

**TOWARDS THE REGULATION OF INTERACTIVE GAMBLING: AN ANALYSIS
OF THE GAMBLING REGULATORY FRAMEWORK IN SOUTH AFRICA**

by

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DECLARATION

I, Segokane Lawrence Monnye, hereby declare:

- that “Towards the regulation of interactive gambling: an analysis of the gambling regulatory framework in South Africa” is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references;
- That in pursuit of scholarly work, I have published less than a quarter of this work under my credentials in the UNLV Gambling Law Journal;
- Further, that I have not previously submitted this work, or part of it, for examination at this or any other higher education institution.

Signature:

Date of submission: February 2016

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ABSTRACT

With the exception of horse racing, any form of gambling was criminalised in South Africa until the dawn of constitutional democracy in 1994. In the same year, the Lotteries and Gambling Board Act, 1993, came into force decriminalising, amongst others, casinos and gambling games within the Republic. This Act has since been repealed and gambling is governed by the National Gambling Act, 2004, as well as by provincial gambling laws. Interactive / online gambling is illegal pending authorisation by a national legislation. Such legislation, the National Gambling Amendment Act, 2008, seeking to regulate interactive gambling awaits proclamation of the date of its commencement by the President. The National Gambling Policy, 2016, dashes any hope of regulation of interactive gambling, however, as it seeks to embargo the introduction of (new) forms of gambling, including but not limited to interactive gambling. The scourge of problem gambling and the protection of traditional forms of gambling, that is, casinos, are the main reasons for advocating for the continued prohibition of interactive gambling.

Problem gambling is not unique to interactive gambling, but affects all modes of gambling. South Africa is among countries with a high rate of problem gambling. It is feared that interactive gambling will exacerbate the scourge of problem gambling as gamblers with access to the internet will now have unlimited gambling opportunities around the clock. On the other hand, interactive gambling offers practical solutions to the implementation of harm minimisation strategies to deal with problem gambling such as limitations on gambling deposits, losses and time.

Prohibition of interactive gambling is difficult to enforce and deprives the country of an opportunity to control, through licensing, this mode of gambling and possible benefit from taxation and licensing fees. It further exposes gamblers – who despite prohibition choose this mode of gambling – to unregulated and illegal gambling websites. This thesis attempts to provide safeguards for regulation of interactive gambling and to embrace the benefits of the technological development that makes interactive gambling a reality. The United Kingdom (UK) is a prime example of a

country that has successfully legalised and licensed interactive gambling in its jurisdiction.

KEY TERMS

Interactive gambling; online gambling; remote gambling; land-based gambling; problem gambling; gambling disorder; gambler; gambling provider; gambling licence; harm-minimisation.

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ABBREVIATIONS

EU	European Union
CJEU	Court of Justice of the European Union
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
IGA	Interactive Gambling Act 84 of 2001
LCCP	Licence Conditions and Codes of Practice
NGB	National Gambling Board (to be replaced by NGR)
NGR	National Gambling Regulator
NHA	National Horseracing Authority
NRGP	National Responsible Gambling Programme
TBVC	Transvaal, Bophuthatswana, Venda and Ciskei
TFEU	Treaty on the Functioning of the European Union
UIGEA	Unlawful Internet Gambling Enforcement Act
UK	United Kingdom
USA	United States of America
WTO	World Trade Organisation

UPDATE

On 01 April 2016, the Minister of Trade and Industry published the National Gambling Policy, 2016, having obtained Cabinet approval on 17 February 2016. It replaced the Gambling Policy Review, 2015.

Accordingly, the thesis has been updated to reflect the National Gambling Policy, 2016.

CHAPTER 1: INTRODUCTION TO THE GAMBLING SECTOR IN SOUTH AFRICA

1.1 Introduction

Gambling, with the exclusion of horse racing, has always been criminalised in South Africa for reasons of immorality.¹ Since 1994, however, gambling has metamorphosed into an acceptable recreational or leisure activity² and is duly recognised by the Constitution (Interim Constitution of the Republic of South Africa, 1993 and its replacement the Constitution of the Republic of South Africa, 1996) as an activity for regulation by national and provincial spheres of government.³ The economic impact of gambling is partly responsible for its transition from an illegal activity to a recreational economic activity.⁴ Apart from its potential for job creation, gambling provides opportunities for government to generate revenue through taxes and licence fees. For instance, the provincial spheres of government consider gambling to be one of their most important sources of revenue, with a combined gross gambling revenue of more than R16 billion in 2012.⁵

More interestingly however is the increasing impact of interactive gambling on revenues generated from interactive gambling in the European Union. The annual

¹ Gambling Review Commission *Review of the South African gambling industry and its regulation* (September 2010) 8 summarising the legal position of gambling before and after 1994 constitutional dispensation in which gambling other than betting on horseracing was illegal. The then National Party led government which came to power in 1948 and ruled until 1994 then described gambling as an “evil capable of doing immeasurable harm to the public” – Sallaz J “The making of the global gambling industry: an application and extension of field theory” 2006 *Theory and Society* 265–297 274.

² Carnelley M “A précis of the South African gambling industry” 2004 *Gaming Law Review* 3–9 3 observes that changes in public policy and legislative recognition of certain gambling activities would positively make South Africa a “haven” for gambling.

³ Initially Schedule 6 of the Interim Constitution of the Republic of South Africa, 1993, and subsequently Part A in Schedule 4 of the Constitution of the Republic of South Africa, 1996, makes provision for regulation of gambling by both national and provincial spheres of government.

⁴ The report of the Wiehahn Commission cited as Lotteries and Gambling Board *Main report on gambling in the Republic of South Africa* (Pretoria March 1995) 63–64 hinting at the economic effects of legalising gambling in South Africa, which includes massive job opportunities due to the labour-intensive nature of the casinos’ (land-based gambling establishments) development of human capital and stimulation of other industries such as service and manufacturing industries.

⁵ PricewaterhouseCoopers *Betting on Africa: Gambling outlook for 2013–2017 (South Africa – Nigeria – Kenya)* (November 2013) 5.

revenues generated in 2008 by the gambling service sector, measured on the basis of gross gambling revenue (that is, stakes less prizes but including bonuses), were estimated to be €75,9 billion.⁶ A fraction of this amount, that is, 7,5% or €6,16 of the revenue generated by the gambling service sector, is derived from interactive gambling.⁷ The interactive gambling sector in the EU is generating increased revenue that is projected to rise above €13 billion by 2015,⁸ with the UK set to take a substantial share. By the end of the financial year 2013/14, the UK – one of the EU members legalising interactive gambling – reported gross gambling revenue of more than £1 billion from its interactive gambling sector.⁹ This amount is expected to increase to more than £2 billion in the financial year 2014/2015, following the introduction of the Gambling (Licensing and Advertising) Act 2014, which effectively requires all interactive gambling providers offering or advertising their interactive gambling services in the UK to be licensed by the latter's Gambling Commission.¹⁰

As interactive gambling is prohibited in SA, little is known about the market and the potential for growth of this segment of the gambling sector. Figures for interactive gambling in South Africa are generally estimates and therefore not very reliable, despite the credibility of the source.¹¹ Nevertheless, Betfair – a renowned interactive corporation offering interactive gambling services in the UK that has expressed interest in the South African market – estimated that the South African interactive gambling market was worth over US\$450 million in 2012.¹² In the same year, the IT Web Financial issued a media release estimating that legal interactive gambling could rake in R110 million in taxes for the government in South Africa.¹³ All in all, this

⁶ European Commission *Green paper on on-line gambling in the internal market* (24 March 2011) 6–7.

⁷ European Commission *On-line gambling* 1–6.

⁸ European Gaming and Betting Association Market reality http://www.egba.eu/media/FACTSHEET_MARKET_REALITY.pdf (Date of use: 04 January 2016).

⁹ Gambling Commission *Annual Report* (2014/15) 12.

¹⁰ Gambling Commission *Annual Report* 12.

¹¹ National Centre for Academic Research into Gaming *Internet gaming and South Africa: implications, costs and opportunities* (Cape Town 1999) 6 expressing its frustration regarding absence of statistics owing to stance prohibiting interactive gambling in the country. It lamented that “*In parallel with the proliferation of internet usage internationally, and in South Africa, gambling on the net is growing at a high rate. Because the industry is at present illegal in most parts of the world and inadequately regulated in most of the others, accurate statistics of its size are difficult to come by.*”

¹² Betfair Presentation for the South Africa Gambling Review Commission (12 July 2010). The author of this thesis accompanied the South Africa Gambling Review Commission to this presentation.

¹³ Mawson N “Don’t bet on online gambling” http://www.itweb.co.za/index.php?option=com_content&view=article&id=40619:don... (Date of use: 01 February 2011).

point to potential economic benefits from interactive gambling in the form of taxation and licensing fees.

The financial possibilities of gambling in general encouraged gambling operators to take advantage of the developing technological innovations and to introduce interactive gambling, including in South Africa. Prior to the decision in *Casino Enterprises (Pty) Ltd v Gauteng Gambling Board*¹⁴ outlawing interactive gambling, gambling operators led by Piggs Peak and Casino Enterprises had been offering interactive gambling in South Africa. As mentioned above, international interactive gambling providers such as Betfair and Virgin Games, which are both based in the UK, were prepared to offer interactive gambling in South Africa provided it was properly regulated within the gambling environment.¹⁵ As no framework existed these conditions could not be met.

While the perils of location-based gambling such as problem gambling and its associated characteristics, including but not limited to criminal behaviour, substance and drug abuse and financial difficulties, are relatively well known,¹⁶ there is little information on whether interactive gambling will exacerbate or alleviate problem gambling. Interactive gambling offers more regulatory challenges, for example, the barring of underage gamblers, detection of gamblers with a gambling problem and provision of interactive counselling and treatment, all of which are not easy to regulate online. Interactive gambling will further be subjected to the same pitfalls of all internet business transactions such as money laundering, tax avoidance and hacking of personal gambling accounts.¹⁷ As pointed out by the CJEU in *Liga Portuguesa de Futebol Profissional and Bwin International Ltd, formerly Baw International Ltd v Departamento de Jogos da Santa casa da Misericórdia de Lisboa*,¹⁸ the lack of direct contact between interactive gambling operators and

¹⁴ *Casino Enterprises (Pty) Ltd v Gauteng Gambling Board* 2011 (6) SA 614 (SCA).

¹⁵ Representation by UK Virgin Games and Betfair “Presentation for the South Africa Gambling Review Commission”.

¹⁶ Petry N “Pathological gamblers, with and without substance abuse disorders, discount delayed rewards at high rates” 2001 *Journal of Abnormal Psychology* 482–487.

¹⁷ Smith A “Controversial and emerging issues associated with cybergambling (e-casinos)” 2004 *Online Information Review* 435–443.

¹⁸ *Liga Portuguesa de Futebol Profissional and Bwin International Ltd, formerly Baw International Ltd v Departamento de Jogos da Santa casa da Misericórdia de Lisboa* C–42/07, ECR [2009] 70.

consumers exposes the latter to risks of fraud by unscrupulous interactive gambling operators that are different to the risk posed by traditional location-based gambling establishments. The CJEU further highlighted in *Carmen Media Group Ltd v Land Schleswig-Holstein*¹⁹ the relative accessibility of interactive gambling, the isolation of the gambler and the absence of social control as some of the factors contributing to the development of gambling addiction, the squandering of money, and many other negative consequences.²⁰ The potential risks in interactive gambling have prompted EU member states through the European Union Commission to initiate a research study with a key focus on consumer protection, prevention of fraud, incitement to squander on gaming as well as the general need to preserve public order.²¹

The position is thus that while interactive gambling may contribute hugely to the fiscus and consequently assist the state in discharging its social responsibilities, the dangers inherent in gambling that are exacerbated by the nature of interactive gambling result in an ambivalent approach to questions about the regulation of interactive gambling. Regulations to manage interactive gambling in South Africa have already been prepared for promulgation in terms of the National Gambling Amendment Act,²² which provides for regulation of “interactive gambling”. However, uncertainties regarding the adverse socio-economic effects of interactive gambling have led to both the Cabinet and Parliament (that is, the executive and legislative branches of government) to reconsider the approval of the regulations. The commencement date for the National Gambling Amendment Act has been delayed, pending the enactment of regulations governing interactive gambling. Yet, when the regulations were introduced for public discourse, Parliament appeared to be reluctant to proceed with the development and enactment of regulations governing interactive gambling. Instead, it called for a review of the gambling industry in South Africa, including its regulations, which led to the appointment of the Gambling

¹⁹ *Carmen Media Group Ltd v Land Schleswig-Holstein* C-46/08, ECR [0000] [103]; similarly the case also touched on freedom to provide gambling services as guaranteed by Article 49 of the European Commission Treaty.

²⁰ *Carmen Media Group Ltd v Land Schleswig-Holstein* [103].

²¹ European Commission *On-line gambling* 2–3.

²² National Gambling Amendment Act 10 of 2008 – As early as 2008 Parliament passed the National Gambling Amendment Act to regulate interactive gambling and the President duly signed it on 10 July 2008, pending date of commencement.

Review Commission.²³ This Commission was tasked with interrogating and reporting on (*inter alia*):

- the appropriateness of the current gambling policy (in so far as it concerns legalisation of new forms of gambling such as interactive gambling);
- the adequacy or effectiveness of the current gambling regulatory framework;
- the proliferation of gambling opportunities; and
- the protection of society from the over-stimulation of latent gambling through the limitation of gambling opportunities.

These issues have had an impact on the future regulation of interactive gambling in South Africa. It is proposed that the main motivation for the appointment of the Commission was to determine whether the regulation of interactive gambling could be included in the existing gambling policy – if not, whether it should be allowed in South Africa and, if allowed, how it should be regulated. At the time, it appeared that government was prepared to entertain the possibility of regulating interactive gambling. This is evident in the remarks of members of the National Gambling Board, which is at the forefront of developing the proposed regulatory framework for interactive gambling spearheaded by the Department of Trade and Industry. In its annual report, the National Gambling Board confirmed that:

*the National Gambling Board is fully aware of the challenges that are inherent in legalising interactive gambling and maintains that the problems of regulating it can be mitigated by enabling legislation to an acceptable level, rather than controls to ensure complete prohibition of participation of international and local operators and gamblers.*²⁴

South Africa is not the only country to prohibit interactive gambling. A jurisdiction such as the USA has absolute prohibition of interactive gambling whereas Australia somehow does not *per se* forbid the operation of interactive gambling in its territory but prohibits the offering of interactive gambling to its citizens.²⁵ Nevertheless,

²³ Department of Trade & Industry “Terms of reference: establishment of the Gambling Review Commission in the gambling industry in South Africa 2009” <http://www.dti.gov.za/gamblingreview/home.html> (Date of use: 01 April 2011).

²⁴ NGB *Annual Report* (2009) 6.

²⁵ Productivity Commission *Inquiry report on gambling vol. 1* (February 2010) 35.

prohibition of interactive gambling has been lambasted as unsustainable in both countries. In the USA *the Economist* – a popular magazine – has warned that attempts to ban interactive gaming are doomed to fail. It continues: “... it is better to legalise, tax and regulate the habit”.²⁶ In Australia, the Productivity Commission Gambling Report of Australia favoured regulation of this activity rather than its current prohibition on Australian residents.²⁷ South Africa’s position is not constant; it alternates between regulation (that is, legalisation) and prohibition. The National Gambling Amendment Act²⁸ was set to usher in and provide for the regulation of interactive gambling but it has never come into operation simply because it has no commencement date and the President has not proclaimed one. Recently, the Department of Trade and Industry published the National Gambling Policy, 2016,²⁹ proposing retention of the *status quo*, that is, continued prohibition of interactive gambling.³⁰

1.2 Definition of key terms

1.2.1 Gambling

According to the *Britannica Online Encyclopaedia*, gambling is defined as the betting or staking of something of value, with consciousness of risk and hope of gain, on the outcome of a game, a contest, or an uncertain event whose result may be determined by chance or accident, or it may have an unexpected result by reason of the bettor’s miscalculation.³¹ In recent times, gamblers have developed or honed their skills in gambling to ensure a positive return for their efforts. As a result, their

²⁶ Anonymous “Online gambling: you bet” 2010 *The Economist* 14. The article reminds the reader that prohibition destroyed America’s once-robust brewing industry, made smugglers rich and did nothing to curb drinking. And therefore there is little reason to suppose that the latest line in American prohibition – an effort to ban interactive gambling – will fare any better. Indeed, it points out that despite the ban, large numbers of Americans still gamble interactive though illegally.

²⁷ Productivity Commission *Gambling vol.1* 35 in which the Australia National Gambling Board is quoted as saying strict regulation of interactive gambling, and not prohibition, is a more practical and effective solution to the risk of interactive gambling.

²⁸ National Gambling Amendment Act 10 of 2008.

²⁹ Department of Trade & Industry *National gambling policy, 2016* (Notice 389 of 2015 published in Government Gazette 39887 of 1 April 2016).

³⁰ Department of Trade & Industry *National gambling policy* 9.

³¹ Britannica Online Encyclopaedia “Gambling” <http://0-www.britannica.com.oasis.unisa.ac.za/EBchecked/topic/2248636/gambling> (Date of use: 21 April 2011).

winnings are no longer a matter of pure luck but a combination of both skill and luck. For this reason, the *Canadian Encyclopaedia*³² has added the element of skill to its definition of gambling. It defines gambling as the betting of something of value on the outcome of a contingency or event, the result of which is uncertain and may be determined by chance, skill, a combination of chance and skill or a contest.³³

Often the term “gambling” is used interchangeably with “gaming”³⁴ though countries may differ in their identification of what qualifies as gambling activities. The broad concept of gambling is universally understood to mean a game of chance. In the European Union, “gambling activities” are said to involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions.³⁵ In South Africa, an activity is considered a gambling game “if it is played upon payment of any consideration, with the chances that the person playing the game might become entitled to, or receive pay-out and the result might be determined by the skill of the gambler, the element of chance, or both”.³⁶ Included within legal gambling activities are bingo games, amusement games provided they are licensed under provincial laws, as well as activities involving placing or accepting a bet (including a totalisator bet) or a wager.³⁷ The lottery is excluded from gambling activities as it is expressly governed by the Lotteries Act.³⁸ The latter defines a lottery as including any game, scheme, arrangement, system, plan, promotional competition or device for distributing prizes by lot or chance and any game, scheme, arrangement, system, plan, competition or device, which the Minister may by notice in the Gazette declare to be a lottery.³⁹ Also excluded from the ambit of gambling are sports pools which are governed by the Lotteries Act.⁴⁰

³² James H (ed) *The Canadian encyclopaedia vol. II* (Hurting Publishers Ltd 1985).

³³ James (ed) *The Canadian encyclopaedia* 717.

³⁴ Law J & Martin E “A dictionary of law” <http://0-www.oxfordreference.com.oasis.unisa.ac.za/views/ENTRY.html?subview=Main&entry+t49e1659>

(Date of use: 29 March 2011).

³⁵ European Commission *On-line gambling* 13–14.

³⁶ Section 5 of the National Gambling Act 7 of 2004.

³⁷ Section 3 of the National Gambling Act 7 of 2004.

³⁸ Lotteries Act 56 of 1997.

³⁹ Section 1 of the Lotteries Act 56 of 1997.

⁴⁰ In terms of the Lotteries Act 56 of 1997, the Minister may, after consultation with the National Lotteries Board, by licence authorise the licensee to conduct a national sports pool: provided the licence shall specify the sports pools, or descriptions of sport pools, the conduct of which it authorises.

1.2.2 Interactive gambling

Internet-based technology has now made it possible to offer gambling activities traditionally associated with land-based gambling establishments (that is, casinos) in a virtual space.⁴¹ This mode of gambling is known as interactive / online or remote gambling. It denotes gambling activities adaptable to the use of computer software and interactive communication.⁴² For purposes of legal certainty, however, the EU defines interactive gambling services as any service that involves wagering a stake with monetary value in games of chance, including lotteries and betting transactions that are provided at a distance, by electronic means and at the individual request of a recipient service.⁴³ The Australian Parliamentary Joint Select Committee on Gambling Reform distinguishes between two forms of interactive gambling.⁴⁴ Firstly, interactive wagering that denotes a betting on an anticipated outcome transmitted by means of the internet. This may include betting on horse racing and sport games. Secondly, interactive gaming (gambling), which involves games that are typically interactive in nature such as “staking money on casino-type games that are played online, such as poker, roulette, blackjack, and many more newly introduced casino games”.⁴⁵

The National Gambling Amendment Act signed by the President on 14 July 2008 but not yet operational uses the term “interactive game”. It defines an interactive game as a gambling game played or available to be played through the mechanism of an electronic agent accessed over the internet and other than a game that can be

⁴¹ For this purpose see McMillen J “Online gambling: challenges to national sovereignty and regulation” 2000 *Prometheus* 391–401 392 in which he argues that interactive gambling delivers two forms of gambling, in the form of interactive wagering/betting and virtual interactive gaming. He argues that the former is not a new form of gambling but merely technological developments allowing bets to “be made interactively in ‘real time’ so that a gambler can bet on various events within a game, rather than waiting for the final result”. On the other hand, interactive gaming is indeed a new form of gambling made possible only by computer technology. He adds: “interactive gaming/games are not played in a physical location but instead are generated by computer software and results are determined by a random-number generator on the operator’s server”.

⁴² Rose N *et al Internet gaming law* 2nd ed (Mary Ann Liebert Inc New York 2009) 27. Lotteries, wagers and gaming are all particularly adaptable to the use of computer software and interactive communication – in other words, the internet.

⁴³ European Commission *On-line gambling* 13–14.

⁴⁴ Parliamentary Joint Select Committee on Gambling *Reform interactive and online gambling and gambling advertisement* 2nd Report (December 2011) 6.

⁴⁵ Parliamentary Joint Select Committee on Gambling *Interactive and online gambling* 6.

played only in licensed premises and only if the licensee of any such premises is authorised to make such game available for play.⁴⁶ This thesis focuses on games that are interactive in their nature and require gamblers' involvement to achieve a particular desired outcome, rather than waiting for results of a game or contest over which a gambler has no influence.

1.3 Gambling activities in terms of the National Gambling Act

Gambling as such is legalised in South Africa, although not all forms of gambling activities are sanctioned by the National Gambling Act. An activity is deemed to be gambling if it involves placing or accepting a bet or wager; placing or accepting a totalisator bet; or making available for play or playing – (i) bingo or another gambling game; or (ii) an amusement game.⁴⁷ As a result, the National Gambling Act makes provision for the licensing of the following gambling activities or gambling establishments discussed hereunder.

1.3.1 Casinos

“Casino” refers to premises where gambling games are played, or are available to be played, but does not include premises in which bingo or limited pay-out machine(s) is/are played or available to be played.⁴⁸ Licences for casinos are issued by the provincial licensing authorities with the Minister prescribing the maximum number to be issued for the entire country.⁴⁹ Casinos have become the bedrock of gambling in

⁴⁶ Section 1 of the National Gambling Act 7 of 2004 already contains the definition of interactive game or interactive gambling even though it was not included in its section 3 as one of its gambling activities. Therefore the amendment introduced by section 5 of the National Gambling Amendment Act 10 of 2008 is only intended to bring interactive games or interactive gambling within the purview of the definition of gambling activities in section 3. See also Rahamim W & Mthiyane T “Regulation of interactive gambling in South Africa” 2008 *Werksman Newsletter* 1–2.

⁴⁷ Section 3 of the National Gambling Act 7 of 2004.

⁴⁸ Section 1 of the National Gambling Act 7 of 2004.

⁴⁹ In February 2006, the Minister issued the Notice of Prescribed Maximum Numbers of Casino Licences (Notice 350 of 2006 Government Gazette 28571) in which 36 casino licences were authorised and divided among the 9 (nine) provinces as follows: Eastern Cape 5; Free State 4; Gauteng 7; KwaZulu-Natal 5; Mpumalanga 4; Limpopo 3; Northern Cape 3; North West 4; and, Western Cape 5. Initially, section 13(1)(j) of the repealed National Gambling Act 33 of 1996 set the maximum number of casino licences to be issued in the country at 40. This has now been replaced by section 45 of the National Gambling Act 7 of 2004, empowering the Minister by means of regulation to

South Africa and account for the lion's share of tax revenue collected by provincial authorities for the entire gambling sector.⁵⁰ Casinos are the largest employers within the gambling sector with more than 34 000 direct employees and over 16 000 indirect employees.⁵¹

1.3.2 Bingo

Bingo refers to a game, including a game played in whole or in part by electronic means that is played for a consideration, using cards or other devices that are divided into squares, each of which bears a different number, picture or symbol. These numbers, pictures or symbols are arranged randomly in such a manner that card or similar device contains a unique set of numbers, pictures or symbols. An operator or announcer calls or displays a series of numbers, pictures or symbols in random order and the gamblers match each such number, picture or symbol on the card or device as it is called or displayed; the gambler who is first to match all the numbers, pictures or symbols in the spaces on the card or device, or who matches a specified set of numbers, pictures or symbols on the card or device, wins a prize.⁵² This comprehensive definition attempts to distinguish the requirements for a game of bingo that may be on offer at casinos but that does not comply with the generally accepted pattern of bingo, for example, a bingo game or a slot machine. The *Concise Oxford Dictionary* defines bingo as "a game in which gamblers mark off randomly called numbers, pictures or symbols on printed or electronic cards, the winner being the first to mark off all their numbers, pictures or symbols".⁵³ Bingo is a small stakes game and inherently inexpensive. It serves as a leisure pastime and a social gathering for the many gamblers who participate.⁵⁴

prescribe a maximum number. The current provisions allow the Minister to amend the prescribed maximum number of casino licences without amending the legislation.

⁵⁰ In 2008–2009 the provincial gambling regulatory authorities collected over R1,5 billion in gambling taxes and 81% of this amount came from casinos, according to the report of the Gambling Review Commission *South African gambling industry* 42.

⁵¹ Gambling Review Commission *South African gambling industry* 50.

⁵² Section 1 of the National Gambling Act 7 of 2004.

⁵³ Soanes C and Stevenson A (eds) *The concise oxford dictionary* 11th ed (Oxford University Press London 2008).

⁵⁴ Lotteries and Gambling Board *Main report on gambling in the Republic of South Africa* (Pretoria March 1995) 131.

An electronic version of bingo called electronic bingo terminals has divided the South African gambling industry as the Gauteng licensing authority is the only gambling regulatory authority in the country to issue licences for such electronic bingo terminals,⁵⁵ this despite the attempt by the Legislature to prevent slot machines from offering games simulating bingo. The legitimacy of the licensing authority's (that is, Gauteng Gambling Board) conduct will be discussed in Chapter 3.

1.3.3 Limited pay-out machines

A limited pay-out machine is defined by the Act as a gambling machine with a restricted prize.⁵⁶ Regulations on limited pay-out machines issued in terms of the National Gambling Act define such machines as gambling machines outside casinos, the stakes and prizes of which are limited.⁵⁷ Limited pay-out machines are distinguished from slot machines found mostly in casinos by the predetermined maximum prize that may be dispensed by each machine. At present, the maximum stakes and prizes payable by these limited pay-out machines are set at R5.00⁵⁸ and R500.00⁵⁹ respectively. These minimum and maximum amounts have not been raised since 2000.⁶⁰ Limited pay-out machines are "intended to provide additional revenue streams to non-casino venues such as taverns and pubs".⁶¹

1.3.4 Horse-racing

Betting on horse-racing and sports is a gambling activity authorised by the National Gambling Act. In terms of the aforesaid act, betting or wagering involves the staking of money or anything of value on a fixed-odd bet, or open bets with one or more

⁵⁵ Decision of the Gauteng Gambling Board in the matter between *Metro Bingo Johannesburg (Pty) Ltd v Peermont Global (Pty) Ltd* decided on 21 February 2014 upholding amended provisions of the Gauteng Gambling Act incorporating electronic bingo terminals.

⁵⁶ Section 1 of the National Gambling Act 7 of 2004.

⁵⁷ See Regulations on Limited Pay-Out Machines (GN R1425 in GG 21945 of 21 December 2000).

⁵⁸ Section 5 of the Regulations on Limited Pay-Out Machines.

⁵⁹ Section 6 of the Regulations on Limited Pay-Out Machines.

⁶⁰ Department of Trade & Industry "Presentation to the Portfolio Committee on Trade and Industry" Parliament of the Republic of South Africa (01 August 2014).

⁶¹ Gambling Review Commission *South African gambling industry* 57.

other persons on a contingency.⁶² The Act also gives recognition to bookmakers⁶³ who may receive bets from punters/gamblers.⁶⁴ Other than that, horse racing remains a self-regulated industry governed by the National Horseracing Authority (“NHA”).⁶⁵ The NHA is a non-statutory body established by the horse-racing industry to maintain the integrity of the sport of horse-racing.⁶⁶ It is responsible for the licensing of horse owners, trainers, racecourses, racing operators and the monitoring of all races.⁶⁷ Most, if not all, racecourses are owned and controlled by private entities, Phumelela and Gold Circle, which are also responsible for conducting races.⁶⁸

Race meetings (that is, gatherings of persons attending a horse-race) are regulated by provincial gambling laws that have legislative authority to issue licences to racing clubs authorising the holding of race meetings at a racecourse.⁶⁹ For instance, the Gauteng Gambling and Betting Act expressly prohibits any person from holding race meetings without a licence issued in accordance with this Act.⁷⁰

⁶² Section 4 of the National Gambling Act 7 of 2004.

⁶³ Section 1 of the National Gambling Act 7 of 2004 defines a bookmaker as a person who directly or indirectly lays fixed-odds bets or open bets with members of the public or other bookmakers, or takes such bets with other bookmakers.

⁶⁴ Section 4 of the National Gambling Act 7 of 2004.

⁶⁵ Section 3 of the constitution of the National Horseracing Authority of Southern Africa (06 February 2014) regarding “incorporation and liability” of National Horseracing Authority.

⁶⁶ According to the logo of the National Horseracing Authority which is based on the provisions of its constitution, that is, *the constitution of the National Horseracing Authority*. In terms of section 4 of the aforesaid constitution, the objects of this non-statutory body are, amongst others, to regulate the sport of thoroughbred horse racing in Southern Africa through promotion and maintaining of honourable practices and elimination of malpractice which may arise in thoroughbred horse-racing falling within its jurisdiction.

⁶⁷ Sections 5 and 20 of *The constitution of the National Horseracing Authority* relating to powers and licensing authority of the National Horseracing Authority. In terms of section 20 “*the Licensing Board shall have the power to, and may, in its absolute discretion, without any obligation to furnish reasons, grant, refuse to grant, renew, or refuse to renew, any privilege provided for in this Constitution or the Rules, excluding the privileges referred to in clauses 16.2.6 (that is, licence for racing operator) and 16.2.7 (that is, licence for race course).*”

⁶⁸ According to SA Racing Factbook 2008/2009 4 Phumelela Gaming & Leisure Ltd and Gold Circle (Pty) Ltd are the main racing operators in South Africa. The former conducts race meetings at five tracks located in Gauteng Province, Eastern Cape Province and Northern Cape Province whereas the latter conducts race meetings at its five tracks located in KwaZulu-Natal and the Western Cape.

⁶⁹ With the exception of the Province of the Western Cape, an operator requires a license from the provincial licensing authority to operate a race course – Kenilworth Racing (Pty) Ltd v Gold Circle (Pty) Ltd Competition Tribunal of South Africa Case No. 36/AM/Apr12 [68].

⁷⁰ Section 90 of the Gauteng Gambling and Betting Act 4 of 1995, as amended.

1.4 Gambling activities falling outside the National Gambling Act

Other well-known gambling activities not expressly authorised by the National Gambling Act include, but are not limited to, interactive gambling, dog racing (sometimes referred to as greyhound racing) and fahfee.

1.4.1 Dog racing

Dog racing has never been accorded legal recognition in South Africa despite its practice from as early as 1932.⁷¹ Dog racing is prohibited in terms of provincial legislation by means of four ordinances: namely the Cape Ordinance,⁷² the Free State Ordinance,⁷³ the Transvaal Ordinance⁷⁴ and the Natal Ordinance.⁷⁵ These ordinances have not been replaced by subsequent legislation. The validity of one of these ordinances was confirmed by the Free State High Court in *United Greyhound Racing and Breeders Society v Vrystaat Dobbel en Wedren Raad en Andere*⁷⁶ in an application to have “the Prohibition of Dog Race-Meetings Ordinance 11 of 1976 (Free State) declared to have fallen into disuse” since its promulgation. The court held that the provisions of the ordinance had indeed been applied from time to time and that members of the applicant society had been warned to obey it, failing which criminal steps would be taken against them.⁷⁷ The court held further that no factual basis had been laid to show that the provisions of the ordinance had fallen into disuse and the application was accordingly dismissed.

Attempts by various commissions investigating the possibility of the legalisation of dog racing and betting have not yielded positive results.⁷⁸ Delivering its report in

⁷¹ Carnelley M “Betting on dog racing: the next legalised gambling opportunity in South Africa? A cautionary note from the regulation of greyhound racing in Britain” 2010 *UNLV Gaming Law Journal* 73-98 76.

⁷² Cape Ordinance 11 of 1986.

⁷³ Free State Ordinance 11 of 1976.

⁷⁴ Transvaal Ordinance 4 of 1949.

⁷⁵ Natal Ordinance 23 of 1985.

⁷⁶ *United Greyhound Racing and Breeders Society v Vrystaat Dobbel en Wedren Raad* 2003 (2) SA 269 (O).

⁷⁷ *United Greyhound Racing and Breeders Society v Vrystaat Dobbel en Wedren Raad* 274E–G.

⁷⁸ Howard Commission *South Africa Commission of Inquiry into lotteries, sports pools, fund raising activities and certain matters relating to gambling* (Government Printers 1993) 99–100 in which a

2010, the Gambling Review Commission reported that the dog racing industry was unlikely to generate significant revenues and dog racing would not stimulate demand for a new gambling product.⁷⁹ Therefore its legalisation could not be supported. Dog racing remains illegal in South Africa.

1.4.2 Fahfee

“Fahfee” is a betting game played mainly in South Africa and is said to have its origins in South Africa’s Chinese community.⁸⁰ In modern parlance, fahfee may be said to be a lottery of the numbers 1 to 36, in which gamblers choose only the winning number.⁸¹ Fahfee is played by the taking of bets and issue of tickets to customers by a runner who places all bets with the operator on behalf of customers who placed the bets. The operator then draws a lucky number and pays a dividend to winners who have matched the drawn number in their bets.⁸²

Many people in rural, industrial and township areas take part in the game of fahfee.⁸³ Most fahfee gamblers live at the margins of poverty and regard this as an opportunity to make an extra income.⁸⁴ According to statistics of the Limpopo Gambling Board, 375 arrests were made for involvement in fahfee during the financial year 2009–

proposal for legalisation, regulation and control of dog racing and betting was made similar to the legal framework governing horseracing. In 1994–1995, the Lotteries and Gambling Board also had an opportunity to consider regulation of dog racing and betting. It concluded that the Board could not recommend the legislation of dog racing then, but recommended that further research be undertaken to establish whether dog racing should be permitted in South Africa. No such further research was ever done. In 2009, *Department of Trade & Industry* commissioned a study through the University of the Free State to investigate and make recommendations for legalisation of dog racing. The results of the study are not available.

⁷⁹ Gambling Review Commission *South African gambling industry* 150.

⁸⁰ Howard Commission *Inquiry into lotteries* 13.

⁸¹ Krige D “We are running for a living: work, leisure and speculative accumulation in an underground numbers lottery in Johannesburg” 2011 *African Studies* 3–24 8. Giving an account of Fahfee’s activity the author wrote: “punters make use of runners to place wagers of usually small amounts of money on any number(s) between one and 36. At set times and established places, between two and six times a day, a banker arrives at the designated ‘bank’ and announces the winning number of that particular draw.”

⁸² Scott L & Barr G “Unregulated gambling in South African townships: a policy conundrum?” 2012 *Journal of Gambling Studies* 719–732. It is argued that fahfee is linked to mythology around dreams, numerology concepts, and it is associated with folk tales passed from one generation to another.

⁸³ As early as the 1950s it was warned that fahfee had gripped the imagination of thousands of people, in particular black women serving as domestic employees in the suburbs – See Longmore “A study of fah-fee” 1956 *South African Journal of Science* 281.

⁸⁴ Scott & Barr 2012 *Journal of Gambling Studies* 720.

2010.⁸⁵ Unfortunately, there is no evidence of case law dealing with fahfee. There is also no data regarding the financial benefits, including possible gambling tax revenue, of fahfee to society. The Howard Commission Report of 1993 received an unsubstantiated estimate that the annual turnover of fahfee as a gambling sector ranged from R2 billion to R5 billion.⁸⁶ As mentioned, the figure was not backed by any data and cannot therefore be regarded as reliable. The Gambling Review Commission seemed to have little or no interest in the growth of this gambling activity other than recommending further research.⁸⁷

1.4.3 Interactive gambling

Interactive gambling is one of the most popular illegal gambling activities in South Africa and also the focus of this thesis.

1.5 Research problem

The lawfulness of interactive gambling was challenged in the case of *Casino Enterprises (Pty) Ltd v Gauteng Gambling Board*,⁸⁸ in which the Supreme Court of Appeal upheld the decision of the *court a quo* declaring interactive gambling an illegal form of gambling in terms of the National Gambling Act. This decision sparked a debate on whether interactive gambling should be prohibited or legalised, and in case of legalisation, what should be the scope of the legislative framework authorising interactive gambling. South Africa has a constitutional dispensation with the result that any decision on prohibition or legalisation has to be constitutionally sound.

Schedule 5 of the Constitution recognises casinos, racing, gambling and wagering, excluding lotteries and sports pools, as activities falling within legislative competence of the national and provincial spheres of government. As a result, the National

⁸⁵ Limpopo Gambling Board *Law enforcement statistics from April 2009 to March 2010* (2010) 1–2.

⁸⁶ Howard Commission *Inquiry into lotteries* 13.

⁸⁷ Gambling Review Commission *South African gambling industry* 158.

⁸⁸ *Casino Enterprises (Pty) Ltd v Gauteng Gambling Board* 2011 (6) SA 614 (SCA).

Gambling Act was adopted for the uniform regulation of gambling activities. The Act distinguishes between traditional gambling (that is, gambling games taking place in a physical environment – casinos) and interactive gambling (that is, gambling taking place in a virtual environment). The latter is prohibited unless authorised by legislation. The Act envisages the development of legislation authorising interactive gambling. Such legislation – namely the National Gambling Amendment Act⁸⁹ – has since been passed by Parliament and signed by the President, but is not yet operational. Until such time that the National Gambling Amendment Act comes into operation, interactive gambling remains a prohibited gambling activity.

The prohibition of interactive gambling raises the question of whether this mode of gambling is distinct from gambling. If it is, what are the regulatory issues germane to interactive gambling that would be inapplicable to traditional forms of gambling? Identification of regulatory issues pertinent to interactive gambling would go a long way towards advocating for its legalisation. On the other hand, prohibition of interactive gambling denies consumers (that is, gamblers) an opportunity to engage in a recreational economic activity of their choice. With the current dispensation prohibiting virtual gambling, gamblers are restricted to traditional gambling that requires travelling to gambling venues during opening hours to indulge in gambling, while the technological development of the internet makes gambling accessible anywhere at any time.

Although the SCA has pronounced on the legality of interactive gambling based on the absence of legislation authorising this mode of gambling, existence of such legislation duly passed by Parliament and assented to by the President obliges constitutional scrutiny of its non-implementation. Once the legal position is settled, the sustainability of the prohibition of interactive gambling, including the concerns for regulation of this activity in South Africa, will be considered. The challenge facing South Africa is not in essence whether to prohibit or regulate interactive gambling, but rather whether sufficient measures exist to regulate this form of activity as a result of its borderless nature. In the modern era of regulatory efficiency, regulations are best judged in terms of socio-economic benefits, harm minimisation and crime

⁸⁹ National Gambling Amendment Act 10 of 2008.

prevention. In the sphere of interactive gambling, the focus is more on establishing responsible gambling practices and safety measures. Interactive gambling regulations that are not anchored in responsible gambling practices and safety measures will achieve very little, but will instead expose the gambling populace to the untold risks of problem gambling and gambling disorders.⁹⁰

1.6 Influence of foreign jurisdiction

The world is still divided over legalisation of interactive gambling. There are countries, many in Europe, that have recognised the potential gains and permit this form of gambling.⁹¹ The European Commission Treaty (“Treaty”) does not prohibit interactive gambling. Instead, Article 49 of the Treaty requires member states to remove all forms and manner of prohibition aimed at restricting member states from providing or offering their services in the jurisdiction of other member states. Gambling, which encompasses interactive gambling, constitutes a service.⁹² Attempts to restrict interactive gambling potentially restrict Article 49, that is, freedom to provide services within the EU.⁹³ The Article is intended to promote freedom to provide services within the European Union. Relying on this Article, member states such as the UK approached the CJEU to declare laws of other member states prohibiting interactive gambling contrary to the provisions of Article 49 of the Treaty. The sole reason for this action was to enable UK-based interactive gambling providers/corporations to extend their services across territories of EU members. Therefore, within the EU, any member state is free to regulate the provision of interactive gambling services in its territory, provided that its national regulatory

⁹⁰ Gainsbury S “Response to the Productivity Commission inquiry report into gambling: online gaming and the Interactive Gambling Act” 2010 *Gambling Research* 3–12 7.

⁹¹ Countries permitting interactive gambling include Antigua and Barbuda, Austria, Denmark, Gibraltar, Netherlands Antilles, Panama, Philippines, Slovakia and the UK. A few countries permit online gambling but prohibit their own residents from accessing interactive gambling websites, namely Australia, Malta, Papua New Guinea – Williams R, Wood R and Parke J “History, current worldwide situation, and concerns with internet gambling” in Williams R, Wood R and Parke J (eds) *Routledge international handbook of internet gambling* (Routledge London and New York 2012) 3–26 8.

⁹² European Commission *On-line gambling* 6 clearly referring to provision of interactive gambling as interactive gambling service. Also Article H of the European Parliament *Resolution on online gambling in the internal market* (adopted on 10 September 2013) acknowledging that the provision of games of chance or gambling is an economic activity of special nature.

⁹³ Lovejoy K “A busted flush: regulation of online gambling in the European Union” 2014 *Fordham International Law Journal* 1525–1574 1536.

regime complies with the fundamental freedoms enshrined in the EU's treaties. In this respect, selected approaches of various jurisdictions in legalising, prohibiting or restricting interactive gambling will be considered.

In Europe, the UK is one of the leading countries to have liberalised and legalised interactive gambling. The Gambling (Licensing and Advertising) Act of 2004 unequivocally provides for the regulation of interactive gambling. The UK's position is a reflection of the dominant view within the EU of the need to embrace technological developments in the gambling sphere and seize economic opportunities arising from this mode of gambling enabled by the internet. In contrast to the UK and other countries embracing interactive gambling, the USA has taken a resolute decision not to permit interactive gambling, despite its citizenry contributing 28–35% (that is, over 4 million people) of the global interactive gambling population.⁹⁴ Interactive gambling is prohibited in the USA through the Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA").⁹⁵ The UIGEA prohibits interactive gambling by primarily preventing financial institutions from authorising or allowing the transfer of funds to interactive gambling services or operators. By restricting financial institutions from honouring transfer requests to gambling sites by bankers, the latter are effectively shut out of their mode of business in the USA's jurisdiction.⁹⁶ Furthermore, the UIGEA expressly forbids interactive gambling operators from accepting funds from interactive gamblers.⁹⁷

Rather than legalising or prohibiting interactive gambling, Australia has opted for a different approach, restricting provisioning of interactive gambling within its jurisdiction. Australia's Interactive Gambling Act of 2001 does not *per se* forbid the operation of interactive gambling in its territory, but prohibits the offering of

⁹⁴ Williams R & Wood R *Internet gambling: a comprehensive review and synthesis of the literature*. (Report prepared for the Ontario Problem Gambling Research Centre Guelph Ontario Canada 30 August 2007) 16.

⁹⁵ Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. §§ 5361–5367, Pub. L. No. 109–347, 120 Stat. 1884.

⁹⁶ Carlson E "Drawing dead: recognizing problems with Congress' attempt to regulate the online gambling industry and the negative repercussions to international trade" 2008 *Suffolk Transnational Law Review* 135–160 135.

⁹⁷ Harrington L "Loaded dice: do national internet gaming statutes violate World Trade Organization fair trade access standards" 2007 *Ariz. J. Int'l. & Comp. L* 769–802 776.

interactive gambling to its citizens.⁹⁸ In other words, it outlaws the provision of interactive gambling to its citizens. That is to say, Australia is amenable to hosting interactive gambling sites, thereby collecting tax levies from interactive gambling operators, provided that those interactive gambling operations are not consumed by its citizens. The Australian approach poses challenges ranging from enforcement to sustainability in so far as denying its citizens access to interactive gambling but allowing non-citizens to consume this service. It would be of interest to gauge its success in blocking its citizens from gambling illegally on websites based in its territory.

Not every jurisdiction has a policy stance on interactive gambling. Canada is a prime example of jurisdictions whose strategy on interactive gambling is deficient, offering a “safe haven” for interactive gambling providers. Canada’s gambling law makes interactive gambling illegal, yet it has turned a blind eye to the licensing of interactive gambling activities in one of its territories occupied by its aboriginal tribe – the Kahnawake – in the province of Quebec.

1.7 Purpose

Although the government seems to have changed its view on the legalisation of interactive gambling from regulation to prohibition, as has emerged from the National Gambling Policy, 2016, which expressly discourages the introduction of interactive gambling,⁹⁹ it is submitted that the intrusive nature of interactive gambling will not allow for successful prohibition. The purpose of this thesis is therefore to evaluate the existing gambling landscape, the proposed regulatory framework and the reasons and concerns offered for the prohibition of interactive gambling, while cognisant of the internet and the increasing ease of access to the internet. A principled approach addressing the most serious concerns is then proposed as the researcher is of the opinion that interactive gambling does not lend itself to prohibition. The ultimate goal of this thesis is to offer safeguards for the regulation of interactive gambling in South Africa.

⁹⁸ Productivity Commission *Inquiry report on gambling vol.2* (February 2010) 35.

⁹⁹ Department of Trade & Industry *National gambling policy* 9.

1.8 Hypothesis

If interactive gambling were to be regulated in South Africa, would the existing legislative gambling framework be adequate to cater for it? This question seeks to deal with the common challenges posed by interactive gambling such as: protection of vulnerable gamblers; prohibition of underage gambling; viability of self-limit measures, including self-exclusion, to prevent or reduce problem gambling; protection of interactive gambling from becoming a source of crime,¹⁰⁰ in particular, cybercrimes; regulation of advertisement of interactive gambling with a view to preventing it being associated with services/goods popular among minors. Interactive gambling has espoused modern forms of advertising such as sponsorship by displaying the logos of interactive gambling providers on the apparel of popular sports clubs televised across the globe. For instance, under the current regulatory regime interpreted to prohibit interactive gambling, it could be asked whether the advertisement of interactive gambling violates any law. How should gambling regulatory authorities react to such advertisements?

On the banning of particular forms of gambling, a question arises as to whether a dichotomy exists between the need to generate tax revenue through gambling and the banning of interactive gambling and other forms of gambling capable of being regulated. Principles evolve with time and so have the policy principles of gambling in South Africa. At the time of the enactment of the National Gambling Act, the magnitude of interactive gambling was relatively unknown and therefore not given much consideration; this underlines the present need and mandate to investigate interactive gambling.

The following questions therefore warrant attention when considering the future of interactive gambling:

- Do the transitional provisions of the National Gambling Act advocate legalisation of interactive gambling? If not, why did the Minister of the Department of Trade and Industry publish the draft Interactive Gambling

¹⁰⁰ Fabuli M "Online casino an easy bet for phishers" <http://www.symantec.com/connect/blogs/online-casinos-easy-bet-phishers> (Date of use: 22 September 2014).

Regulations, 2009, for public comment and the Minister of Finance issue the Interactive Tax Bill?

- To what extent should interactive gambling be regulated in South Africa; in other words, what should be the scope of such regulation?
- Does the technological development and advent of interactive gambling necessitate the review of the gambling principles upon which the National Gambling Act is premised?
- What are the best regulatory practices for interactive gambling?
- What are the best regulatory structures for interactive gambling in light of the concurrent jurisdiction of the national and provincial spheres on gambling regulation?
- Is the prohibition of interactive gambling sustainable in South Africa?

1.9 Research framework

In order to provide an in-depth analysis of pertinent issues highlighted above, the framework for this research project is set out according to the following topics.

1.9.1 Chapter 2: Historical regulation of gambling legislation

This chapter provides an historical overview of the gambling legislation from three significant eras: namely, the colonial era, the Union Government era and the apartheid era. Of particular significance is the fact that, while the government has been consistent in the prohibition of gambling, cracks emerged in the former self-governing territories and development regions of the old South Africa. These self-governing territories included Transkei, Bophuthatswana, Venda and Ciskei – commonly referred to as the TBVC states. These states were authorised to regulate gambling, including the issuance of casino licences.¹⁰¹ When these former TBVC states were integrated into the Republic, the government had no option but to incorporate their legal position on gambling for the entire Republic, thereby

¹⁰¹ Peltzer K & Thole M “Gambling attitudes among black South Africa university students” 2000 *Psychological Reports* 957–962 957.

(inadvertently) legalising certain forms of gambling in South Africa. Since then the blanket prohibition of gambling has never been an option. Instead, South Africa has realised and appreciated the need to establish policy principles for its selective recognition of certain forms of gambling.

1.9.2 Chapter 3: Exposition of South Africa's law on gambling

Gambling falls within concurrent jurisdiction by national and provincial spheres of government. It is therefore governed by the National Gambling Act and provincial gambling laws. With each province having enacted gambling legislation, focus is given to the National Gambling Act. The Act sets out gambling activities falling within its scope; establishes uniform norms and standards applicable to national and provincial regulation and licensing of certain gambling activities; establishes a central regulatory body; and provides the manner of its enforcement through the creation of statutory offences.

The destination policy of the Act seeking to locate gambling activities a reasonable distance away from society in order to limit the proliferation of gambling opportunities and ultimately reducing problem gambling is examined with a view to assessing its relevance in the modern era of urban redevelopment and the incorporation of casinos into shopping malls or nearby affluent areas. Since the enactment of the Act in 2004, various forms of gambling have emerged, such as electronic bingo terminals and interactive gambling. Does the Act make provision for the regulation of these forms of gambling activities without it being necessary to overhaul gambling legislation? The exposition of the Act indirectly sheds light on its success or failures since its enactment, with a focus on its destination approach.

1.9.3 Chapter 4: Addressing challenges facing interactive gambling in pursuit of its regulation in South Africa

There are many regulatory challenges posed by interactive gambling all over the world and South Africa is no exception. Some of these challenges are not entirely new to gambling but would be aggravated in an interactive environment. For instance, methodologies for detection and arrest of problem gambling applicable to traditional forms of gambling would not apply to interactive gambling; to the extent that they would be applicable, they would require adaptation to an interactive environment. Unlike other addictions such as substance and drug abuse, which may result in a consumer being visibly “high” or drunk or suffering from an overdose, problem gambling, which is present in all forms of gambling, is simply a hidden addiction until diagnosed. In many instances, by the time members of the public take notice of the financial or social difficulties experienced by a gambler, the latter may already have developed fully fledged problem gambling/gambling disorder.

The purpose of this chapter is to identify challenges peculiar to South Africa if ever interactive gambling were to be legalised. These challenges range from monitoring of interactive gambling behaviour; self-limit programmes, including self-exclusion; regulatory uniformity and advertisement in particular modern modes of advertisement such as sponsorship logos.

1.9.4 Chapter 5: Discussion of proposed regulatory framework for interactive gambling

The emergence of interactive gambling in the 1990s as a result of advanced technological development capable of transforming traditional casino games from land-based to electronic means meant that a review of policy principles for the recognition of certain forms of gambling became unavoidable. That absolute prohibition of interactive gambling is unsustainable was realised and a foundation for a regulatory framework was laid.

This chapter commences with a discussion of the legal position of interactive gambling in South Africa as pronounced by the judiciary, and continues with an exploration of whether such a position is based upon constitutional principles recognising gambling. It follows that the endeavours of the Department of Trade and Industry and the Department of Finance to initiate legislation for the regulation and taxation of interactive gambling come under scrutiny in the chapter.

1.9.6 Chapter 6: Comparative studies in the regulation of interactive gambling

This chapter is devoted to the best regulatory approaches to interactive gambling by foreign jurisdictions. The purpose of this chapter is to examine approaches taken by a few selected countries that are deemed to have expressly responded to the emergence of interactive gambling through legislation. It starts with the

- Prohibitive stance of the USA, in which interactive gambling is outlawed yet intrastate interactive gambling is taking place;
- Liberalised approach of the UK as a member state within the European Union. For this purpose the European Union's stance on gambling regulation is first discussed;
- Restrictive approach of Australia in its licensing regime for interactive gambling provided it is not offered to its residents;
- Legal conundrum of Canadian law as a reflection of challenges presented by the reliance on existing laws in addressing the legal status of interactive gambling.

Unfortunately, there is no country on the continent of Africa with interactive gambling regulations that could serve as an example to South Africa. For this reason, guidance has to be sought from other continents.

1.9.6 Chapter 7: Conclusion and recommendations for regulation of interactive gambling in South Africa

Legislative prescripts have opened a space for the regulation of interactive gambling in South Africa. With the guidance of the gambling regulatory authority, South Africa must identify and implement the best regulatory approaches to ensure protection of the gambling populace from the negative impact of gambling, while at the same time maximising the benefits of interactive gambling regulation in the form of licensing and taxation fees.

Based on the discussion and inferences made in each chapter, a legislative scope (and not a bill) identifying pertinent issues for interactive gambling regulation is proposed. It is hoped that this thesis will have an influence on the inevitable legalisation and regulation of interactive gambling in South Africa.

CHAPTER 2: HISTORICAL REGULATION OF GAMBLING IN SA

2.1 Introduction

The origin of gambling is debatable, with anthropologists tracing its existence to the most primitive of societies when humans used unknown objects to predict the future.¹⁰² Unfortunately, this account of the origin and history of gambling fails to distinguish between gambling that is motivated by the possibility of financial gain through winning and the prediction of the future, where winning may be even more unattainable. Regardless of the uncertainty of its origin, however, gambling, like prostitution, was frowned upon by both colonial and apartheid society as contrary to religious and moral beliefs,¹⁰³ although it must be acknowledged that not all religious groups were opposed to gambling.¹⁰⁴ Among many religiously biased reasons for objecting to gambling was its propensity to undermine the ethic of production in that a gambler aims to amass loot, in the form of winnings, without putting any effort into labour.¹⁰⁵ This religious predisposition was imposed as a reflection of public morality.¹⁰⁶ Writing on the subject of morals and obscenity, Henken points out that “... adultery, fornication, gambling find their origin in notions of morality rooted in our ... history which is inevitably derived from ancestral voices raised on the moral teachings of the Bible”.¹⁰⁷ Whether or not morals originate from religious teachings and principles, one thing is certain, morals are intended to guide members of society on what is considered to be right on one hand and wrong on the other.

¹⁰² Lotteries and Gambling Board -*Report on gambling* 25.

¹⁰³ Henkin L “Morals and the constitution: the sin of obscenity” 1963 *Columbia Law Review* 391–414 391 and Borna S & Lowry J “Gambling and speculation” 1987 *Journal of Business Ethics* 219–224 219.

¹⁰⁴ Literature reveals that while Protestants duly regarded gambling as a moral vice or sin, historically the Roman Catholics were more reluctant to view gambling as a sin – Wolfe A “What we don’t know about gambling, but should” 2007 *The Chronicle Review* B8.

¹⁰⁵ Reith G “Gambling and the contradictions of consumption: a genealogy of the ‘pathological’ subject” 2007 *American Behavioural Scientist* 33–55 34.

¹⁰⁶ That morality policies often touch upon issues that are central elements of various religious doctrines was echoed by Heichel S, Knill C & Schmitt S “Public policy meets morality: conceptual and theoretical challenges in the analysis of morality policy change” 2013 *Journal of European Public Policy* 318–334 325. Issues such as abortion, pornography, stem cell, gambling are cited as examples.

¹⁰⁷ Henkin 1963 *Columbia Law Review* 409.

Morality dictates what is right and wrong, based on the convictions and perceptions of the majority of members of any particular society. Sanctioning and criminal prosecution become the end result in morality policy.¹⁰⁸ Therefore, those opposed to the dictates of morality often abide by the feelings of the majority as to what is considered to be morally acceptable, especially when moral beliefs find their way into the rules governing society. This has prompted Hart,¹⁰⁹ a well-known philosopher, to ask, regarding legal enforcement of morality:

*Is the fact that certain conduct is by common standards immoral sufficient to justify making that conduct punishable by law? Is it morally permissible to enforce morality as such? Ought immorality as such to be a crime?*¹¹⁰

A brief synopsis of Hart's argument is that morally acceptable conduct (rules of morality) has found its way into the statute books, while immoral conduct, which is frowned upon, has to a certain extent been criminalised.¹¹¹ It is this criminalisation of immorality that has opened a floodgate of debate regarding the relationship between morality and law. Hart is not convinced that immorality should be criminalised. He uses sexual morality as an example and argues that by society's standards, it is immoral conduct and yet it causes no harm to others.¹¹² In support of Hart, Dworkin argues that *it is not the legitimate function of the state to punish conduct simply on the grounds that it is immoral.*¹¹³ Feinberg adds to this debate by distinguishing between conduct that may be said to cause harm to others, offence to others, harm to self and harmless wrongdoing.¹¹⁴ An example of each type of conduct is given below:

¹⁰⁸ Knill C "The study of morality policy: analytical implications from a public policy perspective" 2013 *Journal of European Public Policy* 309–317 315.

¹⁰⁹ Hart H.L.A. *Law, liberty and morality* (Stanford University Press California 1963).

¹¹⁰ Hart *Law, liberty and morality* 4.

¹¹¹ Hart *Law, liberty and morality* 4.

¹¹² Hart *Law, liberty and morality* 5.

¹¹³ Dworkin G "Devlin was right: law and the enforcement of morality" 1998–1999 *William & Mary Law Review* 927–946 928.

¹¹⁴ Feinberg J *Harm to others: the moral limits of the criminal law* vol 1 (Oxford University Press New York 1984); *Feinberg J Offences to others: the moral limits of the criminal law* vol 2 (Oxford University Press New York 1985); *Feinberg J Harm to self: the moral limits of the criminal law* vol 3 (Oxford University Press New York 1986); and *Feinberg J Harmless wrongdoing: the moral limits of the criminal law* vol 4 (Oxford University Press New York 1988).

- Harm to others – Actions that *rarely cause clear and substantial harm to any specific person or group, but are said to cause harm to “the public”, “society”, “the state”, public institutions or practices, the general ambience of neighbourhoods, the economy, the climate, or the environment. Typical of crimes in this general category are counterfeiting, smuggling, income tax evasion, contempt of court, and violation of zoning and anti-pollution ordinances. The harms produced by such crimes can be labelled “public” as opposed to “private” harms provided it is kept in mind that the public is composed of private individuals standing in complex social and legal relations to one another.*¹¹⁵
- Offence to others – Conduct that no single person would want to decriminalise. Feinberg cites numerous offences including rape, assault, burglary, fraud and corruption and argues that *the common element in these crimes is the direct production of serious harm to individual persons and groups.*¹¹⁶
- Harm to self – Conduct that involves reckless disregard of one’s safety. An example of such immoral conduct is suicide, which would harm no one directly but the doer.¹¹⁷
- Harmless wrongdoing (that is, an immoral conduct with no potential adverse effect either to the doer or society)¹¹⁸ – Feinberg cites trespass as an example of harmless wrongdoing and explains that *trespassing on another’s land violates the landowner’s property rights and thereby “wrongs” him even though it does not harm the land. But the law does recognize a proprietary interest in the exclusive possession and enjoyment of one’s land, and for whatever it is worth, the trespass did invade that interest. It is “harmless” only in the sense that it doesn’t harm any other interests, and certainly no interest of a “tangible and material kind.”*¹¹⁹

¹¹⁵ Feinberg *Harm to others* 11–12.

¹¹⁶ Feinberg *Harm to others* 10–11.

¹¹⁷ Feinberg *Harm to self* 22.

¹¹⁸ However, sceptics remain uncertain as to whether there is such a thing as “harmless wrongdoing” – Dworkin 1998–1999 *William & Mary Law Review* 936–939.

¹¹⁹ Feinberg *Harm to others* 35.

The purpose of distinguishing between these types of conduct is to determine which conduct the State may rightly make criminal.¹²⁰ The distinction has enabled modern scholars to argue that before proscribing a particular conduct on the basis of its immorality, focus should be on whether such conduct causes harm or potential harm to others. As Alexander¹²¹ sought to explain, conduct that causes harm or offence to others should be criminalised but conduct that is harmful only to the actor ... should not.¹²² It is not the purpose of this discussion to join the debate on when conduct should be criminalised but rather to determine whether the regulation of gambling should depend on public morality. In other words, if gambling is considered immoral, ought it to be criminalised? In order to address this issue, one must first establish whether gambling is a public morality issue in South Africa and elsewhere.

In a dispute relating to the provisioning of interactive gambling and betting services in the US territory, the World Trade Organisation's Appellate Body in *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*¹²³ affirmed gambling as a public morality issue (in other words, it falls under measures designed to protect its public morals) in terms of the General Agreement on Trade in Services (hereinafter referred to as "GATS") justifying member states to adopt restrictive trade measures.¹²⁴ Two of the WTO member states, namely Antigua and Barbuda, had laid a complaint against the US that several of the latter's gambling laws, including the Illegal Gambling Business Act,¹²⁵ Travel Act¹²⁶ and Wire Act,¹²⁷ contributed to the prohibition of the supply of cross-border interactive gambling and betting services and consequently constituted a violation of US obligations under the GATS.¹²⁸ The US had undertaken a market access commitment in its GATS

¹²⁰ Feinberg *Harm to others* 4.

¹²¹ Alexander L "Harm, offense and morality" 1994 *Canadian Journal of Law & Jurisprudence* 199–216.

¹²² Alexander 1994 *Canadian Journal of Law & Jurisprudence* 199.

¹²³ *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WT/DS285/AB/R 7 April 2005 (Report of the Appellate Body). This matter was first heard by the WTO Panel and reported as Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (10 November 2004).

¹²⁴ *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WT/DS285/AB/R 7 April 2005 (Report of the Appellate Body) [123–124].

¹²⁵ Illegal Gambling Business Act 18 U.S.C. § 1955 (2000).

¹²⁶ Travel Act 18 U.S.C. § 1952 (2000 & Supp. II 2004).

¹²⁷ Wire Act 18 U.S.C. § 1084 (2000).

¹²⁸ *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WT/DS285/AB/R 7 April 2005 (Report of the Appellate Body) [1].

schedule with regard to gambling and betting services. This implies that the US was under the obligation not to maintain or adopt any measures that may hamper accessibility of its market by fellow WTO member states.¹²⁹ Apart from refuting that it had adopted restrictive trade measures in violation of its market access commitments, the US invoked a provision in GATS entitling member states to maintain and enforce trade restrictive measures intended to protect its public morals. It provides in part thus:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

*(a) necessary to protect public morals or to maintain public order.*¹³⁰

It was held that the aforesaid US laws were in violation of the US's market access commitments but that this was justifiable in terms of "public morality provision". In regard to public morality, the US had argued that interactive gambling would

¹²⁹ The undesirable measures are listed in Article XVI GATS, which states thus:

"(1) With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule. (2) In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

- (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
- (b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
- (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;
- (d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;
- (e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and
- (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

¹³⁰ Article XIV(a) of GATS. Similarly, GATT 1994 has a public morality clause as a justification for restrictive trade measures. Article XX provides in part thus: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures necessary to protect public morals."

introduce gambling into inappropriate settings such as homes and schools, lead to underage gambling and possibly have a detrimental effect on problem gamblers because of its 24-hour availability.¹³¹ The Appellate Body found that the concerns that the Illegal Gambling Business Act, the Wire Act and the Travel Act sought to address correctly fell within the scope of public morals and or public order in terms of Article XIV(a) of GATS.¹³² In so doing, the Appellate Body confirmed the original finding made by the Panel Body (*a court quo*) that gambling was a public morality issue, the prohibition of which could not be viewed as a violation of its marketing access commitments as it specifically provided for an exception in instances where public morality was offered as defence.¹³³

Public morality is defined as “standards of right and wrong conduct maintained by or on behalf of a community or nation”¹³⁴ and has in the past been a source of friction in the enactment of gambling laws. Public morality has been the chief protagonist in the “US’s love-hate relationship with gambling” described as intermittently prohibiting, then regulating.¹³⁵ This is best illustrated by the State of Nevada’s historic regulation of gambling and developments at federal level. From 1869–1909, gambling was not illegal in Nevada although it was relegated to back rooms and treated as a secondary line of business.¹³⁶ This changed between 1909–1931 when moral persuasions that gambling was a “vice” led to its banning. The findings by the Kefauver Committee’s investigation into organised crime¹³⁷ that a correlation existed between gambling and organised crime in the US¹³⁸ gave those who were opposed to gambling the moral high ground. Increasing secularisation, accompanied by society’s separation of religion from politics, economics, law-making and other facets of human life led to a gradual decline in the influence of religion on public morality. In

¹³¹ Marwell J “Trade and morality: the WTO public morals exception after gambling” 2006 *New York University Law Review* 802–842 812.

¹³² *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WT/DS285/AB/R 7 April 2005 (Report of the Appellate Body) [299].

¹³³ Marwell 2006 *New York University Law Review* 813.

¹³⁴ *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WT/DS285/AB/R 7 April 2005 (Report of the Appellate Body) [296].

¹³⁵ Ferraiolo K “Is state gambling policy “morality policy”? Framing debates over State lotteries” 2013 *Policy Studies Journal* 217–242 220.

¹³⁶ Sauer R “The political economy of gambling regulation” <https://ideas.repec.org/a/wly/mgtdec/v22y2001i1-3p5-15.html> (Date of use: 22 February 2015)

¹³⁷ Kefauver Committee *Organised crime in interstate commerce* (31 August 1951).

¹³⁸ Kefauver Committee *Organised crime* 6–12 on suggestions and recommendations of the committee.

1963, Nevada weathered moral storms and became the first state to allow commercial casino gambling.¹³⁹ Public opposition to gambling eased and many states followed in the footsteps of Nevada by allowing gambling as a recreational activity.¹⁴⁰ Despite this development, the US passed legislative measures, among them the Wire Act, preventing the transmission of gambling information across state lines, thereby putting an end to what is today described as interactive gambling. Reasons for the *de facto* prohibition of interactive gambling include the prevention of organised crime, the curbing of the proliferation of and access to gambling by underage persons. It is submitted that these were not real reasons but were rather informed by public morality.

As in the US, South Africa's prohibition of gambling has been based on public morality. The discussion that follows endeavours to trace gambling's transmutation from a "moral vice"¹⁴¹ to a recreational activity and, at times, a springboard for economic development. The section starts with the historical regulation of gambling, which encapsulates reasons for its early prohibition and the subsequent abrogation of rules prohibiting gambling. Then, more importantly, it discusses whether continued prohibition of interactive gambling is constitutionally sustainable. The question of whether the current prohibition of interactive gambling is influenced by the need to protect the welfare of gamblers, society and/or the state is also interrogated.

2.2 Legal regulation of gambling during the colonial era (1806–1910)

Gambling was originally regarded as inherently immoral, a danger to society and therefore deserving of total prohibition.¹⁴² This stigma of immorality became more pronounced under the influence of the missionaries, whose religious teaching promoted Christianity, a faith openly opposed to gambling. The more religious denominations began to mushroom and to be afforded recognition by rulers, the more gambling was frowned upon as the activity of lazy and evil people not willing to

¹³⁹ Nelson "The morality politics of lotteries and casinos: comparing gambling legalization in Tennessee and Mississippi" 2013 *Journal of Policy History* 62–88 63.

¹⁴⁰ Brietzke P & Kline T "The law and economics of Native American casinos" 1999 *Nebraska Law Review* 263–347 266.

¹⁴¹ Moral vice implies moral failing, wickedness or corruption.

¹⁴² Editor "Addressing problem gambling" 2011 *South African Medical Journal* 675.

sweat for their living.¹⁴³ These religious teachings had an influence in the promulgation of laws introduced during the colonial era prohibiting gambling and prostitution activities. Prohibition of gambling in South Africa came to the fore in the 18th century when South Africa was divided into four major provinces, namely the Cape,¹⁴⁴ Natal¹⁴⁵ (both colonised by Britain) and the republics¹⁴⁶ of the Transvaal and Orange Free State (both of which were independent Boer Republics). It is not that there were no legislative attempts to regulate gambling, as calls for the regulation of gambling were reported to have arisen as early as 1673 owing to the rise of gambling activities, notably in the Cape.¹⁴⁷ However, the absence of gambling provisions within Roman-Dutch law, which was the applicable law prior to colonisation, made it difficult to chronicle the regulation of gambling prior to the colonial era in the 18th century.¹⁴⁸

2.2.1 Gambling regulations in the Cape Colony

When Britain re-annexed the Cape Colony in 1806,¹⁴⁹ some of the legislative measures introduced included the re-enactment of laws applicable at that time in Britain. In Britain, gambling was generally proscribed by means of several Acts of Parliament passed for the prevention of lotteries and unlawful games, by which

¹⁴³ Kingma S “Dutch casino space or the spatial organization of entertainment” 2008 *Culture and Organization* 31–48 31. Gambling has been religiously condemned and has been considered economically unproductive and incompatible with the protestant work ethic.

¹⁴⁴ While the Cape was first colonised by Jan van Riebeeck, representing the Dutch East India Company, in 1652, it was conquered first by Britain between 1795–1803 and for the second time in 1806–1910. For a brief history of the Cape of Good Hope as a British colony see Singh D *From Dutch South Africa to Republic of South Africa 1652–1994* (Allied Publishers New Delhi 2010) 27.

¹⁴⁵ Though the Voortrekker Republic of Natalia was formed in 1838 by the Boers following their triumph over the Zulu warriors, the British government, which was then in control of the Cape of Good Hope, colonised Natal in 1843. See Laband J *Rope of sand: the rise and fall of the Zulu Kingdom in the nineteenth century* (Jonathan Ball Publishers South Africa 1995) 125. On 12 May 1843, The British Crown issued a proclamation stating that “the district of Port Natal according to such convenient limits as shall hereafter be fixed and defined, will be recognized and adopted by Her Majesty the Queen as a British Colony, and that the inhabitants thereof shall, so long as they conduct themselves in an orderly and peaceable manner, be taken under the protection of the British Crown” – Kalley J *South Africa’s treaties in theory and practice 1806–1998* (Scarecrow Press New Jersey Inc 2001) 18.

¹⁴⁶ The Transvaal and Orange Free State Republics remained semi-autonomous entities under Boer control. They were formed during the long trek which began in 1834 – See Singh *From Dutch South Africa to Republic of South Africa* 67–69.

¹⁴⁷ Lotter “The odds against gambling” 1994 (7) *S. Afr. J. Crim. Just.* 191.

¹⁴⁸ Lotteries and Gambling Board *Report on gambling* 31.

¹⁴⁹ See Singh *From Dutch South Africa to Republic of South Africa* 27.

persons engaged in such activities would be subjected to certain “pains and penalties”.¹⁵⁰ In 1846, Britain passed the Art Unions Act¹⁵¹ through which voluntary associations for the promotion of arts, under the name of Art Unions, were allowed to allot or distribute by chance (that is, lottery) works such as paintings or drawings to raise money. The money raised was expended solely and entirely for the purchase of paintings, drawings or other works of art for the benefit of the arts, however. This form of lottery, if conducted in terms of the Art Unions Act, was exempted from “the pains and penalties” provision imposed to deter lotteries and unlawful games.¹⁵² One can assume that it was viewed as fundraising rather than gambling.

The British Art Unions Act was reintroduced in the Cape Colony¹⁵³ as the Art Unions Act.¹⁵⁴ Its purpose was to “legalise voluntary art unions and ... lottery in the Cape Colony which could be run on condition that the revenue derived therefrom was used for the encouragement of fine arts”.¹⁵⁵ Notwithstanding this limited recognition of lotteries, many lotteries were established in the Cape Colony in connection with horse races, with prizes as high as £20 000 on offer.¹⁵⁶ The emergence of various modes of lottery with huge prizes led to a public outcry calling for the ending of large lotteries “in the interests of morality and the prevention of crime”.¹⁵⁷ A fear was that young persons were being tempted to take part in lotteries in the hope of striking it lucky and becoming rich without having to sweat for their fortune.¹⁵⁸ The proliferation of lotteries led to the promulgation of the Lotteries Prohibition Act¹⁵⁹ to clamp down on them. This legislation prohibited any person

from disposing of any property by way of lottery under a penalty of a fine of twenty-five rix dollars (rijksdaalders) and forfeiture of the property. The mere taking of a ticket also entailed the penalty, and in default of payment the convicted parties were to be severely flogged. All tavern-keepers, publicans (and others) who allowed lotteries to

¹⁵⁰ See Lardner-Burke H “Lotteries” 1890 *Cape L.J.* 96–105 97 chronicling the legislative prohibition of gambling in the United Kingdom/England/Britain.

¹⁵¹ Art Unions Act of 1846 http://www.legislation.gov.uk/ukpga/1846/48/pdfs/ukpga_18460048_en.pdf. (Date of use: 11 July 2011).

¹⁵² Article I of the Art Unions Act of 1846.

¹⁵³ Lotteries and Gambling Board Report on gambling 30.

¹⁵⁴ Art Unions Act 28 of 1860.

¹⁵⁵ Lotteries and Gambling Board Report on gambling 30.

¹⁵⁶ Lardner-Burke 1890 *Cape L.J.* 99.

¹⁵⁷ Lardner-Burke 1890 *Cape L.J.* 99.

¹⁵⁸ Lardner-Burke 1890 *Cape L. J.* 99.

¹⁵⁹ Lotteries Prohibition Act 9 of 1889.

*take place in their houses were liable to a double fine, and were precluded from ever obtaining a renewal of their licence.*¹⁶⁰

While this legislation might have curbed the spread of lotteries, it did not stop the proliferation of gambling in the Cape Colony.¹⁶¹ Gambling is said to have flourished and this led to the enactment of the Betting Houses, Gaming Houses and Brothels Suppression Act.¹⁶² This act provided that gambling and lotteries are null and void and therefore unenforceable.¹⁶³ It also made it impossible for gamblers to bring an action for recovery of stakes against gambling providers, as gambling was considered to be illegal.¹⁶⁴ It could be said that the overall purpose of the legislation, in addition to curbing brothels and/or prostitution, was to suppress gambling in the Cape Colony.¹⁶⁵ Gambling and prostitution were both viewed as immoral activities that ought to be curtailed.

