliance with its licence and all applicable local laws, it should not be subjected to the laws of the State of New York and the United States.[210] The Court rejected WIGC's argument, stating the following:

> A computer server cannot be permitted to function as a shield against liability, particularly in this case where [WIGC] actively targeted New York as the location where they conducted many of their allegedly illegal activities. Even though gambling is legal where the bet was accepted, the activity was transmitted from New York.[211]

The Court found that relevant federal U.S. laws applied to the conduct of WIGC because the language of each law specifically stated it was to apply to foreign commerce.[212] Accordingly, the Court was satisfied that it could exercise jurisdiction over WIGC, thereby extraterritorially applying its anti-interactive gambling laws over a licenced foreign corporation.[213]

In another case, *United States v. Cohen*, Jay Cohen, the co-owner and operator of World Sports Exchange, an interactive casino based and licenced in Antigua, was indicted for alleged violations of the Wire Act of 1961 (Wire Act) after accepting bets from customers physically present in the State of New York via the telephone.[214] Cohen argued that his actions were not unlawful because section 1084(b) of the Wire Act exempted the transmission of betting information between a state and a foreign country where betting was lawful.[215] The defendant further maintained that he did not violate the statute because betting was lawful

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210. *Id.* at 845.

211. *Id.* at 859-60. One commentator asserts that "Congress has clearly chosen to exclude extraterritorial gambling from breaching our borders, and no foreign governmental licensing agency can, or should, alter that." Joel Michael Schwarz, *The Internet Gambling Fallacy Craps Out*, 14 BERKELEY TECH. L.J. 1021, 1043 (1999).

212. Wire Act of 1961, 18 U.S.C. § 1084 (2000); Travel Act, 18 U.S.C. § 1952; Paraphernalia Act, 18 U.S.C. § 1953; *World Interactive Gaming Corp.*, 714 N.Y.S.2d at 851. The legislative history of the Wire Act of 1961, 18 U.S.C. § 1084 (2000), states the following:

> The purpose of the bill is to assist various States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offences and to aid in the suppression of organized gambling activities by prohibiting the use of wire communication facilities which are or will be used for the transmission of bets or wagers and gambling information in interstate and foreign commerce.

World Interactive Gaming Corp., 714 N.Y.S.2d at 851.

213. *World Interactive Gaming Corp.*, 714 N.Y.S.2d at 853.

214. 260 F.3d 68, 70, 71 (2d Cir. 2001); 18 U.S.C. § 1084.

215. Memorandum of Law in Support of Motion Pursuant to 28 U.S.C. § 2255, at 2, *Cohen* (No. 98 CV 4379).

in both the State of New York and Antigua and Barbuda.[216] This argument was similar to that raised by WIGC in *World Interactive Gaming Corp.*[217] However, the Court rejected Cohen's defence, stating that, among other things, Cohen could not rely upon the "safe harbor provision" in section 1084(b) of the Wire Act because the relevant transmissions amounted to the placement of customers' bets rather than the mere provision of information for the purpose of assisting the placement of customers' bets.[218] Consequently, a federal court jury convicted Cohen of violating the Wire Act, and Cohen was subsequently fined US$5000 and sentenced to twenty-one months of jail time by a federal court judge.[219]

It may be gleaned from the expansive approach taken by the U.S. courts to the question of subject matter jurisdiction that, provided there is some element of contact between a foreign resident or corporation, such as a foreign IGSP, and a resident of the forum in respect to the proscribed interactive gambling activity, such as an interactive gambling transaction or advertisement, a U.S. court is likely to be satisfied that it has competency to adjudicate the matter. It appears that this position remains unaffected notwithstanding that the proscribed activity may be lawful in the relevant foreign jurisdiction of the defendant, such as by way of licence, or that the Web site connected to the unlawful or proscribed activity, such as the Web site of the IGSP, itself, may be located in a foreign jurisdiction.

