THE LEGALISATION AND REGULATION OF ONLINE GAMBLING IN SOUTH AFRICA

Mini-thesis submitted in partial fulfilment of the requirements for the LLM degree in the Department of Mercantile Law and Labour Law

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15 June 2017
DECLARATION

I declare that The legalisation and regulation of online gambling in South Africa is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

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CHAPTER 1

1. INTRODUCTION

Gambling is defined as wagering money on an event with an uncertain outcome. Gambling thus requires three elements to be present: consideration, chance and prize.\(^1\) Gambling activities were historically considered immoral; this was the basis for the common law unenforceability of gambling debts.\(^2\) Recently this stigma has faded and gambling has become a recreational activity.\(^3\)

The history of gambling in South Africa and its introduction into the mainstream economy started with the Bantustans.\(^4\) These areas were considered independent countries by the Apartheid government, thus the general prohibition against gambling did not extend to them.\(^5\) At the end of the Apartheid regime a decision had to be made regarding the 17 casinos licensed to operate in the Bantustans.\(^6\) As a result of the introduction of the Interim Constitution,\(^7\) the Howard commission\(^8\) and the resultant Lotteries and Gambling Board Act,\(^9\) gambling became legal in South Africa.\(^10\)

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\(^1\) Thuo Gaming Western Cape (Proprietary) Limited v Chairperson of the Western Cape Gambling and Racing Board [2014] JOL 32027 (WCC) at para 6.

\(^2\) Thuo Gaming Western Cape (Proprietary) Limited case at para 7.

\(^3\) Monneye SL, ‘The legality of banning online gambling in South Africa: Is online gambling not a component of gambling’ (2012) 3 UNLV Gaming Law Journal 221 at 221.

\(^4\) Thuo Gaming Western Cape (Proprietary) Limited case at para 11 and Gaming Associations of South Africa (Kwazulu-Natal) and others v Premier, Kwazulu-Natal, and others [1997] 4 SA 494 (N) at pg 499 para b.

\(^5\) The prohibition contained in Gambling Act No. 51 of 1965 applied to most forms of gambling except horse racing. Gambling Act No. 51 of 1965, s 6. Also see Thuo Gaming Western Cape (Proprietary) Limited case at para 11 and Gaming Associations of South Africa (Kwazulu-Natal) case at pg 499 para b.

\(^6\) Thuo Gaming Western Cape (Proprietary) Limited case at para 14.

\(^7\) The Interim Constitution Act 200 of 1993.

\(^8\) Mr. Justice Howard chaired the commission of enquiry into the introduction of gambling legislation in South Africa.

\(^9\) Lotteries and Gambling Board Act 210 of 1993, preamble.

\(^10\) Thuo Gaming Western Cape (Proprietary) Limited case at para 15.
Professor Wiehahn, of the Lotteries and Gambling Board, produced a report in 1995 regarding gambling in South Africa.\textsuperscript{11} The findings of this report have been distilled into a set of principles, the Wiehahn principles, which govern South Africa’s gambling policy to date.\textsuperscript{12} The report and the Wiehahn principles were produced for South Africa. Many of the principles espoused, however, have application to gambling universally.

The 13 Wiehahn principles were incorporated into the National Gambling Act. These principles state, \textit{inter alia}, that:

‘…members of the public who participate in any licensed gambling activity shall be protected; society and the economy shall be protected against the over-stimulation of the latent demand for gambling; standardisation and quality in respect of equipment used by any licence holder shall be promoted and maintained…’\textsuperscript{13}

Gambling, due to its nature and origins, presents certain universal concerns including the need to protect vulnerable parties,\textsuperscript{14} responsible gambling\textsuperscript{15} and the issue of criminality.\textsuperscript{16}

When looking at how to protect vulnerable parties, it is essential to know who they are. Vulnerable parties are people who for one reason or another are in a position to be taken advantage of by the gambling industry, such as underage gamblers,\textsuperscript{17} pathological gamblers\textsuperscript{18}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Gaming Associations of South Africa (Kwazulu-Natal)} case at pg 499 para h.
\item \textit{Gaming Associations of South Africa (Kwazulu-Natal)} case at pg 500 para c – d and DTI, Responses to Remote Gambling Bill and Stakeholder Submission, Parliament Cape Town, 2 June 2015 at page 5.
\item National Gambling Act No. 33 of 1996, s 13(1).
\item Monnye SL (2012) at 241 and Devaney M (2009) at 274.
\end{enumerate}
\end{footnotesize}
and people who are unable to control their gambling activities.\(^\text{19}\) In the South African context vulnerable parties include the impoverished\(^\text{20}\) and historically disadvantaged people.\(^\text{21}\) Our Constitutionally enshrined principles of fairness, substantive equality and justice demand that the interests of these vulnerable parties be given specific notice.\(^\text{22}\) The economic resources necessary to provide recovery and support programs them creates further incentive to ensure their interests are protected.\(^\text{23}\)

Another universal concern demanding attention is criminality. Unlicensed casinos have no incentive to act in a scrupulous and responsible manner. Certainly, when dealing with vulnerable parties but in respect of ordinary consumers as well.\(^\text{24}\) Unlicensed casinos create unfair competition for licensed providers, who have added fiscal and regulatory burdens. Furthermore, their criminal operations deprive governments of revenue not only in respect of taxes but also in respect of licensing (and other administrative) fees.\(^\text{25}\)

Internationally, the issue of criminality receiving focus is money laundering.\(^\text{26}\) South Africa defines money laundering as an ‘activity which has or is likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the proceeds of unlawful

\(^{18}\) Pathological gamblers are defined as gamblers who are ‘...unable to resist impulses to gamble, which can lead to severe personal or social consequences’ according to the New York Times ‘Pathological Gambling’ available at http://www.nytimes.com/health/guides/disease/pathological-gambling/overview.html (Accessed 26 March 2016).


\(^{20}\) DTI, Responses to Remote Gambling Bill and Stakeholder Submission, Parliament Cape Town, 2 June 2015 at page 14.

\(^{21}\) DTI, Responses to Remote Gambling Bill and Stakeholder Submission, Parliament Cape Town, 2 June 2015 at page 5.


\(^{23}\) Devaney M (2009) at 274.


\(^{25}\) Casino Enterprises v The Gauteng Gambling Board (653/10) [2011] ZASCA 155 (28 September 2011) at 35.

activities or any interest which anyone has in such proceeds.\textsuperscript{27} Money laundering is an international issue; it erodes legitimate economies and has the potential to corrupt governmental structures.\textsuperscript{28} The seriousness with which the international community views money laundering can be seen by the establishment of the Financial Action Task Force.\textsuperscript{29} The purpose of this intergovernmental body includes overseeing the effective implementation of anti-money laundering strategies by countries who have endorsed their recommendations.\textsuperscript{30} Money laundering has become an even greater concern due to the advent of online gambling and its inherent anonymity and easy access.\textsuperscript{31}

These universal concerns or adverse effects are often weighed up against the positive effects of gambling including economy stimulation and job creation. The economic incentives mean laws and regulations are necessary to offset the adverse effects. As can be seen from the above South Africa is no different. The employment provided by the Bantustan casinos\textsuperscript{32} and the potential for revenue creation were significant considerations in the legalisation of gambling in South Africa as well as in other jurisdictions.\textsuperscript{33}

\begin{itemize}
\item Financial Intelligence Centre Act 38 of 2001, s 1 definitions.
\item United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (hereinafter referred to as the 'Vienna Convention') at page 1.
\item The Financial Action Task Force (hereinafter referred to as the FATF) ‘International Standards of combating Money Laundering and the Financing of Terrorism & Proliferation’ February 2012 (updated October 2015) page 7, the FATF was established in 1989 as a result of the Vienna Convention and Bana A (2011) at 339-340.
\item FATF ‘International Standards of combating Money Laundering and the Financing of Terrorism & Proliferation’ February 2012 (updated October 2015) page 7, 180 countries have endorsed the FATF recommendations.
\item Thuo Gaming Western Cape (Proprietary) Limited case at para 12 – 13.
\item Devaney M (2009) at 274 and Bana A (2011) at 336.
\end{itemize}
2. SOUTH AFRICAN BACKGROUND

The National Gambling Act’s (NGA) stated purpose is the protection of ‘people participating in gambling and their communities against the adverse effects of gambling…’.\textsuperscript{34} The NGAs framework provides for the licensing and regulation of certain gambling activities.\textsuperscript{35} Any gambling activity not licensed in terms of the NGA is unlawful.\textsuperscript{36} This includes, for the most part,\textsuperscript{37} providing and participating in online gambling activities.\textsuperscript{38}

Only one case has dealt with the issue of online gambling in South Africa. It looked at whether gambling websites registered and operating outside of South African borders could be regulated in terms of local legislation.\textsuperscript{39} In \textit{Casino Enterprises v The Gauteng Gambling Board}\textsuperscript{40} the Court was asked to determine whether the plaintiff (the appellant in the Supreme Court of Appeal case) had contravened ss 8 and 11 of the NGA. The plaintiff, a licensed online casino operating in Swaziland, had targeted advertisements at residents of Gauteng. Enticing the latter to make use of the services provided.\textsuperscript{41} The plaintiff argued as its servers operated from Swaziland, the gambling activity took place there and the relevant legislation was not applicable.\textsuperscript{42} The defendant (the respondent in the Supreme Court of Appeal case) argued input from the consumer

\textsuperscript{34} The National Gambling Act 7 of 2004, as amended (hereinafter referred to as the NGA), preamble.
\textsuperscript{35} NGA, ch 3.
\textsuperscript{36} NGA, s 8.
\textsuperscript{37} Certain Provincial Legislatures have legalised online (remote) gambling in respect of Bookmaker and Totalisator licences only, see the Western Cape Gambling and Racing Act 4 of 1996, ss 84D(1) and 84D(3) and the Eastern Cape Gambling and Betting Act 5 of 1997, s 74 (4)(c). A Bookmaker licences refers to someone who is licensed to accept and make both fixed-odds and open bets with private individuals and other bookmakers. A Totalisator licence refers to someone who is licensed to accept or make bets where the amount of the winnings is determined by dividing the total of bets laid, proportional to their original bet, between the winners. These forms of gambling are popular forms of sports betting, that is the contingency upon which the bet is premised is a sporting event, like Rugby or Football.
\textsuperscript{38} NGA, s 11.
\textsuperscript{39} \textit{Casino Enterprises (Pty) Limited (Swaziland) v Gauteng Gambling Board and Others} 2010 (6) SA 38 (GNP) and \textit{Casino Enterprises v The Gauteng Gambling Board} (653/10) [2011] ZASCA 155 (28 September 2011).
\textsuperscript{40} 2010 (6) SA 38 (GNP) and (653/10) [2011] ZASCA 155 (28 September 2011).
\textsuperscript{41} See generally \textit{Casino Enterprises} and \textit{Casino Enterprises Appeal}.
\textsuperscript{42} \textit{Casino Enterprises}, para 7-8 and \textit{Casino Enterprises Appeal}, para 17.
was essential, this took place in South Africa, thus the legislation was applicable. The Court agreed with the defendant and gave judgement in their favour. The Court reviewed the meaning of ‘gambling’ as used by both the provincial and national acts. The potential extra-territorial application and the purpose of the legislation were also considered.

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The matter was brought before the Supreme Court of Appeal by the plaintiff who contended the court a quo had erred in its judgement regarding the issue of extra-territorial application of the relevant statutes and ‘that neither statute was designed with the internet in mind’. The Court concluded the games were, in part, played in South Africa and accordingly ‘struck by the prohibitions’. Based on a review of the evidence provided by expert witnesses and its interpretation of the meaning of gambling the Court dismissed the appeal and confirmed the judgement of the court a quo. Seemingly neither the court a quo nor the Appeal Court gave a reason for the prohibition. Without the interpretive assistance of the courts, one must turn to existing legislation to provide an answer to this question.

The NGA was introduced to ensure protection for the economy and for gambling consumers. The NGA places an obligation on the National Gambling Board to produce a report on the regulation of online gambling and a further obligation on the Minister of Trade and Industry to

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44 Casino Enterprises, para 69.
45 Casino Enterprises, para 37-38.
46 Casino Enterprises, para 40.
47 Casino Enterprises, para 42-54.
48 Casino Enterprises Appeal, para 16-18.
49 Casino Enterprises Appeal, para 15.
50 Casino Enterprises Appeal, para 40-41.
51 See generally Casino Enterprises and Casino Enterprises Appeal cases.
52 NGA, preamble.
provide Parliament with proposed legislation, taking the abovementioned report into consideration.\textsuperscript{53}

The National Gambling Amendment Act (NGAA) was enacted to discharge this obligation.\textsuperscript{54} It provides for the legalisation and regulation of online gambling.\textsuperscript{55} The NGAA was accompanied by Interactive Gambling Regulations (IRG) published and made available for comments until 7 May 2009.\textsuperscript{56} The IRG applied only to games played over the internet\textsuperscript{57} with sports and horse race betting excluded.\textsuperscript{58} The IRG included regulations regarding consumer funds,\textsuperscript{59} the introduction of mandatory consumer age and identity verification,\textsuperscript{60} the availability of information relating to exclusion requests\textsuperscript{61} and responsible gambling.\textsuperscript{62} Despite the above, the NGAA has not come into operation. Concerns were raised regarding the socio-economic impact of gambling and instead a review was commissioned by the Gambling Review Commission.\textsuperscript{63} Considering this response to the NGAA and the accompanying regulations, Monnye submits online gambling has not yet been legalised in South Africa due to concerns surrounding the protections afforded to vulnerable parties.\textsuperscript{64}

\textsuperscript{53} NGA, ss 5 (1) and 5(2) Schedule 1.
\textsuperscript{54} The National Gambling Amendment Act 10 of 2008 (hereinafter referred to as the NGAA).
\textsuperscript{55} NGAA preamble, ss 10-12, 15, 17 and 18.
\textsuperscript{56} The Interactive gambling regulations, General Notice 211 of 2009, GG 31956 published 27 February 2009 (hereinafter referred to as the IGR).
\textsuperscript{57} IGR s3 (1).
\textsuperscript{58} IGR s3(3).
\textsuperscript{59} IGR ss 6, 7 and 8.
\textsuperscript{60} IGR ss 9 and 10.
\textsuperscript{61} IGR s 15.
\textsuperscript{62} IGR s 16.
\textsuperscript{63} Monnye SL (2012) at 227, the author relies on Mandisi Mpahlwa, the then Minister of Trade and Industry’s Second Reading Debate of the National Gambling Amendment Bill, National Assembly on 17 September 2007. This speech is no longer available via the link provided by Monnye, furthermore an alternative copy of the speech could not be located elsewhere.
\textsuperscript{64} Monnye SL (2012) at 226 - 227.
Despite the NGAA still seemingly being on the books, in April 2014 the Remote Gambling Bill of 2014 (RGB) was introduced into Parliament. The RGB proposed the regulation and licensing of online gambling in South Africa as well as certain issues incidental thereto. As of March 2016, the RGB was still before Parliament as a private member’s Bill. The RGB did not receive the support of the Department of Trade and Industry, which may have been a significant obstacle to its enactment. The RGB was not passed by Parliament, signalling the continued prohibition of online gambling. An approach at variance with that of most international jurisdictions.

3. ONLINE GAMBLING INTERNATIONALLY: AN INTEREST(ING) BALANCING ACT

The online gambling market is showing significant growth in overseas jurisdictions. This paper submits it could do the same here in South Africa. There is an increasing movement towards legalisation and regulation rather than maintaining a complete prohibition. For example, on 1 November 2014, the United Kingdom (UK) introduced stricter regulations to their online gambling.
gambling sector. Most of these regulations focus on responsible gambling and protecting vulnerable parties such as persons under the age of 18. Prior to the introduction of the Gambling (Licensing and Advertising) Act 2014 (GLAA), the UK had a very liberal approach to online gambling. The GLAA brought with it the UK Gambling Commissions Licence Conditions and Codes of Practice (February 2015 as amended in April 2015) (‘LCCP’). These regulations are divided into three parts with particular focus on so-called ‘social responsibility’ provisions. The importance of the social responsibility provisions is clear: non-complying licensees risk losing their licence and possibly prosecution.

The UK Parliament echoes the concerns of the South African Parliament relating to the adverse effects of gambling and specifically protecting vulnerable parties. In addressing these concerns, the UK and the South African Parliaments have seemingly come to differing conclusions, the UK Parliament has chosen to legalise and regulate whereas the South African Parliament has chosen to prohibit.

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76 Gambling Act 2005 (UK) (hereinafter referred to as the GA), ss 82(1) and s 24 (2) read with the GLAA, ss 1 and 2 and UK Gambling Commission Licence Conditions and Codes of Practice (February 2015 as amended in April 2015) (hereinafter referred to as the ‘LCCP’), Part II chap 3.
77 The GA, Part 4 read with the GLAA, ss 1 and 2 and the LCCP, part II chap 3.
78 Snail SL (2007) at 120.
79 LCCP general introduction, para 1.
80 LCCP general introduction, para 2 and part 2.
81 LCCP part 2, page 28.
82 GA, s 1 (The GA licensing objectives include the protection of ‘children and other vulnerable persons from being harmed or exploited by gambling.’ ss1 (c)) and NGA preamble.
83 See generally the GA, GLAA.
84 NGA, ss 8 and 11.
In contrast to the UK position allowing foreign online casinos to provide services to their residents, Australia has prohibited such activities, echoing the current South African position following the Gauteng Gambling Board case. The Interactive Gambling Act (IGA) governs the position of online gambling in Australia. The IGA criminalises the provision of certain online gambling activities to Australian residents by foreign online casinos. Some online gambling activities are not subject to this prohibition including ‘sports betting’ (provided the wager is placed before the sporting event begins) and online lotteries. The IGA further prohibits Australian based online casinos from providing services to certain countries that have been nominated by the Minister of Social Services.

Despite this prohibition many foreign online casinos make their services available to Australian consumers and the Australian government has to date not sought to prosecute any of these foreign online casinos. The issue of enforceability prompted the Australian government to commission a review of foreign online casinos. Focusing on the impact to the Australian economy and vulnerable parties. The Interactive Gambling Amendment Bill (IGAB) resulted from this review although its provisions have not yet come into operation.