2.2.2 Gambling regulation in the Natal Colony

Natal was colonised in 1843 by the British.¹⁶⁶ Gambling flourished in this colony and in 1878 the Discouragement of Gambling Act was promulgated.¹⁶⁷ Its purpose was to prohibit provisioning of gambling activities and lotteries.¹⁶⁸ The Act made it a punishable offence for gambling operators to provide and gamblers to participate in gambling activities, including lotteries.¹⁶⁹ However, the Act had little effect outside the gambling sphere in which building societies and financial institutions used lotteries or draws to give prizes as a means of promoting their activities. For instance, financial institutions with the object of advancing money would make the granting of loans dependent upon the result of a ballot, draw, chance or lottery.¹⁷⁰

¹⁶⁰ Lardner-Burke 1890 *Cape L. J* 96–97.

¹⁶¹ See Lotteries and Gambling Board *Report on Gambling* 30.

¹⁶² Betting Houses, Gaming Houses and Brothels Suppression Act 36 of 1902.

¹⁶³ Section 11 of the Betting Houses, Gaming Houses and Brothels Suppression Act 36 of 1902.

¹⁶⁴ Hunt P “General principles of contract” 1965 *Ann. Surv. S. African L.* 72–93 84.

¹⁶⁵ Lotteries and Gambling Board *Report on Gambling* 30.

¹⁶⁶ For an in-depth discussion of the colonisation of Natal, see Laband *Rope of sand* 125.

¹⁶⁷ Discouragement of Gambling Act 25 of 1878.

¹⁶⁸ Lotteries and Gambling Board *Report on Gambling* 31.

¹⁶⁹ Lotteries and Gambling Board *Report on Gambling* 31.

¹⁷⁰ Lotteries and Gambling Board *Report on Gambling* 31.

The government responded by enacting the Law Against Gambling in 1902,¹⁷¹ which was amended by the Law Relating to Gambling in 1909 by widening the definition of lottery to include “*any ballot, drawing or other proceeding connected with the making of advances or loans in a manner prescribed by the Act*”.¹⁷² It then prohibited entities from offering loans linked to lottery schemes or draws. It provided thus:

*No building society registered after the commencement of this Act, and no other society (which word in this Act includes a company, club, or other institution or association), having as its object, or one of its objects, the advancing of money, shall cause, permit, or suffer any advances of money or loans, or the order of precedence in taking up advances or loans, to be made dependent upon, or to be settled by, the result of any ballot, drawing, chance or lot.*¹⁷³

This legislation prevailed until the Natal Colony was subsumed into the Union Government of South Africa.

2.2.3 Gambling regulations in the Boer Republics

The Orange Free State and Transvaal republics were formed as a result of the migration (commonly known as the Great Trek) of Afrikaners from British rule in the Cape Colony. The migration was largely triggered by the Afrikaners’ dissatisfaction with British rule. They decided to trek inland to escape British control and to find independence.¹⁷⁴ Certain groups settled in what became known as the Orange Free State while others moved on and settled in what was known as the Transvaal.

In the Orange Free State, representatives of all populations in the area converged on 23 February 1854 to sign the Bloemfontein Convention, which formally established the Orange Free State as a republic and sovereign from any British authority.¹⁷⁵ They followed in the footsteps of those in the Transvaal who had signed the Sand

¹⁷¹ Law Against Gambling Act 3 of 1902.

¹⁷² Section 7 of the Law Relating to Gambling, 1909.

¹⁷³ Section 1 of the Law Relating to Gambling, 1909.

¹⁷⁴ Some of the dissatisfaction emanated from the 1834 Resolution passed by the British Parliament abolishing all forms of slavery in all its colonies, including the Cape Colony, thereby granting equality to all racial groups settled at the Cape Colony – Fairbridge D *A history of South Africa* (Oxford University Press London 1918) 1–90.

¹⁷⁵ Van Schoor M “The Orange Free State” in Muller C *Five hundred years: a history of South Africa* (Academica Pretoria and Cape Town 1969) 234–255.

River Convention on 17 January 1852, recognising the Transvaal as an existing independent state. In September 1853, the Transvaal was proclaimed as De Zuid-Afrikaansche Republiek (The South African Republic) in accordance with a decision by the ruling authority then known as the Volksraad.¹⁷⁶ The government in the Orange Free State is described as having been “ill-equipped for self-government”¹⁷⁷ and the Volksraad in the Transvaal Republic as having struggled with the enactment of laws, including its constitution.¹⁷⁸ This had an effect on its reaction to gambling activities that were regulated in dribs and drabs. Nonetheless, each authority was eventually able to provide regulation on gambling during its governing era, as discussed hereunder.

2.2.3.1 Orange Free State Republic

The Orange Free State Republic sought to regulate gambling by passing the Law on Lotteries and Sweepstakes¹⁷⁹ and the Law on Gambling.¹⁸⁰ These laws were aimed at the prohibition of all forms of gambling, including lottery. The ban on gambling was extended to include the advertisement of gambling.¹⁸¹ Those who had already concluded long advertisement deals were allowed to recover their advertising subscriptions from the advertisers or gambling promoters, although it is not known if they were fully refunded.¹⁸² Interestingly, the residents of the Orange Free State Republic were not only banned from engaging in any gambling activities, but also from any gambling outside the territory of the Orange Free State Republic.¹⁸³ In 1902, the Police Offences Ordinance was issued¹⁸⁴ to strengthen the prohibition of gambling. It widened the scope of the definition of gambling activities to include gambling houses and gaming tables.¹⁸⁵ More importantly, the Police Offences Ordinances placed a presumption of guilt on anyone found in possession of a

¹⁷⁶ Du Plessis J “The South African Republic” in Muller C *Five hundred years: a history of South Africa* (Academica Pretoria and Cape Town 1969) 256–296.

¹⁷⁷ Van Schoor *The Orange Free State* 234.

¹⁷⁸ Du Plessis *The South African Republic* 256.

¹⁷⁹ Law on Lotteries and Sweepstakes, 1897.

¹⁸⁰ Law on Gambling, 1890.

¹⁸¹ Lotteries and Gambling Board Report *on gambling* 31.

¹⁸² Lotteries and Gambling Board Report *on gambling* 31.

¹⁸³ Lotteries and Gambling Board Report *on gambling* 31.

¹⁸⁴ Police Offences Ordinance 21 of 1902.

¹⁸⁵ Lotteries and Gambling Board Report *on Gambling* 31.

gaming table or found in a gambling house.¹⁸⁶ In other words, the onus was on such a person to prove that he/she was not involved in gambling in violation of the laws prohibiting gambling. The prohibition on gambling lasted until the formation of the Union Government in 1910.

2.2.3.2 Transvaal Republic

With the discovery of deposits of gold in the Transvaal Republic, many migrant workers flocked to the republic in search of greener pastures. Gambling also developed at a rapid pace among gold miners and business people. The Transvaal government passed the “Wet Tegen Hazardspelen” prohibiting provisions of gambling activities within its territory.¹⁸⁷ It made it unlawful to operate or run gambling houses, including being in possession of gaming tables. The Act encouraged whistle-blowing by offering whistle-blowers half the amount(s) paid by the convicted gambler(s) or gambling operator(s) as a fine.¹⁸⁸

2.3 Legal regulation of gambling under the Union Government

On 31 May 1910, the Cape and Natal colonies and the two Boer republics, Orange Free State and Transvaal, were united to constitute the Union of South Africa.¹⁸⁹ Although the cabinet was in place, the government had no legislative arm responsible for making laws.¹⁹⁰ Consequently, the gambling laws adopted during the colonial or republican era remained applicable to the respective provinces. No national gambling legislation was in place to enforce the prohibition of gambling.

The first gambling legislation to be enacted by the Union Government was the Gambling Amendment Act,¹⁹¹ which was promulgated in 1933. This act, containing

¹⁸⁶ Lotteries and Gambling Board *Report on Gambling* 31.

¹⁸⁷ Wet Tegen Hazardspelen van 1889.

¹⁸⁸ Lotteries and Gambling Board *Report on Gambling* 31.

¹⁸⁹ Liebenberg B “The Union of South Africa up to the Statute of Westminster, 1910–1931” in Muller C *Five hundred years: a history of South Africa* (Academica Pretoria and Cape Town 1969) 385–411.

¹⁹⁰ Liebenberg *The Union of South Africa* 385.

¹⁹¹ Gambling Amendment Act 26 of 1933.

only two clauses, acknowledged the existence of laws prohibiting gambling but also ensured that no gambling activities took place in clubs or entertainment venues. It provided thus:

*Whenever any person is charged with an offence under any law relating to unlawful gambling, and the facts proved would establish the commission of such offence by such person, were it not that certain acts were performed in the premises of a club or a similar association of persons or in premises of which such person was a co-owner or co-lessee, such person shall be deemed to be guilty of such offence, and shall be liable on conviction to the penalties prescribed by any law for that offence.*¹⁹²

A major amendment came in 1939, in the shape of the Gambling Amendment Act,¹⁹³ amending the Gambling Act by widening the range of prohibited gambling activities. The Gambling Amendment Act empowered the Minister to declare the use or operation of pin-tables, machines or contrivances, named or described in the notice as issued by the Minister as a lottery.¹⁹⁴ Once the notice was issued, usage, operation or exposure for use of such named or described gambling activities was stopped unless the notice was withdrawn by the Minister.¹⁹⁵ The overall purpose of the amendment was to stop the development of lotteries or gambling as a means of raising money during the difficult financial times attributable to the Second World War.¹⁹⁶ Gambling operators tried their best to circumvent the restrictions of the existing gambling legislation by constantly creating new games in an effort to bypass the threat of prohibition.

2.4 Legal regulation of gambling during the apartheid era

Historically, the apartheid era commenced in earnest when the National Party led by Dr Malan came into power in 1948. Faced with an influx of blacks from the so-called “Native Areas” to emerging cities/urban areas in pursuit of economic survival,¹⁹⁷ the Nationalist government sought measures that would limit this influx and confine

¹⁹² Section 1 of the Gambling Amendment Act 26 of 1933.

¹⁹³ Gambling Amendment Act 5 of 1939.

¹⁹⁴ Section 1(a) of the Gambling Amendment Act, 1939.

¹⁹⁵ Section 1(b) of the Gambling Amendment Act, 1939.

¹⁹⁶ Lotteries and Gambling Board *Report on Gambling* 32.

¹⁹⁷ Houghton D “The significance of the Tomlinson report” <http://www.disa.ukzn.ac.za/webpages/DC/asjan57.4/asjan57.4.pdf> (Date of use: 14 August 2014)

blacks to so-called “Native areas”, that is, land allotted to blacks under the leadership of traditional councils in terms of the Natives Land Act (27 of 1913).¹⁹⁸ In order to limit such an influx, the Nationalist government enacted the Bantu Authorities Act¹⁹⁹ for the establishment or creation of Bantustan areas for each of the specific ethnic groups in South Africa.²⁰⁰ In 1958, when Dr Verwoerd came to power as Prime Minister, his Nationalist government enacted the Promotion of Bantu Self-Governing Act,²⁰¹ explicitly stating that “Bantu peoples of the Union of South Africa do not constitute an homogeneous people but merely constitute separate national units and are therefore in need of gradual development within their own areas to self-governing units on the basis of Bantu systems of government”.²⁰² In a way, the Promotion of Bantu Self-Governing Act was intended to allow for the transformation of traditional tribal lands into fully fledged Bantustans with self-determination. As envisaged by this act, Transkei was the first to be formalised as a Bantustan Area in 1963 and later gained independence on 26 October 1976 from the white South African republic. In no particular order, Bophuthatswana, Ciskei, KwaZulu-Natal, Lebowa, Venda and Gazankulu were established or recognised as self-governing units or independent states. These units/independent states saw gambling as a viable economic opportunity to boost their state coffers and uplift the socio-economic conditions of their citizenry, despite the continued prohibition of gambling in white South Africa.²⁰³

The Gambling Amendment Act passed during the era of Union government continued to govern the prohibition of gambling in the apartheid era. This legislation did not outlaw horse racing or betting, which gave rise to a surge in sports pools. In 1949, the apartheid government passed the Prohibition of Sports Pools Act.²⁰⁴ In terms of this act:

¹⁹⁸ Natives Land Act 27 of 1913 allocated arable land to blacks (Africans) while fertile land was owned by Whites but, more importantly, prohibited the sale of land owned by whites to blacks and vice versa.

¹⁹⁹ Bantu Authorities Act 68 of 1951.

²⁰⁰ Section 2 of the Bantu Authorities Act empowered the Governor-General ... to establish in respect of any native tribe or community ... a Bantu tribal authority – Richardson III H “Self-determination, international law and the South African bantustan policy” 1978 *Colum. J. Transnat'l L.* 185–220 185.

²⁰¹ Promotion of Bantu Self-Governing Act 46 of 1959.

²⁰² Preamble to Promotion of Bantu Self-Governing Act 46 of 1959.

²⁰³ Sallaz J “It’s an empowerment thing: an ethnography of colour bar conservation in a South Africa service industry” 2005 *Society in Transition* 38–56 42.

²⁰⁴ Prohibition of Sports Pools Act 38 of 1949.

No person shall –

(a) establish or commence a sports pool, or be a partner or shareholder or have any financial interest in any organization conducting a sports pool; or

(b) manage, conduct or in any way assist in managing or conducting a sports pool; or

(c) sell or dispose of or purchase or have any interest in any ticket in any sports pool; or

(d) allow any house, room or other premises under his control to be used in any way for the management or conduct of any sports pool or for any business purpose connected therewith.²⁰⁵

With sports pools being prohibited, the Act extended its reach to newspaper publishers who had unwittingly undermined the provisions of this Act by publishing sports pools advertisements. It prohibited any publication of a notice or advertisement of any sports pools even if these were to be conducted outside the territory of the Union.²⁰⁶ Contravention of the Act attracted a possible imprisonment of not more than two years or a hefty monetary fine.²⁰⁷ In order to thwart any attempt to circumvent the Act by sending sports pools tickets via mail services offered by the post office, the Postmaster General was empowered to intercept and dispose of suspicious letters or documents relating to sports pools.²⁰⁸

In 1965 the Nationalist government combined all gambling related legislation into the Gambling Act.²⁰⁹ The overall purpose of the Act was to prohibit lotteries, sports pools and games of chance within the South African territory as defined by the apartheid government. South West Africa (as Namibia was called at the time) was a protectorate of South Africa.²¹⁰ In a nutshell, the Act prohibited participation in, advertisement of, distribution and delivery of lottery, sports pools or games of chance as declared by the Minister in the Government Gazette. The Act further empowered the Minister to prohibit the use or keeping of pin-tables, machines, contrivances or similar instruments whether or not intended for the playing of games of chance. To seal the Act, any offenders found guilty of contravening it were liable to a fine not exceeding R1 000.00 or faced imprisonment not exceeding one year, or both.

²⁰⁵ Section 2 of Prohibition of Sports Pools Act 38 of 1949.

²⁰⁶ Section 3 of Prohibition of Sports Pools Act 38 of 1949.

²⁰⁷ Section 5 of Prohibition of Sports Pools Act 38 of 1949.

²⁰⁸ Section 7 of Prohibition of Sports Pools Act 38 of 1949.

²⁰⁹ Gambling Act 51 of 1965.

²¹⁰ Section 12 of Gambling Act 51 of 1965.

Denouncing the approach adopted by the apartheid government in outlawing gambling instead of regulating it, Lotter attributes the government's ignoring of the protestations of opposition parties and society at large as portraying the "paternalistic attitude displayed in matters of morality".²¹¹ Expanding on this theme, Sallaz concurs that the apartheid government denounced gambling as an immoral activity that it thought "would undermine the work ethic of the population by encouraging reliance upon luck rather than hard work and skill".²¹² This moral stance is apparent in a statement by the then Minister of Justice in 1965, Mr John Vorster, who is quoted as justifying the banning of gambling "as an evil capable of doing an immeasurable harm to the public".²¹³ Although it remains indisputable that the apartheid government must have thought that they were upholding the moral convictions of society towards gambling, this moral contestation of gambling could have been settled, as Lotter suggests, by appointing a commission to enquire into the regulation of gambling in South Africa.²¹⁴ The result of the inquiry would have cast light on whether gambling had by then shed its stigma of immorality and been embraced by society. It is clear that this Act reflected views on religion, morals and law that were in existence at the time of its promulgation.

When the apartheid government passed the Bantu Homelands Constitution Act²¹⁵ for purposes of establishing legislative assemblies and executive councils in the so-called Bantu areas, it empowered the legislative assemblies of these areas to enact or make laws, not inconsistent with the Bantu Homelands Constitution Act.²¹⁶ To a great extent, this paved the way for the TBVC states (that is, Transkei, Bophuthatswana, Venda and Ciskei) to regulate gambling in their own manner without being constrained by the Gambling Act, 1965. The TBVC states built gambling casinos as a means of producing their own economic capital. The moral stance of the old South Africa, taken to justify the banning of gambling, appeared not to have been a consideration for the TBVC states.²¹⁷ For instance, Transkei concluded agreements with foreign companies to build casinos, amongst others,

²¹¹ Lotter S "The odds against gambling" 1994 *S. Afr. J. Crim. Just.* 189–199 192.

²¹² Sallaz 2005 *Society in Transition* 41

²¹³ Sallaz 2005 *Society in Transition* 41–42.

²¹⁴ Lotter 1994 *S. Afr. J. Crim. Just.* 192.

²¹⁵ Bantu Homelands Constitution Act 21 of 1971.

²¹⁶ Section 3 of Bantu Homelands Constitution Act 21 of 1971.

²¹⁷ Sallaz 2005 *Society in Transition* 42.

partly as an affirmation of its independence from the old South Africa and as a basis for the attraction of tourists.²¹⁸ From 1976 until the disbandment and incorporation of the TBVC states into the democratic South Africa in 1993, the TBVC states issued no fewer than 18 casino licences.²¹⁹

If there was any hope that the apartheid government would reconsider its approach towards the regulation of gambling, such hope faded when the Gambling Amendment Act²²⁰ was passed almost three decades after the promulgation of the Gambling Act. The overall objective of the Gambling Amendment Act was to widen the definition of gambling games to include gambling devices. It defined a gambling game as:

*any game, irrespective of whether or not the result is determined by chance, played with playing cards, dice or gambling devices for money, property, cheques, credit or anything of value, including roulette, bingo, twenty-one, black jack, chemin de fer and baccarat.*²²¹

It further defined a gambling device as:

*any equipment or mechanical, electro-mechanical or electronic device, component or machine, used remotely or directly in connection with a gambling game and which brings about the result of a wager by determining win or loss.*²²²

In this manner, the use of these aforesaid devices for gambling or in connection with gambling was outlawed. The apartheid regime's stance in treating gambling as a moral vice remained until its demise and its replacement by the Government of National Unity, established by the Interim Constitution.²²³ This despite the appointment of the Howard Commission by the apartheid government shortly before its demise to inquire into and report on the desirability of legalising lotteries, sports pools and other forms of betting games that were not authorised by law.²²⁴ The initial mandate of the Howard Commission was extended to include the desirability of

²¹⁸ Stern 1987 *Geography* 140–141.

²¹⁹ Lotteries and Gambling Board *Report on Gambling* 34.

²²⁰ Gambling Amendment Act 144 of 1992.

²²¹ Section 1 Gambling Amendment Act 144 of 1992.

²²² Section 1 Gambling Amendment Act 144 of 1992.

²²³ Interim Constitution of the Republic of South Africa, 1993.

²²⁴ See Howard Report *Inquiry into lotteries* 1–5.

²²⁴ Lotter 1994 *S. Afr. J. Crim. Just* 194.

legalising gambling games in certain areas and/or regions. It must be remembered that gambling games were only legal in the TBVC states and many of the gambling patrons flocking to those casinos were residents of the Republic (for example, 84% of casino patrons visiting Bophuthatswana's major casino centres were residents of South Africa)²²⁵ as gambling remained illegal here. Illegal casinos mushroomed within the Republic despite its prohibition. According to Lotter, when the Johannesburg regional court in *State v Houssein*²²⁶ declared gambling games such as blackjack to be games in which gamblers exercised a modicum of skill and not luck or chance, casino operators took notice of such loopholes in the legislation and seized the opportunity to operate freely in the Republic, as their gaming activities were considered not to be in contravention of the Gambling Act.²²⁷

2.5 Post-apartheid regulation of gambling: Lotteries and Gambling Board Act

The recommendations of the Howard Commission led to the enactment of the Lotteries and Gambling Board Act,²²⁸ which was passed shortly after the adoption of the Interim Constitution. The Lotteries and Gambling Board Act had to take cognisance of constitutional developments mandated by the Interim Constitution²²⁹ in its regulation of gambling, lotteries and sports pools.²³⁰ This Act did not usher in a new gambling policy for the Republic *per se*, but merely sought to accommodate the existing gambling policies and laws of the former TBVC states, which had licensed gambling. This was partly due to the Interim Constitution's allowing the continuation of existing laws that were in force in any area forming part of the new South Africa, until such laws were repealed by a competent authority. Gambling laws of the former TBVC states were given a temporary stay of execution through incorporation into the national legislation.

²²⁵ Stern E "Competition and location in the gaming industry: the 'casino states' of Southern Africa" 1987 *Geography* 140–150.

²²⁶ *State v Houssein* 1990, Johannesburg Regional Court as discussed in Lotter 1994 *S. Afr. J. Crim. Just* 194.

²²⁷ Lotter 1994 *S. Afr. J. Crim. Just* 194.

²²⁸ Lotteries and Gambling Board Act 210 of 1993.

²²⁹ Section 229 of the Interim Constitution of the Republic of South Africa, 1993.

²³⁰ Schedule 6 of the Interim Constitution of the Republic of South Africa, 1993, prescribes casinos, racing, gambling and wagering as matters within legislative competences of provinces and section 156 empowers provinces to impose tax on these matters.

The Lotteries and Gambling Board Act decriminalised existing lotteries, sports pools, fundraising activities, casinos and gambling games within the Republic. Section 9 reads as follows:

(1) Any person lawfully (that is, issued with licence to) conducting or operating any lottery, sports pool, casino or gambling game ... in a state the territory of which formed part of the Republic (reference to TBVC states) shall, if and when such state is reincorporated into the Republic ... register in the prescribed manner such lottery, sports pool, casino or gambling game with the Lotteries and Gambling Board.

(2) The conducting or operating of, and participation in, a lottery, sports pool, casino or gambling game registered ... shall be deemed not to be in contravention of the provisions of the Gambling Act, (that is, Act 51 of 1965).

The establishment of the Lotteries and Gambling Board ensured that the government would have at its disposal the institutional capacity for the regulation and implementation of lotteries, sports pools and gambling games.²³¹ Thus, the Gambling Board was empowered to set criteria for the granting of casino licences and measures for the control and restriction of bingo games or any similar game. While the Howard Commission is to be commended for its bold step in decriminalising existing lotteries, sports pools, gambling games including casinos, it is my submission that the real motivation for legalising these activities was the monetary advantage that the state could gain from legalised gambling.

The Howard Commission's recommendations were not accepted without criticism. That casinos should be placed outside cities was criticised as a mere reproduction of the homeland casino system.²³² Perhaps the Howard Commission should have gone further by recommending criteria for regulation of current and future gambling activities. It could be that, when interrogated, society's attitudes towards gambling might have changed to the extent that properly regulated gambling activities would have been tolerated. But such an omission is understandable as it was not part of their remit or terms of reference. The Lotteries and Gambling Board Act was not premised on any policy. Instead, the newly established Lotteries and Gambling Board was expected to fill the vacuum by formulating and advising the Minister on

²³¹ Section 2 of the Lotteries and Gambling Board Act.

²³² Sallaz 2005 *Society in Transition* 43.

policy for the regulation of gambling activities. It is not surprising, then, that within a short time of the implementation of the Lotteries and Gambling Board Act, a commission headed by Judge Nicholas Wiehahn was appointed by the Lotteries and Gambling Board to inquire broadly and report on the legalisation of lotteries and gambling in South Africa.

Upon examination of the existing legislation and by conducting public hearings into the matter, the Wiehahn Commission²³³ concluded in its report that the then prevailing Gambling Act no longer reflected the true moral viewpoint of the majority of South Africans. In other words, while it was presumed that society prior to and during the apartheid government had regarded gambling as immoral, society under the democratic dispensation could not be said to subscribe to this viewpoint.²³⁴ The commission then recommended that all forms of gambling, lotteries included, be regulated as continued prohibition was counterproductive and unsustainable.²³⁵ This would ensure that only licensed lotteries and gambling would operate in the country and within the strictures of the legislation.

The Wiehahn Commission's recommendation culminated in the enactment of the National Gambling Act,²³⁶ promulgated after the adoption of the Interim Constitution. The Interim Constitution, which had established three tiers of government at national, provincial and municipal levels, bestowed upon the provincial governments powers to make laws for the regulation of casinos, gambling and wagering in their respective provinces.²³⁷ This, therefore, required the national government, which exercised

²³³ The report by the Wiehahn Commission has been cited as Lotteries and Gambling Board *Main report on gambling in the Republic of South Africa* (Pretoria March 1995).

²³⁴ Lotteries and Gambling Board *Report on gambling* 143 in which it was boldly concluded that: "*Legalised gambling presents a dramatic change to South Africa. However, no society can afford not to change and while there are risks in reckless change, greater danger lurks in blind conservatism. The strength of the nation is not forever holding on to old views and ways but rather in its capacity to adapt itself in an orderly manner to the changing attitudes of its society. Fate has dealt South Africa a mixed hand of cards – we must let our common sense, courage and faith allow us to play a grand-slam with it.*"

²³⁵ Lotteries and Gambling Board *Report on gambling* 143.

²³⁶ National Gambling Act 33 of 1996.

²³⁷ Section 126 of the Interim Constitution of the Republic of South Africa, 1993, entitled Legislative Competence of Provinces stated as follows: "A provincial legislature shall be competent ... to make laws for the province with regard to all matters which fall within the functional areas specified in Schedule 6". Schedule 6 also entitled legislative competence of provinces' lists, among others, casinos, racing, gambling and wagering as falling within the competence of provinces.

concurrent jurisdiction with provincial government for the regulation of the aforesaid activities, to make provision for the coordination and promotion of uniform norms and standards in the regulation of gambling.²³⁸ In order to achieve this, the National Gambling Act established the National Gambling Board,²³⁹ with the responsibility of bringing uniformity to the legislation relating to gambling in the various provinces and of advising the Minister on the issuing of casino licences.²⁴⁰

For the first time, guidelines for the regulation of gambling in the Republic were contained in the national legislation. These guidelines range from the protection of consumers, that is gamblers, against the adverse effects of gambling; protection of both society and the economy against the proliferation of gambling; barring of the state from holding financial interests in gambling activities; and setting of the maximum number of casino licences to be issued in the country. A maximum of 40 casino licences was set, meaning that provincial governments with few or no casino establishments were able to develop their casino establishments.²⁴¹ Gambling was on the rise but it was also being regulated.

The National Gambling Act, 1996, was replaced by the current National Gambling Act 7 of 2004 (hereinafter “National Gambling Act”). The repeal or replacement was partly necessitated by imperatives of the Constitution, in terms of which gambling falls within the concurrent jurisdiction of the national and provincial governments.²⁴² Concurrent jurisdiction over gambling requires cooperation between national and provincial spheres of government.²⁴³ The National Gambling Act has thus to provide for the coordination of concurrent/shared jurisdiction over gambling activities.²⁴⁴ Within the framework of shared jurisdiction, the National Gambling Act set out the responsibilities of the NGB and its relations with provincial licensing authorities.²⁴⁵ While South Africa was engaged in gambling reforms mandated by the Constitution,

²³⁸ Chapter 3 of the Constitution of the Republic of South Africa, 1996, promoting cooperative government read together with Schedule 4 dealing with functional areas of concurrent national and provincial legislative competence.

²³⁹ Section 2 of the National Gambling Act, 1996.

²⁴⁰ Section 10(a) of the National Gambling Act, 1996.

²⁴¹ Section 13(1)(j) of the National Gambling Act, 1996.

²⁴² Schedule 4 (Part A) of the Constitution of the Republic of South Africa, 1996.

²⁴³ Chapter 3 of the Constitution of the Republic of South Africa, 1996.

²⁴⁴ Preamble to the National Gambling Act 7 2004.

²⁴⁵ Section 65–66 of the National Gambling Act 7 2004.

interactive gambling was developing rapidly across the globe. It is submitted that the legislature should at this point have addressed interactive gambling and clarified the legal position and intentions of government regarding its regulation.

As explained in the Memorandum on the Objects of the National Gambling Bill, 2003, repeal of the National Gambling Act, 1996, did not mean that the efforts of the Wiehahn Commission, which led to its enactment, had gone to waste. The National Gambling Bill, 2003, proposed to “*re-enact many of its provisions (that is, National Gambling Act, 1996) in a new form, while adding several new provisions which introduce new policies ...*”.²⁴⁶ A clear legacy of the Wiehahn Commission carried into the new legislative framework was to retain the separation of lottery from gambling regulation. Today, gambling is regulated separately by the National Gambling Act (7 of 2004) while lotteries are governed by the Lotteries Act (57 of 1997).

2.6 Legal framework for gambling and interactive gambling

As a result of concurrent jurisdictions in the national and provincial government on gambling matters, both governments are vested with the power to pass legislation on gambling.²⁴⁷ Local governments, popularly known as local municipalities, were excluded from the concurrent governance of gambling in its entirety. In order to ensure cooperation among these tiers of government, the Constitution established principles of cooperative government and intergovernmental relations that all spheres of government must observe.²⁴⁸ In fulfilment of their constitutional obligations to regulate gambling among other things, the provincial governments amended their separate legislation to complement the National Gambling Act. None of the provincial legislation deals with interactive gambling, however; the National Gambling Act does not allow for regulation of interactive gambling by provinces.

²⁴⁶ Memorandum on the objects of the National Gambling Bill, 2003, 44.

²⁴⁷ Section 44(1)(a)(ii) and section 104(1)(b)(i) of Constitution of the Republic of South Africa, 1996, enjoins the national government and provincial governments respectively to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4.

²⁴⁸ Sections 40–41 of the Constitution of the Republic of South Africa, 1996.

In August 2004, the National Gambling Act²⁴⁹ was signed into law to regulate gambling in South Africa. It left the door open for legislative regulation of interactive gambling by mandating the NGB to set up a committee that would report on the regulation of interactive gambling. Section 5 of the Schedule: Transitional Provisions provides:

- 5(1) The National Gambling Board must establish a committee to consider and report on national policy to regulate interactive gambling within the Republic, and may include with its report any draft national law that the committee may consider advisable.*
- (2) Despite section 71(2), the committee constituted in terms of this item may include –*
- (a) representatives of provincial licensing authorities; and*
- (b) other persons, whether or not those persons are members of the board.*
- (3) Sections 71(3) and (4) apply to the committee constituted in terms of this item.*
- (4) The committee constituted in terms of this item must report jointly to the National Gambling Board and the National Gambling Policy Council within one year after the effective date.*
- (5) Within two years after the effective date, the Minister, after considering the report of the committee and any recommendations of the National Gambling Board or the National Gambling Policy Council, must introduce legislation in Parliament to regulate interactive gambling within the Republic.²⁵⁰*

In compliance with this mandate, the National Gambling Amendment Act²⁵¹ was eventually passed in Parliament and signed into law by the President on 14 July 2008.²⁵²

2.7 Legal status of the National Gambling Amendment Act and its impact on interactive gambling

The National Gambling Amendment Act is not yet in operation, despite being assented to by the President. Its commencement date is left open for the President to proclaim in the official government communication publications.²⁵³ This move was

²⁴⁹ Government Notice No. 960 published in Government Gazette No. 26670 of 12 August 2004.

²⁵⁰ Section 5 in the Schedule: Transitional Provisions of the National Gambling Act 7 of 2004.

²⁵¹ National Gambling Amendment Act 10 of 2008.

²⁵² Government Gazette No. 31245 published 14 July 2008.

²⁵³ Section 44 of the National Gambling Amendment Act 10 of 2008.

probably to afford the Minister an opportunity to establish mechanisms for its implementation, in particular, its regulations. This is apparent from the Minister's address to Parliament during the approval of the National Gambling Amendment Act, when he indicated the need for the enactment of regulations giving effect to the provisions of the National Gambling Amendment Act prior to its commencement.²⁵⁴ Despite the development of the draft Interactive Gambling Regulations, 2009,²⁵⁵ by the Minister, it has since transpired that Parliament had reservations regarding, in general, "the socio-economic impact of gambling in South Africa, especially on the poor"²⁵⁶ and the "viability of the gambling industry to accommodate further roll-outs of new activities".²⁵⁷ This led to the appointment of the Gambling Review Commission in December 2009 to investigate these issues, amongst others.²⁵⁸

The Gambling Review Commission released its final report in September 2010, recommending regulation of interactive gambling. It wrote:

*In a world driven by technology, interactive gambling is unlikely to disappear. Internationally, jurisdictions that prohibit interactive gambling often appear to have different forms of interactive gambling available, which are linked with land-based gambling activities.*²⁵⁹

The Commission continued:

*The Commission is therefore of the view that a holistic view of interactive gambling should be applied to its regulation that includes interactive gambling and all forms of remote gambling, such as telephone or cell phone gambling.*²⁶⁰

When the official opposition party, the Democratic Alliance ("DA"), realised that nothing had come of the recommendations by the Gambling Review Commission, it

²⁵⁴ Minister of Trade and Industry "Second reading debate of the National Gambling Amendment Bill, in the National Assembly" <http://www.info.gov.za/speeches/2007/07092014151002.htm> (Date of use: 05 September 2011).

²⁵⁵ Draft Interactive Gambling Regulations, 2009.

²⁵⁶ Gambling Review Commission *South African gambling industry* 8 and Mahlong A "Interactive gambling legislation lags" http://www.itweb.co.za/index.php?option=com_content&view=article&id=29017:interactive-gambling-legislation-lags&catid=147:internet&Itemid=68 (Date of use: 05 November 2011).

²⁵⁷ Gambling Review Commission *South African gambling industry* 26.

²⁵⁸ Department of Trade & Industry Terms of reference: establishment of the Gambling Review Commission in the gambling industry in South Africa (2009) 1–2.

²⁵⁹ Gambling Review Commission *South African gambling industry* 182.

²⁶⁰ Gambling Review Commission *South African gambling industry* 183.

published the Remote Gambling Bill²⁶¹ for the regulation of interactive (remote) gambling. The Bill was introduced as a private member's bill (that is, bills that are drawn up by private members, as opposed to ministers or committees) in the National Assembly on 19 February 2015.²⁶² In brief, the DA's Remote Gambling Bill seeks to provide for the regulation and licensing of interactive (remote) gambling in the country.²⁶³ Reacting to news of the publication of this Bill, the Department of Trade and Industry, responsible for gambling, is quoted as saying:

*In our view no amount of control will adequately curb the harm that may be caused to South African citizens by interactive gambling; hence we reiterate that it must remain a banned activity.*²⁶⁴

The Department of Trade and Industry's statement refers to the court's decision to ban interactive gambling, which will shortly be discussed. It can be accepted that the Department of Trade and Industry's position reflects the Minister's position on the subject, which diminishes the DA's chances of achieving success with this Bill.

The Department of Trade and Industry has since published the National Gambling Policy, 2016,²⁶⁵ outlining *"the policy position that intends to review the gambling landscape in South Africa"*.²⁶⁶ The National Gambling Policy, 2016, was necessitated by, amongst others, the report of the Gambling Review Commission (mentioned earlier) and Parliament's deliberations on the report of the Gambling Review Commission. Amongst others, the National Gambling Policy, 2016, proposed to embargo new forms of gambling activities, including interactive gambling. It read thus:

No new forms of gambling will be allowed at this point and that rather improved controls should be implemented to address issues arising from currently legalised modes of gambling in South Africa. Improved provisions will be included in the legislation to deal effectively with illegal gambling. The capacity to regulate online gambling currently is not adequate, but can be streamlined to

²⁶¹ Remote Gambling Bill, 2014, published in the Government Gazette 37569 of 23 April 2014.

²⁶² Parliamentary Monitoring Group "Remote Gambling Bill" (PMB3–2015) <https://pmg.org.za/bill/554/> (Date of use: 25 February 2015).

²⁶³ Preamble to Remote Gambling Bill.

²⁶⁴ Siphamandla Goge "Hopes to legalise interactive gambling bite the dust" (27 January 2015) <http://www.iol.co.za/business/news/hopes-to-legalise-online-gambling-bite-the-dust-1.1809331> (Date of use: 25 February 2015).

²⁶⁵ Department of Trade & Industry *National gambling policy, 2016* (Notice 389 of 2015 published in Government Gazette 39887 of 1 April 2016).

²⁶⁶ Department of Trade & Industry *National gambling policy* 1.

prevent illegal operations. Provisions must be included to prohibit illegal winnings, with amendments to prohibit Internet Service Providers (the latter must knowingly host an illegal gambling sites) banks and other payment facilitators from facilitating illegal gambling, transferring, paying or facilitating payment of illegal winnings to persons in South Africa. The prohibition will require the NGR to be vigilant in terms of alerting the institutions above of such illegal operators. If the notification by NGR is not implemented the affected institution or facilitating body should be criminally liable in terms of the Act. Such winnings should be paid over to the Unlawful Winnings Trust as indicated above.²⁶⁷

It adds that:

The policy does not propose introduction of new gambling activities like online casino gambling, greyhound or animal racing. Introduction of online casino gambling requires a policy shift in regard to the destination approach to gambling as it proposes bringing gambling activities more closer to people. This aspect is considered against the concern regarding problem gambling in South Africa, and measures to combat it successfully.²⁶⁸

Prohibition does not guarantee that interactive gambling will cease to exist. Regulation, however, provides an opportunity to manage societal differences on what is right and wrong. It allows contested activities to take place within the confines of the law without foregoing socio-economic benefits.

2.8 Legality of non-implementation of the National Gambling Amendment Act

Section 84(2)(a) of the Constitution entrusts the President with powers “to assent to and sign Bills”. If the President has reservations regarding the constitutionality of a bill, it may be referred back to Parliament for reconsideration.²⁶⁹ The President has two options after reconsideration of the Bill by Parliament. In terms of section 79(4) of the Constitution, the President must either

- (a) assent to and sign the Bill; or*
- (b) refer it to the Constitutional Court for a decision on its constitutionality.*

²⁶⁷ Department of Trade & Industry *National gambling policy* 5.

²⁶⁸ Department of Trade & Industry *National gambling policy* 9.

²⁶⁹ Sections 79(2)(b) and 84(2)(b) of the Constitution of the Republic of South Africa, 1996.

If the Constitutional Court decides that the bill is constitutional, the President must assent to it and sign it.²⁷⁰ Nowhere in the Constitution is the President's power to proclaim the commencement date of a duly signed Act of Parliament addressed, thus giving rise to an apparent constitutional vacuum with respect to presidential proclamations of a particular Act of Parliament. The President's vetoing powers arise only if he (she) has reservations about the constitutionality of a bill. By virtue of signing the National Gambling Amendment Act, the President implicitly confirmed that there were no reservations on his part regarding its constitutionality. It is submitted that the moment a bill is signed into law by the President – as was the case with the National Gambling Amendment Act – unless there is a specified commencement date, it should come into operation by default. The purpose of the President's assent to a bill is to make it legislation.

When the President assents to a bill, an expectation arises that it will sooner or later come into operation. The determination of a commencement date is merely an administrative matter designed to allow for a smooth implementation of the legislation. But if legislation is allowed to lapse as a result of the commencement date not being proclaimed by the President, then this will amount to giving him (her) vetoing powers not envisaged by the Constitution. Writing on this issue, Bennion suggests that by conferring upon the executive (in this case, the President) the power to proclaim the commencement date, the legislature implicitly intends that it will be brought into force within a reasonable time by the executive.²⁷¹ It may be argued that if a commencement date is not set the President is not fulfilling his (her) mandate in terms of section 84(2)(a) of the Constitution.

This issue has been addressed in Canada and the United Kingdom. The leading case in Canada arose in the *Criminal Law Amendment Act, Reference*,²⁷² a case

²⁷⁰ Section 79(5) of the Constitution of the Republic of South Africa, 1996.

²⁷¹ Sullivan R *Sullivan and Driedger on the construction of statutes* 4th ed (LexisNexis Canada 2002) 524 quoting Bennion *Statutory interpretation* 3rd ed (London Butterworths 1997) 208 and Twomey A "The refusal or deferral of royal assent" 2006 *Public Law* 580–602 584.

²⁷² *Criminal Law Amendment Act, Reference* [1970] S.C.R. 777 hereinafter referred to as ("*Criminal Law Amendment Act, Reference*") <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc->

referred to the Supreme Court of Canada by the Governor-General in Council. The case concerned the operation date of section 16 of the Canadian Criminal Law Amendment Act.²⁷³ This section “was proclaimed with the exception of three subsections”.²⁷⁴ The proclaimed provisions/subsections “imposed a new requirement whereby a person, believed to be impaired, in control of a motor vehicle, could be required to provide a sample of his breath for analysis, to create a new offence of refusing to give such sample of breath; and to create a rebuttable evidentiary presumption that the chemical analysis of an accused’s breath is proof of the proportion of alcohol in the blood. The three subsections not proclaimed laid down the requirements that the accused must be offered a sample of his breath in an approved container.”²⁷⁵ Section 120 of the Criminal Law Amendment Act enjoined the Governor-General in Council to proclaim the commencement. It stated “*this Act or any of the provisions of this Act shall come into force on a day or days to be fixed by proclamation*”.²⁷⁶ The Governor-General in Council did not proclaim certain sections concerning penal provisions. Thus the issue before the Supreme Court of Canada was the constitutionality of the proclamation and, in particular, whether the Court had the power to enforce or bring into force the provisions for which the Governor-General in Council had yet to proclaim a commencement date. Judson J. was of the opinion that:

*“Once it has been ascertained that Parliament has given the executive a certain power, as it has done in this instance by virtue of section 120, then it is beyond the power of Courts to review the manner in which the executive exercises its discretion. Courts cannot examine policy considerations animating the executive.”*²⁷⁷

He continued:

*“In the present case, if we accept, as I do, that section 120 gives the Privy Council the power to proclaim or not to proclaim various sections and subsections, then that is an end of the matter; this Court cannot examine the way in which this power is exercised.”*²⁷⁸

csc/en/5076/1/document.do (Date of use: 23 January 2013). The case is also discussed by Sullivan *Sullivan and Driedger on the construction of statutes* 525.

²⁷³ Criminal Law Amendment Act of 1968–69.

²⁷⁴ *Criminal Law Amendment Act, Reference* [1970] S.C.R. 777.

²⁷⁵ *Criminal Law Amendment Act, Reference* [1970] S.C.R. 777.

²⁷⁶ Section 120 of the Canadian Criminal Law Amendment Act.

²⁷⁷ *Criminal Law Amendment Act, Reference* [1970] S.C.R. 784.

²⁷⁸ *Criminal Law Amendment Act, Reference* [1970] S.C.R. 784.

Similarly, Hall J. was of the opinion that:

*“Notwithstanding that in my view the Order in Council proclaiming parts only of section 16 of the Criminal Law Amendment Act ... may indicate on the part of the executive a failure to live up to the spirit of what was intended by Parliament, I am nevertheless bound to hold that the remedy does not lie with the Courts. Under our system of parliamentary responsible government, the executive is answerable to Parliament, and when Parliament, by enacting section 120, gave the executive a free hand to proclaim “any of the provisions of the Act”, the responsibility for the result rests with Parliament which has the power to remedy the situation if the executive has actually acted contrary to its intention”.*²⁷⁹

The decision is based on the fact that the Supreme Court lacked authority to direct the Governor-General in Council, or the Privy Council, to carry out the mandate of the legislature. According to the Court, the legislature may by way of amendment, remove the clause empowering the President to proclaim the commencement, thereby making the legislation applicable immediately upon the President’s assent

In the United Kingdom, the House of Lords also had an opportunity to scrutinise the omission or failure to proclaim the commencement date of the Criminal Justice Act, 1988, in the case of *R v United Kingdom (Secretary of State for the Home Department)*.²⁸⁰ The United Kingdom’s Criminal Justice Act 1988 bestowed upon the Secretary of State the power to proclaim its commencement date. It provided that certain sections of the Act “*shall come into force on such a day as the Secretary of State may ... appoint*”.²⁸¹ The Secretary of State, instead of bringing into force the sections of the Act dealing with statutory compensation for victims of crime, opted to introduce a non-statutory scheme under the Crown’s prerogative. As the name suggests, this non-statutory scheme fell outside the provisions and scope of the Act. The question was whether the Secretary of State acted lawfully by ignoring a clear mandate of the legislature to bring the Act into force. Lord Browne-Wilkinson presenting the majority decision said:

“In my judgment it would be most undesirable that ... the court should intervene in the legislative process by requiring an Act of

²⁷⁹ *Criminal Law Amendment Act, Reference* [1970] S.C.R. 784-785.

²⁸⁰ *R v United Kingdom (Secretary of State for the Home Department)* [1995] , 180 N.R. 200 (H.L.)

²⁸¹ Section 71 of the United Kingdom’s Criminal Justice Act of 1988.

Parliament to be brought into effect. That would be for the courts to tread dangerously close to the area over which Parliament enjoys exclusive jurisdiction, namely the making of legislation.”²⁸²

Indicating his disapproval of using the courts to force the Secretary of State to pronounce the commencement date, Lord Nicholls of Birkenhead was of the opinion that:

“A court order compelling a Minister to bring into effect primary legislation would bring the courts right into the very heart of the legislative process. But the legislative process is for the legislature, not the judiciary.”²⁸³

Based on the above examples, it appears that there is no recourse against the President for his omission to bring the National Gambling Amendment Act into operation owing to the separation of powers requiring the executive, the legislature and the judiciary to avoid encroaching on each other’s area of competence. Parliament is also at fault for not setting the default commencement date. It is no excuse that Parliament did not foresee that the President might not proclaim the commencement date. This may be the first but certainly not the last legislation without a commencement date. Government is at liberty to change or revise its policies but this should be done in a constitutional manner, in contrast to the failure to proclaim duly signed legislation. The National Gambling Policy, 2016, seeking amongst others to place an embargo on new forms of gambling activities, is an indication of government’s change of policy from regulation to prohibition.²⁸⁴ Notwithstanding, this does not mean that the National Gambling Amendment Act has lapsed by virtue of being inoperative. It remains valid but not operational until such time that it is properly repealed by Parliament. Until then, its contents are relevant when discussing South Africa’s developed regulatory framework for interactive gambling.

²⁸² *R v United Kingdom (Secretary of State for the Home Department)* [1995], 180 N.R. 200 (H.L.) [24–25] and Kaye P “When do Ontario Acts and Regulations come into force?” http://www.ontla.on.ca/bills/general-information/files_pdf/files...rp_b31.pdf (Date of use: 15 July 2011)

²⁸³ *R v United Kingdom (Secretary of State for the Home Department)* [1995], 180 N.R. 200 (H.L.) [111].

²⁸⁴ Department of Trade & Industry *National gambling policy* 4-5.

2.9 Case law on the prohibition of interactive gambling

The High Court's decision in *Casino Enterprises (Pty) Ltd (Swaziland) v Gauteng Gambling Board*,²⁸⁵ declaring interactive gambling to be an activity prohibited by the National Gambling Act, and upheld by the Supreme Court of Appeal in *Casino Enterprises (Pty) Ltd v Gauteng Gambling Board*²⁸⁶ dealt a major blow to interactive gambling operators who would have wished to enter such a segment of the gambling market in South Africa. Based in Swaziland, Casino Enterprises owned and operated a land-based casino under its Swaziland-issued licence. The company also operated an interactive casino. It expanded its market to South Africa by advertising its interactive casino on three radio stations based in the province of Gauteng. It did not obtain, nor did it seek the Gauteng Gambling Board's approval for these advertisements of the availability of its interactive casino to the inhabitants of the province.²⁸⁷ Armed with the Gauteng Gambling and Betting Act,²⁸⁸ the Gauteng Gambling Board issued an order to the three unnamed radio stations to desist from airing the advertisements of Casino Enterprises.²⁸⁹ In so doing, the Gauteng Gambling Board relied on the provisions of section 71 which states:

- (1) *No person shall, by way of advertisement or with intent to advertise, publish or otherwise disseminate or distribute any information concerning gambling in the Province in respect of which licence [sic] in terms of this Act is not in force.*
- (2) *The advertising of gambling shall be subject to such restrictions and prohibitions as may be prescribed.*
- (3) *Any person who contravenes a provision of subsection (1) shall be guilty of offence.*²⁹⁰ [sic]

The Board further invoked the provisions of section 11 of the National Gambling Act making "unauthorised interactive gambling unlawful".²⁹¹ In addition to prohibiting interactive gambling in general, the National Gambling Act further prohibits "the

²⁸⁵ *Casino Enterprises (Pty) Ltd (Swaziland) v Gauteng Gambling Board* 2010 (6) SA 38 (GNP).

²⁸⁶ *Casino Enterprises (Pty) Ltd v Gauteng Gambling Board* 2011 (6) SA 614 (SCA).

²⁸⁷ *Casino Enterprises (Pty) Ltd (Swaziland) v Gauteng Gambling Board* 2010 (6) SA 38 (GNP) 40E–G or [10].

²⁸⁸ Gauteng Gambling and Betting Act 4 of 1995.

²⁸⁹ *Casino Enterprises (Pty) Ltd (Swaziland) v Gauteng Gambling Board* 2010 (6) SA 38 (GNP) 39D or [2].

²⁹⁰ Section 71 of the Gauteng Gambling and Betting Act.

²⁹¹ Section 11 of the National Gambling Act 7 of 2004 states clearly that: "A person must not engage in or make available an interactive game except as authorised in terms of this Act or any other national law."

advertisement or promotion of any gambling activity ... considered unlawful under the terms of the Act or applicable provincial law”.²⁹² On this point, the Gauteng Gambling Board argued that advertisement of an interactive casino on Gauteng-based radio stations by Casino Enterprises could not be lawful as no licence had been issued in respect of this interactive casino.²⁹³ The court agreed that the radio stations could not lawfully advertise interactive casinos belonging to Casino Enterprise as the latter had no licence for interactive gambling services in Gauteng.²⁹⁴ The radio stations obliged and withdrew all advertisements of Casino Enterprises and their interactive casinos in South Africa.²⁹⁵

It is this forced withdrawal of advertisements that culminated in three court cases involving Casino Enterprises.²⁹⁶ In the first case, Casino Enterprises sought an order declaring “*that when Gauteng gamblers patronise the casino their gambling occurs in Swaziland so that neither such gambling nor advertising contravenes the [South African] legislation*”.²⁹⁷ It therefore argued that the provisions of the Gauteng Gambling and Betting Act did not apply to its interactive casino or advertisements. Casino Enterprises sought to take advantage of the legislative vacuum created by the non-commencement of the National Gambling Amendment Act and to escape the provisions relating to licensing requirements and advertisements. It argued that its interactive casino did not constitute interactive gambling as contemplated by the National Gambling Act simply because it did not take place in South Africa. Therefore, accessibility of its interactive gambling services to customers based in South Africa as well as its advertisement within Gauteng could not be unlawful under either the National Gambling Act or the Gauteng Gambling and Betting Act.

²⁹² Section 15 of the National Gambling Act 7 of 2004.

²⁹³ *Casino Enterprises (Pty) Ltd (Swaziland) v Gauteng Gambling Board* 2010 (6) SA 38 (GNP) 49H–I or [61].

²⁹⁴ *Casino Enterprises (Pty) Ltd (Swaziland) v Gauteng Gambling Board* 2010 (6) SA 38 (GNP) 50A or [61].

²⁹⁵ Unreported case of *Casino Enterprises (Pty) Ltd (Swaziland) v Gauteng Gambling Board* (91/07) [2008] ZASCA 31 (28 March 2008) [3] <http://www.saflii.org/za/cases/ZASCA/2008/31.html> (Date of use: 04 November 2011).

²⁹⁶ Firstly, unreported *Casino Enterprises (Pty) Ltd (Swaziland) v Gauteng Gambling Board* (91/07) [2008] ZASCA 31 (28 March 2008); secondly, *Casino Enterprises (Pty) Ltd (Swaziland) v Gauteng Gambling Board* 2010 (6) SA 38 (GNP); and, thirdly, *Casino Enterprises (Pty) Ltd v Gauteng Gambling Board* 2011 (6) SA 614 (SCA).

²⁹⁷ *Casino Enterprises (Pty) Ltd (Swaziland) v Gauteng Gambling Board* (91/07) [2008] ZASCA 31 (28 March 2008) [3].

Ultimately, Casino Enterprises argued that the entire activity took place where the interactive gambling server was located, in this case Swaziland.²⁹⁸

Presiding over the matter, the North Gauteng High Court focused on the Gauteng Gambling and Betting Act's definition of "gambling": the "wagering of money on the unknown result of a future event, irrespective of whether any measure of skill is involved and encompassing all forms of gaming and betting".²⁹⁹ The court further emphasised that to carry out such envisaged gambling activities, a gambling license was required.³⁰⁰ Ultimately, the High Court had no difficulty in finding that the interactive casino of Casino Enterprises constituted gambling and was accordingly in contravention of provincial legislation.³⁰¹ The court effectively rejected Casino Enterprises' argument that the transaction took place where the gambling server was located.

According to the court, interactive gambling takes place at the interactive gambler's computer terminal, in this case Gauteng. In making its decision, the court settled the debate regarding "place of consumption" versus "location of supplier" emanating from the development of interactive gambling.³⁰² By ruling that interactive gambling takes place at the computer terminal of the gambler, the court approved "place of consumption" as being where interactive gambling takes place. This is relevant when determining which country has jurisdiction to enforce its rules governing interactive gambling. In conveying this point, the court reasoned that:

"It matters not in my view whether the critical elements are to be found or generated within the borders of South Africa or not. Section 11 prohibits ... both engaging in the game, which happens each time a gambler presses the SPIN button, and making available the game, which takes place at least when the plaintiff's servers in Swaziland

²⁹⁸ *Casino Enterprises (Pty) Ltd (Swaziland) v Gauteng Gambling Board* 2010 (6) SA 38 (GNP) 40B or [7].

²⁹⁹ Section 1 of Gauteng Gambling and Betting Act 4 of 1995.

³⁰⁰ *Casino Enterprises (Pty) Ltd (Swaziland) v Gauteng Gambling Board* 2010 (6) SA 38 (GNP) 44C or [34].

³⁰¹ *Casino Enterprises (Pty) Ltd (Swaziland) v Gauteng Gambling Board* 2010 (6) SA 38 (GNP) 45A or [38].

³⁰² Debate regarding place of consumption or location of gambler versus location of a gambling operator has also arisen in the UK following promulgation of the UK Gambling (Licensing and Advertisement) Act, 2011.

*make it possible for the gambler in Gauteng to connect interactively with them through the internet*³⁰³ (my emphasis).

It therefore follows that the interactive gambling activities of Casino Enterprises in South Africa constituted an illegal gambling activity and were not permitted by the National Gambling Act or the Gauteng Gambling and Betting Act.³⁰⁴

As mentioned above, the High Court's decision was upheld by the Supreme Court of Appeal (in *Casino Enterprises (Pty) Ltd v Gauteng Gambling Board*).³⁰⁵ The SCA was called upon to decide "whether the activities of the internet casino contravene the gambling laws of this country, being for present purposes, the National Gambling Act and the Gauteng Gambling and Betting Act, when gamblers in South Africa gamble online".³⁰⁶ The Supreme Court of Appeal was of the opinion that this question required the consideration of the supposition by Casino Enterprises that its gambling activities took place where its server was located, in this instance in Swaziland, and not in Gauteng in any manner that contravened either Act.³⁰⁷ If this supposition were to be accepted/proved, it would imply that Casino Enterprises was not in contravention of South African law. Casino Enterprises further proposed that neither the National Gambling Act nor the Gauteng Gambling and Betting Act had been designed with interactive gambling in mind.³⁰⁸ Its interactive casino operations "were not foreseen by the lawmakers or catered for in the existing legislation; it operates in the cyberspace and does not have a terrestrial presence in South Africa".³⁰⁹ This submission was based on the argument that its interactive casinos or gambling activities fell beyond the jurisdiction of the aforesaid statutes.

³⁰³ *Casino Enterprises (Pty) Ltd (Swaziland) v Gauteng Gambling Board* 2010 (6) SA 38 (GNP) 50G–H or [64].

³⁰⁴ *Casino Enterprises (Pty) Ltd (Swaziland) v Gauteng Gambling Board* 2010 (6) SA 38 (GNP) 50A–D.

³⁰⁵ *Casino Enterprises (Pty) Ltd v Gauteng Gambling Board* 2011 (6) SA 614 (SCA).

³⁰⁶ *Casino Enterprises (Pty) Ltd v Gauteng Gambling Board* 2011 (6) SA 614 (SCA) 616C or [3].

³⁰⁷ *Casino Enterprises (Pty) Ltd v Gauteng Gambling Board* 2011 (6) SA 614 (SCA) 616G or [6].

³⁰⁸ *Casino Enterprises (Pty) Ltd v Gauteng Gambling Board* 2011 (6) SA 614 (SCA) 618G–I or [17–s18]. According to Casino Enterprises, current gambling legislative framework was intended to regulate casino with a terrestrial presence in South Africa and not casinos operating in cyberspace. Accordingly, neither the National Gambling Act 7 of 2004 nor the Gauteng Gambling and Betting Act should have been applied to its case.

³⁰⁹ *Casino Enterprises (Pty) Ltd v Gauteng Gambling Board* 2011 (6) SA 614 (SCA) 618I–619A or [18].

These submissions by Casino Enterprises required the SCA to examine the playing of interactive casino games and to determine which activities took place in South Africa and which in Swaziland, where the server was hosted. It found the following activities to be taking place in South Africa, namely: “the gambler’s transfer of money between his wallet in the casino and his bank account; the gambler’s decision as to which game to play, which bets to make, and what stakes to play; the gambler’s pressing or clicking of the ‘spin’ button. Spin initiates a sequence of actions which includes the sending of the data packet to the server and the spinning wheels being displayed on the screen.”³¹⁰ The activities or actions found to be taking place in Swaziland included the “verification of the gambler’s credentials; recording of a monetary transaction, keeping of the gambler’s wallet; the state of the current game and keeping of the history of games played; offering of games; playing of the game by the game server, which interprets the gambler’s instructions; determination of the outcomes of the games and the effect of the outcome on the gambler’s balance and status”.³¹¹

The main purpose of outlining these activities was to determine at which stage gambling could be said to take place, which would then determine the location where it took place. After hearing argument, the SCA accepted that gambling started when “the stake is irrevocably placed on the outcome of the gambler’s chosen gambling game” followed by the moment when the “spin” button or its equivalent was activated.³¹² This, according to the SCA, took place where the gambler was located and therefore in this case would undoubtedly be in South Africa.³¹³ Having established the main elements of gambling, which are payment of a consideration (stake, bet or wager) and the chance (contingency) of becoming entitled to or receiving a pay-out (the uncertain event),³¹⁴ all of which were found to take place in the location of the gambler, the legal question for determination was therefore whether these elements fell within the definition of the Gauteng Gambling and Betting Act.

³¹⁰ *Casino Enterprises (Pty) Ltd v Gauteng Gambling Board* 2011 (6) SA 614 (SCA) 622A–B or [20].

³¹¹ *Casino Enterprises (Pty) Ltd v Gauteng Gambling Board* 2011 (6) SA 614 (SCA) 622C–D or [20].

³¹² *Casino Enterprises (Pty) Ltd v Gauteng Gambling Board* 2011 (6) SA 614 (SCA) 625I or [34].

³¹³ *Casino Enterprises (Pty) Ltd v Gauteng Gambling Board* 2011 (6) SA 614 (SCA) 625I–J or [34].

³¹⁴ *Casino Enterprises (Pty) Ltd v Gauteng Gambling Board* 2011 (6) SA 614 (SCA) 624J–625A or [29].

The Gauteng Gambling and Betting Act defines gambling as the “wagering of a stake of money or anything of value on the unknown result of a future event at the risk of losing all or a portion thereof for the sake of a return, irrespective of whether any measure of skill is involved or not and encompasses all forms of gambling and betting, but excludes the operation of a machine”.³¹⁵ According to the SCA, this definition provides clarity in establishing when gambling can properly be said to take place, which is the moment when a gambler places a bet or stake upon an uncertain chance.³¹⁶ The moment a gambler activates the play button, the bet or stake becomes irrevocable, in other words he/she can no longer change the bet or stake. All these actions are deemed to take place at the point of consumption or where a gambler is situated and not in Swaziland where Casino Enterprise is operating this service.³¹⁷ Thus the SCA rejected the assertion by Casino Enterprises that its interactive casinos did not fall within the jurisdiction of the South African statutes. Delivering judgement for the SCA, Heher JA, concluded as follows:

*“The conclusions at which I have thus arrived have the effect that persons in South Africa who gamble with the appellants as well as the appellant in its interactive participation contravene the provisions of ss 8 and 11 of NGA and ss 76(2) of GGA. The consequence is that advertisement of information concerning the activities of appellant’s casino is prohibited by s 15(1) of the first-mentioned and s 71(1) of the last-mentioned statutes.”*³¹⁸

According to this judgement, anyone who engages in or makes available interactive gambling activities contravenes the provisions of the aforesaid acts. As this is the Supreme Court of Appeal’s judgement, the position in respect of interactive gambling is as set out above unless (or until) the legislature changes the position by amending existing gambling legislation. However, the courts’ application of the National Gambling Act holding the provision of interactive gambling services as illegal does not operate to prevent Parliament from developing an efficient framework for regulation of interactive gambling. Parliament can achieve this by amending the National Gambling Act currently prohibiting unauthorised interactive gambling. The courts were merely applying the law, which excluded the amendments giving recognition to interactive gambling. In all probability, the judiciary is not at all times

³¹⁵ Section 1 Gauteng Gambling and Betting Act 4 of 1995.

³¹⁶ *Casino Enterprises (Pty) Ltd v Gauteng Gambling Board* 2011 (6) SA 614 (SCA) 625H or [33]

³¹⁷ *Casino Enterprises (Pty) Ltd v Gauteng Gambling Board* 2011 (6) SA 614 (SCA) 625I–J or [34].

³¹⁸ *Casino Enterprises (Pty) Ltd v Gauteng Gambling Board* 2011 (6) SA 614 (SCA) 627D–E or [40].

the most appropriate avenue to test the legality of prohibiting interactive gambling. In order for interactive gambling to be legalised in South Africa, proper safety measures should be put in place, for example:

1. Legislation is required to deal proactively with threats arising from interactive gambling;
2. Consumers' choice should determine the supply or what is to be supplied;
3. A policy approach balancing the interests of location-based gambling and the emergence of interactive gambling would provide solutions to address the fears of location-based gambling harboured by investors. Instead of prohibiting interactive gambling through moralistic ideology, the focus should be on developing intelligent regulatory practices that will address the socio-economic ills associated with interactive gambling.

2.10 Constitutionality of the prohibition of interactive gambling

The debate on whether the prohibition of a particular gambling activity is constitutional or not emerged during the era of the Interim Constitution³¹⁹ in the case of *Soundprop Casino v Minister of Safety and Security*.³²⁰ Soundprop Casino operated a casino in contravention of the then legislation governing gambling in South Africa. The Gambling Act of 1965 prohibited all forms of gambling, including inside casinos, in the Republic.³²¹ The Interim Constitution ushered in an era that enshrined the Bill of Rights as the cornerstone of South Africa's democracy. It guaranteed the right to engage in economic activity in which anyone could pursue his/her chosen occupation and profession.³²² Soundprop Casino took advantage of this newly granted right and freedom by launching an interdict preventing the

³¹⁹ Interim Constitution of the Republic of South Africa, 1993.

³²⁰ *Soundprop 1239 CC/ta 777 Casino v Minister of Safety and Security* 1996 (4) SA 1086 (C).

³²¹ Section 6 of the Gambling Act 51 of 1965 states that "*no person shall permit the playing of any game of chance for stakes at any place under his control or in his charge and no person shall play any such game at any place or visit any place with the object of playing any such game*".

³²² Section 26 of the Interim Constitution of the Republic of South Africa, 1993 entitled "Economic Activity," which provided thus:

"(1) Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory,

(2) Subsection (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality."

Minister of Safety and Security (now called Minister of Police) from seizing its gaming tables, and more importantly restraining the Minister from prosecuting the casino for its operation, which contravened the Gambling Act of 1965. Soundprop Casino invoked the Interim Constitution, arguing that the Gambling Act of 1965 was “unconstitutional in as far as it offends against the fundamental right contained in section 26 of the Interim Constitution, entitling persons to freely engage in economic activity”.³²³ By challenging the constitutionality of the Gambling Act, Soundprop sought an order permitting it to carry on operating gaming machines and equipment in terms of its constitutional right to freely engage in an economic activity. Selikowitz, J. commented as follows:

*“Having regard to the evidence which is before me, it is clear that the total ban on lotteries and on games of chance other than in a non-habitual private sphere does, indeed, offend section 26(1) of the Interim Constitution in that it prevents people who wish to engage in the business of casinos and gambling houses from carrying on and freely engaging in that particular economic activity.”*³²⁴

However, Selikowitz, J. added that such a finding did not automatically mean that the infringement was unconstitutional. The judge had to consider legislative measures in place, which included the fact that a Bill had been tabled before Parliament, intended to legalise gambling. He then opted not to strike down the Gambling Act of 1965 in order to avoid leaving a legislative vacuum that would allow uncontrolled, unregulated and unlicensed gambling.³²⁵

In 1996, the Interim Constitution was replaced by the current Constitution of the Republic of South Africa, 1996. The right to economic activity was replaced by freedom of trade, occupation and profession. It now provides: “Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law”,³²⁶ which means if the trade is prohibited by law, therefore it cannot be exercised.

³²³ *Soundprop 1239 CC/ta 777 Casino v Minister of Safety and Security* 1996 (4) SA 1086 (C) 1089B.

³²⁴ *Soundprop 1239 CC/ta 777 Casino v Minister of Safety and Security* 1996 (4) SA 1086 (C) 1091E.

³²⁵ *Soundprop 1239 CC/ta 777 Casino v Minister of Safety and Security* 1996 (4) SA 1086 (C) 1096D–

H.

³²⁶ Section 22 of the Constitution of the Republic of South Africa, 1996.

Under the Interim Constitution the right to freely engage in economic activity was available to every person, which presumably included any juristic person. In other words, juristic persons such as Casino Enterprise (Pty) Ltd, whose interactive gambling was declared illegal, could have laid claim to this right and possibly had recourse to the Constitutional Court for its protection. In terms of the Constitution, however, the right to choose their trade, occupation or profession is limited to citizens of the country and does not include legal entities. The replacement of person with citizen has the effect of excluding all corporations (juristic persons) and non-residents, as observed in the constitutional jurisprudence developed by South African courts. This was confirmed in the matter of *City of Cape Town v AD Outpost (Pty) Ltd*³²⁷ involving the displaying of a billboard within the municipal area of Cape Town. The AD Outpost, which had not obtained a licence for such billboards, sought to rely on section 22 of the Constitution.³²⁸ The City of Cape Town's municipal by-laws provided for a limitation on information that could be contained on the billboard.³²⁹ The plaintiffs argued that this was an infringement of their constitutional right guaranteeing freedom of trade and occupation.³³⁰ The court dismissed the applicants' claim in terms of section 22 on the basis that the section protects individual citizens and not juristic bodies.³³¹ According to the court, the section ensures that citizens are afforded protection in choosing how to employ their labour or utilise their skills.³³² It is not a "provision that should be extended to the regulation of economic intercourse as undertaken by economic enterprises owned by juristic bodies which might otherwise fall within the description of economic activity."³³³

³²⁷ *City of Cape Town v AD Outpost (Pty) Ltd* 2000 (2) SA 733 (C).

³²⁸ *City of Cape Town v AD Outpost (Pty) Ltd* 2000 (2) SA 733 (C) 744G.

³²⁹ *City of Cape Town v AD Outpost (Pty) Ltd* 2000 (2) SA 733 (C) 738D. Section 3(1) of the City of Cape Town by-law required that any person intending to display a new sign should make written application in accordance with the provisions of this by-law. Section 5(1) of the by-law provides that any person who displays or attempts to display a new sign without the prior approval of the City of Cape Town is guilty of an offence. Section 5(5) provides that City of Cape Town may serve upon any such person an order in writing requiring such person to remove or begin to remove such sign and to complete such removal by a date specified in the order.

³³⁰ *City of Cape Town v AD Outpost (Pty) Ltd* 2000 (2) SA 733 (C) 744G.

³³¹ *City of Cape Town v AD Outpost (Pty) Ltd* 2000 (2) SA 733 (C) 747E.

³³² *City of Cape Town v AD Outpost (Pty) Ltd* 2000 (2) SA 733 (C) 747E.

³³³ *City of Cape Town v AD Outpost (Pty) Ltd* 2000 (2) SA 733 (C).747F. Furthermore in the matter of *New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang and Another NNO; Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO* 2005 (2) SA 530 (C) the court confirmed that the right to economic activity is not available to a juristic person. The applicants sought to challenge the regulations issued by the Minister of Health, which set the capped dispensing fee to be levied by pharmacies. The applicants sought to have the Minister's regulations declared invalid on the basis that these violated pharmacists' right to freedom of trade enshrined in section 22 of the

The decisive judgment of the Constitutional Court in the matter between *Affordable Medicines Trust and Others v Minister of Health*³³⁴ brought the interpretation of this section to a head. Again, in this case the Affordable Medicines Trust challenged the regulations issued by the Minister of Health requiring medical practitioners licensed to dispense medicines to do so from licensed premises.³³⁵ The regulation would require such medical practitioners to undergo training in good dispensing practice, including the keeping of suitable premises from which dispensing would take place.³³⁶ Affordable Medicines Trust argued that this additional training placed limitations on potential medical practitioners who would otherwise freely have chosen the profession.³³⁷ Accordingly, Affordable Medicines Trust argued that the regulation violated their constitutional rights under section 22 of the Constitution.³³⁸

Ngcobo, J. pointed to the history of job reservation, restrictions on employment imposed by the laws, and the exclusion of women from many occupations as examples of issues driving the rationale underlying the right.³³⁹ The right is therefore intended to restore and protect the dignity of historically marginalised members of society while equally preventing any possible recurrence of exclusion of any citizen from economic participation.³⁴⁰ In emphasizing this right, Ngcobo, J. left no doubt that the right is directed at natural persons and not legal entities. He said:

*“One’s work is part of one’s identity and is constitutive of one’s dignity. Every individual has a right to take up any activity which he or she believes himself or herself prepared to undertake as a profession and to make that activity the very basis of his or her life. And there is a relationship between work and the human personality as a whole. It is a relationship that shapes and completes the individual over a lifetime of devoted activity; it is a foundation of a person’s existence.”*³⁴¹

Constitution. They argued that the capped dispensing fee would drive pharmacies out of business and discourage future potential pharmacists from pursuing this profession. In dismissing this application, the court held that “none of the applicants, being entities as they are, claim that they are citizens that are entitled to the rights conferred upon citizens in terms of section 22 of the Constitution”.

³³⁴ *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC).

³³⁵ *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) 258D or [1].

³³⁶ *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) 264F or [21].

³³⁷ *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) 276G–277A or [35–36].

³³⁸ *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) 274D or [56].

³³⁹ *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) 274G or [58].

³⁴⁰ *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) 274H–275A or [59].

³⁴¹ *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) 274H–275A or [59].

The consequence of the restriction of the right to natural persons is that legal entities such as Casino Enterprises are constitutionally excluded from relying on it in their pursuit of legalised interactive gambling.

The remaining constitutional issue requiring attention involves the notion of a gambler as a consumer of interactive gambling services. The possibility of an infringement of a gambler's constitutional right was alluded to by the High Court in *Casino Enterprises (Pty) Ltd (Swaziland) v Gauteng Gambling Board*. Tuchten, J. considered the constitutional justification of such a right and had this to say:

"I do not overlook the high value our Constitution places on personal privacy, which would include the right to engage in recreational activities. The more a person moves from his or her innermost core and interacts with other people, the more the right to privacy is attenuated. To restrict gambling to licensed premises, or to regulate the conduct of persons who gamble from within their own homes, on a basis broadly equivalent to the regulation of the conduct of persons who travel to licensed premises to enjoy the gambling experiences seems to me legitimate legislative choices which, moreover, are entirely appropriate, given the clear purposes of the provincial and national Acts."³⁴²

It would have been interesting to examine this right to privacy within the context of engaging in recreational activities; that is, whether the National Gambling Act is a justifiable limitation to this supposed right to engage in recreational activity. However, such an exercise would be futile, as the learned judge has already suggested in passing that the *legislature has exercised clear policy choices against enjoyment of the casino experience from the gambler's personal cosy abode where the gambler can just relax and be at home.*³⁴³ Accordingly the judge considered both the Gauteng Gambling Act and the National Gambling Act to be justifiable limitation to this supposed right to engage in recreational activity.

³⁴² *Casino Enterprises (Pty) Ltd (Swaziland) v Gauteng Gambling Board* 2010 (6) SA 38 (GNP) 47E–F or [48].

³⁴³ *Casino Enterprises (Pty) Ltd (Swaziland) v Gauteng Gambling Board* 2010 (6) SA 38 (GNP) 47I or [50].

2.11 Conclusion

It is clear that the prohibition of gambling was originally based on considerations of morality. Since 1994, gambling has developed into a leisure activity and its revenue generating potential has been identified and explored. Gambling, as regulated by the National Gambling Act, has become acceptable and respectable. Interactive gambling seems to pose a new threat, however. While the National Gambling Amendment Act has been signed by the President, no date has been determined for its commencement. Concerns, reminiscent of those raised when gambling was legalised, are mentioned when the regulation of interactive gambling is queried. The next chapter will deal with the provisions of the National Gambling Act, which regulates legal gambling.