Given that the FCA has yet to consider the jurisdictional scope of the IGA, it is ultimately unclear whether it will follow the trend set by U.S. courts and take an expansive approach to the question of subject matter jurisdiction under the Regulations.[220] It is conceivable that the FCA may follow the U.S. approach, thereby becoming amenable to giving an expansive interpretation to the Regulations, and find that a financial instrument or transaction for the funding of an interactive gambling service which involves a foreign element is sufficiently connected with Australia or otherwise falls within its jurisdictional purview. Therefore, it is possible that the FCA may be willing to find

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216. *Cohen*, 260 F.3d at 73.

217. *World Interactive Gaming Corp.*, 714 N.Y.S.2d at 844.

218. Petitioner's Brief for the United States in Opposition on Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, at 12-13, *Cohen* (No. 01-1234).

219. *Cohen*, 260 F.3d at 78. *See generally* David B. McGinty, *The Near-Regulation of Online Sports Wagering by* United States v. Cohen, 7 GAMING L. REV. 205 (2003).

220. At the time of writing this Article, there is no reported decision where an Australian court has considered any provision of the IGA.

subject matter jurisdiction to adjudicate a cause of action under the Regulations where a foreign resident, such as an IGSP or financial institution or payment system, funds or facilitates the funding of or is otherwise connected with a payment for an illegal interactive gambling service.

C. Enforcement of an Australian Judgment Made Under the Regulations

Once the FCA has subject matter and personal jurisdiction over a foreign corporation defendant, it may hear the complaint or allegation brought under the Regulations and enter a judgment against the foreign corporation defendant. The nature of a judgment handed down by the FCA under the Regulations will depend upon whether the relevant proceedings are civil or criminal and whether the judgment is for a liquidated sum[221] or is equitable in its character.[222] The outcome of these questions will determine the enforcement procedure that is available to a judgment creditor or the Commonwealth.[223]

The enforcement of a FCA judgment in either civil or criminal proceedings brought under the Regulations is largely procedural, assuming that adequate local assets of the defendant are available to satisfy the debt or penalty owed under the judgment, or that the senior officer of a foreign corporation defendant is amenable to incarceration, as the case may be. However, where local assets are insufficient to satisfy a judgment creditor or the Commonwealth, or where the foreign corporation defendant is wholly located outside of the forum of adjudication, the judgment creditor or Commonwealth may have no alternative but to seek the recognition and enforcement of the FCA judgment in a foreign court, usually in the jurisdiction in which the foreign corporation defendant has its assets or is physically present. Accordingly, given the likelihood that many foreign corporation defendants, such as IGSPs or financial institutions or payment systems, will have limited, if any, assets in Australia, or are likely not to be physically present in Australia,[224] the ability for a judgment creditor or the Commonwealth to enforce a judgment of the FCA in a foreign court is

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221. This means that the judgment must be for a fixed or readily calculable sum. Taylor v. Begg, [1932] N.Z.L.R. 286, 290-92 (N.Z.).

222. For example, an injunction or specific performance.

223. A reference to a judgment creditor in this Part of the Article refers to an applicant who has a pecuniary benefit, such as damages, under a judgment entered by the FCA pursuant to the Regulations.

224. Compare Citibank, N.A., which is physically present in Australia and has significant assets located in the jurisdiction.

critical to the overall achievement of the policy objectives of the Regulations.[225] The inability of a judgment creditor or the Commonwealth to enforce its judgment in a foreign court would frustrate the operation of the Regulations.

This Part of the Article summarily evaluates the methods that are available to a judgment creditor or the Commonwealth for the recognition and enforcement of a judgment of the FCA made pursuant to the Regulations in a foreign court.