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85 GA part 5.
86 The Interactive Gambling Act 84 of 2001 (hereinafter referred to as the ‘IGA’), s 15.
87 The Interactive Gambling Act 84 of 2001 (hereinafter referred to as the ‘IGA’).
88 IGA s 15.
89 IGA ss 8A(1), 5 (3) and 6 (3).
90 IGA ss 8A(3) and 8D.
95 Interactive Gambling Amendment Bill 2016 (hereinafter referred to as the ‘IGAB’).
In the absence of governmental regulation many of these casinos have chosen to subject themselves to the standards of quality and fairness prescribed by independent regulators such as eCogra.\textsuperscript{97} The IGA does not criminalise participating in online gambling for private individuals.\textsuperscript{98} Australian consumers consequently rely on the certifications and other regulatory methods adopted by these independent regulators to protect them.\textsuperscript{99}

The adverse effects of gambling, while obviously important, cannot be considered in isolation.\textsuperscript{100} This paper is of the view it would be unjustly biased to focus solely on these adverse effects without considering the potentially positive effects gambling can bring about. The positive effects include potential revenue creation. In 2012, the gambling sector directly contributed R11.0 billion to the South African Gross Domestic Product (GDP), with a further R11.0 billion contributed indirectly.\textsuperscript{101} Comparatively the UK’s gambling sector directly contributed £2.3 billion in 2015 and a further £2.7 billion indirectly.\textsuperscript{102} It should be noted that these figures do not include the tax revenue generated, although this is an important factor to be considered.

\textsuperscript{99}eCogra ‘Services, Safe and Fair Seals’ available at \url{http://www.ecogra.org/srs/services_safe_fair_seals.php} (accessed 16 March 2016) and eCogra ‘eCogra Generally Accepted Practices’ 2 October 2015 (hereinafter referred to as “eGAP”).
\textsuperscript{100}See generally NGA.
\textsuperscript{102}William Hill ‘Betting and gaming are enjoyed the world over by millions of people’ available at \url{http://www.williamhillplc.com/responsibility/about-the-gambling-industry/} (Accessed 5 March 2016), Titanbet Casino ‘How the gambling industry is affecting the UK economy’ \url{http://www.growthbusiness.co.uk/growing-a-business/business-regulations/2484481/how-the-gambling-industry-is-affecting-the-uk-economy.html} (Accessed 5 March 2016) and The Association of British Bookmakers ‘New report reveals Britain’s betting industry is key contributor to the UK economy, directly generating £2.3 billion towards UK GDP’ \url{http://www.abbgamblingcrooke.com/new-report-reveals-britains-betting-industry-is-key-contributor-to-the-uk-economy-directly-generating-2-3billion-towards-uk-gdp/} (Accessed 5 March 2016).
Another positive effect, particularly important for South Africa, is the potential for job creation.\textsuperscript{103} South Africa is currently experiencing an employment crisis with the latest statistics placing unemployment at 26.5 percent.\textsuperscript{104} Enterprises within South Africa are already providing services to online casinos licensed and operating overseas.\textsuperscript{105} To name one, Microgaming Software Systems Ltd is a software company currently registered in the Isle of Man.\textsuperscript{106} They are considered the market leaders in the provision and maintenance of online gambling software.\textsuperscript{107} While registered in the Isle of Man, its origins are South African and a large portion of the company operates in South Africa.\textsuperscript{108}

The legalisation of online gambling in South Africa means existing companies have the potential for further growth inevitably leading to job creation.\textsuperscript{109} It is further submitted that there would be potential for entrepreneurship as the capital required for an online casino would be significantly less than that required for a brick and mortar casino.

The above potentially positive effects must be weighed against the adverse effects of gambling and the need to protect vulnerable parties. The question arises whether South Africa can provide adequate protection in an online environment? The lack of discussions, articles and other commentaries regarding online gambling and this question is concerning as the rapid growth of

\textsuperscript{103} The Gauteng Gambling Amendment Act 6 of 2001, preamble.
\textsuperscript{109} Gauteng Gambling Amendment Act 6 of 2001, preamble.
this industry means legislatures are already playing catch-up.\textsuperscript{110} This paper is of the view that a review of the measures implemented by other jurisdictions will assist in providing the answer. The South African socio-economic landscape is however vastly different. The safeguards implemented by these jurisdictions need to be reviewed, focusing on whether they can be as effective in South Africa.

4. A DEARTH OF DISCUSSIONS, REVIEWS AND COMMENTARIES

The legalisation of online gambling is not a new discussion, yet there a limited number of authors have tackled these issues in the South African context. Monnye discusses the NGAA including the legal position relating to it not having come into operation.\textsuperscript{111} The author reviews various definitions of gambling and online gambling, highlighting online gambling doesn’t change the activities (games) themselves, merely the way they are played.\textsuperscript{112} As a result he adopts the position that online gambling can be seen as a component of gambling.\textsuperscript{113} In contrast, Miller rightly recognises the online gambling environment is too disparate from land-based gambling to be governed by the same regulations.\textsuperscript{114} The author concludes recommending regulating the online gambling industry rather than maintaining a complete prohibition, although he does recognise the difficulties involved in effective regulation.\textsuperscript{115} The author does not specify what regulations he recommends, he does however provide a brief overview of online gambling in a select number of jurisdictions.\textsuperscript{116} The article was published in 2012, consequently the latest

\textsuperscript{111} Monnye SL (2012) at 232.
\textsuperscript{112} Monnye SL (2012) at 232-233.
\textsuperscript{113} Monnye SL (2012) at 224-225.
\textsuperscript{114} Miller KC (2014) at 55.
\textsuperscript{115} Monnye SL (2012) at 242.
\textsuperscript{116} Monnye SL (2012) at 240.
developments in available technologies and recent regulatory frameworks implemented by other jurisdictions couldn’t have been taken into consideration.\textsuperscript{117}

Snail also shies away from recommending specific regulations, though he does provide an instructive discussion of a number of differing regulatory models,\textsuperscript{118} and further recommends a restrictive prohibitive model for South Africa.\textsuperscript{119} This model allows for online gambling on the condition that the provider of these services is appropriately licenced often excluding foreign online casinos.\textsuperscript{120} Interestingly, Snail concludes by confirming the movement towards regulation, rather than prohibition and prophetically, in light of recent industry growth, indicates the maintenance of a complete prohibition ‘…seem[s] to stem from a dying philosophy.’\textsuperscript{121} Snail highlights concerns relating to protecting vulnerable parties, money laundering and a host of possible misdeeds by unscrupulous service providers.\textsuperscript{122} For the purposes of this paper, highlighting these issues assists in directing attention to areas that will require more stringent regulation, as it is submitted these remain the most pertinent issues.

Rodrigues, in her brief discussion of the NGAA, recognises consumers will benefit from regulation of the online gambling market irrespective of the cost of that regulation.\textsuperscript{123} It should be noted this article was written before it became clear the NGAA would not come into

\begin{footnotesize}
\begin{enumerate}
\item See generally Monnye SL (2012).
\item Snail SL (2007) at 116-117.
\item Snail SL (2007) at 117.
\item Snail SL (2007) at 116.
\item Snail SL (2007) at 121.
\item Snail SL (2007) at 115-116.
\end{enumerate}
\end{footnotesize}
operation. It nevertheless serves as an overview of the more salient provisions of the NGAA.

The authors discussed above profess similar sentiments, namely that regulation provides better protection for vulnerable parties than prohibition. It appears the South African Department of Trade and Industry (DTI) disagrees with them in this regard. Responding to the RGB and submission from various stakeholders, the DTI raised a number of concerns including unscrupulous service providers allowing underage gambling. As well as concerns the ‘[b]ill creates unfair competition’ no clarity regarding the victim(s) or the basis for this unfairness is provided. Further that problem gambling may increase as a result of the ease of access, the assertion that regulating problem gambling is easier in an online environment is not addressed.

Potential lost employment is another concern raised by the DTI, indicating online gambling will result in minimal job creation and threatens employment opportunities created by land-based gambling. Regarding the maintenance of a complete prohibition the DTI indicated ‘[t]he decision to ban was taken a long time back…’ and further ‘[t]he status quo should be maintained as the harm by over-stimulation to gamble out-weighs the benefits.’ The DTI lists

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127 DTI, Responses to Remote Gambling Bill and Stakeholder Submission, Parliament Cape Town, 2 June 2015 at page 5.
130 DTI, Responses to Remote Gambling Bill and Stakeholder Submission, Parliament Cape Town, 2 June 2015 at page 11 and 21.
factors that have influenced this decision, in addition to those mentioned above, the increasing rate of poverty, inequality and indebtedness.\footnote{DTI, Responses to Remote Gambling Bill and Stakeholder Submission, Parliament Cape Town, 2 June 2015 at page 14.}

The question that arises is this: In the event the concerns raised by the DTI and by the above authors can adequately be addressed, would the benefits then outweigh the harm? This paper’s approach to answering that question will involve primarily a comparative analysis supported by a literary review. Consequently, this paper will rely heavily on primary sources, using secondary sources where appropriate. In respect of primary sources Acts\footnote{The NGA, NGAA, GA and GLAA.} and Bills\footnote{The RGB.} will be extensively reviewed, including subordinate legislation\footnote{The IGR and LCCP.} such as regulations. In respect of secondary sources, this paper will refer to textbooks, journal articles, websites, notes and commentaries.

This comparative analysis will focus on the position of online gambling in the UK and Australia. The UK was considered due to the recent introduction of extensive and comprehensive regulations relating to its online gambling industry which is instructive to this study.\footnote{The GLAA and LCCP.} Australia was chosen as it provides a very different perspective than that of the UK. The disregard foreign online casinos show for the prohibition contained in the IGA\footnote{IGA, s15.} and the consumer’s reliance on independent regulators is a unique.\footnote{Legal Gambling and the Law ‘Australian Gambling Law’ available at \url{http://www.legalgamblingandthelaw.com/au} (Accessed 16 March 2016), Australian Gambling ‘Australian Online Gambling Laws’ available at \url{http://www.australiangambling.com.au/australian-gambling-laws/} (Accessed 16 March 2016) and Gambling Sites.com ‘Gambling Regulation in Australia’ available at \url{http://www.gamblingsites.com/online-gambling-jurisdictions/australia/} (Accessed 16 March 2016).} For the purposes of this paper Australia provides an
example of the prohibition model, currently followed by South Africa. Providing a valuable comparison of the standard of protection this model affords to vulnerable parties.\textsuperscript{140}

From these two countries, South Africa can learn which measures may provide the necessary protection from the adverse effects of gambling and specifically online gambling. Facilitating a proper balancing of these adverse effects and potentially positive effects. Allowing an informed decision regarding the legalisation and regulation of online gambling in South Africa to be made.

5. CONCLUSION

From the above it becomes clear there are significant adverse effects relating to the legalisation and regulation of online gambling in South Africa.\textsuperscript{141} Viewed in isolation these adverse effects certainly support the maintenance of a complete prohibition. The positive effects of online gambling when similarly viewed in isolation are just as compelling in support of legalisation and regulation.\textsuperscript{142} For this reason, there is a need to weigh up these aspects.

South Africa has experience in this balancing exercise. As discussed above the fiscal benefits of the former Bantustan casinos led to the legalisation of gambling in South Africa.\textsuperscript{143} The NGA was introduced to ensure the adverse effects of this legalisation were, wherever possible, mitigated.\textsuperscript{144} Chapter two of this paper will thus provide an outline of current South African gambling industry, including the protections provided by the NGA, and intended to be provided

\textsuperscript{140} Due to the prohibition contained in the IGA, s 15 foreign casinos who are struck by this prohibition operate without governmental regulations to guide their policies and procedures.

\textsuperscript{141} DTI, Responses to Remote Gambling Bill and Stakeholder Submission, Parliament Cape Town, 2 June 2015 and generally the NGA.

\textsuperscript{142} See generally Significance of the Study above.

\textsuperscript{143} Thuo Gaming Western Cape (Proprietary) Limited case at para 11 and Gaming Associations of South Africa (Kwazulu-Natal) and others v Premier, Kwazulu-Natal, and others [1997] 4 SA 494 (N).

\textsuperscript{144} NGA preamble.
by the NGAA and RGB. This outline will illustrate the standard of protection South Africa demands to justify the fiscal benefits of legalisation.

Having established this standard, any measures that can be implemented to combat the adverse effects of online gambling need to be reviewed. Chapter three of this paper will provide an outline of the current UK gambling industry. The protections afforded to vulnerable parties by the GA and LCCP will be examined. This analysis will assist in determining whether South Africa can adequately address and in certain instances prevent the adverse effects. This analysis may tip the scales in favour of legalisation and regulation.

Conversely the scales may be tipped in favour of maintaining a complete prohibition if the adverse effects cannot be adequately addressed. Chapter four will examine the practicality and efficacy of the prohibition model. An outline of the current Australian gambling industry will be provided. Through the IGA, notwithstanding recent suggested amendments, Australia continues to maintain a complete prohibition.\(^{145}\)

Chapter five of this paper will discuss the unique regulatory opportunities presented by online gambling. Due to the borderless nature of the internet,\(^ {146}\) online gambling may be better regulated on an international level. Money-laundering, the proliferation of which is a threat posed by online casinos is for example regulated on an international level. Chapter five will also discuss the threat posed by money-laundering through online casinos. A discussion of the potential impediments to international regulation will also be included.

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\(^{145}\) IGA and IGAB.

\(^{146}\) Bana A (2011) at 343.
A practical and useful balancing should be possible after having set out the necessary standard of protection, the measures implemented to prevent harm, the practicality of a flat ban and regulatory alternatives. It is submitted that the interests of South Africans, whether it be the financial interests or the community’s interests, should be used to determine the outcome. In light of this, chapter six will provide a summative conclusion and recommendations to this mini-thesis.
CHAPTER 2

1. INTRODUCTION

This chapter examines the current position of gambling in South Africa.\textsuperscript{147} Land-based casino and other forms of gambling are legalised and regulated under the National Gambling Act (NGA).\textsuperscript{148} Currently online or interactive gambling is prohibited in terms of the NGA.\textsuperscript{149} Since the NGA’s enactment two legislative attempts have been made to legalise and regulate online gambling, namely the National Gambling Amendment Act (NGAA)\textsuperscript{150} and the Remote Gambling Bill (RGB).\textsuperscript{151} To provide a complete view of the South African gambling industry, all three will be discussed.

The focus of this chapter as in those to follow will be on vulnerable parties and the protections provided to them. The choice whether to legalise (certain forms of) gambling often involves an assessment of the impact on these vulnerable parties, a balancing of interests.\textsuperscript{152} In respect of land-based gambling this balance is achieved through the NGA.\textsuperscript{153} The NGA provides an example of the standard of protection South Africa considers acceptable. It remains to be seen whether the vastly different online gambling environment can provide this same standard. This question is explored in chapter 3 to follow. Whilst exploring this question it is imperative to bear in mind South Africa’s unique socio-economic landscape.

\begin{flushright}
\textsuperscript{147} The current position is governed by the National Gambling Act 7 of 2004 (hereinafter referred to as the ‘NGA’), see fn 2 regarding the NGAA.
\textsuperscript{148} Excluding online (interactive) gambling, see generally NGA.
\textsuperscript{149} NGA s 11.
\textsuperscript{150} Act 10 of 2008, although passed by Parliament no date has as yet been set for the NGAA to come into operation as stipulated in s 44.
\textsuperscript{151} The Remote Gambling Bill was published in gg 37569 on 23 April 2014.
\textsuperscript{152} Bana A ‘Online Gambling: An Appreciation of Legal Issues’ (2011) volume 12 Business Law International 335 at 339
\textsuperscript{153} NGA preamble.
\end{flushright}
This chapter will not be an attempt at measuring or quantifying the number of vulnerable parties affected. A proactive assessment of the possible efficacy of the measures put in place to protect them is instead proposed. The reason for this approach is the lack of consistency in research approaches, methodologies and definitions.\footnote{Eggert K ‘Truth in gaming: toward consumer protection in the gambling industry’ (2004) 63 Maryland Law Review 217 at 227 - 228.}

Studies finding strong links between the legalisation and regulation of gambling and an increase in problem gambling, underage gambling, crime and other socio-economic issues are often critiqued.\footnote{Eggert K (2004) at 227 - 228.} The lack of consistency in defining parameters for measuring and methods of calculating the impact, instance and causes of these issues has generated a multiplicity of estimates, varying greatly.\footnote{The author notes the majority of these studies show definitive errors both in terms of data capturing and in methodology. Eggert K (2004) at 227 - 228.}

It should be noted that studies examining the positive effects of gambling suffer from similar quantitative issues as those above.\footnote{Eggert K (2004) at 227 – 228.} Eggert asserts those in favour of legalisation as well as those against, tend to exaggerate their findings in order to support their particular conviction.\footnote{Eggert K (2004) at 227 – 228.}

These issues are further exacerbated by a research deficit in the online gambling field.\footnote{Gainsbury S Internet Gambling Current Research Findings and Implications (2012) at 5.} There is however consensus among industry stakeholders regarding certain universal concerns associated with (online) gambling.\footnote{MP O’Farrell B ‘Review of Illegal Offshore Wagering’ (2015) at 147.} These include the spread of problem (and pathological) gambling, underage gambling and money-laundering.\footnote{Snail SL ‘Online gambling in South Africa’ (2007) 15 The Quarterly Law Review for People in Business 114 at 115-116, Koos G ‘Online gambling in the case-law of the European Court of Justice’ 54 Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominitae Sectio Computatorica (2013) 225 at 226, Carnelley M ‘Recent cases in Gambling Law’ (2010) 3 SACJ at 444, Devaney M ‘Online gambling and international regulation: an outside bet’ (2009) 18 Information &}
safeguarded against. These are vulnerable parties whose interests are protected by the legislative instruments discussed below.

2. **LEGISLATION**

2.1. **Underage Gambling**

In a 2010 report prepared for the Gambling Review Commission, the authors concluded although not currently a crisis, underage gambling and its growth is a concerning trend.\(^{162}\) In particular as emerging evidence indicates gambling is being used as a means of subsistence by the youth.\(^{163}\)

2.1.1. **The National Gambling Act (NGA)**

As mentioned in the above introduction, gambling in South Africa is currently governed by the NGA. Sections 12, 15, 16 and 17 relate specifically to the protection of minors\(^{164}\) and the prevention of underage gambling.\(^{165}\)

Section 12 prohibits minors from entering designated areas within licensed casinos.\(^{166}\) The use of any gambling device by a minor is also prohibited.\(^{167}\) The onus is placed upon the licensee to ensure that minors are not allowed to violate this prohibition.\(^{168}\) The licensee and their employees are obliged to take reasonable steps in this regard.\(^{169}\) The 2010 report confirms this

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\(^{164}\) A minor is defined by the NGA as ‘a person under the age of 18 years’ NGA, s 1 definitions.


\(^{166}\) NGA s12(1)(a).

\(^{167}\) NGA s12(1)(b).

\(^{168}\) NGA s12(3)(a)-(d).

obligation is met through observation: an employee observes those entering the premises and anyone suspected of being underage is asked to provide identification.\textsuperscript{170} The authors indicate this system seemed to be effective.\textsuperscript{171} Further confirming “there did not appear to be a significant problem with minors accessing licensed gambling premises.”\textsuperscript{172}

The quantitative issues alluded to by Eggert are certainly applicable here.\textsuperscript{173} The 2010 report indicates the above conclusion is based on information provided by industry stakeholders.\textsuperscript{174} No other source or evidence is provided in support of this conclusion.\textsuperscript{175} If the information is being drawn from those minors who have following observation and identification been denied access to the premises, it begs the question as to whether this really be considered to be an accurate quantification. For instance, it would not take into consideration ‘mature-looking’ minors who following observation did not arouse suspicion and were allowed to enter the premises. It is submitted that the exact number of underage gamblers may however prove impossible to accurately calculate.