CHAPTER 3: EXPOSITION OF SOUTH AFRICA'S LAW ON GAMBLING

3.1 Introduction

Gambling is primarily governed by the National Gambling Act (hereafter “the Act”),³⁴⁴ with provincial governments enjoying concurrent legislative authority to regulate gambling activities within their respective jurisdictions.³⁴⁵ By virtue of concurrent legislative authority, all nine (9) provincial governments have passed provincial legislation regulating the provisioning of gambling activities within their jurisdiction. In alphabetical order, the Eastern Cape province enacted the Eastern Cape Gambling and Betting Act;³⁴⁶ the Free State province enacted the Free State Gambling and Liquor Act;³⁴⁷ Gauteng province enacted the Gauteng Gambling and Betting Act;³⁴⁸ KwaZulu-Natal province enacted the KwaZulu-Natal Gaming and Betting Act;³⁴⁹ Limpopo province enacted the Limpopo Gambling Act;³⁵⁰ Mpumalanga province enacted the Mpumalanga Gaming Act;³⁵¹ North West province enacted the North West Gambling Act;³⁵² Northern Cape province enacted the Northern Cape Gambling Act;³⁵³ and the Western Cape province enacted the Western Cape Gambling Act.³⁵⁴ In cases of conflict between the National Gambling Act and provincial gambling legislation, the former prevails provided it complies with the

³⁴⁴ National Gambling Act 7 of 2004.

³⁴⁵ Section 104(1)(b)(i) of the Constitution of the Republic of South Africa, 1996, provides: “*The legislative authority of a province is vested in its provincial legislature, and confers on the provincial legislature the power to pass legislation for its province with regard to any matter within a functional area listed in Schedule 4*”. Schedule 4, entitled “Functional Areas of Concurrent National and Provincial Legislative Competence”. lists in Part A “casinos, racing, gambling and wagering, excluding lotteries and sports pools” amongst others.

³⁴⁶ Eastern Cape Gambling and Betting Act 5 of 1997, as amended.

³⁴⁷ Free State Gambling and Liquor Act 6 of 2010.

³⁴⁸ Gauteng Gambling and Betting Act 4 of 1995, as amended.

³⁴⁹ KwaZulu-Natal Gaming and Betting Act 8 of 2010.

³⁵⁰ Limpopo Gambling Act 3 of 2013.

³⁵¹ Mpumalanga Gaming Act 5 of 1995, as amended.

³⁵² North West Gambling Act 2 of 2001.

³⁵³ Northern Cape Gambling Act 3 of 2008

³⁵⁴ Western Cape Gambling Act 4 of 1996, as amended.

conditions set out by the Constitution regarding conflicts between national and provincial legislation.³⁵⁵

The main purpose of the Act is to provide for the coordination and uniformity in the regulation of gambling activities between the NGB and provincial licensing authorities (also known as provincial gambling boards) through the establishment of norms and standards.³⁵⁶ The Act retains the NGB (established in terms of the repealed National Gambling Act, 1996) while adding another statutory body, the National Gambling Policy Council. Therefore the Act re-enacts many of the provisions contained in the National Gambling Act, 1996, while adding several provisions that introduce new policies for the concurrent national and provincial regulation of gambling.³⁵⁷

3.2 Policy approach to the regulation of gambling

It is clear from the preamble of the Act that the policy approach guiding the regulation of gambling activities should be to protect society and the economy against over-stimulation of a latent demand for gambling.³⁵⁸ Embedded in this approach is the limitation of gambling opportunities by locating gambling venues a distance away from society.³⁵⁹ Referred to as the destination-approach, *the goal of this approach is “to reduce accessibility by vulnerable communities to convenience gambling by concentrating these opportunities in fewer dedicated gambling venues that require some effort and deliberate intention to visit.”*³⁶⁰ This has been the

³⁵⁵ Section 146 of the Constitution of the Republic of South Africa, 1996.

³⁵⁶ Preamble to the National Gambling Act 7 of 2004.

³⁵⁷ Explanatory Memorandum to the National Gambling Bill, 2003.

³⁵⁸ Preamble to the National Gambling Act 7 of 2004 adds that “*it is desirable to establish certain uniform norms and standards, which will safeguard people participating in gambling and their communities against the adverse effect of gambling, applying generally throughout the Republic with regard to casinos, racing, gambling and wagering, so that society and the economy are protected against over-stimulation of the latent demand for gambling*”.

³⁵⁹ Tyawa B “Regulating gaming in the new South Africa” 2012 *UNLV Gaming Research & Review Journal* 93–96 95 stating that South Africa has adopted a “*sumptuary model whereby most gambling sites are a reasonable distance away from poorer areas*”; and Department of Trade & Industry *National Gambling Policy* 13.

³⁶⁰ Young M, Tyler B & Lee W *Destination-style gambling: A review of literature concerning the reduction of problem gambling and related social harm through the consolidation of gambling supply structures* (2007: Department of Justice, Victorian Government, Melbourne) 1.

guiding principle in South Africa, in particular, in regard to casinos,³⁶¹ which are used as tourist attractions.³⁶² This approach has been suggested as a harm minimisation measure that could potentially result in a reduction of problem gambling.³⁶³ Problem gambling is characterised by difficulties in limiting time and money spent on gambling, which leads to adverse consequences for the gamblers such as financial instability, family disruption, stress, criminal behaviour and substance and drug abuse.³⁶⁴

Research in Australia into the destination approach to gambling has revealed that destination gambling addresses environmental contributors to problem gambling such as proximity to gambling venues but does not seek to affect the behaviour of problem gamblers.³⁶⁵ South Africa's policy on gambling still reflects destination approach with a view to affect problem gambling and yet problem gambling is on the rise and opportunities for gambling are increasing with ever greater demand for new games and proximity to people.³⁶⁶ It is debatable whether the destination approach is still relevant in the wake of the integration of casino venues into shopping malls.³⁶⁷ For instance, in Gauteng, the Gauteng Gambling Board approved the application by Sun International to relocate its Maroela casino licence to Menlyn in Pretoria, a business area surrounded by leafy suburbs.³⁶⁸ As observed by Tywa, former CEO of the NGB, the current regulatory regime based on the destination approach "seems antiquated and in need of change", particularly in light of the penetration by internet

³⁶¹ Howard Commission *Inquiry into lotteries* 110–112 recommended that casinos be placed an hour's drive from cities, and Gambling Review Commission *South African gambling industry* 53.

³⁶² Van Lill D "Transformational change in the South African gambling and lotteries sector" 2007 *Acta Commercii* 66–80 67 on the role of casinos in South African tourism.

³⁶³ Department of Justice *Taking action on problem gambling: a strategy for combating problem gambling in Victoria* (October 2006) 31 – "Destination gaming is a style of gaming venue that encourages pre-determined decisions to gamble – Findings in a number of research reports suggest that less gaming venues might reduce problem gambling by making it less likely that problem gamblers will attend venues on impulse alone."

³⁶⁴ Department of Justice *Combating problem gambling in Victoria* 7.

³⁶⁵ Armytage P *Destination gaming: evaluating the benefits for Victoria* (May 2008) 2.

³⁶⁶ Department of Trade & Industry *National gambling policy 7* evaluating the objective of protecting society against over-stimulation of latent gambling through limitation of gambling opportunities in order to minimise problem gambling.

³⁶⁷ Kingma 2008 *Culture and Organization* 35 – alluding to placement of casinos in Holland. In Rotterdam and Eindhoven the casinos were integrated into new indoor shopping centres. In Nijmegen and Amsterdam the casinos became part of a new urban redevelopment project with entertainment facilities, waterfronts, shops, terraces, plazas, cafes, restaurants and apartments.

³⁶⁸ Tsogo Sun *Integrated annual report* (2015) 18. The report further notes that the Western Cape licensing authority is considering the relocation of its existing Western Cape casino licence to the Cape Metropole.

technology, which shifts gambling from the physical walls of casinos to the virtual world.³⁶⁹

3.3 Lawful gambling activities

If the gambling activities mentioned in the Act³⁷⁰ are measured against the destination approach, the results are as follows:

- Casino gambling offers a complex choice of entertainment, of which gambling is only a single component. Casino games include, amongst others, slot machines, poker, roulette, bingo, blackjack;
- Betting on horse racing and sports: horse racing takes place at dedicated racetracks located a reasonable distance from society. Nevertheless, the industry generates more income from off-course betting. The Act regulates betting on horse racing and sports whereas provincial gambling laws regulate race meetings. This includes issuing licences to race clubs authorising the holding of race meetings on a race track (that is, horse racing activity).³⁷¹
- Limited pay-out machines: although a deviation from destination approach in that these are found in convenience or non-gambling venues, the decision to limit their availability to a maximum of 50 000 machines across the country is in keeping with the sentiment of dedicated gambling venues. This is according to the Gambling Review Commission, which reasoned that this “*places an absolute cap on convenience gambling on gaming machines whilst allowing the public to enjoy gambling entertainment in a restricted number of carefully regulated sites with a very limited number of machines at each site*”.³⁷²
- Bingo: apart from being available in casinos, the Act makes provision for the issuing of bingo licences as a stand-alone gambling activity outside casinos.
- Amusement games: these are games with restricted prizes played on amusement machines. According to the Act, amusement games should not be similar or derived from a gambling game other than bingo and cannot offer

³⁶⁹ Tyawa 2012 *UNLV Gaming Research & Review Journal* 96.

³⁷⁰ Chapter 2, Part A of the National Gambling Act 7 of 2004.

³⁷¹ Section 91 of the Gauteng Gambling and Betting Act 4 of 1995.

³⁷² Gambling Review Commission *South African gambling industry* 15.

a cash prize or a combination of a cash prize with any other prize.³⁷³ The market value of such prizes should not exceed R50.00 (fifty rand).³⁷⁴

Accordingly, any gambling activity not envisaged by this Act amounts to unlawful activity and cannot be licensed.³⁷⁵ Upholding this provision, the court in *Casino Enterprises (Pty) Ltd v Gauteng Gambling Board*³⁷⁶ declared interactive gambling to be an unlawful activity as it is not sanctioned by the Act. A similar fate befell electronic bingo terminals, discussed hereunder.

3.3.1 Uncertainty regarding lawfulness of electronic bingo terminals

An electronic version of bingo, said to be an evolution of traditional paper bingo,³⁷⁷ has created policy uncertainty in South Africa. The Act gives recognition to bingo (that is, traditional bingo) and defines it as follows:

“bingo” means a game, including a game played in whole or in part by electronic means –
(a) that is played for consideration, using cards or other devices;
(i) that are divided into spaces, each of which bears a different number, picture or symbol; and
ii) with numbers, pictures or symbols arranged randomly such that each card or similar device contains a unique set of numbers, pictures or symbols;
(b) in which an operator or announcer calls or displays a series of numbers, pictures or symbols in random order and the players match each such number, picture or symbol on the card or device as it is called or displayed; and
*(c) in which the player who is first to match all the spaces on the card or device or who matches a specified set of numbers, pictures or symbols on the card or device, wins a prize; or any other substantially similar game declared to be bingo in terms of section 6 (4).*³⁷⁸

³⁷³ Section 47(3) of the National Gambling Act 7 of 2004.

³⁷⁴ Regulation 17 of the National Gambling Regulations, 2004, published under Government Notice R1342 in Government Gazette 26994 dated 12 November 2004 provides: “Any prize offered in respect of a single amusement game shall be limited to a non-cash prize with a market value of no more than fifty rand”.

³⁷⁵ Section 8 of the National Gambling Act 7 of 2004 declaring unlicensed gambling activities unlawful provides “despite any other law, a person must not engage in, conduct or make available a gambling activity except a licensed gambling activity”.

³⁷⁶ *Casino Enterprises (Pty) Ltd v Gauteng Gambling Board* 627D–E or [40].

³⁷⁷ NGB Regular gamblers’ perceptions on bingo 3.

³⁷⁸ Section 1 of the National Gambling Act 7 of 2004.

An electronic bingo terminal, on the other hand, is regarded as a technological aid to the playing of bingo. Traditional bingo allows for the player to match the numbers, pictures or symbols whereas an electronic bingo terminal performs this responsibility. The gambler is not personally involved in the matching of numbers, pictures or symbols.³⁷⁹ The challenge posed by electronic bingo terminals came before the judiciary in the unreported case of *Akani Egoli (Pty) Ltd v Chairperson Gauteng Gambling Board*.³⁸⁰ The latter had approved electronic bingo terminals "for use in licensed bingo premises or bingo outlets in the Gauteng gambling jurisdiction".³⁸¹ Akani Egoli challenged the Gauteng Gambling Board on the roll-out of electronic bingo terminals on the basis that they amounted to slot machines commonly found in casinos premises.³⁸² The court ruled that the games played on electronic bingo terminals are not bingo and consequently may not lawfully be played or made available for play on bingo premises.³⁸³ Du Plessis J reasoned that:

"What in my view is more important is that the gambler takes no part in the actual game played or the RTB. He or she does no matching, either by electronic means or otherwise. In that regard, the RTB simply does not provide for an interactive game with gambler involvement in accordance with the definition. Referring to the gambler 'who is first to match' and 'who matches', paragraph (c) [of section 1 of the National Gambling Act] confirms the requirement that, for the game of bingo, the gambler must be involved in the matching process albeit he or she may do it by electronic means, for

³⁷⁹ NGB *Regular gamblers' perceptions on bingo* 4 explains the operation of electronic bingo terminals as follows: "Players enter the bingo game through a note reader, and all numbers and cards are displayed on touch-screens. The central server automatically doles out a player's numbers every time a group of balls is drawn. A player has to accept the draw by either pressing the touch screen or the "daub" button to electronically mark the numbers on the card within a limited time. On the lower screen, there are electronic spinning wheels and a numbers screen that resembles a slot machine. The machines have little "buttons" on the video screens that read "Daub" and "Bingo". Players who fail to press the "Daub" button after the numbered balls appear on their screens find their cards are not marked. Flexibility is built into the game, in that players are able to change their cards before each draw of numbers and they can keep track of more cards than thought humanly possible. Electronic bingo terminals display winnings which are not only as a marked bingo card, but also have spinning reel symbols like cherries and diamonds which are similar to traditional slot machine symbols. To claim winnings, the player pushes the onscreen "cash out" button and the machine prints out a barcoded ticket showing the credits accumulated by the player during the game."

³⁸⁰ Unreported case of *Akani Egoli (Pty) Ltd v Chairperson Gauteng Gambling Board*, Transvaal Provincial Division, Case No. 187891/06 (unreported).

³⁸¹ *Akani Egoli (Pty) Ltd v Chairperson Gauteng Gambling Board* Transvaal Provincial Division, Case No. 187891/06 [2].

³⁸² *Akani Egoli (Pty) Ltd v Chairperson Gauteng Gambling Board* Transvaal Provincial Division, Case No. 187891/06 [3].

³⁸³ *Akani Egoli (Pty) Ltd v Chairperson Gauteng Gambling Board* Transvaal Provincial Division, Case No. 187891/06 [14].

*instance, by touching a touch screen.*³⁸⁴ [RTB herein stands for Real Touch Bingo, a trademark name for electronic bingo terminals.]

The court upheld a contention by Akani Egoli that the aforesaid electronic bingo terminals amounted to slot machines and should not be dispensed outside casino premises.³⁸⁵ This decision implies that the playing of electronic bingo terminals in bingo halls is illegal in that electronic bingo terminals do not conform to the definition of bingo as prescribed in the National Gambling Act. At the time, the Gauteng Gambling and Betting Act did not contain a definition of bingo. Chapter 5 of the Gauteng Gambling and Betting Act relating to bingo licences authorises casino or bingo licence holders to conduct or provide the game of bingo on the licensed premises concerned.³⁸⁶ According to Du Plessis J, it follows that the only gambling game that the holder of a bingo licence may provide is the game of bingo.³⁸⁷

Following this decision, the Gauteng Gambling Board lobbied its provincial government for amendment of the Gauteng Gambling and Betting Act, 1995, to accommodate electronic bingo terminals. The definition of bingo in the Gauteng Gambling and Betting Act, 1995, has since been amended to include “paper bingo, in the classical and traditional sense, and electronic bingo games involving the selection and matching of winning or losing numbers, symbols or pictures randomly by electronic means”.³⁸⁸

³⁸⁴ *Akani Egoli (Pty) Ltd v Chairperson Gauteng Gambling Board* Transvaal Provincial Division, Case No. 187891/06 [13].

³⁸⁵ *Akani Egoli (Pty) Ltd v Chairperson Gauteng Gambling Board* Transvaal Provincial Division, Case No. 187891/06 [14].

³⁸⁶ Sections 46–47 of the Gauteng Gambling and Betting Act 4 of 1995.

³⁸⁷ *Akani Egoli (Pty) Ltd v Chairperson Gauteng Gambling Board* Transvaal Provincial Division, Case No. 187891/06 [5].

³⁸⁸ Decision of the Gauteng Gambling Board in the matter between *Metro Bingo Johannesburg (Pty) Ltd v Peermont Global (Pty) Ltd* decided on 21 February 2014. Gauteng Gambling and Betting Act (as amended) now defines bingo as “a game, including a game played in whole or part by electronic means:

- (a) *that is played for consideration, using cards or other devices (whether electronic or otherwise) –*
 - (i) *that are divided into spaces, each of which bears a different number, picture or symbol;*
 - (ii) *with numbers, pictures, symbols arranged randomly such that each card or device contains a unique set of numbers, pictures, symbols*
- (b) *in which either –*
 - (i) *an operator announcer calls or displays a series of numbers, pictures or symbols in random order and the gamblers then match each such number,*

Other than in Gauteng, where the definition of bingo has been amended to include electronic bingo terminals, these remain illegal in the country as they fall outside the scope of bingo as defined in the Act. The inclusion of electronic bingo terminals by the Gauteng Gambling and Betting Act, 1995, does not accord with the definition of bingo in the National Gambling Act. Despite this, it appears that the decision by the Gauteng Gambling Board might pave way for incorporation of electronic bingo in the Act. This is according to the National Gambling Policy, 2016, which acknowledges that the prohibition of electronic bingo terminals is far outweighed by the demand for its regulation.³⁸⁹

3.4 Licences

The Act, together with provincial gambling legislation, provides for a number of different gambling licences, including:

- licence for gambling activity/operator licence – this is the licence permitting the holder to engage in or conduct the identified gambling activity or to make it available for other persons to engage in. It can only be issued in respect of lawful gambling activities, namely: casinos, betting on horse racing and sports, limited pay-out machines, bingo and amusement games.

-
- picture or symbol to numbers, pictures or symbols appearing on the card or other devices as such series is called or displayed; or*
- (iii) *an electronic or similar device generates and displays a series of numbers, pictures or symbols and, on behalf of the gamblers, matches each such number, picture or symbol to the numbers, pictures or symbols appearing on the electronic card or other similar device after such number, picture or symbol is generated or displayed; and*
- (c) *in which either –*
- (i) *the gambler who is first to match all spaces on the card or other similar device, or who matches a specified set of numbers, pictures or symbols on the card or device, wins a prize; or*
- (ii) *the gambler on whose behalf the electronic or similar device referred to in paragraph (b)(ii) first matches all the spaces on the card or similar device, or symbols on the electronic card or similar device, wins a prize or more than one prize,*

or any other substantially similar game declared to be bingo in terms of section 2(a)."

³⁸⁹ Department of Trade & Industry National gambling policy 19 - *The need to prohibit EBTs is outweighed by the demand to regulate the industry. However there should be limitations to ensure that the operations of electronic bingo terminals do not pose unfair competition to existing forms of gambling especially the LPMs and casinos. The policy should focus on the numbers of licences and machines per province and per site; the location and accessibility; Corporate Social Investment (CSI) and the contribution to the responsible gambling programmes.*

- licence for gambling premises – This licence identifies or lists the premises approved for the conducting and provisioning of the identified gambling activity/activities. In terms of the Act, any place or premises which are used for gambling activities must be licensed for such purposes.³⁹⁰
- employment licence – this is a licence permitting a person to work in the gambling industry. In terms of the Act, no person is allowed to engage in any work within the gambling industry without an employment licence permitting that work.³⁹¹ It cannot be reasonably expected that every “blue-collar worker” should be licensed, however. For this purpose the National Gambling Regulations, 2004, specifies categories of employees requiring licences. They include directors, or employees in managerial positions and personnel responsible for programming of gambling machines and devices.³⁹²
- manufacturer, supplier and maintenance provider licence – this licence entitles the holder to manufacture or supply gambling machines or to provide routine maintenance of gambling machines.

³⁹⁰ Section 17(3) of the National Gambling Act 7 of 2004.

³⁹¹ Section 28 of the National Gambling Act 7 of 2004 provides:

“(1) A person must not engage in any work within the gambling industry in terms of this Act or applicable provincial law unless that person has a valid –

- (a) national employment licence permitting that work; or*
- (b) provincial employment licence permitting that work issued by the provincial licensing authority in the province in which the person proposes to work, or works.*

(2) A licensee must not employ a person, or permit an existing employee to engage in any work within the gambling industry unless that employee has satisfied the requirements of subsection (1).”

³⁹² Regulation 18 of the National Gambling Regulations, 2004, deals with licensing of persons employed in the gambling industry and provides that:

“(1) The categories of work that are subject to the requirements of section 28 (of the National Gambling Act) pertain to –

- (a) every director of a licence holder;*
- (b) every person who is employed at or by a gambling business who is directly involved in the conduct of gambling operations and required to be licensed in terms of provincial legislation;*
- (c) every person who may exercise control over gambling operations or the exercise of their functions by the persons contemplated in paragraph (b);*
- (d) every employee of a licence holder who, by virtue of his or her functions may reasonably be in a position –*
 - (i) to influence the outcome of a gambling game; or*
 - (ii) to make representations regarding the liability for tax of any licence holder; and*
- (e) such other categories of persons as may be required to be licensed as employees in terms of provincial legislation.”*

- testing agent licence – this is a licence to conduct tests and perform calibrations on gambling machines to ensure compliance with standards established by the South African Bureau of Standards.³⁹³

3.4.1 Authority to issue licence

The Act makes a distinction between national and provincial licences with the power to issue such licences being conferred on provincial licensing authorities. Each provincial licensing authority has exclusive jurisdiction within its province to investigate and consider applications for, and issue licences in respect of casinos, racing, gambling or wagering, with the exception of activities or purposes for which a national licence is required in terms of this Act.³⁹⁴ An example of an activity requiring a national licence is the manufacture or supply of national central electronic systems for the monitoring and analysis of data related to limited pay-out machines.³⁹⁵ In terms of the Act, the NGB is empowered to contract anyone to supply any or all products required for the operation of the system.³⁹⁶ Whoever is contracted must obtain a national licence. Provincial licensing authorities may also issue national licences.³⁹⁷ However, the NGB would be responsible for the evaluation of the issuing of national licences.³⁹⁸

The issuing of a licence is an administrative function performed by a designated authority. In *Gauteng Gambling Board v Silverstar Development Ltd*,³⁹⁹ however, the court had to interfere by directing the Gauteng Gambling Board (“the Board”) to issue a casino licence to Silverstar. In 1997, the Board issued an invitation for applications for casino licences.⁴⁰⁰ The licences were to be based in six geographical areas across the province. Silverstar and Rhino Hotel Ltd were the only applicants shortlisted in the West Rand area.⁴⁰¹ After consideration of these two applications,

³⁹³ Section 24 of the National Gambling Act 7 of 2004

³⁹⁴ Section 30 of the National Gambling Act 7 of 2004.

³⁹⁵ Section 27 of the National Gambling Act 7 of 2004.

³⁹⁶ Section 27(2) of the National Gambling Act 7 of 2004.

³⁹⁷ Section 30(1)(a)(ii) of the National Gambling Act 7 of 2004.

³⁹⁸ Section 33 of the National Gambling Act 7 of 2004.

³⁹⁹ *Gauteng Gambling Board v Silverstar Development Ltd* 2005 (4) SA 67 (SCA).

⁴⁰⁰ *Gauteng Gambling Board v Silverstar Development Ltd* 2005 (4) SA 67 (SCA) 70D–E or [4].

⁴⁰¹ *Gauteng Gambling Board v Silverstar Development Ltd* 2005 (4) SA 67 (SCA) 70J or [7]

the Board concluded that Rhino Hotel should be ranked above Silverstar.⁴⁰² Upon presentation of its recommendations to EXCO (that is, the Executive Council of the Gauteng Province), the latter preferred Silverstar although the Board supported Rhino Hotel.⁴⁰³ Unfortunately, Rhino Hotel withdrew its application following the rejection by the Minister of Environmental Affairs of its application to build the proposed casino on land declared a World Heritage site.⁴⁰⁴

Rhino Hotel then entered into an agreement with Silverstar to form a new entity called Rhino Resort Ltd; it then applied to the Board for amendment of its original application. The casino was to be established on land originally earmarked by Silverstar. The shareholders of Silverstar were to become sole shareholders in the casino company on payment of a nominal price.⁴⁰⁵ After a consideration of objections, the Board allowed the amendment and resolved to award the licence to the newly formed entity. EXCO supported the decision of the Board.⁴⁰⁶ Aggrieved by this decision, Tsogo Sun Holdings (Pty) Ltd successfully applied to the court to set aside the decision as an impermissible substitution of one application for another.⁴⁰⁷

Silverstar then requested the Board to grant its original application for a casino licence. *“Rhino supported the request. Silverstar informed the Board that ‘the imposition, for example, of those conditions which attached to the licence as awarded to Rhino Resort Ltd would be acceptable to Silverstar’”*.⁴⁰⁸ The Board considered the request but still decided that Silverstar was not a preferred applicant for the casino licence in the West Rand area.⁴⁰⁹ This prompted Silverstar to approach the court to set aside the decision of the Board and award the casino licence to it (Silverstar). The *court a quo* agreed and ordered the Board to grant the casino licence to Silverstar. The Board appealed against this decision by the *court a quo* on the basis that this matter should have been remitted to the Board for

⁴⁰² *Gauteng Gambling Board v Silverstar Development Ltd* 2005 (4) SA 67 (SCA) 71C or [9].

⁴⁰³ *Gauteng Gambling Board v Silverstar Development Ltd* 2005 (4) SA 67 (SCA) 71E or [10].

⁴⁰⁴ *Gauteng Gambling Board v Silverstar Development Ltd* 2005 (4) SA 67 (SCA) 72I or [17].

⁴⁰⁵ *Gauteng Gambling Board v Silverstar Development Ltd* 2005 (4) SA 67 (SCA) 73A–C or [18].

⁴⁰⁶ *Gauteng Gambling Board v Silverstar Development Ltd* 2005 (4) SA 67 (SCA) 73G–H or [19].

⁴⁰⁷ *Gauteng Gambling Board v Silverstar Development Ltd* 2005 (4) SA 67 (SCA) 73I–J or [21].

⁴⁰⁸ *Gauteng Gambling Board v Silverstar Development Ltd* 2005 (4) SA 67 (SCA) 73I–J or [21].

⁴⁰⁹ *Gauteng Gambling Board v Silverstar Development Ltd* 2005 (4) SA 67 (SCA) 74A or [22].

decision-making. The SCA concurred with the decision of the *court a quo* and reasoned that:

“In my view no purpose would be served by remitting the matter to the Board. Silverstar is presently the only applicant for a casino licence for the West Rand Area. It is common cause on the papers that it had complied with the minimum requirements that had been set out in the invitation to apply for licences that were issued by the Board. It was found by the Board during the evaluation process of the applicants for licences that Silverstar's proposed project was a viable one and also a sustainable one. As far back as 9 June 1999 Exco had already concluded that Silverstar's application was to be preferred to that of Rhino. Exco's reasons for its conclusions are convincing. [The MEC and the Premier] abide by the judgment of the Court. Swart J also said that if the matter before him had been an appeal, he would have been inclined in favour of Silverstar. In the present matter an affidavit has been filed wherein [a director of Rhino and of its subsidiary created for purposes of the failed joint proposal] says that the two companies support the allocation of a casino licence to Silverstar. It appears from the resolution passed by Rhino ... that it has withdrawn its application for a casino licence in 'Western Gauteng'. Under these circumstances I am of the view that this Court should now bring finality to the whole saga.”⁴¹⁰

The court emphasised that this was an exceptional case and that the *court a quo* did not err when it decided against remittal to the Board.⁴¹¹

While the Act bestows on provincial licensing authorities the power to issue gambling licences, the authority to decide the maximum number of any kind of licence in the Republic or in each province is vested with the Minister.⁴¹² With regard to the maximum number of licences for limited pay-out machines, provincial law is allowed to prescribe a lower number than the number prescribed by the Minister.⁴¹³

⁴¹⁰ *Gauteng Gambling Board v Silverstar Development Ltd* 2005 (4) SA 67 (SCA) 75A–D or [27].

⁴¹¹ *Gauteng Gambling Board v Silverstar Development Ltd* 2005 (4) SA 67 (SCA) 80C or [41].

⁴¹² Section 87(b) of the National Gambling Act 7 of 2004.

⁴¹³ Section 26(6) of the National Gambling Act 7 of 2004.

3.5 National Gambling Board (NGB) and Provincial Licensing Authorities

The NGB was first established by the repealed National Gambling Act 33 of 1996 with a view to promoting uniform norms and standards applicable generally throughout the Republic, and to bring about uniformity in the legislation relating to gambling in force in the various provinces.⁴¹⁴ The current National Gambling Act retains the NGB as established by the previous Act⁴¹⁵ and addresses the inter-relationship between the NGB and provincial licensing authorities established under provincial legislation.⁴¹⁶ Under the scheme of the current Act, it is the responsibility of the NGB to evaluate the process for the issuing of national gambling licences by provincial licensing authorities. It will also perform a general oversight function to ensure that provincial licensing authorities adhere to national norms and standards in the issuing of gambling licences in their respective provinces.⁴¹⁷

Although provincial licensing authorities owe their existence to provincial gambling legislation, the Act affirms their jurisdiction with regard to gambling activities taking place within their respective provinces.⁴¹⁸ In terms of the Act, the provincial licensing authorities are responsible for enforcing this Act and their applicable provincial law in respect of:

*“(i) premises, activities or prescribed devices –
(aa) licensed by that licensing authority; or
(bb) within the jurisdiction of that licensing authority; and
(ii) offences in terms of this Act or applicable provincial law.”*⁴¹⁹

Provincial licensing authorities have been instrumental in the enforcement of the Act and its applicable provincial laws, in particular those regarding prohibition of unlawful gambling activities within their jurisdiction as required by the Act. In *Ivanov v North*

⁴¹⁴ Section 10 of the repealed National Gambling Act 33 of 1996 detailing the objective of the NGB.

⁴¹⁵ Section 64(1) of the National Gambling Act 7 of 2004.

⁴¹⁶ Explanatory Memorandum to the National Gambling Bill, 2003.

⁴¹⁷ Section 30 of the National Gambling Act of 2004.

⁴¹⁸ Explanatory Memorandum to the National Gambling Bill, 2003.

⁴¹⁹ Section 31(1)(d) of the National Gambling Act 7 of 2004.

*West Gambling Board*⁴²⁰ the latter raided the premises of Ivanov and upon searching, found unlicensed gambling devices and machines.⁴²¹ Possession and use of gambling devices and machines is regarded as an offence in terms of the provisions of the Act (section 82 of the Act). The seizure of the gambling devices and machines by North West Gambling Board prompted Ivanov to challenge the lawfulness of the search and seizure warrant. The matter culminated in Ivanov resorting to the Supreme Court of Appeal as this concerned general principles underlying the *mandament van spolie* (that is, unlawful deprivation of another's right of possession) because the search warrant obtained by the North West Gambling Board was declared invalid.⁴²² The legal question before the SCA was thus whether Ivanov was entitled to the restoration of his unlicensed gambling machines and devices. The SCA held that Ivanov, who was in undisturbed and peaceful possession, was entitled to restoration of his machines once the search warrant had been declared unlawful and set aside. The question of lawfulness or illegality was irrelevant.⁴²³ As a result, the North West Gambling Board lost on appeal and was ordered to return the seized unlicensed gambling devices and machines.⁴²⁴

Despite the setback suffered by the North West Gambling Board, this case serves to illustrate that the provincial licensing authorities are at the forefront of enforcing gambling legislation, unlike the NGB whose future hangs in the balance. According to the impression given by the National Gambling Policy, 2016, the NGB's inspectorate division is incapable of carrying out its tasks without significant involvement of the South African Police Service.⁴²⁵ Unfortunately, the recommendation by the National Gambling Policy, 2016, to revamp the NGB to become a strategic entity of the Department of Trade & Industry and change its name to National Gambling Regulator (NGR)⁴²⁶ appears not to be premised on the need to improve its efficiency as a regulatory authority. The rationale offered for this

⁴²⁰ *Ivanov v North West Gambling Board* 2012 (6) SA 67 (SCA).

⁴²¹ *Ivanov v North West Gambling Board* 2012 (6) SA 67 (SCA) 70D or [4].

⁴²² *Ivanov v North West Gambling Board* 2012 (6) SA 67 (SCA) 73B–C or [11].

⁴²³ *Ivanov v North West Gambling Board* 2012 (6) SA 67 (SCA) 78A or [27].

⁴²⁴ *Ivanov v North West Gambling Board* 2012 (6) SA 67 (SCA) 79F–H or [34].

⁴²⁵ Department of Trade & Industry *National gambling policy* 4 regarding enforcement recommends that “*the inspectorate must be improved, resourced and empowered to ensure that cases can be investigated and prosecuted without involving the South African Police Service if the latter happen to be over committed in other crimes.*”

⁴²⁶ Department of Trade & Industry *National gambling policy* 1-2.

proposed overhaul is to make it a “*strategic trading entity of the Department of Trade & Industry for regulating gambling*”.⁴²⁷ With weaknesses having been identified in its inspectorate, such an overhaul should, amongst others, be used to strengthen its enforcement structures.

3.6 National Gambling Policy Council

Conscious of possible disputes between the NGB and provincial licensing authorities, the Act establishes a National Gambling Policy Council comprising the Minister and provincial Members of the Executive Council responsible for gambling.⁴²⁸ Chairperson of the NGB and chairpersons from provincial licensing authorities are supplementary non-voting members of the Council. According to the Act, the Council is a consultative body between the national and provincial sphere of government on matters of gambling, in particular, in regard to:

- determination of gambling policy;
- gambling laws, including the promotion of uniform norms and standards;
- the resolution of disputes between the NGB and provincial licensing authorities on regulation and control of gambling activities.⁴²⁹

In exercise of its functions, the Council may provide oversight and direction to the NGB in the exercise of its powers and the performance of its duties. Furthermore, it may make a finding against the provincial licensing authority if the latter has failed to comply with the Act, and may direct how such findings should be addressed.⁴³⁰

Conflicts between national and provincial legislation such as legalisation of electronic bingo terminals, as evidenced in Gauteng appears to be beyond the scope of the National Gambling Policy Council and is best addressed by provisions of the Constitution, which establishes criteria as to which legislation will prevail over

⁴²⁷ Department of Trade & Industry *National gambling policy* 1-2.

⁴²⁸ Explanatory Memorandum to the National Gambling Bill, 2003.

⁴²⁹ Section 62(1) of the National Gambling Act 7 of 2004.

⁴³⁰ Section 62(2) of the National Gambling Act 7 of 2004.

another.⁴³¹ The functioning of the National Gambling Policy Council has come under the spotlight in the National Gambling Policy, 2016. Without giving too much detail, the latter seeks to empower the Council “to take binding resolutions if there is no quorum in the first meeting and the same happens in the next meeting”⁴³² (sic). It can only be speculated, based on this proposal, that the Council is handicapped by a lack of interest among its members. The challenge facing the Council is that the Act does not accord equal treatment to its members.⁴³³ For instance, the Act encourages the Council to reach its decisions by consensus but in the case of disagreement a

⁴³¹ Section 146 of the Constitution of the Republic of South Africa dealing with conflicts between national and provincial legislation provides thus:

“(1) This section applies to a conflict between national legislation and provincial legislation falling within a functional area listed in Schedule 4.

(2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met:

- (a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.
- (b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing –
 - (i) norms and standards;
 - (ii) frameworks; or
 - (iii) national policies.
- (c) The national legislation is necessary for –
 - (i) the maintenance of national security;
 - (ii) the maintenance of economic unity;
 - (iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;
 - (iv) the promotion of economic activities across provincial boundaries;
 - (v) the promotion of equal opportunity or equal access to government services ;or
 - (vi) the protection of the environment.

(3) National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that –

- (a) is prejudicial to the economic, health or security interests of another province or the country as a whole; or
- (b) impedes the implementation of national economic policy.

(4) When there is a dispute concerning whether national legislation is necessary for a purpose set out in subsection (2)(c) and that dispute comes before a court for resolution, the court must have due regard to the approval or the rejection of the legislation by the National Council of Provinces.

(5) Provincial legislation prevails over national legislation if subsection (2) or (3) does not apply.

(6) A law made in terms of an Act of Parliament or a provincial Act can prevail only if that law has been approved by the National Council of Provinces.

(7) If the National Council of Provinces does not reach a decision within 30 days of its first sitting after a law was referred to it, that law must be considered for all purposes to have been approved by the Council.

(8) If the National Council of Provinces does not approve a law referred to in subsection (6), it must, within 30 days of its decision, forward reasons for not approving the law to the authority that referred the law to it.”

⁴³² Department of Trade & Industry *National gambling policy 1* concerning regulatory structures and framework.

⁴³³ This is apparent from section 63 of the National Gambling Act 7 of 2004 concerning Council meetings.

formal vote may be taken. However, a motion requiring a vote can only pass if it is voted by the Minister and at least five of the regular members of the Council.⁴³⁴ Accordingly, even if all the Council members with the exception of the Minister took a stance on any matter, their stance would not hold sway until it was supported by the Minister. As mentioned, why the Council seems to be dysfunctional can only be speculated but in my view, failure to form a quorum points to a lack of interest among members that may be attributable to unequal treatment in decision-making. In matters involving issues of concurrent jurisdiction, voting should be discouraged. Voting may have the effect of undermining policy decisions made by provincial governments as members of the Council represent their respective provinces.

3.7 Norms and standards

Norms and standards feature prominently in the preamble to the Act in setting its objectives. Among these, the Act seeks to: (i) “establish certain uniform norms and standards applicable to national and provincial regulation and licensing for certain gambling activities”, and (ii) “to provide for the creation of additional uniform norms and standards applicable throughout the Republic”. The purpose of “norms and standards” is, *inter alia*, to establish a uniform approach towards matters of common interest, in this case on the application of gambling policy, legislation and its regulations.⁴³⁵

With gambling governed by the National Gambling Act and nine (9) provincial legislations and sets of regulations, the possibility of a fragmented approach to its regulation is considerable, as exposed in *Weare v Ndebele*.⁴³⁶ This matter involved the constitutionality of section 22(5) of the KwaZulu-Natal Regulation of Racing and Betting Ordinance 28 of 1957, which was in force before the current KwaZulu-Natal Gaming and Betting Act came into operation and the repealing of the Ordinance.⁴³⁷

⁴³⁴ Section 63(5) of the National Gambling Act 7 of 2004.

⁴³⁵ Draft National Gambling Norms and Standards Notice 397 of 2014.

⁴³⁶ *Weare v Ndebele* 2009 (1) SA 600 (CC).

⁴³⁷ *Weare v Ndebele* 2009 (1) SA 600 (CC) 604C or [1].

According to the provisions of the Ordinance, a juristic person may not hold a licence to carry on the business of bookmaking.⁴³⁸ Only natural persons may hold bookmaking licences in the province. In contrast to other provinces, a juristic person may and is capable of carrying on the business of bookmaking. The *court a quo* held that this constituted an irrational and arbitrary differentiation and thus declared the affected provisions of the Ordinance unconstitutional for contravening the right to equality before the law [section 9(1) of the Constitution] and the right against unfair discrimination [section 9(3) of the Constitution].⁴³⁹ As required by the Constitution, the matter was referred to Constitutional Court for confirmation of the decision of the *court a quo*.⁴⁴⁰

The Constitutional Court held that differentiation between the legal regimes in provinces does not in itself constitute a breach of the right to equality before the law.⁴⁴¹ Regarding the right against unfair discrimination, the Constitutional Court emphasised that “the core of the right against discrimination in section 9(3) is dignity. Differentiation becomes unfair discrimination when it is based on grounds that have the potential to impact upon the fundamental dignity of human beings.”⁴⁴² It added that it is not easy to conceptualise the application of a right against unfair discrimination to juristic persons separately from the natural persons involved in them.⁴⁴³ The Constitutional Court made no final finding in this regard, however, as the point was briefly argued and was no longer a basis of the appeal. The Constitutional Court held that the *court a quo* erred in finding that the provisions of

⁴³⁸ Section 22(5) of the KwaZulu-Natal Regulation of Racing and Betting Ordinance Act 28 of 1957 read thus: “No bookmaker’s license shall be issued in the name of any partnership or any company or other association of persons, or to the representative or agent or officer of any partnership, company or association, or to the representative or agent of any individual on behalf of that individual: provided that nothing hereinbefore contained shall be deemed to prevent the carrying on of a bookmaker’s business in partnership by two or more persons each of whom is the holder of a valid bookmaker’s license issued to him in terms of the Ordinance.”

⁴³⁹ *Weare v Ndebele* 2009 (1) SA 600 (CC) 604C or [1].

⁴⁴⁰ Section 172(2)(a) of the Constitution of the Republic of South Africa, 1996 providing thus: “The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.”

⁴⁴¹ *Weare v Ndebele* 2009 (1) SA 600 (CC) 621B or [70].

⁴⁴² *Weare v Ndebele* 2009 (1) SA 600 (CC) 621F–622A or [72].

⁴⁴³ *Weare v Ndebele* 2009 (1) SA 600 (CC) 622C or [73].

the Ordinance barring a juristic person from holding a bookmaking licence were unconstitutional.⁴⁴⁴ It reasoned that:

*“The forms of differentiation imposed by section 22(5) [the Ordinance] are not arbitrary and are rationally linked to a legitimate government purpose. The appeal must succeed and the application for confirmation of the order of invalidity has to fail.”*⁴⁴⁵

The Ordinance has since been repealed by the KwaZulu-Natal Gambling and Betting Act, which provides that a bookmaker’s licence may be issued to a natural person or a corporate body.⁴⁴⁶ This case reinforces the significance of having uniform norms and standards to guard against a fragmented approach to the application of gambling legislation, provincial gambling acts and regulations.

The National Gambling Act has established uniform norms and standards concerning the process of issuing both national and provincial licences.⁴⁴⁷ These norms and standards relate to issues of (i) licence criteria, categories and conditions; (ii) disqualifications for employment licences; (iii) disqualifications and restrictions for other licences; (iii) disqualification after licence has been issued; and (iv) acquisition of interest by a disqualified person.⁴⁴⁸ For instance, any provincial licensing authority issuing a national or provincial licence must set out in the licence certificate the duration of the licence.⁴⁴⁹ The Act also establishes additional norms and standards that must be taken into account when issuing licences other than employment licences.⁴⁵⁰ These issues include (i) economic and social development; (ii) competition; (iii) State interests; and (iv) licence requirements, acquisitions and transfers.⁴⁵¹

⁴⁴⁴ *Weare v Ndebele* 2009 (1) SA 600 (CC) 622H or [76]

⁴⁴⁵ *Weare v Ndebele* 2009 (1) SA 600 (CC) 622H or [76].

⁴⁴⁶ Section 94(4) of the KwaZulu-Natal Gambling and Betting Act 8 of 2010.

⁴⁴⁷ Part D in Chapter 3 of the National Gambling Act 7 of 2004.

⁴⁴⁸ Sections 48–52 of the National Gambling Act 7 of 2004.

⁴⁴⁹ Section 48(5)(b) of the National Gambling Act 7 of 2004.

⁴⁵⁰ Part E in Chapter 3 of the National Gambling Act 7 of 2004.

⁴⁵¹ Sections 53–56 of the National Gambling Act 7 of 2004.

The National Gambling Policy Council is still concerned that legislation, provincial acts and regulations concerning gambling are implemented in a fragmented manner. The Council believes that this fragmented approach is causing, amongst others, “uncertainties, increasing cost of doing business in South Africa and lack of uniform application of service delivery standards in relation to issuance of trading licences”.⁴⁵² As a result, a draft National Gambling Norms and Standards has been published to identify areas requiring a uniform approach.⁴⁵³

3.8 Persons prohibited from gambling

Gambling is a recreational activity with economic costs in the form of the placing of a stake (money) in order to derive benefits. It is also said to be addictive (a public health issue) and therefore not suitable for certain categories of persons such as minors and problem gamblers.⁴⁵⁴ As a result, not every person is allowed to gamble in South Africa.

3.8.1 Protection of minors from gambling

The Act defines a minor as a person under the age of 18 years.⁴⁵⁵ The Act protects minors from gambling by preventing them from (i) entering gambling venues/premises; (ii) operating a gambling device or machine; (iii) conducting or making a gambling activity available; and (iv) engaging in social gambling or gambling activities.⁴⁵⁶ The prohibition does not apply to amusement games and amusement machines.⁴⁵⁷

⁴⁵² Draft National Gambling Norms and Standards, 2014, paragraph 3.2.

⁴⁵³ Draft National Gambling Norms and Standards, 2014 published in Government Gazette 37653 of 23 May 2014.

⁴⁵⁴ Messerlian C, Deverensky J and Gupta R “Youth gambling problems: a public health perspective” 2005 *Health Promotion International* 69-79 - gambling may render youth vulnerable to the risks and negative consequences associated with problem gambling and/or gambling disorder.

⁴⁵⁵ Section 1 of the National Gambling Act 7 of 2004.

⁴⁵⁶ Section 12 of the National Gambling Act 7 of 2004.

⁴⁵⁷ Section 12(d) of the National Gambling Act 7 of 2004.

In order to give effect to this protection, gambling operators are obliged to deny minors access to gambling.⁴⁵⁸ It is the responsibility of gambling operators to take reasonable measures to determine whether or not a person seeking access to gambling activities is a minor before permitting that person to have access.⁴⁵⁹

3.8.2 Excluded persons

An excluded person is a person registered in terms of this Act in order to be prevented from engaging in any gambling activity.⁴⁶⁰ The Act makes provision for a register of excluded person to be maintained by the NGB.⁴⁶¹ There are two ways in which a person can be excluded from gambling:

- a person may voluntarily submit a prescribed notice requesting to be prevented from engaging in any gambling activity – popularly known as “self-exclusion” in gambling parlance.⁴⁶²
- Any person may apply to a court for an order requiring the registration as an excluded person of a (i) family member; (ii) maintenance provider; (iii) dependent; (iv) mentally ill person; and (v) any person under the care of the applicant whose behaviour manifests symptoms of addictive or compulsive gambling.⁴⁶³ The court may grant such order if it considers it reasonable and just to prevent the person concerned from engaging in any gambling activity.⁴⁶⁴ An excluded person affected by this order may apply to a court to set it aside. However, the court will only do so if it is satisfied that it is no longer reasonable and just to prevent that person from gambling.⁴⁶⁵

Other than a court order requiring the removal of a person from the register of excluded persons, an excluded person (including self-excluded) can only be

⁴⁵⁸ Section 12(3) of the National Gambling Act 7 of 2004.

⁴⁵⁹ Section 12(4) of the National Gambling Act 7 of 2004.

⁴⁶⁰ Section 1 of the National Gambling Act 7 of 2004.

⁴⁶¹ Section 14(7) of the National Gambling Act 7 of 2004.

⁴⁶² Section 14(1) of the National Gambling Act 7 of 2004.

⁴⁶³ Section 14(2) of the National Gambling Act 7 of 2004.

⁴⁶⁴ Section 14(5) of the National Gambling Act 7 of 2004.

⁴⁶⁵ Section 14(6) of the National Gambling Act 7 of 2004.

removed upon submission of a notice to cancel registration as an excluded person containing, amongst others, “*documentary proof that the excluded person has complied with all requirements of any rehabilitation programme*”.⁴⁶⁶ By implication, an excluded person must seek professional help upon exclusion. Until such time that the excluded person is rehabilitated, access to gambling activities is not permissible.

Through the register, gambling providers may obtain photos of excluded persons to ensure that they do not gain access to gambling activities. Nonetheless, even with photos and details of excluded persons available, the latter may still gain access either through fraudulent means or blatant disregard of exclusion by gambling providers. According to Research Bulletin published by the NGB in relation to a question of whether problem gambling is properly managed in South Africa, it has been revealed that excluded persons have “found themselves being invited back into casinos without restriction, or at least until they tried to claim their winnings and were then denied payment under the fiction that they were banned.”⁴⁶⁷ This raises questions about the protection of excluded persons or gamblers with a gambling problem. It is not sufficient to argue that the conduct of gambling providers allowing excluded persons access to gambling activities amounts to breach of the Act and is therefore catered for by penalty provisions concerning failure to comply with the Act. Strategies should be put in place to ensure that problem gamblers are not tempted to gamble during exclusion but that they instead concentrate on their rehabilitation.

3.9 Counselling and treatment services

In terms of the Act, a gambling provider must have a directory of locally recognised counselling and treatment services available for the benefit of problem gamblers (or in the words of the Act – addressing the problems of compulsive and addictive gambling).⁴⁶⁸ This is the extent to which the Act implicitly makes reference to the provision of counselling and treatment services. Counselling and treatment services

⁴⁶⁶ Regulation 2(3)(e) of the National Gambling Regulations, 2004.

⁴⁶⁷ NGB “Is problem gambling properly managed in South Africa?” February 2014 *Research Bulletin*

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⁴⁶⁸ Section 14(2) of the National Gambling Act 7 of 2004.

for problem gambling is offered by the National Responsible Gambling Programme⁴⁶⁹ – a public/private partnership project funded by the gambling industry with each licensed gambling operator contributing 0,1% of his gross gambling revenue.⁴⁷⁰ The challenge remains, however, that the National Responsible Gambling Programme appears nowhere in the National Gambling Act. In other words, it has no statutory recognition despite being bestowed with responsibility for the rehabilitation (that is, counselling and treatment) of gamblers with gambling-related problems. Incorporation of the National Responsible Gambling Programme to facilitate provision of counselling and treatment services within the gambling statute is long overdue.

3.10 Restriction on granting credit to gamblers and enforceability of gambling debts

In principle, the National Gambling Act does not prohibit gambling providers from extending credit to gamblers.⁴⁷¹ This emerges from the National Gambling

Regulations, 2004,⁴⁷² dealing with credit extensions, which states:

(1) The holder of a casino licence, a bookmaker licence or a totalisator operator licence may extend credit to a patron only after obtaining sufficient information regarding the patron's identity, credit history and financial capabilities in terms of the credit being requested.

(2) The holder of a licence contemplated in sub-regulation (1) may extend credit to a patron only in respect of a gambling activity authorised by that licence.

(3) All credit extensions shall be evidenced by a credit instrument signed at the time of credit extension by the patron who receives the credit.⁴⁷³

⁴⁶⁹ NRGF *Introducing South Africa's public/private partnership in responsible gambling* (Information Brochure 2010) 1–2.

⁴⁷⁰ Department of Trade & Industry *National gambling policy* 38-39.

⁴⁷¹ Section 13 of the National Gambling Act 7 of 2004 which reads thus: “A person licensed to make any gambling activity available to the public must not extend credit contrary to this Act, in the name of the licensee or a third party, to any person for the purposes of gambling.”

⁴⁷² National Gambling Regulations published under Government Notice R1342 in Government Gazette 26994 dated 12 November 2004.

⁴⁷³ Regulation 4 of the National Gambling Regulations, 2004.

Effectively, a gambling provider may also double as a credit provider in the course of the business of gambling. Such gambling providers may grant credit to gamblers for purposes of gambling, which advances the business of the gambling provider. In terms of the Act, a gambling debt incurred by a gambler – other than a minor or excluded person – is enforceable.⁴⁷⁴ The Act specifies instances in which the gambling debt may not be enforceable, that is if (i) the gambling provider is unlicensed, and (ii) the excluded person gained access to that gambling activity by fraudulently claiming to be a different person.⁴⁷⁵ Unlike an excluded person, gambling debt by a minor is under no circumstances enforceable. That is, if a minor managed to access gambling activities, which should not happen under normal circumstances.

3.11 Advertising of gambling

Gambling advertisement offers an opportunity for gambling providers to market or promote their gambling services to the society. According to Derevensky *et al.*, gambling advertisement intends to “influence and modify the consumer’s attitudes toward gambling and reinforce the image of achieving great wealth without much work”.⁴⁷⁶ The ultimate purpose of the advertisement is to ensure that it leaves a lasting memory on individuals to the extent that they will consider trying the advertised product. Evaluating the impact of gambling advertisement on adolescent gambling attitudes and behaviours in Canada, even though this category is not legally allowed to gamble, Derevensky *et al.* concluded that 96% of 1 147 adolescents who had seen TV advertisements for gambling perceived the “underlying message of such gambling advertisements to mean that gambling is an easy way to become wealthy”.⁴⁷⁷ Equally, adults are not immune to the influence of gambling advertisements. The influence of advertisement of gambling applies to anyone exposed to it.

⁴⁷⁴ Section 16(1)(a–b) of the National Gambling Act 7 of 2004.

⁴⁷⁵ Section 16(1)(c) and (d) of the National Gambling Act 7 of 2004 respectively.

⁴⁷⁶ Derevensky J *et al* “An empirical study examining the impact of gambling advertisements on adolescent attitudes and behaviours” 2010 *Int J Ment Health Addiction* 21–34 31.

⁴⁷⁷ Derevensky *et al* 2010 *Int J Ment Health Addiction* 21-34.

In order to prevent gambling providers from enticing gamblers and prospective gamblers to indulge in gambling, the National Gambling Act places restrictions on the advertising and promotion of gambling activities. The Act prohibits advertisement of gambling in a false and misleading manner.⁴⁷⁸ According to the National Gambling Regulations, 2004, advertisement in respect of gambling must not:

- present gambling as a potential means of relieving financial difficulties;
- exhort gambling as a means of recovering past gambling or other financial losses;
- imply that winning is the probable outcome of gambling or is likely to make players' dreams a reality;
- contain claims or representations that persons who gamble are guaranteed personal, financial or social success;
- present gambling as an alternative to employment or a means of acquiring financial security.⁴⁷⁹

Restrictions on the advertisement of gambling are not intended to deal with perceptions but rather to regulate what is actually conveyed or contained in the advertisements. The effect or impact of an advertisement cannot be regulated.

In addition to prohibiting false or misleading advertisements, the Act prohibits advertisements of gambling that target minors. In order to achieve this goal, the National Gambling Regulations, 2004, provides that gambling advertisements must not:

- portray or contain persons or characters engaged in gambling who are, or appear to be, under the age of eighteen years;
- be placed (i) in media primarily directed at persons under the age of eighteen years; (ii) at venues where the majority of the audience may reasonably be expected to be under the age of eighteen years; or (iii) on outdoor displays directed at schools, youth centres, or university campuses.⁴⁸⁰

⁴⁷⁸ Section 15(1)(a)(i) of the National Gambling Act 7 of 2004.

⁴⁷⁹ Regulation 3(1)(d–g) of the National Gambling Regulations, 2004.

⁴⁸⁰ Regulation 3(1)(h–i) of National Gambling Regulations, 2004.

Advertisement of gambling must relate to a lawful gambling activity, in other words, such gambling must be licensed in accordance with the Act or applicable provincial law.⁴⁸¹

3.12 Offences and penalties for contravention of the Act

Contravention of the National Gambling Act constitutes a statutory offence. In terms of the Act, it is an offence to contravene provisions regarding prohibited gambling and restricted gambling activities; to conduct gambling on unlicensed premises; to use unlicensed gambling machines and devices, and to employ persons who do not have an employment licence permitting them to work in the gambling industry.⁴⁸² The commission of an offence by any gambling provider licensed in terms of this Act automatically constitutes a breach of a condition of the licence. In addition to contravention of the Act, failure to comply with the Act also constitutes an offence.⁴⁸³

This failure to comply may occur in various forms, such as:

- doing anything calculated to improperly influence the board concerning any matter connected with an investigation;
- any conduct that would amount to contempt of court had it occurred in a court of law;
- providing false information;
- interrupting proceedings of the NGB where a hearing is underway;
- impersonating an inspector appointed by the NGB, employee of the NGB or provincial licensing authority; and,
- failing to comply with the request of an inspector appointed by the NGB.

The penalty for contravention of the Act upon conviction by a court of law is a fine not exceeding R10 million or a jail term not exceeding 10 years, or both a fine and

⁴⁸¹ Section 15(1)(ii) of the National Gambling Act 7 of 2004.

⁴⁸² Section 82(1) of the National Gambling Act 7 of 2004.

⁴⁸³ Section 81 of the National Gambling Act 7 of 2004.

imprisonment.⁴⁸⁴ A licensed gambling provider in breach of a licence condition is liable to an administrative cost not exceeding 10% of its annual turnover.⁴⁸⁵

As alluded at the beginning of this chapter, gambling is governed by the National Gambling Act and provincial gambling laws. If a person's conduct constitutes an offence in terms of both these laws, such person may only be prosecuted under one of them, that is, either the National Gambling Act or provincial law, but certainly not both.⁴⁸⁶ The approach by provincial licensing authorities has been to prosecute gambling infractions in terms of their provincial laws. In *Magajane v Chaiperson, North West Gambling Board*⁴⁸⁷ the latter used provisions of the North West Gambling Act authorising inspection of unlicensed gambling premises without a warrant issued by a court for the purpose of obtaining evidence for criminal prosecution.⁴⁸⁸ On being challenged as to the constitutionality of the provisions by the North West Gambling Act for this procedure, the Constitutional Court held that the "*provisions of section 65(1) authorising an inspector to enter an unlicensed premises without a warrant are unconstitutional and invalid*".⁴⁸⁹ Despite this setback, provincial gambling laws have largely been relied upon in curbing unlicensed gambling activities.

⁴⁸⁴ Section 83(1) of the National Gambling Act 7 of 2004.

⁴⁸⁵ Section 83(2) of the National Gambling Act 7 of 2004.

⁴⁸⁶ Section 82(2) of the National Gambling Act 7 of 2004.

⁴⁸⁷ In *Magajane v Chaiperson, North West Gambling Board* 2006 (5) SA 250 (CC).

⁴⁸⁸ Section 65(1) of the North West Gambling Act 2 of 2001 providing in relevant part, thus:

"(1) An inspector shall for the purpose of this Act –

- (a) enter upon any licensed or unlicensed premises which are occupied or being used for the purposes of any gambling activities or any other premises on which it is suspected—
 - (i) that a casino or any other gambling activity is being conducted without the authority of a licence,
 - (ii) that persons are being allowed to play or participate in any gambling game or other gambling activities or to play any gambling machine, or
 - (iii) that any gambling machine or any equipment, device, object, book, record, note, recording or other document used or capable of being used in connection with the conducting of gambling games or any other gambling activity may be found, and may, after having informed the person who is deemed or appears to be in charge of the premises of the purpose of his or her visit, make such investigation or enquiry as he or she may think necessary;
- (d) seize and remove any gambling machine, equipment, device, object, book, record, note or other document referred to in paragraph (a) which in his or her opinion may furnish proof of a contravention of any provision of this Act or mark it for the purposes of identification".

⁴⁸⁹ *Magajane v Chaiperson, North West Gambling Board* 288A or [102].

3.13 Unauthorised interactive gambling

As discussed in the previous chapters, the National Gambling Act explicitly prohibits interactive gambling. It provides that:

*A person must not engage in or make available an interactive game except as authorised in terms of this Act or any other national law.*⁴⁹⁰

The Act regarding interactive gambling, that is, the National Gambling Amendment Act, is not operational. Therefore interactive gambling remains an unlawful gambling activity.

3.14 Conclusion

It is now over a decade since the National Gambling Act was enacted for regulation of gambling. Evaluating the impact of this Act, the National Gambling Policy, has noted that the Act has made positive progress in respect of generation of revenue in the form of taxes and licence fees and contributions to employment. Its impact on the transformation (that is, empowerment) of the gambling sector is limited; but it has failed with regard to the limitation of gambling opportunities and ultimately in arresting the scourge of problem gambling, the protection of excluded persons and minors from accessing gambling activities and in alleviating the lack of uniformity characterised by inconsistent provincial gambling laws that have a bearing on the gambling policy.⁴⁹¹

The verdict of the National Gambling Policy, is not surprising given that the policy approach of the Act was to locate gambling activities a reasonable distance from society. This has since been overtaken by urban redevelopment projects that have integrated gambling and entertainment facilities into shopping malls. Inclusion of electronic bingo terminals in the definition of bingo by the Gauteng Gambling and Betting Act, as amended, points to the need to overhaul the Act to allow it cater for

⁴⁹⁰ Section 11 of the National Gambling Act 7 of 2004.

⁴⁹¹ Department of Trade & Industry *National gambling policy* 7-8.

new forms of gambling. Furthermore, proposed legalisation of interactive gambling will certainly require a review of the destination approach.

Other than exclusion from gambling, the Act makes no provisions for harm minimisation measures such as placing limits on gambling time and losses. Lastly, regulation of the advertisement of gambling does not encapsulate new forms of gambling such as sponsorship logos and celebrity endorsement. These issues receive detailed attention in subsequent chapters as they are central to the regulation of interactive gambling.

CHAPTER 4: ADDRESSING CHALLENGES FACING REGULATION OF INTERACTIVE GAMBLING IN SOUTH AFRICA

4.1 Introduction

Gambling is frowned upon not only from a morality point of view, but also as a result of the damage caused by problem gambling. The socio-economic stability of gamblers with an uncontrolled urge to gamble is often disrupted by problem gambling. The popular perception is that interactive gambling will increase problem gambling as access to this form of gambling increases the availability of gambling opportunities.⁴⁹² This perception holds true for South Africa, as expressed in the National Gambling Policy, 2016, that seeks to block regulation of interactive gambling. The National Gambling Policy, 2016, asserts that:

*Introduction of online casino gambling requires a policy shift in regard to the destination approach to gambling as it proposes bringing gambling activities closer to people. This aspect is considered against the concern regarding problem gambling in South Africa, and measures to combat it successfully.*⁴⁹³

South Africa is eager to limit the availability and creation of more gambling opportunities in order to avert exacerbating problem gambling;⁴⁹⁴ interactive gambling is not an exception.

Problem gambling is a scholarly term to denote among others, excessive gambling that compromises the financial stability of the gambler and disrupts or damages

⁴⁹² In its review of the interactive gambling regulatory framework, Australia had an opportunity to scan the literature to gauge “prevalence of online problem gambling”, which is an indication that online/interactive gambling if not properly regulated may heighten prevalence of problem gambling – Department of Broadband, Communications and the Digital Economy *Review of the Interactive Gambling Act 2001* (Final report 2012) 32–35.

⁴⁹³ Department of Trade & Industry *National gambling policy* 9.

⁴⁹⁴ Gambling Review Commission *South African gambling industry* 79–88.

personal, family or recreational pursuits.⁴⁹⁵ Problem gambling, if not curbed, may result in an illness called gambling disorder (or gambling addiction). In medical parlance, gambling disorder is defined as persistent and recurrent problematic gambling behaviour leading to clinically significant impairment or distress.⁴⁹⁶ The difference between problem gambling and gambling disorder is best described by the National Opinion Research Centre at the University of Chicago, who puts it that the terms “problem gambling” or “at-risk gambling” *have all been proposed by gambling researchers or treatment professionals to identify individuals who do not meet the psychiatric criteria for a gambling disorder but who nevertheless appear to experience substantial difficulties related to their gambling* (my emphasis).⁴⁹⁷ The presence of four to five of the following prescribed conditions⁴⁹⁸ could be an indication of a gambling disorder –

- the need to gamble with increasing amounts of money in order to achieve the desired excitement;
- restlessness or irritability when gambler attempts to cut down or stop gambling; repeated unsuccessful efforts to control, cut back or stop gambling;
- preoccupation of gambler with gambling (for example, having persistent thoughts of reliving past gambling experience, handicapping or planning the venture, thinking of ways to get money with which to gamble;
- often gambles when feeling distressed (for example, helpless, guilty, anxious, depressed);
- chasing after one’s gambling losses, that is, after losing money gambling, often returns to recoup losses or get even;
- deception –lying to conceal the extent of involvement with gambling;

⁴⁹⁵ NGB *Socio-economic impact of legalised gambling in South Africa* [Gambling behaviour in South Africa: Results from the 2009 socio-economic impact study] (October 2009) 39. See also Blaszczynski A & Nower L “A pathways model of problem and pathological gambling” 2002 *Addiction* 487–499 487 describing problem gambling as referring to a “situation when a gambling activity gives rise to harm to the individual gambler, and/or to his or her family, and may extend into the community”. Added the authors “*typically, gambling problems may arise as a result of differences of opinion regarding amounts potentially risked or time spent away from home/family in the absence of any excessive financial losses relative to disposable income, preoccupation with gambling, absent impaired control or other adverse consequences.*”

⁴⁹⁶ American Psychiatric Association *Diagnostic & statistical manual of mental disorders (DSM–5)* 5th ed (American Psychiatric Publishing New York 2013) 585.

⁴⁹⁷ National Opinion Research Centre – University of Chicago *Gambling impact and behaviour study: report to National Gambling Impact Study Commission* (1 April 1999) 20–21.

⁴⁹⁸ American Psychiatric Association *DSM–5* 586.

- jeopardising or losing relationship, job or educational or career opportunity because of gambling; or
- reliance on others to provide money to relieve the desperate financial situation caused by gambling.⁴⁹⁹

While psychiatrists have reached consensus regarding the diagnosis of gambling disorder, diagnosing problem gambling proves to be more difficult, with various screening tests in contention, although South Oaks Gambling Screen has gained popularity, including in South Africa.⁵⁰⁰ The South Oaks Gambling Screen, originally developed by Lesieur and Blume in 1987⁵⁰¹ has been modified over the years to cover personal questions including but not limited to, whether a gambler has: lied about gambling, money and time spent on gambling; argued with family members over gambling; borrowed money from a variety of sources to gamble or to pay gambling debts.⁵⁰²

Strategies, if any, devised for detection, identification, monitoring and possibly elimination (including treatment and rehabilitation of gamblers) of problem gambling in land based gambling are relatively untested in a virtual environment of interactive gambling. Some of the risks associated with problem gambling are identified and discussed in this chapter. Risks include indebtedness/bankruptcy,⁵⁰³ substance and alcohol abuse,⁵⁰⁴ domestic violence that may lead to family disintegration,⁵⁰⁵ and

⁴⁹⁹ American Psychiatric Association *DSM–5* 481.

⁵⁰⁰ National Centre for the Study of Gambling *The national 2006 prevalence study: gambling and problem gambling in South Africa* (2006) 19.

⁵⁰¹ Lesieur H and Blume S “The South Oaks Gambling Screen (SaGS): a new instrument for the identification of pathological gamblers” 1987 *American Journal of Psychiatry* 1184–1188 1185, the original South Oaks Gambling Screen covers seven items to determine the existence of gambling problems, namely: family disruption, job disruption, lying about gambling wins and losses, default on debts, going to someone to relieve a desperate financial situation produced by gambling, borrowing from illegal sources, and committing an illegal act to finance gambling.

⁵⁰² National Opinion Research Centre – University of Chicago *Gambling impact* 13.

⁵⁰³ Scholnick B “The impact of VLT location on problem gamblers: evidence from individual bankruptcy filings” A presentation made at a conference themed “Controversial Topics in Gambling” hosted by Alberta Gambling Research Institute Canada (03–05 April 2014).

⁵⁰⁴ Zoland J *et al* “The prevalence of problem gambling among substance abusing offenders” 2013 *Journal of Gambling Issues* 1–8 supports earlier research findings by Petry N Stinson F & Grant “Comorbidity of DSM–IV pathological gambling and other psychiatric disorders: results from the national epidemiological survey on alcohol and related conditions” 2005 *Journal of Clinical Psychiatry* 564–574.

criminal activities.⁵⁰⁶ Unlike other ailments such as substance and drug abuse, which may result in a consumer being visibly “high” or drunk or suffering from an overdose, effects of problem gambling are more difficult to detect.⁵⁰⁷ In many instances, by the time it is realised that a gambler is experiencing the socio-economic hardships of gambling, his/her condition may have mutated into gambling disorder.⁵⁰⁸ Usually, family members become aware of problem gambling when the family’s financial resources deteriorate as a result of gambling.⁵⁰⁹ While problem gambling leads to socio-economic problems, its existence should not serve as a reason to prohibit interactive gambling. It is submitted that problem gambling in respect of interactive gambling should be managed by the inclusion of the following strategies:

- Monitoring of gamblers’ gambling activities;
- Self-limit measures;
- Self-exclusion;
- Online counselling and treatment services;
- Regulatory uniformity; and,
- Making gambling debts unenforceable.

Interactive gambling offers an ideal opportunity for the prevention of problem gambling as well as gambling disorder. This goal can be achieved by including the strategies listed above to create and maintain a responsible gambling environment. This can be described as an environment that minimises the negative effects of gambling, identifies problem gamblers, and provides a safety net for those at risk,

⁵⁰⁵ Suomi A *et al* “Problem gambling and family violence: family member reports of prevalence, family impacts and family coping” 2013 *Asian Journal of Gambling Issues and Public Health* 1–15.

⁵⁰⁶ Crawford J “Organised crime and connection to illegal gambling” A presentation made at a conference themed “Controversial Topics in Gambling” hosted by Alberta Gambling Research Institute Canada (03–05 April 2014). See also Meyer G & Stadler M “Criminal behaviour associated with pathological gambling” 1999 *Journal of Gambling Studies* 29–43.

⁵⁰⁷ McComb J, Lee B & Sprenkle D “Conceptualizing and treating problem gambling as a family issue” 2009 *Journal of Marital and Family Therapy* 415–431 418 and Downs C “Gambling on debt: problem gamblers’ strategies for concealing deviant identities” A presentation made at a conference themed “Controversial Topics in Gambling” hosted by Alberta Gambling Research Institute Canada (03–05 April 2014).

⁵⁰⁸ Griffiths M & Cooper G “Online therapy: implications for problem gamblers and clinicians” 2003 *British Journal of Guidance & Counselling* 113–135 115.

⁵⁰⁹ Holdsworth L *et al* “Impacts of gambling problems on partners: partners’ interpretation” 2013 *Asian Journal of Gambling Issues and Public Health* <http://www.ajgiph.com/content/3/1/11> (Date of use: 11 June 2014).

putting gamblers in a position to control their gambling expenditure and minimising the harm they cause through legal compliance.⁵¹⁰

4.2 Prevalence of problem gambling and gambling disorders

South Africa's gambling regulatory framework acknowledges the existence of problem gambling as well as gambling disorders. In terms of the National Gambling Act, the NGB must "*research and identify factors relating to, and patterns, causes, and consequences of addictive or compulsive gambling*"⁵¹¹ Relying on South Oaks Gambling Screen to identify problem gambling, the NGB classifies gamblers into four categories, namely: no-risk gamblers, low-risk gamblers, moderate risk gamblers and at-risk gamblers.⁵¹² An individual in the latter category is described as a gambler who has suffered from or experienced undue social or financial stress as a result of his/her gambling activities, that is, problem gambling.⁵¹³

Using this classification, the National Centre for the Study of Gambling released findings in 2006 on the prevalence rate of problem gambling in South Africa. It found that in 2003, problem gambling stood at 6,8% of the gambling population.⁵¹⁴ By 2006, the number had declined to 4,8%.⁵¹⁵ The last statistics published by the NGB show that by November 2012 problem gambling stood at 2.9% of the gambling population.⁵¹⁶ Though this declining of problem gambling between 2003–2012 is a welcome relief, problem gambling still remains the concern for the gambling sector. It is reported that worldwide, problem gambling ranges from 0,5% to less than 8%, with many countries averaging 2–3%.⁵¹⁷ Statistics in South Africa do not include interactive gambling as this is not yet legalised.

⁵¹⁰ Hing N and Mackellar J "Challenges in responsible provision of gambling: questions of efficacy, effectiveness and efficiency abstract" 2004 *UNLV Gaming Research & Review Journal* 43–58 47.

⁵¹¹ Section 65(1)(d)(ii) of the National Gambling Act 7 of 2004.

⁵¹² NGB October 2012 *Research Bulletin* 3.

⁵¹³ NGB October 2012 *Research Bulletin* 3.

⁵¹⁴ National Centre for the Study of Gambling *Problem gambling* 5.

⁵¹⁵ National Centre for the Study of Gambling *Problem gambling* 5.

⁵¹⁶ NGB "National Gambling Board leads tracking gambling research in South Africa" June 2013 *Research Bulletin* 1–3 1.

⁵¹⁷ NGB June 2013 *Research Bulletin* 1.

Statistics in the US revealed that in the 1980s, at least three per cent (3%) of the gambling population showed a gambling disorder, degenerating into serious financial and criminal misdeeds.⁵¹⁸ In 1994, the American Psychiatric Association suggested that the prevalence rate of gambling disorders in the US could as high as 1%–3% of the adult population.⁵¹⁹ In its DSM–5 published in 2013, the American Psychiatric Association reported that the lifetime prevalence rate of gambling disorder was about 0.4%–1.0% among the US gambling population.⁵²⁰

In Australia, a 2009 study conducted for the Ontario Problem Gambling Research Centre showed that the prevalence of problem gambling was three to four times higher in interactive gambling than in traditional forms of gambling.⁵²¹ These statistics should be cause for concern in countries contemplating introducing interactive gambling, including South Africa, particularly in light of speculation among researchers that the introduction of new forms of gambling will lead to increased rates of problem gambling.⁵²² Lastly, a worldwide research study by Gainsbury *et al.* on the impact of interactive gambling on problem gambling reported that “*young adults between ages of 18–29 are not only more likely to engage in internet gambling, but are also more likely to experience significant problems*”.⁵²³ This concern has been echoed within our borders by the National Centre for the Study of Gambling, which stated, in part, thus:

If a jurisdiction introduces new forms of gambling and does nothing else it will most likely experience an increase in the incidence of problem gambling. However, if the jurisdiction combines the introduction of new forms of gambling especially with an effective public awareness campaign about the dangers of gambling and how to avoid them, it is likely to experience a decrease in problem

⁵¹⁸ Davidson M “Aces over eights: pathological gambling as a criminal defense” 1989 *The Army Lawyer* 11–16 11.

⁵¹⁹ American Psychiatric Association *Diagnostic & statistical manual of mental disorders* (DSM–IV) 4th ed (American Psychiatric Publishing New York 1994) 617.

⁵²⁰ American Psychiatric Association *DSM–5* 587

⁵²¹ Wood R & Williams R *Internet gambling: prevalence, patterns, problems, and policy options* (Final report prepared for the Ontario Problem Gambling Research Centre Guelph Ontario Canada 5 January 2009) 10–11.

⁵²² Abbott MW, Volberg RA & Ronnberg S “Comparing the New Zealand and Swedish national surveys of gambling and gambling problems” 2004 *Journal of Gambling Studies* 237–258.

⁵²³ Gainsbury S *et al* “Impact of internet gambling on gambling problem: a comparison of moderate-risk and problem internet and non-internet gamblers” 2013 *Psychology of Addictive Behaviour* 1092–1101.