1. Enforcement of a Civil Judgment by a Judgment Creditor

Generally, each foreign state has its own unique set of rules dealing with the recognition and enforcement of foreign judgments. As a consequence, a judgment creditor must examine the laws relating to the recognition and enforcement of a foreign judgment in each applicable foreign jurisdiction in which it seeks to enforce a judgment of the FCA. Due to the divergence between the laws of foreign states in relation to the recognition and enforcement of foreign judgments, it is difficult to synthesise a set of common principles that may assist a judgment creditor in its enforcement of a FCA judgment made pursuant to the Regulations.[226] Therefore, to assist the discussion in this Part of the Article, the methods that are available to a judgment creditor for the recognition and enforcement of a judgment of the FCA are nonexclusively delineated as arising under either the common law of a foreign state or the statute of a foreign state.[227]

a. Enforcement of a Judgment Under the Common Law of a Foreign State[228]

As a general proposition, English-based common law jurisdictions often adopt a hybrid approach, under both statute and the common law, to

225. *Supra* Part III.B.

226. See BRADFORD A. CAFFREY, INTERNATIONAL JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN THE LAWASIA REGION: A COMPARATIVE STUDY OF THE LAWS OF ELEVEN ASIAN COUNTRIES INTER-SE AND WITH THE E.E.C. COUNTRIES pt. 3 (1985), for a comparison of the laws relating to the recognition and enforcement of foreign judgments between Asia and Europe.

227. Niv Tadmore, *Recognition of Foreign in Personam Money Judgments in Australia*, 2 DEAKIN L. REV. 129, 130-31, 166 (1995).

228. Evidently, the discussion in this Part of the Article is unlikely to assist a judgment creditor seeking to enforce a judgment in a civil law jurisdiction.

the recognition and enforcement of certain types of foreign judgments.[229] Accordingly, it may be useful to consider briefly the recognition and enforcement of a foreign judgment from a common law perspective, as these rules may be somewhat consistent across English-based common law states.

The recognition and enforcement of a foreign judgment at common law is historically based on the "doctrine of obligation," as stated by Justice Blackburn in *Schibsby v. Westenholz*: "The judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on him to pay the sum for which judgment is given, which courts in this country are bound to enforce."[230] However, the modern justification for the enforcement of foreign judgments is now more closely aligned with public interest considerations of limiting the repetition of litigious claims, commonly referred to in the United States as the "policy of preclusion" under which "one trial of an issue is enough."[231]

Broadly, the common law allows a plaintiff to make an action in personam on a foreign judgment in the court of the forum by way of two methods, as follows:

(a) a plaintiff may enforce a judgment obtained in a competent court in a foreign country by bringing an action for a liquidated sum, thus relying on the foreign judgment as imposing an obligation on the defendant to pay the sum adjudged;[232] or alternatively

(b) a plaintiff may bring a new action in the forum based on the original cause of action relying on the foreign judgment to estop the defendant from raising any defence, other than fraud, which was, or which could have been, raised in the foreign proceedings.[233]

Importantly, under either method, the judgment must be for a fixed monetary sum and cannot be a nonmoney judgment, such as an equitable remedy.

A common law state that has a statutory regime for the registration of foreign judgments will usually prevent a judgment creditor from enforcing a judgment at common law where that judgment can be

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229. For example, Australia gives recognition and enforcement of judgments in personam at common law and judgments registered under the Foreign Judgments Act of 1991 (Austl.). CAFFREY, *supra* note 226, at 67.

230. *Id.* at 159.

231. Carl Zeiss Stiftung v. Rayner & Keeler Ltd., [No 2] 1 A.C. 853, 967 (1967); *see also* MARTIN DAVIES ET AL., CONFLICT OF LAWS: COMMENTARY AND MATERIAL 305 (1997).

232. *See* LexisNexis Butterworths OnLine, *Halsbury's Laws of Australia*, [85-1915].