The abovementioned system of observation requires an employee of the licensee to estimate the age of an individual entering the premises.\textsuperscript{176} The trouble with this is best illustrated by Gilbert who provides two case studies:\textsuperscript{177} Two minor females registered on social media sites, one of which included a legitimate photograph of herself at the time, both purporting to be 18, fell

\textsuperscript{173} Eggert (2004) at 227-228.
victim to sexual predators that were not aware they were minors.\textsuperscript{178} They were 14 and 13 at the time and both cases involved face to face encounters.\textsuperscript{179} This begs the question how effective a system of observation can be when it is based on a subjective estimation of an individual’s age during a brief moment as they enter the premises?

It is submitted that preventing underage gambling does not only involve preventing minors from entering casinos\textsuperscript{180} or accessing online gambling websites.\textsuperscript{181} In addition ensuring minors do not frequently encounter inappropriate advertising material is vital.\textsuperscript{182} This approach has displayed some success in reducing underage smoking.\textsuperscript{183} Research indicates although minors have the cognitive ability to understand and evaluate the advertisements, they are particularly susceptible to emotionally charged messages.\textsuperscript{184} Accordingly, the NGA expressly prohibits advertising that is designed to entice minors to gamble.\textsuperscript{185} The content and placement of any gambling advertisements is also regulated to further this end.\textsuperscript{186}

Section 16 removes the economic incentive for both the underage gambler\textsuperscript{187} and licensee.\textsuperscript{188} The NGA contains an express provision declaring any gambling debt incurred by a minor to be unenforceable.\textsuperscript{189} Any economic incentive for licensees to allow underage gambling is thereby

\begin{itemize}
\item \textsuperscript{178} Gilbert F (2008-2009) at 7.
\item \textsuperscript{179} Gilbert F (2008-2009) at 7.
\item \textsuperscript{180} NGA s12.
\item \textsuperscript{181} NGAA s12, RGB s 40.
\item \textsuperscript{182} Gainsbury (2012) at 91.
\item \textsuperscript{184} Gainsbury (2012) at 91.
\item \textsuperscript{185} NGA s 15 (1)(a)-(b).
\item \textsuperscript{186} NGR reg 3.
\item \textsuperscript{187} NGA s 16 (2), (3) and (4).
\item \textsuperscript{188} NGA s 16 (1).
\item \textsuperscript{189} NGA s 16 (1) (d) (i).
\end{itemize}
removed. The NGA also prohibits any licensee from paying winnings over to a minor. 190 Instead these winnings are remitted to the National Gambling Board. 191 The latter must thereafter apply to the High Court having jurisdiction for the forfeiture of those winnings in favour of the State. 192

2.1.2. The National Gambling Amendment Act (NGAA) and Interactive Gambling Regulations (IGR)

The processes and procedures, discussed above, are designed to protect minors in respect of brick and mortar casinos. Chapter 1 of this paper asserted that the online environment’s nature necessitates a different approach in respect of certain regulations. 193 Preventing minors from accessing gambling premises and making use of gambling machines or devices is undoubtedly an example of this. There is an adage that goes ‘On the Internet, no one knows you are a dog.’ 194 Hyperbole aside, the anonymity inherent in the internet means that the system of observation used in the case of brick and mortar casinos would simply be futile. 195

The NGAA was introduced to meet the obligation placed on Parliament in terms of section 5(1) and 5(2) of Schedule 1 of the NGA. This section required draft legislation providing for the legalisation of online gambling be drafted and introduced. 196 The NGAA was accompanied by

190 NGA s 16 (2) (a).
191 NGA s 16 (3) and RGB s 7 (3).
192 NGA s 16 (4) (a) and (b) and RGB s 7 (4) (a) and (b).
196 NGA ss 5(1) and 5(2) Schedule 1 and NGAA preamble, ss 10 to 12, 15, 17 and 18.
Interactive Gambling Regulations (IRG)\textsuperscript{197} which were intended to complement the NGAA and inform the latter’s implementation and application.\textsuperscript{198}

The NGAA restricts online gambling to persons who have registered an account with a licensee.\textsuperscript{199} The NGAA obliges licensees in terms of section 12 to not knowingly allow a minor to register as a player.\textsuperscript{200} Regulation 9(1)(a) of the IGR requires that a copy of either the prospective player’s identity document or passport be requested before registering an account.\textsuperscript{201}

The IGR goes further, prescribing a form to be submitted along with the above documentation.\textsuperscript{202} The form includes a statement confirming the player is not younger than 18.\textsuperscript{203} This statement must be made and the form signed in front of a certified Commissioner of Oaths.\textsuperscript{204} This form along with the copy of the player’s identity document or passport is then submitted to the licensee before an account can be registered.\textsuperscript{205}

It is unlikely that a prospective player who has chosen to gamble online rather than at a brick and mortar casino would be willing to endure such an arduous procedure.\textsuperscript{206} Especially as the allure of online gambling stems from being able to play ‘…casino games from the comfort of your own home…’ \textsuperscript{207} and its ease of access.\textsuperscript{208} This may undermine the revenue potential of legalising and

\textsuperscript{197} The Interactive gambling regulations, General Notice 211 of 2009, GG 31956 published 27 February 2009 (hereinafter referred to as the IGR).
\textsuperscript{198} See generally IGR.
\textsuperscript{199} NGAA s11.
\textsuperscript{200} NGAA s12.
\textsuperscript{201} IGR reg 9 (1) (a).
\textsuperscript{202} IGR reg 10, see Form NGR 10.
\textsuperscript{203} IGR reg 10, see Form NGR 10.
\textsuperscript{204} IGR reg 10, see Form NGR 10.
\textsuperscript{205} IGR reg 9 and 10, see Form NGR 10.
\textsuperscript{207} Casino Enterprises v The Gauteng Gambling Board (653/10) [2011] ZASCA 155 (28 September 2011) at para 36.
\textsuperscript{208} Monnye S (2012) at 241.
regulating online gambling. Prospective licensees may also be wary of paying the non-refundable licence application fee of R500 000.\footnote{This is a non-refundable fee, IRG reg 42 (1).}

2.1.3. The Remote Gambling Bill (RGB)

The recent introduction of the RGB has provided Parliament with another opportunity to legalise and regulate online gambling.\footnote{RGB preamble, see RGB generally.} To date there are no regulations to accompany the Bill. There are however a number of provisions dealing with the issue of preventing underage gambling.\footnote{RGB, ss 2, 7, 13, 40, 44 and 45.}

Akin to the NGAA, the RGB requires that prospective players register an account before being allowed to engage in remote gambling activities.\footnote{NGAA s 11 and RGB s 44(1) (a).} The licensee is again obliged to take ‘reasonable measures’ to ensure minors are not allowed to access and participate in online gambling activities.\footnote{RGB 40(4).}

As already noted, there are no regulations to accompany the RGB to give substance to its provisions. It is submitted that perhaps the ‘golden standard’ as described by Miller will be applicable.\footnote{Miller KC (2014) at 70.} The author submits that the use of government-issued ID databases is the current best practice for reliable age verification.\footnote{Miller KC (2014) at 70.} Following the registration of an account the prospective players details are verified against the information contained in one or more of these databases.
South Africa boasts several reliable databases for the confirmation of identity and other details such as marital status and judgement debts.\textsuperscript{216} Both the NGAA and the RGB call for reasonable measures to be taken, and making use of these databases could potentially be a solution. Notwithstanding that such use could be an infringement of a prospective player’s right to privacy, it is submitted that it could be a justifiable limitation.\textsuperscript{217} Alternatively permission could simply be granted by the player directly. Participation in online gambling, as with all forms of gambling, is voluntary.\textsuperscript{218}

The RGB also contains a prohibition against advertising designed to entice minors to gamble.\textsuperscript{219} Section 43(1)(b) of the RGB echoes the contents of the NGA.\textsuperscript{220} Prohibiting advertising that encourages an activity ‘…that is unlawful in terms of this Act…’\textsuperscript{221} As the RGB contains an express prohibition against underage gambling, any advertising material intended to encourage underage gambling would fall within this sections ambit.\textsuperscript{222} Additionally, the RGB contains comparable provisions to those in the NGA designed to remove the economic incentive for underage gambling.\textsuperscript{223} The RGB declares any gambling debt incurred by a minor to be unenforceable.\textsuperscript{224} The payment of any winnings to a minor is similarly


\textsuperscript{217} Constitution of the Republic of South Africa 1996, Chapter 2 Bill of Rights at ss 14 and 36.


\textsuperscript{219} RGB s 43.

\textsuperscript{220} NGA s 15(1)(a)(ii) and RGB s 43(1)(b).

\textsuperscript{221} RGB s 43 (1) (b).

\textsuperscript{222} RGB ss 43(1)(b) and 45 (2) (a).

\textsuperscript{223} NGA s 16(1)(d)(i) and RGB s 7(1)(c)(i).

\textsuperscript{224} RGB s 7 (1) (c) (i).
prohibited by the RGB.\textsuperscript{225} Winnings not paid in terms of these provisions are dealt with in the same manner as laid out in the NGA.\textsuperscript{226}

2.2. Problem and Pathological Gambling

Much like the minors discussed above, problem and pathological gamblers are another group of vulnerable parties whose interests need to be protected. It is not uncommon for minors who have engaged in underage gambling to develop a gambling problem later on.\textsuperscript{227} Pathological gambling is an impulse control disorder.\textsuperscript{228} Problem gambling in turn is not classified as a disorder but when escalated will become pathological gambling in most instances.\textsuperscript{229}

To be classified as a pathological gambler a person must display at least five out of a set of ten factors.\textsuperscript{230} These factors are;

‘(1) is preoccupied with gambling,

(2) needs to gamble with increasing amounts of money in order to achieve the desired excitement,

(3) has repeated unsuccessful efforts to control, cut back, or stop gambling,

(4) is restless or irritable when attempting to cut down or stop gambling,

(5) gambles as a way of escaping from problems or of relieving a dysphoric mood,

(6) after losing money gambling, often returns another day to get even,

\begin{footnotesize}
\begin{itemize}
\item[^225] RGB s 7 (2) (a).
\item[^226] NGA ss 16 (3) and 16(4)(a) and RGB ss 7 (3) and 7(4)(a) and (b).
\end{itemize}
\end{footnotesize}
(7) lies to family members, therapist, or others to conceal the extent of involvement with gambling,
(8) has committed illegal acts such as forgery, fraud, theft, or embezzlement to finance gambling,
(9) has jeopardized or lost a significant relationship, job, or educational or career opportunity because of gambling, [or]
(10) relies on others to provide money to relieve a desperate financial situation caused by gambling.²³¹

For the purposes of this paper the distinction between problem and pathological gambling is immaterial, and hereafter any reference to problem gambling should be read to include pathological gambling.

²³² NGA s 14.
²³³ NGA s 14 (1).
²³⁴ National Gambling Regulations (NGR) GN R1342 in GG 26994 dated 12 November 2004 reg 2 (2), prescribed Form NGR 1/1.
²³⁵ NGA s 14 (1) and NGR reg 2 (1) - (2).

2.2.1. The National Gambling Act (NGA)

Section 14 of the NGA contains the majority of provisions relating to the protection of problem gamblers.²³² Section 14 provides for ‘[a] person who wishes to be prevented from engaging in any gambling activity [to] register as an excluded person…’.²³³ This registration takes effect by way of completing and submitting a prescribed notice.²³⁴ It may be done at any time.²³⁵
As mentioned above, pathological gambling is an impulse control disorder.\textsuperscript{236} For this reason it is acutely alarming that removal from the register may be effected in the same manner. Simply by the completion and submission of a prescribed notice.\textsuperscript{237} The National Gambling Regulations (NGR) do require ‘…documentary proof that the excluded person has complied with all requirements of any rehabilitation programme.’\textsuperscript{238} There are worryingly no legislative requirements or prerequisites for the rehabilitation programme mentioned in regulation 2(3) (e).\textsuperscript{239}

It is heartening to note that the NGA does make provision for a family member or other interested party\textsuperscript{240} to apply to have a person registered in terms of section 14.\textsuperscript{241} Further reassurance can be taken from the contents of section 14(6) which obliges a person excluded in this manner to approach the Court to have their name removed.\textsuperscript{242} This is a marked improvement from section 14(2) which does not demand any inquiry into the reasonableness and justness of such removal.\textsuperscript{243}

It is submitted that the lack of proper oversight, whether judicial or otherwise, for excluded persons seeking to be removed from the register shows an alarming lack of understanding from the legislature regarding problem gambling and impulse control disorders generally. The NGR does require an excluded person wanting to be removed from the register to provide proof that they’ve met any requirements prescribed by a rehabilitation programme. However, it is

\textsuperscript{237} NGA s 14 (2) and NGR reg 2 (3).
\textsuperscript{238} NRG reg 2(3) (e).
\textsuperscript{239} See NGA generally, see NGR generally.
\textsuperscript{240} The NGA specifies a number of competent applicants including an applicant who is economically responsible for or on the person to be registered as well as an applicant who owes a duty of care to the person to be registered, NGA s 14 (4) (a) – (e).
\textsuperscript{241} NGA s 14 (4) – (6).
\textsuperscript{242} NGA s 14 (6).
\textsuperscript{243} NGA s 14(6).
submitted that the lack of accreditation requirements for these programmes undermines the purpose of the regulation.\textsuperscript{244}

There are of course measures in the NGA designed to protect problem gamblers not associated with this register. For example, the NGA requires that a notice be clearly and prominently displayed warning players of the risks associated with gambling, including addiction.\textsuperscript{245}

Notices and cautionary warnings aside the majority of the protections afforded, do however relate to this register. For example, licensees are prohibited from allowing excluded persons to engage in gambling activities.\textsuperscript{246} The NGA prescribes certain steps be taken to ensure this prohibition is enforced.\textsuperscript{247} These steps are detailed in the NGR where once again a system of observation is prescribed.\textsuperscript{248} Employees of the licensee are provided with access to the register of excluded persons.\textsuperscript{249} Thereafter one such employee is posted at every entrance to control and monitor access to any area where gambling activities take place.\textsuperscript{250}

The NGR requires a colour photograph be included with the relevant form when a person is added to the register of excluded persons.\textsuperscript{251} This photograph is used for identifying excluded persons and preventing them from engaging in gambling activities. There are no regulations or requirements that this photograph be kept up to date.\textsuperscript{252}

\textsuperscript{244} NGR reg 2(3)(e).
\textsuperscript{245} NGA s 17(2).
\textsuperscript{246} NGA s 14 (10)(a)–(e).
\textsuperscript{247} NGA s 14(11)(a).
\textsuperscript{248} NGR reg 2(7).
\textsuperscript{249} NGR reg 2(7)(b).
\textsuperscript{250} NGR reg 2(7)(a).
\textsuperscript{251} NGR reg 2 (2).
\textsuperscript{252} See generally NGA and RGB.
Section 14(11)(b) of the NGA exempts the licensee and their employees from liability, both civil or criminal, arising from allowing an excluded person to engage in gambling activities, provided that the steps discussed above have been adhered to.\textsuperscript{253} Notwithstanding this exemption, the legislature has again attempted to remove the economic incentive for both licensees and problem gamblers. The gambling debts incurred by an excluded person are declared by the NGA to be unenforceable.\textsuperscript{254} It is concerning that the NGA provides a further exemption; in the event an excluded person fraudulently claimed to be someone else, the debts will be enforceable in law.\textsuperscript{255}

Being in a dire financial situation due to gambling is one of the ten factors displayed by pathological gamblers.\textsuperscript{256} Another factor is using crime to support their gambling activities, often forgery or embezzlement.\textsuperscript{257} It is difficult to see the reasoning in financially punishing pathological gamblers who use deception as a means to access gambling activities. It is most likely the gambler is already suffering financial difficulty.\textsuperscript{258} It is submitted that enforcing a further debt, while exempting the licensee from liability seems excessively punitive.

An argument could be made that this exemption is intended to protect the interests of licensees from excluded persons who may take advantage of the unenforceability of their debts.\textsuperscript{259} That argument does however lose some legitimacy when section 16 of the NGA is considered.\textsuperscript{260}

\textsuperscript{253} NGA s 14(11)(b).
\textsuperscript{254} NGA s 16 (1) (a) and 16 (1)(d)(ii).
\textsuperscript{255} NGA s 16(1)(d)(ii).
\textsuperscript{258} Gottfried J (2003 -2004) at 9 and NGA s 16 (1)(d)(ii).
\textsuperscript{259} NGA s 16(1)(d)(ii).
\textsuperscript{260} NGA s 16(2)-(4).
provision prohibits the payment of winnings to an excluded person. The same procedure as in respect of a minor’s winnings is followed.

2.2.2. The National Gambling Amendment Act (NGAA) and Interactive Gambling Regulations (IGR)

The NGAA does not introduce any amendments to the process stipulated in the NGA for the registration of excluded persons. The IGR further confirms registration and removal of a person from the register of excluded persons remains the same.

As with the excluded persons register, the NGAA does not significantly change the notice requirements of the NGA. The provisions are only altered to include both websites and licenced premises as being required to display the notice mentioned above. One significant change is that the NGAA through the IGR requires any prospective player to register an account before being allowed to engage in gambling activities. As noted above regarding minors, part of this registration process is providing a copy of the prospective player’s identity document or passport. The IGR stipulates that an account must be registered in the name of the prospective player. Coupled with the prohibition against allowing excluded persons to take part in gambling activities, it is safe to assume that a prospective player’s identity (as verified by both

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261 NGA s 16(2) to (4).
262 NGA s 16(3) to (4).
263 See NGAA generally and NGA s 14.
264 IGR reg 15 (5).
265 NGAA s 17 and NGA s 17.
266 NGA s 11.
267 IGR reg 9(1)(a).
268 IGR Reg 11(1).
269 NGA s 14 (10).
an identity document/passport\textsuperscript{270} and affidavit\textsuperscript{271}) would be confirmed against the register of excluded persons as kept by the National Gambling Board.\textsuperscript{272}

There is one safeguard for problem gamblers in the NGAA that the NGA would not be able to offer. The IGR requires a prospective player to nominate a single bank account during the registration process.\textsuperscript{273} This account is the only account from which the player is able to pay for the gambling activities offered by licensees.\textsuperscript{274} During the registration process prospective players are required to set a maximum amount of money that may be transferred out of the account in respect of gambling activities.\textsuperscript{275} This acts as a safeguard against overspending, especially in respect of problem gamblers. Taking into consideration the compulsive nature of problem gambling\textsuperscript{276} this may be a particularly effective mechanism. Furthermore, it may serve as an early warning for those developing a problem.