*gambling numbers and even in the numbers of people who gamble regularly as well.*⁵²⁴

Public awareness is one of the many ways in which to warn gamblers about the pitfalls of gambling. Notwithstanding, the inclusion of harm prevention and minimisation provisions in interactive gambling regulations, would, it is argued in this chapter, be more effective in addressing problem gambling. The current legal framework for gambling has few or no provisions regarding harm minimisation measures for problem gambling other than acknowledging it as a risk facing gamblers.

4.3 Social harms associated with problem gambling and/or gambling disorder

In most cases, the effects of gambling disorder extend beyond an individual gambler to family members, as well as the workplace and society. On average, it is estimated that the effects of problem gambling and gambling disorder, per person, have an impact upon 10–17 individuals, including family members and colleagues.⁵²⁵ Much social harm, such as domestic violence, substance and alcohol abuse, criminal acts and over-indebtedness, have been reported and linked to problem gambling as well as to gambling disorder.⁵²⁶ The prevalence and consequences of these social harms are discussed hereunder. While these negative effects of gambling disorder are discussed in isolation from interactive gambling, the ultimate purpose is to lay a foundation for the inclusion of harm prevention and minimisation provisions in the regulation of interactive gambling, in order to prevent this form of gambling from aggravating a society already damaged by gambling. Where possible, the technological benefits of interactive gambling should be used to detect gambling disorder and to offer effective prevention and treatment methods.

⁵²⁴ National Centre for the Study of Gambling *Problem gambling* 6.

⁵²⁵ Kalischuk R *et al* "Problem gambling and its impact on families: a literature review" 2006 *International Gambling Studies* 31–60 37.

⁵²⁶ Australian Gaming Council *Current issues related to identifying the problem gambler in the gambling venue* (August 2002) 2.5.

4.3.1 Domestic violence

Domestic violence is counted among social harms affecting families. According to Lee, it is very difficult to prove that a relationship exists between problem gambling/gambling disorder and domestic violence, as episodic and at times prolonged emotional and physical abuse exists even before the onset of gambling problems.⁵²⁷ The 2013 Diagnostic Statistics Manual (DSM–5) for Gambling Disorder does not list domestic violence *per se* among its indicators for problem gambling,⁵²⁸ but it cannot be ruled out where deception or lying to family members as well as jeopardising of a significant relationship are acknowledged as some of the diagnostic criteria.⁵²⁹

Empirical research shows that domestic violence is more prevalent among gamblers with gambling disorder than the general population.⁵³⁰ This is largely the result of financial strains placed on family resources by a partner, spouse or family member who is a problem gambler and who becomes unable to discharge his/her obligations towards the family as a result of losing his/her income through gambling. The financial stress caused by gambling losses has the propensity to manifest itself within the family and may result in the perpetration of violence against family members. Analysing the relationship between gambling problems and the perpetration of intimate partner violence and child abuse, Afifi *et al.* found that, among the negative consequences of gambling disorder was an increase in odds of the perpetration of dating violence, acute marital violence and aggravated child abuse.⁵³¹ The discharge of violence is seen as an attempt by a gambler with a gambling disorder to manage or maintain his/her own equilibrium.⁵³² According to Suomi *et al.*, the perpetration of domestic violence (within the sphere of gambling)

⁵²⁷ Lee B “Towards a relational framework for pathological gambling (part I): five circuits” 2014 *Journal of Family Therapy* 371–393.

⁵²⁸ American Psychiatric Association *DSM–5* 585.

⁵²⁹ American Psychiatric Association *DSM–5* 585 – diagnostic criteria 7 and 8 for gambling disorder.

⁵³⁰ Korman L *et al* “Problem gambling and intimate partner violence” 2008 *Journal of Gambling Studies* 13–23 14.

⁵³¹ Afifi T *et al* “The relationship of gambling to intimate partner violence and child maltreatment in a nationally representative sample” 2010 *Journal of Psychiatric Research* 331–337.

⁵³² Suissa A “Gambling, violence, and family dynamics: some intervention markers” 2005 *International Journal of Mental Health & Addiction* 1–5 3.

occurs as a “reaction to deeply rooted and accumulated anger and mistrust whereas victimisation is an outcome of a gambler’s anger brought on by immediate gambling losses and frustration”.⁵³³ The anger or frustration is a culmination of financial stress caused by the loss of money through gambling.

Domestic violence occurs in various forms. In terms of the Domestic Violence Act⁵³⁴ it includes physical abuse,⁵³⁵ sexual abuse,⁵³⁶ economic abuse,⁵³⁷ emotional, verbal and psychological abuse,⁵³⁸ intimidation,⁵³⁹ harassment,⁵⁴⁰ stalking,⁵⁴¹ damage to property,⁵⁴² entry into the residence of a complainant without consent, where parties do not share the same residence, or any other controlling or abusive behaviour towards a complainant – where such conduct harms or may cause imminent harm to the safety, health or wellbeing of the complainant. For it to occur, the perpetration of violence against a complainant must occur in a domestic relationship, that is, a family setting in which a perpetrator and a complainant are either married, partners, parents of a child, family members or sharing the same residence.⁵⁴³ If there is no

⁵³³ Suomi *et al* 2013 *Asian Journal of Gambling Issues and Public Health* 1–15.

⁵³⁴ Domestic Violence Act 116 of 1998.

⁵³⁵ Physical abuse means any act or threatened act of physical violence towards a complainant.

⁵³⁶ Sexual abuse means any conduct that abuses, humiliates, degrades, or otherwise violates the sexual integrity of the complainant.

⁵³⁷ Economic abuse is described in the Domestic Violence Act 116 of 1998 as (i) the unreasonable deprivation of economic or financial resources to which a complainant is entitled under law or which the complainant requires out of necessity, including household necessities for the complainant, and mortgage bond repayments or payment of rent in respect of the shared residence; (ii) the unreasonable disposal of household effects or other property in which the complainant has an interest.

⁵³⁸ Emotional, verbal and psychological abuse means a pattern of degrading or humiliating conduct towards a complainant, including (i) repeated insults, ridicule or name calling; (ii) repeated threats to cause emotional pain; or (iii) the repeated exhibition of possessiveness or jealousy, which is such as to constitute a serious invasion of the complainant’s privacy, liberty, integrity, or security.

⁵³⁹ Intimidation means uttering or conveying a threat, or causing a complainant to receive a threat, which induces fear.

⁵⁴⁰ Harassment means engaging in a pattern of conduct that induces the fear or harm to a complainant including (i) repeatedly watching, or loitering outside of or near the building or place where the complainant resides, works, carries on business, studies or happens to be; (ii) repeatedly making telephone calls, or inducing another person to make telephone calls to the complainant, whether or not conversation ensues; (iii) repeatedly sending, delivering, or causing delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant.

⁵⁴¹ Stalking means repeatedly following, pursuing or accosting the complainant.

⁵⁴² Damage to property means the wilful damaging or destruction of property belonging to a complainant or in which the complainant has a vested interest.

⁵⁴³ See definition section of the Domestic Violence Act 116 of 1998 describing respondent as a person who is or has been in a domestic relationship with a complainant and who has committed or allegedly committed an act of domestic violence against the complainant.

domestic relationship between the perpetrator and complainant, then it does not amount to domestic violence.

While focus is on the minimisation or prevention of problem gambling and gambling disorder among gamblers, a need may exist to offer treatment or counselling to a gambler's family in cases where problem gambling or gambling disorder is proven to be a direct cause of domestic violence.⁵⁴⁴ The extent of problem gambling and gambling disorder in a family has the potential to cause negative relationship dynamics, in particular, marital problems.⁵⁴⁵ Marital problems, if not resolved, may ultimately lead to separation or divorce. Cases of spouses divorcing each other as a result of gambling are not a new phenomenon. Previous research found that 25–33% of US couples who were divorcing cited gambling disorder as the main reason for ending their marital unions.⁵⁴⁶ Socially, family members feel ashamed of the gambling deeds committed by their family member who has gambling disorder. When one family member experiences a change such as loss of income, especially by a breadwinner, the effects of such a loss extend beyond the individual to his or her immediate family.⁵⁴⁷ The family should therefore be included during treatment of problem gambling and/or gambling disorder. Failure to include the family may leave them with secondary effects.⁵⁴⁸

It is difficult to determine the prevalence of domestic violence in South Africa as it does not constitute a crime *per se* until such time as there is a violation of a protection order issued by the court.⁵⁴⁹ While instances of domestic violence all constitute crimes in terms of criminal law, not all instances are reported, either in

⁵⁴⁴ Suissa 2005 *International Journal of Mental Health & Addiction* 3 warns that “*treatment is structured to care for the individual gambler and less for his or her family and social system; consequently, the family is largely ignored during the treatment process. In other words, the family is always seen in relation to the gambler and when the family members want treatment, they are often advised ... to seek their own counselling.*”

⁵⁴⁵ Suomi *et al* 2013 *Asian Journal of Gambling Issues and Public Health* 1–15.

⁵⁴⁶ Mathews M & Volberg R “Impact of problem gambling on financial, emotional and social well-being of Singaporean families” 2013 *International Gambling Studies* 127–140 129, citing Potenza M *et al* “Gender-related differences in the characteristics of problem gamblers using a gambling helpline” (2001) *American Journal of Psychiatry* 1500–1505.

⁵⁴⁷ Kalischuk *et al* 2006 *International Gambling Studies* 34.

⁵⁴⁸ Suissa 2005 *International Journal of Mental Health & Addiction* 4.

⁵⁴⁹ Section 17 of the Domestic Violence Act 116 of 1998.

terms of the Domestic Violence Act or as general crimes, for example, assault.⁵⁵⁰ Victims of domestic violence often try to sort out their differences internally, before seeking protection from law enforcement authorities. Thirdly, police statistics tend to capture domestic violence under the common law crime of assault and statutory sexual offences.⁵⁵¹ It is not known, from this category of crime, how many are linked to domestic violence. Statistics of domestic violence will not necessarily reveal the causes for domestic violence but will provide a starting point for further research.

4.3.2 Substance and drug abuse

Substance and drug abuse as such do not necessarily lead to gambling addiction, but they are often associated with gambling. Various studies have shown that a large percentage of persons diagnosed with substance and drug abuse disorders are also found to suffer from gambling disorder. In a study conducted by the National Opinion Research Centre at the University of Chicago, published in 1999 and involving 2867 participants, in which 56 participants were found to be problem gamblers and another 57, pathological gamblers, 22.3% (that is, 12,4% and 9,9% respectively) were gamblers diagnosed with substance abuse disorders.⁵⁵² The study probed the relationship between gambling problems and drug use disorders. Of the 57 participants classified as problem gamblers and the 57 who were classified as pathological gamblers, it found that 16,8% and 8,1% respectively had been diagnosed with a drug use disorder.⁵⁵³ Results from the 2005 National Epidemiologic Survey on Alcohol and Related Conditions reinforced previous findings of the co-occurrence of gambling disorder and substance and drug abuse disorders.⁵⁵⁴ The study was made up of 43 093 household of whom 0,42% were found to have active gamblers. From this percentage of gamblers, almost three quarters (that is, 73.2%) had an alcohol use disorder and 38,1% had a drug use disorder.⁵⁵⁵

⁵⁵⁰ Monyela A “Statistics on domestic violence in South Africa” [http://www.womemination.co.za/statistics-on-domestic-violence-in-south Africa/](http://www.womemination.co.za/statistics-on-domestic-violence-in-south-Africa/) (Date of use: 12 June 2014).

⁵⁵¹ Monyela [http://www.womemination.co.za/statistics-on-domestic-violence-in-south Africa/](http://www.womemination.co.za/statistics-on-domestic-violence-in-south-Africa/) (Date of use: 12 June 2014).

⁵⁵² National Opinion Research Centre –University of Chicago *Gambling impact* 30.

⁵⁵³ National Opinion Research Centre – University of Chicago *Gambling impact* 30.

⁵⁵⁴ Petry, Stinson & Grant 2005 *Journal of Clinical Psychiatry* 564–574.

⁵⁵⁵ Petry, Stinson & Grant 2005 *Journal of Clinical Psychiatry* 564.

There undeniable correlation between gambling and alcohol consumption is revealed by Stewart and Kushner, who point out that a large percentage of gamblers indulge in alcohol consumption during gambling.⁵⁵⁶ This is most often the case in land-based gambling establishments, which are designed with bars inside in order to allow their patrons easy access to alcohol.⁵⁵⁷ Generally, consumption of alcohol or drugs has an effect on a person's state of mind. If consumed during gambling, these substances may affect the gambler's ability to control his/her spending. If this becomes a habit for a gambler, it may lead to problem gambling and/or gambling disorder. Commenting on the relationship between gambling and alcohol consumption, French, Maclean and Ettner noted that:

*The consumption of alcohol can influence gambling choices, making individuals more (less) likely to initiate (terminate) gambling and increasing the amount they are prepared to wager in a particular gambling session. Specifically, alcohol consumption may inhibit the proper evaluation of the costs and benefits of gambling, impair the ability to understand the rules of the game, and/or lead to an inflated confidence in the ability to win.*⁵⁵⁸

In a study published in 2010, commissioned by the National Responsible Gambling Programme in South Africa to determine, amongst others, the co-occurrence of problem gambling amongst persons with alcohol dependency, it was found that among 82 persons with full-blown alcohol dependency (that is, alcohol abuse disorder), 15 (18%) were also suffering from problem gambling/gambling disorder.⁵⁵⁹ For an overall picture of this latter category with no/low risk to moderate gambling risk and problem gambling, the abridged results adapted from a study entitled National Urban Prevalence Study of Gambling Behaviour⁵⁶⁰ are presented below.

⁵⁵⁶ Stewart S & Kushner M "Recent research on the comorbidity of alcoholism and pathological gambling" 2003 *Alcoholism: Clinical and Experimental Research* 285–291.

⁵⁵⁷ Ramirez L *et al* "Patterns of substance abuse in pathological gamblers undergoing treatment" 1983 *Addictive Behaviour* 425–428.

⁵⁵⁸ French M, Maclean JC & Ettner S "Drinkers and bettors: investigating the complementarity of alcohol consumption and problem gambling" 2008 *Drug and Alcohol Dependence* 155–164 156.

⁵⁵⁹ NRGP *Summary of basic data from the national urban prevalence study of gambling behaviour* (Cape Town March 2010) 81.

⁵⁶⁰ NRGP *Gambling behaviour* 81.

Persons diagnosed with alcohol abuse disorder	Not involved in gambling	Involved in gambling but at no risk	Low risk of developing a gambling problem	Moderate risk of developing a gambling problem	Developed gambling problem/gambling disorder	Total
Number	15	17	12	23	15	82
Percentage	18%	21%	15%	28%	18%	100%

Co-occurrence of problem gambling among persons with full-blown alcohol dependency.

The evidence of a correlation between problem gambling and substance/alcohol use disorder should be a cause for concern, especially when introducing interactive gambling that does not leave a room for physical monitoring of gamblers to determine whether they are sober or highly intoxicated during their gambling spree.

4.3.3 Criminal behaviour

Criminal behaviour has been confirmed as one of the by-products of problem gambling/gambling disorder.⁵⁶¹ In an effort to finance an uncontrollable urge to gamble, problem gamblers often resort to committing crimes with financial benefits as a means of recouping their gambling losses.⁵⁶² According to a theory that seeks to explain the motives gamblers have for resorting to criminal behaviour to fund their gambling, gamblers start using their savings before asking for advances in the form of loans or credit cards. “Faced with mounting financial difficulties and gambling related debts, when all these legal sources of gambling funds are exhausted, gamblers may resort to illegal activities to obtain money”.⁵⁶³

⁵⁶¹ Clark C & Walker D “Are gamblers more likely to commit crimes? An empirical analysis of a nationally representative survey of US young adults” 2009 *International Gambling Studies* 119–134.

⁵⁶² Turner N *et al* “The relationship of problem gambling to criminal behavior in a sample of Canadian male federal offenders” 2009 *Journal of Gambling Studies* 153–169, conclude in their study concerning the relationship between problem gambling and criminal behaviour that players with a gambling addiction were “significantly more likely to have committed income producing offences, but were neither more nor less likely than other offenders to have committed violent offences”. Also Campbell C, Hartnagel T & Smith G *The legalization of gambling in Canada* (06 July 2005) 39 categorising theft and fraud as crimes committed by gambling players to finance their gambling activities.

⁵⁶³ Crofts P “Problem gambling and property offences: an analysis of court files 2003 *International Gambling Studies* 183–197 193.

Evidence exists of prisoners incarcerated for crimes attributable to gambling addiction. Artz, Hoffman-Wanderer and Moulton⁵⁶⁴ interviewed three women in Cape Town prisons, convicted for crimes caused by their gambling addiction. In narrating their stories, the authors wrote that:

*These women were all relatively well-off and employed in “white collar” jobs in positions of responsibility for their company’s finances. They received decent salaries, at least enough to cover their personal expenses and needs outside of gambling. However, their uncontrollable gambling was so expensive (ranging from hundreds of thousands to millions of Rands) that they were unable to finance it legally. Their crimes were thus a direct result of their gambling addictions: all three committed fraud against the companies for which they worked. In all three cases, the women’s fraud snowballed rapidly. They started stealing small amounts, which got progressively larger, as the amounts they were gambling with got larger.*⁵⁶⁵

A link between gambling and crime was also confirmed in a study published by the Australian Institute of Criminology and PricewaterhouseCoopers, which partly examined primary motivation for commission of crimes, in this case, theft and fraud.⁵⁶⁶ Amongst others, the study examined 148 court files and identified gambling as the second most motivating factor for the commission of crime.⁵⁶⁷ That is, 40 files indicated greed while gambling was indicated in 23 files.

With interactive gambling on the horizon, one of the biggest concerns is whether its legalisation will lead to an increase in crime. In the same way that gambling was viewed as a primary financial base for crime syndicates,⁵⁶⁸ the National Gambling Policy, 2016, regards interactive gambling as a potential source of cybercrimes.⁵⁶⁹ One of the reasons for embargoing the regulation of interactive gambling is the lack of capacity within the NGB and provincial licensing authorities to “successfully

⁵⁶⁴ Artz L, Hoffman-Wanderer Y & Moulton K *Hard time(s): Women’s pathways to crime and incarceration* (GHJRU University of Cape Town 2012) 212.

⁵⁶⁵ Artz, Hoffman-Wanderer & Moulton *Hard time(s)* 212.

⁵⁶⁶ Australian Institute of Criminology and PricewaterhouseCoopers *Serious fraud in Australia and New Zealand: Research and Public Policy Series No. 48* (Australian Institute of Criminology Canberra 2003) 144 in figure 20.

⁵⁶⁷ Australian Institute of Criminology and PricewaterhouseCoopers *Fraud in Australia and New Zealand* 144.

⁵⁶⁸ Gardiner J “Public attitudes towards gambling and corruption” 1967 *Annals of the American Academy of Political and Social Science* 123–134 *Science* 125.

⁵⁶⁹ Department of Trade & Industry *National gambling policy* 36-37.

investigate and prosecute cyber-crimes.”⁵⁷⁰ Cybercrimes are a threat not only to interactive gambling, however, but to any internet commerce. In other words, probable cybercrimes posing a threat to regulation of interactive gambling would be the same as, if not less than, cybercrimes targeting any internet commerce in the country.⁵⁷¹ Even in the absence of interactive gambling as a result of its prohibition, cyber-related offences are reported to be escalating and “*exceed in value in excess of R1billion annually*”.⁵⁷² In terms of the Cybercrimes and Cybersecurity Bill,⁵⁷³ cybercrimes include a variety of offences such as (i) unlawful access, interception, interference of data; (ii) unlawful acts in respect of malware; (iii) unlawful acquisition, possession, provision, receipt or use of passwords, access codes or similar data or devices; (iv) computer related fraud, forgery and uttering, appropriation, extortion, terrorist activity and related offences; (v) dissemination of any data message that advocates, promotes or incites hate, discrimination or violence.⁵⁷⁴

Commentating on the relationship between interactive gambling and crime, Banks notes that:

*Interactive gambling offers many opportunities for criminal entrepreneurs to engage in fraud, theft, extortion and money laundering in and around gambling sites.*⁵⁷⁵

Nonetheless, nowhere in this statement it is suggested that the perpetrators of these crimes are gamblers; instead, Banks points a finger at criminal syndicates. This is important in distinguishing crimes committed by gamblers from crimes associated with gambling, including interactive gambling. There is no argument that interactive gambling will be the target of cybercriminals but as McMullan and Rege observe, “*like other forms of internet commerce, online gambling has not been immune to criminal exploitation*”.⁵⁷⁶

⁵⁷⁰ Department of Trade & Industry *National gambling policy* 36-37.

⁵⁷¹ McMullan J & Rege A “Online crime and internet gambling” 2010 *Journal of Gambling Issues* 54–85 72.

⁵⁷² Department of Justice and Constitutional Development “Justice publishes draft Cybercrimes and Cybersecurity Bill for public comments” 28 August 2015.

⁵⁷³ Cybercrimes and Cybersecurity Bill, 2015, published by the Department of Justice and Constitutional Development on 28 August 2015.

⁵⁷⁴ Section 4–17 of the Cybercrimes and Cybersecurity Bill, 2015.

⁵⁷⁵ Banks J “Online gambling and crime: a sure bet?” 2012 *The ETHICOMP Journal*. <http://shura.shu.ac.uk/id/eprint/6903> (Date of use: 14 July 2015)

⁵⁷⁶ McMullan & Rege 2010 *Journal of Gambling Issues* 72.

Anecdotal cases of cybercrimes related to interactive gambling have begun to surface; however, the bulk of these cases indicate that crime syndicates remain the perpetrators of cybercrimes targeting interactive gambling. With the exception of *R v Mitchell*,⁵⁷⁷ in which a frequent poker player was convicted of hacking into gambling websites and stealing poker chips for resale on Facebook, there is hardly any evidence showing relationship between gamblers and cybercrimes. In the case, Mitchell is described as an IT businessman with a penchant for the game of poker on the internet. Mitchell regularly played interactive poker offered by Zynga – an interactive gambling provider. With access to the gambling games offered by Zynga, Mitchell hacked into the websites and stole £7 million's worth of virtual poker chips for resale on Facebook. Mitchell used a front company when selling the stolen chips. Mitchell's activities were uncovered and he was arrested for hacking offences in terms of UK's Computer Misuse Act of 1993. Mitchell pleaded guilty and was sentenced to two years' imprisonment. Although Mitchell is correctly described as a poker player, it is not clear whether his penchant for interactive poker had become problem gambling; in other words, there is nothing in the case to indicate that a diagnosis was made.

In contrast, cases emerging from the gambling literature point to crimes targeting gambling websites perpetrated by crime syndicates, not gamblers. It is reported that gambling entities in Costa Rica and Antigua, namely BoDog Sportsbook and World Wide Telesports, paid more than \$20 000 and \$30 000 respectively to cyber-extortionists, in exchange for the latter halting attacks on the software operated by these entities.⁵⁷⁸ Interactive gambling operators find the costs of fighting cyber-extortionists far more exorbitant than paying the ransom and being assured of no further disruption to their business. In the UK, Canbet Sports Bookmakers Ltd, an interactive gambling activity, is reported to have been a target of an extortionist who demanded £10 000 in ransom. Canbet Sport Bookmakers Ltd refused to pay the ransom. The extortionist then blocked the company server during the Breeders' Cup races, using distributed denial of service attacks (DDoS), thereby costing this

⁵⁷⁷ *R v Mitchell* Exeter Crown Court 03/02/2011.

⁵⁷⁸ Paulson R & Weber J "Cyberextortion: An overview of distributed denial of service attacks against online gaming companies" 2006 *Issues in Information System* 52–56.

interactive gambling provider more than £100 000 in lost revenues.⁵⁷⁹ Another UK interactive gambling provider, Grafix Softech, fell victim to a cyber extortionist operating from Russia.⁵⁸⁰ Its production servers for interactive gambling were hacked and infected with a virus that encrypted the company's data. It is reported that the extortionist demanded a ransom from the company in exchange for the decryption key. An undisclosed amount was paid in ransom and the decryption key was furnished to the company; however, the damage was done as the company recovered data from only one server and had to enlist the services of IT companies to recover the remainder of its lost data.⁵⁸¹

Interactive gambling should not be seen as a predicate for criminal activities, but merely as an intermediary capable of being exploited by criminals for the commission of crimes, including cybercrimes. It is no different from any internet commerce in relation to cybercrime. The same logic applies to other forms of crime such as money laundering and organised crime, which have been singled out as inevitable in interactive gambling.⁵⁸² According to the report of the USA General Accounting Office concerning "Internet gambling: An overview of the issues" issued in 2002, there is no more risk of money laundering through interactive gambling than in any other form of internet commerce.⁵⁸³

⁵⁷⁹ Howard R Cyber fraud: tactics, techniques and procedures (Auerbach Publications Florida 2009) 118.

⁵⁸⁰ Ward M & Jennas II P "Hacking networked games" <http://www.cs.arizona.edu/collberg/.../report.pdf> (Date of use: 23 July 2015).

⁵⁸¹ Ward M and Jennas II P <http://www.cs.arizona.edu/collberg/.../report.pdf> (Date of use: 23 July 2015).

⁵⁸² Mills J "Internet casinos: a sure bet for money laundering" 2001 *Journal of Financial Crime* 365–383 – argues that *the greatest criminal threat posed by the blossoming virtual gaming industry is the unprecedented potential it presents for criminal elements seeking to launder their ill-gotten gains.*

⁵⁸³ United States General Accounting Office *Internet gambling: an overview of the issues* (December 2002) 5 finds conflicting information between law enforcement officials on one hand and banking and gaming regulatory officials on the other hand concerning vulnerability of interactive gambling to money laundering. "Law enforcement believed that interactive gambling could potentially be a powerful vehicle for laundering criminal proceeds at the relatively obscure "layering" stage of money laundering. Banking and gaming regulatory officials did not view interactive gambling as being particularly susceptible to money laundering, especially when credit cards, which create a transaction record and are subject to relatively low transaction limits, are used for payment. They did not believe that Internet gambling was any more or less susceptible to money laundering than other types of electronic commerce and pointed out that, in their view, the financial industry, which is responsible for the payments system, is better suited to monitoring for suspicious activity in the area than the gaming industry itself." Accordingly the General Accounting Office could not make recommendation to the US Congress in light of this conflicting information.

4.4 Recognition accorded to problem gambling and gambling disorder

The existing gambling regulatory framework acknowledges the existence of problem gambling as well as gambling disorder by requiring gambling providers to warn gamblers about “the dangers of addictive or compulsive gambling”.⁵⁸⁴ The purpose of this warning is two-fold, namely to encourage gamblers to gamble responsibly and seek professional help if their gambling habit is out of control. However, the courts often find themselves having to pronounce on whether this condition (that is, problem gambling/gambling disorder) induces or amounts to mental illness. Mental illness can, under certain circumstances, exclude criminal capacity.⁵⁸⁵ In this regard, jurisprudence of the courts in the US and in South Africa is evaluated to offer an insight into the legal treatment of problem gambling and/or gambling disorder.

4.4.1 Gambling disorder as a defence to criminal charges: the case of *United States v J Torniero*⁵⁸⁶

The American Psychiatric Association is credited with the recognition of gambling disorder following inclusion of this condition in its Diagnostic and Statistical Manual of Mental Health Disorders.⁵⁸⁷ Its inclusion under Substance-Related and Addictive Disorders⁵⁸⁸ will enable gamblers with gambling disorder to access services and treatment for public health, which are similarly available for substance and drug use disorders. Following its recognition by psychiatry, it was not long before the US judiciary was called upon in the matter of *United States v Torniero* to decide in an insanity defence based on compulsive gambling disorder.⁵⁸⁹

⁵⁸⁴ National Gambling Act 7 of 2004 – section 15 regarding advertising or promotion of gambling activities and section 17 on standards for gambling premises.

⁵⁸⁵ Kemp G *et al Criminal law in South Africa* (Oxford University Press Southern Africa 2012)136.

⁵⁸⁶ *United States v J Torniero* 735 F2d 725 (2d Cir. 1984).

⁵⁸⁷ Gambling disorder appeared for the first time in the DSM–III published in 1980 and since then it has appeared in subsequent publications, that is, DSM–IV as well as the current DSM–5 of the American Psychiatric Association *DSM–5* 585.

⁵⁸⁸ American Psychiatric Association <http://www.dsm5.org/Documents/Substance%20Use%20Disorder%20Fact%20Sheet.pdf> (Date of use: 23 June 2014).

⁵⁸⁹ *United States v J Torniero* 735 F2d 725 (2d Cir. 1984) [1].

During September 1982, Torniero was charged with theft and the transportation of stolen goods.⁵⁹⁰ He was accused of having stolen jewellery valued at approximately \$750 000 and transporting it from New Haven to the Diamond District in Manhattan, where he sold it.⁵⁹¹ The then item 18 U.S.C. §2314 made it a criminal offence to transport stolen goods in interstate commerce.⁵⁹² In his defence, Torniero presented two psychiatrists who testified that he suffered from so-called compulsive gambling disorder, which rendered him insane.⁵⁹³ One of the psychiatrists testified that Torniero suffered from the mental disease of pathological gambling, which meant that he was unable to resist the impulse to steal in order to satisfy his gambling addiction.⁵⁹⁴ Torniero's defence was that his compulsion to gamble led to an accumulation of debts, which in turn compelled him to steal. Had it not been for his uncontrollable urge to gamble, he would not have accumulated debts and ultimately been compelled to steal.⁵⁹⁵ In other words, Torniero argued, he did not have criminal capacity as a result of his mental illness.

The *court a quo*⁵⁹⁶ rejected the defence of compulsive gambling as it could not find a nexus between Torniero's disorder and the offences for which he was charged.⁵⁹⁷

The court was of the opinion that:

*"It is questionable whether such disorder, characterised more by repeated engagement in a particular activity than by any derangement of one's mental faculties, amounts to a mental disease as that concept has long been understood by the criminal law. But it is even more troubling that the defendant asserts this defense in a case in which his alleged gambling is only tangentially related to the offense with which he has been charged."*⁵⁹⁸

This led to the appeal in which Torniero contended that the trial judge had erred by refusing to permit the compulsive gambling disorder as a defence.⁵⁹⁹ For Torniero to succeed, the appeal court indicated that he had to show that compulsive gambling

⁵⁹⁰ *United States v J Torniero* 735 F2d 725 (2d Cir. 1984) [2].

⁵⁹¹ *United States v J Torniero* 735 F2d 725 (2d Cir. 1984) [4].

⁵⁹² *United States v J Torniero* 735 F2d 725 (2d Cir. 1984) [6].

⁵⁹³ *United States v J Torniero* 735 F2d 725 (2d Cir. 1984) [5].

⁵⁹⁴ Castellani B *Pathological gambling: the making of a medical problem* (State University of New York Press New York 2000) 20.

⁵⁹⁵ *United States v J Torniero* 735 F2d 725 (2d Cir. 1984) [17].

⁵⁹⁶ *United States v Torniero* 570 F. Supp. 721 (D.Conn.1983).

⁵⁹⁷ *United States v J Torniero* 735 F2d 725 (2d Cir. 1984) [22].

⁵⁹⁸ *United States v Torniero* 570 F. Supp. 721 (D.Conn.1983) 723.

⁵⁹⁹ *United States v J Torniero* 735 F2d 725 (2d Cir. 1984) [7].

was a mental disease or defect. In other words, “*he must demonstrate that the infirmity could have prevented him from appreciating that theft was wrongful, or could have deprived him of the ability to restrain himself from the criminal act*”.⁶⁰⁰ In upholding the decision of the trial court rejecting Torniero’s defence, the appeal court held thus:

*“Similarly, there must be a connection between the compulsion to gamble and the inability to conform with the law or to restrain oneself from breaking the law. It is this link between a putatively mentally diseased compulsion to gamble and an uncontrollable urge to steal that the trial court specifically found unsupported by the evidence adduced at the pre-trial hearing. We therefore conclude that the trial court correctly acted within its discretion in deciding that evidence of a compulsive gambling disorder would not be relevant for insanity defense to the charge of interstate transportation of stolen goods.”*⁶⁰¹

Military courts in the USA have also presided over cases involving gambling disorder in their criminal court martial proceedings, wherein it was argued that the gambling disorder led to insanity and was then raised as a defence.⁶⁰² As in Torniero’s case, these courts have not reached any conclusion on whether gambling disorder constitutes a defence for crimes committed. This is largely owing to the lack of a causal connection between gambling disorder and the accused’s inability to resist the impulse to obtain gambling money through criminal acts.⁶⁰³ If the accused relies on mental illness it would affect his criminal capacity.

As it stands, gambling disorder is one of the recognisable “behavioural addictions” under Substance-Related and Addictive Disorders in DSM–5.⁶⁰⁴ This classification will enable affected gamblers to access treatment and counselling services in the same manner as persons with substance and drug use disorders.

⁶⁰⁰ *United States v J Torniero* 735 F2d 725 (2d Cir. 1984) [7].

⁶⁰¹ *United States v J Torniero* 735 F2d 725 (2d Cir. 1984) [26–27].

⁶⁰² Little W and Hecker F “Compulsive gambling and the changing military law” 1988 *Journal of Gambling Behaviour* 277–281.

⁶⁰³ Davidson 1989 *The Army Lawyer* 11–16.

⁶⁰⁴ American Psychiatric Association *DSM–5* 585.

4.4.2 South Africa's approach to gambling disorder as a defence to exclude criminal liability or a criminal offence

Mental illness constitutes a defence for criminal wrongdoing in South Africa.⁶⁰⁵ In terms of the Criminal Procedure Act, 1977, “a person who commits an act which constitutes an offence and who at the time of such commission suffers from a mental illness or mental defect which makes him incapable of appreciating the wrongfulness of his act or of acting in accordance with an appreciation of the wrongfulness of his act, shall not be criminally responsible for such act”.⁶⁰⁶ The judiciary has on a few occasions been called upon to consider whether or not gambling disorder amounts to mental illness or constitutes a substantial and compelling reason to warrant a lesser sentence in the case of criminal convictions.

In *S v Wasserman*,⁶⁰⁷ the court had to consider gambling disorder as a substantial and compelling reason to deviate from the prescribed minimum sentence of convicted criminals. The facts are as follows: Wasserman was charged and convicted on 64 counts of theft involving an amount of more than R1,1 million.⁶⁰⁸ She was sentenced to 15 years' imprisonment, which is a prescribed minimum sentence unless substantial and compelling circumstances justifying a lesser sentence exist. She appealed against this sentence on the basis that the *court a quo* failed to take into account the gambling disorder that had caused her to commit the crimes.⁶⁰⁹ Wasserman was diagnosed with gambling disorder prior to her arrest and convicted by the *court a quo*.⁶¹⁰

The court had to decide whether the sentence of 15 years' imprisonment was just and fair, taking into account her gambling disorder as the trigger for her commission of theft. In order to answer this question, the court stated that:

“It is prudent to consider whether pathological gambling disposition is an acknowledged disease and whether it qualifies as substantial

⁶⁰⁵ Snyman CR *Criminal Law* 5th ed (LexisNexis Durban 2008) 170–174.

⁶⁰⁶ Section 78 of the Criminal Procedure Act 51 of 1977.

⁶⁰⁷ *S v Wasserman* 2004 (1) SACR 251 (T).

⁶⁰⁸ *S v Wasserman* 2004 (1) SACR 251 (T) 253c or [4].

⁶⁰⁹ *S v Wasserman* 2004 (1) SACR 251 (T) 252i–253a or [2].

⁶¹⁰ *S v Wasserman* 2004 (1) SACR 251 (T) 258g or [16].

*and compelling circumstances in rendering the prescribed minimum sentence unjust and unfair and thereby warranting the imposition of lesser sentence”.*⁶¹¹

Relying on the developments of the American Psychiatric Association, which first included pathological gambling (now disordered gambling) in its DSM III published in the 1980s, the court held that “*pathological gambling is an illness characterised by persistent and recurrent maladaptive patterns of gambling behaviour*”.⁶¹² Regarding whether this illness should be treated as a mitigating factor, it held:

*“Addiction to gambling is a mitigating factor and will certainly impact upon sentencing considerations”.*⁶¹³

After evaluation of the personal circumstances of Wasserman, that is her career, gambling history until the time of her thieving, the court concluded that pathological gambling disorder must qualify as a substantial and compelling circumstance.⁶¹⁴ The court said:

*“The crime of theft committed by the appellant is to some extent generated by the pathology to gambling. It must surely lessen the offender’s moral culpability when compared with other offenders who commit offences of dishonesty for pure greed. The pathology is not an excuse for theft but it is an explanation and ought to be taken into account in determining a just and fair punishment.”*⁶¹⁵

Based on this conclusion, the court reduced the 15 years imprisonment to five years, 2½ years of which was suspended, while the remaining half would be served under house arrest.⁶¹⁶

In *S v Nel*⁶¹⁷ the Supreme Court of Appeal clarified the legal position in respect of gambling disorder by holding that even if it was to be proved, it could not serve as a defence for the commission of an offence nor immunise an offender from direct imprisonment. In February 1999 Nel, armed with a firearm, robbed Lorraine Entertainment Centre, a casino establishment based in Port Elizabeth. He stole the

⁶¹¹ *S v Wasserman* 2004 (1) SACR 251 (T) 253f or [5].

⁶¹² *S v Wasserman* 2004 (1) SACR 251 (T) 254c or [7].

⁶¹³ *S v Wasserman* 2004 (1) SACR 251 (T) 255d or [9].

⁶¹⁴ *S v Wasserman* 2004 (1) SACR 251 (T) 257i or [13].

⁶¹⁵ *S v Wasserman* 2004 (1) SACR 251 (T) 259a or [17].

⁶¹⁶ *S v Wasserman* 2004 (1) SACR 251 (T) 259i–260b or [22].

⁶¹⁷ *S v Nel* 2007 (2) SACR 481 (SCA).

amount of R32 595. His motive for committing armed robbery was that he was heavily indebted. On the day of the robbery, he desperately needed money to pay his employees but could only obtain a loan for a lesser amount. He used the money to gamble in the hope of winning and pay his employees. Upon losing, he plotted to rob the Lorraine Entertainment Centre.

Following his arrest, he pleaded guilty and was convicted of armed robbery.⁶¹⁸ In mitigation of his sentence, Nel called a clinical psychologist who testified that he (Nel) had been suffering from gambling disorder since 1994. Evidence corroborating the gambling disorder was as follows: Nel lost R300 000 at the Fish River Sun, R40 000 at Lorraine Entertainment Centre and R60 000 at the 777 Casino. According to the testimony of the psychologist, Nel was consumed by gambling to the extent that gambling houses had recognised him as one of the top ten gamblers and rewarded him with the status of a most valued guest, entitled to free accommodation, food and drinks whenever he gambled at these casinos.⁶¹⁹ The psychologist concluded that Nel was a compulsive gambler and that this personality defect had led to his pathological gambling.⁶²⁰

Despite his explanation, the *court a quo* sentenced Nel to 15 years' imprisonment, which is the prescribed minimum sentence.⁶²¹ The *court a quo* rejected the notion that gambling disorder could serve as a defence for the commission of an offence.⁶²² Nel appealed to the Supreme Court of Appeal. His argument was that "*his pathological gambling had made drastic inroads into his ability to make rational decisions and should have been viewed on its own as a mitigating factor and was in the nature of things a substantial and compelling circumstance justifying imposition of a sentence lower than the ordained minimum*".⁶²³ The Supreme Court of Appeal rejected Nel's argument and made it clear that even if gambling disorder was to be found to be the main cause of the commission of an offence, such finding alone

⁶¹⁸ *S v Nel* 2007 (2) SACR 481 (SCA) 484a or [4].

⁶¹⁹ *S v Nel* 2007 (2) SACR 481 (SCA) 484c–e or [6].

⁶²⁰ *S v Nel* 2007 (2) SACR 481 (SCA) 485f–i or [11–12].

⁶²¹ *S v Nel* 2007 (2) SACR 481 (SCA) 483e–f or [1].

⁶²² *S v Nel* 2007 (2) SACR 481 (SCA) 486c or [12].

⁶²³ *S v Nel* 2007 (2) SACR 481 (SCA) 486d–e or [13].

could not absolve an offender from the imposition of the prescribed minimum sentence. In its own words, it said:

“Whilst a gambling addiction may be found to cause the commission of an offence, even if it is pathological (as in this case) it cannot on its own immunise an offender from direct imprisonment”.⁶²⁴

Quoting from Terblanche⁶²⁵, it added:

“Nor indeed can it on its own be a mitigating factor, let alone a substantial and compelling circumstance justifying a departure from prescribed sentence”.⁶²⁶

The Court rejected the findings in *S v Wasserman* (discussed earlier), which accorded gambling disorder the status of a mitigating factor for criminal offences, on the basis that it had no support in South African judicial literature and “could open the door to undue reliance by gambling addicts on their addiction to escape an appropriate sentence in the form of direct imprisonment”.⁶²⁷ Even if proven, gambling disorder would not be treated separately from the personal circumstances of an affected gambler in mitigation of sentence. The court emphasised that gambling disorder on its own did not constitute a mitigating factor. For this reason, Nel’s sentence of 15 years’ imprisonment was reduced to 10 years⁶²⁸ after consideration of his circumstances, including the fact that he had “committed this crime as a result of financial pressure from gambling and my business activities”.⁶²⁹

With South Africa’s gambling regulatory framework still giving scant regard to either problem gambling or gambling disorder,⁶³⁰ gamblers with gambling disorder are not

⁶²⁴ *S v Nel* 2007 (2) SACR 481 (SCA) 487e or [16].

⁶²⁵ Terblanche S “Sentencing: case” 2004 *South African Journal of Criminal Justice* 443–452.

⁶²⁶ *S v Nel* 2007 (2) SACR 481 (SCA) 487g or [17].

⁶²⁷ *S v Nel* 2007 (2) SACR 481 (SCA) 486h–i.

⁶²⁸ *S v Nel* 2007 (2) SACR 481 (SCA) 488h–,i or [15].

⁶²⁹ *S v Nel* 2007 (2) SACR 481 (SCA) 488d or [20].

⁶³⁰ This is in comparison to New Zealand’s Gambling Act, 2003, which includes both problem gambler as well as responsible gambling in its definition section which in my view is a recognition of the existence of problem gambling and the need to prevent problem gambling (disorder) by fostering responsible gambling practices. This is evident from the purpose of this Gambling Act, 2003 which, amongst others, is to “prevent and minimise harm from gambling, including gambling problem.” The Gambling Act, 2003, defines a problem gambler as a “person whose gambling causes harm or may cause harm. Harm is understood to mean harm or distress of any kind arising from, or caused or exacerbated by, a person’s gambling.” It further defines responsible gambling as participation in lawful, fair and honest gambling “conducted – (i) in a safe and secure environment; and (ii) without pressure or devices that encourage or may encourage gambling at levels that cause or may cause harm”. In order to fulfil this goal, the Gambling Act makes a range of provisions for the minimisation of

assured of treatment and/or counselling services to recover from this disorder. Therefore suggestions by gambling researchers who advocate for consideration of treatment/counselling of convicts with gambling disorder when imposing custodial sentences are unlikely to be realised. In particular, Carnelley and Hoctor lament custodial sentences on the basis that prisons are not equipped with the treatment and rehabilitation facilities required for the care of convicts with gambling disorder.⁶³¹ For this reason, Carnelley suggests that although disordered gamblers who commit criminal activities should be held responsible, *“the need for assistance and therapy should not be ignored and should be taken into consideration as a mitigating factor prior to sentencing”*.⁶³²

Although Carnelley and Hoctor have a point, the first challenge before lamenting the state of prison facilities to enable rehabilitation of convicts with gambling disorder is to accord legislative recognition to the severity of problem gambling and/or gambling disorder and the need for its treatment/counselling. The current Act is mute regarding treatment and counselling of problem gambling and/or disorder. Once this has been achieved, courts may be requested and should be amenable to take this factor into consideration when imposing custodial sentences.

4.5 Strategies for minimising problem gambling and/or gambling disorder in an interactive gambling environment

Having interrogated the social effects of a gambling disorder and/or problem gambling as well as the legal position of gambling disorders as a defence in crimes, strategies for minimising problem gambling and/or gambling disorder that are viable in an interactive gambling environment will now be discussed. The emergence of interactive gambling has raised a legitimate concern that this form of gambling may increase the prevalence of gambling disorder, as more and more gamblers will find it easier to gamble as a result of its greater accessibility and availability. Interactive

harm, including but not limited to self-limit programmes, identification of problem gamblers and their removal from gambling.

⁶³¹Carnelley M “Recent cases: gambling law” 2010 SACJ 439–453.

⁶³²Carnelley M & Hoctor SV “Pathological gambling as a defence in criminal law” 2001 *Obiter* 379–388.

gambling offers an ideal opportunity for the implementation of harm reduction strategies, which if successful will significantly reduce the number of gamblers becoming problem gamblers and/or developing a gambling disorder. Strategies for the minimisation of problem gambling are therefore discussed with a view to their inclusion in the Act and, more specifically, as a strategy to overcome objections against the legalisation of interactive gambling.

4.5.1 Monitoring of gamblers' gambling activities

Monitoring of gamblers' gambling activities is seen as one of strategies for the promotion of responsible gambling, with the aim of preventing the negative impact of gambling disorder.⁶³³ In a land based gambling environment, personnel are on the lookout for various signs or behaviours that may be an indication of problem gambling, ranging from erroneous and irrational verbalisation such as talking to a gambling machine, making multiple withdrawals at in-house ATMs, emotional breakdown, aggressive behaviour and gambling regularly for long sessions.⁶³⁴ Physical monitoring has the propensity to interfere with a gambler's concentration on the games and borders on unwanted intrusion despite its noble intention of ensuring that gamblers are in control of their gambling habit. Interactive gambling makes this daunting task of physically monitoring gamblers unnecessary and saves personnel from intruding on gamblers during gambling sessions. It allows for the introduction of technological tools to monitor and record gambling activities of individual gamblers through their gambling accounts.

Interactive gambling requires gamblers to open accounts with interactive gambling providers. This is the beginning of the creation of a database providing accurate information on gambling patterns and the expenditure of gamblers. In some instances, this database may include credit grants made to gamblers by providers, which should serve as an indication of possible financial troubles afflicting individual gamblers. In an attempt to make their database more useful, gambling providers

⁶³³ Department of Broadband, Communications and the Digital Economy *Interactive Gambling Act* 36.

⁶³⁴ Hing N, Nuske E & Holdsworth L "How gaming venue staff use behavioural indicators to assess problem gambling in patrons" 2013 *Journal of Gambling Issues* 1–25.

may develop or acquire behavioural tracking tools capable of showing which gamblers are associated with low, moderate or high gambling risks, before they become problem gamblers.⁶³⁵ In a nutshell, interactive gambling provides a platform for the development and implementation of innovative tools for responsible gambling. As Haefeli, Lischer and Schwarz observe in highlighting the advantages of interactive gambling in terms of detecting early signs of gambling disorder:

*In interactive gambling ... various factors related to problem gambling can be monitored and logged during the gambling activities. The following factors and trends over time could be used to indicate problem gambling. Duration and frequency of gambling activities, number and frequency of bets, size of the stakes, chasing of losses, and lack of adaptation in gambling behaviour.*⁶³⁶

Gambling operators derive much of their profits from gamblers who are problem gamblers and/or have a gambling disorder, and they should be enjoined by legislation in an effort to prevent the occurrence of problem gambling/gambling disorder. Legislation/regulation remains the most effective tool to enforce this moral responsibility, particularly where technology exists and allows for monitoring. Regulators should not shy away from requiring operators to develop and implement the best available technological tools to monitor the gambling patterns of their gamblers and to alert them if they are on the brink of developing a gambling disorder.

4.5.2 Self-limit measures

A study by McBride and Derevensky of internet gambling behaviour among interactive gamblers revealed that gamblers spend more time and lose more money

⁶³⁵ Haefelia J, Lischer S & Schwarz "Early detection items and responsible gambling features for online gambling" 2011 *International Gambling Studies* 273–288 282.

⁶³⁶ Haefelia, Lischer & Schwarz 2011 *International Gambling Studies* 277. See also Braverman J & Schaffer H "How do gamblers start gambling: identifying behavioural markers for high-risk internet gambling" 2010 *European Journal of Public Health* 273–278 highlighting the importance of information about gambling patterns harvested from operators' websites linked to gamblers' accounts in so far as it sheds light on gambling patterns, such as gambling frequency (that is, number of days on which the gambler actively gambles), gambling intensity (that is, average number of gambling sessions/transactions undertaken by a gambler) and variability (that is, changes in the amount gambled per session or day, either as a result of chasing losses or delusional ideas of winning).

than intended in interactive gambling.⁶³⁷ While this is a positive development from the perspective of interactive gambling providers, gamblers losing more money than they intended is not in line with responsible gambling practices, which are safety measures to assist gamblers in avoiding gambling beyond their financial means.⁶³⁸ They include self-limiting measures such as the setting of deposit, spending and time limits. The overall intention of these measures is to enable gamblers to make decisions regarding their intended gambling expenditure prior to playing.⁶³⁹ The display of pop-up messages is one of the preferred ways of implementing these strategies, once a gambler has consented to their inclusion.⁶⁴⁰ As the term suggests, messages will come up on the screen and display losses, time spent, cash available, *etcetera*. This serves as a necessary interruption, allowing the gambler to reflect and decide on the most responsible action, such as taking a break from gambling.⁶⁴¹

Setting of monetary deposit limits is seen as a key move in promoting responsible gambling.⁶⁴² Deposit limits may be either voluntary or mandatory, although many jurisdictions prefer a two-pronged approach to deposit limits. In other words, in addition to legislation stipulating maximum deposit limits that gamblers cannot exceed, gamblers are allowed to set their own deposit limits, provided that these are below the maximum limit. Statutory deposit limits can make a mockery of responsible gambling strategies if gamblers opt not to set lower deposit limits voluntarily. Statutory limits are normally set at a higher amount, with the understanding that each

⁶³⁷ McBride J and Derevensky J "Internet gambling behaviour in a sample of online gamblers" 2009 *International Journal of Mental Health & Addiction* 149–167 162.

⁶³⁸ Blaszczynski A, Ladouceur R & Schaffer HJ "A science-based framework for responsible gambling: the Reno model" 2004 *Journal of Gambling Studies* 301–317.

⁶³⁹ Ladouceur R, Blaszczynski A & Lalande D "Pre-commitment in gambling: a review of the empirical evidence" 2012 *International Gambling Studies* 215–230 216.

⁶⁴⁰ Other ways of implementing responsible gambling strategies include education-based animation – Michael J *et al* "Facilitating responsible gambling: the relative effectiveness of education-based animation and monetary limit setting pop-up messages among electronic gaming machine players" 2012 *Journal of Gambling Studies* 703–717. Education-based animation ideally explains how the chosen gambling activity works, and how to set monetary limits before engaging in the chosen activity. The placing of posters and posting of notices/signs have also been used as ways of implementing responsible gambling strategies.

⁶⁴¹ Kim H *et al* "Limit your time, gamble responsibly: setting a time limit (via a pop-up message) on an electronic gaming machine reduces time on device" 2014 *International Gambling Studies* 1–13 3, advocating that pop-up messages as a vehicle for pre-commitment indeed disrupt a gambling session and captures the gambler's attention, thereby providing the opportunity to effectively convey responsible gambling information.

⁶⁴² Michael *et al* 2012 *Journal of Gambling Studies* 704.

gambler is free to set his/her own lower deposit limit.⁶⁴³ In South Africa the draft Interactive Gambling Regulations, 2009, proposes a maximum deposit limit of R20 000 in a gambling account (that is, the highest amount that a gambler can deposit in a gambling account). If a gambler opts not to set a voluntary lower deposit limit, such a gambler will have to abide by the statutory deposit limit, which means that he or she can only be stopped when he or she reaches the amount of R20 000. This amount, at any given time or per month, is not within the range of affordability of many South Africans, especially if it is used solely for gambling activities. Not many South Africans earn enough to be financially able to have a gambling or entertainment budget of R20 000 or even half of that amount per month. By the time gamblers have gambled to the maximum deposit allowed, many could be teetering on the brink of a gambling disorder. According to a press statement issued by Statistics South Africa for the period 2010–2011, the average annual household income stood at R119 542 (almost R120 000).⁶⁴⁴ Spreading this amount over a 12-month period gives a monthly household income of R10 000, which is half of the statutory maximum deposit limit. This should be sufficient indication that the majority of gamblers may gamble away all their income, without ever coming close to exceeding the maximum deposit limit. On the other hand, there are professions that reward handsomely, making a maximum deposit limit of R20 000 a drop in the ocean.⁶⁴⁵

Disparity in income makes it difficult to determine an affordable maximum gambling limit. It is for this reason that maximum deposit limits, as determined in a gambling statute, may be self-defeating if set at a higher amount. Wood and Griffiths have argued strongly that as much as deposit limits are desirable, they do not necessarily encourage gamblers to take responsibility for managing and reducing their gambling

⁶⁴³ Ladouceur, Blaszczynski & Lalande 2012 *International Gambling Studies* 215 commented as follows regarding maximum deposit limits: "In addition, website limits were set at a high level, making it difficult for most subscribers to exceed thresholds; only 0,3% received at least one 'limit exceeded' notification message".

⁶⁴⁴ Statistics South Africa "Income and expenditure survey (IES) 2010/2011" <https://www.statssa.gov.za/Publications/P02112/P021122010.pdf> (Date of use: 23 May 2014).

⁶⁴⁵ See Chartered Institute of Management Accountants, which boasts that its qualified members earn on average R906 943 per annum – CIMA "Salary survey South Africa 2013" [http://www.cimaglobal.com/Documents/Jobs-docs/Salary_Survey/2013/2013-Salary-survey-South-Africa\).pdf](http://www.cimaglobal.com/Documents/Jobs-docs/Salary_Survey/2013/2013-Salary-survey-South-Africa).pdf) (Date of use: 23 May 2014)

expenditure.⁶⁴⁶ It is also possible that wealthy gamblers may find a maximum limit to be an unnecessary constraint on their deep pockets, prompting them to seek exemption from the statutory deposit limits. If this fails, they will be left with no choice but to have multiple registrations with different interactive gambling providers or to attempt to by-pass statutory deposit limits, as a result of their willingness to take financial risks.⁶⁴⁷

Equally, the display of time spent gambling may have little effect, depending on the priorities of the gambler. If a gambler is concerned about the amount of time he or she spends gambling, the display of time spent may have a positive effect.⁶⁴⁸ On the other hand, it will have little or no effect on the amount of loss or winnings, simply because there is no link between winnings or losses and time spent gambling. In the study conducted by Ladouceur and Sévigny, which investigated the influence of clock and cash displays, it was concluded that neither a clock nor a gambling time device was instrumental in promoting responsible gambling.⁶⁴⁹ This is supported by Auer and Griffiths, who concluded that:

*Overall ... the settings of voluntary time limits are less important than the voluntary setting of monetary limits in significantly decreasing the theoretical losses among the most gaming intense gamblers. Effectively adding these devices to interactive gambling in the form of pop-up message may be unhelpful as seen in the case of Electronic Gaming Machines.*⁶⁵⁰

In order to strengthen the use of monetary and deposit limits as a strategy to encourage responsible gambling practices, it is my submission that only voluntary deposit limits should be permitted. Authorities should not be allowed to cap monetary limits through legislation. Instead, depending on the financial information supplied by or generated from gamblers' gambling behaviour, interactive operators should be able to determine monetary limits for each gambler registered on its database. The

⁶⁴⁶ Wood R & Griffiths M "Spending limits: social responsibility in interactive gambling: voluntary limit setting" 2010 *World Online Gambling Law Report* 10–11.

⁶⁴⁷ Broda A *et al* "Virtual harm reduction efforts for internet gambling: effects of deposit limits on actual Internet sports gambling behaviour" 2008 *Harm Reduction Journal* 27–36.

⁶⁴⁸ Kim *et al* 2014 *International Gambling Studies* 8.

⁶⁴⁹ Ladouceur R & Sévigny S "Electronic gambling machines: influence of a clock, a cash display, and a precommitment on gambling time" 2009 *Journal of Gambling Issues* 31–41.

⁶⁵⁰ Auer M & Griffiths M "Voluntary limit setting and player choice in most intense online gamblers: an empirical study of gambling behaviour" 2013 *Journal of Gambling Studies* 647–660 657.

fixing of monetary or deposit limits through legislation may have a negative effect on the country's quest to attract gamblers with deep pockets. Nevertheless, interactive gambling makes it possible for gamblers to take control of their gambling habits and to limit their spending.

4.5.3 Self-exclusion

Self-exclusion refers to a voluntary request by a gambler to be excluded from participating in gambling activities. It has been described as a harm reduction intervention designed to limit a gambler's participation in and resultant financial losses from gambling.⁶⁵¹ In land based gambling, self-exclusion has been hailed as a success in mitigation of problem gambling/gambling disorder, with gamblers generally indicating that it played significant role in helping them to stop gambling, and in cases of those who did not stop, it helped them to take control of their gambling.⁶⁵² The popularity of self-exclusion in the South African gambling sector is partly evident from the annual report of the Gauteng Gambling Board which indicate that it had received 419 requests for self-exclusion in Gauteng during the financial year 2012–2013.⁶⁵³

The success of self-exclusion in interactive gambling is relatively unknown as few studies having investigated its effectiveness in the virtual environment. A study by

⁶⁵¹ Faregh N & Leth-Steensen C "Reflections on the voluntary self-exclusion of gamblers and the lawsuits against Ontario Lottery and Gaming Corporation" 2009 *Journal of Gambling Studies* 131–138 and (UK) Gambling Commission *Briefing note on the national online self-exclusion scheme* (May 2015) 2 – characterising self-exclusion "as an important harm minimisation tool for some people who have recognised that they have a problem with their gambling and have made a commitment to dealing with it and for others who wish to use measures such as this to better manage their gambling activities. One of the principal benefits of self-exclusion is the formal acknowledgement by the individual that they are experiencing problems with their gambling and wish to take steps to address these problems."

⁶⁵² Responsible Gambling Council *From enforcement to assistance: evolving best practices in self-exclusion* (Discussion Paper 2008) 27 – evaluated a study involving a focus group consisting of 76 gamblers who had self-excluded from gambling. "Many participants said that the mere fact that self-exclusion existed was helpful. Participants felt that self-exclusion provided a chance for them to think about and assess their gambling behaviours and their lives in general. They also reported that self-exclusion gave them a break from gambling and helped them save money."

⁶⁵³ Gauteng Gambling Board *Annual Report (2012/2013)* 20.

Hayer and Meyer⁶⁵⁴ evaluating the effectiveness of self-exclusion in interactive gambling raised concerns about gamblers' adherence to the terms of self-exclusion. It raises the possibility of having a gambler self-excluding himself or herself from one gambling website and yet continuing to gamble on another websites. This possibility arises in the light of information provided by some of the participants that their reasons for self-exclusion were merely a form of protest against services received from their gambling providers. They wondered whether gamblers – whose motive for self-exclusion had nothing to do with problem gambling – had migrated to other gambling websites during the self-exclusion period.⁶⁵⁵ This concern remains legitimate in light of reports on land-based gambling in which some gamblers confessed to having visited gambling venues to gamble despite their self-imposed bans.⁶⁵⁶ It is for this reason that in their report concerning problem gambling and self-exclusion, Collins and Kelly recommended the creation of a national register for self-excluded gamblers.⁶⁵⁷ Through access to a national or central register, providers would be able to verify excluded gamblers and enforce their ban from gambling.

4.5.4 Online counselling and treatment services

With or without interactive gambling, the scourge of problem gambling and gambling disorder necessitates counselling and treatment services for gamblers suffering from these. Problem gambling and gambling disorder are an inherent risk of gambling, controllable with harm minimisation strategies such as education and awareness and reversible with the provision of counselling and treatment services. Naturally, studies of interactive gambling raise concerns about the possible burdening of existing

⁶⁵⁴ Hayer T & Meyer G "Internet self-exclusion: characteristics of self-excluded gamblers and preliminary evidence for its effectiveness" 2011 *Int J Ment Health Addiction* 296–307 298.

⁶⁵⁵ Hayer & Meyer 2011 *Int J Ment Health Addiction* 305 pondered thus "*On the other hand, some of the non-problem gamblers obviously decide to close their accounts due to reasons that are not related to responsible gambling practices. For example, being annoyed by ... online gambling could reflect the subjective attribution of a frustrated player that unfair business practices (for example, manipulated software) have to account for his or her losing streak. As a consequence, the decision to self-exclude is made simply to punish the operator. It remains unknown whether these individuals continued gambling on other websites, making the instrument of self-exclusion literally meaningless.*"

⁶⁵⁶ Gainsbury S "Review of self-exclusion from gambling venues as an intervention for problem gambling" 2014 *Journal of Gambling Studies* 229–251 247 discusses some of the studies that have found that self-excluded individuals engage in gambling at venues they have not excluded themselves from and in other forms of gambling to which bans do not apply.

⁶⁵⁷ Collins P & Kelly J "Problem gambling and self-exclusion: a report to the South African Responsible Gambling Trust" 2002 *Gambling Law Review* 517–531 518.

resources for counselling and treatment services on one hand, but also provide a platform to offer counselling and treatment services in an online environment, on the other hand. As Cooper and Doucet observe:

*Technological advances have now made it possible for individuals who are concerned about stigma to seek help for their problems without making any personal disclosures. In this way, the inherent advantages of the internet (privacy, convenience, safety and portability) help to ensure that assistance for problem gamblers is always available and that concerns about stigma are neutralized.*⁶⁵⁸

Currently organisations such as GamCare⁶⁵⁹ and GamAid⁶⁶⁰ in the UK proclaim to offer, amongst others, online counselling services for those affected by problem gambling, that is, when a gambler is classified as suffering from problem gambling or is diagnosed with gambling disorder. However, some of the purported online counselling services fall short of the standard and services expected of counselling services.⁶⁶¹ As with any other service, there are challenging issues (ranging from ethical to legal) arising from this mode of counselling and treatment, such as overcoming the advantages of observing body language and behavioural attitude, which are present in face-to-face sessions, unless such interaction is enabled by video-link; 24-hour availability of qualified professionals to screen gamblers seeking counselling and treatment and the instant offering of such services; allowing the gambler to give his or her informed consent prior to counselling services; safeguarding of anonymity if gamblers seeking services opt for it; elimination of fictitious gamblers pretending to be in need of counselling and so on. Nonetheless, these are issues that professionals can resolve in order to facilitate online counselling and treatment services. Research indicates that individuals, in particular

⁶⁵⁸ Cooper G & Doucet G "Online help for problem gambling: why it is and is not being considered" <http://www.camh.net/egambling/issue7/clinic/index.html> (Date of use: 28 June 2014).

⁶⁵⁹ GamCare "the UK's national organisation for gambling problems" <http://www.gamcare.org/uk> (Date of use: 20 June 2015).

⁶⁶⁰ Wood R & Griffiths M "Online guidance, advice, and support for problem gamblers and concerned relatives and friends: an evaluation of the GamAid pilot service" 2007 *British Journal of Guidance and Counselling* 373–389.

⁶⁶¹ Wood & Griffiths 2007 *British Journal of Guidance and Counselling* 376 evaluating the purported interactive counselling service offered by GamAid, it found that the latter was "providing reassurance and advising clients more than offering a counselling service".

the youth, are turning to the internet to seek help for a variety of personal problems and this may be of great assistance to those with a gambling problem.⁶⁶²

In South Africa, the National Responsible Gambling Programme (“NRGP”) is responsible for providing counselling and treatment for problem gambling.⁶⁶³ The NRGP integrates research and monitoring, treatment and counselling, public education and awareness as well as industry training.⁶⁶⁴ The Programme does not proclaim to offer its services online, yet it does offer an online “self-check quiz”⁶⁶⁵ to gamblers to determine whether problem gambling exists and consequently to enable them to obtain counselling and treatment services, if need be.

With the effectiveness of internet based programmes for health and mental health reported to be equal if not greater than face-to-face therapy interventions,⁶⁶⁶ justification exists for complementing the proposed introduction of interactive gambling with online counselling and treatment services.

4.5.5 Regulatory uniformity

Unless South Africa would want to restrict its services to South African residents only (that is, participation in its interactive gambling to gamblers with *.za domain*, which in all likelihood would be an unwise and unnecessarily costly exercise to manage), it will need to bring its regulation into line with international norms and standards. The challenge does not end there, however – operators have to offer handsome prizes that are appealing to both citizens and non-citizens, regulators need to reduce the gambling tax rate in its various forms to attract both operators and global gamblers, and Parliament must enact legislation that balances the competing interests of gamblers and businesses if it desires to compete in this global recreational activity.

⁶⁶² Gainsbury S “Internet interventions for the treatment of problem gambling” 2011 *YGI Newsletter* 1–3.

⁶⁶³ NRGP *Responsible gambling* 1–2.

⁶⁶⁴ NRGP *Responsible gambling* 2.

⁶⁶⁵ National Responsible Gambling Programme “Help available for gambling problems” <http://www.responsiblegambling.co.za/content/?38> (Date of use: 20 June 2015).

⁶⁶⁶ Gainsbury 2011 *YGI Newsletter* 2.

The lack of a uniform approach dictated by a regulatory framework could have undesirable consequences, such as the opening of multiple gambling accounts by gamblers who, if not successful, might migrate from one gambling website to another, as elaborated on hereunder. South Africa faces no internal challenges pertaining to regulatory uniformity, however, as the proposed administration of interactive gambling would lie in the hands of the NGB, while provincial gambling authorities would assist in the monitoring and enforcement of regulations.

A study by McBride and Derevensky assessing internet gambling behaviour of interactive gamblers and involving 563 participants found that 378 (that is, 67.2%) of the participants had been on more than one gambling site,⁶⁶⁷ which is an indication that the opening of multiple accounts is common practice in interactive gambling.⁶⁶⁸ Reasons provided for holding multiple accounts include price, betting options, payout rates and game experience.⁶⁶⁹ The opening of multiple accounts presents a challenge to harm minimisation efforts such as limiting gamblers' spending on gambling, unless such accounts are linked. Even if attempts are made to link these accounts, gamblers may still frustrate this by migrating to other websites in other countries. It is for this reason that in the words of Gainsbury *et al.*, a "universal gambling strategy that will assist gamblers to track and control their expenditure" is required.⁶⁷⁰

The borderless dimension of interactive gambling makes it necessary for countries to cooperate with each other in matters of common interest such as harm minimisation strategies. In the European Union member states are trying to establish common principles in tackling problem gambling/gambling disorder, despite diverse national interests.⁶⁷¹ Countries would benefit from each other if there was regulatory

⁶⁶⁷ McBride & Derevensky 2009 *International Journal of Mental Health & Addiction* 155.

⁶⁶⁸ Gainsbury S *Internet gambling: current research findings and implications* (Springer Science and Business Media New York 2012) 68.

⁶⁶⁹ Gainsbury S *et al* "Greater involvement and diversity of internet gambling as a risk factor for problem gambling" 2015 *Eur J Public Health* <http://dx.doi.10.1093/eurpub/ckv006> (Date of use: 22 June 2015).

⁶⁷⁰ Gainsbury *et al* <http://dx.doi.10.1093/eurpub/ckv006> (Date of use: 22 June 2015).

⁶⁷¹ Article 11 of European Parliament *Resolution on online gambling in the internal market* (adopted on 10 September 2013) in which member states are called on to cooperate "where appropriate through the expert group – to explore the possibility of EU-wide interoperability between national self-

uniformity in terms of various harm minimisation efforts. In the case of countries that may be concerned about competition, regulatory uniformity would have little or no bearing on competition, as each jurisdiction would still be able to set their own gambling taxation, while operators continued to offer different games and prizes to attract gamblers.

4.5.6 Making gambling debts unenforceable

On its website providing counselling for problem gambling, UK-based GamCare warns about gambling debts:

*One of the most common results of a gambling problem is debt, and yet debt is also used by many gamblers as a reason for their continued gambling. It plays a complex and contradictory role at the heart of the gambling experience for many of the people that we speak to.*⁶⁷²

GamCare's warning resonates with general research findings concerning financial consequences of gambling for gamblers who have no luck when it comes to winning when on a gambling spree. Such a lack of luck, skill and an inability to know when to stop may lead to the financial meltdown of a gambler and have a direct impact on his or her family. Observing these financial consequences of gambling, Downs and Woolrych write the following:

*Moreover, unmanageable debt may be an outcome of problem gambling and debt and is in itself a social problem of significance, leading to an inability to service credit commitments and a shortage of expenditure for (and subsequent deprivation of) household goods and services, which have an impact at the individual, family and community level. Moreover, a gambling problem that leads to debt problems can potentially lead to a range of social harms, spreading far beyond the individual.*⁶⁷³

exclusion registers that include, inter alia, self-exclusion, personal loss and time limits, and that are accessible to national authorities and licensed gambling operators, so that any customer self-excluding or surpassing their gambling limits at one gambling operator has the opportunity to be automatically self-excluded from all other licensed gambling operators; underlines the fact that any mechanism to exchange personal information on problem-gamblers must be subject to strict data protection rules; stresses the importance of the expert group in working towards the protection of citizens against gambling addictions; stresses that in order to make consumers aware of their own gambling activity, this register should show the consumer all information pertaining to her/his gambling history whenever she/he starts to play".

⁶⁷² GamCare <http://www.gamcare.org/uk> (Date of use: 20 June 2015).

⁶⁷³ Downs and Woolrych 2010 *Community, Work and Family* 313.

Interactive gambling places gamblers at greater risk of incurring gambling-related debts than gambling in a land-based gambling environment. Upon opening a gambling account, gamblers are required to link their accounts to their cheque or credit card account.⁶⁷⁴ Generally, a cheque account is associated with an overdraft facility whereas a credit card account is a bank's means of offering pre-approved credit lending. Gamblers with no financial discipline may tap into these facilities to finance their gambling habits, in this way incurring debts attributable to gambling with their financial institutions. Ordinarily, one would have advocated for the banning of cheque or credit card accounts in gambling but this measure would have no meaningful impact in that gamblers can instantaneously transfer funds from their cheque or credit card accounts into their debit accounts or whatever form of account is approved for gambling purposes.⁶⁷⁵

Although the control of credit emanating from outside gambling is difficult, the same cannot be said for the provisioning of credit for gambling purposes – the so-called credit betting, that is, the provision of a line of credit by a gambling provider to allow a customer to place bets and reconcile the account at a later date.⁶⁷⁶ US case law illustrates this type of credit. In the matter of *CBA Credit Services of North Dakota v Azar*,⁶⁷⁷ a loyal gambler who was playing blackjack at a casino was offered and accepted an advance of \$4,000 in blackjack chips from casino employees. Unfortunately, the gambler lost all the chips during this fateful gambling session. Thereafter, the casino asked the gambler to acknowledge his liability for this debt and issue a cheque payable to the casino in settlement thereof. The gambler issued the cheque but owing to there being insufficient money in the account, the cheque was dishonoured. This led to the gambler being hauled before the court. As the relevant gambling legislation prohibited the granting of gambling debts the court declared the debt unenforceable.⁶⁷⁸ In an interactive gambling environment, Hing et

⁶⁷⁴ Regulation 6 of draft Interactive Gambling Regulations, 2009.

⁶⁷⁵ Productivity Commission *Gambling vol.2* 15.27.

⁶⁷⁶ Department of Broadband, Communications and the Digital Economy *Interactive Gambling Act* 45.

⁶⁷⁷ *CBA Credit Services of North Dakota v Azar* 551 N.W. 2d 787 (N.D. 1996)

⁶⁷⁸ Section 4 of the Tribal-State Compact addresses the regulatory standards for blackjack, and includes a subsection titled, "No Credit Extended." It states thus: "All gaming shall be conducted on a cash basis. Except as herein provided, no person shall be extended credit for gaming by any gaming facility operated within the White Earth Band's reservation, and no operator shall permit any person or organization to offer such credit for a fee."

al.⁶⁷⁹ allude to perverse interactive gambling websites that entice gamblers to apply for credit.

*... their sites say ... apply for credit. I mean there shouldn't be anything like that ... You shouldn't borrow money to gamble. Yes, that's enticing someone with a problem, that's not responsibility by the website. They shouldn't be allowed to do that. The last two sites I have been on had it.*⁶⁸⁰

South Africa's common law⁶⁸¹ in respect of gambling providers providing credit has been overtaken by the provisions of the National Gambling Act, which prohibits licensed gambling providers from extending credit to any person for the purpose of gambling.⁶⁸² Nonetheless, this does not detract from the dangers of credit lending and the use of credit and overdraft facilities by gamblers.

Ideally, the issue of gambling debts should not arise by virtue of the National Gambling Act's prohibition of extension of credit for gambling purposes. Common sense dictates that once such credit is granted, a portion or all of it will be consumed through gambling activities. Nevertheless, the prohibition is only directed at gambling providers and, more importantly, if it is intended for gambling purposes. Therefore gambling providers may still provide some form of credit to gamblers provided it is not intended for gambling purposes. In accordance with the National Gambling Act, this form of gambling debt is legally enforceable. The Act provides thus:

*Despite any provision of the common law, or any other law other than this Act, a debt incurred by a person, other than an excluded person ... or a minor, in the course of a gambling activity that is licensed in terms of this Act or provincial law, is enforceable in law.*⁶⁸³

⁶⁷⁹ Hing N *et al* "Maintaining and losing control during internet gambling: a qualitative study of gamblers' experiences" 2014 *New Media & Society* 1–21.

⁶⁸⁰ Hing *et al* 2014 *New Media & Society* 14.

⁶⁸¹ See *Sea Point Racing CC v Wilkinson* [1999] 2 All SA 626 (D) in which a bookmaker was allowed to place bets on credit in excess of R3 million. When the bookmaker was sued for failing to pay for his credit betting, he challenged the enforceability of such debt. See also Carnelley M "Tata 'ma millions?' the enforceability of a gambling debt between the lottery operator and the ticket holder; and the enforceability of a partnership agreement to share lottery winnings already paid to one of the partners" 2006 *Obiter* 358–368 359 discusses a subsequent unreported case of *Sea Point Racing v Pierre de Villiers Barange NO* ((N) 2000-08-01) case number AR 774/99, which reversed the decision in *Sea Point Racing CC v Wilkinson*. With the legal position being clarified by the National Gambling Act 7 of 2004, there is no point in elaborating on these cases.

⁶⁸² Section 13 of the National Gambling Act 7 of 2004.

⁶⁸³ Section 16(a) of the National Gambling Act 7 of 2004.