233. *Id.*

enforced by registration.[234] In these cases, a judgment creditor must have regard to the relevant statutory regime and is barred from raising a common law action.[235]

b. Enforcement of a Judgment Under a Statute of a Foreign State

Some foreign states have adopted a legislative regime to provide for the efficient recognition and enforcement of certain foreign judgments.[236] The legislation provides for the enforcement of judgments rendered by superior and specified inferior courts in foreign states. The legislative regime is based on the foundation of "substantial reciprocity."[237] First, the courts of a state are urged to recognise a foreign judgment rendered in a situation in which they would *mutatis mutandis* have exercised jurisdiction themselves.[238] Second, the legislation will only apply to specified foreign courts if substantially reciprocal arrangements have been made for the enforcement of judgments of the state in the foreign state concerned.[239]

Principally, recognition and enforcement of a foreign judgment is based on its registration in an appropriate court of the forum. By way of example, a foreign judgment may only be registered pursuant to the Foreign Judgments Act of 1991 (Austl.) provided that, among other things, the foreign judgment:[240]

1. is a judgment recognised under the Foreign Judgments Act of 1991[241] and filed with an Australian court within six years of it being made;[242]

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234. Foreign Judgments Act, 1991, § 10 (Austl.).

235. *Infra* Part IV.C.1.b.

236. Uniform Foreign Money-Judgments Recognition Act (1988 Conn. Pub. Acts 88-39); Foreign Judgments Act, 1991 (Austl.).

237. NYGH & DAVIES, *supra* note 107, at 200.

238. *Id.*

239. Foreign Judgments Act, 1991, § 5(1), (3), (6) (Austl.).

240. *See generally* LexisNexis Butterworths OnLine, *Halsbury's Laws of Australia*, [85-2080]-[85-2140].

241. The Foreign Judgments Act of 1991 (Austl.), extends to judgments made by superior and specified inferior courts of: Canadian province of Alberta; Bahamas; Canadian province of British Columbia; British Virgin Islands; Cayman Islands; Dominica; Falkland Islands; Fiji; France (including specified inferior courts); Germany (including specified inferior courts); Gibraltar; Grenada; Hong Kong Special Administrative Region of the People's Republic of China; Israel (including specified inferior courts); Italy (including specified inferior courts); Japan (including specified inferior courts); Korea (including specified inferior courts); Malawi; Canadian province of Manitoba; Montserrat; New Zealand (including specified inferior courts); Papua New Guinea; Poland (including specified inferior courts); St. Helena; St. Kitts and Nevis; St. Vincent and the Grenadines; Seychelles; Singapore; Solomon Islands; Sri Lanka (including specified inferior courts); Switzerland (including specified inferior courts); Taiwan (including specified inferior courts); Tonga; Tuvalu; United Kingdom (including specified inferior courts);

2. is final and conclusive.[243] The fact that an appeal is pending does not ordinarily render the judgment inconclusive and incapable of registration, but it may be sufficient to justify an adjournment of the registration proceedings; and
3. is for a sum of money, unless it is a specified nonmoney judgment to which the Foreign Judgments Act of 1991 applies,[244] and is not in respect of taxes or a fine or criminality.[245]

On the basis of substantial reciprocity between Australia and those foreign states whose judgments may be recognised and enforced under the Foreign Judgments Act of 1991, it stands that a judgment creditor may correspondingly enforce its FCA judgment made pursuant to the Regulations upon registration with such relevant foreign states.[246]

c. Summary and Application

The practical issue of a foreign court's recognition and enforcement of a judgment of the FCA is compounded by the fact that a judgment creditor or the Commonwealth, as the case may be, may potentially have to seek enforcement of its judgment in any foreign state in the world, depending upon the location of the assets or physical presence of the foreign corporation defendant. The recognition and enforcement of the FCA judgment under common law by a judgment creditor or the Commonwealth is inherently problematic for the following reasons:

1. in many instances, a relevant foreign court may not be an English-based common law state and, accordingly, may not recognise the competence of the jurisdiction of the FCA;
2. given that recognition and enforcement of a foreign judgment is based on the cumbersome common law action of a judgment debt, it may be procedurally difficult for a judgment creditor to enforce its judgment in a foreign common law state; and

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and Western Samoa. Foreign Judgments Act, 1991, § 5 (Austl.); Foreign Judgments Regulations, 1992 (Austl.). Most noticeably, the Foreign Judgments Act, 1991 (Austl.) does not extend to the United States.