The NGAA, through the IGR stipulates that a 7-day cool-off period be observed after requesting the abovementioned limit be increased.\textsuperscript{277} A requested decrease will however be immediately effective.\textsuperscript{278} The impulsive nature of problem gambling\textsuperscript{279} naturally means that changing these financial limits cannot be instantaneous, and this provision is to be welcomed.

\section*{2.2.3. The Remote Gambling Bill (RGB)}

\begin{footnotesize}
\begin{enumerate}
\item IGR reg 9(1)(a).
\item IGR reg 10(2)(e).
\item NGA s 14(7)(a).
\item IGR reg 6(1).
\item IGR regs 6 and 6(6).
\item IGR regs 7(1).
\item IGR reg 7(4).
\item IGR reg 7(5).
\end{enumerate}
\end{footnotesize}
The RGB, as mentioned above, does not have regulations to accompany its provisions. Much like the NGAA, the RGB does however require prospective players register an account before engaging in gambling activities.\textsuperscript{280} It has also not amended the process stipulated in the NGA and the NGR for the registration of excluded persons.\textsuperscript{281} The same applies for the notice requirements of the NGA as they are again only altered to include websites.\textsuperscript{282} The RGB requires licensees make the necessary registration forms available on their websites in respect of section 14 of the NGA.\textsuperscript{283}

The RGB again echoes the provisions of the NGA designed to remove the economic incentive for both problem gamblers and licensees.\textsuperscript{284} The financial limitations provided for by the NGAA are included in the RGB.\textsuperscript{285} However, the cooling off period for both an increase and a decrease of any financial limit is, somewhat puzzlingly, only forty-eight hours now.\textsuperscript{286}

3. \textbf{A UNIQUELY SOUTH AFRICAN VULNERABLE PARTY}

As mentioned in chapter 1 of this paper, South Africa has a unique socio-economic landscape. The above discussion focused on minors and problem gamblers as vulnerable parties. Vulnerable parties are ‘small groups of consumers with unique reactions to products considered harmless when used by most people.’\textsuperscript{287} There is however one further vulnerable party unique to South Africa’s socio-economic landscape, the poor.\textsuperscript{288} The South African poor gambler is similarly

\textsuperscript{280} RGB s 44(1)(a)(i).
\textsuperscript{281} RGB s 42.
\textsuperscript{282} NGA s 17(2) and RGB s 46(1).
\textsuperscript{283} RGB s 46(2)(a).
\textsuperscript{284} NGA ss 16(1)(a) and 16 (1)(d)(ii) and RGB ss 7(1)(a) and 7(1)(c)(ii).
\textsuperscript{285} IGR reg 7(4)-(5) and RGB s 52(5).
\textsuperscript{286} RGB s 52(5).
unique.\textsuperscript{289} Research indicates they are ‘much poorer in financial terms, have significantly worse health indicators, and are less educated.’\textsuperscript{290}

Gambling policy involves balancing the economic benefits against the associated societal ills.\textsuperscript{291} Legalising and regulating online gambling should not place the already vulnerable poor gambler at further risk. In 2012 the unemployed made up 29.6 per cent of gambling participants in South Africa.\textsuperscript{292} Furthermore, 37.8 per cent had not matriculated and 29.4 per cent earnt less than one thousand rand per month.\textsuperscript{293} These are the parties whose interests the constitutionally enshrined principles of fairness, substantive quality and justice demand are protected.\textsuperscript{294}

Current research indicates the National Lottery is the most popular form of gambling amongst the impoverished.\textsuperscript{295} The 2010 review mentioned indicated of those South African’s earning less than six thousand rand per month 23.6 per cent participated in the National Lottery.\textsuperscript{296} The impoverished are far less likely to frequent casinos, with 3.3 per cent of the same demographic opting for it.\textsuperscript{297} This preference for the National Lottery may stem from its availability and accessibility.\textsuperscript{298} The poor gambler shows a preference for gambling forms that are easily accessible.\textsuperscript{299} The appeal of online gambling stems from its ease of access.\textsuperscript{300}

\textsuperscript{289} Dellis A, Spurrett D, Hofmeyr A et al (2013) at 421.
\textsuperscript{290} Dellis A, Spurrett D, Hofmeyr A et al (2013) at 421.
\textsuperscript{291} Bana A (2011) at 336.
\textsuperscript{293} National Gambling Board (2014) at 2.
\textsuperscript{299} Dellis A, Spurrett D, Hofmeyr A et al (2013) at 425
\textsuperscript{300} Monnye S (2012) at 241.
Naturally, online gambling requires an internet connection as well as an electronic device. Increasing internet connectivity and broadband penetration has played an integral role in the growth of the online gambling market. The poor are generally underrepresented on the internet. In South Africa this issue is exacerbated by the expensive fees charged by internet service providers. As a result, the legalisation and regulation of online gambling is ‘unlikely to impact or target the poor on a large scale.’ The most impoverished within South Africa would not, practically, be able to access this form of gambling. Furthermore, there is a clear preference, after the National Lottery, for informal games such as cards or scratch cards. This popularity may also be due to their ease of access. Due to the abovementioned practical impediments the correlation between popularity among the poor and ease of access shouldn’t translate to online gambling.

4. IS ONLINE GAMBLING FOR YOU, SOUTH AFRICA?

Bana notes the choice to legalise gambling is ‘within the powers of a sovereign nation’s autonomy.’ This choice involves finding a balance between the positive effects and adverse effects of gambling. It is submitted that South Africa, in respect of land-based gambling, has already achieved this balance.

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309 Bana A (2011) at 336.
310 Bana A (2011) at 336 and
Through the implementation of the NGA the employment and tax revenue generated by the former Bantustans casinos could continue to be enjoyed.\textsuperscript{311} The legalisation and regulation of online gambling will not pose a serious risk to the poor. It may however provide the South African economy and by extension the poor with an opportunity to recover.

As introduced in chapter 1, the unemployment rate in South Africa is 26.5 percent.\textsuperscript{312} In 2010 the gambling industry employed 59,958 people.\textsuperscript{313} One of the positive effects of legalised and regulated (online) gambling is job creation.\textsuperscript{314} The South African Department of Trade and Industry has raised concerns that online gambling will jeopardise land-based gambling employment and thus contribute little to employment growth.\textsuperscript{315} This presupposes that the same skill set is necessary for both land-based and online casino employment. This is certainly not so. By way of example, an online casino host needs to be computer literate while a land-based casino host does not.

Additionally, online gambling presents a unique opportunity to foster entrepreneurship.\textsuperscript{316} The capital necessary to start an online casino is significantly less than that required for a brick and mortar casino.\textsuperscript{317} The opportunity for entrepreneurship is of particular importance for South Africa. Research shows that ‘entrepreneurship is one the most effective means of alleviating

\begin{itemize}
  \item Thuo Gaming Western Cape (Proprietary) Limited v Chairperson of the Western Cape Gambling and Racing Board [2014] JOL 32027 (WCC) at para 11 and Gaming Associations of South Africa (Kwazulu-Natal) and others v Premier, Kwazulu-Natal, and others [1997] 4 SA 494 (N) at pg 499 para b.
  \item Eggert K (2004) at 227.
  \item Department of Trade and Industry ‘Responses to Remote Gambling Bill and Stakeholder Submission’ Parliament Cape Town, 2 June 2015 at page 11 and 21.
\end{itemize}
poverty in developing and transitional countries…”.  

Fostering entrepreneurs has shown a positive impact on employment and personal economic empowerment.

The opportunity to legalise and regulate online gambling should not be viewed frivolously. Instead within the above economic context, that is South Africa’s unique socio-economic landscape. The potential employment and entrepreneurial opportunities of online gambling need to be given due consideration.

5. CONCLUSION

As emphasised above, legalising any form of gambling involves a policy consideration. Thompson argues that when one interest is deemed more important than another, one must exclude the other. Respectfully, Bana’s contention is preferred, where it is better to strike a delicate balance between the positive effects and the adverse effects of gambling, and regulate accordingly. This is seemingly the approach followed by the NGA. The NGA provides for legalised and regulated gambling activities within the Republic of South Africa. It does however contain provisions designed to ‘safeguard people…against the adverse effect[s] of gambling…”.

This chapter has discussed the safeguards provided by the NGA. A discussion of the protections provided to vulnerable parties by the as yet ineffective NGAA has also been included. A

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318 Friedrich C ‘Universities should grow entrepreneurs’ Tygerburger 15 March 2017 page 8.
322 See generally NGA.
323 NGA preamble.

http://etd.uwc.ac.za
discussion of the unpassed RGB has completed the illustration of the level of protection South Africa currently provides minors and problem gamblers.

The chapter to follow will provide a comparative of the protections afforded by online gambling to these vulnerable parties. During this comparative, it is essential to bear the unique South African socio-economic landscape in mind. The value that online gambling entrepreneurs and employment may add to the economy is both necessary and vital, an argument which will be further built on in ensuing chapters.
CHAPTER 3

1. INTRODUCTION

This chapter examines the current position of online gambling in the United Kingdom (UK). Focus is placed on the Gambling Act (GA)\(^\text{324}\), the Gambling (Licensing and Advertising) Act (GLAA)\(^\text{325}\) as well as the Gambling Commission’s (GC) licence conditions and codes of practice (LCCP).\(^\text{326}\) The UK’s recent introduction of stricter online gambling regulations was aimed at protecting the interests of vulnerable parties.\(^\text{327}\) This was modelled on the success of the GA’s social responsibility focus.\(^\text{328}\) This provides a useful comparative for South Africa, bearing the research deficit in mind.\(^\text{329}\) The UK’s long history of legislative regulation\(^\text{330}\) with the attendant reviews, reforms and research\(^\text{331}\) provides a valuable and scarce resource.

This chapter will provide a discussion of the above-mentioned legislation. The decision whether to legalise (online) gambling involves a balancing of interests,\(^\text{332}\) and for this reason the question of whether the interests of vulnerable parties can be protected in an online environment is crucial. Consequently, the focus will be on the effectiveness of UK provisions relating specifically to the interests of vulnerable parties.

2. **LEGISLATIVE REGULATION**

2.1. **The Gambling Act (GA)**

Currently the UK gambling industry is regulated by the GA, the objectives of which include protecting ‘children and other vulnerable persons from being harmed or exploited by gambling.’\(^{333}\) Part 2 of the GA establishes the GC\(^{334}\) and empowers the latter to issue Codes of Practice.\(^{335}\) The GA further requires the GC to consult persons having knowledge about social problems relating to gambling before any code is issued or changed.\(^{336}\)

Section 4 of the GA defines remote gambling as ‘gambling … us[ing]… remote communication’\(^{337}\) and the Secretary of State has the authority to exempt a specific form of communication from this designation.\(^{338}\) The regulation of the remainder, however, falls within the purview of the GC. The fast-paced development, not only of the online gambling industry generally but also the technology it is dependent on specifically, has increasingly outpaced the legislature’s ability to regulate it.\(^{339}\) This is one of the arguments against a complete prohibition.\(^{340}\) It is further argued that smaller dedicated bodies of authority will be able to respond promptly to developments and challenges in the industry.\(^{341}\)

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\(^{333}\) GA part 1, s 1(c).

\(^{334}\) GA part 2, s 20 and schedule 4.

\(^{335}\) GA part 2, s 24.

\(^{336}\) GA part 2, s 24(10), providing a practical guarantee for the continued protection of vulnerable parties’ interests.

\(^{337}\) GA part 1, s 4.

\(^{338}\) GA part 1, s 4(3).


\(^{341}\) The Remote Gambling Bill of 2014, published in GG No. 31956, 29 February 2009 (hereinafter referred to as the RGB) part 4 follows a similar approach splitting the powers, functions and responsibilities between the provincial licensing authorities and the National Gambling Board.
Section 33 of the GA criminalises the provision of gambling facilities without an appropriate license.\textsuperscript{342} Prior to the commencement of the GLAA, this prohibition applied to online casinos only if at least one piece of remote gambling equipment was situated in Great Britain.\textsuperscript{343} The GLAA places more responsibility on the licensees themselves, effectively expanding section 33 to include a person who provides services in Great Britain, or a person who knows or should know that their facilities are being used, or are likely to be used, in the UK.\textsuperscript{344} Another purpose of the GA is to ensure gambling is fair and transparent.\textsuperscript{345} Wisely then, the gambling software industry is also regulated by the GA. \textsuperscript{346} Section 41(1) criminalises the production, sale \textit{et cetera} of gambling software without an appropriate license.\textsuperscript{347} No distinction is made between a software operating licence and a remote operating licence in this regard.\textsuperscript{348} As such, compliance with the social responsibility provisions in the codes of practice is a condition of an operator’s licence. This aspect will be discussed at a later stage.

Another objective is protecting the interests of vulnerable parties such as children.\textsuperscript{349} The GA distinguishes between a young person, someone between 16 and 18 years old, and a child, someone younger than 16 years.\textsuperscript{350} The invitation to gamble, provision of advertising or other material intended to encourage gambling, permitting or inviting entrance to premises licenced and currently in use as a casino are all acts criminalised by the GA in respect of both young

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{342} GA part 3, s 33(1) read with 33(2)&(3).
\item \textsuperscript{343} GA part 3, s 36(3) prior to amendment by GLAA s 1(2).
\item \textsuperscript{344} GLAA s 1(2).
\item \textsuperscript{345} GA part 1, s 1(b), the RGB, s 15(b), similarly intends to license and regulate the gambling software sector.
\item \textsuperscript{346} GA part 5 s 65(2)(i).
\item \textsuperscript{347} GA part 3, s 41(1).
\item \textsuperscript{348} GA part 5 s 82 (1) and LCCP part 2, page 28.
\item \textsuperscript{349} GA part 1 s 1 (c).
\item \textsuperscript{350} GA part 4 s 45 (1) – (2).
\end{itemize}
\end{footnotesize}
persons and children.\textsuperscript{351} In section 48 the distinction becomes important. It is an offence for a young person to gamble.\textsuperscript{352} The offence carries a fine upon conviction.\textsuperscript{353} No similar offence exists for a child. Section 82(1) of the South African Act\textsuperscript{354} also criminalises a minor’s participation in gambling.\textsuperscript{355} There is however no distinction between the penalty in respect of an adult who commits an offence and a minor.\textsuperscript{356} The Remote Gambling Bill (RGB) does not contain a distinction between young persons and children either.\textsuperscript{357} It does however distinguish between penalties in respect of a first offence\textsuperscript{358} and a second or subsequent offence.\textsuperscript{359}

An offence relating to minors found in the GA with no similar corresponding provision in either the RGB or NGA is the return of the minor’s stake.\textsuperscript{360} The GA requires that licensees return the stake of a minor.\textsuperscript{361} The RGB does list a litany of valuables forfeitable to provincial licensing authorities in the case of contraventions.\textsuperscript{362} While the NGA remains silent on the stake of a minor, any minor’s winnings are forfeitable to the National Gambling Board.\textsuperscript{363} The GA remains silent on the fate of a minor’s winnings. Except to confirm, like the NGA and RGB,\textsuperscript{364} that they may not be paid out to the minor.

\begin{itemize}
\item \textsuperscript{351} GA part 4 ss 46 (1), 46 (3) and 47 (1) respectively.
\item \textsuperscript{352} GA part 4 s 48 (1).
\item \textsuperscript{353} GA part 4 s 62 (2).
\item \textsuperscript{354} National Gambling Act 7 of 2004 (hereinafter referred to as the ‘NGA’).
\item \textsuperscript{355} NGA s 12 (1) (a) - (e).
\item \textsuperscript{356} NGA s 83.
\item \textsuperscript{357} RGB s 41.
\item \textsuperscript{358} RGB s 62(3)(a).
\item \textsuperscript{359} RGB s 62(3)(b).
\item \textsuperscript{360} Stake is defined as ‘an amount paid or risked in connection with gambling and which…is used in calculating the amount of the winnings…’ GA part 18 s 353.
\item \textsuperscript{361} GA part 5 s 83 read with s 58.
\item \textsuperscript{362} RGB s 62(4) and NGA
\item \textsuperscript{363} NGA s 16(2)-(4).
\item \textsuperscript{364} RGB s 7(2)(a), s 7(3)-(4) stipulates unlawful winnings will be forfeited to the National Gambling Board.
\end{itemize}
As mentioned above, the GA regulates the gambling software industry. The GC furthermore has the authority to make regulations relating to gambling machines, specifically relating to the standards designed to ‘discourage repetitive play or to protect children or other vulnerable persons from harm.’

A final notable provision of the GA, section 89(2). It demonstrates the UK’s commitment to protecting the interests of vulnerable parties and also to fair and transparent gambling activities. This section requires that the equipment of a remote gambling licensees be installed in Great Britain. This to a large extent allows consumers a greater level of protection against unscrupulous providers. These ‘assets’ can be used not only to found jurisdiction in the case of litigation but also to settle outstanding judgment debts.

2.2. Licence Conditions and Codes of Practice (LCCP)

To further the GA’s objectives, compliance with the social responsibility provisions of the LCCP are a requisite for licensees. The anonymity provided by the internet is often cited as an appreciably valid argument for prohibition. As will be discussed below, this paper submits that Miller’s ‘golden standard’ for identity verification is the lynchpin of any regulatory regime.