Gambling debts remain a concern and a contributor to problem gambling and/or disorder. In my view, the only way to discourage gambling debts, that is, debts incurred during the course of gambling and in the midst of interactive gambling is to make such debts unenforceable. Enforceability of this type of debt serves to reverse the gains, if any, of prohibiting extension of credit for gambling purposes. The gambling fraternity should return to the common law position when gambling debts were unenforceable,⁶⁸⁴ although this time on the basis that it is tantamount to reckless credit lending. South Africa should guard against recreational activities such as gambling becoming a contributor to its alarming rate of credit spending.⁶⁸⁵

4.6 Conclusion

Problem gambling is a challenge not only to interactive gambling but to any form of gambling activities. It threatens the financial stability of gamblers by eroding the latter's ability to control their gambling habits, leading ultimately to various social harms such as family breakdown, substance and drug abuse and criminal behaviour. Its prevalence has been used solely as an excuse for the non-recognition of new forms of gambling, including interactive gambling. With the judiciary reluctant to offer any exculpation for gamblers whose problem gambling and/or gambling disorder has led them to criminal misconduct, gamblers find themselves being shunned by the legal system, including the gambling regulatory framework, which gives scant recognition to problem gambling and/or gambling disorder as trigger strategies for its prevention.

It is not only the legal system that has shunned gamblers with problem gambling, however: the gambling sector's management of problem gambling has proved

⁶⁸⁴ *Christie, N.O. v Mudaliar* 1962 (2) SA 40 (N) 48 confirmed common law position that gambling debts were unenforceable. However, this position was changed by the National Gambling Act on the basis that it was based on public policy or morality as opposed to the manner in which such debts are recklessly granted.

⁶⁸⁵ Credit Bureau Monitor *Report 4th quarter* (December 2013) 1-8, indicate that by December 2013 out of 45.20 million active consumers in South Africa, 45.7% (that is, 20.64 million) are credit-active consumers. Of these credit-active consumers, 15.4% are financially unable to repay their credit, 12.6% had judgements and administrative orders issued against them, 20.1% are more than 3 months in arrears and less than 13.8% are in arrears by more than a month.

disastrous. This is evident from periodical studies published by the NGB – in relation to the question “is problem gambling properly managed in South Africa?”⁶⁸⁶ – in which the following key findings were made:

- large numbers of people are in denial about their addiction and as a result have no clear idea as to how to manage the problems their gambling incurs;
- Most such people have no understanding of the implications of their addiction or of the services offered by the National Responsible Gambling Programme (or Gambling Anonymous);
- Those who have excluded themselves, have found themselves being invited back into casinos without restriction, or at least until they try to claim their winnings and are then denied payment under the fiction that they have been “banned”;
- The demand for treatment facilities for gamblers far exceeds the supply. There are far too few facilities to deal with rehabilitation outside the main urban concentrations. There are virtually no support services for problem gamblers outside major cities.
- Relapse is very frequent among problem gamblers as a result of their continued exposure to money and temptation in modern commercial society.⁶⁸⁷

Numerous strategies for prevention of problem gambling, commonly referred to as harm minimisation measures for responsible gambling, have been devised across the globe. Harm minimisation measures such as deposit limits, loss limits and time limits appear to be more suitable to interactive gambling than to land-based gambling. In other words, interactive gambling creates a platform for the implementation of strategies intended to minimise or prevent problem gambling/gambling disorder. Through gambling accounts, players can set their own deposit limits for gambling and time spent gambling. Harm minimisation efforts reduce the costs of counselling and treatment services by arresting problem gambling from the outset. With measures such as online counselling and treatment

⁶⁸⁶ NGB February 2014 *Research Bulletin 4*.

⁶⁸⁷ NGB February 2014 *Research Bulletin 4*.

services viable in interactive gambling services, South Africa stands a good chance of making a breakthrough in the control of problem gambling.

To a degree, prevention of problem gambling requires regulatory uniformity and cooperation, especially with regard to the opening of gambling accounts with more than one interactive gambling provider and the exclusion of players from gambling. Without cooperation, gamblers who have reached self-limit measures in one gambling website may change to other gambling websites, thereby rendering self-limit measures futile. The same applies to gamblers who have self-excluded. Without a central register and the sharing of information, it may be difficult for gambling providers to become aware of a gambler's exclusion from gambling. Notwithstanding this, interactive gambling is the best platform for the implementation of harm minimisation strategies to prevent the scourge of problem gambling and/or gambling disorder. Such prevention is an on-going activity in countries that are keen to learn from each other in an effort to devise and implement best strategies.

CHAPTER 5: A PROPOSED REGULATORY FRAMEWORK FOR INTERACTIVE GAMBLING

5.1 Introduction

In fulfilment of the mandate of the National Gambling Act requiring development of interactive policy and law,⁶⁸⁸ the Minister of Trade and Industry, in consultation with the NGB and provincial licensing authorities, developed the legal framework for regulation of interactive gambling in 2008. This was adopted by Parliament as the National Gambling Amendment Act and signed into law by the President on 10 July 2008.⁶⁸⁹ The objective of the National Gambling Amendment Act is to provide for the regulation of interactive gambling.⁶⁹⁰ According to the preamble, regulation will ensure that gambling activities falling within this mode of gambling are conducted responsibly, fairly and honestly; gamblers are treated fairly; minors and vulnerable persons are protected from the negative effects of gambling; and, that efforts will be made to prevent gambling from being a source of, or associated with crime.⁶⁹¹ Apart from legalising interactive gambling, the Act appears to address some of the issues relating to problem gambling, in particular responsible gambling. In short, the objective or purpose sets the scope of the Act. Whether the Act achieves its objectives depends on the legislative mechanisms (that is, regulatory provisions) for the realisation of these objectives.

⁶⁸⁸ Section 5 "in the Schedule: Transitional Provisions of the National Gambling Act 7 of 2004 entitled "Development of Interactive gambling policy and law" provides that:

"(1) The board must establish a committee to consider and report on national policy to regulate interactive gambling within the Republic, and may include with its report any draft national law that the committee may consider advisable.

(2) Despite section 71(2), the committee constituted in terms of this item may include –

(a) representatives of provincial licensing authorities; and

(b) other persons, whether or not those persons are members of the board.

(3) Section 71(3) and (4) apply to the committee constituted in terms of this item.

(4) The committee constituted in terms of this item must report jointly to the board.

(5) Within two years after the effective date, the Minister, after considering the report and the Council within one year after the effective date of the committee and any recommendations of the board or the Council, must introduce legislation in Parliament to regulate interactive gambling within the Republic."

⁶⁸⁹ Government Gazette Notice 31245 – National Gambling Amendment Act 10 of 2008 – published 14 July 2008.

⁶⁹⁰ Preamble to the National Gambling Amendment Act 10 of 2008.

⁶⁹¹ Section 2A of the National Gambling Act 7 of 2004.

In order to provide mechanisms for the operation of the National Gambling Amendment Act, draft regulations for interactive gambling – Interactive Gambling Regulations, 2009 – were tabled before Parliament in September 2010 while the Interactive Tax Bill,⁶⁹² which provided for a taxation rate for interactive gambling was published. Both the draft Regulations for Interactive Gambling and the Interactive Gambling Tax Bill have since been held in abeyance pending a decision by government on its position with respect to interactive gambling. Nevertheless, these instruments provide a glimpse into South Africa’s regulatory approach to interactive gambling. They provide a starting point for a country still grappling with legalisation and regulation of interactive gambling.

The purpose of this chapter is to analyse and evaluate the approaches of the National Gambling Amendment Act and Regulations for Interactive Gambling to basic issues relative to interactive gambling, namely: proposed licensing regime; policy on responsible gambling registration of gamblers; detection and prevention of underage gambling; self-limit measures including self-exclusion; restriction on granting credit; and interactive gambling advertisement. Thereafter, the necessity for implementing a different tax regime for interactive gambling in light of the Interactive Gambling Tax Bill will be evaluated. Taxation as well as licence fees provide impetus to the regulation of interactive gambling.

Self-limit measures, including self-exclusion, will be evaluated against the “Internet Responsible Gambling Standards” developed by the National Council on Problem Gambling in the USA as a standard measure to prevent problem gambling and/gambling disorder.⁶⁹³ Although these are not universal standards and are probably followed only in the USA, they are in my view an existing attempt to codify best practices for responsible gambling based on actions of countries legalising interactive gambling, including the USA’s offering of intrastate interactive gambling. These standards are developed from the legislation and regulations of some countries that regulate interactive gambling and from institutions or associations with

⁶⁹² The Interactive Gambling Tax Bill of 2008 was published on 09 June 2008 for public consultation <http://www.treasury.gov.za/legislation/bills/2008/Interactive%20Gambling%20Admin%20Bill.pdf> (Date of use: 12 August 2013).

⁶⁹³ National Council on Problem Gambling *Internet Responsible Gambling Standards* (23 April 2012).

a keen interest in the regulation of interactive gambling.⁶⁹⁴ This discussion will add to the value of the thesis by identifying areas in the proposed regulatory framework that require strengthening, either by legislation or regulation, including codes of good practice.

5.2 Licences

Licensing is the common method across jurisdictions of authorising gambling providers to offer their interactive gambling services. In terms of the Act, four types of licences are identified for the provision of interactive gambling services within the country, namely an interactive gambling operator licence, manufacturer licence, supplier licence, and software and/or equipment maintenance provider licence.⁶⁹⁵ These licences may be issued either temporarily or permanently for a duration determined by the NGB, which will be stipulated in the regulation issued by the latter in conjunction with the Minister.

Owing to the borderless nature of interactive gambling, which means that gambling providers need not physically locate their gambling operations in every country offering their interactive services, the Act clearly intends to cut off providers who have no intention of locating their gambling operations within this country. It provides that:

it is a condition of every licence to make interactive games available to be played that the interactive gambling equipment used by the interactive provider must be situated within the Republic. (my emphasis)⁶⁹⁶

⁶⁹⁴ Appendix A to the Internet Responsible Gambling Standards lists regulations consulted in this regard, which include Alderney Gambling Regulations; American Gaming Association Code of Conduct for US Licensed Internet Poker Companies; British Columbia Responsible Gambling Standards for the British Columbia Gambling Industry; eCommerce and Online Gaming Regulation and Assurance Generally Accepted Practices; European Gaming and Betting Association Standards; European Union Responsible Remote Gambling Measures Workshop Agreement Final 2011; Global Gambling Guidance Group e-Gambling Code of Practice; Gibraltar Code of Practice for the Gambling Industry; International Association of Gaming Regulators eGambling Guidelines; Isle of Man Online Gambling Regulations; Loto-Quebec Responsible Gaming Code of Conduct; Malta Lotteries and Gaming Authority Remote Gaming Regulations and United Kingdom Gambling Commission Codes of Practice

⁶⁹⁵ Section 26 of the National Gambling Amendment Act 10 of 2008.

⁶⁹⁶ Section 24(4) of the National Gambling Amendment Act 10 of 2008.

This requirement of the Amendment Act restricts operators' ability to operate in this country without having a physical presence. Requiring interactive gambling operators to establish a location in the country will indirectly assist in imposing gambling tax, which is essential revenue for the State. Without a physical presence, it would be almost impossible to enforce compliance with South Africa's legislation.

The draft Interactive Gambling Regulations, 2009, envisaged the issue of no more than ten (10) interactive gambling licences in the country.⁶⁹⁷ With South Africa geographically divided into nine (9) provinces, each province should ideally host at least one gambling operator. The NGB has the power to direct an applicant operator to base its interactive gambling operations in a particular province.⁶⁹⁸ It must be emphasised that operators' gambling services will not be restricted to a particular province, as doing so would be counter to the nature of this borderless activity.

Authority for the issuing of licences lies with the NGB.⁶⁹⁹ This includes granting, revocation, suspension or denial of all the aforementioned licences. Operators or anyone adversely affected by the decision of the NGB in this regard has the option of approaching courts of law for recourse. In comparison to other regulatory authorities, in particular Nevada in the US, decisions of the Nevada Gambling Board are subjected to the authority of the Nevada Gaming Commission⁷⁰⁰ before approaching ordinary courts. It is unfortunate that South Africa's gambling regulatory structure does not include a similar authority as this might have eliminated any perception that the NGB plays the role of prosecutor and judge in enforcing its laws. With all the regulatory power being vested in the NGB, provincial licensing authorities still have a limited role to play in the application and enforcement of interactive gambling prescripts in that these provincial authorities will be responsible for the registration and licensing of the operator's key employees (employees in management position) located in their province.⁷⁰¹

⁶⁹⁷ Regulation 26(10) of draft Interactive Gambling Regulations, 2009.

⁶⁹⁸ Regulation 26(2) of draft Interactive Gambling Regulations, 2009.

⁶⁹⁹ Regulation 33 of draft Interactive Gambling Regulations, 2009.

⁷⁰⁰ Ludwig N "Gaming regulatory systems: how emerging jurisdictions can use the three major players as a guide in creating a tailored system for themselves" 2012 *UNLV Gaming Law Journal* 277–298 279.

⁷⁰¹ Regulation 53 of draft Interactive Gambling Regulations, 2009.

5.3 Registration

Unlike traditional forms of gambling, where gamblers remain relatively unknown until they arrive at gambling premises to bet or place a wager in a particular gambling activity, interactive gambling provides an opportunity for providers to create a database of individuals seeking to gamble through this mode.⁷⁰² Through this database, providers will be able to obtain all the particulars of and information about gamblers including but not limited to identity number, location or residence of such gamblers.⁷⁰³ Although this may be regarded as a huge risk to gamblers (providing personal details), interactive gambling involves financial transactions that necessitate compliance with national laws requiring the identification of those carrying out these transactions.⁷⁰⁴ This information is therefore necessary to enable enforcement authorities to trace suspicious transactions for the purpose of preventing and combatting illegal activities.⁷⁰⁵ Although this involves the divulging of personal information, the supplying of personal information to trace suspicious financial transactions is governed by the provisions of the Financial Intelligence Centre Act, which disposes of confidentiality or restriction on the disclosure of information in this regard.⁷⁰⁶ The information to be included in the registration process includes details regarding identity document, address of gambler, and banking account of gambler that will be used to deposit funds into his/her gambling account.⁷⁰⁷

⁷⁰² Preamble to the National Gambling Amendment Act 10 of 2008 read together with Regulation 10 of draft Interactive Gambling Regulations, 2009.

⁷⁰³ Regulation 10(2) of draft Interactive Gambling Regulations, 2009.

⁷⁰⁴ Chapter 3 of Financial Intelligence Centre Act 38 of 2001 imposes a duty upon “accountable institutions”, which include gambling providers, to establish and verify identity of client.

⁷⁰⁵ Section 29 of the Financial Intelligence Centre Act, 2001.

⁷⁰⁶ Section 37 of the Act entitled “reporting duty and obligations to provide information not affected by confidentiality rules” stipulates that:

“(1) Subject to subsection (2), no duty of secrecy or confidentiality or any other restriction on the disclosure of information, whether imposed by legislation or arising from the common law or agreement, affects compliance by an accountable institution, supervisory body, reporting institution, the South African Revenue Service or any other person with a provision of this Part.

(2) Subsection (1) does not apply to the common law right to legal professional privilege as between an attorney and the attorney's client in respect of communications made in confidence between –

- (a) the attorney and the attorney's client for the purposes of legal advice or litigation which is pending or contemplated or which has commenced; or*
- (b) a third party and an attorney for the purposes of litigation which is pending or contemplated or has commenced.”*

⁷⁰⁷ Relevant parts of the draft form – NGB 10 – Application for nominated account and for registration as a player read thus *“I ... (full names) hereby acknowledge that the information supplied in this application is true and also confirm that I am 18 years or older and it is not against the law of my country where I primarily reside to participate in interactive gambling”* (my emphasis).

Gamblers from foreign countries would be allowed to register and participate in gambling activities offered in South Africa provided the laws of the country within which the player primarily resides do not prohibit gamblers from playing interactive games.⁷⁰⁸ The Minister will, from time to time, publish lists of jurisdictions permitting interactive gambling. In order to accommodate gamblers from countries that have recently passed interactive gambling legislation but have not yet been updated on the Minister's list, provision is made for a gambler to file a statement declaring that his or her country does not prohibit interactive gambling.⁷⁰⁹ In actual fact, the inclusion of such a statement is compulsory for foreign gamblers, despite the existence of the Minister's list of jurisdictions permitting interactive gambling.

Part of the registration requires the gambler to open a gambling account with the gambling provider.⁷¹⁰ This account must be linked to the bank account provided by the gambler, which is verified with the bank. This enables a gambler to transfer money from his/her bank account to a gambling account in order to gamble. Providers have access and ultimate control over the gambling account, and it is their responsibility to ensure that the amount kept in such an account originates from the legitimate, nominated bank accounts of gamblers and does not exceed the stipulated limit. The draft Interactive Gambling Regulations, 2009, set the maximum amount that could be held in a gambling account to R20 000 over the period of a month.⁷¹¹ Any amount in excess must be returned to the gambler's bank account. The purpose of setting a limit on the amount that can be held in a gambler's account is solely to curb gamblers from spending almost all their income on excessive gambling. This is a part of measures intended to protect gamblers who have no control over their gambling finances.

⁷⁰⁸ Section 11 of the National Gambling Amendment Act 10 of 2008 inserting section 11A (d) (iv) in the National Gambling Act 7 of 2004.

⁷⁰⁹ Regulation 10(2)(f) of draft Interactive Gambling Regulations, 2009.

⁷¹⁰ Regulation 11 of draft Interactive Gambling Regulations, 2009.

⁷¹¹ Regulation 8 of draft Interactive Gambling Regulations, 2009.

5.4 Underage gambling

Implicit in the insistence upon gambler registration prior to engaging in gambling is the desire to eliminate underage gambling.⁷¹² This is apparent from the objectives of the National Gambling Amendment Act, which amongst others, are to provide for further protection of minors from gambling.⁷¹³ Gambling is not permissible for persons below the age of 18 years who are regarded as minors.⁷¹⁴ Any involvement of a minor in gambling, unless he or she has attained the status of majority, either by marriage or by virtue of being an emancipated minor, falls within the category of underage gambling. The barring of minors from gambling in a virtual world has its own challenges, and not applicable to land-based gambling. In land-based gambling, operators usually assign its personnel to verify the age of gamblers entering gambling venues. In interactive gambling this is achieved by requiring the gambler to provide a certified copy of an identity document during registration process, in order to ensure that an applicant is 18 years or older.⁷¹⁵ Apart from this, a gambler is required to make a statement confirming his or her age.⁷¹⁶ It is not clear what such a statement would achieve if the identity document has been furnished and whether it should be made under oath. An ordinary statement that a gambler is of a particular age would carry little or no force of law, as opposed to a statement made under oath. In most jurisdictions, including South Africa, giving false information under oath is considered to be perjury, an offence punishable by law. An identity number appearing in an officially issued identity document thereof constitutes a *prima facie* proof of that person's real age. Any additional document concerning the gambler's age achieves no more than an identity number stated in an identity document. This additional requirement achieves nothing useful in the way of gambler protection.

⁷¹² Regulation 10(3) of the draft Interactive Gambling Regulations specifically states that the “*interactive provider’s registration process must include a clear message regarding prohibition of underage play and responsible gambling*”.

⁷¹³ Preamble to the National Gambling Amendment Act 10 of 2008.

⁷¹⁴ Section 12 of the National Gambling Act 7 of 2004. The restriction on age is carried over in regulation 8 of the draft Interactive Gambling Regulations, 2009.

⁷¹⁵ Section 11 of the National Gambling Amendment Act 10 of 2008 inserting section 11A (d) (iii) in the National Gambling Act 7 of 2004.

⁷¹⁶ Regulation 10(2)(e) of the draft Interactive Gambling Regulations, 2009.

The scale of underage gambling in South Africa may be relatively unknown, but indications worldwide are that adolescent participation in gambling is on the rise.⁷¹⁷ The review of the South African gambling industry and its regulation completed in 2010 has indicated that 1.5% of 755 youth interviewed confirmed having been involved in interactive gambling-related activities before attaining the age of 18 years.⁷¹⁸ On the other hand, the National Gambling Policy, 2016, cites inadequate access control failing to prevent minors and excluded persons from gaining entry to gambling venues as one of the obstacles in achieving the policy objectives of the Act, including preventing underage gambling.⁷¹⁹ Legalisation of interactive gambling in South Africa is sure to attract minors who will try to cheat the registration system. A study (in the form of entrapment) conducted in Britain revealed the alarming laxity in the prevention of underage gambling by interactive operators. An underage volunteer, aged 16, with a lawfully issued bank debit card, was asked to register gambling accounts with 37 interactive gambling providers.⁷²⁰ Except for his age, which was falsified as 21 years, the volunteer gave all the correct information required during the registration process. The purpose of the debit card was to provide proof that the volunteer possessed a bank account, as this is a requirement for interactive gambling. All monies transferred to a gambling account must come from the legitimate bank account of the registered gambler. A shocking 30 out of 37 interactive licensed operators successfully registered the volunteer as a legal gambler on their websites, without detecting the age falsification.⁷²¹

If not detected, underage gambling may have adverse effects on the school/academic performance of minors who are gambling regularly.⁷²² Minors exposed to gambling will often view it as a possible means of earning an income, in

⁷¹⁷ Griffiths M, Derevensky J & Parke J "Online gambling among youth: cause for concern?" in Williams R, Wood T and Parke J (eds) *Routledge international handbook of internet gambling* (Routledge London and New York 2012) 183–99 noted an increase in youth gambling in most countries as "availability, accessibility and social acceptance have risen." This is also supported by Nastally B & Dixon M "Adolescent gambling: current trends in treatment and future directions" 2011 *Int J Adolesc Med Health* 95–111 96.

⁷¹⁸ Gambling Review Commission *South African gambling industry* 88–89.

⁷¹⁹ Department of Trade & Industry *National gambling policy* 8.

⁷²⁰ Smeaton M *et al* "Study into underage access to online gambling and betting sites" www.gamcare.org.uk/pdfs/StudyReportFinal.pdf (Date of use: 04 September 2013).

⁷²¹ Smeaton *et al* www.gamcare.org.uk/pdfs/StudyReportFinal.pdf (Date of use: 04 September 2013).

⁷²² Shead W, Derevensky J & Gupta R "Risk and protective factors associated with youth problem gambling" 2010 *Int J Adolesc Med Health* 39–8 47.

addition to entertainment. Studies suggest that minors exposed to gambling at an early age are at increased risk of developing immature and unrealistic perspectives about winning opportunities, which may lead to them becoming further involved in gambling.⁷²³

Prevention of underage gambling has proved to be difficult in land-based gambling. It has been reported that minors often find ways to evade the system and gain access to casinos illegally.⁷²⁴ It is often only during the process of verifying the details of the winner for purposes of being accountable to tax authorities for withholding tax compliance that the real age of the underage gambler becomes known to the gambling operator.⁷²⁵ This may be even more serious in the case of interactive gambling, which seems reliant on a declaration by the registering gambler to affirm his/her age in addition to furnishing an identity document. Consideration should be given to linking this registration system with government agencies (such as the Electoral Commission of South Africa, which keeps the voters' roll on which voters of 18 years or above are reflected) in order to enable them to verify ages of its interactive gambling patrons. Common practice worldwide is to rely on credit card and not debit card, in addition to an identity document, as proof that its holder has reached the required age to gamble. Credit cards are issued to persons above 18 years if they comply with the criteria of the financial institution.⁷²⁶

5.5 Self-limit measures

Self-limit measures are part and parcel of responsible gambling practices, designed

⁷²³ Shead, Derevensky & Gupta 2010 *Int J Adolesc Med Health* 41.

⁷²⁴ Nastally & Dixon 2011 *Int J Adolesc Med Health* 96, allude, in passing, to youth still finding their ways to casinos, despite legislative prohibition and security means to prevent them from gaining access.

⁷²⁵ Wojcik S "Gambling underage not worth risk after 20-year-old's jackpot forfeited at casino" http://blog.lehighvalleylive.com/bethlehem_impact/print.html?entry=/2013/08/gaming_officials_say_gambling.html (Date of use: 05 September 2013).

⁷²⁶ ABSA "Absa student credit card – qualifying criteria" <http://www.co.za/Absacoza/Individual/Banking/Credit-Cards/Student-Credit-Card> (Date of use: 05 September 2013).

to help gamblers to avoid gambling beyond their financial means.⁷²⁷ Self-limit measures include limits on deposits, monthly losses and time spent on gambling. According to “Internet Responsible Gambling Standards”,⁷²⁸ regulation of interactive gambling must set requirements that gambling sites provide:–

- the option of setting daily, weekly or monthly limits on the size of deposits;
- the option of setting a system-wide loss or time limit;
- the option of setting individual loss or time limits for each type of game offered by the site; and
- Time-out when limit is reached.

Inclusion of self-limit measures in interactive gambling contributes to the prevention and reduction of problem gambling and promotes responsible gambling.

Self-limit measures for interactive gambling are set out by the draft Interactive Gambling Regulations, 2009, which provide thus:

- (1) Before participating in an interactive game, a player must set a limit on the amount that the player may transfer from a nominated account into a player account over a specific period of time, including a zero limit if the player does not wish to participate in interactive games for that specific period of time;*
- (2) A player may at any time set a limit on:*
 - (a) an individual amount or the total amount to:*
 - (i) wager, over a specific period of time, or*
 - (ii) lose, over a number of games, or during a specific period of time;*
 - or*
 - (b) the time the player intends to play in any one session;*
- (3) A player who has set a limit as contemplated in sub-regulation 1 or 2 may, at any time, change the said limit by written notice to an interactive provider;*
- (4) A notice to increase the limit contemplated in sub-regulation 1 or 2 will only be effective 7 days after the notice was delivered;*
- (5) A notice to decrease the limit contemplated in sub-regulation 1 or 2, including a zero limit, will be effective immediately;*
- (6) An interactive provider may not accept a wager above the limit or exclusion set by the player under this regulation.*

It is encouraging to note that the draft Interactive Gambling Regulations, 2009, comply with self-limit measures in the “Internet Responsible Gambling Standards”.

⁷²⁷ Blaszczyński, Ladouceur & Schaffer 2004 *Journal of Gambling Studies* 301–317.

⁷²⁸ National Council on Problem Gambling *Internet Responsible Gambling Standards* 1–7.

However, this should not imply that with these self-limit measures in place, gamblers will not descend into problem gambling. As Broda warns, self-limit measures are not without loopholes for a gambler who has no regard for responsible gambling. Such a gambler, upon reaching limits on one gambling site, may switch to another gambling site.⁷²⁹ In other words, it is standard practice for gamblers to gamble on different websites and, as a result, there is nothing preventing a gambler who has exhausted the prescribed maximum amount to move to another gambling website and continues to gamble until all his/her money in the bank account is exhausted. The challenge, as pointed out by Broda *et al.*, is that gamblers cannot be restricted to register with one gambling site only. Doing so would invoke legal questions related to consumer's choice and, more importantly, would undermine competition among interactive gambling providers.

5.6 Self-exclusion

Among its objectives, the National Gambling Amendment Act seeks to *provide for further protection ... of other persons vulnerable to the negative effects of gambling.*⁷³⁰ These other persons are not defined but it is understood that persons involved in gambling are gamblers and in the case of interactive gambling they are registered gamblers. Gamblers' gambling behaviour may affect their family members indirectly. Gambling, like any other recreational activity, may pose harm to the well-being of gamblers. In the worst cases, gamblers become addicted and ruin their financial status, which may lead to the unintended break-up of families, job losses, criminal behaviour and substance and drug abuse.⁷³¹ As a result, it becomes significant that gamblers are afforded protection within the scope of gambling

⁷²⁹ Broda *et al* 2008 *Harm Reduction Journal* 35.

⁷³⁰ Preamble to the National Gambling Amendment Act 10 of 2008.

⁷³¹ At the time of writing, the Chief Magistrate in Kempton Park, Judith van Schalkwyk, was suspended from work for allegedly "gambling during office hours and requesting a colleague to drive her to Emperor's Palace (a popular gambling venue in SA). The Chief Magistrate admitted to gambling, though not during office hours, and also to being indebted to micro-lenders for loans not necessarily related to gambling – Molosankwe B "Top magistrate 'abused her position'" <http://www.iol.co.za/news/crime-courts/top-magistrate-abused-her-position-1.1558498> (Date of use: 06 August 2013).

legislation. Among the protection afforded to gamblers is the ability to exclude themselves from gambling.⁷³²

Self-exclusion is a voluntary measure taken by a gambler to exclude himself or herself from participation in gambling. According to the “Internet Responsible Gambling Standards” advocating responsible gambling standards in interactive legislation/regulation, self-exclusion must include the following:

- Length of exclusion;
- The closure process for any accounts opened by the same person during the exclusion;
- Requirements for reinstatement and renewal upon expiration of the exclusion;
- How reward points and remaining balances are managed;
- Cancellation of any payments scheduled to be withdrawn from the player’s account at a future date.⁷³³

Self-exclusion is at the heart of every responsible gambling practice, be it land-based or interactive. It is for this reason that both the National Gambling Amendment Act and the draft Interactive Gambling Regulations, 2009, avoid reinventing self-exclusion and rely on the terms of the self-exclusion agreement published in terms of the National Gambling Act. In terms of the draft Interactive Gambling Regulations, 2009, every gambling website must display links to the information and forms for self-exclusion.⁷³⁴ Self-exclusion must be for a minimum period of 12 months.⁷³⁵ The procedure for exclusion is provided by the National Gambling Act, which stipulates that *“any person who wishes to be prevented from engaging in any gambling activity may register as an excluded person by submitting a notice to that effect in the prescribed manner and form at any time”*.⁷³⁶

For ease of reference, notice or a form for self-exclusion is reproduced hereunder.

⁷³² Section 14 of the National Gambling Act 7 of 2004.

⁷³³ National Council on Problem Gambling *Internet Responsible Gambling* 3–4.

⁷³⁴ Regulation 15(2) of draft Interactive Gambling Regulations, 2009.

⁷³⁵ Regulation 15(3) of draft Interactive Gambling Regulations, 2009.

⁷³⁶ Section 14(1) of the National Gambling Act of 2004 provides *“A person who wishes to be prevented from engaging in any gambling activity may register as an excluded person by submitting a notice to that effect in the prescribed manner and form at any time”*.

Waiver/Release

I,.....
(Full name and Identity number of the applicant)

wish to be placed on the National Register of Excluded Persons and I have filed with the licence holder/regulatory authority this application for placement on the National Register for Excluded Persons. By filing such application, I understand that I might be a problem gambler and that I am assuming the responsibility of refraining from visiting designated gambling areas nationally. Furthermore, I understand that if I visit a designated area after completing this application and I am discovered, that I will be removed from such premises.

I understand that the licence holder or regulatory authority may recommend that I seek free treatment with the National Responsible Gambling Programme.

I also understand that by completing the application, I am authorising a licence holder or regulatory authority to release the contents of my application – including my name and ID number –to all regulatory authorities, licensed operators, their agents and affiliates.

I also understand that, if I complete the application form, a further consequence of my being discovered in a designated gambling area is that I will not be eligible to win a gambling game and thereafter I will be denied winnings I may attempt to claim while visiting designated gambling areas. I also understand that my presence in designated gambling areas constitutes trespassing and the licence holder will request that I be arrested for such.

Moreover, I understand that by filing an application for placement on the National Register for Excluded Persons and by signing this Waiver/Release, I agree that I am not eligible to place a legal wager and that I will be denied the winnings based on any wager that I might place.

I authorise any licence holder or its employees to deny me access to a designated gambling area. By signing this release and acknowledgement of receipt of good and valid consideration thereof, I hereby release, remise, and forever discharge the gambling industry members, agents and employees from any and all manner of actions, causes of action, suits, debts, judgments, executions, claims and demands whatsoever, known and unknown, in law or equity, which I, the undersigned, and my heirs, successors, administrators, executors, and assigns ever had, now has, may have, or claim to have against any or all of said entities or individuals arising out of or by reason of the processing, enforcing or other action or omission relating to this application including but not limited to, the release of the contents of my application to any licence holder, its agents or employees.

I understand that a licence holder, in conjunction with my placement on the National Register for Excluded Persons, will submit a plan for approval to the Board for removing my name from all mailing lists which may generate marketing offers being sent specifically to me and to deny me credit (if applicable), and any club memberships. I will notify the licence holder of any errant mailing or marketing offer I might receive after completing this application.

I understand the National Responsible Gambling Programme or its agents or employees may contact me from time to time to conduct research necessary to evaluate the Voluntary Exclusion Programme and determine appropriate methods of addressing exclusions and or problem gambling issues.

I have read this Waiver/release and understand all its terms. I execute it voluntarily and with full knowledge of its consequences and significance.

.....
APPLICANT

.....
WITNESS

SIGNED at **on this** **day of**

Reproduced from Amendment of Regulations Regarding Gambling Advertising and Exclusions Register Notice R.386 of 15 May 2012.

This form is incomplete unless accompanied by a section which provides the details of the official assisting the gambler to complete the form. The official must confirm that the applicant completed the form voluntarily and without duress, and appeared to be in his/her sober senses when signing and initialling the form/agreement.⁷³⁷ The assisting official is not a Commissioner of Oaths, but an employee of a gambling provider with management authority.

It is evident that the self-exclusion form was crafted in relation to land-based gambling and will require amendment to accommodate interactive gambling. Currently, the form provides that the presence of a self-excluded gambler at a gambling venue constitutes trespassing and may attract criminal sanctions. In a virtual environment of interactive gambling trespassing would have to be replaced by unauthorised access. In terms of section 86 of the Electronic Communications and Transactions Act *a person who intentionally accesses ... any data without authority or permission to do so, is guilty of an offence.*⁷³⁸

Extending the scope of criminal law or legislation unrelated to gambling to prevent gambling transgressions is not the best form of regulation. Unauthorised access to either gambling venues or gambling websites by an excluded gambler should be

⁷³⁷ Amendment of Regulations Regarding Gambling Advertising and Exclusion Register R. 386 published in Government Notice 35349 on 15 May 2012.

⁷³⁸ Section 86(1) of Electronic Communications and Transactions Act 25 of 2002.

regulated and punishable within the gambling regulatory framework. The National Gambling Act currently contains a number of statutory offences including failure to comply with the Act,⁷³⁹ which could be widened to include gamblers who breach conditions for exclusion orders or self-exclusion from gambling. New Zealand already provides for such offences in its regulatory framework for land-based gambling.⁷⁴⁰

Self-exclusion is an impermanent remedy for addictive gambling. It is necessary that gamblers undergo treatment/counselling during the exclusion period that will enable them to take control of their gambling activities. It therefore requires an innate willingness on the part of the excluded person to remedy his/her gambling behaviour and change for the better using the available support programmes; if not, self-exclusion remains an exercise in futility.⁷⁴¹

5.7 Restriction on granting credit to gamblers

Provisioning of credit to gamblers for gambling purposes undermines efforts in the promotion of responsible gambling practices. Unmanageable debt has been described as one of the consequences of problem gambling⁷⁴² and it is caused partly

⁷³⁹ Sections 87 and 86 of the National Gambling Act 7 of 2004.

⁷⁴⁰ In New Zealand, the Gambling Act of 2003 has an offences section relating to breach of exclusion orders. In terms of section 312:

“(1) Every person commits an offence who enters the gambling area of a class 4 venue or casino venue –

(a) in breach of an exclusion order issued under section 309(3) or 310(1); or
(b) in breach of a condition of re-entry imposed under section 309(4) or 310(2).

(2) Every venue manager or the holder of a casino operator’s licence, or a person acting on behalf of either of those persons, commits an offence who, after having received a request under section 310(1) that includes the information specified in section 310(1A), fails to issue an exclusion order to a self-identified problem gambler.

(3) Every venue manager or the holder of a casino operator’s licence, or a person acting on behalf of either of those persons, commits an offence who –

(a) allows a person who is subject to an exclusion order under section 310(1) to enter the gambling area of a class 4 venue or casino venue; or
(b) fails to remove a person who has entered those areas –
(i) in breach of an exclusion order issued under section 310(1); or
(ii) in breach of a condition of re-entry imposed under section 310(2).”

⁷⁴¹ O’Hare C “Self-exclusion – concept vs reality” 2004 *Gaming Law Review* 189–191 and Collins & Kelly 2002 *Gambling Law Review* 519.

⁷⁴² Downs and Woolrych 2010 *Community, Work and Family* 313.

by the provisioning of credit. In contrast to the current National Gambling Act, which permits gambling providers to extend credit to gamblers for gambling purposes,⁷⁴³ the National Gambling Amendment Act prohibits interactive gambling providers from granting credit to gamblers for purposes of gambling. It provides:

(1) A person licensed to make any gambling activity available to the public must not extend credit contrary to this Act or any other law, in the name of the licensee or a third party, to any person for the purposes of gambling.

(2) Despite subsection (1), an interactive provider may not extend credit to any person for the purposes of engaging in interactive games.⁷⁴⁴

The National Gambling Amendment Act does not prohibit the granting of credit to gamblers, provided such credit is not to be used for gambling purposes. This means that a gambler whose bank account has been depleted by gambling may ask the provider for a loan, provided it is not to be used for gambling purposes. How the provider will ensure that the loan or any portion thereof is not used for gambling activities is unclear, as the provider's reason for interacting with the gambler is gambling. Financial matters outside gambling should not be allowed to creep into gambling prescriptions. If the National Gambling Amendment Act truly intends to prohibit the granting of credit to gamblers, it should expressly ban providers from using financial information supplied and obtained for gambling purposes as a means of approving non-gambling loans.

Within the sphere of gambling, providers should be barred from doubling as credit providers. This proposal, drastic as it may seem, will contribute to the avoidance of gambling debt(s), a matter which should be at the core of responsible gambling practices. As it is, society frowns upon the proliferation of gambling, mainly because of gamblers' reckless spending of money that should be used to provide for their families. Extending credit to gamblers in the gambling sphere will lead to their unnecessary indebtedness to providers and will increase gamblers' reckless

⁷⁴³ Section 13 of the National Gambling Act 7 of 2004 read together with Regulation 4 of the National Gambling Regulations, 2004 (discussed in Chapter 3 of this thesis).

⁷⁴⁴ Section 13 of the National Gambling Amendment Act 10 of 2008 substituting section 13 of the National Gambling Act 7 of 2004.

spending. It must be emphasised that the criticism here is not against the granting of credit outside the gambling sphere, where providers should, in the same way as any other credit provider, enjoy and practise their lawfully approved trade of providing credit to any person seeking and qualifying for a loan. Under no circumstances should credit be granted in interactive gambling, however.

5.8 Advertising or promotion of interactive gambling

In terms of the Amendment of Regulations Regarding Gambling Advertising and Exclusions Register,⁷⁴⁵ advertisement of interactive gambling is prohibited “*until enabling legislation is enacted and promulgated by the President*”.⁷⁴⁶ Advertisement is defined as: “

any direct or indirect visual or oral communication transmitted by any medium, or any representation or reference written or inscribed, recorded, encoded upon or embedded within any medium, by means of which a person seeks to –

(a) bring to the attention of all or part of the public

- *the existence or identity of a supplier; or*
- *the existence, nature, availability, properties, advantages or uses of any goods or services that are available for supply, or the conditions on, or prices at which any goods or services are available for supply.*

(b) promote the supply of any goods or services or

*(c) promote any cause.*⁷⁴⁷

Prohibitions on advertising of interactive gambling include, *inter alia*, (i) placing of internet links encouraging or inviting members of the public to access interactive gambling websites and (ii) providing sponsorships, gifts, prizes or scholarships related to interactive gambling in exchange for the promotion of a gambling activity, product, trademark, brand or name of a gambling operator, manufacturer or supplier.⁷⁴⁸ The regulations were issued as a direct result to the case of *Casino*

⁷⁴⁵ Amendment of Regulations Regarding Gambling Advertising and Exclusions Register R.386 of 15 May 2012 published in Government Gazette Notice 35349.

⁷⁴⁶ Regulation 5 of Amendment of Regulations Regarding Gambling Advertising and Exclusions Register.

⁷⁴⁷ Regulation 1 of Amendment of Regulations Regarding Gambling Advertising and Exclusions Register.

⁷⁴⁸ Regulation 5 of Amendment of Regulations Regarding Gambling Advertising and Exclusions Register.

Enterprises (Swaziland) v Gauteng Gambling Board prohibiting the former from advertising their interactive gambling services on Gauteng-based radio stations.⁷⁴⁹

This regulation has not deterred online gambling forums such Cardschat – an online poker forum⁷⁵⁰ and South African online casino⁷⁵¹ – from enticing and encouraging South Africans to gamble on certain identified gambling websites. Cardschat proclaims on its website that:

*We have listed the best legal interactive casinos that accept South African gamblers. These sites have all been rigorously tested and researched to offer South African casino gamblers safe and legal gaming.*⁷⁵²

It continues:

*Internet gambling is illegal in South Africa, but the truth is that the emphasis is on hosts and providers of gambling, not individual gamblers. There are no laws against participating in interactive betting in South Africa, only laws making it illegal for game providers to open their doors to South Africans.*⁷⁵³

Despite Cardschat's statement regarding the encouragement of South Africans to gamble on listed gambling sites being misleading and in contravention of the Amendment of Regulations Regarding Gambling Advertising and Exclusions Register, there is not much that can be done to stop its dissemination. Cardschat is not actually an interactive gambling provider but rather a forum for individuals interested in interactive gambling and in particular, internet poker.

As interactive gambling is prohibited, the Amendment of Regulations Regarding Gambling Advertising and Exclusions Register is not intended to give directions on the manner of advertisement of interactive gambling. Prescribing the manner and form of interactive gambling advertisement, provided this were to be legalised, would be the responsibility of the National Gambling Amendment Act and the draft Interactive Gambling Regulations, 2009. Section 15 of the National Gambling

⁷⁴⁹ *Casino Enterprises (Pty) Ltd (Swaziland) v Gauteng Gambling Board* 39D or [2].

⁷⁵⁰ Cardschat "South African online casinos" <http://www.cardschat.com/south-africa/casinos/> (Date of use: 12 October 2013).

⁷⁵¹ South Africa Online Casino "Top 2015 SA online casino" <http://wwwsouthafricaonlinecasino.com/> (Date of use: 31 December 2015).

⁷⁵² Cardschat <http://www.cardschat.com/south-africa/casinos/> (Date of use: 12 October 2013)

⁷⁵³ Cardschat <http://www.cardschat.com/south-africa/casinos/> (Date of use: 12 October 2013)

Amendment Act empowers the Minister in accordance with section 87 of the National Gambling Act to prescribe the manner and form for interactive gambling advertisement. The draft Interactive Gambling Regulations, 2009, contains provisions regarding advertising of this mode of gambling. It prohibits false, deceptive or misleading advertisement and advertisement intended to appeal to minors.⁷⁵⁴ Any advertisement of interactive gambling must carry a message indicating the prohibition of underage gambling.⁷⁵⁵ The draft Interactive Gambling Regulations, 2009, contains no provisions regarding advertisement in the form of sponsorship logos.⁷⁵⁶ This form of advertisement, in particular sponsorship logos of

⁷⁵⁴ Regulation 17(4) of draft Interactive Gambling Regulations, 2009.

⁷⁵⁵ Regulation 17(2) of draft Interactive Gambling Regulations, 2009.

⁷⁵⁶ Regulation 17 of draft Interactive Gambling Regulations, 2009, entitled "advertising" provides that:

-
- (1) *An interactive provider must not –*
 - (a) *advertise itself as a licensed interactive provider unless it holds a valid interactive gambling operator licence issued by the board; and*
 - (b) *advertise an interactive game unless the game is an approved game.*
 - (2) *An interactive provider must ensure that any interactive gambling advertisement includes a clear message regarding prohibition of underage play;*
 - (3) *Any person who makes computer or internet access facilities or similar devices available to the public for a fee must not have, in any of the said devices, an interactive gambling website as a home page;*
 - (4) *In addition to the requirements of regulation 3 of the National Gambling Regulations, 2004, an interactive provider may not advertise or authorise the advertising of any interactive gambling in a manner that:*
 - (a) *is false, deceptive or misleading;*
 - (b) *is intended to appeal specifically to minors.*
 - (c) *implies that interactive gambling promotes or is required for social acceptance, personal or financial success or the resolution of any economic, social or personal problems;*
 - (d) *contains endorsements by well-known personalities that suggest interactive gambling contributed to their success;*
 - (5) *An interactive provider may not engage in any activity that involves the sending of unsolicited electronic mail, whether through its own operation or by the intervention of third parties;*
 - (6) *The board must, on its own accord or pursuant to a complaint, make a determination on whether an advertisement contravenes any of the requirements contemplated in this regulation;*
 - (7) *If the board determines that an advertisement contravenes any of the requirements contemplated in this regulation, the board must order the interactive provider to take appropriate steps to:*
 - (a) *stop the advertisement from being published or shown*
 - (b) *change the advertisement;*
 - (8) *The order by the board contemplated in sub-regulation (7), must*
 - (a) *be in writing;*
 - (b) *state the grounds for the direction;*
 - (c) *if it is a direction to change the advertisement, state how the advertisement must be changed;*
 - (d) *specify a period of time within which to comply with the order; and*
 - (e) *inform the interactive provider of its rights to appeal the decision of the board and the time period within which to lodge the appeal."*

interactive gambling corporations, appears to be popular in European countries, as discussed below.

5.8.1 Sponsorship logo

South Africa's populace is an indirect consumer of advertisements of interactive gambling entities through sponsorship logos. With a subscription of almost 4,5 million households in South Africa by 2013,⁷⁵⁷ MultiChoice – a digital service pay television channel broadcast through its DStv Compact – European soccer games in which corporations offering interactive gambling such as B.win, bet365 and so on, have their logos displayed by their sponsored soccer teams. For instance, numerous sports clubs in the UK have sponsorship deals with gambling operators.⁷⁵⁸ Broadcasting of activities involving sponsored sports clubs ensures indirect broadcasting or advertising of the logos of their sponsors, in this case interactive gambling entities. Although the ultimate product that is sold to South African households is soccer matches, the resultant coverage ensures the intensive advertisement of interactive gambling corporations to a wider audience.⁷⁵⁹ Despite the fact that sponsorship deals do not provide any opportunity to sell the products of their sponsors (in this case gambling corporations), the latter sees commercial value in associating their name with sponsored teams. Through the sponsorship of sport, gambling corporations hope to achieve, amongst others, “increased market penetration, brand awareness and accompanying media exposure”, all of which will influence public perception and contribute positively to their ultimate goal of increased revenue.⁷⁶⁰

⁷⁵⁷ Staff Writer “DStv – more subscribers, more money” <http://www.mybroadband.co.za/news/broadcasting/81013-dstv-more-subscribers-more-money.html> (Date of use: 21 May 2015). Although the 4,5 million household subscriptions do not specify how many are DStv Compact and DStv Premium, all of which broadcast European soccer on a weekly basis, by the year 2012 they accounted for 1,85 million and 1,75 million respectively.

⁷⁵⁸ Gambling Commission Sponsorship of British sporting clubs by gambling operators: Advice note (November 2014).

⁷⁵⁹ In New Zealand, sponsorship of sporting teams by gambling corporations has been used as a way of engaging with certain indigenous communities and attracting them to their gambling activities – Dyllal L, Tse S & Kingi A “Cultural icons and marketing of gambling” 2009 *Int J Ment Health Addiction* 84–96 89.

⁷⁶⁰ Lamont M, Hing & Gainsbury S “Gambling on sport sponsorship: a conceptual framework for research and regulatory review” 2011 *Sport Management Review* 246–257 246.

Countries such as Spain and the UK, with massive soccer followings, can bear testimony to the marketing of gambling corporations through their sponsorship logos. In 2010, a staggering £47 million was spent on sports bodies through advertisements by gambling corporations.⁷⁶¹ In 2012, Asian gambling corporations such as SBO Bet, 12 Bet and 188 Bet chose to sponsor and display their logos on soccer clubs affiliated with the English Premier League.⁷⁶² The purpose of such sponsorship, according to one interactive gambling company – Bwin – is to stay “*at the centre of promotional activities of the club and to ensure its brand is integrated into the club’s website, social media and mobile apps. The agreement also includes the creation of co-branded gaming products as well as marketing campaigns featuring club’s gamblers.*”⁷⁶³

The purpose of this form of advertisement is to encourage viewers to try out those services and products.⁷⁶⁴ It is in this regard that gambling advertisement through sports sponsorship should be properly managed and regulated, as it becomes an enticement for interactive gambling. At the moment, South Africa’s regulations fail to curb promotion of interactive gambling corporations through sponsorship logos where this originates in another country that allows interactive gambling. It is my submission that the current regulatory approach based on prohibition of interactive gambling stands no chance of closing loopholes exposed by modern forms of advertisement, which have seen the penetration by interactive gambling promotions of South Africa’s broadcasting industry. This is one area that can only be addressed upon legalisation of interactive gambling through strengthening of Interactive Gambling Regulations to include sponsorship logos.

⁷⁶¹ Thomas S *et al* “They are working every angle’. a qualitative study of Australian adults’ attitudes towards, and interactions with gambling industry marketing strategies” 2011 *International Gambling Studies* 1–17 3.

⁷⁶² O’ Donnell M “The biggest gambling sport sponsorship deals” <http://calvinayre.com/2012/07/03/business/biggest-gambling-sport-sponsorship-deals> (Date of use: 29 January 2014).

⁷⁶³ Hammer L “New deal between Real Madrid and Bwin.party” http://www.smartgambler.com/news/all/17643/new_deal_between_real_madrid_and_bwinparty.html (Date of use: 29 January 2014).

⁷⁶⁴ Lamont, Hing & Gainsbury 2011 *Sport Management Review* 21–22.

5.9 Complementary legislation for interactive gambling: Interactive Gambling Tax Bill

Tax is levied on gambling in this country. Taxation of land-based gambling providers is administered by provincial licensing authorities. Each province is entitled to levy its own gambling tax for land-based gambling. For example, the Gauteng Gambling Board, one of the nine provincial gambling boards in South Africa, imposes gambling tax at a rate of 9% of the operators' gross gambling revenue during the tax period.⁷⁶⁵ The tax period for the Gauteng Gambling Board is one week, commencing every Wednesday and ending the following Wednesday, unless the latter is a public holiday.⁷⁶⁶ On the other hand, the Limpopo Gambling Board imposes a gambling tax of 8% of the gross gambling revenue.⁷⁶⁷ The lure of interactive gambling revenue that can be generated by taxing has prompted many governments to bring interactive gambling under the strictures of a tax regime.⁷⁶⁸ In 2008, the Minister of Finance published the Interactive Gambling Tax Bill ("the Bill"), seeking to impose taxation on interactive gambling. The Bill has yet to serve before Parliament, which will allow for public consultation. The reason for this is that it is wholly dependent on the commencement of the National Gambling Amendment Act. The creation of specific tax legislation for interactive gambling providers is sanctioned by the National Gambling Amendment Act.⁷⁶⁹ The proposed tax regime is to be imposed only on interactive gambling providers. There is no taxation of gamblers or their winnings.

⁷⁶⁵ Regulation 85 of the Gauteng Gambling Regulations, April 2012, which provides in relevant parts:

⁷⁶⁶ Regulation 86 of the Gauteng Gambling Regulations, April 2012, provides, in regard to the tax period, that:

(1) *Every licensee shall –*

(a) *not later than Wednesday in each week or, if any Wednesday is a public holiday, not later than the next working day submit to the board a return in the form and containing such information in respect of its gaming operations during the preceding week as may be determined by the board; and*

(b) *simultaneously pay to the board any gaming tax due in respect of the preceding week."*

⁷⁶⁷ Regulation 172 of the Limpopo Casino and Gaming Regulations, 2011.

⁷⁶⁸ Germany is reported to have introduced gambling taxation to online gambling – see Englisch J "Taxation of online gambling in Germany" 2013 *Gaming Law Review and Economics* 20–32 20–32, whereas Denmark passed its own Gaming Duties Act 698 of 2010 to levy different taxes on online and land-based gambling.

⁷⁶⁹ Section 43 of the National Gambling Amendment Act 10 of 2008 inserting section 88A in the National Gambling Act 7 of 2004.

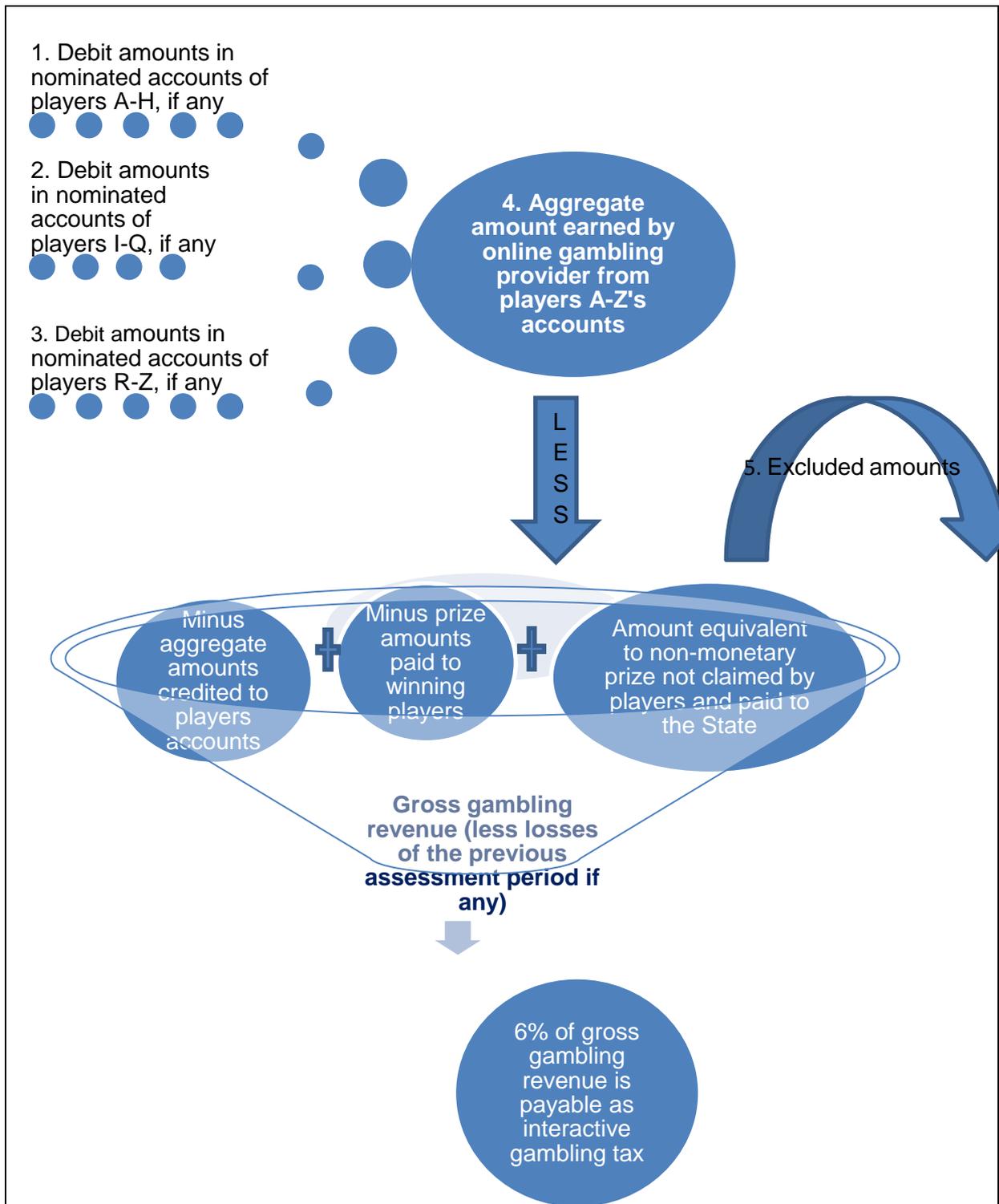
In the absence of a uniform gambling levy for land-based gambling, which could be used as a basis for interactive gambling, the Bill proposed a tax rate of 6% (six per cent) for each assessment period, payable by the provider from his/her gross gambling revenue.⁷⁷⁰ The assessment period is not defined in the Bill; however, the Draft Explanatory Memorandum indicates the calculation of the proposed tax on a monthly basis.⁷⁷¹ The gross gambling revenue for interactive gambling is not necessarily the same as for land-based gambling.

In terms of the Bill, the gross gambling revenue is defined as the total amount generated by the provider from the registered gambling accounts (referred to as nominated accounts) of gamblers. From this amount, the provider must deduct (i) prize money paid to winning gamblers, (ii) amounts paid to the State as a result of non-monetary prizes not claimed by winners and duly auctioned, and (iii) amount credited to the (nominated) accounts of gamblers. In cases where the gross gambling revenue of a provider is negative, scope is created for the deduction of the negative amount from the gross gambling revenue of the next assessment period. By allowing the provider to deduct negative gross gambling revenue incurred during a previous assessment period, the Bill eliminates the need for a provider to seek a gambling rebate from tax authorities. Calculation of gross gambling revenue can be illustrated as follows:

As illustrated in this figure, the interactive gambling provider will be liable for 6% of the gross gambling revenue for each assessment period.

⁷⁷⁰ Section 3 of Interactive Gambling Tax Bill.

⁷⁷¹ (Draft) Explanatory Memorandum for the (Draft) Interactive Gambling Tax Bill, 2008 published on 9 June 2008:
<http://www.treasury.gov.za/legislation/bills/2008/Draft%20IG%20Tax%20Bill%20EM%202008.pdf>
(Date of use: 16 June 2015).



Example

The scenario depicted in Figure 1 above may be explained in monetary terms as follows: during the month of December 2014, an interactive gambling provider generates an amount of R25 million from gamblers' nominated accounts. The provider also makes a payment of R3 million in prizes directly to winning gamblers, R1 million to the State resulting from the auction of non-monetary prizes not claimed by winning gamblers, and credits R1 million to various gamblers' nominated accounts. In this scenario, the provider would have earned a gross gambling

revenue of R20 million. Out of this gross gambling revenue, a tax at a rate of 6% is payable to the State, as required by the Interactive Gambling Tax Bill. Therefore, the provider would be liable for an amount of R1.2 million during the abovementioned month.

In the case of negative gross gambling revenue (loss) for a particular assessment period, such loss must be deducted during the next assessment period. For instance, during the month of November 2014, if the provider shows a negative gross gambling revenue of R10 million, this amount is carried forward and is deductible from December's gross gambling revenue. Using the same scenario, the following can be said: in December, the provider earns revenue of R25 million from gamblers' nominated accounts. The provider pays R3 million in prizes directly to winning gamblers, R1 million to the State resulting from the auction of non-monetary prizes not claimed by winning gamblers, and credits R1 million to various gamblers' nominated accounts. Before calculating the gross gambling revenue for December, the provider must first deduct losses for November 2014. In other words, R20 million - R10 million losses for November = R10 million. Therefore, the gross gambling revenue for December is R10 million, from which an interactive gambling taxation of 6% is payable. The provider would thus be liable for a sum of R600 000 (six hundred thousand rand).

This illustration is based on calculation of the gross gambling revenue supplied in the Explanatory Memorandum for the (Draft) Interactive Gambling Tax Bill, 2008

Once the calculation of the gross gambling revenue is clarified, the determination of the taxable gross gambling revenue falls to the NGB. All tax amounts obtained in terms of the Bill accrue to the National Revenue Fund.⁷⁷² Enactment of the Bill (which depends on the National Gambling Amendment Act) would result in a two-tier system of taxation. While the Bill creates a system for taxation of interactive gambling, provincial licensing authorities have their own system for taxation of land-based gambling. The tax rate for interactive gambling is set at 6% whereas provincial licensing authorities impose slightly higher taxes, as indicated previously in respect of Gauteng and Limpopo provinces.⁷⁷³

⁷⁷² Section 2 of Interactive Gambling Tax Bill.

⁷⁷³ Regulation 85 of the Gauteng Gambling Regulations, April 2012, and Regulation 172 of the Limpopo Casino and Gaming Regulations, 2011.

5.9.1 Taxation of gambling winnings

Tax authorities worldwide have long been grappling with the idea of imposing tax on money won by gamblers through their gambling activities (hereinafter referred to as gambling winnings). In South Africa, the desire to tax gambling winnings came to the fore during the apartheid era in the case of *Morrison v Commissioner for Inland Revenue* (hereinafter referred to as the *Morrison* case).⁷⁷⁴ The then Commissioner for Inland Revenue (now Commissioner for South African Revenue Service) had included the amount earned from betting activities in the appellant's (Morrison's) taxable income. The Income Tax Court hearing the matter as a court of first instance had ruled that the appellant's betting activities constituted a business, and therefore amounts earned were correctly included in the basic profit as derived from a business or venture. Hearing the matter on appeal, the High Court treated the appellant's betting activities as part of his trade and therefore liable for tax. Disputing the findings of these courts, the appellant approached the then apex court (that is, Appellate Division and now Supreme Court of Appeal), seeking to exclude his gambling winnings from tax on the basis that the *court a quo* had erred in its finding that his betting activities constituted a trade or business. The court offered its insight on the taxation of gambling winnings, however.

In the case of a bookmaker, it is accepted that his/her gambling activities constitute a trade or business. It is not entirely clear whether or not it is only a bookmaker's gambling activities that qualify as a gambling business or trade. The betting activities of a systematic gambler who is very far from being a registered bookmaker may qualify as a business or trade, and therefore be liable for income tax.⁷⁷⁵ In the words of Schreiner, JA, "no rule exists that a bookmaker's activities constitute the carrying on of a trade or business while those of a punter do not (my emphasis)".⁷⁷⁶ Whether or not gambling winnings constitute a source of income and are therefore liable for

⁷⁷⁴ *Morrison v Commissioner for Inland Revenue* 1950 (2) SA 449 (AD).

⁷⁷⁵ *Morrison v Commissioner of Inland Revenue* 1950 (2) SA 449 (AD) 458.

⁷⁷⁶ *Morrison v Commissioner of Inland Revenue* 1950 (2) SA 449 (AD) 459.

income tax is a matter for determination, depending on whether or not the gambling activities of a gambler are part of his/her trade or business.⁷⁷⁷

The *Morrison* case did not resolve the legal uncertainty on whether or not gambling winnings attract taxation. As a result, each case will have to be decided on its own merits when establishing whether or not the betting activities of a punter/gambler constitute the conduct of a trade or business. A large number of gamblers continued to benefit from this tax vacuum during the apartheid era. This is not to say that tax legislation has remained the same since the 1950s to the present. The current Income Tax Act excludes the capital gain or loss resulting from gambling from income tax calculation. Effectively, gambling winnings obtained from gambling operators operating lawfully in South Africa are exempted from tax calculation. Equally, gamblers may not include gambling losses in their tax calculation. Article/Paragraph 60 of the Eighth Schedule of the Income Tax Act entitled “gambling, games and competitions” currently states the following:

- (1) A person must disregard a capital gain or capital loss determined in respect of a disposal relating to any form of gambling, game or competition.*
- (2) Notwithstanding subparagraph (1), a capital gain may not be disregarded –*
 - (a) by any person other than a natural person; or*
 - (b) by any natural person, unless that form of gambling, game or competition is authorised by, and conducted in terms of, the laws of the Republic.”*

Until recently, no attempt was made to introduce a gambling tax for gambling winnings, that is, a tax specifically for gamblers. Gamblers enjoyed a gambling tax honeymoon as a result of the absence of any taxation specifically imposed by the Income Tax Act on gambling winnings. Even bookmakers whose trade or business was in gambling were subjected only to personal income tax as opposed to taxation of their betting activities. On the other hand, gambling providers have long been subjected to various taxes by both national as well as provincial governments.

⁷⁷⁷ *Morrison v Commissioner of Inland Revenue* 1950 (2) SA 449 (AD) 458–459.

The first indication of the imposition of a tax on gambling winnings appeared in the 2010 budget speech delivered by the then Minister of Finance.⁷⁷⁸ He proposed to review any measures regarding “treatment of winnings in the hands of gamblers” owing to their exemption from personal income tax.⁷⁷⁹ While no action, at least in the eyes of the public, was visible to support the Minister’s undertaking, this was followed up in the 2011 budget speech, in which he allocated a 15% (fifteen percent) tax withholding on gambling winnings above R25 000 (twenty-five thousand rand).⁷⁸⁰ Gambling winnings included pay-outs from lotteries that have distributed millions of rand to lucky winners.

According to the Minister, the objective of introducing the withholding of tax was “to discourage excessive gambling”.⁷⁸¹ It is not clear whether the Minister carefully distinguished excessive gambling from gambling in general. The former suggests out-of-control gambling, which poses a threat to the socio-economic well-being of a gambler and ultimately leads to problem gambling. It is debatable whether this form of gambling can be discouraged merely by the deduction of tax from prize money payable to a winning gambler. In other words, is the withholding of tax an appropriate measure for curbing out-of-control gambling, including the lottery? The withholding of tax will affect the winnings of a gambler, but not the amount set aside by a gambler to gamble for a particular period. Winnings will be affected, in that winners will pocket a reduced amount, and this may diminish their desire to gamble. One thing is certain, however: a withholding of tax will ensure that the State takes its share of gambling winnings from winners. The possibility of tax evasion by gambling winners is greatly reduced, and it is up to the gambling providers to account for gambling winnings and transfer the collected amount to tax authorities.

⁷⁷⁸ Minister of Finance “2010 budget speech”
<http://www.treasury.gov.za/documents/national%20budget/2010/speech/speech2010.pdf> (Date of use: 13 August 2013).

⁷⁷⁹ Minister of Finance
<http://www.treasury.gov.za/documents/national%20budget/2010/speech/speech2010.pdf> (Date of use: 13 August 2013)

⁷⁸⁰ Minister of Finance “2011 budget speech”
<http://www.treasury.gov.za/documents/national%20budget/2011/speech/speech2011.pdf> (Date of use: 13 August 2013)

⁷⁸¹ Minister of Finance
<http://www.treasury.gov.za/documents/national%20budget/2011/speech/speech2011.pdf> (Date of use: 13 August 2013)

There is no doubt that tax withholding is a successful tool in the fight against tax evasion. According to Soos, withholding tax “*provides a convenient payment method to taxpayers and enables the government to collect small amounts of tax efficiently. It speeds up tax collection, ensures a steady flow of funds to the treasury, and increases total tax revenue because of earlier receipt of tax payments. In addition, it avoids the problem of inability to pay by collecting tax before taxpayers spend their income.*”⁷⁸² A challenge to the proposed withholding of tax is its inability to allow gamblers to deduct losses before winnings can be taxed. In other words, it will not take into account gambling losses before calculation of payable gambling tax winnings is made.⁷⁸³ It is my submission that provision should be made in the Interactive Gambling Tax Bill to allow gamblers with existing gambling accounts to claim their losses whenever their gambling winnings are taxed.

In South Africa, withholding tax has been used as a tax collection method in the payment of royalties for intellectual property,⁷⁸⁴ payment for sales of immovable properties by non-residents,⁷⁸⁵ as well as taxation of foreign entertainers and sportspersons.⁷⁸⁶ Nonetheless, it can be argued that the proposed withholding of tax in the gambling sphere is a strategy employed by the government to discourage excessive gambling. In reality, this will unfortunately also affect the chances of gamblers gambling responsibly. The use of tax withholding as a means of reducing excessive gambling raises the question of whether excessive gambling can be contained by withholding tax. Perhaps the target is not tax withholding *per se*, but rather making gambling less attractive to prospective gamblers and countering its proliferation in all its various forms and facets. If excessive gambling and taxation are not linked, then the Minister’s objective will be difficult to achieve. In all, this makes

⁷⁸² Soos P “Self-employed evasion and tax withholding: a comparative study and analysis of the issues” 1990–1991 *Davies Law Review* 107–193 127. For opposite counter argument questioning the general view of withholding tax as a successful tool for tax compliance, see Martinez-Vazquez J, Harwood G and Larkins E “Withholding position and income tax compliance: some experimental evidence” 1992 *Public Finance Review* 152–174.

⁷⁸³ Zorn S “The federal income tax treatment of gambling: fairness or obsolete moralism?” 1995–1996 *Tax Lawyer* 1–54 3.

⁷⁸⁴ Section 35 of the Income Tax Act 58 of 1962, as amended, dealing with the assessment of persons not ordinarily resident or registered, managed or controlled in the Republic, who derive income from royalties or similar payments.

⁷⁸⁵ Section 35A of the Income Tax Act 58 of 1962, as amended, allows for the withholding of amounts from payments to non-resident sellers of immovable property.

⁷⁸⁶ Section 47B–E of the Income Tax Act 58 of 1962, as amended.

the mooted promulgation of a gambling tax, including the withholding of tax, something to be awaited with much anticipation. This expectation is not far-fetched as the media statement that accompanied the Taxation Laws Amendment Bill, 2012, expressly indicated that “*remaining tax proposals ... which require specific legislation (for example, the gambling tax)*” will be dealt with at a later stage.⁷⁸⁷ The Minister of Finance has since established the Davis Tax Committee to assess the “*tax policy framework and its role in supporting the objectives of inclusive growth, employment and fiscal sustainability*”.⁷⁸⁸ Although gambling taxation, as envisaged by the Minister in his budget speech, is not listed in Terms of Reference, the mandate of the Davis Tax Committee is broad enough to enable this committee to make recommendations in this regard. This will obviate and allay fears of the introduction of gambling taxation without proper consultation. Lamenting the introduction of gambling tax rules without the benefit of research to enlighten the proposed measures, Zorn warned that “*limitations on the tax treatment of gambling have been enacted with little or no legislative history, and academic attention to the subject has been largely confined to specific issues raised by court decisions*” (my emphasis).⁷⁸⁹

5.10 Conclusion

The National Gambling Amendment Act, Interactive Gambling Regulations and Interactive Gambling Tax Bill were legislative measures that were relevant to the regulation of interactive gambling at a time when little was known about the challenges of interactive gambling. With the benefit of information derived from various gambling research studies and jurisdictions regulating interactive gambling (to be discussed in the following chapter), the discussion has identified some challenges regarding:

⁷⁸⁷ National Treasury “Taxation Laws Amendment Bills, 2012: general overview” http://www.treasury.gov.za/comm_media/press/2012/2012070501.pdf (Date of use: 13 August 2013).

⁷⁸⁸ The Davis Tax Committee “Terms of reference” <http://www.taxcom.org.za/termsofreference.html> (Date of use: 07 January 2016).

⁷⁸⁹ Zorn 1995-1996 *Tax Lawyer* 2-3.

- (i) exclusion at the request of family members proving too onerous by requiring court approval before implementation; there is no indication that this has ever been applied;
- (ii) breaches of self-exclusion requests and their enforcement. Resorting to common law or legislation outside gambling to enforce self-exclusion is not ideal, especially when the provisions of the existing gambling regulatory framework regarding failure to comply with the Act can achieve the same result;
- (iii) fixing of monthly gambling limits without regard to gamblers' earning capacity may have a negative effect on the competitiveness and attractiveness of the South African gambling market. Owing to its borderless nature, interactive gambling is an inherently international market with international gamblers.
- (iv) Within the sphere of gambling, providers should be barred from doubling as credit providers. This amounts to reckless lending.
- (v) Inadequate provisions regulating advertisement, including modern forms of advertisement such as sponsorship logos espoused by interactive gambling providers in sports clubs. It is unknown whether this form of advertisement encourages gambling or not.
- (vi) Creation of a two-tier system of taxation, that is, a lower tax rate for interactive gambling and a higher tax rate for land-based gambling may give rise to constitutional difficulties. Furthermore, statements regarding the introduction of sin tax in the form of taxation of gambling winnings is worrisome.

The regulation of interactive gambling is by no means an easy task but it is not impossible. Interactive gambling is merely another mode through which gambling activities can be offered in the virtual environment facilitated by internet technology. Its regulation does not require completely new legislation distinct from the current regulatory framework for gambling. It is just unfortunate that the current regulatory framework governing gambling is in itself inadequate in addressing certain issues that would be of concern if interactive gambling was to be legalised immediately.

Despite these shortcomings, effective regulation of interactive gambling is achievable and within reach of South Africa's gambling regulatory framework.

CHAPTER 6: COMPARATIVE STUDIES ON THE REGULATION OF INTERACTIVE GAMBLING

6.1 Introduction

The emergence of interactive gambling has left many governments pondering whether to regulate or prohibit this growing segment of the gambling sector. These are governments whose legislation already contains gambling laws, but they remain unsure about the socio-economic impact of interactive gambling. The borderless nature of this activity brings it into direct competition with traditional land-based gambling establishments, which have been a source of revenue for many governments through licensing and taxation fees. More importantly, if not properly regulated, the borderless nature of this activity may result in providers offering their interactive gambling services, without ever physically placing their equipment or operations in their targeted countries. Jurisdictions such as Antigua, Costa Rica and Canada,⁷⁹⁰ amongst others, provide so-called “safe havens” for interactive gambling providers licensed to offer their gambling services to users worldwide.⁷⁹¹ These safe havens are driven more by the financial reward of serving as hosts to interactive gambling providers than by being a flourishing market for this type of gambling.⁷⁹² As Jepson observes, the licensing procedures established in these countries require negligible effort and cost.⁷⁹³ This creates challenges for countries whose citizens are lured onto the websites of interactive gambling providers situated or licensed in such safe havens. Realising the burden of carrying the costs of problem gambling while safe havens earn licensing and taxation fees, countries with discernible markets for

⁷⁹⁰ In the Province of Quebec in Canada, the Kahnawake Gambling Commission licenses entities for the provisioning of interactive gambling.

⁷⁹¹ Jepson V “Internet gambling and the Canadian conundrum” 2000 *Appeal Review of Current Law & Law Reform* 6–13 7.

⁷⁹² According to Paldam M “Safe havens in Europe: Switzerland and the ten dwarfs” 2013 *The European Journal of Comparative Economics* 377–396, a safe haven is a country that makes substantial money by exporting a problematic product to neighbouring countries, where it is restricted or illegal. In order to succeed, the safe haven keeps restriction, including tax rates, lower than in the neighbouring countries.

⁷⁹³ Jepson 2000 *Appeal Review of Current Law & Law Reform* 7.

interactive gambling have had to pronounce their legal position regarding this recreational economic activity. Such legal positions vary from prohibition to restriction and liberalising of interactive gambling.

The purpose of this chapter is to examine the approaches of a few selected countries that are deemed to have expressly responded to the emergence of interactive gambling with legislation. The chapter looks at the following:

- The prohibitive approach of the USA, in which interactive gambling is outlawed, although intrastate interactive gambling is taking place.
- The liberalised approach of the UK as a Member State within the European Union. For this purpose, the European Union's stance on gambling regulation is first examined.
- The restrictive approach of Australia, which has a licensing regime for interactive gambling, provided that it is not offered to its residents.
- The legal conundrum of Canadian law, which reflects the challenges posed by reliance on existing laws to address the legal status of interactive gambling.

In addition, the discussion will also focus on gambling taxation in the light of a two-tier system in which tax on interactive gambling is levied at a higher rate than land-based gambling. Other mooted forms of tax such as the withholding of tax that is simply the taxation of gambling winnings will be evaluated. The discussion is intended to inform policy-makers who are safeguarding the sustainability of the gambling sector.