242. Foreign Judgments Act, 1991, § 5(1), (3), (6) (Austl.).

243. *Id.* §§ 4-5. "'[A] final judgment' means a judgment obtained in an action by which the question whether there was a pre-existing right of the plaintiff against the defendant is finally determined, in favour either of the plaintiff or of the defendant." *In re Riddell*, 20 Q.B.D. 512, 516 (1888) (Eng.).

244. Foreign Judgments Act, 1991, § 5(4) (Austl.).

245. *Id.* § 3(1) (defining "enforceable money judgment").

246. *Id.* § 5; Foreign Judgments Regulations, 1992 (Austl.).

3. the process of enforcing a FCA judgment in a foreign court may be vastly expensive, and may in fact outweigh the unsatisfied debt remaining under the judgment in the first instance.

The recognition and enforcement of the FCA judgment under statute in a foreign court by a judgment creditor or the Commonwealth will in most cases be limited to the foreign jurisdictions that have a reciprocal enforcement arrangement with Australia. Where the state of a foreign court is not party to a reciprocal enforcement arrangement with Australia, a judgment creditor or the Commonwealth must seek the recognition and enforcement of its FCA judgment by some other method, such as under the common law. Therefore, it is far from certain whether a judgment creditor may be able to have its judgment recognised and enforced by a foreign court, and even if enforcement is possible, whether it is cost effective vis-à-vis the unsatisfied debt under the judgment to do so.

2. Enforcement of a Criminal Judgment by the Commonwealth

A judgment made by the FCA under the Regulations in favour of the Commonwealth will involve either the payment of a penalty by the foreign corporation defendant to the Commonwealth or the imprisonment of a senior officer of the foreign corporation defendant by the Commonwealth. However, the rules relating to the recognition and enforcement of a judgment of the FCA that is criminal in nature are usually divorced from those rules that relate to civil judgments. While it is beyond the scope of this Article to discuss the enforcement of foreign criminal judgments in any great detail, adopting a similar approach to the discussion of the enforcement of civil foreign judgments in Part IV.C.1 of this Article, the following hallmarks should be considered:

1. common law courts will generally "refuse to enforce a foreign [criminal] penalty whether directly at the suit of a foreign government or indirectly where in a suit between private citizens one party claims that the rights of the other have been modified or extinguished by a [criminal] law";[247]
2. recognition of foreign judgments statutes usually prevents the enforcement of a criminal penalty, except civil compensation that may be awarded in criminal proceedings;[248] and

247. NYGH & DAVIES, *supra* note 107, at 340-41; Banco de Vizcaya v. Don Alfonso de Borbon y Austria, 1 K.B. 140, 141 (1935) (Eng.).

248. Foreign Judgments Act, 1991, § 3(1) (Austl.) (defining "enforceable money judgment").

3. the imprisonment of a senior officer of a foreign corporation defendant is axiomatic with the FCA having personal jurisdiction to hear the cause of action brought under the Regulations. Therefore, a senior officer of a foreign corporation defendant will always be amenable to incarceration, for otherwise, the FCA would not have had personal jurisdiction over the senior officer to adjudicate the matter in the first instance.

Accordingly, unless the foreign corporation defendant has sufficient assets in the jurisdiction to satisfy a criminal judgment of the FCA made pursuant to the Regulations or its senior officers are in custody or present in Australia, it is unlikely that the Commonwealth may enforce the judgment in a foreign court.

V. CONCLUSION

The advent of e-commerce and its ability to congregate economic markets has reinforced the Commonwealth's commitment to ensure that commercial activities undertaken via the Internet are suitably regulated.[249] The ability for the Commonwealth Parliament to legislate extra-territorially in respect to certain e-commerce activities must ultimately be consistent with the overarching principles of public international law as affected by the body of cyberspace jurisprudence. However, the unique nature of cyberspace, together with its ability to transcend and, perhaps in some cases, merge jurisdictional boundaries, would seem to only further complicate the already blurred territorial lines that may exist between Australia and other nation-states.

