

# The State of Play in Games Regulation

**Simone Brandon identifies some of the problems with Australia's multi-level approach to regulating games on mobile phones and elsewhere and outlines Hutchison's position**

## Instructions

When the Greek government introduced a law banning any form of electric, electro-mechanical or electronic game devices many people wondered what the regulatory world was coming to. The Greek government passed the law because it said it was incapable of distinguishing innocuous video games from illegal gambling machines and so it was best to ban all games<sup>1</sup>. Whilst the law was subsequently held to be unconstitutional<sup>2</sup> it begs the question - what is the best way to regulate games? In the Australian context the issue is broader than distinguishing games from gaming or gambling. The key question is how to achieve regulatory consistency across game content regardless of the means of delivery.

## **"The key question is how to achieve regulatory consistency across game content regardless of the means of delivery"**

Games are available to purchase and play using a variety of technologies. Platforms include PC, console (eg Xbox, PS2), handheld (eg GameBoy Advance), mobile proprietary handsets (eg N-Gage) and miscellaneous applications (eg toys such as Tamogotchi and PDAs). In the mobile telecommunications arena games are offered via SMS, WAP and Java applications. Many mobile phones offer sophisticated games for users – the advent of 3G technology even allows for real-time multiplayer game experiences to occur between users who do not know each other and may be in different locations within Australia<sup>3</sup>. Apart from the range of games and the quality of game experience the main difference to the user is how the game is accessed. PC, console and handset games are purchased on physi-

cal media where as mobile telecommunication games are obtained directly from the mobile or are requested online and sent to the mobile phone.

The variety of games and technological platforms creates the need for a consistent regulatory approach. However this is not currently the case; games regulation is found in a number of regulatory frameworks.

## Level 1

The first regulatory stage is the Commonwealth *Classification (Publications, Films and Computer Games) Act 1995*. A "computer game" is defined as a computer program and associated data capable of generating a display on a computer monitor, television screen,

liquid crystal display or similar medium that allows the playing of an interactive game. To be advertised, sold or hired computer games must be classified by the Office of Film and Literature Classification (**OFLC**) under the Guidelines for the Classification of Films and Computer Games 2003 (**OFLC Guidelines**) and must carry the appropriate classification on packaging.

The OFLC has indicated that it will only classify games which can be physically purchased, for example on a cartridge or memory stick. It does not classify games which may be delivered wirelessly to mobile devices or via the Internet unless requested to classify a game by the Australian Broadcasting Authority (**ABA**).

## Level 2

The second regulatory framework is found within Schedule 5 of the *Broadcasting Services Act 1992 (Online Provisions)*. These provisions regulate the provision of 'Internet Content' – defined somewhat circuitously as stored information provided by means of a listed carriage service that enables end-users to access the internet.

Under the Online Provisions, a person may complain to the ABA about "prohibited content" or "potential prohibited content" on the internet, and the ABA must investigate the complaint. "Prohibited content" is content that has been classified Refused Classification or X by the OFLC, or as R where access to the content is not subject to a restricted access system. As there is no R rating for games, any game available on the Internet that has been refused classification would be prohibited content. A game will be potential prohibited content if it has not been classified by the OFLC, but if it were to be classified, there is a substantial likelihood that the content would be prohibited content. If the ABA is satisfied that the game contains potential prohibited content, the ABA must request the OFLC to classify the content.

The Online Provisions clearly apply to the provision of games by Australian providers in Australia on the world wide web. Whether the Online Provisions extend to the provision of games (or content in general) delivered by a mobile carrier to a mobile phone has been a topic of debate between regulators and mobile carriers and is a topic that goes beyond the scope of this article.

The Department of Communications, Information Technology and the Arts (**Department**) is undertaking a review of the regulation of content delivered over mobile communications devices<sup>4</sup>. This review seeks to capture information about the range of convergent mobile devices, the breadth of content available, report on the extent to which existing regulatory approaches apply to new services and consider what additional regulation may be necessary.



The closing date for submissions to this review was in early September 2004 however it is not known when a report will be delivered. The mobile content regulation review follows on from the Department's review of the Online Provisions which commenced in September 2002 - the report was made public in May 2004.

## First person shooter

The Department has stated that the "nature of the access device (whether it is a PC, games device or 3G mobile phone) does not affect the question of whether the content is regulated by Schedule 5"<sup>6</sup>. Consistent with this reasoning, Hutchison's view is that the Online Provisions and supporting Code of Practice developed by the Internet Industry Association (IIA) provide a working model of government and self-regulation including complaints investigation and initiatives such as education and research. This model can similarly be adapted to cover new developments in content delivery, including games, both to fixed and mobile devices whether or not they are telecommunications devices. It would be a curious result if the games used by purchasers of a Nokia N-Gage as a games console (and to make a few calls) were regulated by a different regime to the games used by a the purchaser of a mobile.

A revised IIA Code of Practice in relation to Internet Content (**IIA Code**) was available for public comment and was registered by the ABA at the end of May 2005. The IIA Code incorporates new provisions specifically aimed at the regulation of content including games delivered to mobile devices. These provisions have been drafted with the protection of consumers against the inappropriate supply of adult content in mind, and with the objective of maintaining regulatory consistency.

Hutchison and other industry players were actively involved in the drafting of the IIA Code. The underlying intent of that code is to enable the assessment of content including games by authorised assessors based on the OFLC categories but not to incorporate the formal OFLC pre-classification scheme, requiring classification by the OFLC.