6.2 The USA's approach to interactive gambling

If the legal position of interactive gambling in the USA was uncertain prior to 2006, the enactment of the Unlawful Internet Gambling Enforcement Act (UIGEA)⁷⁹⁴ made it even murkier as a result of its reliance on federal or state legislation for the

⁷⁹⁴ Unlawful Internet Gambling Enforcement Act of 2006 (31 U.S.C. Sections 5361-5367).

prohibition of interactive gambling.⁷⁹⁵ Up until the passing of the UIGEA, the Wire Act⁷⁹⁶ was the basis for the prohibition of interactive gambling. This Act criminalises the use of a wire communication facility in interstate commerce to place a bet or wager on any sporting event or contest, unless the transmission is for *bona fide* news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event, where such betting is legal in both the jurisdiction from which the information is transmitted and the jurisdiction in which it is received. In criminalising such activity, the Act provides that:

*Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.*⁷⁹⁷

However, the interpretation of the Wire Act in *In re MasterCard Int'l, et al.*⁷⁹⁸ changed the landscape of interactive gambling prohibition. The main issue was whether the Wire Act applies only to gambling on sporting events, such as betting on football games, or to all forms of gambling, including casino games such as poker that have become popular in interactive gambling. The 2nd Circuit Court held that the Wire Act did not apply to non-sporting interactive gambling, thereby leaving non-sporting games such as poker unaffected by the Act.⁷⁹⁹ This was confirmed on appeal by the 5th Circuit Court, which held that the Wire Act only prohibited sports betting, not interactive gambling on a game of chance.⁸⁰⁰ Nevertheless, the US Department of Justice is insistent that the Wire Act applies to all forms of gambling.⁸⁰¹ It relies upon,

⁷⁹⁵ Ciaccio C, Jr. "Internet gambling: recent developments and state of the law" 2010 *Bekerley Technology Law Journal* 529–553, wondered whether interactive gambling is legal in the USA, owing to the patchwork of regulation created before and after the UIGEA that is not navigable. He laments the legal ambiguity created by federal gambling statutes.

⁷⁹⁶ Wire Act (18 U.S.C. § 1084).

⁷⁹⁷ Wire Act (18 U.S.C. § 1084(a)).

⁷⁹⁸ *In re MasterCard Int'l, et al.*, 132 F. Supp. 2d 468,472 (E.D. La. 2001). The case is also discussed at length by Walsh E "In re MasterCard International, Inc.: the inapplicability of the Wire Act to traditional casino-style games" 2002 *J. Marshall J. Computer & Info. L.* 445–470.

⁷⁹⁹ *In re MasterCard Int'l, et al.*, 132 F. Supp. 2d 468,472 (E.D. La. 2001) [2].

⁸⁰⁰ *In re Mastercard International, Inc., v. Internet Gambling Litigation aff'd* 313 F.3d 257 (5th Cir. 2002).

⁸⁰¹ Ciaccio 2010 *Bekerley Technology Law Journal* 538.

amongst others, *United States v. Lombardo*,⁸⁰² which ruled that the Wire Act applies to every form of gambling that involves wire transmissions in interstate or foreign commerce, and not just to gambling on non-sporting events. The federal courts' different interpretation of the Wire Act has not been helpful in bringing legal certainty on which forms of gambling are prohibited. Unfortunately, the US Supreme Court was not called upon to clarify this divergent interpretation of the Wire Act.

The passing of the UIGEA was perceived by law enforcement agencies and, to a certain degree, by the gambling fraternity to bring legal certainty to this ambiguity. Many perceived the UIGEA to be a panacea for the banning of interactive gambling.⁸⁰³ Nevertheless, it failed to fulfil this expectation and proved to be merely a secondary legislation intended to enforce federal or state law that prohibited interactive gambling, rather than a principal legislation directly prohibiting interactive gambling.⁸⁰⁴

The UIGEA's prohibition of interactive gambling is dependent upon federal or state law making internet gambling unlawful. In other words, there must be a violation of existing federal or state anti-interactive gambling laws for the UIGEA to become applicable.⁸⁰⁵ It is therefore a secondary legislation intended to reinforce existing primary laws (that is, existing state or federal laws). The UIGEA requires interactive gambling to be unlawful under either federal or state law, in order to trigger criminal liability.⁸⁰⁶ Where such law is non-existent or permits interactive gambling, UIGEA's application is obsolete and wanting, to say the least. Its reliance on federal or state laws is apparent from its definition, which fails to give a succinct definition of what

⁸⁰² *United States v. Lombardo*, 639 F. Supp. 2d 1271, 1275 (D. Utah 2007). Other cases include *United States v Cohen* 260 F.3d 68 (2d Cir. 2001).

⁸⁰³ Blankenship M "The Unlawful Internet Gambling Enforcement Act: a bad gambling act? You betcha!" 2007–2008 *Rutgers Law Review* 485–518 492.

⁸⁰⁴ Murawski M "The online gambling wager: domestic and international implications of the Unlawful Internet Gambling Enforcement Act of 2006" 2008 *Santa Clara Law Review* 441–471 443.

⁸⁰⁵ Crutchfield R "Folding a losing hand: why Congress should replace the Unlawful Internet Gambling Reinforcement Act with a regulatory scheme 2009 *Tulsa L. Rev* 161–190 164.

⁸⁰⁶ Alexander G "The U.S. on tilt: why the Unlawful Internet Gambling Enforcement Act is a bad bet" 2008 *Duke Law & Technology Review* <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1181&context=dltr> (Date of use: 20 February 2015)

constitutes unlawful internet gambling. It interprets unlawful internet gambling as follows:

*To place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made.*⁸⁰⁷

In general, the UIGEA's attempted criminalisation of interactive gambling is skewed, in that instead of unconditionally prohibiting acceptance, transmission or receiving of an internet bet or wager, its prohibition applies only if such an internet bet or wager is unlawful under the federal or state law.

Gambling providers are barred from accepting funds, electronic fund transfers, cheques or any financial transaction in relation to "unlawful internet gambling". In terms of the prohibition of such flows of funds, the UIGEA states the following:

No person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling –

(1) credit, or the proceeds of credit, extended to or on behalf of such other person (including credit extended through the use of a credit card);

(2) an electronic fund transfer, or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service, from or on behalf of such other person;

(3) any check, draft, or similar instrument which is drawn by or on behalf of such other person and is drawn on or payable at or through any financial institution; or

*(4) the proceeds of any other form of financial transaction, as the Secretary and the Board of Governors of the Federal Reserve System may jointly prescribe by regulation, which involves a financial institution as a pay or financial intermediary on behalf of or for the benefit of such other person.*⁸⁰⁸

Equally, financial transaction providers (that is, financial institutions such as banks) are barred from accepting, facilitating or transmitting financial transactions relating to "unlawful internet gambling". In terms of UIGEA, financial transaction providers are required "*to identify and block or otherwise prevent or prohibit restricted transactions*

⁸⁰⁷ Section 5362 (10)(A) of Unlawful Internet Gambling Enforcement Act of 2006.

⁸⁰⁸ Section 5363 of Unlawful Internet Gambling Enforcement Act of 2006.

through the establishment of policies and procedures reasonably designed to identify and block or otherwise prevent or prohibit the acceptance of restricted transactions".⁸⁰⁹ The UIGEA's objective, as observed by Blankenship, was ultimately to cut off the flow of money to and from interactive gamblers using US-based banking institutions.⁸¹⁰

It is clear from these provisions that the prohibition is not directed at the gambler, but rather at interactive gambling providers and any financial institutions facilitating such payments. In other words, gamblers will not be penalised for depositing money for the purposes of unlawful gambling, while banks and gambling operators face severe sanctions if they process or transmit such payments. Commentators have highlighted this as one of the UIGEA's weaknesses, as it does not deter gamblers from indulging in interactive gambling.⁸¹¹ It is an offence for interactive gambling providers or any financial institution to contravene this prohibition, but the same cannot be said for gamblers.⁸¹² In other words, the UIGEA does not make it an offence for a gambler to indulge in interactive gambling, since the prohibition is directed at "persons engaged in the business of betting or wagering" and financial institutions.⁸¹³ The offence is for accepting, facilitating or transmitting payment in unlawful internet gambling by financial institutions. Practically, this implies that the latter would not transmit payment in respect of unlawful internet gambling to gamblers lest it violates UIGEA.

Certain states within the USA, such as Delaware (enacted 29 Del. C. §§4801–4835 in June 2012), Nevada (enacted NRS 463.745–463.785 in 2011) and New Jersey

⁸⁰⁹ Section 5364 of Unlawful Internet Gambling Enforcement Act of 2006.

⁸¹⁰ Blankenship 2007–2008 *Rutgers Law Review* 492.

⁸¹¹ Crutchfield 2009 *Tulsa L. Rev* 164.

⁸¹² Section 5366 of Unlawful Internet Gambling Enforcement Act of 2006 makes it an offence to accept payment, by providing thus: "Any person who violates section 5363 shall be fined ... or imprisoned for not more than 5 years or both".

⁸¹³ Crutchfield 2009 *Tulsa Law Review* 164 argues that the offence created by the Unlawful Internet Gambling Enforcement Act of 2006 is for accepting a financial instrument for unlawful interactive gambling. According to Rose N "Viewpoint: The Unlawful Internet Gambling Enforcement Act of 2006 analyzed" 2006 *Gaming Law Review* 537–541 539 noted as follows: "... for a law designed to stop the flow of money, it is bizarre to make it a crime only to receive the funds, but not to send them or transmit them: Neither the gambler nor the intermediary can be charged with this crime." Humphrey C "Internet gambling funding ban" <http://www.gambling-law-us.com/Federal-Laws/internet-gambling-ban.htm> (Date of use: 20 November 2014) argued that "mere participation in online betting or wagering is not banned or criminalized by UIGEA".

(enacted N.J. Rev. Stat. §§5.12–95.17–5.12–95.33 in February 2013) have taken advantage of the UIGEA’s reliance on existing federal or state anti-interactive gambling laws to regulate intrastate interactive gambling.⁸¹⁴ These states have enacted laws that will allow casinos operating in their jurisdictions to offer interactive gambling to those residents who are registered as gamblers. In its definition of “unlawful internet gambling”, the UIGEA specifically excludes interactive gambling conducted solely within the boundaries of a state or tribal laws.⁸¹⁵ This has been interpreted as an implicit recognition of the state or tribe’s power to regulate interactive gambling.⁸¹⁶ Accordingly, the UIGEA does not prohibit intrastate interactive gambling, provided that mechanisms for gambler registration, age and location verification are in place.⁸¹⁷ Nevada will be discussed as an example of an American state that has used the provisions of the UIGEA to its advantage. It used the latitude in the Act to openly apply its own interpretation of UIGEA regarding legality of interactive gambling, and enacted legislation giving effect to intrastate interactive gambling within its jurisdiction.⁸¹⁸

⁸¹⁴ There are dozens of media announcements heralding a new era of interactive casinos in the USA – see also Sportsmoney “Online gaming legalized in New Jersey and Virgin, others building virtual boardwalk empires” <http://www.forbes.com/sites/darrenheitner/2014/02/04/is-interactive-gambling-virgin-on-new-territory-in-the-garden-state/> (Date of use: 20 November 2014) and Palmeri C “New Jersey Governor signs Bill allowing online gambling” <http://www.bloomberg.com/news/2013-02-26/new-jersey-governor-christie-signs-law-allowing-online-bets-1-.html> (Date of use: 20 November 2014).

⁸¹⁵ Section 5362(10)(B) of Unlawful Internet Gambling Enforcement Act of 2006 entitled ‘intrastate transactions’ states as follows: “*The term ‘unlawful internet gambling’ does not include placing, receiving, or otherwise transmitting a bet or wager where—*

- (i) *the bet or wager is initiated and received or otherwise made exclusively within a single State;*
- (ii) *the bet or wager and the method by which the bet or wager is initiated and received or otherwise made is expressly authorized by and placed in accordance with the laws of such State.”*

⁸¹⁶ American Gaming Association *White paper: online gambling five years after UIGEA* (American Gaming Association 2011) 7.

⁸¹⁷ Conon J “Aces and eights: why the Unlawful Internet Gambling Enforcement Act resides in ‘dead man’s land’ in attempting to further curb online gambling and why expanded criminalization is preferable to legalization” 2009 *The Journal of Criminal Law and Criminology* 1158–1194 1164.

⁸¹⁸ Nevada Gaming Commission and Nevada Gaming Control Board *Internet gaming prepared for the meeting of the Gaming Policy Committee* (March 2012) table 2 in which the State of Nevada, tasked the office of its Attorney General to prepare a legal opinion regarding “legality of internet gaming including online-gambling” in the face of Unlawful Internet Gambling Enforcement Act of 2006 and Wire Act (18 U.S.C. § 1084). It concluded that both the Unlawful Internet Gambling Enforcement Act of 2006 and Wire Act (18 U.S.C. § 1084) do not prohibit intrastate interactive gambling. Based on this opinion, it passed legislation giving effect to regulation of intrastate interactive gambling in its jurisdiction.

6.2.1 State of Nevada's regulatory framework for interactive gambling

Nevada responded to legal uncertainties created by the UIGEA by passing the Interactive Gaming Act,⁸¹⁹ publicly declaring its readiness to regulate intrastate interactive gambling.⁸²⁰ This Act introduces a licence regime for those seeking to operate interactive gambling within its borders, to manufacture gambling or associated equipment, or to act as a service provider for interactive gambling. The Interactive Gaming Act, which is administered by the Nevada Gaming Commission, authorises the State of Nevada to put in place a “necessary structure for licensure, regulation as well as enforcement”. While regulation is done on an on-going basis, the Interactive Gaming Act must not be read in isolation, as it is an amendment to the Nevada Gaming Control Act, which regulates the provision of gambling throughout Nevada.

Subsequent to the Interactive Gaming Act, the Nevada Gaming Commission adopted Regulation 5A⁸²¹ and Technical Standard 6,⁸²² governing the licensing and operation of interactive gambling. Regulation 5 specifically governs the provisioning or operation of interactive gambling, while Technical Standard 6 focuses on gambling systems and associated equipment for the operation of interactive gambling. Interactive gambling is provided through licensed casinos, and operators are bound to establish, maintain, implement and comply with set rules and standards promoting responsible gambling practices. This includes, but is not limited to, allowing gamblers to self-exclude or set limits for gambling, and prohibiting both excluded and non-adults from gambling.

⁸¹⁹ Interactive Gaming Act of 2011 (NRS 463.745–463.785).

⁸²⁰ Interactive Gaming Act of 2011 NRS 463.745 declares: “*The State of Nevada leads the nation in gaming regulation and enforcement, such that the State of Nevada is uniquely positioned to develop an effective and comprehensive regulatory structure related to interactive gaming*”.

⁸²¹ Regulation 5A entitled Operation of Interactive Gaming issued under the Regulations of the Nevada Gaming Commission and State Gaming Control Board. Regulation 5A was adopted on 22 December 2011 and became effective immediately.

⁸²² Technical Standard 6, Interactive Gaming Systems and Associated Equipment issued under Regulation 14 of the Regulations of the Nevada Gaming Commission and State Gaming Control Board. Technical Standard 6 was adopted on 27 January 2012 and became effective from 08 April 2012. Relevant provisions of Technical Standards 6 as well as Regulation 5A are discussed at length by Gambling Compliance *U.S. online responsible gaming regulations: Delaware, Nevada and New Jersey* (January 2014).

According to the provisions of Regulation 5, gamblers who have chosen to self-exclude from gambling must serve a mandatory minimum suspension of 30 days before they are allowed to resume playing.⁸²³ It is the duty of the interactive gambling operator to deny self-excluded gamblers from gaining access to the gambling websites.⁸²⁴ Nevertheless, it is not clear how a gambler excluded from one gambling website will be prevented from registering on another as there is no central register of excluded persons. During the self-exclusion period, the interactive gambling system must block the transmission of any marketing material or promotions to the gambler in question.⁸²⁵ This is achieved by removing the self-excluded gambler from the mailing and marketing lists.

In order to enable gamblers to control their gambling habits, Regulation 5 requires interactive gambling providers to offer interactive tools that allow for the setting of monetary gambling limits, including limits on deposits, losses, number of tournaments that are taken part in, play time limits/duration, *etcetera*.⁸²⁶ When these set-limits are exceeded, the system must block the gambler and immediately notify him/her of the resultant termination.⁸²⁷ Regulation 5 makes it possible for gamblers to draw account statements detailing their interactive gambling activity for any specified time period.⁸²⁸ The minimum information to be contained in the account statement includes, but is not limited to, the following:

- deposits;
- withdrawals;
- total amount wagered in each session;
- total winnings in each session;
- bonus credits issued to the account;
- bonus credits wagered;

⁸²³ Regulation 5A 130(1)(d) of Regulations of the Nevada Gaming Commission and State Gaming Control Board.

⁸²⁴ Regulation 5A 130(1) of Regulations of the Nevada Gaming Commission and State Gaming Control Board.

⁸²⁵ Regulation 5A.130(2) of Regulations of the Nevada Gaming Commission and State Gaming Control Board.

⁸²⁶ Regulation 5A.120(13)(a–f) of Regulations of the Nevada Gaming Commission and State Gaming Control Board.

⁸²⁷ Technical Standard 6.120(2)(e) issued under Regulation 14 of the Regulations of the Nevada Gaming Commission and State Gaming Control Board.

⁸²⁸ Technical Standard 6.110 issued under Regulation 14 of the Regulations of the Nevada Gaming Commission and State Gaming Control Board.

- Manual adjustments or modifications to the gambling account.⁸²⁹

Regulation 5 has also made strides in ensuring that gamblers are continuously reminded of responsible gambling practices. The home page of each gambling website is required to contain information regarding problem gambling or links to websites containing such information, where gamblers can seek help for addiction or related negative effects of gambling.⁸³⁰

6.2.2 Concluding remarks on the USA's approach to gambling and interactive gambling

Until such time as the US Supreme Court is petitioned with a legal challenge regarding the interpretation and scope of the Wire Act and UIGEA or the Congress enacts legislation establishing the legal position of interactive gambling, states in the US with no primary legislation prohibiting interactive gambling may follow in the footsteps of Nevada and pursue intrastate interactive gambling. It is almost five years since the passing of the Interactive Gambling Act and the Department of Justice, which has a different opinion⁸³¹ regarding interactive gambling, has not challenged Nevada's legislation regulating intrastate interactive gambling. The UIGEA's non-prohibition of intrastate interactive gambling is slowly eroding its firm stance on interactive gambling. It is now up to individual states to decide whether or not to follow Nevada, New Jersey and Delaware in their licensing of interactive casinos.

In summation, the US' prohibition of interactive gambling does not apply to intrastate interactive gambling. In terms of UIGEA, the term unlawful internet gambling does not include placing, receiving or otherwise transmitting a bet or wager where such bet or wager is initiated and received or otherwise made exclusively within a single

⁸²⁹ Technical Standard 6.110 (11)(a-h) issued under Regulation 14 of the Regulations of the Nevada Gaming Commission and State Gaming Control Board.

⁸³⁰ Regulation 5A 150(6) (b and d) of Regulations of the Nevada Gaming Commission and State Gaming Control Board.

⁸³¹ Ciaccio 2010 *Berkeley Technology Law Journal* 538.

State and is expressly authorised by and placed in accordance with the laws of such State.⁸³²

6.3 The European Union's approach to gambling and interactive gambling

The European Union⁸³³ is an international structure established through various treaties, which integrates European countries, referred to as member states, into a single market, in order for them to pursue and cooperate on matters of common interest.⁸³⁴ Through the Treaty on European Union, member states confer their sovereign powers in matters of mutual interest upon the Union and subject themselves to its dictates.⁸³⁵ On the other hand, the Treaty on the Functioning of the European Union ("TFEU") serves to enable the functioning of the Union and determines its areas and delimitations, and arrangements for exercising its competences.⁸³⁶ The TFEU provides for various freedoms, such as the free movement of goods, persons, capital and services.⁸³⁷ These freedoms allow member states to perform cross-border activities within the European Union. Tensions between member states caused by the enforcement of the provisions of the EU's treaties are referred to its adjudicative body, the Court of Justice of the European Union ("CJEU"). Within these freedoms, gambling has been confirmed by

⁸³² Section 10(B)(i-ii) of Unlawful Internet Gambling Enforcement Act of 2006.

⁸³³ The European Union is established by notably the Treaty on European Union and Treaty on the Functioning of the European Union. The Treaty on European Union was signed on 7 February 1992, in Maastricht, Netherlands. It is an integration of numerous treaties giving birth to the European Union. The European Union was conceived as a result of the European Coal and Steel Community Treaty signed in 1951 by France, Germany, Italy, Belgium, Luxembourg and the Netherlands, in order to cooperate in the areas of coal and steel production. During the period 1957–1958, a treaty establishing the European Economic Community was concluded. This treaty was amended and replaced with the Treaty on the Functioning of the European Union. Today, the Treaty on European Union and Treaty on the Functioning of the European Union ("TFEU") are still notable treaties governing the European Union.

⁸³⁴ Current member states of the EU are Belgium, France, Germany, Italy, Luxembourg, Netherlands (considered as founding members and forming what is today known as the EU in 1957), Denmark, Ireland and the United Kingdom (all joining in 1973), Greece (joining in 1981), Portugal and Spain (all joining in 1986), Austria, Finland, Sweden (all joining in 1995), Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic, Slovenia (all joining in 2004), Bulgaria, Romania (all joining in 2007) and Croatia (joining in 2013).

⁸³⁵ Article 1 of the Treaty on European Union.

⁸³⁶ Article 1 of TFEU.

⁸³⁷ Article 26 (2) of TFEU provides thus: "*The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties*".

the CJEU as a service within the EU's internal market, and has therefore been deservedly protected under its treaties.⁸³⁸

With the freedom to provide services in the European Union, nationals – including corporations – of a member state are given permission to receive or supply services to and from any member states, without having to establish its agency, branch or subsidiary in the latter's territory. This freedom is enshrined in Article 56 of TFEU, which reads as follows:

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.”

Article 56 serves to prevent any member state from denying EU nationals the freedom to provide or receive services in its territory on the basis that they are not citizens of the member state that is denying them such right.⁸³⁹ The actual responsibility of member states was clarified by the CJEU as follows:

*“The Article requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State, but also the abolition of any restriction, on the freedom to provide services imposed on the ground that the person providing a service is established in a Member State other than the one in which the service is provided. In particular, the Member State cannot make the performance of the services in its territory subject to observance of all the conditions required for establishment; were it to do so the provisions securing freedom to provide services would be deprived of all practical effect”.*⁸⁴⁰

The freedom to offer gambling services in the EU was confirmed by the CJEU in a number of cases, including *Her Majesty's Customs and Excise v Gerhard Schindler*

⁸³⁸ CJEU decisions in *Her Majesty's Customs and Excise v Gerhard Schindler and Jörg Schindler* C – 275/92 dated 24 March 1994 and *Questore di Vereona v Diego Zenatti* C–67–98 dated 21 October 1999 are some of the cases clarifying the legal position of gambling within the European Union.

⁸³⁹ *Diaconu M International trade in gambling services* (Kluwer Law International BV, The Netherlands 2010) 146.

⁸⁴⁰ *Commission of the European Communities v French Republic* C–154/89 [12] and *Commission v Luxembourg* C–445/03 [20].

and Jörg Schindler.⁸⁴¹ This case involved the importation of a lottery, lawfully conducted in Germany, to UK nationals by the respondents.⁸⁴² UK laws governing gambling (that is, the Revenue Act of 1898, together with the Lotteries and Amusement Act of 1976, prior to its amendment by the National Lotteries Act of 1993) precluded the importation of any lottery or form of gaming not governed by its laws into its market. The respondents were promoting the lotteries of a German-based company and selling those lottery tickets in the UK.⁸⁴³ The main issue before the CJEU was whether or not the aforesaid UK laws (national laws) prohibiting the foreign lottery of a member state (in this case Germany) in the UK violated the freedom to provide service, as enshrined in Article 56 of the TFEU.⁸⁴⁴ In order to answer this question, the CJEU had to decide whether or not this lottery conducted in Germany and made available in the UK constituted service, and was therefore in line with the provisions of Article 56. The CJEU held that lotteries were to “be regarded as ‘services’ within the meaning of Article 57”.⁸⁴⁵ Article 57 construes services to mean services “normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons”. In this case, lotteries or gambling, as the CJEU explained, were thus not activities relating to goods,⁸⁴⁶ but to services.⁸⁴⁷ The CJEU held that UK laws governing gambling were an obstacle to freedom of services,⁸⁴⁸ nevertheless they were justifiable “in view of the concerns of social policy and of the prevention of fraud” and accordingly not precluded by the provisions of the treaty regarding freedom of services.⁸⁴⁹ For this reason, the UK was absolved from accepting the lottery conducted in Germany.

⁸⁴¹ *Her Majesty’s Customs and Excise v Gerhard Schindler and Jörg Schindler* C–275/92 dated 24 March 1994.

⁸⁴² *Her Majesty’s Customs and Excise v Gerhard Schindler and Jörg Schindler* C–275/92 [2].

⁸⁴³ *Her Majesty’s Customs and Excise v Gerhard Schindler and Jörg Schindler* C–275/92 [3].

⁸⁴⁴ *Her Majesty’s Customs and Excise v Gerhard Schindler and Jörg Schindler* C–275/92 [1].

⁸⁴⁵ *Her Majesty’s Customs and Excise v Gerhard Schindler and Jörg Schindler* C–275/92 [25].

⁸⁴⁶ *Her Majesty’s Customs and Excise v Gerhard Schindler and Jörg Schindler* C–275/92 [24].

⁸⁴⁷ In *Her Majesty’s Customs and Excise v Gerhard Schindler and Jörg Schindler* C–275/92 [27–29], the court explained that: “*The services at issue are those provided by the operator of the lottery to enable purchasers of tickets to participate in a game of chance with the hope of winning, by arranging for that purpose for the stakes to be collected, the draws to be organised and the prizes or winnings to be ascertained and paid out. Those services are normally provided for remuneration constituted by the price of the lottery ticket. The services in question are cross-border services when, as in the main proceedings, they are offered in a Member State other than that in which the lottery operator is established.*”

⁸⁴⁸ *Her Majesty’s Customs and Excise v Gerhard Schindler and Jörg Schindler* C–275/92 [45].

⁸⁴⁹ *Her Majesty’s Customs and Excise v Gerhard Schindler and Jörg Schindler* C–275/92 [63].

Secondly, the question as to whether or not gambling falls within the scope of freedom of services arose in *Questore di Vereona v Diego Zenatti*,⁸⁵⁰ which dealt with Italian legislation that prevented Zenatti from acting as an intermediary in Italy for a UK company taking bets on sporting events.⁸⁵¹ Article 49 enshrined the “freedom of establishment”, which effectively prohibits the placing of restrictions on corporations or nationals established in one member state that wish to extend or offer their services to nationals or corporations in other member states.⁸⁵² The CJEU confirmed its earlier decision, taken in *Her Majesty’s Customs and Excise v Gerhard Schindler and Jörg Schindler*, namely that freedom to provide services also applies to gambling activities. It added that an activity that enables people to participate in gambling in return for remuneration falls within the freedom to provide services if at least one of the providers is established in a member state other than that in which the service is offered.⁸⁵³ This case emphasised the freedom of establishment, by making it clear that corporations established in one member state would not be denied the freedom to set up an agency or subsidiary in another member state, in order to pursue business within the scope of the freedom to provide services.

Generally, interactive gambling is deemed to be a subset of traditional land-based gambling,⁸⁵⁴ and it can therefore be argued that the CJEU’s earlier decision on gambling would apply equally to it. Nevertheless, the case of *Liga Portuguesa de Futebol Profissional (CA/LPFP) and Baw International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa*,⁸⁵⁵ which concerned the provision of

⁸⁵⁰ *Questore di Vereona v Diego Zenatti* C–67–98 dated 21 October 1999.

⁸⁵¹ *Questore di Vereona v Diego Zenatti* C–67–98 [2].

⁸⁵² Article 49 of Treaty on the Functioning of the European Union entitled ‘right of establishment’ states thus:

“Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings ... under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.”

⁸⁵³ *Questore di Vereona v Diego Zenatti* C–67–98 [24].

⁸⁵⁴ Casabona S *The EU’s online gambling regulatory approach and the crisis of legal modernity* (EU Centre in Singapore Working Paper No. 19 January 2014) 2.

⁸⁵⁵ *Liga Portuguesa de Futebol Profissional (CA/LPFP) and Baw International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* C–42/07 dated 8 September 2009.

gambling services via the internet, that is, interactive gambling, provided much needed clarity on whether interactive gambling as a service in the EU market merits protection under the freedom to provide services. Baw International Ltd (“Bwin”), an on-line gambling company registered in Gibraltar, offered its interactive gambling services in Portugal. In the promotion of these services, Bwin sponsored the football league of Portugal in return for the display of the Bwin logo on the jerseys of Liga Portuguesa’s football clubs.⁸⁵⁶ Bwin and Liga Portuguesa were fined €74 500 and €75 000 respectively⁸⁵⁷ for violating Portuguese law, which conferred on its state monopoly, Santa Casa, exclusive rights for the operation of interactive gambling.⁸⁵⁸ The CJEU had to decide, amongst others, whether or not Portuguese law restricted Bwin from exercising the freedom to provide services on the basis that it was not established in its territory.⁸⁵⁹ It is submitted that the CJEU correctly held that Portuguese law prohibiting providers (in this case Bwin) that were established in one member state from offering, via the internet, services in the territory of another member state, constituted a restriction on the freedom to provide services.⁸⁶⁰

The CJEU proceeded to enquire as to whether or not this restriction in terms of Portuguese law might be justified on the grounds of public policy, public security or public health. Article 52 of TFEU allows for restrictive measures/laws if they can be justified on one of the above grounds. It provides thus:

(1) The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.

(2) The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the coordination of the abovementioned provisions.

⁸⁵⁶ *Liga Portuguesa de Futebol Profissional (CA/LPFP) and Baw International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* C-42/07 [25].

⁸⁵⁷ *Liga Portuguesa de Futebol Profissional (CA/LPFP) and Baw International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* C-42/07 [26].

⁸⁵⁸ Decree-Law No 322/91 of 26 August 1991 adopting the statutes of Santa Casa da Misericórdia de Lisboa as amended by Decree-Law No 469/99 of 6 November 1999.

⁸⁵⁹ *Liga Portuguesa de Futebol Profissional (CA/LPFP) and Baw International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* C-42/07 [50].

⁸⁶⁰ *Liga Portuguesa de Futebol Profissional (CA/LPFP) and Baw International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* C-42/07 [52].

The Portuguese government had argued that its gambling laws granting exclusive rights to Santa Casa to provide interactive gambling services were intended “to fight against crime, more specifically the protection of consumers of games of chance against fraud on the part of operators”.⁸⁶¹ According to the Portuguese government, this exclusive system had the advantage of confining the availability of interactive gambling to controlled and regulated channels, and thereby reducing the risk of crime. The CJEU conceded that Portugal’s restrictive measures/laws might have been appropriate for the protection of its consumers against fraud on the part of operators. In conclusion, it held that:

“Article 56 does not preclude legislation of a Member State, such as that at issue in the main proceedings, which prohibits operators such as Bwin, which are established in other Member States, in which they lawfully provide similar services, from offering games of chance via the internet within the territory of that Member State (my emphasis)”.⁸⁶²

As a result of the many cases, including those involving gambling, which had been heard by the CJEU with regard to the enforcement of the freedom to provide services, as well as the freedom of establishment under the TFEU, the European Parliament realised that a reliance on the CJEU to remove barriers to the enforcement of these two freedoms on a case-by-case basis was less than ideal and only resulted in legal uncertainty.⁸⁶³ In accordance with the principle of subsidiarity, which enables the EU to take action in matters not falling within its exclusive jurisdiction, but which cannot be adequately achieved by member states,⁸⁶⁴ the European Parliament passed the Directive on Services in the Internal Market in December 2006.⁸⁶⁵ This directive only covers services that are performed for

⁸⁶¹ *Liga Portuguesa de Futebol Profissional (CA/LPFP) and Baw International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* C-42/07 [62].

⁸⁶² *Liga Portuguesa de Futebol Profissional (CA/LPFP) and Baw International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* C-42/07 [73].

⁸⁶³ Article 5 of the Directive 2006/123/EC of the European Parliament and of the Council.

⁸⁶⁴ Article 5 of the Treaty on the European Union states as follows: “Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”.

⁸⁶⁵ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (27/12/2006) *Official Journal of the European Union* L376.

economic purposes.⁸⁶⁶ These are services that constitute the heartbeat of the EU's economic growth and account for 70% of the gross domestic product and employment in most member states.⁸⁶⁷ The purpose of the directive is to remove barriers restricting the freedom to provide services within the EU⁸⁶⁸ and to provide a general legal framework encompassing a wide variety of service activities, which is vital in order to achieve a genuine internal market.⁸⁶⁹ More importantly, the directive calls for the harmonisation of national laws and administrative cooperation in the provision of the freedom to provide services.⁸⁷⁰ Unfortunately, gambling is excluded from the scope of this directive.⁸⁷¹ The exclusion is partly the result of considerable differences in member states' public order requirements and different taxation regimes, which would make it difficult to achieve the harmonisation of gambling.⁸⁷² The result of this exclusion implies that member states are free to regulate gambling.

6.3.1 The European Union's shift towards the harmonisation of interactive gambling regulation

The EU has no uniform approach to the regulation of interactive gambling, let alone traditional gambling. Any member state is free to regulate the provision of interactive gambling services in its territory, provided that its national regulatory regime complies with the fundamental freedoms enshrined in the TFEU. This does not mean that the EU has folded its arms, other than referring national laws seeking to regulate interactive gambling to its adjudication body, the CJEU, in order to determine compliance with the provisions of TFEU. In 2011, the European Commission

⁸⁶⁶ Article 17 of the Directive 2006/123/EC of the European Parliament and of the Council.

⁸⁶⁷ Article 4 of the Directive 2006/123/EC of the European Parliament and of the Council.

⁸⁶⁸ Article 5 of the Directive 2006/123/EC of the European Parliament and of the Council.

⁸⁶⁹ Article 7 of the Directive 2006/123/EC of the European Parliament and of the Council.

⁸⁷⁰ Article 7 of the Directive 2006/123/EC of the European Parliament and of the Council.

⁸⁷¹ Article 25 of the Directive 2006/123/EC of the European Parliament and of the Council states thus: *"Gambling activities, including lottery and betting transactions, should be excluded from the scope of this Directive in view of the specific nature of these activities, which entail implementation by Member States of policies relating to public policy and consumer protection"*.

⁸⁷² Diaconu *International trade in gambling services* 203 provides additional wording to Article 25 of the Directive, which gives insight into the exclusion of gambling from the scope of this Directive. She adds that: *"In addition, given the considerable disparities in the taxation of gambling activities, which are at least partly related to differences in Member States' public order requirements, it would be totally impossible to establish fair cross-border competition between operators in the gaming industry without either first or simultaneously dealing with questions of fiscal cohesion between Member States"*.

published a consultation paper on interactive gambling in the internal market.⁸⁷³ It must be emphasised that the purpose of this paper was in no way aimed at deregulating or liberalising interactive gambling; rather, its purpose was to “*identify if the current rules applicable to on-line gambling services at EU level are fit to ensure the overall co-existence of the national systems and determine if greater cooperation at EU level might help Member States to achieve more effectively the objectives of their gambling policy*”.⁸⁷⁴ This consultation culminated in the adoption of a resolution on interactive gambling by the European Parliament.⁸⁷⁵

The European Parliament acknowledges interactive gambling as a growing sector that is not covered by the Directive on Services in the Internal Market⁸⁷⁶, which resulted in different forms of regulation being applied by member states. Furthermore, it takes cognisance of the fact that the principle of mutual recognition of licences in the gambling sector does not apply.⁸⁷⁷ In other words, a gambling licence issued in one member state does not entitle its holder to operate in another member state. Any operator seeking to operate in the territory of another member state must obtain a licence issued by the latter, unless exempted by the rules/laws of such member state. Owing to the risks posed by the interactive gambling sector, which the EU considers to be unusual in an ordinary economic sector, consumers should be adequately protected from illegal interactive operators. As member states are free to regulate interactive gambling, the resolution advocates for measures aimed at the protection of consumers,⁸⁷⁸ compliance with EU law,⁸⁷⁹ administrative cooperation among member states,⁸⁸⁰ and the prevention of money laundering,⁸⁸¹ amongst others.

⁸⁷³ European Commission *On-line* 1–35.

⁸⁷⁴ European Commission *On-line gambling* 6.

⁸⁷⁵ European Parliament *Resolution on online gambling in the internal market* (adopted on 10 September 2013) replacing European Parliament resolution of 15 November 2011 on online gambling in the internal market [2011/2084(INI)] (31/05/2013) *Official Journal of the European Union* C153E.

⁸⁷⁶ European Parliament *Online gambling* [E–F].

⁸⁷⁷ European Parliament *Online gambling* [E–F].

⁸⁷⁸ European Parliament *Online gambling* [1–27].

⁸⁷⁹ European Parliament *Online gambling* [28–33].

⁸⁸⁰ European Parliament *Online gambling* [34–42].

⁸⁸¹ European Parliament *Online gambling* [43–48].

Thus far, the resolution remains the only formal position adopted by the EU on interactive gambling, with member states retaining exclusive powers to legislate on interactive gambling in their jurisdictions. It is no surprise that Europe has a mixed approach to interactive gambling regulation. For this reason, it is important to consider the legal framework of one member state, the United Kingdom⁸⁸² as, in the researcher's view it is a champion for the liberalisation and legalisation of interactive gambling.

In conclusion, the issue of whether or not interactive gambling can be properly regulated and its associated gambling risks be reduced will depend on the legislative measures of each member state.

6.3.2 The UK's approach to interactive gambling

The UK has established itself as a leading destination for the liberalisation, legalisation and regulation of interactive gambling. It has embraced the benefits of technological advancement, which have altered the landscape of gambling. Instead of resisting the waves of interactive technology in the gambling sphere, it has relentlessly pursued ways in which to maximise the potential benefits to be gained from the regulation of interactive gambling.⁸⁸³ If this was a race, the UK would have made it to the finishing line with its gradual regulation of interactive gambling, including taxation and licensing fees. The UK has endeavoured to include responsible gambling practices and safety measures in its regulatory framework. The emphasis is on provisions that embrace responsible gambling practices including harm minimisation efforts.

⁸⁸² The United Kingdom joined the European Union on 1 January 1973 together with Denmark and Ireland – European Union “The history of the European Union” http://europa.eu/about-eu/eu-history/index_en.htm (Date of use: 18 March 2015).

⁸⁸³ Light R “The Gambling Act: regulatory containment and market control” 2007 *Modern Law Review* 626–653 644.

6.3.2.1 UK's Gambling Act⁸⁸⁴

In the UK, interactive gambling is legalised in terms of the Gambling Act of 2005, which empowers the Gambling Commission to issue various types of operating licences for gambling purposes.⁸⁸⁵ Such licences include a remote operating licence that authorises “remote gambling”.⁸⁸⁶ The Gambling Act defines “remote gambling” as gambling that is facilitated by remote communication. Included in this form of communication is the internet, telephone, television, radio or any kind of electronics or technology for facilitating communication.⁸⁸⁷ Technical modalities concerning whether or not a particular form of communication qualifies as a remote communication are left up to the Secretary of State to advise by means of regulation.⁸⁸⁸ In order to avoid any uncertainty regarding its type, any operating licence issued in accordance with this Act specifies whether or not it is a remote operating licence.⁸⁸⁹

In general, the Gambling Act makes allowance for holders of remote operating licences issued under this Act to have at least one piece of their remote gambling equipment used for activities licensed therein, situated in the UK.⁸⁹⁰ However, the Gambling Commission may waive such condition or requirement based on its licensing objectives.⁸⁹¹ With these provisions, the Gambling Act ushered in the availability of interactive gambling services or, as they refer to it, “remote gambling services” in the UK. Doors to interactive gambling were opened to operators who were willing to subject themselves to the script of the Gambling Act and the scrutiny of the Gambling Commission, enabling them to provide their services inside or outside the UK. Unless a foreign jurisdiction is designated as a “prohibited territory” in terms of this Act, UK-based interactive gambling operators are free to extend their interactive gambling services to foreign jurisdictions; it is an offence for UK-based

⁸⁸⁴ Gambling Act of 2005 (Chapter 19) signed on the 07 April 2005 and came into force on 1 September 2007.

⁸⁸⁵ Section 65 of the Gambling Act, 2005.

⁸⁸⁶ Section 67 of the Gambling Act, 2005.

⁸⁸⁷ Section 4 of the Gambling Act, 2005.

⁸⁸⁸ Section 4(3) of the Gambling Act, 2005.

⁸⁸⁹ Section 67(3) of the Gambling Act, 2005.

⁸⁹⁰ Section 89(2) of the Gambling Act, 2005.

⁸⁹¹ Section 89(3) of the Gambling Act, 2005.

interactive gambling operators to offer their gambling services in a “prohibited territory”.⁸⁹²

Broad as it is, the Gambling Act (prior to the 2014 legislation) created a regulator scheme in which interactive gambling providers licensed in EEA States,⁸⁹³ Gibraltar and countries whose regulatory regime was approved by UK (the so-called “white-listed States”)⁸⁹⁴ were allowed to offer their interactive gambling services to UK-based customers.⁸⁹⁵ The consequences of this were somewhat regrettable – many of the larger operators relocated to offshore jurisdictions such as Gibraltar and “white-listed States”,⁸⁹⁶ which were considered to have lower tax rates and greater prospects for increased revenue. The exodus of gambling operators from the UK translated, in economic terms, into the loss of revenue in the mode of licensing and taxation fees. This resulted in more than 80% of the UK’s interactive gambling market being serviced by operators licensed outside the UK.⁸⁹⁷ Furthermore, interactive operators based in EEA states, Gibraltar or those included in its “white-list states” could advertise in the UK without having to obtain a licence issued by the UK’s Gambling Commission. Ordinarily, it is an offence to advertise without this licence,⁸⁹⁸ and this provision becomes applicable to interactive gambling if at least one piece of “remote gambling equipment to be used in providing facilities for the advertised gambling” is situated in the UK.⁸⁹⁹

⁸⁹² Section 44 of the Gambling Act, 2005.

⁸⁹³ EEA State refers to a country which is a contracting party to the Agreement on the European Economic Area.

⁸⁹⁴ Countries with broadly comparable standards of gambling regulation designated by the Secretary of State to advertise in the UK as if they were licensed by the UK’s Gambling Commission. These countries included Antigua and Barbuda, the Isle of Man, the States of Alderney and Tasmania.

⁸⁹⁵ Section 331(4) of the Gambling Act, 2005.

⁸⁹⁶ *Gibraltar Betting and Gaming Association Ltd v Secretary of State for Culture Media and Sport* [2014] EWHC 3236 (Admin); [2015] 1 CMLR 28 [4].

⁸⁹⁷ (UK) Gambling Commission *Annual Review* (2013/2014) 19 and House of Commons – Culture, Media and Sport Committee *Pre-legislative scrutiny of the draft Gambling (Advertising and Licensing) Bill* (Sixth Report of Sessions 2012–2013) 3.

⁸⁹⁸ Section 330 of the Gambling Act, 2005.

⁸⁹⁹ Section 331 of the Gambling Act, 2005.

6.3.2.2 UK's Gambling (Licensing and Advertising) Act⁹⁰⁰

In an attempt to identify interactive gambling operators preying on UK-based gamblers and to subject them to the jurisdiction of its Gambling Commission, the government passed the Gambling (Licensing and Advertising) Act in 2014.⁹⁰¹ This extends the scope of the UK's interactive gambling regulation and effectively brings to an end the listing of countries permitted to offer interactive gambling services in its jurisdiction – the so-called white-listed states. It now compels any interactive gambling operators offering or seeking to offer their services in the UK to be licenced by the UK's Gambling Commission.⁹⁰² This applies even if such an operator has no equipment located in the UK.⁹⁰³ Failure to obtain a licence issued by the Gambling Commission where such interactive gambling services are used or likely to be used in the UK constitutes an offence.⁹⁰⁴ Nor does it end there, according to the Gambling Commission, because “as from January 2015 its licence holders will be required to obtain software from its licensed supplier thus providing another important compliance lever”.⁹⁰⁵ By implication, the Gambling (Licensing and Advertising) Act has subjected non-UK based interactive gambling operators to the jurisdiction of its Gambling Commission,⁹⁰⁶ with the latter boasting that:

*Repatriation of the regulation of the 85% of the remote gambling market currently provided by overseas operators will give the Commission direct access to and oversight of virtually all commercial gambling provided to those in Britain. As a result we will be far better placed to respond to and advise the government on gambler protection and other emerging risks and issues.*⁹⁰⁷

⁹⁰⁰ Gambling (Licensing and Advertisement) Act of 2014 signed on 14 May 2014.

⁹⁰¹ House of Commons *Draft Gambling (Advertising and Licensing) Bill* 12–13.

⁹⁰² Section 1 of the Gambling (Licensing and Advertising) Act 2014. Wessing T “Fundamental changes to the way online gambling is regulated in Great Britain: a summary” http://www.taylorwessing.com/download/article_changes_gambling_gb.html (Date obtained: 20 September 2013).

⁹⁰³ Chairman and Chief Executive's statement contained in the (UK) Gambling Commission *Annual Reports & Accounts* (2013/2014) 8.

⁹⁰⁴ Section 33 of the Gambling Act, 2005, read together with changes brought by Gambling (Licensing and Advertising) Act, 2014.

⁹⁰⁵ (UK) Gambling Commission *Annual Review* 19.

⁹⁰⁶ Tench D & Davies L “Challenging the UK's proposed long arm gambling licensing legislation” 2014 *European Gaming Lawyer* 37–38.

⁹⁰⁷ (UK) Gambling Commission *Annual Review* 8.

It is no secret that the UK's approach of bringing foreign-based interactive gambling operators within the direct control of the Gambling Commission is motivated in part by an expected financial windfall in the form of licence and taxation fees.⁹⁰⁸ Nevertheless, the UK government maintains that "*bringing all operators serving UK customers within its tax net is a consequence, but not the prime motivation*" of the Gambling (Licensing and Advertising) Act.⁹⁰⁹ The UK government maintains that its motive is to ensure that interactive gambling companies doing business in the UK are subjected to the same legislative requirements, regardless of their location.⁹¹⁰

The regulatory scheme introduced by the Gambling (Licensing and Advertising) Act elicited a backlash from the Gibraltar Betting and Gaming Association, with the latter taking the UK's government to court in *Gibraltar Betting and Gaming Association Ltd v Secretary of State for Culture Media and Sport*.⁹¹¹ Gibraltar Betting and Gaming Association challenged the legality of the legislative framework introduced by the Gambling (Licensing and Advertising) Act, which "*changes a system of regulation based upon place of supply to one based upon place of consumption*".⁹¹² It argued that by requiring all gambling operators to comply with the UK's legislative scheme, in particular to have a licence issued by the Gambling Commission for operators offering or advertising their gambling services in that country, the UK government had failed to take into account that "*off-shore interactive gambling service providers are already subject to (extensive) regulatory burdens in their primary place of operation*".⁹¹³ Accordingly, it seeks a relief declaring the entire regulatory scheme unlawful on the basis that it is a disproportionate restriction on the freedom to provide services guaranteed by Article 56 of the TFEU.⁹¹⁴ The court ruled that the regulatory regime introduced by the Gambling (Licensing and Advertising) Act "is neither disproportionate nor discriminatory", reasoning that the regulatory regime

⁹⁰⁸ House of Commons *Draft Gambling (Advertising and Licensing) Bill* 3.

⁹⁰⁹ House of Commons *Draft Gambling (Advertising and Licensing) Bill* 27.

⁹¹⁰ House of Commons *Draft Gambling (Advertising and Licensing) Bill* 19.

⁹¹¹ *Gibraltar Betting and Gaming Association Ltd v Secretary of State for Culture Media and Sport* [2014] EWHC 3236 (Admin); [2015] 1 CMLR 28.

⁹¹² *Gibraltar Betting and Gaming Association Ltd v Secretary of State for Culture Media and Sport* [2014] EWHC 3236 (Admin); [2015] 1 CMLR [4].

⁹¹³ *Gibraltar Betting and Gaming Association Ltd v Secretary of State for Culture Media and Sport* [2014] EWHC 3236 (Admin); [2015] 1 CMLR [7].

⁹¹⁴ *Gibraltar Betting and Gaming Association Ltd v Secretary of State for Culture Media and Sport* [2014] EWHC 3236 (Admin); [2015] 1 CMLR [8].

served a series of legitimate objectives and there was no reason to doubt parliament's judgement in this regard.⁹¹⁵ Accordingly, Gibraltar's application for judicial review could not succeed.⁹¹⁶

Apart from compliance with both the Gambling Act and the Gambling (Advertising and Licensing) Act, foreign-based operators serving the UK would also be required to comply with the Licensing Conditions and Codes of Practice issued by the Gambling Commission. The Licensing Conditions and Codes of Practice set technical standards and codes of practice for gambling operators.

6.3.2.3 UK's Licensing Conditions and Codes of Practice

In the UK, the Gambling Commission has the power to issue codes of practice for the manner in which gambling facilities are offered under its licence regime.⁹¹⁷ In 2007, the Gambling Commission published its first Licence Conditions and Codes of Practice ("LCCP").⁹¹⁸ In September 2014, the Gambling Commission updated its LCCP to address, amongst others, comments raised during a parliamentary debate on the Gambling (Licensing and Advertising) Act.⁹¹⁹ The LCCP contains several provisions concerning responsible gambling practices and safety measures. It is the purpose of the discussion here to assess such measures in so far as they could strengthen South Africa's position if and when the regulation of interactive gambling receives the green light from relevant authorities. It must be pointed out that only those provisions relating to interactive gambling will be considered in this regard.

It has become a regulatory practice for providers of interactive gambling to know their "customers", by requiring them to register and open gambling accounts. The

⁹¹⁵ *Gibraltar Betting and Gaming Association Ltd v Secretary of State for Culture Media and Sport* [2014] EWHC 3236 (Admin); [2015] 1 CMLR [14].

⁹¹⁶ *Gibraltar Betting and Gaming Association Ltd v Secretary of State for Culture Media and Sport* [2014] EWHC 3236 (Admin); [2015] 1 CMLR [268].

⁹¹⁷ Section 24 of the Gambling Act, 2005. However, a failure to comply with a code of practice does not *per se* make a person liable for criminal or civil proceedings.

⁹¹⁸ Gambling Commission *Proposed amendments to licence conditions and codes of practice (LCCP) for all operators: response document – Part 1*, 5.

⁹¹⁹ (UK) Gambling Commission *Licence Conditions and Codes of Practice* (May 2014) 1.

registration process allows for the verification of information such as age and location. The LCCP is no exception to this regulatory practice. It places the onus on its licensees to ensure that interactive gamblers have concluded a contract before gambling on their premises. Other than requiring that the contractual terms upon which gambling is offered should not be unfair, as required by the UK's law on contract, the LCCP does not dictate or stipulate the terms of the gambling contract.⁹²⁰ Nevertheless, the contractual information furnished by gamblers should enable licensees to discharge their obligations, in so far as reporting suspected cases of money laundering, problem gambling and complaints made by gamblers, as well as suspected cheating, to the Gambling Commission.⁹²¹

Aware of the challenges of preventing the socio-economic ills of gambling, such as problem gambling, the LCCP encourages its "licensees" (that is, in this case the UK's licensed interactive gambling operators) to implement policies and procedures intended to promote socially responsible gambling.⁹²² It leaves it to the licensees to set their own policies and procedures. It is the duty of licensed operators to determine how they will contribute to research, public awareness and funding of socially responsible gambling. There is no procedure or standard for the identification and treatment of problem gambling prescribed by the LCCP. Nevertheless, the licensees' own policies and procedures must include a commitment to and an indication of how they will contribute to the identification and treatment of problem gamblers.⁹²³

In order to give effect to the provisions of the Gambling Act, making it an offence to cause or permit a child or minor to gamble,⁹²⁴ the LCCP requires that interactive gambling licensees develop policies and procedures designed to prevent underage gambling, and to self-monitor the effectiveness of these policies.⁹²⁵ The procedures should include age verification. If it is found that a gambler is underage (that is, not

⁹²⁰ Licence condition 7.1.1 of Licence Conditions and Codes of Practice.

⁹²¹ Licence condition 3.1.2 of Licence Conditions and Codes of Practice.

⁹²² Social responsibility code provision 3.1.1 of Licence Conditions and Codes of Practice.

⁹²³ Social responsibility code provision 3.2.11 of Licence Conditions and Codes of Practice.

⁹²⁴ Section 46(1) of the Gambling Act, 2005.

⁹²⁵ Social responsibility code provision 3.1.1 of Licence Conditions and Codes of Practice.

yet 18 years of age, as required by the Gambling Act⁹²⁶), the gambling accounts of the underage gamblers should be closed and any deposits currently in the gambling account returned to the gambler.⁹²⁷ No winnings are paid out, however.⁹²⁸ No mention is made of gambling losses incurred. In other words, licensees are allowed to retain this undue enrichment at the expense of underage gamblers, as if the former is not at fault at all. While acknowledging that no single regulation in the world requires the reimbursement of gambling losses incurred by underage gambler(s), it would not be unethical to prevent gambling operators from unduly benefitting from the losses of minors.

Responsible gambling is best achieved when gamblers know when to quit. In an effort to help gamblers to exercise such responsibility, licensees are directed to make responsible gambling information readily available to them.⁹²⁹ Such information should include the following: (a) measures provided by the licensee to help individuals monitor or control their gambling, such as restricting the duration of a gambling session or the amount of money they can spend; (b) timers or other forms of reminders or “reality checks” where available; (c) self-exclusion options; and (d) information about the availability of further help or advice.⁹³⁰

The LCCP provides for the self-exclusion of gamblers by requiring licensees to put into effect procedures for such self-exclusion.⁹³¹ Upon request for self-exclusion, licensees must take all reasonable measures to prevent gamblers from gaining access to the licensees’ gambling websites.⁹³² Other steps include immediate closure of a gambler’s account, return of deposits held in a gambler’s account; his/her removal from the marketing and promotional database. The LCCP prescribes a minimum period for self-exclusion of six months, with a gambler given the option to extend his/her exclusion to a maximum of five years.⁹³³ It is disconcerting to note,

⁹²⁶ Section 45 of the Gambling Act, 2005.

⁹²⁷ Social responsibility code provision 3.2.11 of Licence Conditions and Codes of Practice.

⁹²⁸ Social responsibility code provision 3.2.11 of Licence Conditions and Codes of Practice.

⁹²⁹ Social responsibility code provision 3.3.1 of Licence Conditions and Codes of Practice.

⁹³⁰ Social responsibility code provision 3.3.1 (2a–d) of Licence Conditions and Codes of Practice.

⁹³¹ Social responsibility code provision 3.5.3 and Ordinary code provision 3.5.4 of Licence Conditions and Codes of Practice.

⁹³² Social responsibility code provision 3.5.3 of Licence Conditions and Codes of Practice

⁹³³ Ordinary code provision 3.5.4(6(a) of Licence Conditions and Codes of Practice.

however, that this self-exclusion applies only to the gambling provider to which the self-excluded gambler has applied. The LCCP expressly leaves it up to the excluded gambler to extend his/her exclusion to other interactive gambling operators he/she may currently be using.⁹³⁴

The provision of responsible gambling practices and safety measures is an on-going exercise and no single jurisdiction has adequately addressed the potential risks of interactive gambling; the UK is no exception. Providing credit for the purpose of gambling is an irresponsible practice that can only exacerbate problem gambling. To its credit, the LCCP bans the provision of credit in connection with gambling by its licensees.⁹³⁵ Nevertheless, LCCP's provisions regarding self-exclusion, detailing the closure of the gambling account of a self-excluded gambler, raise doubts as to whether the ban on giving credit for gambling purposes applies to interactive gambling. It provides in part that:

Where the giving of credit is permitted, the licensee may retain details of the amount owed to them by the individual, although the account must not be active⁹³⁶ (my emphasis).

Even if it applies, the aforesaid provision creates a *lacuna* for provision of credit that is self-contradictory.

As far as the protection of gamblers is concerned, the LCCP makes it one of the licence conditions for interactive gambling operators to segregate the gambling accounts of gamblers from ordinary bank accounts.⁹³⁷ According to the Gambling Commission, the aim is to deter these operators from dipping into gamblers' funds.⁹³⁸ This is a standard practice in interactive gambling, where gamblers are required to open a gambling account solely dedicated to their gambling activities. It makes no difference that the LCCP labels it the "protection of customers' funds". What matters most is the control of the account by a gambler and the prevention of exploitation of the account information by gambling providers, such as enticing the former, through marketing materials, to gamble the deposits remaining in their

⁹³⁴ Ordinary code provision 3.5.4 (3) of Licence Conditions and Codes of Practice.

⁹³⁵ Licence condition 6.1.1 of Licence Conditions and Codes of Practice.

⁹³⁶ Social responsibility code provision 3.5.3 (5) of Licence Conditions and Codes of Practice.

⁹³⁷ Licence condition 4.1.1 of Licence Conditions and Codes of Practice.

⁹³⁸ (UK) Gambling Commission *Annual Review* 10.

gambling account. These are pertinent issues that the UK needs to consider when it comes to the “protection of customer funds”.

6.3.2.4 Concluding remarks on the UK’s approach to interactive gambling

The UK’s gambling legislation makes unequivocal provision for interactive gambling, thereby making it one of the leaders within the European Union in having an articulated policy regulating this form of gambling activity. The UK’s position is a reflection of the dominant view within the EU that there is a need to embrace technological developments in the gambling sphere and seize opportunities (that is, economic spin-offs) arising from them. As previously mentioned, it is up to member states within the EU to regulate or prohibit interactive gambling and where they regulate, to devise and implement responsible gambling practices and safety measures, in order to protect gamblers from the risks associated with this activity.

With the UK requiring any operator offering or advertising its interactive gambling services in its jurisdiction to be licensed by its Gambling Commission, it has the unenviable task of policing the world of interactive gambling.⁹³⁹ There are countless numbers of unlicensed and/or illegal interactive gambling providers across the globe targeting flourishing gambling markets such as the UK and it will be almost impossible for this country to subject them to its regulatory regime. In order to succeed, the UK will require cooperation from other countries that regulate interactive gambling. As observed in the case of *Gibraltar Betting and Gaming Association Ltd v Secretary of State for Culture Media and Sport*, certain foreign gambling operators are resistant to dual licensing. Nevertheless, the strides made in the UK in the regulation of interactive gambling are commendable and difficult to ignore.

⁹³⁹ Schneider S “The fight over point-of-consumption vs point-of-supply taxation in the UK heats up” 2014 *Gaming Law Review and Economics* 791–792.

6.4 Australia's approach to interactive gambling

Australia's legal stance on interactive gambling is relevant to South Africa, in that both countries prohibit the provision of interactive gambling services to their residents, although the former has amended its legislation to allow its licensed gambling operators to provide interactive gambling services to customers situated outside Australia.⁹⁴⁰ Concerned about the proliferation of gambling opportunities and the growing number of its citizens involved in an unregulated interactive gambling environment, Australia undertook a review of its regulatory framework. This review exposed the weaknesses of their current regulatory approach, in particular the challenges of enforcing the prohibition of interactive gambling. Prohibition holds the treat of Australia losing a sizeable income to offshore interactive gambling providers, who may lure Australia-based residents to their gambling websites.⁹⁴¹

Nevertheless, the review provides both a foundation and a motivation for liberalising gambling laws, thereby allowing regulated interactive gambling.

6.4.1 Australia's Interactive Gambling Act⁹⁴²

Australia regulates interactive gambling through the Interactive Gambling Act ("IGA"). The IGA is a legislative tool designed to curb the potential increase in the accessibility of interactive gambling, which if not kept in check, will exacerbate problem gambling among Australians.⁹⁴³ This objective is stated in the Revised Explanatory Memorandum to the IGA. It states thus:

The Government is 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 in Australia. The Government is also mindful of the need

⁹⁴⁰ Section 15 of Australia's Interactive Gambling Act 84 of 2001.

⁹⁴¹ Reports emanating from Australia indicate that in 2010, Australians spent AUD\$968 million gambling on unregulated and offshore websites. This figure is expected to rise by 10–20% each year as interactive gambling extends its reach – Gainsbury 2010 *Gambling Research* 3–12.

⁹⁴² Interactive Gambling Act 84 of 2001, as amended.

⁹⁴³ Jolly J "The safest bet: revisiting the regulation of internet gambling in Australia" 2011 *Gaming Law Review and Economics* 441–453 441.

*not to place undue burdens on Australia's communications industries. It hence seeks a strategy for restricting Australian's access to interactive gambling while balancing the interests of the information economy.*⁹⁴⁴

The IGA regulates interactive gambling services in two respects:

- Firstly, by prohibiting interactive gambling operators, regardless of their location, from providing interactive gambling services to any gambler based in Australia (that is, any gambler based or located in Australia).
- Secondly, by prohibiting Australian-licensed interactive gambling operators from making their interactive gambling services available to gamblers in designated countries (designation implies that such country has requested that no interactive gambling services be offered within its shores).⁹⁴⁵

In order to enforce these prohibitions, the IGA criminalises the provision of interactive gambling services to Australian-based gamblers.⁹⁴⁶ It targets the supply rather than the demand of interactive gambling. The offence provision applies to the providers of interactive gambling services and not consumers, that is, gamblers.⁹⁴⁷

There is nothing in the IGA that prevents Australian-based gamblers from accessing interactive gambling services. The criminalisation of the provision of interactive gambling services applies both to local (that is, Australian-based) and international interactive gambling operators. Prohibition aimed at operators based outside its territory is over zealous and difficult to enforce, unless a cooperative agreement exists between the enforcement country (in this case Australia) and a host country (that is, the country where the interactive gambling operator's website is located).⁹⁴⁸

A successful trend is to filter and block websites providing "prohibited internet gambling services". Not every interactive gambling service is prohibited by the IGA,

⁹⁴⁴ The Parliament of the Commonwealth of Australia, House of Representatives *Interactive Gambling Bill 2001: Revised Explanatory Memorandum* 7.

⁹⁴⁵ Section 3 of Interactive Gambling Act 84 of 2001.

⁹⁴⁶ Section 15 of Interactive Gambling Act 84 of 2001 provides: "A person is guilty of an offence if (a) the person intentionally provides an interactive gambling service; and (b) the service has an Australian-customer link".

⁹⁴⁷ Parliamentary Joint Select Committee on Gambling *Interactive and online gambling* 118.

⁹⁴⁸ Miller J & Tetstall J "Virtual currency and Australia's Interactive Gambling Act" 2013 *iGaming Business* 18–19 attest to the fact that only offshore providers that have a connection with Australia are likely to be prosecuted.

which clearly makes exceptions to its “prohibited internet gambling services”.⁹⁴⁹ For this purpose, the IGA defines “prohibited internet gambling services” as gambling services offered through an Internet service provider and capable of being accessed by Australian-based customers.⁹⁵⁰ The excluded “internet gambling services” include telephone betting services; wagering services;⁹⁵¹ excluded gaming services;⁹⁵² services that have a designated broadcasting or datacasting link;⁹⁵³ lottery services; and services that are related to entering into a contract of financial products governed by Australia’s Corporations Act. Accordingly, interactive gambling websites that offer interactive casino games such as poker, roulette, bingo, blackjack and virtual electronic games are forbidden by the IGA.⁹⁵⁴ It is important to note that the IGA succeeded only in preventing Australian-based companies from providing interactive gambling services to Australians.

In addition to criminalising the provision of interactive gambling services within Australia, the IGA makes it an offence for Australian-based interactive gambling operators to provide interactive gambling services to a “designated country”.⁹⁵⁵ For this purpose, the IGA empowers the Minister to declare a foreign country a designated country. Any country seeking to prevent Australia-based operators from luring their citizens to gamble on its website must submit a request for designation

⁹⁴⁹ Section 6(3) of Interactive Gambling Act 84 of 2001.

⁹⁵⁰ Section 6(1)(b–c) of Interactive Gambling Act 84 of 2001.

⁹⁵¹ Section 8A of Interactive Gambling Act 84 of 2001 prohibits “in-play” or “in-the-run” sports wagering using the internet, but permits this type of wagering when it is conducted telephonically. According to the Parliamentary Joint Select Committee on Gambling *Interactive and online gambling* 119 – “*Online wagering services before an event/match commences are permitted. However, 'in-play' wagering on the outcome of an event, that is, betting on the outcome of an event online, after the event has started, is prohibited but customers can use telephone or in person (for example, TAB) for such bets. Further 'ball-by-ball' betting is permitted via the telephone or in person (for example, TAB) during the event/match, however, this wagering (for example, who will score the first try) in the online format is not permitted during the event. In simple terms, the following is allowed: (i) telephone betting on sport and racing both before play and during the course of play; and (ii) online betting on sport and racing before play or racing.*”

⁹⁵² An excluded gaming service includes a service for the conduct of a game where (i) the game is played for money or anything else of value; and (ii) the game is a game of chance or of mixed chance and skill; and (iii) a customer of the service gives or agrees to give consideration to play or enter the game.

⁹⁵³ In terms of section 8C of Interactive Gambling Act 84 of 2001, the purpose of the gambling service must be the promotion of goods or services (other than gambling services) that are the subject of advertisements broadcast via a broadcasting service, and the gambling service is associated with these advertisements.

⁹⁵⁴ Miller and Tetstall 2013 *iGaming Business* 19.

⁹⁵⁵ Section 9A of Interactive Gambling Act 84 of 2001.

from the government of Australia.⁹⁵⁶ It is a requirement that the requesting country has an interactive gambling legislation mirroring the IGA; in other words, it must equally prohibit its locally based operators from luring Australia-based gamblers.⁹⁵⁷ It is no surprise that no single country has been designated in terms of the IGA.⁹⁵⁸ As Vuaren states, “Australia is without friends in banning interactive gambling”.⁹⁵⁹ If truth be told, there are countries banning interactive gambling, but none of them will subject themselves to the legal measures prescribed by the IGA. If Australia is keen to cooperate with other countries in stemming the spread of unlicensed or unregulated interactive gambling, it should consider a more accommodating approach.

The IGA also prohibits the advertisement/broadcasting of “prohibited internet gambling services” within Australia.⁹⁶⁰ This prohibition applies to all forms of advertising, whether they are in print or electronic format. It therefore follows that this prohibition cannot apply to advertisements published or transmitted outside Australia.

6.4.2 Outcomes of the review process of the Interactive Gambling Act

In August 2011, Australia’s Department of Broadband, Communications and the Digital Economy, which is responsible for gambling, commenced with a review of the IGA. In principle, the IGA was not intended to ban the provision of interactive gambling holistically, but merely to limit its availability to Australians.⁹⁶¹ At the time of its enactment, Australians’ spending on interactive gambling (which is illegal) for the year 2010 was estimated at AUD\$968 million yet this could not persuade the government to change its position prohibiting provisioning of interactive gambling to customers in Australia.⁹⁶² According to critics, the IGA is a “testimony to the lost

⁹⁵⁶ Section 9A(3)(a) of Interactive Gambling Act 84 of 2001.

⁹⁵⁷ Section 9A(3)(b) of the Interactive Gambling Act 84 of 2001.

⁹⁵⁸ Parliamentary Joint Select Committee on Gambling *Interactive and online gambling* 126.

⁹⁵⁹ Vuaren D “The banning of internet gambling in Australia: the Interactive Gambling Act 2001” 2002 *Gaming Law Review* 207–212.

⁹⁶⁰ Part 7A of Interactive Gambling Act 84 of 2001.

⁹⁶¹ Jolly 2011 *Gaming Law Review and Economics* 441.

⁹⁶² Gainsbury 2010 *Gambling Research* 3–4.

opportunity for enforcement and realistic control of the internet gambling industry in Australia".⁹⁶³ By starting on this shaky ground, the IGA was destined for review in many years to come.⁹⁶⁴ Amongst other reasons, the review was necessitated by the Productivity Commission Inquiry Report on Gambling,⁹⁶⁵ which made recommendations for the review of new gambling opportunities, in particular those targeting youths, with the view to developing a national regulatory approach. This recommendation put the IGA squarely within the focus of such review. The review culminated in the publication of the final report in 2012, which was entitled Review of the Interactive Gambling Act 2001.⁹⁶⁶

The main purpose of the review was to consider and report on

- The growth of interactive gambling services (both regulated and unregulated) worldwide;
- The growing number of Australians gambling interactively in an unregulated environment and the risks they were exposed to, in particular problem gambling;
- The difficulties of enforcing the existing prohibition against certain types of interactive gambling.⁹⁶⁷

Recommendations were made that would eventually prove that regulation was more effective than prohibition. Instead of making a holistic decision on whether or not interactive gambling should be regulated in all its forms, the review sought to look at specific types of interactive gambling prohibited by the IGA and, based on its risks, to make recommendations.⁹⁶⁸ It was the recommendation made with respect to poker

⁹⁶³ Vuaren 2002 *Gaming Law Review* 207.

⁹⁶⁴ Interactive Gambling Act 84 of 2001 was first reviewed in 2004 – see Parliamentary Joint Select Committee on Gambling *Interactive and online gambling* 125.

⁹⁶⁵ Australian Government Productivity Commission *Productivity Commission Inquiry Report on Gambling*. The Productivity Commission is described as the Australian government's principal review and advisory body on micro economic policy, regulation and a host of social and environmental issues.

⁹⁶⁶ Department of Broadband, Communications and the Digital Economy *Interactive Gambling Act*.

⁹⁶⁷ Terms of reference released by the Minister of Broadband, Communications and the Digital Economy, Senator Stephen Conroy on 19 August 2011 http://www.dbcde.gov.au/broadband/online_gambling/2011_review_of_the_interactive_gambling_act_2001 (Date of use: 03 February 2015).

⁹⁶⁸ Department of Broadband, Communications and the Digital Economy *Interactive Gambling Act* 14–16.

that paved the way for Australia's intended approach to interactive gambling regulation. In this regard, it was recommended that the IGA be amended "*to enable and encourage (currently prohibited) interactive gaming sites (as well as currently licensed sites that prevent Australians from accessing their interactive poker tournaments) to become licensed in Australia on condition that they cease offering higher-risk interactive gaming services to Australians and only offer interactive tournament poker (that is, the lowest risk type of interactive gaming)*".⁹⁶⁹ Australia is intent on allowing only those interactive gambling activities that present few risks to its citizenry. It is aware of the popularity of interactive gambling among its citizens and the difficult task of putting an end to their participation. It concedes in the review report that Australians are likely to continue to use interactive gambling services in growing numbers, "possibly associated with a relative decline in such gaming at bricks and mortar gaming providers".⁹⁷⁰ This is consistent with the Productivity Commission Report into Gambling, which observed the following:

*Australian consumption of interactive gaming has grown and will continue to do so, making the prohibition less effective over time.*⁹⁷¹

Interactive gambling has expanded exponentially among Australians, with a reported 2170 gambling websites targeting Australians based in 75 jurisdictions (that is, by August 2013), in contravention of the IGA.⁹⁷² The prohibitive stance adopted by the IGA has driven Australian interactive gamblers to seek recreational refuge in offshore gambling websites. Being unlicensed in Australia, offshore gambling websites are not subject to Australia's measures for harm minimisation. This means only one thing, namely that Australians are exposed to the dangers or risks of interactive gambling.⁹⁷³ More concerning, however, is the fact that they are without legislative recourse, even though the mere act of gambling interactively is not *per se* illegal (only the provision of interactive gambling services is illegal in Australia). For this reason, recommendations 2 and 3 call respectively for the licensing of interactive

⁹⁶⁹ Department of Broadband, Communications and the Digital Economy *Interactive Gambling Act 2001* 119.

⁹⁷⁰ Department of Broadband, Communications and the Digital Economy *Interactive Gambling Act 2001* 14.

⁹⁷¹ Productivity Commission *Gambling vol. 2* 15.18.

⁹⁷² Gambling Research Australia *Interactive gambling* (March 2014) 8.

⁹⁷³ Gainsbury 2010 *Gambling Research* 4–5 warns of non-regulated interactive gambling websites that provide no platform for customer protection and responsible gambling policies. Unscrupulous operators of non-regulated gambling websites may even cheat gamblers who would be left with little to no recourse in resolving disputes.

gambling providers under the IGA and proposed “harm minimisation and consumer protection measures”.⁹⁷⁴ In summary, the proposed measures and standards cover the following: displaying of responsible gambling messages; self-limit programmes such as monetary and time limits; identity and age verification, particularly when opening gambling accounts; exclusion database for gamblers to self-exclude; display of losses and profits incurred by a gambler; and alerting gamblers who show signs of problem gambling.

6.4.3 Concluding remarks on Australia’s approach to interactive gambling

The fact that the IGA has not been amended significantly since its inception should not be perceived as a sign of its approval by the Australian gambling populace. The ongoing reviews conducted after its enactment are a reflection of a positive attitude towards regulation. It has been realised, in government circles, that in its present form, the IGA is fast losing its objective of limiting the availability of interactive gambling activities to its gambling populace.⁹⁷⁵ In the Review of the Interactive Gambling Act published in 2012, the Australian government conceded that there may be around 2200 sites offering interactive gaming services to Australians despite prohibition by the IGA.⁹⁷⁶ Although not implemented, the review recommended the regulation of interactive gambling services that are low-risk, such as interactive poker. This is an acknowledgement that the IGA is ineffective and that the liberalisation of interactive gambling is inevitable.⁹⁷⁷ The legalisation of interactive gambling will lead to controlled regulation and provide Australians with safer platforms for interactive gambling. Through licensing, smart, responsible gambling practices and measures can be prescribed. The fact that interactive gambling is prohibited means that, from an economic perspective, Australia stands to lose from possible taxation and licensing fees.

⁹⁷⁴ Department of Broadband, Communications and the Digital Economy *Interactive Gambling Act* 8.

⁹⁷⁵ Nettleton J & Camilleri M “Calling a bluff? Developments in internet gaming law in Australia” 2011 *Gaming Law Review and Economics* 717–718.

⁹⁷⁶ Department of Broadband, Communications and the Digital Economy *Interactive Gambling Act* 2001 14.

⁹⁷⁷ Gambling Research Australia *Interactive gambling* 7.