The most obvious reason for an identity verification process is to prevent underage gambling. The LCCP obliges licensees to have identity verification processes in place and to continually

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365 GA part 5 ss 96(1), (3) read with s 235.
366 GA part 5 s 96(1) read with (3).
367 GA part 5 s 89(2), this condition may be varied under circumstances set out in s 89(3).
368 The RGB does not contain a similar condition.
369 GA part 5 s 82(1) and LCCP part 2, page 28.
371 Miller K (2014) at 70.
monitor their effectiveness, including by way of providing staff training and keeping any
technologies updated.\textsuperscript{372} The identity verification process applies to all consumer. Those that
choose to use a payment method other than a credit card\textsuperscript{373} can have their identity verified
through a third party. In the event this is not possible the consumer will be unable to withdraw
their winnings until additional information about the consumer can be verified.\textsuperscript{374} Their account
will also be suspended in the event their identity cannot be verified through the above methods
within 72 hours of their first deposit.\textsuperscript{375}

The identity verification process is an essential part of preventing underage gambling. It further
facilitates and ensures the efficacy of self-exclusion processes. Self-exclusion procedures and
processes are a common feature of regulatory regimes. They are intended to prevent problem
gambling.\textsuperscript{376} Self-exclusions function by preventing the consumer from accessing their account.
Thereby preventing them from engaging in gambling activities. Any funds remaining in the self-
excluded consumer’s account will be returned to them.\textsuperscript{377}

During the requested self-exclusion period the licensee is required to take reasonable steps to
ensure no marketing material regarding gambling is sent to the consumer.\textsuperscript{378} Once the self-

\begin{flushright}
\textsuperscript{372} LCCP part 2 social responsibility code provision (hereinafter referred to as ‘SRCP’) 3.2.11(1), (2)(c) – (d).
\textsuperscript{373} LCCP part 2 SRCP 3.2.11(2)(h), the reason a credit card would be an acceptable form of identity verification is because proof
\textsuperscript{374} LCCP part 2 SRCP 3.2.11(2)(f)(i).
\textsuperscript{375} LCCP part 2 SRCP 3.2.11(2)(f)(iv).
\textsuperscript{377} LCCP part 2 SRCP 3.5.3(1) and (5).
\textsuperscript{378} LCCP part 2 SRCP 3.5.3(2) and (3), Ordinary code provision (hereinafter referred to as ‘OCP’) 3.5.4(5)(g).
\end{flushright}
exclusion period has expired the licensee cannot automatically resume sending marketing material to the consumer unless explicitly requested.\textsuperscript{379}

From the above it is clear self-exclusion procedures are largely reliant on an effective identity verification process. Problem gamblers could otherwise simply open new accounts thereby circumventing the process. In a further effort to prevent this, the LCCP requires that licensees maintain a register containing information relating to self-excluded consumers, including their credit card details.\textsuperscript{380} Many larger online casinos have already seen the logic in sharing this information amongst one another. The GC recognised the practicality of this approach and is currently establishing a similar multi-operator self-exclusion scheme.\textsuperscript{381}

It is submitted that a scheme such as the one above is most effective in respect of online gambling. It can too easily be subverted in brick and mortar casinos by using cash. Customer interactions, a proactive intervention by licensees to identify behaviours typically associated with problem gambling and intervene,\textsuperscript{382} are another example of schemes wherein online gambling has an advantage. The LCCP requires processes and procedures that identify at risk customers including those not displaying typical problem gambling behaviour.\textsuperscript{383} Online gambling allows licensees to accurately track every action on a consumer’s account, including the money and time they’ve spent.\textsuperscript{384} The LCCP further makes provision for refusing consumer’s service and / or admission.\textsuperscript{385}

\textsuperscript{379} LCCP part 2 OCP 3.5.2(7)(f).
\textsuperscript{380} LCCP part 2 SRCP 3.5.3(6)(a)-(b).
\textsuperscript{381} LCCP part 2 SRCP 3.5.5(1).
\textsuperscript{382} LCCP part 2 SRCP 3.4.1.
\textsuperscript{383} LCCP part 2 SRCP 3.4.1(e)(i).
\textsuperscript{385} LCCP part 2 SRCP 3.4.1(c).
Problem gambling is an impulse control disorder. For this reason measures such as prohibiting directed marketing material, customer interactions and self-exclusion procedures may be effective. Due to the lack of research in the field, developing effective regulatory strategies can be difficult. The LCCP in response requires licensees to make yearly donations aimed at researching, treating and preventing problem-gambling, this includes developing regulation (prevention) strategies.

The most effective regulations are based on evidence. Evidence of the abovementioned compulsive nature of problem gambling has given rise to other regulatory measures. These include time-out facilities, like self-exclusion periods, during a time-out the consumer is prevented from accessing gambling activities. The duration of the time-outs offered and their consequences are however different. An example of the differing consequences can be seen in relation to marketing material. A consumer whose self-exclusion period has expired may not be sent marketing material or invitations to gamble by the licensee for a further seven years from the expiration of their self-exclusion period. After the requested period has expired the self-exclusion remains in place for all intents and purposes. This is not the case for time-out facilities.

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387 LCCP part 2 SRCPs 3.5.3(2)-(4), 3.4.1 and 3.5.3 respectively.
388 LCCP part 2 SRCP 3.1.1(2).
391 LCCP part 2 SRCP 3.3.4 and OCP 3.5.4(5)(a)-(c). Time-out facilities may be offered for a period of one day up to a maximum of 6 weeks, whereas self-exclusions may be offered for a minimum of 6 months up to at least 5 years.
392 LCCP part 2 OCP 3.5.4(5)(f).
393 LCCP part 2 OCP 3.5.4(5)(e).
Once the requested self-exclusion period has expired the consumer may of course ask to remove the self-exclusion. Following such request, the consumer will once again receive marketing material. They will also be able to access and engage in gambling activities following a further 24-hour cooling off period. This request must however be made by the consumer themselves. From the perspective of the licensee without this request they are treated as though still self-excluded.

Understanding the nature and causes of problem gambling helps legislators understand circumstances that both encourage and discourage it. ‘Continuous play,’ for example, has repeatedly been associated with encouraging the development of problem gambling. Continuous play is a game ‘with short intervals between bet placement and determination of outcome and utilize variable ratio schedules of reinforcement, such as casino games, slots…’ Continuous play has a tendency to create a dissociative state wherein the consumer doesn’t notice the passage of time. The LCCP, in an effort to prevent this dissociative state, encourages the availability of ‘reality checks’ such as on screen timers or self-imposed limits relating to time spent and/or money.

There is widespread evidence suggesting a strong link between underage and problem gambling. The primary method used to prevent underage gambling is identity verification. Other methods include limitations on advertising and access to gambling facilities. The UK has

394 LCCP part 2 OCP 3.5.4(5)(f).
395 LCCP part 2 OCP 3.5.4(5)(f).
396 LCCP part 2 OCP 3.5.4(5)(e)-(f).
397 Gainsbury S (2012) at 94.
399 Gainsbury S (2012) at 94.
400 LCCP part 2 SRCP 3.3.1(2)(a)-(b).
shown a willingness to take advantage of technological improvements. Licensees must for example permit filtering software to be used by parents and/or schools. As mentioned above, limitations on advertising is a method used to prevent underage gambling. To this end the LCCP requires all licensees to comply with the relevant advertising rules and regulations. Adolescents are more likely to take risks, they are also more easily swayed by the emotional message of gambling advertisements. The LCCP, through the advertising rules, as a result demands no person in gambling advertisements appear younger than 25.

3. PROTECTING OR PRIVATISING VULNERABLE PARTIES INTERESTS?

Essa submits that “[g]iven the innovative technological framework within which the Internet exists, and in light of preliminary evidence leading to the assumption that prohibition is not working, it is clear that the source of the problem is the prohibition model itself.” As will be discussed in chapter four, the argument between prohibitory and regulatory models has been leaning in favour of regulation. This is mainly due to the lack of efficacy in maintaining complete prohibitions. The prohibition model’s argued lack of efficacy does not mean that the alternative’s effectiveness shouldn’t be investigated. The question this paper asks is whether sufficient protection can be afforded to vulnerable parties if online gambling is legalised and regulated. In answering this question, the efficacy of the measures found in the GA and LCCP must be examined.

402 LCCP part 2 SRCP 3.2.11(2)(c).
403 LCCP part 2 SRCP 5.1.7(2).
405 LCCP part 2 OCP 5.1.6(3).
Before examining the specific provisions, it is necessary to discuss unlicensed operators. Unlicensed operators have no incentive to implement responsible gambling measures.\textsuperscript{408} Collectively, unlicensed operators are referred to as the black market. This black market furthermore does not keep records or report criminal transactions.\textsuperscript{409} As a result, a responsible gambling policy must eliminate this black market. Vulnerable parties are of course more likely to be taken advantage of by unlicensed operators. Ordinary consumers are, however, at risk too. Thompson submits that, due to the ease of starting a website, a new illegal internet casino could presumably open every day.\textsuperscript{410} This leaves ordinary consumers with no practical recourse against fraudulent unlicensed operators.\textsuperscript{411} A flourishing black market renders the procedures assessed below futile. Consumers will most likely not receive them. For this reason, any gambling policy that allows the black market to flourish places vulnerable parties at greater risk.\textsuperscript{412}

Legalisation and regulation would logically reduce the black market. To further reduce it a balanced regulatory regime needs to be implemented. Allowing licensed operators to effectively compete with unlicensed operators.\textsuperscript{413} Exhaustive regulation of the industry, whether through overly strict regulations or granting monopolies, encourages the growth of the black market.\textsuperscript{414} Whether legalising and regulating online gambling would completely eradicate the illegal market

\textsuperscript{408} Loscalzo T & Shapiro S (2000) at 19.
\textsuperscript{409} Blankenship M (2008) at 515.
\textsuperscript{410} Thompson B 'Internet Gambling' (2001) 2 issue 1 North Carolina Journal of Law & Technology 81 at 102.
\textsuperscript{412} Alexander G 'The U.S. on Tilt Why the Unlawful Internet Gambling Enforcement Act is a Bad Bet' (2008) 5 Duke Law & Technology Review 1 at 21.
\textsuperscript{413} Gainsbury S (2012) at 34.
\textsuperscript{414} Gainsbury S (2012) at 34.

If this balance is achieved, consumers are overall more likely to patronise lawful operator.\footnote{Kelly J M (2000) at 176.} Increasing consumer confidence in online payment methods is an important factor in the growth of the online gambling industry. Consumers tend to be warier when transacting online.\footnote{Gainsbury S (2012) at 39.} This acts in regulators’ favour as consumers have shown that a similar legal alternative will be given preference. In response operators have shown not only a willingness but a desire to be licensed and regulated as this gives them an advantage in an increasingly competitive industry.\footnote{Kelly J M (2000) at 176.} This has certainly been the case in Malawi, where this balance has been achieved. The 2010 study of international gambling jurisdictions found that within eight years of the legalisation and regulation of gambling the ‘previously widespread illegal industry’ had all but been replaced with a ‘stable and contributory industry’.\footnote{Gambling Review Commission (2010) at 15.}

Eradicating the black market is necessary for one further reason, namely to ensure a proper comparative basis is allowed.\footnote{Gottfried J (2004) at para 13.} Regulators and legislators must beware of comparing unlicensed (and unregulated) online casinos with licensed brick and mortar casinos.\footnote{Gottfried J (2004) at para 13.} As mentioned above, online casinos have shown a willingness to comply with regulations.\footnote{Kelly J M (2000) at 176.} Thus, when the protections afforded to vulnerable parties are discussed below the proper comparative basis must

\footnote{Kelly J M (2000) at 176.}
\footnote{Gainsbury S (2012) at 39.}
\footnote{Kelly J M (2000) at 176.}
\footnote{Gambling Review Commission (2010) at 15.}
\footnote{Gottfried J (2004) at para 13.}
\footnote{Gottfried J (2004) at para 13.}
\footnote{Kelly J M (2000) at 176.}
be borne in mind. The comparison is between licensed online casinos and licensed brick and mortar casinos.\(^{423}\)

### 3.1. Underage Gambling

Liddell describes vulnerable parties as persons who are uniquely at risk of harm from products that are otherwise safe for public consumption.\(^{424}\) Minors have consistently been identified as one of these groups. The risk stems from their unfinished cognitive development, which leads to irrational behaviour and increased risk-taking.\(^{425}\) Minors are consequently at a greater risk of developing addictive behaviours.\(^{426}\)

#### 3.1.1. Identity Verification

The primary method of countering underage gambling is identity verification. Since Liddell first argued that preventing underage gambling through identity verification would be futile,\(^{427}\) there have been significant improvements in the available technology.\(^{428}\) The consensus among recent authorities suggests that identity verification is a sufficient and effective method of preventing minors from accessing online gambling.\(^{429}\) This unanimity is in large part based on the growing confidence in external, independent third party verifiers.\(^{430}\) Traditionally these third-party verifiers have been used to outsource certain aspects of compliance monitoring, particularly in

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\(^{425}\) Gainsbury S (2012) at 90.  
jurisdictions with insufficient funds, resources or skills to implement the regulatory regime themselves.\textsuperscript{431} The current industry standard in respect of identity verification is government issued photographic identification; the document is then scrutinized by a third-party verifier.\textsuperscript{432}

While the above method is not infallible,\textsuperscript{433} it is submitted that it is a significant improvement from its counterpart in brick and mortar casinos\textsuperscript{434} which rely on systems of observation.\textsuperscript{435} Gottfried contends regular online underage gambling is unlikely due to the difficulty identity verification presents and lack of financial benefit.\textsuperscript{436}

3.1.2. Advertising Regulation

Another method employed to prevent underage gambling is gambling advertising limitations. It may at first appear ‘somewhat odd to view limitations on advertising as a form of consumer protection.’\textsuperscript{437} However adolescents show a marked susceptibility to the emotionally charged messages of advertising campaigns\textsuperscript{438} despite a demonstrated cognitive ability to understand and evaluate the information provided.\textsuperscript{439}

Evidence suggests the prevalence of advertisements relating to online gambling can also influence the behaviour of adolescents and increase their desire to try (online) gambling.\textsuperscript{440} The

\textsuperscript{431} Mcallister L K (2012) at 2-3.
\textsuperscript{432} Blankenship M (2008) at 501.
\textsuperscript{435} LCCP part 2 SRCP 3.2.1(5), Gottfried (2004) at para 35.
\textsuperscript{436} Gottfried (2014) at para 34, Gottfried is supported in his contention by Carran M (2013) at 516-517 who cites several prevalence studies confirming same.
\textsuperscript{437} Miller K (2014) at 70.
\textsuperscript{438} Gainsbury (2012) at 91.
\textsuperscript{439} Gainsbury (2012) at 91.
\textsuperscript{440} Gainsbury (2012) at 91.
concurrent development of the adolescent’s sense of identity, individuality, sexuality and the need to belong are some of the factors that make adolescents a vulnerable party. Additionally adolescents are risk-takers, apt to over-estimating their own abilities. They are thus uniquely at risk of being taken advantage of by gambling advertisements.

3.2. Problem Gambling

Self-exclusion processes are the most common regulatory strategy for protecting the interests of problem gamblers. Antolak-Saper in her 2010 article discusses the effectiveness of self-exclusion programmes in brick and mortar casinos, highlighting several key issues. The author indicates the lack of reporting requirements means a true measure of the efficacy of these programs is difficult to obtain. Enforcement through observation at access points is another major concern. The regular incidence of self-excluded consumers subsequently being able to gain access and continue playing is a worrying situation. Lastly, the author suggests without cooperation between licensees, particularly sharing information relating to self-excluded consumers, these programs cannot effectively protect the problem gambler.

Applying these same concerns to the online environment, the identity verification process becomes pertinent. Its absence would undermine any attempts to implement these protections.

Recent technological developments have allowed the development of reliable fast identity

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441 Gainsbury (2012) at 91.
442 Gainsbury (2012) at 90.
443 Gainsbury (2012) at 91.
verification systems. In turn licensees are able to share information regarding self-excluded consumers between themselves. This process has subsequently been adopted by regulatory regimes. Implementing this protective strategy is undemanding and virtually effortless in the online environment.

A question that remains is whether self-exclusion programs assist problem gamblers in a therapeutic sense. It would be illogical to suggest simply preventing a problem gambler from accessing gambling facilities is sufficient. Ideally a self-exclusion procedure should be used in conjunction with other therapeutic devices, such as counselling. Successful recovery for a problem gambler depends partly on the use and availability of other therapeutic devices. The way self-exclusions are implemented may also play a role. The tone and nature of interactions with the licensees’ employee are important here. The self-exclusion must not be made to feel like a punishment.

The LCCP requires licensees to prominently display information regarding problem gambling including self-exclusion procedures. Licensees must also provide staff training to ensure consumers are directed towards counselling and/or other support initiatives. Miller recommends compliance with these provisions a prerequisite for licensees. The LCCP has done just that.

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451 LCCP part 2 SRCP 3.5.5.
453 Miller K (2016) at 32.
454 Miller K (2016) at 32.
455 Miller K (2016) at 31-32 and 36.
456 LCCP part 2 SRCP 3.3.1(4).
457 LCCP part 2 SRCP 3.4.1(1)(d) and 3.5.3(7).
458 Miller K (2016) at 44-45, GA part 5 s 82 (1) and LCCP part 2, page 28.
An alternative or supplementary enforcement option suggested by Liddell neither Miller nor Antolak-Saper mention is using market leaders to drive industry and consumer behaviour. The authors indicate brand identity influences an uncertain consumer’s choice, generally a familiar name is preferred, ensuring the market leaders implement social responsibility safeguards will compel other providers to do the same to remain competitive.

4. **LESSONS FOR SOUTH AFRICA**

As mentioned in chapter two, South Africa has a unique socio-economic landscape. It is against this unique landscape that the above protections must be judged. Several reliable databases for confirming identity are readily available in South Africa. As mentioned above, the lynchpin of effective online gambling regulation is a reliable identity verification process. It is submitted that effective and reliable identity verification can be achieved in South Africa through databases such as TransUnion.

Zhang argues a different approach to regulation is necessary for the online environment. Legislators should begin using computer code to drive behaviour. This new approach has benefits, for example, creating, changing and adapting computer code is relatively inexpensive. The cost of an online casino is generally significantly less than brick and mortar casinos.

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462 Zhang C (2016) at 56.
463 Zhang C (2016) at 55.
Expense would thus not prevent the protections, discussed above, from being implemented in South Africa.

Notwithstanding the above, South Africa has chosen to maintain a complete prohibition. Chapter four, to follow, will discuss the practicalities and challenges of this approach.

5. CONCLUSION
The above discussion illustrates the measures implemented by the UK to regulate the online gambling sector may prove effective. Protecting vulnerable parties from harm and being taken advantage of. Online casino operators and legislators from regulated jurisdictions submit the necessary protection is easier to implement in an online environment.466

It is increasingly difficult to justify the continued prohibition of online gambling in South Africa. These perceptions are out-dated,467 the safeguards implemented by the GA and LCCP show the interests of vulnerable parties can be protected. More so than in brick and mortar casinos. A growing advantage with the increased cost-effectiveness of identity verification.468 Authors consequently aptly describe allowing land-based gambling whilst prohibiting online gambling as a case of serious cognitive dissonance.469

Protecting the interests of vulnerable parties is possible through regulation. This does not necessarily mean regulation is the best approach for South Africa. The following chapter will

467 Blankenship (2008) at 500.
discuss the prohibition model as implemented in Australia. Examining whether an equal or better level of protection can be provided. As mentioned previously South Africa has a unique socio-economic landscape. Comparatives drawn with other jurisdictions must be mindful not to overlook this characteristic.
CHAPTER 4

1. INTRODUCTION

This chapter examines the position of online gambling in Australia focusing on the prohibitions contained in the Interactive Gambling Act (IGA). The recent introduction of the Interactive Gambling Amendment Bill (IGAB) will also be discussed. This will facilitate an analysis of the efficacy of the prohibition model. A more general discussion of the prohibition model will conclude the chapter.