Where text, visual images and games are likely to contain sex, violence,



nudity, drug use or adult themes, an appropriately qualified (OFLC trained) person within the carrier, content provider or a third party should assess the relevant content. Hutchison supports an 'assessment' regime as opposed to a 'classification' regime for content provided over mobile devices as it would be commercially unmanageable to require all content to be reviewed by the OFLC. Games sold on physical media are more suited to pre-classification as the game cannot be changed once on the market (a new version must be physically created and released). Mobile game development is such that new versions or new content can easily be introduced and put to market. However the assessment model would allow regulatory continuity by reference to the OFLC Guidelines and an alignment with the regime set out in the Online Provisions.

## Entering the asteroid belt

In May 2004, the Minister for Communications, Information Technology and the Arts (**Minister**) issued a Direc-

tion in relation to content delivered on mobiles. The Minister directed the Australian Communications Authority (**ACA**) to make certain service provider determinations in relation to premium SMS, MMS and 'proprietary network services', the latter phrase attempting to include content delivered by mobile carriers to their customers<sup>6</sup>. This creates a third regulatory framework for games, in addition to the OFLC requirements and the Online Provisions, as the Minister seeks to regulate mobile content provision via the ACA through service provider determinations applicable to carriers.

The Minister's concern is to regulate adult content and the ACA has been directed to make a service provider determination putting in place appropriate measures to require restricted access to adult services<sup>7</sup>. However the Minister has determined that 'adult' content available over mobile devices should include content that would be assessed as MA or R under the OFLC Guidelines. This means that in addition



to the three potential regulatory frameworks for games, there is an inconsistent approach to providing access to games. The result is that games that fall within the MA15+ category are:

- restricted to purchasers over the age of 15 when provided on cartridge;
- restricted to users over the age of 18 when provided on a mobile phone;
- not restricted when provided on the world wide web.

Again, Hutchison and other industry players have been actively involved in providing input to the ACA to assist in developing the proposed service provider determination, expected to be issued by the ACA in June 2005.

There are four key elements for the effective regulation of content services, including games:

- Age verification

Providers of age restricted content should verify any request to access such content is made by the account holder for the relevant service and that the account holder is 18 years or over. Age verification processes would differ between providers however the same principles would apply to all.

- Pre-assessment of content type

An 'assessment' process is the most viable solution. A recognised expert industry association could undertake the administration of the content assessment scheme and accreditation standards could be overseen by ACMA. The association could maintain a register of accredited assessors and ensure accreditation standards for assessors are maintained in consultation with ACMA.

- Complaint handling and issues resolution

Where there is a complaint about game content ACMA (currently the ABA) could receive escalated complaints and issue take down notices as is the case for internet content. Similarly, content classification matters could be referred to the OFLC.

## Classification Categories

- G** – suitable for all ages
- G(8+)** – suitable for ages under 15 but may not be appropriate for those under 8
- M15+** – recommended for mature audiences 15 and over
- MA15+** – restricted to person 15 years and over
- RC** – refused classification - cannot legally be shown in any medium

*Note: There is no R rating for games*

- Enforcement

Under the ACMA arrangements it is assumed the current activities of the ABA in relation to content assessment, escalated complaints and take down notices would continue in dealing with internet content. There is an ongoing role for ACMA to deal with games in the context of Online Provisions. ACMA could undertake its own investigations and deal with breaches of any determination.

It is these elements that the industry have been debating with the ACA over a long period of time. Despite the prolonged process Hutchison expects the ACA's determination to be a workable interim solution pending the outcome of the Department's review of content regulation for mobiles.

## Hints on game play

The merger of the ABA and the ACA to form the Australian Communications and Media Authority (expected to be established by 1 July 2005) is an opportunity to establish and implement rational regulatory policy. However, as converged industries (communications, media and content) are already operating in the market place, the industry is best placed to identify practical approaches to implementing sound public policy for content services including games supplied via various devices (mobiles, PCs, PDAs, laptops) and network platforms (2G, 2.5G, 3G, internet, telephony services). It is important for structures and measures to be established that address the government's immediate public policies and provide

the flexibility to maintain a balanced approach to regulating converged markets. Regulatory consistency is key for consumers, providers and regulators alike. Whilst Australian regulators have not adopted the single bomb approach of the Greeks in attempting to turn off all games, their scattergun approach is also creating problems. There is a need to take a step back and review the entire playing field before moving to the next level.

## Game Over

### *Simone Brandon is Corporate Counsel at Hutchison Telecoms*

(Endnotes)

<sup>1</sup> Kathimerini, 30 May 2002, <http://www.ekathimerini.com/4dcgi/news/content.asp?aid=17011>

<sup>2</sup> BBC News, 10 September 2002, <http://news.bbc.co.uk/1/hi/technology/2249656.stm>

<sup>3</sup> see [www.badlands.com.au](http://www.badlands.com.au)

<sup>4</sup> Discussion Paper available at [www.dcita.gov.au](http://www.dcita.gov.au)

<sup>5</sup> Department of Communications, Information Technology and the Arts, "Review of the operation of schedule 5 to the Broadcasting Services Act 1992", May 2004

<sup>6</sup> Premium Service Determination 2004 (No. 1)

<sup>7</sup> Australian Communications Authority (Service Provider Determination) Direction 2004 (No.2)