While the Commonwealth Parliament may acknowledge the legal difficulties and problems associated with the enactment of certain e-commerce legislative instruments that may have a direct or indirect effect upon individuals and corporations domiciled overseas, the Commonwealth Parliament is ultimately not discouraged from promulgating legislative instruments that are drafted in such a manner so as to promote the widest possible legislative reach.[250] Whether such legislative intent elicited by the Commonwealth Parliament offends the principles of public international law, including such other intrinsic

249. While commercial use of the Internet has prominently existed since the mid-1990s, only recently has there been an active push by the Commonwealth of Australia Government to legislate in this area. *See* Electronic Transactions Act, 1999 (Austl.); Spam Act, 2003 (Austl.).

250. *See* Austl., H of R, *Debates*, 9 Oct. 2003, at 20980 (Austl.).

presumptions against legislating extraterritorially, is a matter which remains open and which is not considered by this Article.[251]

Subject to the foregoing caveat, it appears likely that an Australian court would give full effect to any legislative pronouncement that a Commonwealth e-commerce legislative instrument has extraterritorial operation. In these instances, an Australian court would usually be satisfied that is has subject matter jurisdiction to adjudicate the matter before it, provided that the language of the relevant legislative instrument has been drafted in such a manner so as to capture the conduct at issue. Moreover, the judicial trend of Australian courts suggests that a relevant court would not be reticent from finding subject matter jurisdiction in cases involving conduct arising via the Internet, even in circumstances where the conduct at issue may have some other connection with a foreign forum or where a determination by an Australian court is likely to have a direct or indirect judicial impact upon a party domiciled overseas.[252]

However, the question remains open as to whether Australian courts will be as forthcoming as their U.S. counterparts when confronted with questions of finding subject matter jurisdiction under e-commerce legislation.[253] Even though it appears likely that an Australian court may find subject matter jurisdiction over a cause of action brought under an appropriately drafted Commonwealth e-commerce legislative instrument, an Australian court must equally be satisfied that the foreign defendant is amenable to service. In *Flaherty v. Girgis*, the High Court of Australia highlighted the importance of personal jurisdiction in contrast to subject matter jurisdiction.[254] Acting Chief Justice Mason and Justices Wilson and Dawson stated that

> the jurisdiction of a court of unlimited jurisdiction does not depend upon subject-matter but upon the amenability of the defendant to the writ. . . . [J]urisdiction over the subject-matter of the action, once service has validly been effected, derives from the same source whether or not the service is extraterritorial.[255]

Accordingly, while not dissimilar to any other matter involving an Australian court finding personal jurisdiction over a foreign defendant, it may be particularly difficult for an Australian court to be satisfied that a

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251. See Part IV.B.2.a, for an examination of the methods to determine the extraterritorial operation of legislation.

252. *See supra* Part IV.B.3.a (discussing *Gutnick*).

253. *Supra* Part IV.B.4.

254. (1987) 162 C.L.R. 574 (Austl.).

255. *Id.* at 598.

foreign defendant is amenable to service in an e-commerce environment. This especially may be the case where the relevant foreign defendant operates via the Internet from a remote location in the world or has elected to conduct its operations by way of "jurisdictional arbitrage."[256] In addition, even where an Australian court has appropriate jurisdiction to adjudicate a matter under a Commonwealth e-commerce legislative instrument, a judgment creditor or the Commonwealth may find it difficult to achieve the practical enforcement or satisfaction of its judgment in the jurisdiction of the foreign defendant, thereby frustrating the Commonwealth Parliament's intention for the relevant legislative instrument to operate extraterritorially.

In conclusion, the Commonwealth Parliament's mere extension of its jurisdiction to matters that arise outside of its territory via the Internet, such as e-commerce, may not, in and of itself, be sufficient for an Australian court to find jurisdiction and adjudicate the matter in accordance with Australian law.

256. In this context, "jurisdictional arbitrage" refers to the election made by an entity to conduct its business activities or operations from a particular jurisdiction on the basis that that jurisdiction is favourable to the entity for reasons including, among other things, taxation, licensing, or other forms of government regulation.