At the outset, it should be noted that Australia has a thriving gambling industry. Since 1984 the Australian government has produced a yearly report on the gambling industry with the most recent being the 2014-15 edition. Illustrating Australia has one of the largest gambling industries internationally. During the 2014-15 period Australians spent AUS$10 481.83 per capita on legal forms of gambling. Despite the ubiquity of gambling in Australia, the prevalence of problem gamblers is on par with international standards. The Interactive Gambling Amendment Bill Explanatory Memorandum (IGAB Explanatory Memorandum) asserts;

‘The rate of problem gambling in Australia is said to be 0.6 per cent of the adult population, or just under one per cent of gamblers. This is consistent with international rates, as observations of the prevalence of problem gambling are generally around one per cent of all gamblers. In Australia, over 80 per cent of gamblers are not at risk of

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470 Interactive Gambling Act 84 of 2001 (hereinafter referred to as the ‘IGA’).
471 Interactive Gambling Amendment Bill 2016 (hereinafter referred to as the ‘IGAB’).
473 Interactive Gambling Amendment Bill, explanatory memorandum (2016) at page 16 (hereinafter referred to as the ‘IGAB explanatory memorandum’).
475 IGAB explanatory memorandum at page 19.
problem gambling, while around 12 per cent of gamblers are classified as low risk and a further six per cent are at moderate risk.\(^{476}\)

The rationale behind the abovementioned prohibition is, thus, to protect problem gamblers and to stem the proliferation of problem gambling.\(^{477}\) Legislators were particularly concerned due to Australia’s high rate of internet connectivity.\(^{478}\)

Section 15 of the IGA prohibits the provision of ‘interactive gambling services’ to Australian residents, and although it is an offence to provide facilities for interactive gambling, making use of such facilities as an Australian resident is not.\(^{479}\) This effectively means that there is little reason for Australian residents to abide by the prohibition, given the popularity of the pastime.\(^{480}\) The prohibition means governmental regulation, and by extension protection, is absent, leaving many Australian consumers at the mercy of unscrupulous service providers.\(^{481}\) As a result, Australian consumers have turned to independent regulators such as eCogra to provide protection.\(^{482}\)

A discussion of the measures implemented by these independent regulators to protect vulnerable parties is beyond the scope of this paper, as each regulator is at liberty to create their own policies and procedures. The role of these independent regulators within the online gambling industry will, however, be addressed in this chapter.

\(^{476}\) IGAB explanatory memorandum at page 19.
\(^{479}\) IGA part 2 s 15(1).
\(^{482}\) Gainsbury S Internet Gambling: Current Research Findings and Implications (2012) at 79-80.
2. STATUTORY PROHIBITIONS

2.1. The Interactive Gambling Act (IGA)

As stated, the online gambling industry in Australia is governed by the IGA.\textsuperscript{483} The IGA defines an interactive gambling service as ‘…a gambling service, where … the service is provided to customers using any of the following: an internet carriage service…’ \textsuperscript{484} Section 6(1) goes on to define a prohibited internet gambling service as an interactive gambling service that may be utilised within Australia. Furthermore, the definition does not limit itself to Australian residents or citizens, it encompasses anyone ‘physically present in Australia.’ \textsuperscript{485} The IGA also makes use of the term ‘Australian-customer link,’ terminology not found in either the United Kingdom (UK) or South African legislation.\textsuperscript{486}

Part 1 of the IGA acts as introduction, providing definitions and establishing its applicability.\textsuperscript{487} Parts 2 and 2A focus on the prohibition of interactive gambling services and offences.\textsuperscript{488} The criminalisation of intentionally providing interactive gambling services to persons physically present in Australia is the first offence created by this part.\textsuperscript{489} Interestingly, and in contrast to the approach taken by the UK and South Africa, providing interactive gambling services is prohibited, whereas participation in and/or use of these services is not similarly prohibited.\textsuperscript{490}

Comparing the IGA prohibition to UK legislation is troublesome as online gambling is not prohibited by the latter. Comparing the UK underage gambling prohibition may however be

\begin{itemize}
    \item \textsuperscript{483} See generally IGA.
    \item \textsuperscript{484} IGA Part 1 ss 5(1)(b)(i) and 4.
    \item \textsuperscript{485} IGA Part 1 s 6(1)(b).
    \item \textsuperscript{486} IGA Part 1 s 8, an interactive gambling service that has customers who are physically present in Australia will be deemed to have an Australian-customer link.
    \item \textsuperscript{487} IGA Contents and Part 1, see above paragraph.
    \item \textsuperscript{488} IGA Part 2.
    \item \textsuperscript{489} IGA Part 2 ss 15(1)(a)-(b) read with Part 1 s 8.
    \item \textsuperscript{490} IGA Part 2 s 15(1)(a)-(b).
\end{itemize}
useful. The UK prohibits both the participation in and the provision of underage gambling facilities.\textsuperscript{491} The IGA’s prohibition, by contrast, lacks incentive for persons physically present in Australia to refrain from engaging in prohibited online gambling services.\textsuperscript{492} South African legislation, which does prohibit interactive gambling, also criminalises engaging, conducting and/or providing unlicensed gambling activities.\textsuperscript{493}

The choice to limit the prohibition to services that have been intentionally provided is confusing. The rationale behind prohibition is preventing the proliferation of problem gambling.\textsuperscript{494} Subsection 3 further limits the prohibition exempting providers who did not know and could not, with reasonable diligence, have ascertained that their services had an Australian-customer link.\textsuperscript{495} The IGA requires that details are provided which imply that the consumer isn’t physically present in Australia be considered when determining reasonable diligence.\textsuperscript{496} Personal information (if provided)\textsuperscript{497} as well as any network data information may also be considered.\textsuperscript{498} The presumption that consumers will not deliberately conceal their location further diminishes the prohibition given that deception about involvement in gambling and illegal conduct are factors indicative of problem gambling.\textsuperscript{499}

\textsuperscript{491} Gambling Act 2005 (c. 19) Part 4 s 48(1) read with ss 45 and 353 definition of young person (hereinafter referred to as the ‘GA’).
\textsuperscript{492} See generally IGA part 2 and 2A.
\textsuperscript{493} South African legislation, which does prohibit interactive gambling, also criminalises engaging, conducting and/or providing unlicensed gambling activities.
\textsuperscript{494} The IGA requires that details are provided which imply that the consumer isn’t physically present in Australia be considered when determining reasonable diligence.
\textsuperscript{495} Personal information (if provided) as well as any network data information may also be considered.
\textsuperscript{496} The presumption that consumers will not deliberately conceal their location further diminishes the prohibition given that deception about involvement in gambling and illegal conduct are factors indicative of problem gambling.
The Australian population are eager and avid gamblers\textsuperscript{500} with a preference for sports betting.\textsuperscript{501} In 2002, Datamonitor placed the sports betting market value at 40.8\% of the online gambling market in Australia.\textsuperscript{502} The prohibition contained in the IGA does not extend to an interactive gambling service whereby consumers bet on sporting events,\textsuperscript{503} provided the event has not already begun when the bet is placed.\textsuperscript{504} Allowing interactive sports betting but not in-play\textsuperscript{505} sports betting may stem from the same concerns expressed regarding time limits imposed on problem gamblers. The sense of time running out may lead to increased wagers, both in terms of frequency and value.\textsuperscript{506}

To enforce the prohibitions discussed above, Part 3 of the IGA creates a Complaints system.\textsuperscript{507} Administered by the Australian Communications and Media Authority (ACMA).\textsuperscript{508} Once the ACMA has received a complaint involving an off-shore interactive gambling service provider they have a discretion to investigate the matter.\textsuperscript{509} Following an investigation the ACMA may refer the matter to law enforcement as well as informing internet service providers.\textsuperscript{510} Traditionally a complaint is the catalyst for this process, nonetheless the ACMA is authorised to launch an investigation under its own initiative.\textsuperscript{511}

\footnotesize{\textsuperscript{500} Essa A (2004) at 92.  
\textsuperscript{502} Datamonitor (2002) at 4.  
\textsuperscript{503} IGA Part 1 s 8A(1)(a)(iv).  
\textsuperscript{504} IGA Part 1 ss 8A(2)(a)-(b).  
\textsuperscript{505} In-play sports betting occurs is ‘betting on the outcome of a sporting event, where the bets are placed, made, received or accepted after the beginning of the event…” IGA Part 1 s 32 (10B(a)).  
\textsuperscript{506} Miller K ‘The Utility and Limits of Self-exclusion Programs’ (2016) 6 UNLV Gaming Law Journal 29 at 51.  
\textsuperscript{507} IGA Part 3 s 16(1).  
\textsuperscript{508} IGA Part 3 s 16(1).  
\textsuperscript{509} IGA Part 3 s 21(1).  
\textsuperscript{510} IGA Part 3 s 24(1)(a)-(c).  
\textsuperscript{511} IGA Part 3 s 21(1).}
In addition to these investigative powers, the ACMA is entitled to set industry standards. Both industry standards and industry codes deal exclusively with formulating a designated notification scheme. This scheme includes ‘procedures to be followed by internet service providers in dealing with’ off-shore interactive gambling service providers. The ACMA makes use of the scheme to inform internet service providers of websites offering prohibited interactive gambling services. The IGA requires the provider to take all reasonable steps to prevent end-users from accessing such content. The internet service provider may be notified of this content by way of the abovementioned scheme or by the ACMA itself.

An industry code is, unlike an industry standard, determined by a group of internet services providers. The ACMA must be satisfied that the group is appropriately representative of the industry. Section 39 of the IGA empowers the ACMA to request the abovementioned group provide it with an industry code. If no industry code is provided thereafter or if the code provided is deficient, the ACMA may set an industry standard. If, on the other hand, the industry code is satisfactory the ACMA will register and keep a copy of it.

Part 5 of the IGA deals with enforcing the above industry codes and standards. Section 54(1) of the IGA creates online provider rules. These rules relate to contraventions of access

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512 IGA Part 4 s 44.
513 IGA Part 4 ss 35(a)-(b), 34, 37(1)-(2).
514 IGA Part 1 s 4, Part 3 s 24(1)(b).
515 IGA Part 3 s 24(1)(c).
516 IGA Part 3 s 24(1)(c).
517 IGA Part 4 ss 38(1)(a)-(b).
518 IGA Part 4 ss 39(1)(a).
519 IGA Part 4 ss 46-47 and 44.
520 IGA Part 4 s 53(1)(a)-(e).
521 See generally IGA Part 5.
522 IGA Part 5 s 54(1).
prevention notices, industry codes and standards. Contraventions of an industry code or standard - regarding notices of prohibited internet gambling content are dealt with in two ways. Internet service providers may implement a designated alternative access prevention arrangement. This arrangement will then be implemented in lieu of compliance with the abovementioned notice. If no designated alternative access prevention arrangement exists the IGA allows for written directions from the ACMA requiring that internet service providers comply. If the interest service provider continues to be uncooperative, the ACMA is empowered to approach a Federal Court. The ACMA will seek an order preventing the internet service provider from supplying internet carriage services.

Advertising interactive gambling services is further prohibited under Part 7 of the IGA. There are, however, a number of exceptions to the advertising prohibition. It should be noted that interactive sports betting is one of the exceptions under this Part.

2.2. Interactive Gambling Amendment Bill (IGAB)

The IGAB was introduced on 10 November 2016 as a result of a review of the prohibited interactive gambling market and its impact. A large portion of the IGAB is dedicated to non-compliance with a section 56(2) direction is not a precondition for the application mentioned below. IGAs, ss 56, 57 and 59.

531 IG Part 5 s 59(1)-(2).
532 IG Part 7A ss 61DA(1)-(2) 61EA(1)-(2).
533 IG Part 7A s 61BA(1) read with Part 1 s 5(3)(aa) and 8A(1)(iv) definition interactive gambling service.
clarifying and simplifying terminology and/or procedures. The review found prohibited interactive gambling providers were taking advantage of the ambiguity of certain provisions within the IGA.

It is submitted that many of the IGAB’s proposed amendments do not change or improve the procedures. The substance or contents of the sections remains the same, and the proposed amendments are largely cosmetic. An example of this is the introduction of the term prohibited interactive gambling service, which is merely terminology simplification.

Notwithstanding the above, the IGAB does introduce a few welcome substantive improvements. For example, the IGAB proposes that mandatory complaint requirements be done away with, greatly simplifying complaints procedures. Another welcome substantive change is the introduction of civil penalty provisions. These apply to contraventions of the prohibition on interactive gambling services, the internet service provider rules, as well as the advertising prohibition. The civil penalty provisions empower the ACMA to bring a court application for the award of a monetary penalty. Interestingly, section 64B(4) appears to be an attempt to extend this punitive power outside Australia’s borders.
The review that gave rise to the IGAB did not focus on the prohibition model itself. The terms of reference did allow for other regimes, as well as best practices for consumer protection, to be examined with a view to their implementation in Australia. While it acknowledged the enforcement failures of the IGA, the review report did not recommend expanding the scope of services available. Puzzlingly, this was notwithstanding finding that one of the key factors driving Australian consumers to offshore operators is a wider range of products. The Government in its response to the review acknowledged that the enforcement measures within the IGA were ‘ineffective and outdated’.

The review made special mention of the practical difficulties involved in enforcing the IGA, to counteract this the review recommended expanding the scope of the ACMA’s powers. The Government agreed with this recommendation and has made provision for the ACMA to share information with international regulators and extend their investigative powers.

The IGAB amendments are based on the expectation that a robust regulatory regime will significantly minimise illegal offshore wagering. This is the outcome achieved in both the UK and France. In the UK the combination of a commercially attractive regime for offshore operators as well as product variety and price competitiveness for consumers has led to a marked

546 See above, interactive gambling is allowed in respect of sporting events but not casino games or table games. IGA Part 1 s 8A(1)(a)(iv), Part 2 and 2A.
549 MP O’Farrell B (2015) at 16 and 159.
552 Australian Government (2016) at 3 and 12 and MP O’Farrell B (2016) at 75-76.
decrease in illegal operators. The review noted that ‘[t]he UK approach is based on the concept that if players cannot get access to a reasonably priced, attractive range of gambling products, they are likely to shift their interest to offshore operators.' In short, the UK focuses on both the supply and demand of online gambling services whereas the IGA focuses only on the supply.

The review compared the liberal UK market, with its dedicated regulatory body (the Gambling Commission) and well-funded regulatory regime, against the prohibitive approach of the Australian government. The lack of a dedicated regulatory body is another concern raised by the review. The resources necessary for such a body are usually provided by licensing fees and tax revenue. A prohibitive system which cannot take advantage of these resources may find funding such a body impossible. The Australian government needs to achieve a balance. This balance must be commercially attractive to operators and thereby incentivise licensing. If it cannot be achieved funding for responsible gambling initiatives will remain deficient and as discussed in chapter three the black market will flourish.

3. **REGULATION VERSUS PROHIBITION**

The IGAB staunchly maintains the prohibitive approach. The Australian Productivity Commission’s recommendation to broaden the scope of available services is ignored. The 2010 review as requested by Australian government furthermore recommended the

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553 Australian Government (2016) at 75.
554 MP O’Farrell (2015) at 75.
555 MP O’Farrell (2015) at 75.
556 See Chapter 3 above.
559 MP O’Farrell (2015) at 75.
implementation of robust responsible gambling policies. Nevertheless the prohibition model is maintained, with few improvements to the enforcement measures contained therein.

Australia is not unique in its enforcement difficulties. Several universal impediments prevent the effective implementation of the prohibition model. The borderless nature of the internet, inconsistencies in jurisdictional approaches and enforcement difficulties in general makes such an approach to online gambling tricky. These impediments contribute to the possibility of regulatory failure. To maintain authority the law must be capable of enforcement. Zhang argues that - much like Antarctica, outer space and international seas - the internet is a unique shared international environment. By implication, without adapting to and allowing for the internet’s nature, existing methods of regulation based on territoriality (land) will fail.

3.1. The borderless and anonymous nature of the Internet

The anonymous and borderless nature of the internet presents unique difficulties for regulators. Consumer protection and responsible gambling initiatives are heavily dependent on identification. Enforcing self-exclusion requests or prohibitions against underage gambling without knowing who is accessing online gambling services is impossible. Unscrupulous service providers may also benefit. Without the threat of recourse there is an incentive for

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562 Each impediment will be discussed in greater detail below.
operators to defraud consumers.\textsuperscript{569} This anonymity further allows enforcement efforts to be evaded by simply relocating to a liberal jurisdiction or ‘disappearing.’\textsuperscript{570}

Technological innovations in the area of online privacy\textsuperscript{571} and the increasing popularity of cryptocurrencies,\textsuperscript{572} exacerbates the difficulties facing regulators.\textsuperscript{573} Identity verification, however, is increasingly a cost-effective and reliable cure for the anonymity issue.\textsuperscript{574} Chapter three of this paper discussed identity verification systems. The UKs use of these systems is further discussed in that chapter.

3.2. Inconsistent Jurisdictional Approaches

Just within the microcosm of the EU, member states have varied approaches to online gambling.\textsuperscript{575} Jurisdictions have different priorities, thus their approaches to online gambling differ greatly. This, according to Alexander, effectively renders prohibition a fiction ‘akin to clutching a handful of fine sand.’\textsuperscript{576} Prohibition models attempt to prevent online gambling within a national border. The internet, where online gambling takes place, has no borders, national or otherwise. The author argues prohibition based on national borders cannot thus be effective in a borderless environment.\textsuperscript{577}

\textsuperscript{569} Alexander G ‘The U.S. on tilt Why the Unlawful Gambling Enforcement Act is a bad bet’ (2008) 5 Duke Law & Technology Review 1 at 5.
\textsuperscript{571} Essa A (2004) at 94.
\textsuperscript{572} ‘Crypto currencies typically refer to digital currencies used as an alternate means of exchange relative to traditional currency. Crypto currencies are generally used as a means of exchange for online goods and services. An example of a crypto currency is Bitcoin.’ MP O’Farrell (2015) at 4 and Alexander G (2008) at 14.
\textsuperscript{573} Boto A (2013) at 36.
\textsuperscript{574} See Chapter 3 above.
\textsuperscript{576} Alexander G (2008) at 19.
\textsuperscript{577} Alexander G (2008) at 19.
This inconsistency results in unscrupulous service providers flouting prohibitions. Considering themselves beyond the enforcement capabilities of national governments.\textsuperscript{578} The lack of effective enforcement capabilities has certainly plagued the Australian prohibition. An example of this is the fact that, notwithstanding several complaints, no prosecutions have been pursued in terms of the IGA since its introduction.\textsuperscript{579}

3.3.\textbf{Practical Impediments to Enforcement}

Practical limitations exacerbate the enforcement difficulties experienced by jurisdictions. For example, law enforcement agencies have found obtaining evidence from foreign jurisdictions difficult.\textsuperscript{580} The reality of dwindling regulatory resources in the public sector further contributes to this deficiency.\textsuperscript{581} Regulatory measures such as identity verification can be privatised relatively hassle-free.\textsuperscript{582} The same cannot be said of criminal prosecutions. These deficiencies are further aggravated by technological innovations. Many of which are designed to protect consumers personal information. Consumer are also becoming increasingly vigilant regarding their online ‘footprint’.\textsuperscript{583} Cryptocurrencies and e-wallets\textsuperscript{584} add even more to the evidentiary load of struggling regulators.\textsuperscript{585}

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\textsuperscript{578} MP O’Farrell B (2015) at 107.
\textsuperscript{580} Australian Government (2016) at 3.
\textsuperscript{581} Mcallister L (2012) at 2.
\textsuperscript{582} Mcallister L (2012) at 2.
\textsuperscript{584} A e-wallet for example Paypal allows electronic transactions to be concluded. Paypal ‘About Us’ available at https://www.paypal.com/za/webapps/mpp/about [accessed 5 April].
\textsuperscript{585} Alexander G (2008) at 14.
\end{flushright}
3.4. Academic literature regarding prohibition

In the face of these practical difficulties, academic opinion has increasingly advocated for regulation as a viable alternative. Kelly, referring to the abovementioned review by the Australian government confirms that ‘… regulation provide[s] the best response to illegal gambling’.\(^{586}\) Kelly is supported in this submission by Shapiro and Loscalzo. Their analysis of the United States’ prohibition concludes that maintaining a total prohibition is fruitless in combatting underage gambling and problem gambling.\(^{587}\) The authors suggest that a total prohibition simply encourages unscrupulous service providers to relocate their operations, but not their services, to a more favourable jurisdiction.\(^{588}\) The authors illustrate how this relocation is more detrimental to attaining policy goals.\(^{589}\) Unscrupulous service providers have no incentive to refuse minors or problem gamblers access to their services.\(^{590}\) The total prohibition means there is further very little competition thereby allowing these black markets to flourish.\(^{591}\) Another concern echoed by Kelly is the lack of consumer protection for players who have been defrauded in a prohibitive model.\(^{592}\)

Essa aligns himself with the viewpoints of the above authors. He criticises the Australian government’s approach, labelling a complete prohibition impractical.\(^{593}\) South Africa’s Gambling Review Commission may lack independence, nevertheless in their 2010 report the regulation of online gambling is supported. The South African Parliament chose instead to

\(^{587}\) Shapiro S & Loscalzo T (2000) at 27.
maintain the complete prohibition. Part of the reasoning behind the conclusion reached by the Gambling Review Commissions report is ‘that measures relating to minors and self-exclusion can be more easily implemented and monitored in online gambling than in land-based activities…’.