Without responsible gambling measures and standards, which are the foundation of any legalised and regulated interactive gambling, Australia's approach may be viewed by sceptics as offering little to South Africa in its quest for the regulation of interactive gambling. On the contrary, however, Australia's approach gives credence to the argument that the legislative prohibition of interactive gambling is almost impossible to enforce. This is a challenge faced by regulators all over the world, mainly because of the borderless nature of this activity, which allows providers to be licensed in offshore countries and still provide gambling services to targeted gambling residents of any jurisdiction. Australia's approach only serves to bar locally-based operators from making their interactive gambling services available to local residents, but does not bar these residents from gambling on offshore websites. Prohibition delays regulators in the development of responsible gambling practices and safety measures to alleviate problem gambling, which leaves interactive gamblers more vulnerable than if interactive gambling was properly regulated. Rather than protecting its citizens from negative experiences by prohibition, this leaves its citizens open to bad practices that cannot be controlled. As Gainsbury warns, non-regulated interactive gambling websites provide no platform for customer protection or responsible gambling policies.⁹⁷⁸

Although not a great deal has been reported regarding the implementation of the recommendations made in the Review of Interactive Gambling Act, South Africa should take note of the fact that Australia seems to have changed its stand on prohibition by investigating responsible gambling practices and safety measures to regulate interactive games such as poker.

6.5 Canada's ambivalence towards interactive gambling

Interactive gambling may be one of the fastest growing sectors in the world,⁹⁷⁹ but not all countries feel the need to respond legislatively to its occurrence in their jurisdictions. Canada's strategy towards interactive gambling is completely

⁹⁷⁸ Gainsbury 2010 *Gambling Research* 4-5.

⁹⁷⁹ Observation made by European Parliament in its Resolution on interactive gambling in the internal market 12.

inadequate⁹⁸⁰ and is no model for any jurisdiction concerned with creating regulatory certainty. The discussion of Canada's strategy is relevant in so far as it has resulted in the unwitting provision of a safe haven for interactive gambling operators looking for relaxed interactive gambling regulation with lower tax rates and operating costs. Legally speaking, Canada's gambling law makes interactive gambling illegal, yet in one of its territories occupied by its aboriginal tribe – Kahnawake – in the province of Quebec, the Kahnawake Gambling Commission has adopted regulations governing interactive gambling,⁹⁸¹ thereby providing a refuge for interactive gambling providers.

Canada's position mirrors that of numerous countries whose legal position on interactive gambling is unclear despite reports indicating the occurrence of interactive gambling activities in their jurisdiction.⁹⁸²

6.5.1 The approach of Canada's Criminal Code to interactive gambling

Canada is a federal state divided into 10 territories (that is, provincial governments).⁹⁸³ The Federal Code (that is, Part VII of the Criminal Code of Canada)⁹⁸⁴ governs and determines legal forms of gambling in Canada. The Federal Code confers the power to operate, license and regulate gambling activities upon provincial governments. It provides, in relevant parts, that:

It is lawful for the government of a province, either alone or in conjunction with the government of another province, to conduct and manage a "lottery scheme" in that province, or in that and the other

⁹⁸⁰ Crowne EA and Andreopoulos A "GTL: gaming, territoriality, and the law – comparative approaches to interactive gaming: lessons for Ontario" 2012 *UNLV Gaming Law Journal* 155–166 argue that Canada's current strategy of interactive gaming regulation is deficient.

⁹⁸¹ Kahnawake Gaming Commission *Regulations concerning interactive gambling* July 1999.

⁹⁸² On the continent of Africa, Tanzania and Kenya are prime examples of countries with unclear legal positions regarding interactive gambling. These two countries are reported to be way ahead in terms of interactive gambling regulation and yet there is no discernible legislation governing provisioning of interactive gambling in their jurisdiction – Mubiri S "Sports betting in Tanzania, still a long path to cross" <https://24tanzania.com/sports-betting-in-tanzania-still-long-path-to-cross/> (Date of use: 18 September 2014) and Trembath B "Kenya gaming model" <http://www.casinoaffiliateprograms.com/blog/kenya-online-gambling-update/> (Date of use: 18 November 2014).

⁹⁸³ The Canadian territories comprise Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island, Quebec and Saskatchewan.

⁹⁸⁴ Criminal Code R.S.C., 1985, c. C–46.

*province, in accordance with any law enacted by the legislature of that province.*⁹⁸⁵

The Code defines a lottery scheme as including a *game* or any proposal, scheme, plan, means, device, contrivance or operation ... whether or not it involves betting, pool selling or a pool system of betting.⁹⁸⁶

In the absence of any express provision authorising interactive gambling,⁹⁸⁷ it remains a matter of interpretation as to whether or not the Code bans such an activity. The Code allows provincial governments to conduct and manage a lottery that is operated via a computer or video device.⁹⁸⁸ As mentioned earlier, the operation of a lottery – which includes gambling – via a computer device has been interpreted to include an interactive lottery and therefore interactive gambling.⁹⁸⁹ This implies that privately owned gambling services (whether remote or land-based) are illegal in Canada.⁹⁹⁰ Thus, only provincial governments are empowered to operate gambling, including interactive gambling. An exception is made for charitable or religious organisations licensed by a provincial government or such other person or authority in the province,⁹⁹¹ as may be specified by the provincial government.

⁹⁸⁵ Section 207(1)(a) of Criminal Code R.S.C., 1985, c. C-46. This section was introduced in 1985 following an agreement between the federal and provincial government, in which the former agreed to relinquish its right to operate a lottery in exchange for which it would “receive \$100 million over three years to help fund the 1988 Calgary Winter Olympics and an annual disbursement of \$24 million (adjusted annually for inflation) from the provinces based on a proportion of lottery sale”. Smith G “Sports betting in Canada” in Paul M *et al* (eds) *Sport betting: Law and policy* (T.M.C. Asser Press, The Hague, Netherlands 2012) 291.

⁹⁸⁶ Section 207(4) Criminal Code R.S.C., 1985, c. C-46.

⁹⁸⁷ Gainsbury S and Wood R “Internet gambling policy in critical comparative perspective: the effectiveness of existing regulatory frameworks” 2011 *International Gambling Studies* 309–323 313 observe that Canada’s Criminal Code makes no explicit mention of interactive gambling. *However, it gives permission for governments of a province, alone or in conjunction with other provinces, to conduct and manage a lottery scheme, suggesting that Internet gambling operations are legal, provided that they are operated and regulated by provincial governments.*

⁹⁸⁸ Section 207(4)(f) of Criminal Code R.S.C., 1985, c. C-46.

⁹⁸⁹ Smith *Sports betting* 301.

⁹⁹⁰ Heydary http://www.heydary.com/publications/gaming_lawyers_canada.html (Date of use: 28 November 2014).

⁹⁹¹ Section 207(1)(b) of Criminal Code R.S.C., 1985, c. C-46.

6.5.1.1 Kahnawake's Regulations Concerning Interactive Gaming

The Mohawks of Kahnawake are an aboriginal tribe situated in the province of Quebec, Canada.⁹⁹² As an aboriginal tribe, they maintain that they are independent of the authority of the Quebec Province and have their own police, hospital, social services and educational and legal systems to support their sovereignty.⁹⁹³ In 1996, the Mohawk Council established the Kahnawake Gambling Commission to regulate gambling activities within their territory. In 1999, this tribe began hosting interactive gambling websites operating across the globe.⁹⁹⁴ The Mohawks carry out their gambling activities without the authority of Quebec Province. They rely on the protection of the rights of aboriginal people afforded by the Constitution of Canada,⁹⁹⁵ and accordingly believe that gambling is part of their inherent right.⁹⁹⁶ Canada's Constitution gives recognition to "*existing aboriginal and treaty rights of the aboriginal peoples of Canada*".⁹⁹⁷ Nevertheless, the Supreme Court of Canada in *R v Jones*⁹⁹⁸ had the opportunity to consider whether or not gambling forms part of an inherent right of the aboriginal people of Canada, as enshrined by the Constitution of Canada".⁹⁹⁹ The court ruled that gambling was not an integral part of the cultures of Canadian aboriginal tribes at the time of their contact with Europeans, who at one time colonised Canada.¹⁰⁰⁰ It rejected the notion that gambling is connected to the

⁹⁹² Gainsbury 2010 A presentation to the Discovery Conference held at Toronto, Ontario.

⁹⁹³ Navarro M "Gambling regulation in the NAFTA countries: a comparative analysis" http://nacle.org/sites/default/files/workshop-downloads/Washington_Workshop_Gambling%20regulation%20in%20the%20NAFTA%20countries.pdf (Date of use: 30 March 2015).

⁹⁹⁴ Gainsbury 2010 A presentation to the Discovery Conference held at Toronto, Ontario.

⁹⁹⁵ Canada's Constitution Act, 1982.

⁹⁹⁶ Alluding to its source of authority to regulate gambling, the Kahnawake Gambling Commission states on its website that: "*The Mohawks of Kahnawake have consistently and historically asserted sovereignty and jurisdiction over their territory. They have never been defeated in battle and have never entered into a treaty with any government that waives or diminishes their sovereignty. The Commission's authority to license and regulate gaming is a facet of the sovereign rights Kahnawake has as a community of indigenous peoples to govern its own affairs.*" – Kahnawake Gambling Commission "Frequently asked questions" <https://www.gamingcommission.ca/faq.htm> (Date of use: 31 March 2015).

⁹⁹⁷ Section 35 of Canada's Constitution Act, 1982.

⁹⁹⁸ *R v Jones* 1996 CarswellOnt 3987 (Supreme Court of Canada) also cited as *R v Pamajewon* (1996), 138 D.L.R. (4th) 204 (S.C.C.).

⁹⁹⁹ *R v Jones* 1996 CarswellOnt 3987 (Supreme Court of Canada) [1].

¹⁰⁰⁰ *R v Jones* 1996 CarswellOnt 3987 (Supreme Court of Canada) [29].

self-identity and self-preservation of aboriginal societies and is therefore worthy of protection under the constitutional rights of the aboriginal peoples of Canada.¹⁰⁰¹

Despite this ruling by the Supreme Court of Canada, the Mohawks passed the Kahnawake Gaming Law,¹⁰⁰² which established the Kahnawake Gambling Commission (“Commission”). The latter adopted, amongst others, “Regulations Concerning Interactive Gaming”¹⁰⁰³ in order to regulate interactive gambling. The regulations apply to all forms of interactive gambling based and offered in the Mohawk territory of Kahnawake, “including interactive gaming involving gamblers situated both within and outside of its territory”.¹⁰⁰⁴ The regulations empower the Commission to issue a variety of licences or authorisations¹⁰⁰⁵ for the operation of interactive gambling, namely interactive gaming licences, key person permits, client-provider authorisation, live dealer studio authorisation¹⁰⁰⁶ and inter-jurisdictional authorisation. The latter form of authorisation entitles the holder/licensee to operate in another country, that is, outside the Mohawk territory of Kahnawake. The holder of this licence must however hold a valid and subsisting licence issued by a primary jurisdiction in order to conduct interactive gambling.¹⁰⁰⁷

With a population of less than 20 000 occupying a territory of approximately 20 square miles (that is, 51.7km²),¹⁰⁰⁸ the regulation of interactive gambling by the Mohawks of Kahnawake is designed to capture the market outside its territory, including the off-shore market.¹⁰⁰⁹ It is no surprise that Kahnawake is one of the

¹⁰⁰¹ *R v Jones* 1996 CarswellOnt 3987 (Supreme Court of Canada) [40].

¹⁰⁰² Kahnawake Gaming Law (MCR 26 / 1996–97).

¹⁰⁰³ Regulations Concerning Interactive Gaming enacted on 8 July 1999.

¹⁰⁰⁴ Regulation 1 of Regulations Concerning Interactive Gaming, 1999.

¹⁰⁰⁵ Regulation 10 of Regulations Concerning Interactive Gaming, 1999.

¹⁰⁰⁶ This is an authorisation relating to a physical location within which authorised games are conducted and remotely transmitted to gamblers.

¹⁰⁰⁷ Regulation 108(b) of Regulations Concerning Interactive Gaming, 1999.

¹⁰⁰⁸ According to the Kahnawake Gambling Commission website, Kahnawake's population is estimated to be 8 000. However, it is not known when last the website was updated. Other sources put the population at 16 000. One thing is certain, however its population does not exceed 20 000. <https://www.gamingcommission.ca/faq.htm> (Date: 31 March 2015).

¹⁰⁰⁹ Keley R *et al* *Gambling @ home: internet gambling in Canada* (Research report no. 15 October 2001) 7 alludes to the fact that other than serving as hosts, the residents of Kahnawake are not involved in gambling activities themselves.

world's largest interactive gambling hosts.¹⁰¹⁰ By regulating interactive gambling, the Commission seeks to provide a legal platform for this activity; to ensure that adequate safeguards are established and enforced to prevent this activity from evolving into criminality; and to ensure that this activity is conducted responsibly, fairly and honestly.¹⁰¹¹ Unfortunately, Kahnawake's "Regulations concerning interactive gaming" offer little or nothing with regard to responsible gambling standards and practices intended to protect gamblers from interactive gambling risks. The regulations have succeeded in enabling the Commission to host interactive gambling websites and to profit from licensing fees, thereby providing a safe haven for interactive gambling providers avoiding strict regulation and high taxes.¹⁰¹²

6.5.2 Concluding remarks on Canada's approach

Canada's approach to interactive gambling can be described simply as chaotic as a result of the lack of clarity in both policy and legislation. Unfortunately, Canada's approach reflects that of several other countries that are yet to expressly prohibit or legalise interactive gambling. While authorities are pondering the legality of existing interactive gambling services, the gambling public continue to incur losses while illegal interactive gambling thrives.

6.6 Taxation of gambling

Regulation of gambling allows for governments to generate revenue in the form of taxes and licensing fees payable by gambling operators.¹⁰¹³ The borderless nature of interactive gambling, which allows for gambling operators to offer their services

¹⁰¹⁰ Gainsbury S "Is legalized online gambling in North America inevitable? An Australian perspective". A presentation to the Discovery Conference held at Toronto, Ontario (14 April 2010).

¹⁰¹¹ Regulation 4 of Regulations Concerning Interactive Gaming, 1999.

¹⁰¹² It is estimated that the Kahnawake Gambling Commission makes over \$2 million profit per year from licensing and hosting interactive gambling websites – Rex J & Jackson D "The options for internet gambling in Canada" 2008 *ACSUS Occasional Papers on Public Policy Series* 1–8 2.

¹⁰¹³ Novak J & Allsop R "Free to gamble: the roles of the gambling industry and policy in a modern Australian society" https://www.ipa.org.au/.../1235604569_document_free_to_gamble.pdf (Date of use: 17 October 2015).

without establishing a physical presence within countries of consumption, is in itself a threat to potential tax revenue, however. Gambling operators seeking to maximise their profit margins have shown a desire to relocate their interactive gambling operations to countries offering lower tax rates (that is, safe havens), thereby avoiding tax from countries of consumption.¹⁰¹⁴ Another challenge facing taxation of interactive gambling is the question of whether it should be taxed at the same rate as land-based gambling. This issue has emerged in the European Union where several countries have introduced a two-tier system of gambling tax, namely a lower tax rate for interactive gambling and a higher rate for land-based gambling. Creation of a two-tier tax system has raised questions on whether interactive gambling and land-based gambling are comparable. The EC has already offered its opinion, but specifically only with regard to Denmark's gambling (*Commission Decision on the Measure No C 35/2010 (ex N 302/2010) which Denmark is planning to implement in the form of Duties for Interactive Gaming in the Danish Gaming Duties Act*)¹⁰¹⁵ It noted that "as far as the taxation of gambling activities is concerned, interactive gambling emerges as another distribution channel of a similar type of gaming activities. In support of this position, the Commission notes the substantial efforts carried out by interactive casinos to simulate the land-based casino experience in such a way that interactive gamblers would have the sense of playing in land-based casino surroundings, rather than in virtual environments."¹⁰¹⁶

In addition to the issue of a two-tier system of gambling taxation, the practice of taxing gambling winnings, prevalent in the US, often comes to the fore when taxation of gambling is discussed.¹⁰¹⁷ In the following sections, the focus is on the taxation of gambling (both land-based and interactive), including gambling winnings in comparable jurisdictions.

¹⁰¹⁴ Parliamentary Joint Select Committee on Gambling *Interactive and online gambling* 64.

¹⁰¹⁵ European Commission's decision of 20 September 2011 on the measure C 35/10 (ex N 302/10).

¹⁰¹⁶ European Commission's decision of 20 September 2011 on the measure C 35/10 (ex N 302/10) [89].

¹⁰¹⁷ Segal M & Maroun W "The introduction of a gambling tax in South Africa – what are the odds on the implementation thereof?" 2014 *Journal of Economic and Financial Sciences* 361–374.

6.6.1 Legal framework for taxation of gambling in the USA

In the USA, regulation of gambling has largely remained the domain of individual states, which enjoy constitutional authority for its regulation.¹⁰¹⁸ This authority of individual states to regulate gambling is attributable to the provision of the USA's Constitutional Amendment X (Tenth Amendment) stating that:

*The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*¹⁰¹⁹

In the absence of express constitutional provisions bestowing a legislative mandate upon Congress to regulate gambling, individual states took upon themselves the right to regulate such activity. This did not deter Congress from passing legislation such as the Wire Act and the UIGEA, amongst others, to prohibit or enforce certain activities within the gambling sector. As observed with regard to the UIGEA, Congress' law depends on the existence of a state's primary legislation regulating gambling.¹⁰²⁰ With states enacting their own laws on gambling,¹⁰²¹ it follows that taxation of provisioning of gambling or in this case casinos is equally taxed by states involved in gambling, and not at federal level.¹⁰²²

6.6.1.1 US State of Nevada's taxation of gambling

States allowing gambling have various tax rates for gambling occurring within their jurisdiction. With Nevada allowing intrastate interactive gambling in its casinos, it is useful to consider its rate of gambling tax, in particular whether a separate tax rate for casinos licensed to operate interactive gambling is being imposed or not. The 2015 Casino Tax and Expenditures compiled by the National Conference of State

¹⁰¹⁸ Rodefer "Internet gambling in Nevada: Overview of federal law affecting assembly Bill 466" in Nevada Gaming Commission and Nevada Gaming Control Board *Internet gaming* table 2.

¹⁰¹⁹ Thompson B "Internet Gambling" 2001 *North Carolina Journal of Law & Technology* 81–103 90.

¹⁰²⁰ Nevada Gaming Commission and Nevada Gaming Control Board *Internet gaming* table 2.

¹⁰²¹ For in-state State of Nevada enacted Nevada Gaming Control Act of 1955 (that is, NRS 463: Licensing and Control of Gaming).

¹⁰²² Combs K, Landers J and Spry J "The responsiveness of casino revenue to the casino tax rate" <http://www.ir.stthomas.edu/ocbfincwp/5/> (Date of use: 17 October 2015) writing that States that allow commercial casinos to operate also impose specific taxes and special regulations on the casino operators.

Legislatures¹⁰²³ reflect gambling tax rates imposed by the State of Nevada as follows:

State	Casino Tax Rate	Use of Tax Revenue
Nevada	<p>Monthly graduated tax on the following amounts:</p> <p>First \$50,000 of Gross Revenue – 3.5%</p> <p>\$50,000–\$143,000 Gross Revenue – 4.5%</p> <p>All Gross Revenue over \$134,00 – 6.75%</p> <p>Additional fees and levies may be imposed by counties, municipalities and the state adding approximately 1% to the tax burden</p>	<p>Education, local governments, general fund, problem gambling programs</p>

Statistics obtained from National Conference of State Legislature¹⁰²⁴

From the above table, it is clear that Nevada imposes a gambling tax on the gross revenue generated by a gambling operator without distinguishing whether such operator offers intrastate interactive gambling services or not. The taxation is levied on gross gambling revenue that is the total receipts of all amounts earned by gambling providers minus payout for prizes.¹⁰²⁵ The gross revenue generated by casinos in Nevada ranks the highest in the USA’s gambling industry.¹⁰²⁶

6.6.1.2 Legal framework for taxation of gambling winnings in the USA

The imposition of tax, dubbed “sin taxes”, on “disfavoured goods and services” such as gambling, tobacco and liquor has always been seen as a form of discouragement of destructive behaviour.¹⁰²⁷ Scholars have linked sin taxes to morality politics, which

¹⁰²³ National Conference of State Legislatures “2015 casino tax and expenditures”

<http://www.ncsl.org/.../casino-tax-and-expenditures-2013.asp> (Date of use: 17 October 2015).

¹⁰²⁴ National Conference of State Legislatures <http://www.ncsl.org/.../casino-tax-and-expenditures-2013.asp> (Date of use: 17 October 2015).

¹⁰²⁵ Anderson J “Casino taxation in the United States” 2005 *National Tax Journal* 303–324 306.

¹⁰²⁶ Combs, Landers & Spry “The responsiveness of casino revenue to the casino tax rate” <http://www.ir.stthomas.edu/ocbfincwp/5/> (Date of use: 17 October 2015) and Anderson 2005 *National Tax Journal* 318.

¹⁰²⁷ Morse R “Resisting the path of least resistance: why the Texas ‘pole tax’ and the new class of modern sin taxes are bad policy” 2009 *Third World L.J.* 189–221 191.

seek to dictate what states or governments consider to be acceptable and undesirable values and where consumption of disfavoured goods is tantamount to indulgence in sinful behaviour and deserving of such taxes.¹⁰²⁸ Gambling has not escaped the wrath of sin taxes and features prominently on the list of such indulgences. In order to discourage gamblers from participating in gambling, a direct tax is levied on their winnings. In recent years, this gambling tax has been applied in the form of withholding a certain percentage of the winnings, hence withholding tax.

Taxation of gambling winnings is regulated by the Code of Federal Regulations.¹⁰²⁹ This Code enjoins every person or entity, including government, making any payment of winnings subject to withholding tax, to deduct and withhold the required amount upon payment of the winnings by the person making such payment.¹⁰³⁰ The tax rate for gambling winnings stood at 28% for prize amounts exceeding US\$5,000 in a category of games such as sweepstakes, wagering pools, lotteries, raffles, instant bingo, pull-tabs and poker tournaments.¹⁰³¹ In the case of games such as bingo, keno and slot machines gambling winnings tax is imposed upon prize money of US\$1,200 or above.¹⁰³² Where a non-monetary prize is awarded, the market value of the item must first be determined to establish its monetary value.¹⁰³³ This value would then be deemed to be the prize amount subject to gambling winnings tax.

The gambling winnings tax rate of 28% may be increased to 31% if the winner is unable to provide his tax registration number to prove that he is a registered

¹⁰²⁸ Meier K “Drugs, sex, rock, and roll: theory of morality politics” 1999 *Policy Studies Journal* 681–695 682.

¹⁰²⁹ 26 Code of Federal Regulations 31.3402(q) – Extension of withholding to certain gambling winnings.

¹⁰³⁰ 26 Code of Federal Regulations 31.3402(q)(a)(1) provides: *Every person, including Government of the United States, a State, or a political subdivision thereof, or any instrumentality of any of the foregoing making any payment of “winning subject to withholding” (defined in paragraph (b) of the section) shall deduct and withhold a tax in an amount equal to 20 percent of the payment. The tax shall be deducted and withheld upon payment of the winnings by the person making such payment (“payer”).* However, Internal Revenue Service has issued publications elaborating on gambling winnings tax rate for various gambling games varying stipulated percentage. It is not clear whether publications of Internal Revenue Service amount to amendments of this Regulation.

¹⁰³¹ Internal Revenue Service *Gaming publication for tax-exempt organizations* (Pub 3079 Cat. No. 25706L) 14. See also Kreise L & Jowitt E “The taxation of gambling winnings in Australia and the United States: a comparative study” 1993 *Int'l Tax J.* 75–82 75.

¹⁰³² 26 Code of Federal Regulations 31.3402 (a)(2).

¹⁰³³ Internal Revenue Service *Gaming publication* 14.

taxpayer.¹⁰³⁴ This is purely for administrative purpose to reimburse the gambling provider who is duty-bound to capture all personal details of the winner when reporting to Internal Revenue. A flat tax rate of 30% is applied to all prizes won by non-residents, unless the country of a winning resident has an agreement with the US fixing the gambling winning at a lower rate.¹⁰³⁵

With gambling winnings being subjected to tax, the Code makes provision for the deduction of wagers placed by a gambler when submitting an annual tax return.¹⁰³⁶

Internal Revenue regulations concerning wagering losses provides thus:

*Losses sustained during the taxable year on wagering transactions shall be allowed as a deduction but only to the extent of the gains during the taxable year from such transactions. In the case of a husband and wife making a joint return for the taxable year, the combined losses of the spouses from wagering transactions shall be allowed to the extent of the combined gains of the spouses from wagering transactions.*¹⁰³⁷

According to the Internal Revenue Service, the deduction of wagering losses is limited to the actual amount lost in wagering transactions by a gambler.¹⁰³⁸ It excludes expenses incurred by a gambler towards the placing of wagers or engaging in the business of gambling. Taxation of gambling winnings is not without critics and is viewed as sin tax.¹⁰³⁹ According to critics, all taxes relating to gambling should fall on the shoulders of gambling providers and not gamblers.

6.6.2 Legal framework for taxation of gambling in the UK

The Enactment of Gambling (Licensing and Advertising) Act making it an offence to provide or advertise gambling services in the UK without a licence issued by the Gambling Commission necessitated changes to the legislative framework for the

¹⁰³⁴ Internal Revenue Service *Gaming publication 14*.

¹⁰³⁵ Internal Revenue Service *Gaming publication 14*.

¹⁰³⁶ Section 165 of Internal Revenue Code – Chapter 26 allows for deduction of any loss from gross income sustained during the taxable year and not compensated for by insurance or otherwise. This deduction is further clarified by 26 Code of Federal Regulations § 1.165-10 entitled Regulations concerning “Wagering Losses”.

¹⁰³⁷ 26 Code of Federal Regulations § 1.165-10 entitled Regulation concerning “Wagering Losses”.

¹⁰³⁸ Internal Revenue Service “Memorandum number AM2008-013” <https://www.irs.gov/pub/irs-utl/am2008013.pdf> (Date of use: 17 October 2015).

¹⁰³⁹ Titch S *Internet gambling: keys to a successful regulatory climate* (November 2012)15.

taxation of gambling. This legislation extended its reach to all gambling providers offering or advertising their services in the UK that were previously exempted from obtaining the UK's licence by virtue of being licensed in EEA states, Gibraltar and white-listed states. The UK government passed the Finance Act¹⁰⁴⁰ introducing, *inter alia*, scope for remote gaming duty, effectively amending the Betting and Gaming Duties Act of 1981.¹⁰⁴¹ The relevant provisions for taxation of remote gambling are contained in Chapter 3 entitled "Remote Gaming Duty" of the Finance Act.¹⁰⁴² This chapter extends its reach to interactive gambling by specifying person(s) or entities liable for payment of remote gaming duty. The onus for payment of this duty rests upon the gambling provider.¹⁰⁴³ If the gambling provider is a body corporate, the provider and its directors are jointly and severally liable.¹⁰⁴⁴ In cases where the gambling provider and holder of a remote operating licence are not one and the same person/body corporate, the gaming duty is recoverable from the holder of remote operating licence.¹⁰⁴⁵

The gaming duty is charged on the gambling provider's profit¹⁰⁴⁶ for an accounting period, that is, over a period of three months.¹⁰⁴⁷ A challenge may arise where a gambling provider's profit is made up of income earned from gamblers based in other countries. For instance, if a gambler from any country permitting interactive gambling decides to gamble on a website hosted by a gambling provider licensed and based in the UK, then a question arises as to whether a profit earned by the gambling provider from foreign-based players is subject to gaming duty in the UK. The Act introduces a concept of what it terms the "chargeable person". Section 155 states that:

"(1) A duty of excise, to be known as remote gaming duty, is charged on a chargeable person's participation in remote gaming under arrangements (whether or not enforceable) between the chargeable person and another person (referred to in this Part as a "gaming provider").

(2) In this Part "chargeable person" means –

¹⁰⁴⁰ Finance Act of 2014 (Chapter 6).

¹⁰⁴¹ Schedule 28 on the Finance Act indicates consequential amendments to the Betting and Gaming Duties Act of 1981.

¹⁰⁴² Sections 154–162 of the Finance Act, 2014.

¹⁰⁴³ Section 162(1) of Finance Act, 2014.

¹⁰⁴⁴ Section 162(2) of Finance Act, 2014.

¹⁰⁴⁵ Section 162(3) of Finance Act, 2014.

¹⁰⁴⁶ Section 155(4) of the Finance Act, 2014.

¹⁰⁴⁷ Section 165 of the Finance Act, 2014.

- (a) any UK person, and
- (b) any body corporate not legally constituted in the United Kingdom if the person with whom the arrangements mentioned in subsection (1) is made known, or has reasonable cause to believe, that at least one potential beneficiary of any prizes from remote gaming under arrangements is a UK person.”

Therefore, the Act imposes remote gaming duty for profits earned from UK persons and any non-UK corporate body if the gambling provider knows that a UK person is a potential beneficiary. The tax rate for remote gaming duty is 15% of the gambler’s profit over a period of three months.¹⁰⁴⁸ Ordinarily, the gambling provider’s profit is the total amount of gambling receipts minus the expenditure of gambling winnings. Calculation of profit differs according to ordinary games, pooled prized gaming and retained prizes, however.¹⁰⁴⁹ Profit in respect of ordinary games consists of the “*total payments received by a gambling provider during accounting period less (minus) expenditure for the period on prizes in respect of such gaming*”.¹⁰⁵⁰ Profit in respect of pooled prized gaming is the “*aggregate of gaming payments received by a gaming provider less (minus) the aggregate of payments assigned to gaming prize funds during the accounting period*”.¹⁰⁵¹ The gambling provider is also liable for profit in respect of retained prizes.¹⁰⁵² Retained prizes are simply “*amounts which have previously been transferred to the gambling account of a gambler as winnings, but which a gambler is subsequently prevented from withdrawing*”.¹⁰⁵³ It is not clear why a gambler may subsequently be prevented from withdrawing such a prize,

¹⁰⁴⁸ Section 155(3) of the Finance Act, 2014, states that *remote gaming duty is chargeable at the rate of 15% of the gaming provider’s profits on remote gaming for an accounting period.*

¹⁰⁴⁹ Section 155(4)(a–c) of the Finance Act, 2014.

¹⁰⁵⁰ Section 157 of the Finance Act, 2014, provides calculation for profits on ordinary gaming as follows:

(1) *To calculate the amount of a gaming provider’s profits for an accounting period in respect of ordinary gaming –*

- (a) *take the aggregate of the gaming payments made to the provider in the accounting period in respect of ordinary gaming, and*
- (b) *subtract the amount of the provider’s expenditure for the period on prizes in respect of such gaming.*

(2) *The amount of the gaming provider’s expenditure on prizes for an accounting period in respect of ordinary gaming is the aggregate of the value of prizes provided by or on behalf of the provider in that period which have been won (at any time) by chargeable persons participating in ordinary gaming.*

¹⁰⁵¹ Section 156 of the Finance Act, 2014, regarding calculation of profits on pooled prize gaming.

¹⁰⁵² In terms of section 158 of Finance Act, 2014, *the amount of a gaming provider’s profits for an accounting period in respect of retained prizes is the aggregate of the amounts which cease to be qualifying amounts during the accounting period.*

¹⁰⁵³ Explanatory Notes to the Finance Act, 2014.

nevertheless such monies or prizes are deemed to be the profit of a gambling provider and subject to gaming duty.

Taxation on land-based gambling, termed “gaming duty”, stands at 15% of the gambling provider’s profit.¹⁰⁵⁴ The gaming duty defined as a duty on casino gaming profits is based on the “gross gaming yield” for premises where gambling takes place.¹⁰⁵⁵ Gaming duty applies only to premises-based gambling. Calculation of gaming duty is increased if the gross gaming yield is above £2,302,000 in the accounting period.¹⁰⁵⁶ For ease of reference, a table for the calculation of gaming duty is reproduced below:

Part of gross gaming yield	Rate
The first £2,302,000	15 per cent
The next £1,587,000	20 per cent
The next £2,779,000	30 per cent
The next £5,865,500	40 per cent
The remainder	50 per cent

Tax table as reflected by section 121 of the Finance Act

The UK has thus avoided a two-tier system of taxation in which interactive gambling is taxed at a higher rate. Nevertheless, interactive gambling providers located outside the UK yet offering their interactive gambling services to UK-based citizens begrudge the regulatory scheme introduced by the Finance Act in that it subjects them to double taxation, that is, it requires them to pay tax in the UK despite already paying tax in the countries of their location. Gibraltar Betting and Gaming Association challenged the regulatory scheme of the Finance Act in the matter of *GBGA v HMRC and Gibraltar*¹⁰⁵⁷ after its first case seeking judicial review of the Gambling (Licensing and Advertisement) Act discussed previously was dismissed by the court. This time Gibraltar Betting and Gaming Association argued that the tax regime introduced by the Finance Act was incompatible with Article 56 of the Treaty on the Functioning of

¹⁰⁵⁴ Section 121 of Finance Act, 2014.

¹⁰⁵⁵ HM Revenue & Customs *Excise Notice 453: Gaming Duty* (updated 25 September 2015).

¹⁰⁵⁶ Section 121 of Finance Act, 2014.

¹⁰⁵⁷ *GBGA v HMRC and Gibraltar* [2015] EWHC 1863 (Admin).

the European Union (TFEU) regarding prohibition of restriction on freedom to provide services within the Union by member states.¹⁰⁵⁸ The court ruled that this was a matter for determination by CJEU. It reasoned that:

“The Article 56 issues are potentially relevant to other questions of taxation and potentially of general importance, not only to the United Kingdom but also to other Member States, and to businesses and consumers throughout the EU. A reference to the CJEU would enable other States and the Commission to intervene and make submissions.”¹⁰⁵⁹

It remains to be seen what approach the CJEU will adopt. On the face of it, the regulatory scheme of the Finance Act appears to be a restriction on the freedom to provide services prohibited by Article 56 of the TFEU. Therefore the main issue would be whether the objectives and measures introduced by Finance Act are justifiable.

Lastly, in addition to benefiting from taxation fees, the Gambling Act makes provision for payment of licence fees.¹⁰⁶⁰ The fee is payable annually to the Gambling Commission and failure to pay entitles the latter to revoke the licence.¹⁰⁶¹ The licence fee applies to all forms of licences issued by the Gambling Commission. Licence and taxation fees remain a direct economic windfall from the regulation of interactive gambling.

6.6.3 Legal framework for taxation of gambling in Denmark

In June 2010, Denmark introduced the Danish Gaming Duties Act (hereinafter referred to as the Gaming Duties Act),¹⁰⁶² which stipulated different tax rates for all forms of gambling taking place within its territory. The Gaming Duties Act was

¹⁰⁵⁸ *GBGA v HMRC and Gibraltar* [2015] EWHC 1863 (Admin) [2].

¹⁰⁵⁹ *GBGA v HMRC and Gibraltar* [2015] EWHC 1863 (Admin) [13].

¹⁰⁶⁰ Section 100 of the Gambling Act.

¹⁰⁶¹ Section 120 of the Gambling Act.

¹⁰⁶² Gaming Duties Act 698 of 2010 (adopted on 25 June 2010).

introduced together with a set of Gambling Laws¹⁰⁶³ intended to liberalise the country's gambling sector, which was previously run as a state monopoly. The Gaming Duties Act introduced interactive gambling.¹⁰⁶⁴ Gambling operators wishing to provide interactive gambling have the option of either establishing their services in Denmark or, if they are a resident of the European Union or a European Economic Area member state they may, instead of establishing their services in Denmark, nominate an approved representative residing in Denmark.¹⁰⁶⁵ The nominated representative serves as a contact person for all matters pertaining to compliance with regulations, and is jointly and severally liable for the tax imposed by the Gaming Duties Act.¹⁰⁶⁶

As set out in both articles 10 and 11, the Gaming Duties Act imposes a tax rate of 45 per cent of the gross gambling revenue for all licence holders of land-based casinos, and 20 per cent for the licence holders of interactive casinos. This gross gambling revenue, which is calculated as the total amount of stakes collected by the licence holder less the total amount of winnings paid out to gamblers, is determined on a monthly basis.¹⁰⁶⁷ The tax rate for licence holders of slot machines situated in amusement arcades and restaurants is set at 41 per cent of their gross gambling revenue. Denmark therefore levies a lower tax rate on interactive gambling and a higher rate on land-based gambling. It is submitted that the lower tax rate will in all probability lure potential interactive gambling providers in the highly competitive EU market.

Denmark's differentiation of tax rates and lower tax rates for interactive gambling did not appease its licensees of land-based casinos.¹⁰⁶⁸ In accordance with EU prescripts requiring member states to submit their legislative proposals to the

¹⁰⁶³ Gaming Act 848 of 2010 (adopted on 1 July), Distribution of Profits Stemming from Lotteries and Horse and Dog Racing Act 696 of 2010 (adopted on 25 June 2010) and Statute Governing Danske Spil A/S Act 695 of 2010 (adopted on 25 June 2010).

¹⁰⁶⁴ Article 5 of the Gaming Duties Act 698 of 2010.

¹⁰⁶⁵ Article 27 of the Gaming Duties Act 698 of 2010.

¹⁰⁶⁶ Lycka M "The Danish State aid case: application of EU State aid rules to differences in taxation of online and offline gambling" 2012 *Gaming Law Review and Economics* 184–192 185.

¹⁰⁶⁷ Lycka 2012 *Gaming Law Review and Economics* 185.

¹⁰⁶⁸ European Commission's decision of 20 September 2011 on the measure C 35/10 (ex N 302/10) [2].

European Commission (“EC”) for reasons of legal certainty and compliance, the EC was notified of the Gaming Duties Act on 6 July 2010.¹⁰⁶⁹ An objection was raised specifically with regard to lower tax rates, on the basis that they amounted to financial state aid. This was because the state would now forego its portion of tax revenue through substantially lower tax rates. The mere foregoing of tax revenue points to the appropriation of state revenue resources to confer a tax advantage upon interactive gambling license holders. This deviated from the provisions of the TFEU. Article 107(1) provides that:

Any aid granted by a Member State or through State resources in any form whatsoever, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods and affects trade among Member States is incompatible with the internal market.

Justifying the logic of its differential tax system, the Danish government argued that its measures were needed in light of stiff competition from EU and EEA member states offering lower tax rates for interactive gambling.¹⁰⁷⁰ However, the EC took the view that the Gaming Duties confers a tax advantage and therefore strays from the objectives and spirit of the TFEU. The EC added that “to the extent that the measure provides a selective economic advantage to interactive operators operating in Denmark, it could affect trade in the internal market and distort competition”.¹⁰⁷¹ According to the EC, the loss of tax revenue is equivalent to consumption of state resources in the form of fiscal expenditure and is not allowed under the scope of the TFEU.¹⁰⁷² Before striking down any legislation for non-compliance with Article 107 of the TFEU, it must be determined whether, among other things, the proposed aid measures pursue a common interest. As mentioned earlier, Denmark’s purpose is to reform its gambling sector from a monopoly to a “regulated and partially liberalised regime”. On that basis, the EC held that to “the extent that it will liberalise the market and allow Danish and foreign interactive gambling operators to provide their services to Danish residents, while ensuring that they will fulfil the necessary conditions to be

¹⁰⁶⁹ European Commission’s decision of 20 September 2011 on the measure C 35/10 (ex N 302/10)

[1].

¹⁰⁷⁰ European Commission’s decision of 20 September 2011 on the measure C 35/10 (ex N 302/10)

[24].

¹⁰⁷¹ European Commission’s decision of 20 September 2011 on the measure C 35/10 (ex N 302/10)

[26].

¹⁰⁷² European Commission’s decision of 20 September 2011 on the measure C 35/10 (ex N 302/10)

[27].

licensed by the Danish authorities, it serves a well-defined objective of common interest".¹⁰⁷³ It concluded that the lowering of tax rates for interactive licence holders was the most appropriate method for achieving its liberalisation objectives in relation to the Gaming Duties Act, as well as the Gambling Laws of Denmark.

In short, the EC supported Denmark's differential tax treatment of gambling. With regard to this decision, it can be argued that the EC has now opened a way for various EU member states offering or intending to offer interactive gambling to levy lower tax rates for this form of gambling, with a view to attracting investors to their shores.

6.7 Conclusion

Various countries have responded differently to the emergence of interactive gambling made possible by internet technology. This is evident from the approaches adopted by the UK's legalisation of interactive gambling, US' prohibition of interactive gambling with the exception of intrastate interactive gambling, Australia's restrictive or mixed approach of prohibiting interactive gambling services to its citizenry yet licensing interactive gambling providers to offer this service outside its jurisdiction and Canada's non-existent strategy contributing to the creation of safe havens for interactive gambling providers within its jurisdiction. Interactive gambling cannot be wished away and a tough stance such as prohibition will not diminish its demand. As observed by Gainsbury, the US prohibits interactive gambling yet its "*citizens remain one of the largest groups of customers for interactive gambling sites, despite strict regulations on banks and financial institutions, indicating the potential futility of this approach*".¹⁰⁷⁴ Prohibition can only drive customers to unregulated markets and websites hosted by safe-havens, which provide no consumer protection and expose customers to problem gambling and/or gambling disorders. On the other hand, legalisation of interactive gambling provides an opportunity to set a regulatory

¹⁰⁷³ European Commission's decision of 20 September 2011 on the measure C 35/10 (ex N 302/10) [123].

¹⁰⁷⁴ Gainsbury 2010 *Gambling Research* 7.

framework allowing governments to generate revenue from licensing and taxation fees.

Challenges posed by the prevention of problem gambling and/or gambling disorder will always remain, but this is no excuse for the prohibition of interactive gambling, which is merely a segment of gambling. On the contrary, codes of good practice and technical requirements in both the UK and the US (that is, in the State of Nevada) applicable to interactive and intrastate interactive gambling respectively are capable of limiting, if not eliminating, problem gambling and/or gambling disorder.

Interactive gambling is in competition with land-based gambling but is certainly no threat to its existence. Therefore countries should be discouraged from imposing a two-tier system of taxation with higher taxes for interactive gambling, as practised in Denmark. Allowing unequal tax amounts is protectionist of one form of gambling over another. Lastly, the imposition of taxes on gambling winnings as observed in the US has the potential to return gambling to the days of legislation by morality. This form of taxation smacks of sin taxes that are intended to discourage gambling.

CHAPTER 7: CONCLUSION AND RECOMMENDATIONS FOR REGULATION OF INTERACTIVE GAMBLING IN SOUTH AFRICA

7.1 Motivation for legalisation of interactive gambling

One need look no further than the NGB – the regulatory authority established in terms of the National Gambling Act – and the Gambling Review Commission appointed in 2009 for motivations in favour of legalisation of the interactive mode of gambling currently prohibited in South Africa. Tasked with the responsibility of enforcing the provision of lawful gambling activities and the prevention of illegal gambling activities across the country, the NGB expounded its position regarding legalisation of interactive gambling in South Africa. In its 2009 annual report, it was stated that

*the National Gambling Board is fully aware of the challenges that are inherent in legalising interactive gambling and maintains that the problems of regulating it can be mitigated by enabling legislation to an acceptable level, rather than controls to ensure complete prohibition of participation of international and local operators and gamblers.*¹⁰⁷⁵

The NGB made this statement in relation to and in support of the National Gambling Amendment Act that was adopted in 2008 by Parliament, seeking to legalise interactive gambling.

The NGB's statement speaks to the challenges of prohibiting an activity that has become the fastest growing segment of the overall gambling market in Europe, according to observations by the European Commission.¹⁰⁷⁶ Prohibition of interactive gambling is unlikely to prevent its demand and ultimate consumption by gamblers. For instance, Australia's Productivity Commission Inquiry Report on Gambling conceded in regard to interactive gambling that *"Australians continue to access online gaming services (through non-Australian based sites) that are prohibited*

¹⁰⁷⁵ NGB Annual Report (2009) 6.

¹⁰⁷⁶ European Commission *On-line gambling* 6.

under the IGA” (that is, Interactive Gambling Act).¹⁰⁷⁷ The IGA’s prohibition of interactive gambling in Australia has not prevented its consumption by gamblers. In South Africa, the Gambling Review Commission is of the view that prohibition of interactive gambling is not a viable solution. It warns that prohibition “*creates the platform for illegal operators to thrive and establish themselves and their brands.*”¹⁰⁷⁸ According to Gainsbury, prohibition will expose gamblers to non-regulated and illegal gambling websites with no platform for customer protection or responsible gambling policies.¹⁰⁷⁹ Observing the consequences of the prohibition of interactive gambling in the USA, the American Gaming Association concluded that:

*Despite energetic and creative enforcement efforts by DOJ, online gambling by U.S. residents continues in every community, largely unabated. Until now, the principal effect of DOJ enforcement has been to drive the more responsible online gambling operators out of the market, leaving U.S. residents at the mercy of relatively unregulated operators.*¹⁰⁸⁰

Prohibition denies gamblers the opportunity to engage in recreational activities of their choice while the state foregoes an opportunity to boost its revenues from the economic windfall of interactive gambling. Regulation offers an opportunity to capitalise on the economic benefits of interactive gambling: in particular, taxation and annual licence fees. This will, however, require that interactive gambling providers be located or have a physical presence in the country of operation and provisioning of their gambling services. In turn this will contribute to job creation and skills development in areas of information technology. With prohibition, the state expends its resources in the ongoing enforcement of its strict policy while deriving no financial benefit to offset enforcement costs. At times, measures taken in the prohibition of interactive gambling have proved to be inadequate in preventing its explosion among and consumption by the public. For instance, in the USA the Unlawful Internet Gambling Enforcement Act requires internet service providers to identify and block or prevent or prohibit restricted transactions (that is, transactions concerning interactive gambling).¹⁰⁸¹ Internet service providers have already conceded their inability to

¹⁰⁷⁷ Productivity Commission *Gambling vol.2* 15.15

¹⁰⁷⁸ Recommendation made with regard to online gambling by Gambling Review Commission *South African gambling industry* 182.

¹⁰⁷⁹ Gainsbury 2010 *Gambling Research* 4–5.

¹⁰⁸⁰ American Gaming Association *Five years after UIGEA* 21.

¹⁰⁸¹ Section 5364 of Unlawful Internet Gambling Enforcement Act of 2006.

effectively block those interactive gambling sites.¹⁰⁸² Their inability is not the result of an unwillingness to cooperate, but rather to the constant development of technology that prevents blocking.

In contrast to prohibition, legalisation would allow government to have greater control over interactive gambling occurring within its jurisdiction.¹⁰⁸³ Through regulation and licensing, government would be able to create the legal platform for interactive gambling providers to offer their services in a regulated environment. In turn, gamblers would see no need to gamble on illegal and non-regulated gambling sites where there is little or no protection of their consumer rights. In addition, regulation would enable government to minimise the impact of problem gambling by imposing gambling and loss limits, thereby empowering gamblers to take control of their gambling habits.

The United Kingdom and numerous European countries are prime examples of jurisdictions that have realised the benefits to be derived from the legalisation of interactive gambling. South Africa could take a leaf from the UK's book and embrace the benefits of internet technology by legalising this interactive mode of gambling.

7.2 Reasons for prohibition of interactive gambling in South Africa

South Africa's policy stance on interactive gambling is articulated in the National Gambling Policy, 2016. As the name suggests, its primary purpose is to outline the gambling landscape in the country¹⁰⁸⁴ based on the policy objectives of the National Gambling Act, which includes protection of society from over-stimulation of latent gambling through the limitation of gambling opportunities and the promotion of economic growth, development and employment.¹⁰⁸⁵ According to the National Gambling Policy, 2016, any additions in the form of new gambling activities that include interactive gambling must be measured against their probable impact "on

¹⁰⁸² Murawski 2008 *Santa Clara L. Rev* 449.

¹⁰⁸³ Murawski 2008 *Santa Clara L. Rev* 447 advancing argument for legalisation of online gambling in the USA.

¹⁰⁸⁴ Department of Trade & Industry *National gambling policy*.

¹⁰⁸⁵ Preamble to the National Gambling Act 7 of 2004.

*existing gambling activities in relation to the economic and employment benefits. It is indisputable that the existing gambling activities have contributed seriously towards the economy and employment.”*¹⁰⁸⁶

The National Gambling Policy, 2016, cites four main reasons for its proposal advocating the continued prohibition of interactive gambling in South Africa, discussed hereunder:

Firstly the National Gambling Policy, 2016, argues that the *“introduction of online casino gambling requires a policy shift in regard to the destination approach to gambling as it proposes bringing gambling activities closer to people. This aspect is considered against the concern regarding problem gambling in South Africa, and measures to combat it successfully.”*¹⁰⁸⁷

In order to limit the proliferation of gambling opportunities, the approach in South Africa was to create dedicated gambling-entertainment venues to which gamblers would travel.¹⁰⁸⁸ The intention of this approach was to protect the general public from accidental exposure to gambling activities and to minimise opportunities for impulse or convenience gambling.¹⁰⁸⁹ The National Gambling Policy, 2016, seems to suggest that the introduction of interactive gambling would reverse this approach, particularly in that interactive gambling cannot be restricted to a physical location of casinos. Therefore the perception is that the availability of interactive gambling through internet access would increase gambling opportunities and exacerbate the scourge of problem gambling. Based on this perception, the National Gambling Policy, 2016, could not seek regulation of interactive gambling. The challenge presented by this perception is two-fold: firstly, the benefits of internet technology cannot be wished away and it removes the need to travel in order to engage in commercial or social activity; secondly, there is no evidence to support the perception that interactive gambling will contribute to higher rates of problem gambling. Even with the current

¹⁰⁸⁶ Department of Trade & Industry *National gambling policy* 8-9.

¹⁰⁸⁷ Department of Trade & Industry *National gambling policy* 9.

¹⁰⁸⁸ Gambling Review Commission South African gambling industry 15.

¹⁰⁸⁹ Gambling Review Commission South African gambling industry 15.

prohibition of interactive gambling, South Africa's problem gambling stands at 2,9%.¹⁰⁹⁰

Secondly, the National Gambling Policy, 2016, argues that "*online gambling is not inherently labour intensive*" as compared to land based gambling, that is, casinos. Its potential contribution to the economy should be measured against the value and contributions derived from land based gambling establishments such as 'glittering infrastructure' developed by casinos.¹⁰⁹¹ To this end, the National Gambling Policy, 2016, adds that "*it is important that government protects gambling activities that create jobs from unwarranted competition*".¹⁰⁹²

It cannot be denied that land-based casinos have created much needed job opportunities in the country and have provided stimulus for the hospitality industry in its immediate vicinity. Notwithstanding, shielding one form of activity from competing against its equivalent activities smacks of protectionism and denies gamblers an opportunity to engage in activities of their choice. It remains to be seen whether protection of land-based gambling against competition from interactive gambling is economically sustainable. According to the NGB Research Bulletin, the gambling sector's contribution to the South African economy is stuck at 1% with no foreseeable growth.¹⁰⁹³ The desire to gamble in casinos has dropped from 1,21% in the 2005 survey to 0,69 in both the 2009 and 2012 surveys.¹⁰⁹⁴ Although no explanation is offered for the decrease in the desire to gamble, it is not difficult to understand that it is far more convenient to gamble at home on the internet than to travel to a land-based casino. Interactive gambling might not be inherently labour intensive compared to land-based gambling at casinos, but it may be the missing link to reinvigorate the gambling market.

¹⁰⁹⁰ NGB June 2013 *Research Bulletin* 1.

¹⁰⁹¹ Department of Trade & Industry *National gambling policy* 30-31 wherein it asserts that "*there is no information to clarify if online gambling would be likely to produce significant jobs compared to other regulated activities like casinos. Online gambling is not inherently labour intensive. While managing the server could create a few jobs, there is a constant motivation that there should be no requirement to locate the server locally. The country has already benefited from the taxes collected from the likes of casinos, the significant employment created directly or indirectly by casinos and the glittering infrastructures developed by casinos while online gambling is not likely to match that.*"

¹⁰⁹² Department of Trade & Industry *National gambling policy* 31.

¹⁰⁹³ NGB "Contribution of the gambling sector to the South African economy" March 2014 *Research Bulletin* 1-3.

¹⁰⁹⁴ NGB March 2014 *Research Bulletin* 1.

Thirdly, the National Gambling Policy, 2016, argues that *“online gambling should not be implemented because the country does not have adequate capacity to enforce the regulation of online gambling”*.¹⁰⁹⁵ It adds that *“the NGR and provincial licensing authorities must improve the inspectorate capacity to ensure efficiencies in collecting necessary evidence on gambling related crimes for submission before prosecutors. That will include capacity to investigate and gather evidence on cyber-crimes committed in illegal online gambling operations.”*¹⁰⁹⁶

In the same way that gambling was viewed as a primary financial base for crime syndicates,¹⁰⁹⁷ the National Gambling Policy, 2016, views interactive gambling as a potential source of cybercrimes. Cybercrimes are not a threat to interactive gambling services only, however, but to all services offered in the cyberspace or sectors involving the use of internet for commercial transactions. In the words of McMullan and Rege who studied the relationship between interactive gambling and crime, *“like other forms of internet commerce, online gambling has not been immune to criminal exploitation.”*¹⁰⁹⁸ In other words, challenges that would be presented by regulation of interactive gambling would be the same, if not less than challenges encountered by any internet commerce in the country.

The upholding of the prohibition of interactive gambling, as suggested by the National Gambling Policy, 2016, will only drive gamblers to illegal and unregulated gambling websites. In short, prohibition of interactive gambling is difficult to enforce and denies the gambling authority a realistic opportunity to take control of the service through regulation.

Fourthly, the National Gambling Policy, 2016, suggests that little is known regarding interactive gambling in South Africa to warrant its regulation. It argues that *“too many challenges come into play about online casino gambling... to support the legalization of the sector. More research and impact assessment need to be conducted to inform*

¹⁰⁹⁵ Department of Trade & Industry *National gambling policy* 31.

¹⁰⁹⁶ Department of Trade & Industry *National gambling policy* 37.

¹⁰⁹⁷ Gardiner 1967 *Annals of the American Academy of Political and Social Science* 125.

¹⁰⁹⁸ McMullan & Rege 2010 *Journal of Gambling Issues* 72.

whether this new form of gambling should be allowed".¹⁰⁹⁹ This reasoning flies in the face of the Gambling Review Commission appointed in December 2009 to review the South African gambling industry and its regulation, which recommended regulation of interactive gambling,¹¹⁰⁰ and therefore deserves no further consideration.

7.3 Addressing concerns regarding regulation of interactive gambling in South Africa

Not all concerns raised by the National Gambling Policy, 2016, require addressing. These are those concerns regarding research and the capacity of the NGB to enforce regulation of interactive gambling with the emphasis on prevention of cybercrimes. As pointed out, the Gambling Review Commission carried out a study that was completed in 2010, recommending regulation of interactive gambling. As far as the prevention of cybercrimes is concerned, prevention of crime is the primary responsibility of the police. In this regard, the government has tabled the Cybercrimes and Cybersecurity Bill, which provides for the establishment of various structures to deal with cyber security.¹¹⁰¹ Although this will not absolve regulatory authorities such as the NGB from curbing the occurrence of cybercrimes within the gambling sector, it clearly places the main responsibility on the proposed structures such as the Cyber Response Committee, Cyber Security Centre, National Cybercrime Centre, Cyber Command, Cyber Security Hub and others to take the lead in the detection, investigation and suppression of cybercrimes.¹¹⁰² It is up to the NGB to liaise with the proposed structures to protect its sector from falling prey to cybercriminals.

The main concerns regarding the proliferation of gambling opportunities and, ultimately, the exacerbation of the scourge of problem gambling have received

¹⁰⁹⁹ Department of Trade & Industry *National gambling policy* 12.

¹¹⁰⁰ Gambling Review Commission *South African gambling industry* 24 – “*The Commission is therefore of the view that a holistic view of online gambling should be taken to its regulation that includes interactive gambling and all forms of remote gambling, such as telephone or cell phone gambling*”.

¹¹⁰¹ Preamble to Cybercrimes and Cybersecurity Bill, 2015.

¹¹⁰² Chapter 6 of the Cybercrimes and Cybersecurity Bill, 2015, lays down structures to deal with cyber security.

thorough consideration in this thesis. This applies equally to the potential economic benefits of regulating interactive gambling, which include taxation and licensing fees. As pointed out by the National Gambling Policy, 2016, interactive gambling might not be inherently labour intensive when compared to land-based gambling at casinos establishments, but it will certainly generate much needed revenue for the country, running into millions of rands from taxation and licensing fees.

To reiterate how these concerns have been discussed and addressed in the thesis, a brief summary of the major findings follows hereunder. It must be pointed out that the findings are not limited to the concerns of the National Gambling Policy, 2016, but concern all issues central to the legalisation of interactive gambling in South Africa.

7.3.1 Summary: historical regulation of gambling

Issues of morality were at the heart of the early regulation of gambling in South Africa. From the colonial era of the 18th century up until the end of the apartheid government in the 1990s, the prohibition of gambling activities was premised on principles of morality. Society at large was deemed by successive governments of the time to view gambling as a vice, although no research survey soliciting the views of society on the matter was ever conducted. It took the efforts of the Wiehahn Commission, which released its report in 1995, to rid gambling of this assumption of morality. The Wiehahn Commission advocated for the legalisation of gambling, warning that a prohibitive approach could no longer be said to represent the true moral viewpoint of the majority of South Africans. With the enactment of the Interim Constitution, which conferred concurrent authority on the national and provincial governments to regulate gambling, morality ceased to be a decisive factor in gambling regulation. Nevertheless, this did not mean that gambling was rid completely of its negative stigma, which has its roots in morality. Moral overtones are and will always be part of the debate whenever legislative proposals for new forms of gambling are on the cards.

The current National Gambling Act, informed by the dictates of the Constitution requiring cooperative governance between spheres of governments, ushered in

guidelines upon which regulation of gambling is premised in South Africa. These guidelines include regulation of gambling activities, protection of consumers, that is, gamblers, against the adverse effects of gambling and protection of both society and the economy against the proliferation of gambling. With these guidelines in place, Parliament passed the National Gambling Amendment for the legalisation and regulation of interactive gambling.

As we know today, the uncertainty in the proclamation of the commencement date for the National Gambling Amendment Act suddenly resulted in a u-turn by both Parliament and the Executive in their views on the legalisation of interactive gambling. Unfortunately, there are few grounds for prospective interactive gambling operators or gamblers to challenge the Executive to proclaim the commencement date of the National Gambling Amendment Act. Parliament should have set a default date in order to avoid the current impasse. For this reason, the decision in *Casino Enterprises (Pty) Ltd v Gauteng Gambling Board* affirming the prohibition of interactive gambling in terms of the current National Gambling Act remains.

7.3.2 Summary: exposition of South Africa's law on gambling

Gambling falls within the legislative competence of both the national and provincial spheres of government. As a result it is governed by the National Gambling Act and provincial gambling laws passed by provincial governments in each area of their jurisdictions. The National Gambling Act determines the gambling activities that may be licensed by provincial licensing authorities. Any gambling not authorised by the National Gambling Act is unlawful. As discussed with regard to electronic bingo terminals not catered for in the definition of bingo, however, the Gauteng Gambling and Betting Act expanded the definition of bingo to include electronic bingo terminals. Gambling activities authorised in terms of the National Gambling Act include casinos, limited pay-out machines, bingo, amusement games and betting on racing and sports activities. Horse racing or race-meetings are regulated by provincial gambling laws.

The National Gambling Act is premised on a destination policy in which gambling venues are placed a reasonable distance away from society in order to limit their availability and accessibility by poorer communities. This destination policy assumes that convenience gambling contributes to problem gambling and/or gambling disorder. By locating gambling venues in places that require travel in order to reach them, the government has reduced gamblers' over stimulation for gambling. Nevertheless, the sustainability of the destination policy is under threat, with gambling venues being incorporated into shopping malls and other areas of public interest. Proposed legalisation of interactive gambling will certainly require a rethink of the destination policy.

With its destination policy, the National Gambling Act has not been successful in limiting the proliferation of gambling opportunities or arresting the scourge of problem gambling and/or gambling disorder. Despite this, the Act is to be commended for generating much needed revenue (tax and licence fees) and creating jobs in the gambling sector. The introduction of new gambling activities will certainly require a review of the Act to strengthen consumer protection. The Act is wanting in the areas of harm minimisation measures for the prevention of problem gambling and/or gambling disorder and for the restriction of modern forms of advertisement such as sponsorship logos and celebrity endorsements. It also requires strengthening to bring to an end the fragmented regulatory approach of provincial gambling laws.

7.3.3 Summary: challenges facing regulation of interactive gambling

One of the major challenges facing the regulation of gambling is problem gambling and/or gambling disorder. Interactive gambling, being a subset of gambling, is set to intensify problem gambling as gamblers with access to the internet will now have unlimited availability of more gambling opportunities around the clock. The virtual mode of interactive gambling may mean that some of the strategies devised for land-based gambling to curb or minimise the phenomenon of problem gambling will not be relevant or applicable to interactive gambling activities. For example, the advantage of land gambling is that it is feasible to monitor and physically identify gamblers who have been gambling uninterrupted for long hours; this would not be

possible in an interactive gambling environment. Furthermore, as gambling is characterised as compromising the financial stability of a gambler to the extent that it disrupts personal, family and recreational pursuits, the privacy afforded by interactive gambling may mean that it may take longer before affected family members become aware of a gambler's indulgence in gambling. The same applies to gamblers who show symptoms of problem gambling such as substance abuse; it may be difficult to detect in interactive gambling that a particular gambler has a substance abuse problem attributable to his/her gambling spree. This calls for the strengthening of harm minimisation strategies to respond to the risks of interactive gambling. Problem gambling continues to afflict gambling yet South Africa's gambling regulatory framework remains inadequate in curtailing this trajectory. No legal recognition is accorded to problem gambling and/or gambling disorder. It is of no legal consequence to criminal behaviour when an accused is diagnosed with such a condition. Even worse, treatment and counselling for problem gambling has not yet found its way into South Africa's gambling regulatory framework. With these loopholes, any proposal for legalisation of any new form of gambling, in this case interactive gambling, is likely to be frowned upon for fear of its exacerbating existing problems.

The association between gambling and crime has contributed to the negative stigma attached to gambling, with many viewing gambling as a potential source of crime. In many cases, gamblers with problem gambling resort to wrongful conduct as a means of financing their uncontrollable gambling habits. The proposed introduction of interactive gambling has added another layer of crime targeting the virtual environment, that is, cybercrime in interactive gambling. Nevertheless, there is no more risk of cybercrimes through interactive gambling than any other form of internet commerce.

Challenges facing interactive gambling are not insurmountable. Interactive gambling creates a platform for the implementation of harm minimisation strategies to foster responsible gambling practices.

7.3.4 Summary: proposed regulatory framework for interactive gambling

The regulation of interactive gambling is by no means an easy task but neither is it impossible. Interactive gambling is merely another mode of offering gambling activities in the virtual environment facilitated by internet technology. Its regulation does not require completely new legislation distinct from the current regulatory framework for gambling. The current regulatory framework governing gambling is in itself inadequate if interactive gambling was to be legalised immediately, however.

In terms of the National Gambling Act, the NGB is responsible for issuing gambling licences. In order to cater for interactive gambling, the National Gambling Amendment Act has proposed four types of licence namely: an interactive gambling operator licence, manufacturer licence, supplier licence, and software and/or equipment maintenance provider licence. New measures regarding the identity of gamblers are introduced, by which gamblers are required to register with their interactive gambling providers. This is then followed by the opening of a gambling account that will be linked to gambler's banking account.

The National Gambling Amendment Act together with draft Interactive Gambling Regulations adopts the process for exclusion prescribed by the current National Gambling Act. Unfortunately, the current process is defective in the following respects: (i) The exclusion process at the request of a third party must be sanctioned by a court of law before the name of the affected gambler is entered in the register of excluded persons. There is no evidence that this process has been followed. (ii) The breach of a self-exclusion agreement by visiting gambling premises is viewed as trespassing (which is an equivalent of unauthorised access to gambling websites in case of interactive gambling). The enforcement of self-exclusion is therefore reliant upon common law or other pieces of legislation other than the regulatory framework for gambling. In my view, this is not ideal as breach of self-exclusion should be enforced under provisions regarding failure to comply with the Act.

The Interactive Gambling Regulations attempt to strengthen harm minimisation strategies for problem gambling by introducing self-limit measures such as deposit

limits, loss limits and time limits. These self-limit measures face a challenge the moment a gambler registers with more than one gambling website, however. Upon reaching self-imposed limit(s) on a particular gambling website, there is nothing preventing such a gambler from proceeding to another gambling website and commencing gambling, thereby rendering self-imposed limits futile.

Although the National Gambling Amendment Act seeks to further prohibit the advertisement of interactive gambling in an unlawful manner, its scope or definition does not encompass modern forms of advertisement by interactive gambling providers, namely sponsorship logos. Advertisement by sponsorship logos for gambling seems to pose a particular challenge for current regulatory instruments, especially when broadcasting events/activities based in foreign countries are sponsored by interactive gambling providers.

In addition to the National Gambling Amendment Act and its subsequent Interactive Gambling Regulations, a complementary framework for taxation of interactive gambling has been developed and has resulted in the publication of the Interactive Gambling Tax Bill. Enactment of this Bill will result in a two-tier system of taxation with a lower tax rate for interactive gambling and higher tax rate for land-based gambling. Furthermore, the Bill is likely to be affected by the possible introduction of taxation of gambling winnings. Such taxation is unlikely to curb excessive gambling; rather, it would drive gamblers to gamble in illegal and/or unlicensed interactive gambling websites with better returns and no tax on gambling winnings.

Despite these shortcomings, effective regulation of interactive gambling is achievable and within reach of South Africa's gambling regulatory framework.

7.3.5 Summary: comparative approaches to regulation of interactive gambling

The emergence of interactive gambling has seen countries adopting various approaches intended either to prohibit or embrace this form of recreational activity.

These approaches include:-

- Prohibitive approach – absolute prohibition of any form of interactive gambling services within its jurisdiction, including barring of its citizens from participating in any form of this activity. As discussed, the US is one of the jurisdictions that has not legalised interactive gambling. The UIGEA is perceived to be a panacea for dealing with interactive gambling from the US although in reality it is reliant on federal or state law banning interactive gambling for its application. Its ultimate objective is to stop financial institutions from accepting any money or transmitting financial instruments for interactive gambling purposes. Notwithstanding UIGEA, the US' federal states such as Nevada, New Jersey and Delaware have licensed their casinos to provide interactive gambling services (intrastate interactive gambling) to their patrons. The UIGEA in no way prohibits intrastate interactive gambling, provided that mechanisms for gambler registration, age and location verification are in place.
- Liberal approach – allowing the provisioning of interactive gambling services within its jurisdiction, including participation by its residents in licensed interactive gambling services. The UK has embraced the benefits of internet technology and legalised interactive gambling. Its Gambling Act authorises the issuance of operating licences that authorise “remote gambling”. In 2014, the UK passed the Gambling (Licensing and Advertising) Act to compel interactive gambling operators offering or seeking to offer their services to its citizenry to obtain licences issued by the Gambling Commission. This applies even if such an operator has no equipment located in the UK.
- Restrictive approach – prohibiting certain forms of interactive gambling services for its citizenry while licensing its interactive gambling operators to

offer their services without any restriction to gamblers in foreign jurisdictions. Through its Interactive Gambling Act, Australia forbids the provisioning of interactive casino games such as poker, roulette, bingo, blackjack and virtual electronic games to its citizenry. The growing number of Australians found to be gambling in an unregulated interactive gambling environment has raised concerns and calls for the review of the restrictions imposed by the Act. One such recommendation is *“to enable and encourage (currently prohibited) interactive gaming sites (as well as currently licensed sites that prevent Australians from accessing their interactive poker tournaments) to become licensed in Australia on condition that they cease offering higher-risk interactive gaming services to Australians and only offer interactive tournament poker (that is, the lowest risk type of interactive gaming)”*.¹¹⁰³ Instead of a wholesale legalisation of interactive gambling, it appears that Australia would prefer individual legalisation of certain interactive gambling activities that are deemed to present less risk to its citizenry.

There are also numerous jurisdictions that are uncertain about the prohibition of interactive gambling. Canada is one such country whose laws seem to be prohibiting interactive gambling yet the Kahnawake tribal community has, through the Kahnawake Gambling Commission, adopted regulations governing interactive gambling. Licensing of interactive gambling by the Kahnawake Gambling Commission creates a safe haven for interactive gambling providers looking for relaxed interactive gambling regulation, lower tax rates and lower costs. Canada’s approach mirrors the legal position of numerous countries whose legal position on interactive gambling is uncertain despite reports indicating the occurrence of interactive gambling activities in their jurisdiction.

Immediate economic benefits for countries liberalising and licensing interactive gambling include taxation and licensing fees. Nonetheless, there are still difficulties with regard to differences in tax treatment of interactive gambling and land based gambling.

¹¹⁰³ Department of Broadband, Communications and the Digital Economy *Interactive Gambling Act* 119.

7.4 Recommendations

South Africa should follow in the footsteps of the UK and legalise interactive gambling. The prohibition of interactive gambling is of no economic benefit to the country. Interactive gambling is merely an internet-enabled mode of offering gambling and its legalisation would not prejudice land-based gambling but merely make it possible for consumers to choose their preferred mode of gambling.

The following key areas are recommended for effective regulation of interactive gambling:

A. Inclusion of problem gambling and/or gambling disorder in the regulatory framework

The phenomenon of problem gambling/gambling disorder and its associated characteristics such as, amongst others, unmanageable debt, domestic violence, substance abuse and crime are sufficient for its inclusion in the gambling regulatory framework in order to limit its impact. The current National Gambling Act gives scant regard to problem gambling and/or gambling disorder.

Problem gambling and/or gambling disorder is a threat to gambling and is an impediment to legalisation of new forms of gambling, including interactive gambling. In order to minimise its risks, the gambling regulatory framework should include among its objectives the desire to prevent and minimise problem gambling/disorder. This would set the tone for a strengthening of harm minimisation strategies such as deposit limits, loss limits, time limits and exclusion.

B. Licensing

Legalisation of interactive gambling requires an amendment to the current licensing regime to include this mode of gambling. The following licences are proposed for the successful implementation of interactive gambling.

- *licence for interactive gambling provider –that is, authorisation of provisioning of interactive gambling service;*

- *licence for key personnel – that is, licence for personnel in management positions of the interactive gambling provider, in particular individuals responsible for (i) management and business of the licensed interactive gambling entity (ii) gambling-related information technology and/or software (iii) gambling regulatory compliance (iv) finances of the interactive gambling entity;*
- *licence for location of the operations – Interactive gambling providers seeking to offer their gambling services should have their operations (internet server) situated in one of the provinces of South Africa. This is the only way in which the NGB will be able to exercise authority over interactive gambling services offered in South Africa and to enforce compliance.*
- *Supplier licence and software and/or equipment maintenance provider licence. The purpose of these licences is to prevent the sector from being flooded with below standard equipment that will compromise the integrity of the games and ultimately the sector.*

Authority to issue interactive gambling licences should be vested with the NGB while the provincial licensing authority is given the power to license premises where interactive gambling equipment and/or software is located in its area of jurisdiction.

C. Licence conditions for interactive gambling

Included within the legislative authority to grant licences is the power to impose licence conditions and technical standards required for interactive gambling equipment and/or software. It is recommended that legalisation and licensing of interactive gambling in South Africa should involve the following:

C.1 Registration

It is a condition of every licensed interactive operator to put in place a once-off registration system for gamblers prior to gambling. Registration is a prerequisite for any gambler wishing to participate in interactive gambling. It enables the interactive

gambling provider to obtain personal details of patrons required for the opening of a gambling account.

More importantly, it serves to prevent undesirable patrons from gaining access to interactive gambling activities. While gamblers have a duty to furnish their particulars, including identity documents, to interactive gambling providers, the latter has a concomitant responsibility to verify the age of its patrons upon registration. This may require liaison with relevant government departments or agencies. NB: the age limit for participation in gambling is set out in the current National Gambling Act.

C.2 Opening of gambling accounts

Upon successful registration, the gambling provider must create a gambling account for each gambler. Multiple accounts must be prohibited. The purpose of this account, which must be linked to a bank account, is to allow a gambler to transfer his/her deposit for gambling.

Like any other account, it must reflect all transactions effected by a gambler, namely:

- Deposits into the account;*
- Withdrawals from the account;*
- Winnings;*
- Losses; and*
- Self-imposed, responsible gambling limit history.*

A statement of account containing the above information must be made available to the gambler on a monthly basis or such time period determined by the gambler.

C.3 Harm minimisation strategies

Responsible gambling can only be achieved if gamblers are provided with sufficient information and the necessary tools to manage their gambling habit. This is part of the harm minimisation strategy for problem gambling/gambling disorder. The virtual world of interactive gambling makes it possible for implementation of the following measures to enable gamblers to control their gambling habit:

(i) Deposit limit

Two types of deposit limits are recommended, namely a discretionary deposit limit determined by the gambling provider, and a gamblers' voluntary deposit limit. No statutory deposit limit is recommended.

- *Statutory deposit limit vs Discretionary deposit limit determined by gambling providers*

With the low value of South Africa's currency compared to major foreign currencies, it is not economically prudent to impose a statutory deposit limit. Instead, interactive gambling providers should conduct a financial assessment of each gambler at the time of registration to determine his/her monthly deposit gambling limit. In that way, gamblers will be able to freely indulge within their financial means. Statutory deposit limits have the effect of limiting gamblers with deep financial pockets.

- *Gamblers' voluntary deposit limit*

In addition, gamblers should be free (and encouraged) to set their own monthly deposit limit provided it is lower than the limit determined by the gambling provider. This measure is intended to encourage responsible gambling by allowing gamblers to be in charge of their gambling finances.

(ii) Loss limit

Apart from setting deposit limits, gambling operators should put in place responsible gambling tools allowing gamblers to set a net loss that can occur within a particular time period.

(iii) Time limits

All gambling websites should contain tools enabling gamblers to predetermine the amount of time they intend to spend gambling. This may include the indication of time elapsed during the course of a gambling session. When the predetermined time

has elapsed but not before the end of a playing session, the website should lock the gambler out and allow for a cooling-off period before such gambler commences with another gambling session.

(iv) Changing of set limits

In order to prevent gamblers from changing the set limits at will, a mandatory cooling-off period should be imposed, in particular when a gambler wishes to increase his/her set limits. A downward adjustment requires no cooling-off period, as this does not pose any threat to the gambler.

C.4. Exclusion

Exclusion from gambling activities is the last means of harm reduction intended to save a gambler from problem gambling and/or gambling disorder. It comes in two forms, namely exclusion at the request of a third party and self-exclusion by a gambler.

(i) Exclusion at the request of third party

The process for an exclusion request made by a third party (in particular, a family member) requiring a court order is cumbersome and there is hardly any evidence to show that it has ever been used.