Bogardus reiterates the position of the above authors confirming that a total prohibition merely encourages the black market, echoing the concerns of Shapiro and Loscalzo regarding unscrupulous operators. Bana points out ‘[o]nline gambling is inevitable and is here to stay’, the author strongly advocates for international regulation of online gambling due to the borderless nature of the internet. Vener agreeing succinctly states ‘[a] rational internet gambling policy must not focus on how to prohibit internet gambling it simply cannot be done.’ The prohibition model further lacks support from a law enforcement perspective, as noted by Griffiths.

A diligent search for recent academic support of the prohibition model returns fruitless. Even Craig’s 1998 article conditioned its support for prohibition on the availability of anonymous payment methods. As mentioned above, the growth of popularity in using cryptocurrencies has further complicated prohibition attempts.

596 Bogardus K ‘Lotteries, casinos unite against push to ban Internet gambling’ (2013) The Hill at 16.
4. **CONCLUSION**

Academic opinion is clear: prohibition does not work in respect of online gambling. Market demand and the inconsistent approaches of various jurisdictions leave regulators with little choice.\(^\text{603}\) The whack-a-mole nature of sporadic prosecutions or a general lack of prosecutions, as in the case of Australia, offer little deterrence to consumers or unlicensed operators.\(^\text{604}\) The policy goals of preventing underage or problem gambling are undermined by the prohibitive approach. This approach places vulnerable parties in a very dangerous position.\(^\text{605}\)

The Australian Government has been unable to maintain a complete prohibition. It strains belief that South Africa has sufficient resources to succeed where Australia has failed. An unfortunate state of affairs, particularly for those consumers who are most at risk. But South Africa and Australia have opted to (as Vener puts it) “pretend prohibition is working and turn a blind eye.”\(^\text{606}\)

Valuable and meaningful partnerships cannot be built while jurisdictions practice this blind support for prohibition. The abovementioned borderless nature of the internet provides a unique opportunity for regulators that jurisdictions such as South Africa and Australia may lose out on. Chapter five will discuss these unique opportunities.

\(^{603}\) Vener D (2009) at 216.


\(^{606}\) Vener D (2009) at 216.
CHAPTER 5

1. INTRODUCTION

In the preceding chapter the borderless nature of the internet was briefly introduced. The internet has irrevocably changed both commercial and social spheres of everyday life. It enables the traversing of traditional terrestrial borders with ease and speed. It ‘defies traditional, border-based sovereign control by states,’ presenting new challenges for regulators and law enforcement officials.

Zhang argues a new approach to regulation should be developed to address the above deficiencies. An example of such an approach would be regulation on an international rather than a national level. This is an approach many jurisdictions prefer for enforcing and regulating their anti-money laundering laws and procedures. The internet has certainly bred new crimes, though existing crimes have also found ways to use it advantageously. One of the most pertinent examples of such a crime is that of money laundering. Money launderers are keen to add an international element to their crimes, and the borderless nature of the internet creates new opportunities for exploitation.

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607 See chapter 4.
611 Zhang C (2006) at 73.
612 The Financial Action Task Force (hereinafter referred to as the ‘FATF’) ‘International Standards Combatting Money Laundering and the Financing of Terrorism & Proliferation – The FATF Recommendations’ (hereinafter referred to as the ‘FATF Recommendations’) February 2012 (updated October 2015) at 7, more than 180 jurisdictions have endorsed the FATF Recommendations.
As briefly introduced in chapter one, the relationship between online gambling and crime is a universal concern, in particular the crime of money laundering through online casinos. As noted, most jurisdictions regulate anti-money laundering on an international level. This chapter will provide a brief introduction to money-laundering, the international regulatory bodies involved and the threat posed by money laundering through online casinos.

In respect of the internet, and in particular in relation to online casinos, international regulation seems to be a logical solution to regulatory shortcomings. This is a model employed in respect of anti-money laundering regulation, for the most part successfully. This result has led academics to question whether online gambling may also be best regulated at an international level. Whilst this submission certainly has merit there are a number of potentially fatal impediments. This chapter will briefly discuss those impediments to the international regulation of online gambling.

2. **ANTI-MONEY LAUNDERING**

2.1 What is money-laundering?

Money-laundering is the process by which the economic fruits of criminal activities are integrated into the legitimate economy. The process typically takes place in three phases. Placement is the first phase during which the economic fruits of criminal activities are injected

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621 Bana A (2011) at 336.
into the legitimate economy.\textsuperscript{624} Next, during the Layering phase, the origin of those fruits is deliberately hidden,\textsuperscript{625} although this process may take varying forms the aim is always concealment.\textsuperscript{626} Integration is the final phase during which the fruits, whose origins have now been disguised, are made available for use within the legal economy as legitimate funds.\textsuperscript{627}

2.2. The threat posed by online gambling and money laundering

The money laundering process destabilises the legal economy, erodes tax revenues and encourages criminal activity. Combatting money laundering is rightly a priority for many jurisdictions.\textsuperscript{628} Typically adding an international aspect to the process is ideal for money launderers as jurisdictional issues impede investigations and further conceal the origin of the criminal’s assets.\textsuperscript{629} Casinos have in the past provided criminals with a one-stop-shop to place, layer and integrate their funds simultaneously.\textsuperscript{630} Adding an international element to this particular mode of money laundering was, however, particularly difficult until the emergence of online gambling.\textsuperscript{631}

Proponents of online gambling prohibition submit that online gambling coupled with increasing consumer confidence and the prevalence of electronic payment systems\textsuperscript{632} provides an easy avenue for money launderers to exploit.\textsuperscript{633} This argument may hold water in respect of the black

\textsuperscript{628} Schlendther B (2014) at 18.
\textsuperscript{629} Trehan J (2004) at 110.
\textsuperscript{631} Unger B (2007) at 134.
\textsuperscript{633} Gottfried J (2004) at para 20-24
market. Craig suggests if online gambling is left ‘completely unregulated, [criminals] could open their own Internet casinos for the sole purpose of laundering profits, with the unwitting assistance of the credit card and electronic funds transfer companies.’

In respect of a licensed and regulated market, however, the above argument overlooks a few key factors. First, land-based casinos are attractive to money launderers for the same reason any cash-intensive business would be, namely that cash transactions are difficult to track. Secondly, the objective of the money launderer is to conceal the origin of their funds. Gottfried suggests regulating online gambling provides the opportunity to track every transaction a consumer makes. Thereby making online gambling an unattractive option for money launderers attempting to conceal the origin of their funds. Law enforcement officials would have the ability to track and trace consumer’s winnings, deposits, wagers et cetera, thereby unravelling any layering the criminal has sought to achieve.

Notwithstanding the above, the threat posed by the relationship between online gambling and money laundering should not be underestimated. A clearer understanding of the money laundering process, and its criminal purpose or aim, suggests creating a ‘ID-based certification-rich environment’ through licensing and regulation as both a viable and effective solution. An identification rich online environment would obstruct the concealment of transactions. Given

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635 Unger B (2007) at 133.
that the purpose of money laundering is to disguise the illicit source of funds, online casinos would become an unattractive option for money launderers as a result.

The above approach cannot succeed in isolation. It should be coupled with national legislation and international agreements. Effective regulation of online gambling may be possible through this extra jurisdictional approach. National and international regulation has proved successful in combatting money laundering as regulated by the inter-governmental Financial Action Task Force (FATF).

2.3. The Financial Action Task Force (FATF)

The FATF is an independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering. These policies are contained within the FATF recommendations. These recommendations are not binding, and they are instead enforced by way of naming and shaming countries that don’t comply. In this regard, an annual non-co-operative countries and territories list (NCCT list) is published by the FATF. Being named on the NCCT list acts as a deterrent for potential investors. In this way the FATF along with the 180 countries who have endorsed the recommendations ensure, encourage and foster compliance.

647 FATF Recommendations at 1.
648 FATF Recommendations at 1.
649 FATF Recommendations at 7.
652 FATF Recommendations at 7.
Compliance with the FATF recommendations is monitored by way of self-evaluations and mutual evaluations between member countries.\textsuperscript{653} There are also a number of regional FATF-styled bodies such as the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), the Intergovernmental Action Group against Money Laundering in West Africa (GIABA) and the Middle East and North Africa Financial Action Task Force (MENAFATF) who monitor and assist their regional members with both compliance and implementation of the FATF recommendations.\textsuperscript{654}

As mentioned above, the threat of money laundering from a licensed and regulated online gambling market is often grossly overstated.\textsuperscript{655} The success of the FATF and the various FATF-styled regional bodies further provides evidence for the submission that international regulation is possible. International regulation often has to be balanced against the need to respect state sovereignty. It is submitted that this balance is possible to achieve through treaties, agreements and intergovernmental cooperation.\textsuperscript{656}

Finding common ground or a common approach is often the first step towards international regulation. In this regard, money laundering presents significantly fewer obstacles than online gambling.\textsuperscript{657} One of the pivotal impediments to the international regulation of online gambling is the divergent jurisdictional approaches.\textsuperscript{658} That is to say online gambling is permitted in some jurisdictions and others not. In contrast money laundering is criminalised in the vast majority of

\textsuperscript{654} Moshi HPB (2007) at 6.
\textsuperscript{657} Zhang C (2006) at 74.
\textsuperscript{658} Bana A (2011) at 342.
jurisdictions.\textsuperscript{659} Notwithstanding this commonality the FATF recommendations still recognise and make provision for jurisdictional differences because of criminal justice systems.\textsuperscript{660} The recommendations provide a standard for anti-money laundering measures. How these standards are implemented is, however, up to each jurisdiction.\textsuperscript{661} The FATF shows respecting each state’s sovereignty is possible within the realm of international regulation. The question therefore becomes this: Can the same balance be achieved in respect of online gambling?

3. **INTERNATIONAL REGULATION**

This paper has repeatedly cited the borderless nature of the internet as effectively a fatal impediment to the prohibition of online gambling. In respect of regulating online gambling, while not necessarily fatal, it can present difficulties too.\textsuperscript{662} As noted, certain issues are best dealt with at an international level, thereby circumventing the issues border-based law enforcement may encounter in a borderless environment.\textsuperscript{663}

The most compelling obstacle to the international regulation of online gambling is the divergent approaches of various jurisdictions. A few countries staunchly refuse to accept the failure of the prohibition model\textsuperscript{664} whilst others have accepted the inevitability of online gambling and regulated it instead.\textsuperscript{665} An international convention may still provide the best hopes of overcoming the difficulties created by the divergent approaches mentioned above and the

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\textsuperscript{659} FATF Recommendations at 7.
\textsuperscript{660} Tuba D (2004) at 107 and FATF Recommendations at 7.
\textsuperscript{661} FATF Recommendations at 7.
\textsuperscript{662} Devaney M (2009) at 274.
\textsuperscript{663} Zhang C (2006) at 70.

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The borderless nature of the internet. Such a convention would represent a compromise, and it is submitted that respecting each jurisdiction’s sovereignty would result in a convention that facilitates enforcement for regulated jurisdictions and collaborative efforts in respect of prohibitive jurisdictions.

The above approach could allow for certain benefits associated with international regulation such as more effective information sharing, leading to increased efficacy of self-exclusion programs and anti-money laundering strategies. Such regulation would also allow for greater compatibility between regulatory regimes as well as the development and enforcement of a global standard for social responsibility practices. Bana argues it would first be necessary to coordinate the abovementioned divergence. This coordination may however violate one or more jurisdiction’s sovereignty.

A forced cultural convergence may eventually occur due in large part to the declining practicality of maintaining a complete prohibition in a global marketplace. Until then a compromise involving cooperation may present the best practical alternative. Regulation at this level would provide greater consumer protection not only in relation to social responsibility but also in respect of facilitating recourse against unscrupulous offshore providers.

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667 Miller K (2014) at 73.
670 Bana A (2011) at 342.
672 Devaney M (2009) at 276.
674 Miller K (2014) at 72-73.

A point of departure for international regulation may already exist in the form of the United Nations Commission on International Trade Law (UNCITRAL)’s Model Law on Electronic Commerce. The Model Law on Electronic Commerce has been adopted in 69 jurisdictions. South Africa has done so through the Electronic Communications and Transactions Act (ECTA).

The purpose of the Model Law on Electronic Commerce is to provide uniformity and legal certainty. Currently electronic communications are the norm in respect of international commerce. Thus the Model Law is an effort to harmonise differing jurisdictional approaches, thereby facilitating international trade and economic prosperity. The above objectives are echoed by ECTA, South Africa’s legislative implementation of the Model Law. ECTA recognises the value of electronic communications particularly in relation to ‘the economic and social prosperity of the Republic’. As discussed in Chapter two, the South African economy

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681 ECTA s 2(1).
682 ECTA s 2(1)(a).
has shown little growth since the 2006 record setting low. Consequently, the importance of the information economy is particularly relevant.

The Model Law is intended as a guideline for legislators. Variations may be necessary for its implementation in different jurisdictions. The Model Law is thus accompanied by an enactment guide intended to contextualise the interpretation and implementation of the former provisions. The Enactment guide confirms the recognition and implementation of the principle of functional equivalence. Briefly functional equivalence focuses on the function or purpose, rather than the medium. To avoid lacuna in the rapidly developing world of international electronic commerce, if the same function and purpose is achieved through electronic means, the rules applying to the tangible equivalent may be transplanted.

The principle of functional equivalence gives rise to other principle of electronic commerce. The principles of technological neutrality and non-discrimination are also contained within article 5 of the Model Law. Article 5 confirms ‘[i]nformation shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message.’ Put differently the electronic functional equivalent should not be discriminated against purely because it is in an electronic form.

ECTA s 2(1)(a).
It is submitted that online gambling is the functional equivalent of land-based gambling. South Africa and 68 other jurisdictions have incorporated the Model Law on Electronic Communications into their jurisprudence. As a result the abovementioned principles of functional equivalence, technological neutrality and non-discrimination are also included.

An argument exists that prohibiting online gambling while permitting land-based gambling is technological discrimination. Jurisdictions that follow this approach will therefore have to show that the prohibition is not based purely on the electronic form of the activity. The submission that the interests of vulnerable parties cannot be adequately protected is dealt with in chapter 3 of this paper. The submission that legalised online gambling will proliferate online crime is dealt with above. An extension of this argument was recently used by the European Union (EU) where France was instructed by the EU to remodel their online gambling regime. The EU indicated the earlier regime was excessive and inconsistent with the objectives sought by the French. The objectives being the protection of vulnerable parties and preventing the proliferation of crime. The criticism surrounded the taxation and technological burdens placed on operators as well as the lack of product variety for consumers.

This section has sought to briefly introduce core concepts of ICT law that may be relevant when analysing and arguing the case for and against online gambling. Though noteworthy, a complete assessment of these principles is unfortunately beyond the scope of this paper.

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695 Boto A (2013) at 33.
4. CONCLUSION

The consequences of the internet for legislators and jurists were not understood at its inception, and arguably that understanding is still lagging behind its explosive growth.\(^{697}\) The adage of ‘adapt or die’ is appropriate, and legislators and regulators will have to develop new approaches to accommodate the internet, its peculiarities and especially online gambling.\(^{698}\)

International regulation may provide the best solution for circumventing the issues presented by the borderless nature of the internet.\(^{699}\) Barring the abovementioned eventual cultural divergence, jurisdictions will, most likely, have to settle for a compromise.\(^{700}\) An agreement that respects a jurisdictions individual approach to online gambling whilst demanding the same respect for the differing approaches of other jurisdictions is likely to be the best possible solution to the *status quo*.\(^{701}\)

\(^{697}\) Zhang C (2006) at 54.
\(^{698}\) Zhang C (2006) at 54.
\(^{700}\) Devaney M (2009) at 276.
\(^{701}\) Miller K (2014) at 73.
CHAPTER 6

1. INTRODUCTION

The question this paper asks is whether the adverse effects of online gambling outweigh the positive effects. To be a practical and useful exercise any measures that may be implemented to adequately address and / or prevent these adverse effects needs to be taken into consideration as well. The adverse effects most commonly associated with online gambling are the proliferation of underage and problem gambling.702

Historically gambling has been viewed as an immoral activity. Recently, societal attitudes have shifted towards gambling as a more permissible amoral activity.703 This initial designation has however left gambling with a connection to organised criminal activity, and as a result an increase in crime is often cited as another adverse effect of (online) gambling.704

Online gambling is a recent and global phenomenon.705 Due to its novelty there is a lack of research in the field.706 The Australian Government in their Review of Illegal Offshore Wagering agreed with this assessment,707 as did the South African Gambling Review Commission in their International Study of Gambling Jurisdiction.708 The Australian review further notes evidence and research are necessary for the development of an effective regulatory process to combat or prevent these adverse effects.709

702 Devaney M ‘Online gambling and international regulation an outside bet’ (2009) 18 Information & Communication Technology Law 273 at 274.
706 Gainsbury S Internet Gambling Current Research Findings and Implications (2012) at 5.
This deficit is exacerbated by issues regarding the independence and reliability of quantitative studies in the field.\textsuperscript{710} There are outstanding issues regarding definitions and methodologies that further hamper the collection and verification of the abovementioned vital research and evidence.\textsuperscript{711} For this reason the focus of this paper, as previously indicated, is not an attempt at a quantitative study of the adverse effects of online gambling. The focus is rather on a qualitative assessment of the abovementioned combative measures, their implementation in other jurisdictions and their potential success in the South African context.