It is recommended that a family member affected by a gambler's problem gambling and/or gambling disorder should be free to approach the relevant authority (in this case the NGB) to initiate the process for exclusion. In this case the NGB may, based on the information received from and/or concerns raised by the affected family member, request a problem gambler to self-exclude from gambling. If the gambler is not amenable to such request, it should be incumbent upon the NGB to approach the court to have this gambler entered into the Exclusion Register (that is, list of persons excluded from gambling). In contrast to a family member, the NGB is well placed

through its supporting structures such as the NRGF to establish whether an individual's gambling habit has reached the level of problem gambling or gambling disorder; this evidence is required in court if the individual is to be excluded from gambling.

(ii) Self-exclusion

Ideally, requests for self-exclusion should be made in person. Submitting the request in person will provide an opportunity for a gambling provider to make available sufficient information about the consequence of self-exclusion and, more importantly, to ensure that a gambler's decision is fully informed in this regard. In fact, however, the virtual environment of interactive gambling has made this unnecessary. The information is made available on the website or transmitted to a gambler who is then deemed to have acquainted himself/herself with the information.

Nevertheless, it is recommended that self-exclusion should contain, at the very least, the following information:

- *Information regarding counselling and treatment services providers;*
- *Exclusion period (that is, minimum period for exclusion and an option to extend the minimum period);*
- *Exclusion applies to all gambling providers licensed by, in this case, the NGB;*

This is to ensure that gamblers excluded from one gambling websites do not migrate to another during the exclusion period.

- *Responsibility of gambling providers during exclusion period*

It is recommended that upon exclusion of a gambler, his/her gambling account must be closed. All remaining deposits and winnings held in this gambling account must be payable to the gambler's bank account.

During the exclusion period, gambling providers must remove an excluded gambler from their promotional and/or marketing mailing list. There should be no solicitations, targeted mailings, telemarketing promotions, gambler club materials or other

promotional materials relating to gambling activities transmitted to an excluded gambler.

Legality of self-exclusion

It is debatable whether self-exclusion amounts to a contract or whether it remains a request. If it amounts to a contract/agreement, it will be affected by rules governing the agreement, such as provision for a “cooling-off period” in which a gambler is free to cancel within a particular time period, that is, five working days. For this reason, it is recommended that requests for self-exclusion should be treated as such and not as a contract/agreement. This will obviate aspects of a valid contract/agreement which might affect the validity of self-exclusion.

D. Standards for interactive gambling equipment and/or software

Whilst gambling operators are encouraged to use the best gambling equipment and/or software available worldwide, such equipment or software must be approved by the NGB and certified by the South African Bureau of Standards. The latter is well placed to test and calibrate gambling machines and equipment and/or software as part of its overall mandate for standards development and quality assurance services.

(i) Standard information to be displayed on gambling websites

At the heart of responsible gambling lies the need to provide gamblers with adequate information and technological tools to control their gambling habits. It is not enough that gamblers are warned of the dangers of gambling during the registration process. Alerting gamblers to the dangers of gambling should be an ongoing process.

For this purpose, it is recommended that the homepage of the interactive gambling provider should contain:

- Information on problem gambling;*

- *Links to self-exclusion procedures and responsible gambling service websites, in particular the NRGP. [It is a matter of concern that the National Responsible Gambling Programme (NRGP) has not been accorded recognition in the current National Gambling Act, however. In other words it is a treatment and counselling service for gamblers provided free of charge and yet it is expected to make a dent in curbing problem gambling.];*
- *Technological tools for self-assessment of problem gambling; and,*
- *Self-limit features.*

E. Counselling and treatment services for gambling

Other than requiring a gambling provider to make available to an excluded person a directory (that is, simply contact details) of locally recognised counselling, treatment or education services addressing problem gambling and/or gambling disorder, the current National Gambling Act makes no provision for counselling or treatment services. Yet, the gambling industry is making a financial contribution to the National Responsible Gambling Programme to fulfil its goals of providing counselling and treatment services for problem gambling.¹¹⁰⁴ The challenge is that the National Responsible Gambling Programme has no statutory recognition within the gambling regulatory framework. Incorporation of NRGP into the gambling statute is long overdue.

Without counselling or treatment services, harm minimisation strategies for problem gambling will continue to be incomplete. It is therefore recommended that upon observation of signs of problem gambling in an individual, such an individual must be referred for counselling and treatment.

¹¹⁰⁴ *National Responsible Gambling Programme is funded by the gambling industry with each licence gambling operator contributing 0,1% of its gross gambling revenue – Department of Trade & Industry National gambling policy 38.*

F. Enforceability of gambling debts

Debt is a common result of problem gambling and/or gambling disorder. In order to stem gambling debt, the current provision of the National Gambling Act prohibits gambling providers from extending credit for purposes of gambling, yet the same Act enforces debts incurred in the course of gambling activity, unless such debt was incurred by an excluded person or a minor person. It is understandable that it is difficult for any credit provider to know beforehand that the debt has been incurred in pursuance of gambling unless the person seeking debt or credit extension discloses such fact. Nonetheless, this position does not augur well for the curbing of gambling debts.

It is therefore recommended that:

- With regard to interactive gambling – no gambling websites should be linked to the services of a credit provider;*
- Despite enforceability of debts incurred during the course of gambling, there should be consultation with the National Credit Regulator to establish whether gambling debt falls within reckless lending and is therefore contrary to the National Credit Act.*

G. Advertisement of interactive gambling

Interactive gambling or any gambling per se is not a hazardous recreational activity, although it is unsuitable for minors and, to a certain extent, for gamblers with an inclination to become problem gamblers. As in the case of any other product or service, its advertisement is intended to arouse a person's craving for gambling and the chance of winning vast amounts of money. Ordinarily its advertisement should not present challenges if it steers clear of minors or activities aimed exclusively at minors. The National Gambling Act has already implemented a framework for the acceptable advertisement of gambling that would automatically apply to interactive gambling. Nevertheless, this existing framework falls short of including modern forms of advertisement such as linking gambling to popular goods or services.

Recommendations include:

- *Expanding the scope of gambling advertisement to encapsulate all modes of advertisement including sponsorship logos of interactive gambling providers. [This is not to suggest that sponsorship logos be prohibited; rather, they should be subjected to the same rules that apply to any form of gambling advertisement.];*
- *Prohibiting advertisement within the country of any interactive gambling services not licensed by the NGB;*
- *Prohibiting gambling advertisement or sponsorship of activities or services aimed at minor children. In addition, gambling advertisements should carry a caption or warning that minors are not permitted to gamble.*

H. Taxation of interactive gambling

Gambling tax provides much needed revenue for government to uplift the socio-economic conditions of its citizens. Currently, land-based gambling establishments are taxed at provincial levels of government with each provincial government imposing its own tax rate. There is no uniform tax rate for land-based gambling establishments in South Africa.

With interactive gambling to be administered and licensed at national level, its taxation falls within the legislative competency of the Department of Finance. When setting the tax rate for interactive gambling, South Africa should take into account the need to attract interactive gambling investors. Higher tax rates may serve as a disincentive to potential investors. The proposal of the Interactive Gambling Tax Bill to levy 6% of the gross gambling revenue is reasonable in this regard.

In conclusion, interactive / online gambling is a subset of gambling enabled by internet-based technology. Other than its mode of offering, it is no different from land-based gambling, hence the argument that it should be incorporated in the existing gambling regulatory framework subject to amendments based on the aforementioned recommendations. It should serve as an avenue for reinvigorating

the dwindling South African gambling market, which is failing to attract technologically knowledgeable customers. In contrast to prohibition, its legalisation and regulation will yield socio-economic benefits for the country. Instead of sheltering behind regulatory capacity as the National Gambling Policy, 2016 posits, South Africa should move towards the regulation of interactive / interactive gambling grounded in the existing regulatory framework, hence the title of this thesis **“TOWARDS THE REGULATION OF INTERACTIVE GAMBLING: AN ANALYSIS OF THE GAMBLING REGULATORY FRAMEWORK IN SOUTH AFRICA”**.

IV. BIBLIOGRAPHY

Books

American Psychiatric Association *DSM–IV*

American Psychiatric Association *Diagnostic & statistical manual of mental disorders (DSM–IV)* 4th ed (American Psychiatric Publishing New York 1994)

American Psychiatric Association *DSM–5*

American Psychiatric Association *Diagnostic & statistical manual of mental disorders (DSM–5)* 5th ed (American Psychiatric Publishing New York 2013)

Artz, Hoffman-Wanderer & Moulton *Hard time(s)*

Artz L, Hoffman-Wanderer Y & Moulton K *Hard time(s): Women's pathways to crime and incarceration* (GHJRU University of Cape Town 2012)

Bennion *Statutory interpretation*

Bennion *Statutory interpretation* 3rd ed (London Butterworths 1997)

Castellani *Pathological gambling*

Castellani B *Pathological gambling: the making of a medical problem* (State University of New York Press New York 2000)

Diaconu *International trade in gambling services*

Diaconu M *International trade in gambling services* (Kluwer Law International BV, The Netherlands 2010)

Fairbridge *A history of South Africa*

Fairbridge D *A history of South Africa* (Oxford University Press London 1918)

Feinberg *Harm to others*

Feinberg J *Harm to others: the moral limits of the criminal law* vol 1 (Oxford University Press New York 1984)

Feinberg *Offences to others*

Feinberg J *Offences to others: the moral limits of the criminal law* vol 2 (Oxford University Press New York 1985)

Feinberg *Harm to self*

Feinberg J *Harm to self: the moral limits of the criminal law* vol 3 (Oxford University Press New York 1986)

Feinberg *Harmless wrongdoing*

Feinberg J *Harmless wrongdoing: the moral limits of the criminal law* vol 4 (Oxford University Press New York 1988)

Gainsbury *Internet gambling*

- Gainsbury S *Internet gambling: current research findings and implications* (Springer Science and Business Media New York 2012)
- Hart *Law, liberty and morality*
Hart H.L.A. *Law, liberty and morality* (Stanford University Press California 1963)
- Howard *Cyber fraud*
Howard R *Cyber fraud: tactics, techniques and procedures* (Auerbach Publications Florida 2009)
- Kalley *South Africa's treaties in theory and practice*
Kalley J *South Africa's treaties in theory and practice 1806–1998* (Scarecrow Press New Jersey Inc 2001)
- Kemp *et al Criminal law in South Africa*
Kemp G *et al Criminal law in South Africa* (Oxford University Press Southern Africa 2012)
- Laband *Rope of sand*
Laband J *Rope of sand: the rise and fall of the Zulu Kingdom in the nineteenth century* (Jonathan Ball Publishers South Africa 1995)
- James (ed) *The Canadian encyclopedia*
James H (ed) *The Canadian encyclopedia vol II* (Hurting Publishers Ltd 1985)
- Rose *et al, Internet gaming law*
Rose N *et al Internet gaming law* 2nd ed (Mary Ann Liebert Inc New York 2009)
- Singh *From Dutch South Africa to Republic of South Africa*
Singh D *From Dutch South Africa to Republic of South Africa 1652–1994* (Allied Publishers New Delhi 2010)
- Snyman *Criminal Law*
Snyman CR *Criminal Law* 5th ed (LexisNexis Durban 2008)
- Soanes and Stevenson (eds) *The concise oxford dictionary*
Soanes C and Stevenson A (eds) *The concise Oxford dictionary* 11th ed (Oxford University Press London 2008)
- Sullivan *Sullivan and Driedger on the construction of statutes*
Sullivan R *Sullivan and Driedger on the construction of statutes* 4th ed (LexisNexis Canada 2002)

Chapters in Books

Du Plessis *The South African Republic*

Du Plessis J “The South African Republic” in Muller C *Five hundred years: a history of South Africa* (Academica Pretoria and Cape Town 1969) 256–296

Griffiths, Derevensky and Parke *Online gambling among youth*

Griffiths M, Derevensky J & Parke J “Online gambling among youth: cause for concern?” in Williams R, Wood T and Parke J (eds) *Routledge international handbook of internet gambling* (Routledge London and New York 2012) 183–199

Liebenberg *The Union of South Africa*

Liebenberg B “The Union of South Africa up to the Statute of Westminster, 1910–1931” in Muller C *Five hundred years: a history of South Africa* (Academica Pretoria and Cape Town 1969) 385–411

Smith *Sports betting*

Smith G “Sports betting in Canada” in Paul M *et al* (eds) *Sport betting: Law and policy* (T.M.C. Asser Press, The Hague, Netherlands 2012) 288-303

Van Schoor *The Orange Free State*

Van Schoor M “The Orange Free State” in Muller C *Five hundred years: a history of South Africa* (Academica Pretoria and Cape Town 1969) 234–255

Williams, Wood & Parke *History*

Williams R, Wood R and Parke J “History, current worldwide situation, and concerns with internet gambling” in Williams R, Wood R and Parke J (eds) *Routledge international handbook of internet gambling* (Routledge London and New York 2012) 3–26

Reports

American Gaming Association *Five years after UIGEA*

American Gaming Association *White paper: online gambling five years after UIGEA* (American Gaming Association 2011)

Armytage *Destination gaming*

Armytage P *Destination gaming: evaluating the benefits for Victoria* (May 2008)

Australian Gaming Council *Current issues*

Australian Gaming Council *Current issues related to identifying the problem gambler in the gambling venue* (August 2002)

Australian Institute of Criminology and PricewaterhouseCoopers *Fraud in Australia and New Zealand*

Australian Institute of Criminology and PricewaterhouseCoopers *Serious fraud in Australia and New Zealand: Research and Public Policy Series No. 48* (Australian Institute of Criminology Canberra 2003)

Campbell, Hartnagel & Smith *Gambling in Canada*

Campbell C, Hartnagel T & Smith G *The legalization of gambling in Canada* (06 July 2005)

Casabona *The EU's online gambling*

Casabona S *The EU's online gambling regulatory approach and the crisis of legal modernity* (EU Centre in Singapore Working Paper No. 19 January 2014)

Credit Bureau Monitor *Report*

Credit Bureau Monitor *Report 4th quarter* (December 2013)

Department of Broadband, Communications and the Digital Economy *Interactive Gambling Act*

Department of Broadband, Communications and the Digital Economy *Review of the Interactive Gambling Act 2001* (Final report 2012)

Department of Justice *Taking action on problem gambling: a strategy for combating problem gambling in Victoria*

Department of Justice *Taking action on problem gambling: a strategy for combating problem gambling in Victoria* (October 2006)

Department of Trade & Industry *National gambling policy*

Department of Trade & Industry *National gambling policy, 2016* (Notice 389 of 2015 published in Government Gazette 39887 of 1 April 2016).

European Commission *Online gambling*

European Commission *Green paper on online gambling in the internal market* (24 March 2011)

European Parliament *Online gambling*

- European Parliament *Resolution on online gambling in the internal market* (10 September 2013)
- Gambling Research Australia *Interactive gambling*
Gambling Research Australia *Interactive gambling* (March 2014)
- Gambling Compliance *U.S. online responsible gaming regulations*
Gambling Compliance *U.S. online responsible gaming regulations: Delaware, Nevada and New Jersey* (January 2014)
- Gambling Review Commission *South African gambling industry*
Gambling Review Commission *Review of the South African gambling industry and its regulation* (September 2010)
- Gauteng Gambling Board *Annual Report*
Gauteng Gambling Board *Annual Report* (2012/2013)
- House of Commons *Draft Gambling (Advertising and Licensing) Bill*
House of Commons – Culture, Media and Sport Committee *Pre-legislative scrutiny of the draft Gambling (Advertising and Licensing) Bill* (Sixth Report of Sessions 2012–2013)
- Howard Commission *Inquiry into lotteries*
Howard Commission *South Africa commission of inquiry into lotteries, sports pools, fund raising activities and certain matters relating to gambling* (Government Printers 1993)
- Internal Revenue Service *Gaming publication*
Internal Revenue Service *Gaming publication for tax-exempt organizations* (Pub 3079 Cat. No. 25706L)
- Kefauver Committee *Organised crime in interstate commerce*
Kefauver Committee *Organised crime in interstate commerce* (31 August 1951)
- Keley *et al Gambling @ home*
Keley R *et al Gambling @ home: internet gambling in Canada* (Research report no. 15 October 2001)
- Limpopo Gambling Board *Law enforcement statistics*
Limpopo Gambling Board *Law enforcement statistics from April 2009 to March 2010* (2010)
- Lotteries and Gambling Board *Report on gambling*
Lotteries and Gambling Board *Main report on gambling in the Republic of South Africa* (Pretoria March 1995)
- National Centre for Academic Research into Gaming *Internet gaming*
National Centre for Academic Research into Gaming *Internet gaming and South Africa: implications, costs and opportunities* (Cape Town 1999)

- National Centre for the Study of Gambling *Problem gambling*
National Centre for the Study of Gambling *The national 2006 prevalence study: gambling and problem gambling in South Africa* (2006)
- NGB *Annual Report*
NGB *Annual Report* (2009)
- NGB *Impact of legalised gambling*
NGB *Socio-economic impact of legalised gambling in South Africa [Gambling behaviour in South Africa: Results from the 2009 socio-economic impact study]* (October 2009)
- National Horseracing Authority *The constitution of the National Horseracing Authority*
National Horseracing Authority *The constitution of the National Horseracing Authority of Southern Africa* (06February 2014)
- NRGP *Gambling behaviour*
NRGP *Summary of basic data from the national urban prevalence study of gambling behaviour* (Cape Town March 2010)
- NRGP *Responsible gambling*
NRGP *Introducing South Africa's public/private partnership in responsible gambling* (Information Brochure 2010)
- Nevada Gaming Commission and Nevada Gaming Control Board *Internet gaming*
Nevada Gaming Commission and Nevada Gaming Control Board *Internet gaming prepared for the meeting of the Gaming Policy Committee* (March 2012)
- NGB *Regular gamblers' perceptions on bingo*
NGB *Regular gamblers' perceptions on bingo* (2008)
- National Opinion Research Centre –University of Chicago *Gambling impact*
National Opinion Research Centre – University of Chicago *Gambling impact and behaviour study: report to National Gambling Impact Study Commission* (1 April 1999)
- Parliamentary Joint Select Committee on Gambling *Interactive and online gambling*
Parliamentary Joint Select Committee on Gambling *Reform interactive and online gambling and gambling advertisement 2nd Report* (December 2011)
- Portfolio Committee on Trade and Industry *National gambling legislation*
Portfolio Committee on Trade and Industry *Preliminary report on the review of the national gambling legislation* (March 2010)
- Productivity Commission *Gambling vol.1*
Productivity Commission *Inquiry Report on Gambling vol.1* (February 2010)
- Productivity Commission *Gambling vol. 2*
Productivity Commission *Inquiry Report on Gambling vol. 2* (February 2010)

- PricewaterhouseCoopers *Gambling outlook*
PricewaterhouseCoopers *Betting on Africa: Gambling outlook for 2013–2017*
(South Africa – Nigeria – Kenya) (November 2013)
- Responsible Gambling Council *Self-exclusion*
Responsible Gambling Council *From enforcement to assistance: evolving best practices in self-exclusion* (Discussion Paper 2008)
- SA Racing *Factbook*
SA Racing *Factbook* 2008/2009
- Titch *Internet gambling*
Titch S *Internet gambling: keys to a successful regulatory climate* (November 2012)
- Tsogo Sun *Annual report*
Tsogo Sun *Integrated annual report* (2015)
- Williams & Wood *Internet gambling*
Williams R & Wood R *Internet gambling: a comprehensive review and synthesis of the literature* (Report prepared for the Ontario Problem Gambling Research Centre Guelph Ontario Canada 30 August 2007)
- Wood & Williams *Prevalence, patterns, problems, and policy options*
Wood R & Williams R *Internet gambling: prevalence, patterns, problems, and policy options* (Final report prepared for the Ontario Problem Gambling Research Centre Guelph Ontario Canada 5 January 2009)
- (UK) Gambling Commission *Annual Review*
(UK) Gambling Commission *Annual Review* (2013/2014)
- (UK) Gambling Commission *Annual Reports & Accounts*
(UK) Gambling Commission *Annual Reports & Accounts* (2013/2014)
- (UK) Gambling Commission *Annual Report*
Gambling Commission *Annual Report* (2014/15)
- (UK) Gambling Commission *Online self-exclusion scheme*
Gambling Commission *Briefing note on the national online self-exclusion scheme* (May 2015)
- (UK) Gambling Commission *LCCP*
(UK) Gambling Commission *Licence Conditions and Codes of Practice* (May 2014)
- (UK) Gambling Commission *Proposed amendments to licence conditions and codes of practice (LCCP) for all operators: response document*
(UK) Gambling Commission *Proposed amendments to licence conditions and codes of practice (LCCP) for all operators: response document – Part 1* (March 2014)

United States General Accounting Office *Internet gambling:*
United States General Accounting Office *Internet gambling: an overview of*
the issues (December 2002)

Journal Articles

- Abbott, Volberg & Ronnberg 2004 *Journal of Gambling Studies* 237
Abbott MW, Volberg RA & Ronnberg S "Comparing the New Zealand and Swedish national surveys of gambling and gambling problem" 2004 *Journal of Gambling Studies* 237–258
- Afifi *et al* 2010 *Journal of Psychiatric Research* 331
Afifi T *et al* "The relationship of gambling to intimate partner violence and child maltreatment in a nationally representative sample" 2010 *Journal of Psychiatric Research* 331–337
- Alexander 1994 *Canadian Journal of Law & Jurisprudence* 199
Alexander L "Harm, offense and morality" 1994 *Canadian Journal of Law & Jurisprudence* 199–216
- Anonymous 2010 *The Economists* 14
Anonymous "Online gambling: you bet" 2010 *The Economists* 14
- Anderson 2005 *National Tax Journal* 303
Anderson J "Casino taxation in the United States" 2005 *National Tax Journal* 303–324
- Auer & Griffiths 2013 *Journal of Gambling Studies* 647
Auer M & Griffiths M "Voluntary limit setting and player choice in most intense online gamblers: an empirical study of gambling behaviour" 2013 *Journal of Gambling Studies* 647–660
- Blankenship 2007–2008 *Rutgers Law Review* 485
Blankenship M "The Unlawful Internet Gambling Enforcement Act: a bad gambling act? You betcha!" 2007–2008 *Rutgers Law Review* 485–518
- Blaszczynski, Ladouceur & Schaffer 2004 *Journal of Gambling Studies* 301
Blaszczynski A, Ladouceur R & Schaffer HJ "A science-based framework for responsible gambling: the Reno model" 2004 *Journal of Gambling Studies* 301–317
- Blaszczynski & Nower 2002 *Addiction* 487
Blaszczynski A & Nower L "A pathways model of problem and pathological gambling" 2002 *Addiction* 487–499
- Borna and Lowry 1987 *Journal of Business Ethics* 219
Borna S & Lowry J "Gambling and speculation" 1987 *Journal of Business Ethics* 219–224
- Braverman and Schaffer 2010 *European Journal of Public Health* 273
Braverman J & Schaffer H "How do gamblers start gambling? Identifying behavioural markers for high-risk internet gambling" 2010 *European Journal of Public Health* 273–278

- Brietzke & Kline 1999 *Nebraska Law Review* 263
 Brietzke P & Kline T "The law and economics of Native American casinos" 1999 *Nebraska Law Review* 263–347
- Broda 2008 *Harm Reduction Journal* 27
 Broda A *et al* "Virtual harm reduction efforts for internet gambling: effects of deposit limits on actual Internet sports gambling behaviour" 2008 *Harm Reduction Journal* 27–36
- Carlson 2008 *Suffolk Transnational Law Review* 135
 Carlson E "Drawing dead: recognizing problems with Congress' attempt to regulate the online gambling industry and the negative repercussions to international trade" 2008 *Suffolk Transnational Law Review* 135–160
- Carnelley 2004 *Gaming Law Review* 3
 Carnelley M "A précis of the South African gambling industry" 2004 *Gaming Law Review* 3–9
- Carnelley 2006 *Obiter* 358
 Carnelley M "Tata 'ma millions?' The enforceability of a gambling debt between the lottery operator and the ticket holder; and the enforceability of a partnership agreement to share lottery winnings already paid to one of the partners" 2006 *Obiter* 358–368
- Carnelley 2010 *SACJ* 439
 Carnelley M "Recent cases: gambling law" 2010 *SACJ* 439–453
- Carnelley 2010 *UNLV Gaming Law Journal* 73
 Carnelley M "Betting on dog racing: the next legalised gambling opportunity in South Africa? A cautionary note from the regulation of greyhound racing in Britain" 2010 *UNLV Gaming Law Journal* 73–98
- Carnelley & Hoctor 2001 *Obiter* 379
 Carnelley M & Hoctor SV "Pathological gambling as a defence in criminal law" 2001 *Obiter* 379–388
- Ciaccio 2010 *Bekerley Technology Law Journal* 529
 Ciaccio C, Jr. "Internet gambling: recent developments and state of the law" 2010 *Bekerley Technology Law Journal* 529–553
- Clark & Walker 2009 *International Gambling Studies* 119
 Clark C & Walker D "Are gamblers more likely to commit crimes? An empirical analysis of a nationally representative survey of US young adults" 2009 *International Gambling Studies* 119–134
- Collins & Kelly 2002 *Gambling Law Review* 517
 Collins P & Kelly J "Problem gambling and self-exclusion: a report to the South African Responsible Gambling Trust" 2002 *Gambling Law Review* 517–531

- Conon 2009 *The Journal of Criminal Law and Criminology* 1158
 Conon J “Aces and eights: why the Unlawful Internet Gambling Enforcement Act resides in “dead man’s” land in attempting to further curb online gambling and why expanded criminalization is preferable to legalization” 2009 *The Journal of Criminal Law and Criminology* 1158–1194
- Crofts 2003 *International Gambling Studies* 183
 Crofts P “Problem gambling and property offences: an analysis of court files 2003 *International Gambling Studies* 183–197
- Crowne and Andreopoulos 2012 *UNLV Gaming Law Journal* 155
 Crowne EA and Andreopoulos A “GTL: gaming, territoriality, and the law – comparative approaches to interactive gaming: lessons for Ontario” 2012 *UNLV Gaming Law Journal* 155–166
- Crutchfield 2009 *Tulsa L. Rev* 161
 Crutchfield R “Folding a losing hand: why Congress should replace the Unlawful Internet Gambling Reinforcement Act with a regulatory scheme 2009 *Tulsa L. Rev* 161–190
- Davidson 1989 *The Army Lawyer* 11
 Davidson M “Aces over eights: pathological gambling as a criminal defense” 1989 *The Army Lawyer* 11–16
- Derevensky *et al* 2010 *Int J Ment Health Addiction* 21
 Derevensky J *et al* “An empirical study examining the impact of gambling advertisements on adolescent attitudes and behaviours” 2010 *Int J Ment Health Addiction* 21–34
- Dworkin 1998-1999 *William & Mary Law Review* 927
 Dworkin G “Devlin was right: law and the enforcement of morality” 1998–1999 *William & Mary Law Review* 927–946
- Dyall, Tse & Kingi 2009 *Int J Ment Health Addiction* 84
 Dyall L, Tse S & Kingi A “Cultural icons and marketing of gambling” 2009 *Int J Ment Health Addiction* 84–96
- Editor 2011 *South African Medical Journal* 675
 Editor “Addressing problem gambling” 2011 *South African Medical Journal* 675
- Englisch 2013 *Gaming Law Review and Economics* 20
 Englisch J “Taxation of online gambling in Germany” 2013 *Gaming Law Review and Economics* 20–32
- Faregh & Leth-Steensen 2009 *Journal of Gambling Studies* 131
 Faregh N & Leth-Steensen C “Reflections on the voluntary self-exclusion of gamblers and the law-suits against Ontario Lottery and Gaming Corporation” 2009 *Journal of Gambling Studies* 131–138

- Ferraiolo 2013 *Policy Studies Journal* 217
 Ferraiolo K “Is state gambling policy ‘morality policy’? Framing debates over State lotteries” 2013 *Policy Studies Journal* 217–242
- French, Maclean & Ettner 2008 *Drug and Alcohol Dependence* 155
 French M, Maclean JC & Ettner S “Drinkers and bettors: investigating the complementarity of alcohol consumption and problem gambling” 2008 *Drug and Alcohol Dependence* 155–164
- Gainsbury 2010 *Gambling Research* 3
 Gainsbury S “Response to the Productivity Commission inquiry report into gambling: online gaming and the Interactive Gambling Act” 2010 *Gambling Research* 3–12
- Gainsbury 2011 *YGI Newsletter* 1–3
 Gainsbury S “Internet interventions for the treatment of problem gambling” 2011 *YGI Newsletter* 1–3
- Gainsbury and Wood 2011 *International Gambling Studies* 309
 Gainsbury S and Wood R “Internet gambling policy in critical comparative perspective: the effectiveness of existing regulatory frameworks” 2011 *International Gambling Studies* 309–323
- Gainsbury et al 2013 *Psychology of Addictive Behaviour* 1092
 Gainsbury S et al “Impact of internet gambling on the gambling problem: a comparison of moderate-risk and problem internet and non-internet gamblers” 2013 *Psychology of Addictive Behaviour* 1092–1101
- Gainsbury 2014 *Journal of Gambling Studies* 229
 Gainsbury S “Review of self-exclusion from gambling venues as an intervention for problem gambling” 2014 *Journal of Gambling Studies* 229–251
- Gardiner 1967 *Annals of the American Academy of Political and Social Science* 123
 Gardiner J “Public attitudes towards gambling and corruption” 1967 *Annals of the American Academy of Political and Social Science* 123–134
- Griffiths & Cooper 2003 *British Journal of Guidance & Counselling* 113
 Griffiths M & Cooper G “Online therapy: implications for problem gamblers and clinicians” 2003 *British Journal of Guidance & Counselling* 113–135
- Haefelia, Lischera & Schwarz 2011 *International Gambling Studies* 273
 Haefelia J, Lischera S & Schwarz “Early detection items and responsible gambling features for online gambling” 2011 *International Gambling Studies* 273–288
- Harrington 2007 *Ariz. J. Int’l. & Comp. L* 769
 Harrington L “Loaded dice: do national internet gaming statutes violate World Trade Organization fair trade access standards?” 2007 *Ariz. J. Int’l. & Comp. L* 769–802

- Hayer & Meyer 2011 *Int J Ment Health Addiction* 296
 Hayer T & Meyer G "Internet self-exclusion: characteristics of self-excluded gamblers and preliminary evidence for its effectiveness" 2011 *Int J Ment Health Addiction* 296–307
- Heichel, Knill & Schmitt 2013 *Journal of European Public Policy* 318
 Heichel S, Knill C & Schmitt S "Public policy meets morality: conceptual and theoretical challenges in the analysis of morality policy change" 2013 *Journal of European Public Policy* 318–334
- Henkin 1963 *Columbia Law Review* 391
 Henkin L "Morals and the constitution: the sin of obscenity" 1963 *Columbia Law Review* 391–414
- Hing & Mackellar 2004 *UNLV Gaming Research & Review Journal* 43
 Hing N and Mackellar J "Challenges in responsible provision of gambling: questions of efficacy, effectiveness and efficiency abstract" 2004 *UNLV Gaming Research & Review Journal* 43–58
- Hing, Nuske & Holdsworth 2013 *Journal of Gambling Issues* 1
 Hing N, Nuske E & Holdsworth L "How gaming venue staff use behavioural indicators to assess problem gambling in patrons" 2013 *Journal of Gambling Issues* 1–25
- Hing *et al* 2014 *New Media & Society* 1
 Hing N *et al* "Maintaining and losing control during internet gambling: a qualitative study of gamblers' experiences" 2014 *New Media & Society* 1–21
- Hunt 1965 *Ann. Surv. S. African L.* 72
 Hunt P "General principles of contract" 1965 *Ann. Surv. S. African L.* 72–93
- Jepson 2000 *Appeal Review of Current Law & Law Reform* 6
 Jepson V "Internet gambling and the Canadian conundrum" 2000 *Appeal Review of Current Law & Law Reform* 6–13
- Jolly 2011 *Gaming Law Review and Economics* 441
 Jolly J "The safest bet: revisiting the regulation of internet gambling in Australia" 2011 *Gaming Law Review and Economics* 441–453
- Kalischuk 2006 *International Gambling Studies* 31
 Kalischuk R *et al* "Problem gambling and its impact on families: a literature review" 2006 *International Gambling Studies* 31–60
- Kim *et al* 2014 *International Gambling Studies* 1
 Kim H *et al* "Limit your time, gamble responsibly: setting a time limit (via a pop-up message) on an electronic gaming machine reduces time on device" 2014 *International Gambling Studies* 1–13
- Kingma *Culture and Organization* 31

- Kingma S “Dutch casino space or the spatial organization of entertainment” 2008 *Culture and Organization* 31–48
- Knill “The study of morality policy: analytical implications from a public policy perspective” 2013 (20:3) *Journal of European Public Policy* 309
 Knill C “The study of morality policy: analytical implications from a public policy perspective” 2013 *Journal of European Public Policy* 309–317
- Korman *et al* “Problem gambling and intimate partner violence” 2008 (24) *Journal of Gambling Studies* 13
 Korman L *et al* “Problem gambling and intimate partner violence” 2008 *Journal of Gambling Studies* 13–23
- Kreise & Jowitt 1993 *Int'l Tax J.* 75
 Kreise L & Jowitt E “The taxation of gambling winnings in Australia and the United States: a comparative study” 1993 *Int'l Tax J.* 75–82
- Krige 2011 *African Studies* 3
 Krige D “We are running for a living: work, leisure and speculative accumulation in an underground numbers lottery in Johannesburg” 2011 *African Studies* 3–24
- Ladouceur, Blaszczynski & Lalande 2012 *International Gambling Studies* 215
 Ladouceur R, Blaszczynski A & Lalande D “Pre-commitment in gambling: a review of the empirical evidence” 2012 *International Gambling Studies* 215–230
- Ladouceur & Sévigny” 2009 *Journal of Gambling Issues* 31
 Ladouceur R & Sévigny S “Electronic gambling machines: influence of a clock, a cash display, and a pre-commitment on gambling time” 2009 *Journal of Gambling Issues* 31–41
- Lamont, Hing & Gainsbury 2011 *Sport Management Review* 246
 Lamont M, Hing N & Gainsbury S “Gambling on sport sponsorship: a conceptual framework for research and regulatory review” 2011 *Sport Management Review* 246–257
- Lardner-Burke 1890 *Cape L. J.* 96
 Lardner-Burke H “Lotteries” 1890 *Cape L. J.* 96–105
- Laudwig 2012 *UNLV Gaming Law Journal* 277
 Laudwig N “Gaming regulatory systems: how emerging jurisdictions can use the three major players as a guide in creating a tailored system for themselves” 2012 *UNLV Gaming Law Journal* 277–298
- Lee 2014 2014 *Journal of Family Therapy* 371
 Lee B “Towards a relational framework for pathological gambling (part I): five circuits” 2014 *Journal of Family Therapy* 371–393
- Lesieur & Blume 1987 *American Journal of Psychiatry* 1184

- Lesieur H and Blume S "The South Oaks Gambling Screen (SaGS): a new instrument for the identification of pathological gamblers" 1987 *American Journal of Psychiatry* 1184–1188
- Light 2007 *Modern Law Review* 626
 Light R "The Gambling Act: regulatory containment and market control" 2007 *Modern Law Review* 626–653
- Little & Hecker 1988 *Journal of Gambling Behaviour* 277
 Little W and Hecker F "Compulsive gambling and the changing military law" 1988 *Journal of Gambling Behaviour* 277–281
- Longmore 1956 *South African Journal of Science* 275
 Longmore "A study of fah-fee" 1956 *South African Journal of Science* 275–282
- Lotter 1994 *S. Afr. J. Crim. Just.* 189
 Lotter S "The odds against gambling" 1994 *S. Afr. J. Crim. Just.* 189–199
- Lovejoy 2014 *Fordham International Law Journal* 1525
 Lovejoy K "A busted flush: regulation of online gambling in the European Union" 2014 *Fordham International Law Journal* 1525–1574
- Lycka 2012 *Gaming Law Review and Economics* 184
 Lycka M "The Danish State aid case: application of EU State aid rules to differences in taxation of online and offline gambling" 2012 *Gaming Law Review and Economics* 184–192
- Martinez-Vazquez, Harwood & Larkins 1992 *Public Finance Review* 152
 Martinez-Vazquez J, Harwood G and Larkins E "Withholding position and income tax compliance: some experimental evidence" 1992 *Public Finance Review* 152–174
- Marwell 2006 *New York University Law Review* 802
 Marwell J "Trade and morality: the WTO public morals exception after gambling" 2006 *New York University Law Review* 802–842
- Mathews & Volberg" 2013 *International Gambling Studies* 127
 Mathews M & Volberg R "Impact of problem gambling on financial, emotional and social well-being of Singaporean families" 2013 *International Gambling Studies* 127–140
- McBride and Derevensky 2009 *International Journal of Mental Health & Addiction* 149
 McBride J and Derevensky J "Internet gambling behaviour in a sample of online gamblers" 2009 *International Journal of Mental Health & Addiction* 149–167
- McComb, Lee & Sprenkle 2009 *Journal of Marital and Family Therapy* 415

- McComb J, Lee B & Sprenkle D "Conceptualizing and treating problem gambling as a family issue" 2009 *Journal of Marital and Family Therapy* 415–431
- McMillen 2000 *Prometheus* 391
 McMillen J "Online gambling: challenges to national sovereignty and regulation" 2000 *Prometheus* 391–401
- McMullan & Rege 2010 *Journal of Gambling Issues* 54
 McMullan J & Rege A "Online crime and internet gambling" 2010 *Journal of Gambling Issues* 54–85
- Meier 1999 *Policy Studies Journal* 681
 Meier K "Drugs, sex, rock, and roll: theory of morality politics" 1999 *Policy Studies Journal* 681–695
- Messerlian, Deverensky and Gupta 2005 *Health Promotion International* 69
 Messerlian C, Deverensky J and Gupta R "Youth gambling problems: a public health perspective" 2005 *Health Promotion International* 69–79
- Meyer & Stadler 1999 *Journal of Gambling Studies* 29
 Meyer G & Stadler M "Criminal behaviour associated with pathological gambling" 1999 *Journal of Gambling Studies* 29–43
- Michael *et al* 2012 *Journal of Gambling Studies* 703
 Michael J *et al* "Facilitating responsible gambling: the relative effectiveness of education-based animation and monetary limit setting pop-up messages among electronic gaming machine players" 2012 *Journal of Gambling Studies* 703–717
- Mills 2001 *Journal of Financial Crime* 365
 Mills J "Internet casinos: a sure bet for money laundering" 2001 *Journal of Financial Crime* 365–383
- Miller & Tetstall 2013 *iGaming Business* 18
 Miller J & Tetstall J "Virtual currency and Australia's Interactive Gambling Act" 2013 *iGaming Business* 18–19
- Morse 2009 *Third World L.J.* 189
 Morse R "Resisting the path of least resistance: why the Texas 'pole tax' and the new class of modern sin taxes are bad policy" 2009 *Third World L.J.* 189–221
- Murawski 2008 *Santa Clara Law Review* 441
 Murawski M "The online gambling wager: domestic and international implications of the Unlawful Internet Gambling Enforcement Act of 2006" 2008 *Santa Clara Law Review* 441–471
- Nastally & Dixon 2011 *Int J Adolesc Med Health* 95

- Nastally B & Dixon M "Adolescent gambling: current trends in treatment and future directions" 2011 *Int J Adolesc Med Health* 95–111
- Nelson 2013 *Journal of Policy History* 62
 Nelson M "The morality politics of lotteries and casinos: comparing gambling legalization in Tennessee and Mississippi" 2013 *Journal of Policy History* 62–88
- Nettleton & Camilleri 2011 *Gaming Law Review and Economics* 717
 Nettleton J & Camilleri M "Calling a bluff? Developments in internet gaming law in Australia" 2011 *Gaming Law Review and Economics* 717–718
- NGB October 2012 *Research Bulletin* 1
 NGB "Gambling trends and patterns amongst the South African population" October 2012 (1) *Research Bulletin* 1–3
- NGB June 2013 *Research Bulletin* 1
 NGB "National Gambling Board leads tracking gambling research in South Africa" June 2013 *Research Bulletin* 1–3
- NGB February 2014 *Research Bulletin* 4
 NGB "Is problem gambling properly managed in South Africa?" February 2014 *Research Bulletin* 4
- NGB March 2014 *Research Bulletin* 3
 NGB "Contribution of the gambling sector to the South African economy" March 2014 *Research Bulletin* 3
- O'Hare 2004 *Gaming Law Review* 189
 O'Hare C "Self-exclusion – concept vs reality" 2004 *Gaming Law Review* 189–191
- Paldam 2013 *The European Journal of Comparative Economics* 377
 Paldam M "Safe havens in Europe: Switzerland and the ten dwarfs" 2013 *The European Journal of Comparative Economics* 377–396
- Paulson & Weber 2006 *Issues in Information System* 52
 Paulson R & Weber J "Cyberextortion: an overview of distributed denial of service attacks against online gaming companies" 2006 *Issues in Information System* 52–6
- Peltzer & Thole 2000 *Psychological Reports* 957
 Peltzer K & Thole M "Gambling attitudes among black South Africa university students" 2000 *Psychological Reports* 957–962
- Petry 2001 *Journal of Abnormal Psychology* 482
 Petry N "Pathological gamblers, with and without substance abuse disorders, discount delayed rewards at high rates" 2001 *Journal of Abnormal Psychology* 482–487

- Petry, Stinson & Grant 2005 *Journal of Clinical Psychiatry* 564
 Petry N, Stinson F, & Grant B "Comorbidity of DSM-IV pathological gambling and other psychiatric disorders: results from the national epidemiological survey on alcohol and related conditions" 2005 *Journal of Clinical Psychiatry* 564–574
- Potenza *et al* (2001) *American Journal of Psychiatry* 1500
 Potenza M *et al* "Gender-related differences in the characteristics of problem gamblers using a gambling helpline" (2001) *American Journal of Psychiatry* 1500–1505
- Rahamim & Mthiyane 2008 *Werksman Newsletter* 1
 Rahamim W & Mthiyane T "Regulation of interactive gambling in South Africa" July 2008 *Werksman Newsletter* 1–2
- Ramirez *et al* 1983 *Addictive Behaviour* 425
 Ramirez L *et al* "Patterns of substance abuse in pathological gamblers undergoing treatment" 1983 *Addictive Behaviour* 425–428
- Reith 2007 *American Behavioural Scientist* 33
 Reith G "Gambling and the contradictions of consumption: a genealogy of the 'pathological' subject" 2007 *American Behavioural Scientist* 33-55
- Rex & Jackson 2008 *ACSUS Occasional Papers on Public Policy Series* 1
 Rex J & Jackson D "The options for internet gambling in Canada" 2008 *ACSUS Occasional Papers on Public Policy Series* 1–8
- Richardson III 1978 *Colum. J. Transnat'l L.* 185
 Richardson III H "Self-determination, international law and the South African bantustan policy" 1978 *Colum. J. Transnat'l L.* 185–220
- Rose 2006 *Gaming Law Review* 537
 Rose N "Viewpoint: The Unlawful Internet Gambling Enforcement Act of 2006 analyzed" 2006 *Gaming Law Review* 537–541
- Sallaz 2005 *Society in Transition* 38
 Sallaz J "It's an empowerment thing: an ethnography of colour bar conservation in a South Africa service industry" 2005 *Society in Transition* 38–56
- Sallaz 2006 *Theory and Society* 265
 Sallaz J "The making of the global gambling industry: an application and extension of field theory" 2006 *Theory and Society* 265–297
- Schneider 2014 *Gaming Law Review and Economics* 791
 Schneider S "The fight over point-of-consumption vs point-of-supply taxation in the UK heats up" 2014 *Gaming Law Review and Economics* 791–792
- Scott & Barr 2012 *Journal of Gambling Studies* 719

- Scott L & Barr G “Unregulated gambling in South African townships: a policy conundrum?” 2012 *Journal of Gambling Studies* 719–732
- Segal & Maroun 2014 *Journal of Economic and Financial Sciences* 361
 Segal M & Maroun W “The introduction of a gambling tax in South Africa – what are the odds on the implementation thereof?” 2014 *Journal of Economic and Financial Sciences* 361–374
- Shead, Derevensky & Gupta 2010 *Int J Adolesc Med Health* 39
 Shead W, Derevensky J & Gupta R “Risk and protective factors associated with youth problem gambling” 2010 *Int J Adolesc Med Health* 39–58
- Smith 2004 *Online Information Review* 435
 Smith A “Controversial and emerging issues associated with cybergambling (casinos)” 2004 *Online Information Review* 435–443
- Soos 1990-1991 *Davies Law Review* 107
 Soos P “Self-employed evasion and tax withholding: a comparative study and analysis of the issues” 1990–1991 *Davies Law Review* 107–193
- Stern 1987 *Geography* 140
 Stern E “Competition and location in the gaming industry: the 'casino states' of Southern Africa” 1987 *Geography* 140–150
- Stewart & Kushner 2003 *Alcoholism: Clinical and Experimental Research* 285
 Stewart S & Kushner M “Recent research on the comorbidity of alcoholism and pathological gambling” 2003 *Alcoholism: Clinical and Experimental Research* 285–291
- Suissa 2005 *International Journal of Mental Health & Addiction* 1
 Suissa A “Gambling, violence, and family dynamics: some intervention markers” 2005 *International Journal of Mental Health & Addiction* 1–5
- Suomi A *et al* 2013 *Asian Journal of Gambling Issues and Public Health* 1
 Suomi A *et al* “Problem gambling and family violence: family member reports of prevalence, family impacts and family coping” 2013 *Asian Journal of Gambling Issues and Public Health* 1–15
- Terblanche 2004 *South African Journal of Criminal Justice* 443
 Terblanche S “Sentencing: case” 2004 *South African Journal of Criminal Justice* 443–452
- Tench & Davies 2014 *European Gaming Lawyer* 37
 Tench D & Davies L “Challenging the UK’s proposed long arm gambling licensing legislation” 2014 *European Gaming Lawyer* 37–38
- Thomas *et al* 2011 *International Gambling Studies* 1
 Thomas S *et al* “They are working every angle’. a qualitative study of Australian adults’ attitudes towards, and interactions with gambling industry marketing strategies” 2011 *International Gambling Studies* 1–17

- Thompson 2001 *North Carolina Journal of Law & Technology* 81
 Thompson B "Internet Gambling" 2001 *North Carolina Journal of Law & Technology* 81- 103
- Turner *et al* 2009 *Journal of Gambling Studies* 153
 Turner N *et al* "The relationship of problem gambling to criminal behavior in a sample of Canadian male federal offenders" 2009 *Journal of Gambling Studies* 153-169
- Twomey 2006 *Public Law* 579
 Twomey A "The refusal or deferral of royal assent" 2006 *Public Law* 580-602
- Tyawa 2012 *UNLV Gaming Research & Review Journal* 93
 Tyawa B "Regulating gaming in the new South Africa" 2012 *UNLV Gaming Research & Review Journal* 93-96
- Van Lill 2007 *Acta Commercii* 66
 Van Lill D "Transformational change in the South African gambling and lotteries sector" 2007 *Acta Commercii* 66-80
- Vuaren 2002 *Gaming Law Review* 207
 Vuaren D "The banning of internet gambling in Australia: the Interactive Gambling Act 2001" 2002 *Gaming Law Review* 207-212
- Walsh 2002 *J. Marshall J. Computer & Info. L.* 445
 Walsh E "In re MasterCard International, Inc.: the inapplicability of the Wire Act to traditional casino-style games" 2002 *J. Marshall J. Computer & Info. L.* 445-470
- Wolfe 2007 *The Chronicle Review* B8
 Wolfe A "What we don't know about gambling, but should" 2007 *The Chronicle Review* B8
- Wood & Griffiths 2007 *British Journal of Guidance and Counselling* 373
 Wood R & Griffiths M "Online guidance, advice, and support for problem gamblers and concerned relatives and friends: an evaluation of the Gam-Aid pilot service" 2007 *British Journal of Guidance and Counselling* 373-389
- Wood & Griffiths 2010 *World Online Gambling Law Report* 10
 Wood R & Griffiths M "Spending limits: social responsibility in an interactive gambling: voluntary limit setting" 2010 *World Online Gambling Law Report* 10-11
- Zoland *et al* 2013 *Journal of Gambling Issues* 1-8
 Zoland J *et al* "The prevalence of problem gambling among substance abusing offenders" 2013 *Journal of Gambling Issues* 1-8
- Zorn 1995-1996 *Tax Lawyer* 1
 Zorn S "The federal income tax treatment of gambling: fairness or obsolete moralism?" 1995-1996 *Tax Lawyer* 1-54

Internet Journals (without page numbers)

Alexander

<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1181&context=dltr> (Date of use: 20 February 2015)

Alexander G "The U.S. on tilt: why the Unlawful Internet Gambling Enforcement Act is a bad bet" 2008 *Duke Law & Technology Review*
<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1181&context=dltr>
(Date of use: 20 February 2015)

Banks <http://shura.shu.ac.uk/id/eprint/6903> (Date of use: 14 July 2015)

Banks J "Online gambling and crime: a sure bet?" 2012 *The ETHICOMP Journal* <http://shura.shu.ac.uk/id/eprint/6903> (Date of use: 14 July 2015)

Gainsbury *et al* <http://dx.doi.10.1093/eurpub/ckv006> (Date of use: 22 June 2015)

Gainsbury S *et al* "Greater involvement and diversity of internet gambling as a risk factor for problem gambling" 2015 *Eur J Public Health*
<http://dx.doi.10.1093/eurpub/ckv006> (Date of use: 22 June 2015)

Holdsworth *et al* <http://www.ajgiph.com/content/3/1/11> (Date of use: 11 June 2014)

Holdsworth L *et al* "Impacts of gambling problems on partners: partners' interpretation" 2013 *Asian Journal of Gambling Issues and Public Health*
<http://www.ajgiph.com/content/3/1/11> (Date of use: 11 June 2014)

Presentation papers

Betfair "Presentation for the South Africa Gambling Review Commission"

Betfair Presentation for the South Africa Gambling Review Commission (12 July 2010)

Crawford "Organised crime and connection to illegal gambling"

Crawford J "Organised crime and connection to illegal gambling" A presentation made in a conference themed "Controversial Topics in Gambling" hosted by Alberta Gambling Research Institute Canada (03-05 April 2014)

Downs "Gambling on debt: problem gamblers strategies for concealing deviant identities"

Downs C "Gambling on debt: problem gamblers strategies for concealing deviant identities" A presentation made in a conference themed "Controversial Topics in Gambling" hosted by Alberta Gambling Research Institute Canada (03-05 April 2014)

Gainsbury "Is legalized online gambling in North America inevitable? an Australian perspective"

Gainsbury S "Is legalized online gambling in North America inevitable? an Australian perspective" A presentation to the Discovery Conference held at Toronto, Ontario (14 April 2010)

Scholnick "The impact of VLT location on problem gamblers: evidence from individual bankruptcy filings"

Scholnick B "The impact of VLT location on problem gamblers: evidence from individual bankruptcy filings" A presentation made in a conference themed "Controversial Topics in Gambling" hosted by Alberta Gambling Research Institute Canada (03-05 April 2014)

Department of Trade & Industry "Presentation to the Portfolio Committee on Trade and Industry"

Department of Trade & Industry "Presentation to the Portfolio Committee on Trade and Industry" Parliament of the Republic of South Africa (01 August 2014)

Internet based resources

ABSA <http://www.co.za/Absacoza/Individual/Banking/Credit-Cards/Student-Credit-Card> (Date of use: 05 September 2013)

ABSA "Absa student credit card - qualifying criteria" <http://www.co.za/Absacoza/Individual/Banking/Credit-Cards/Student-Credit-Card> (Date of use: 05 September 2013)

Britannica Online Encyclopaedia <http://0-www.britannica.com.oasis.unisa.ac.za/EBchecked/topic/2248636/gambling> (Date of use: 21 April 2011)

Britannica Online Encyclopaedia "Gambling" <http://0-www.britannica.com.oasis.unisa.ac.za/EBchecked/topic/2248636/gambling> (Date of use: 21 April 2011)

Cardschat <http://www.cardschat.com/south-africa/casinos/> (Date of use: 12 October 2013)

Cardschat "South African online casinos" <http://www.cardschat.com/south-africa/casinos/> (Date of use: 12 October 2013)

CIMA [http://www.cimaglobal.com/Documents/Jobs-docs/Salary_Survey/2013/2013-Salary-survey-South Africa\).pdf](http://www.cimaglobal.com/Documents/Jobs-docs/Salary_Survey/2013/2013-Salary-survey-South Africa).pdf) (Date of use 23 May 2014)

CIMA "Salary survey South Africa 2013" [http://www.cimaglobal.com/Documents/Jobs-docs/Salary_Survey/2013/2013-Salary-survey-South Africa\).pdf](http://www.cimaglobal.com/Documents/Jobs-docs/Salary_Survey/2013/2013-Salary-survey-South Africa).pdf) (Date of use: 23 May 2014)

Combs, Landers & Spry "The responsiveness of casino revenue to the casino tax rate" <http://www.ir.stthomas.edu/ocbfincwp/5/> (Date of use: 17 October 2015)

Combs K, Landers J and Spry J "The responsiveness of casino revenue to the casino tax rate" <http://www.ir.stthomas.edu/ocbfincwp/5/> (Date of use: 17 October 2015)

Cooper & Doucet <http://www.camh.net/egambling/issue7/clinic/index.html> (Date of use 2014-06-28)

Cooper G & Doucet G "Online help for problem gambling: why it is and is not being considered" <http://www.camh.net/egambling/issue7/clinic/index.html> (Date of use: 28 June 2014)

Davis Tax Committee <http://www.taxcom.org.za/termsofreference.html> (Date of use: 07 January 2016)

Davis Tax Committee "Terms of reference" <http://www.taxcom.org.za/termsofreference.html> (Date of use: 07 January 2016)

Department of Trade & Industry <http://www.dti.gov.za/gamblingreview/home.html> (Date of use: 01 April 2011)

Department of Trade & Industry "Terms of reference: establishment of the Gambling Review Commission in the gambling industry in South Africa 2009" <http://www.dti.gov.za/gamblingreview/home.html> (Date of use: 01 April 2011)

European Gaming and Betting Association http://www.egba.eu/media/FACTSHEET_MARKET_REALITY.pdf (Date of use: 18 September 2015)

European Gaming and Betting Association “Market reality” http://www.egba.eu/media/FACTSHEET_MARKET_REALITY.pdf (Date of use: 18 September 2015)

European Union http://europa.eu/about-eu/eu-history/index_en.htm (Date of use: 18 March 2015)

European Union “The history of the European Union” http://europa.eu/about-eu/eu-history/index_en.htm (Date of use: 18 March 2015)

Fabuli <http://www.symantec.com/connect/blogs/online-casinos-easy-bet-phishers> (Date of use: 22 September 2014)

Fabuli M “Online casino an easy bet for phishers” <http://www.symantec.com/connect/blogs/online-casinos-easy-bet-phishers> (Date of use: 22 September 2014)

GamCare <http://www.gamcare.org/uk> (Date of use: 20 June 2015)

GamCare “the UK’s national organisation for gambling problem” <http://www.gamcare.org/uk> (Date of use: 20 June 2015)

Hammer

http://www.smartgambler.com/news/all/17643/new_deal_between_real_madrid_and_bwinparty.html (Date of use: 29 January 2014)

Hammer L “New deal between Real Madrid and Bwin.party” http://www.smartgambler.com/news/all/17643/new_deal_between_real_madrid_and_bwinparty.html (Date of use: 29 January 2014)

Houghton <http://www.disa.ukzn.ac.za/webpages/DC/asjan57.4/asjan57.4.pdf> (Date of use: 14 August 2014)

Houghton D “The significance of the Tomlinson report” <http://www.disa.ukzn.ac.za/webpages/DC/asjan57.4/asjan57.4.pdf> (Date of use: 14 August 2014)

Humphrey <http://www.gambling-law-us.com/Federal-Laws/internet-gambling-ban.htm> (Date of use: 20 November 2014)

Humphrey C “Internet gambling funding ban” <http://www.gambling-law-us.com/Federal-Laws/internet-gambling-ban.htm> (Date of use: 20 November 2014)

Internal Revenue Service <https://www.irs.gov/pub/irs-utl/am2008013.pdf> (Date of use: 17 October 2015)

Internal Revenue Service “Memorandum number AM2008-013” <https://www.irs.gov/pub/irs-utl/am2008013.pdf> (Date of use: 17 October 2015)

Kahnawake Gambling Commission <https://www.gamingcommission.ca/faq.htm> (Date of use: 31 March 2015)

Kahnawake Gambling Commission “Frequently asked questions” <https://www.gamingcommission.ca/faq.htm> (Date of use: 31 March 2015)

Kaye http://www.ontla.on.ca/bills/general-information/files_pdf/files...rp_b31.pdf (Date of use: 15 July 2011)

Kaye P “When do Ontario Acts and Regulations come into force?”
http://www.ontla.on.ca/bills/general-information/files_pdf/files...rp_b31.pdf
(Date of use: 15 July 2011)

Law & Martin <http://0-www.oxfordreference.com.oasis.unisa.ac.za/views/ENTRY.html?subview=Main&entry+t49e1659> (Date of use: 29 March 2011)

Law J & Martin E “A dictionary of law” <http://0-www.oxfordreference.com.oasis.unisa.ac.za/views/ENTRY.html?subview=Main&entry+t49e1659> (Date of use: 29 March 2011)

Mahlong
http://www.itweb.co.za/index.php?option=com_content&view=article&id=29017:interactive-gambling-legislation-lags&catid=147:internet&Itemid=68 (Date of use: 05 November 2011)

Mahlong A “Interactive gambling legislation lags”
http://www.itweb.co.za/index.php?option=com_content&view=article&id=29017:interactive-gambling-legislation-lags&catid=147:internet&Itemid=68 (Date of use: 05 November 2011)

Mawson
http://www.itweb.co.za/index.php?option=com_content&view=article&id=40619:don...
(Date of use: 01 February 2011)

Mawson N “Don’t bet on online gambling”
http://www.itweb.co.za/index.php?option=com_content&view=article&id=40619:don... (Date of use: 01 February 2011)

Minister of Finance
<http://www.treasury.gov.za/documents/national%20budget/2010/speech/speech2010.pdf> (Date of use: 13 August 2013)

Minister of Finance “2010 budget speech”
<http://www.treasury.gov.za/documents/national%20budget/2010/speech/speech2010.pdf> (Date of use: 13 August 2013)

Minister of Finance
<http://www.treasury.gov.za/documents/national%20budget/2011/speech/speech2011.pdf> (Date of use: 13 August 2013)

Minister of Finance “2011 budget speech”
<http://www.treasury.gov.za/documents/national%20budget/2011/speech/speech2011.pdf> (Date of use: 13 August 2013)

Minister of Trade and Industry
<http://www.info.gov.za/speeches/2007/07092014151002.htm> (Date of use: 05 September 2011)

Minister of Trade and Industry “Second reading debate of the National Gambling Amendment Bill, in the National Assembly”
<http://www.info.gov.za/speeches/2007/07092014151002.htm> (Date of use: 05 September 2011)

Molosankwe <http://www.iol.co.za/news/crime-courts/top-magistrate-abused-her-position-1.1558498> (Date of use: 06 August 2013)

Molosankwe B “Top magistrate ‘abused her position”
<http://www.iol.co.za/news/crime-courts/top-magistrate-abused-her-position-1.1558498> (Date of use: 06 August 2013)

Monyela <http://www.womeminaction.co.za/statistics-on-domestic-violence-in-south-Africa/> (Date of use: 12 June 2014)

Monyela A “Statistics on domestic violence in South Africa”
<http://www.womeminaction.co.za/statistics-on-domestic-violence-in-south-Africa/> (Date of use: 12 June 2014)

Mubiri <https://24tanzania.com/sports-betting-in-tanzania-still-long-path-to-cross/> (Date of use: 18 September 2014)

Mubiri S “Sports betting in Tanzania, still long path to cross”
<https://24tanzania.com/sports-betting-in-tanzania-still-long-path-to-cross/> (Date of use: 18 September 2014)

Navarro http://nacle.org/sites/default/files/workshop-downloads/Washington_Workshop_Gambling%20regulation%20in%20the%20NAFTA_A%20countries.pdf (Date of use: 30 March 2015)

Navarro M “Gambling regulation in the NAFTA countries: a comparative analysis”
http://nacle.org/sites/default/files/workshop-downloads/Washington_Workshop_Gambling%20regulation%20in%20the%20NAFTA%20countries.pdf (Date of use: 30 March 2015)

National Conference of State Legislatures <http://www.ncsl.org/.../casino-tax-and-expenditures-2013.asp> (Date of use: 17 October 2015)

National Conference of State Legislatures “2015 casino tax and expenditures”
<http://www.ncsl.org/.../casino-tax-and-expenditures-2013.asp> (Date of use: 17 October 2015)

National Responsible Gambling Programme
<http://www.responsiblegambling.co.za/content/?38> (Date of use: 20 June 2015)

National Responsible Gambling Programme “Help available for gambling problems”
<http://www.responsiblegambling.co.za/content/?38> (Date of use: 20 June 2015)

National Treasury
http://www.treasury.gov.za/comm_media/press/2012/2012070501.pdf (Date of use: 13 August 2013)

National Treasury “Taxation Laws Amendment Bills, 2012: general overview”
http://www.treasury.gov.za/comm_media/press/2012/2012070501.pdf (Date of use: 13 August 2013)

Novak & Allsop
https://www.ipa.org.au/.../1235604569_document_free_to_gamble.pdf (Date of use: 17 October 2015)

Novak J & Allsop R “Free to gamble: the roles of the gambling industry and policy in a modern Australian society”

- https://www.ipa.org.au/.../1235604569_document_free_to_gamble.pdf (Date of use: 17 October 2015)
- O' Donnel <http://calvinayre.com/2012/07/03/business/biggest-gambling-sport-sponsorship-deals> (Date of use: 29 January 2014)
O' Donnel M "The biggest gambling sport sponsorship deals"
<http://calvinayre.com/2012/07/03/business/biggest-gambling-sport-sponsorship-deals> (Date of use: 29 January 2014)
- Palmeri <http://www.bloomberg.com/news/2013-02-26/new-jersey-governor-christie-signs-law-allowing-online-bets-1-.html> (Date of use: 20 November 2014)
Palmeri C "New Jersey Governor signs Bill allowing online gambling"
<http://www.bloomberg.com/news/2013-02-26/new-jersey-governor-christie-signs-law-allowing-online-bets-1-.html> (Date of use: 20 November 2014).
- Parliamentary Monitoring Group <https://pmg.org.za/bills/pmb/> (Date of use: 25 February 2015)
Parliamentary Monitoring Group "Private members Bill"
<https://pmg.org.za/bills/pmb/> (Date of use: 25 February 2015)
- Parliamentary Monitoring Group <https://pmg.org.za/bill/554/> (Date of use: 25 February 2015)
Parliamentary Monitoring Group "Remote Gambling Bill (PMB3-2015)"
<https://pmg.org.za/bill/554/> (Date of use: 25 February 2015)
- Sauer <https://ideas.repec.org/a/wly/mgtdec/v22y2001i1-3p5-15.html> (Date of use: 22 February 2015)
Sauer R "The political economy of gambling regulation"
<https://ideas.repec.org/a/wly/mgtdec/v22y2001i1-3p5-15.html> (Date of use: 22 February 2015)
- Smeaton *et al* www.gamcare.org.uk/pdfs/StudyReportFinal.pdf (Date of use: 04 September 2013)
Smeaton M *et al* "Study into underage access to online gambling and betting sites"
www.gamcare.org.uk/pdfs/StudyReportFinal.pdf (Date of use: 04 September 2013)
- South Africa Online Casino <http://wwwsouthafricaonlinecasino.com/> (Date of use: 31 December 2015)
South Africa Online Casino "Top 2015 SA online casino"
<http://wwwsouthafricaonlinecasino.com/> (Date of use: 31 December 2015)
- Sportsmoney <http://www.forbes.com/sites/darrenheitner/2014/02/04/is-online-gambling-virgin-on-new-territory-in-the-garden-state/> (Date of use: 20 November 2014)
Sportsmoney "Online gaming legalized in New Jersey and Virgin, others building virtual boardwalk empires"
<http://www.forbes.com/sites/darrenheitner/2014/02/04/is-interactive-gambling-virgin-on-new-territory-in-the-garden-state/> (Date of use: 20 November 2014)

Staff Writer <http://www.mybroadband.co.za./news/broadcasting/81013-dstv-more-subscribers-more-money.html> (Date of use: 21 May 2015)

Staff Writer “DStv-more subscribers, more money”
<http://www.mybroadband.co.za./news/broadcasting/81013-dstv-more-subscribers-more-money.html> (Date of use: 21 May 2015)

Statistics South Africa
<https://www.statssa.gov.za/Publications/P02112/P021122010.pdf> (Date of use: 23 May 2014)

Statistics South Africa “Income and expenditure survey (IES) 2010/2011”
<https://www.statssa.gov.za/Publications/P02112/P021122010.pdf> (Date of use: 23 May 2014)

Trembath <http://www.casinoaffiliateprograms.com/blog/kenya-online-gambling-update/> (Date of use: 18 November 2014)

Trembath B “Kenya gaming model”
<http://www.casinoaffiliateprograms.com/blog/kenya-online-gambling-update/>
(Date of use: 18 November 2014)

Ward & Jennas II <http://www.cs.arizona.edu/-collberg/.../report.pdf> (Date of use: 23 July 2015)

Ward M & Jennas II P “Hacking networked games”
<http://www.cs.arizona.edu/-collberg/.../report.pdf> (Date of use: 23 July 2015)

Wessing http://www.taylorwessing.com/download/article_changes_gambling_gb.html
(Date obtained: 02 September 2013)

Wessing T “Fundamental changes to the way online gambling is regulated in Great Britain: a summary”
http://www.taylorwessing.com/download/article_changes_gambling_gb.html
(Date obtained: 202 September 2013)

Wojcik
http://blog.lehighvalleylive.com/bethlehem_impact/print.html?entry=/2013/08/gaming_officials_say_gambling.html (Date of use: 05 September 2013)

Wojcik S “Gambling underage not worth risk after 20-year-old's jackpot forfeited at casino”
http://blog.lehighvalleylive.com/bethlehem_impact/print.html?entry=/2013/08/gaming_officials_say_gambling.html (Date of use: 05 September 2013)

Law Reports

Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC)

Akani Egoli (Pty) Ltd & Others v Chairperson Gauteng Gambling Board & Others, Transvaal Provincial Division, Case No. 187891/06 (unreported)

Carmen Media Group Ltd v Land Schleswig-Holstein C-46/08, ECR [0000]

Casino Enterprises (Pty) Ltd (Swaziland) v Gauteng Gambling Board 2010 (6) SA 38 (GNP)

Casino Enterprises (Pty) Ltd v Gauteng Gambling Board (91/07) [2008] ZASCA 31 (28 March 2008)

Casino Enterprises (Pty) Ltd v Gauteng Gambling Board 2011 (6) SA 614 (SCA)

Christie, N.O. v Mudaliar 1962 (2) SA 40 (N)

City of Cape Town v AD Outpost (Pty) Ltd and Others 2000(2) SA 733 (C)

Commission of the European Communities v French Republic C-154/89

Commission v Luxembourg C-445/03

Criminal Law Amendment Act, Reference [1970] S.C.R 777

European Commission's decision of 20 September 2011 on the measure C 35/10 (ex N 302/10)

Gauteng Gambling Board v Silverstar Development Ltd and Others 2005 (4) SA 67 (SCA)

Gibraltar Betting and Gaming Association Ltd v Secretary of State for Culture Media and Sport [2014] EWHC 3236 (Admin); [2015] 1 CMLR 28

GBGA v HMRC and Gibraltar [2015] EWHC 1863 (Admin)

Her Majesty's Customs and Excise v Gerhard Schindler and Jörg Schindler C-275/92
Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributions (Pty) Ltd and Others; In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit No and Others 2001 (1) SA 545 (CC)

In re MasterCard Int'l, et al., 132 F. Supp. 2d 468,472 (E.D. La. 2001)

In re Mastercard International, Inc., v. Internet Gambling Litigation aff'd 313 F.3d 257 (5th Cir. 2002)

Ivanov v North West Gambling Board and Others 2012 (6) SA 67 (SCA)

Kenilworth Racing (Pty) Ltd v Gold Circle (Pty) Ltd Competition Tribunal of South Africa Case No. 36/AM/Apr12

Liga Portuguesa de Futebol Profissional (CA/LPFP) and Baw International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa C-42/07

Magajane v Chaiperson, North West Gambling Board 2006 (5) SA 250 (CC)

Morrison v Commissioner for Inland Revenue 1950 (2) SA 449 (A)

New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang and Another NNO; Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO 2005 (2) SA 530 C

Questore di Vereona v Diego Zenatti C-67-98

R v Jones 1996 CarswellOnt 3987 (Supreme Court of Canada)

R v Mitchell Exeter Crown Court 03/02/2011

R v Pamajewon (1996), 138 D.L.R. (4th) 204 (S.C.C.)

R v. United Kingdom (Secretary of State for the Home Department) [1995], 180 N.R. 200 (H.L.)

S v Nel 2007 (2) SACR 481 (SCA)

S v Wasserman 2004 (1) SACR 251 (T)

Sea Point Racing CC v Wilkinson [1999] 2 All SA 626 (D)

Sea Point Racing v Pierre de Villiers Barange NO ((N) 2000-08-01) case number AR 774/99

Soundprop 1239 CC/ta 777 Casino v Minister of Safety and Security and Others 1996 (4) SA 1086 (C)

United Greyhound Racing and Breeders Society v Vrystaat Dobbel en Wedren Raad en Andere 2003 (2) SA 269 (O)

United States v Cohen 260 F.3d 68 (2d Cir. 2001)

United States v. Lombardo, 639 F. Supp. 2d 1271, 1275 (D. Utah 2007)

United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services WT/DS285/AB/R (7 April 2005)

United States v Torniero 570 F. Supp. 721 (D. Conn. 1983)

United States v J Torniero 735 F2d 725 (2d Cir. 1984)

Weare and Another v Ndebele and Others 2009 (1) SA 600 (CC)

Legislation

Amendment of Regulations Regarding Gambling Advertising and Exclusions Register (GN R.386 in GG 35349 of 15 May 2012)

Bantu Authorities Act 68 of 1951

Betting Houses, Gaming Houses and Brothels Suppression Act 36 of 1902

Cape Ordinance 11 of 1986

Competition Amendment Act 1 of 2009

Constitution of the Republic of South Africa, 1996 [108 of 1996]

Criminal Procedure Act 51 of 1977

Domestic Violence Act 116 of 1998

Electronic Communication and Transactions Act 25 of 2002

Free State Gambling and Liquor Act 6 of 2010 (Free State Province)

Free State Ordinance 11 of 1976

Gambling Act 51 of 1965

Gambling Amendment Act 26 of 1933

Gambling Amendment Act 5 of 1939

Gambling Amendment Act 144 of 1992

Gambling and Betting Act 5 of 1997 (Eastern Cape Province)

Gauteng Gambling and Betting Act 4 of 1995 (Gauteng Province)

Income Tax Act 58 of 1962

Interim Constitution of the Republic of South Africa, 1993 [200 of 1993]

KwaZulu-Natal Gaming and Betting Act 8 of 2010 (KwaZulu-Natal Province)

Law Against Gambling Act 3 of 1902

Law Relating to Gambling Act 31 of 1909

Limpopo Gambling Act 3 of 2013 (Limpopo Province)

Lotteries Act 56 of 1997

Lotteries and Gambling Board Act 210 of 1993

Lotteries Prohibition Act 9 of 1889

Mpumalanga Gaming Act.5 of 1995 (Mpumalanga Province)

Mutual Banks Act 124 of 1993

Natal Ordinance 23 of 1985

National Gambling Act 33 of 1996

National Gambling Act 7 of 2004

National Gambling Amendment Act 10 of 2008

National Gambling Regulations, 2004. (GN R.1342 in GG 26994 of 12 November 2004)

Northern Cape Gambling Act 3 of 2008 (Northern Cape Province)

North West Gambling Act 2 of 2001 (North West Province)

Police Offences Ordinance 21 of 1902

Prohibition of Sports Pools Act 38 of 1949

Promotion of Bantu Self-Governing Act 46 of 1959

Regulation of Interception of Communication and Provision of Communications-Related Information Act 70 of 2002

Regulations on Limited Pay-Out Machines (GN R1425 in Government Gazette 21945 of 21 December 2000)

Transvaal Ordinance 4 of 1949

Tobacco Products Control Amendment Act 12 of 1999

Value Added Tax Act 89 of 1991

Western Cape Gambling Act 4 of 1996 (Western Cape)

Bills

Cybercrimes and Cybersecurity Bill, 2015

Interactive Gambling Tax Bill, 2008

Draft Interactive Gambling Regulations, 2009 [Notice 211 of 2009 in Government Gazette 31956 of 27 February 2009]

Foreign legislation

Australia

Interactive Gambling Bill 2001

Interactive Gambling Act 84 of 2001

Canada

Constitution Act, 1982

Criminal Code R.S.C., 1985, c. C-46

Criminal Law Amendment Act 1968-69

Kahnawake Gaming Law (MCR 26 / 1996-97)

Kahnawake Gaming Commission *Regulations concerning interactive gaming* July 1999

Denmark

Distribution of Profits Stemming from Lotteries and Horse and Dog Racing Act 696 2010

Gaming Act 848 2010

Gaming Duties Act 698 of 2010

Statute Governing Danske Spil A/S Act 695 2010

EU

Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006

Treaty on European Union

Treaty on the Functioning of the European Union (“TFEU”)

New Zealand

Gambling Act of 2003 (Public Act 51 of 2003)

United Kingdom

Art Unions Act of 1846

Betting and Gaming Duties Act, 1981

Criminal Justice Act of 1988

Finance Act of 2014 (Chapter 6)

Gambling (Licensing and Advertising) Act, 2014

Gambling Act, 2005

HM Revenue & Customs *Excise Notice 453: Gaming Duty* (updated 25 September 2015)

Portuguese

Decree-Law No 322/91

United States of America

Constitution of the United States of America Amendment X (Tenth Amendment) ratified on 15 Dec 1971

Illegal Gambling Business Act 18 **U.S.C.** § 1955 (2000)

Interactive Gaming Act of 2011 (NRS 463.745 - 463.785)

Travel Act 18 **U.S.C.** § 1952 (2000 & Supp. II 2004)

Unlawful Internet Gambling Enforcement Act of 2006 (31 U.S.C. §§ 5361-5367)

Wire Act 18 **U.S.C.** § 1084 (2000)

26 Code of Federal Regulations 31.3402