This chapter will begin with an assessment of the protection afforded to underage gamblers and problem gamblers. A summation of the issues plaguing the prohibition model and the possibility of the regulation model as a viable alternative will follow. A brief discussion of the benefits of the regulation model within the South African context will conclude this chapter.

2. UNDERAGE GAMBLERS

2.1. Identity Verification

In respect of online gambling a reliable identity verification process is key for any successful regulatory regime.\textsuperscript{712} In the absence of one, the inherently anonymous nature of the internet would impede regulatory efforts particularly in respect of the most vulnerable individuals.\textsuperscript{713} The characteristically fast paced technological advancement of the industry often creates difficulty

\textsuperscript{711} Eggert K (2004) at 229.
\textsuperscript{712} MP O’Farrell (2015) at 143.
for slow moving legislatures who cannot keep up with the new developments. This fast paced development can also be advantageous as inexpensive, reliable and efficient identity (and age) verification systems are now readily available for example.

The implementation of an effective identity verification system is a common feature of regulatory regimes that allow online gambling. Global and market trends show that online casinos will implement the prescribed safeguards in return for the legitimacy (and marketing advantage) licensing provides.

The unlicensed black market has, however, no incentive to implement these safeguards. This black market typically flourishes through prohibition. Commercial pressure due in part to consumer preference for licensed competitors may yet succeed where law has failed. Effectively forcing unlicensed operators from the market. With the consequence that underage gamblers searching for an opportunity to gamble online would be met with ever increasing difficulty.

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2.2. Filtering Software

The United Kingdom (UK) encourages schools and parents to make use of filtering software.\(^{723}\) These are computer programs designed to prevent access to particular websites.\(^{724}\) The efficacy of these programs has been questioned.\(^{725}\) It has been suggested that an unlicensed online casino may easily and relatively cheaply alter its website address and thereby avoid the block.\(^{726}\)

Regulation may improve the efficacy of these programs by reducing the number of unlicensed operators.\(^{727}\) Licenced operators may be required to provide accurate information regarding their website address(es) and clearly display the availability of this software thereby improving the efficacy of these programs.\(^{728}\) In isolation and especially when used as a prohibition enforcement method, filtering software is not effective.\(^{729}\) Its utility for parents, schools and employers in a regulated market should however not be too easily dismissed.\(^{730}\)

2.3. Payment methods

The popularity and thus prevalence of electronic payment methods has recently increased.\(^{731}\) To fund their account consumers primarily prefer making use of credit cards, with electronic payment methods (for example e-wallets) a close second.\(^{732}\) Both credit cards and most e-wallets

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\(^{723}\) Gambling Commission, licence conditions and codes of practice, February 2015 (Updated April 2015) (hereinafter referred to as the ‘LCCP’) part 2 Social Responsibility code provision (hereinafter referred to as ‘SRCP’) 3.2.11(2)(e).

\(^{724}\) MP O’Farrell (2015) at 114.

\(^{725}\) MP O’Farrell (2015) at 114.


\(^{727}\) See above discussion regarding commercial pressure through regulation as a means for limiting / eradicating the black market.

\(^{728}\) Loscalzo T & Shapiro S (2000) at 23.


\(^{730}\) Craig A (1998) at 77.


can be used for the purposes of identity (age) verification.\textsuperscript{733} A reasonable and economically competitive limitation on the number and / or types of payment methods available creates a stumbling block for underage gamblers.\textsuperscript{734}

The limitation must however be both reasonable and economically competitive. An unreasonable limitation will encourage that abovementioned fast paced technological advancement to focus on creating payment systems that are highly encrypted, anonymous and capable of circumventing such limitation.\textsuperscript{735} The recent emergence of cryptocurrencies is an example of this.\textsuperscript{736}

3. PROBLEM GAMBLING

3.1. Self-exclusion Schemes

As indicated previously, self-exclusion programs are the primary method used by the (online) gambling industry to assist problem gamblers.\textsuperscript{737} A consumer requesting a self-exclusion period is essentially asking the (online) casino to bar them from gambling.\textsuperscript{738} There is evidence of the therapeutic benefit of these programs.\textsuperscript{739} This benefit is dependent on a number of factors primarily the successful enforcement of the requested exclusion.\textsuperscript{740}

Preventing a specific consumer from entering a brick and mortar casino presents practical difficulties.\textsuperscript{741} Predominantly identifying and preventing the self-excluded consumer from

\textsuperscript{734} Loscalzo T & Shapiro S (2000) at 19 and 23.
\textsuperscript{737} Miller K “The Utility and Limits of self-exclusion programs’ (2016) 6 UNLV Gaming Law Journal 29 at 49.
\textsuperscript{739} Miller K (2016) at 31.
\textsuperscript{740} Antolak-Saper (2010) at 171-172.
\textsuperscript{741} Miller K (2016) at 40.
entering the casino based on a system of observation by the casinos employees. Naturally having more than one entrance to the casino exacerbates this issue. Bottlenecking consumers into a single entrance as an alternative is not acceptable to most fire departments or casinos.

In the online environment, the implementation of an identity verification process circumvents these practical challenges. As indicated above reliable, inexpensive and efficient identity verification processes are now readily available.

Importantly self-exclusion schemes are not, on their own, sufficient to rehabilitate the problem gambler. Evidence suggests to be successful self-exclusion programs need to be used in conjunction with other therapeutic interventions. Authors suggest funding for these programs could be provided by the tax revenue generated from online casinos.

3.2. Customer Interactions

Customer interactions are a proactive intervention to identify and offer assistance to consumers displaying compulsive behaviours. In the implementation of these processes online casinos again have an advantage. Customer interactions have been introduced in the UK for both online and brick and mortar casinos.

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742 Antolak-Slaper (2010) at 172.
743 Miller K (2016) at 40.
744 Miller K (2016) at 40.
747 Miller K (2016) at 38.
748 Miller K (2016) at 38.
750 LCCP Part 2 SRCP 3.4.1.
751 Vener M (2009) at 220.
752 LCCP Part 2 SRCP 3.4.1.
Online casinos track every transaction by the consumer, making the implementation of these schemes relatively easy.\textsuperscript{753} Online casinos, with the assistance of data analysis methods, can accurately detect at-risk consumers through their betting behaviour.\textsuperscript{754} A task that may prove difficult in the case of brick and mortar casinos where cash transactions may be used to easily evade detection.

3.3. Financial Limits

Problem gambling is an impulse control disorder, certain forms of online gambling may aggravate the condition by inducing a dissociative state.\textsuperscript{755} Accordingly the availability of financial limits can be an effective tool for curtailing these impulses and preventing problem gambling.\textsuperscript{756} Enforcing financial limits, whether on consumer deposits or wagers, is once again simpler in the online environment.\textsuperscript{757}

4. PROTECTION PROVIDED TO VULNERABLE PARTIES

The online gambling industry suffers from a lack of reliable research regarding its adverse effects.\textsuperscript{758} Despite this there is consensus amongst those within the industry regarding certain universal concerns associated with (online) gambling.\textsuperscript{759} These issues are preventing an increase in underage and problem gambling as well as criminal activity.\textsuperscript{760}

\textsuperscript{754} MP O’Farrell (2015) at 137.
\textsuperscript{756} Gainsbury S (2013) at 378.
\textsuperscript{757} Gainsbury S (2013) at 378.
\textsuperscript{759} MP O’Farrell B (2015) at 147.
4.1. The Prohibition Model

The prohibition model attempts to prevent underage and problem gambling through criminalising the provision of online gambling services to the general public.\textsuperscript{761} Society’s attitude towards gambling has however shifted.\textsuperscript{762} Thus the prohibition model drives consumers towards unlicensed online casinos and fosters the growth of the black market.\textsuperscript{763} As mentioned above, the black market has no incentive to implement responsible gambling programs.\textsuperscript{764} These illegal operators are, further, often outside the jurisdictional reach of the consumer’s law enforcement officials.\textsuperscript{765}

The practical difficulties involved in enforcing this prohibition compound the above issues.\textsuperscript{766} It should be observed that no model, scheme or system exists that will be one-hundred per cent effective in achieving the policy goals mentioned above.\textsuperscript{767} With this observation in mind, the technology required to effectively enforce the prohibition model and provide vulnerable parties with protection ‘does not exist.’\textsuperscript{768} Whilst (vulnerable) consumers making use of the existing technology to evade the prohibition are left unprotected and with no recourse.\textsuperscript{769}

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\textsuperscript{761} For a discussion on the different regulatory models see generally Snail S ‘Online gambling in South Africa’ (2007) 15 issue 3 The Quarterly Law Review for Persons in Business 114.
\textsuperscript{767} Preventing the increase of underage and problem gambling, Loscalzo T & Shapiro S (2000) at 27.
4.2. The Regulation Model

The regulation model allows for licensed and regulated online gambling. Vener submits that online casinos are creatures of technology, and the technology exists to address concerns also related to them. This technology means that online casinos have an advantage over their brick and mortar counterparts in the implementation of responsible gambling programs.

The use of reliable and efficient identity verification systems that confirm the age and identity of every consumer cannot, practically speaking, be replicated in a brick and mortar casino. The employees of these casinos are instead expected to observe every patron entering, visually assess their age and whether they have requested a self-exclusion from the casino. Gottfried highlights the importance of the correct comparative standard, the protections afforded by regulated offline casinos should be compared with the protections of regulated online casinos. Even with the correct comparative standard applied online gambling has an obvious advantage over brick and mortar casinos.

This trend persists in respect of criminal activity as well. The potential that online casinos may be used by criminals to launder their illegal funds is the primary concern raised. This threat may be a real one in respect of the unregulated black market that prohibition has a tendency to create. One must be mindful of Gottfried’s correct comparative standard: A regulated as opposed to an unregulated online gambling market must be compared to a regulated offline

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770 For a discussion on the different regulatory models see generally Snail S (2007) 114.
773 Miller K (2016) at 40.
778 Craig A (1998) at 70.
market. The money-launderer’s objective is to conceal the source of their illegitimate funds. As mentioned above online casinos can effortlessly track every consumer transaction. This makes laundering funds through regulated online casinos counterproductive, it defeats the objective, concealment.

5. PROHIBITION vs REGULATION: THE LAST WORD

In summation, it is clear that a more efficient and effective level of protection is available to vulnerable parties through regulating online gambling. Equally as important for the protection of vulnerable parties is the realisation that a complete prohibition of online gambling is impossible to enforce. The internet has no respect for terrestrial borders or for any enforcement mechanism based on them. Importantly, although efforts to enforce to this kind of prohibition are futile they are not cheap.

The Gambling Review Commission in their abovementioned study made an important observation regarding the prohibition model:

‘The appearance of the USA and Australia on the list of top twenty online gambling jurisdictions is evidence enough to show that any form of prohibition will not be very successful. The number of online gambling sites is likely to increase and with that, proliferation and possibly problem gambling prevalence. Given the state of denial of

authorities in these jurisdictions it is unlikely that adequate resources will be allocated to prevent proliferation and or problem gambling prevalence\(^{787}\)

Thus the enforcement costs are compounded by the social costs that prohibition is intended to alleviate.\(^{788}\) This is not new information. The Australia government for example flew in the face of seventy percent of the fifty-nine public submissions it received during the consultation process for what would became the prohibitive Interactive Gambling Act.\(^{789}\) South Africa’s government has done no better. Choosing to ignore the recommendations of the Gambling Review Commission\(^{790}\) and the National Gambling Act itself.\(^{791}\)

Essa suggest the reasons for the Australian prohibition are political in nature, rather than an attempt to achieve the policy goals mentioned at 4.1, above.\(^{792}\) This view may be supported by the wording of the abovementioned Australian review.\(^{793}\) The review states ‘[b]y delivering this Review, the Government is working towards a commitment to the public made prior to the 2013 election.’\(^{794}\) The United States in choosing prohibition over regulation may also have given their political motives away.\(^{795}\) The reality of prohibition, politics aside, is that it leaves the most vulnerable in society with no protection and no recourse.\(^{796}\)

\(^{791}\) National Gambling Act 7 of 2004 Schedule 1 ss 5(1) and 5(2).
\(^{793}\) MP O’Farrell B (2015) at 28.
\(^{795}\) Blackenship M (2008) at 514.
6. REGULATION IN SOUTH AFRICA: FACT OR FICTION

As indicated throughout this paper, the decision to legalise and regulate online gambling involves balancing the fiscal benefits (positive effects) against the adverse effects detailed above.\(^{797}\) The adverse effects of online gambling are easier to mitigate and prevent in an online environment.\(^{798}\) This paper has shown regulators have the opportunity to take advantage of the technological advancements in the online gambling industry to better achieve their policy goals.\(^{799}\)

6.1. Job Creation

Due to the current socio-economic climate within South Africa the fiscal benefits may be of particular importance. This is especially notable given unemployment and poverty statistics within South Africa.\(^{800}\) The South African Department of Trade and Industry (DTI) believes the legalisation and regulation of online gambling will have minimal effect in this regard.\(^{801}\) The DTI further raises concerns that the employment created by brick and mortar casinos will be threatened.\(^{802}\) This observation neglects to take into consideration the skills necessary for the employees of a brick and mortar casino are vastly different to that of an online casino. As the most obvious example: computer literacy.

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\(^{797}\) Bana A (2011) at 336.
\(^{799}\) Blankenship M (2008) at 504.
\(^{801}\) The Department of Trade and Industry (hereinafter referred to as ‘DTI’), Responses to Remote Gambling Bill and Stakeholder Submission, Parliament Cape Town, 2 June 2015 at page 11 and 21.
\(^{802}\) DTI, Responses to Remote Gambling Bill and Stakeholder Submission, Parliament Cape Town, 2 June 2015 at page 11 and 21.
To clarify, online gambling requires both an internet connection and the use of a computer (or another electronic device).\textsuperscript{803} This means an employee of an online casino would need to be computer literate. Land-based gambling on the other hand does not require a computer or internet connection. An employee of a brick and mortar casino would thus not necessarily have to be computer literate.

6.2. Skills Development

Additionally, the legalisation and regulation of online gambling within a socially responsible context would by necessity involve staff training.\textsuperscript{804} The UK has mandated the upskilling of licensees’ employees particularly in the area of responsible gambling.\textsuperscript{805} The South African legislature has the opportunity to create jobs through the legalisation and regulation of online gambling. Moreover, it has the opportunity to enforce staff training, thereby encouraging skills development, within the industry.

7. **CONCLUSION**

A press release from the DTI regarding attempts to legalise and regulate online gambling in South Africa clearly demonstrates the legislatures cognitive dissonance.\textsuperscript{806} Concerns regarding the protection of underage gamblers and other associated societal ills have stymied attempts to ‘preserve the integrity of the [South African] Republic as a responsible global citizen’ \textsuperscript{807}


\textsuperscript{805} LCCP Part 2 SRCP 3.2.11(2)(d).

\textsuperscript{806} DTI Press Release 25 June 2015.

\textsuperscript{807} DTI Press Release 25 June 2015. And the Remote Gambling Bill (hereinafter referred to as ‘the RGB’) published in gg 37569 on 23 April 2014, memorandum on the objects of the Remote Gambling Bill point 2.
The perception of online gambling as a lawless breeding ground for underage gambling, problem gambling and criminality is wholly incorrect.\textsuperscript{808} This perception is more importantly damaging to the South African economy, ‘a lack of regulation is resulting in revenue and jobs being lost to other gambling jurisdictions.’\textsuperscript{809}

This paper has demonstrated the online environment can provide the necessary protections against underage gambling and problem gambling. Legislators will need to own up to the true motivations for maintaining a complete prohibition because protecting society isn’t it.\textsuperscript{810} Instead maintaining a complete prohibition will continue to erode the rule of law, foster criminal activity and provide no protection for consumers.\textsuperscript{811}

Regulation is not only a viable alternative,\textsuperscript{812} it provides the South African population with a real opportunity to uplift themselves through job creation, skills development and entrepreneurship.\textsuperscript{813}

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\textsuperscript{809} RGB published in gg 37569 on 23 April 2014, memorandum on the objects of the Remote Gambling Bill point 1.
\textsuperscript{811} RGB published in gg 37569 on 23 April 2014, memorandum on the objects of the Remote Gambling Bill point 1.
\textsuperscript{812} Loscalzo T & Shapiro S (2000) at 22.
\textsuperscript{813} See Chapter 2.
1. **BOOKS**


2. **CASE LAW**

2.1. **Kwazulu-Natal Division**

_Gaming Associations of South Africa (Kwazulu-Natal) and others v Premier, Kwazulu-Natal, and others_ [1997] 4 SA 494 (N).

2.2. **North Gauteng High Court**

_Casino Enterprises (Pty) Limited (Swaziland) v Gauteng Gambling Board and Others_ 2010 (6) SA 38 (GNP).

2.3. **North West High Court**

_American Palace v Minister of Safety and Security and Others_ 2000 (2) SACR 288 (B).

2.4. **Supreme Court of Appeal**

_Online Lottery Services (Pty) Ltd and Others v National Lotteries Board and Others_ 2010 (5) SA 349 (SCA).


2.5. **Western Cape Division**

_Thuo Gaming Western Cape (Proprietary) Limited v Chairperson of the Western Cape Gambling and Racing Board_ [2014] JOL 32027 (WCC).
3. **CHAPTERS IN BOOKS**


4. **CIRCULARS**


5. **CONVENTIONS AND TREATIES**


6. JOURNAL ARTICLES


7. **LEGISLATION**

7.1. **Australia**

The Interactive Gambling Act 84 of 2001.

Interactive Gambling Amendment Bill 2016.

Interactive Gambling Amendment Bill, explanatory memorandum (2016).
7.2. South Africa

7.2.1. National Legislation


Financial Intelligence Centre Act 38 of 2001.

Gambling Act 51 of 1965.


National Gambling Act 33 of 1996.


7.2.2. Provincial Legislation

Eastern Cape Gambling and Betting Act 5 of 1997.


Limpopo Gambling Act 3 of 2013.

Mpumalanga Gambling Act 5 of 1995.


North West Gambling Amendment Act 5 of 2005.

Western Cape Gambling and Racing Act 4 of 1996.

7.2.3. Bills

http://etd.uwc.ac.za
Remote Gambling Bill 2014.

7.3 United Kingdom

Gambling Act 2005 (c. 19).
Gambling (Licensing and Advertising) Act 2014 (c.17).

8. MISCELLANEOUS

eCogra ‘eCogra Generally Accepted Practices’ 2 October 2015 (hereinafter referred to as ‘eGAP’).

9. NEWSPAPERS

http://etd.uwc.ac.za
Friedrich C ‘Universities should grow entrepreneurs’ *Tygerburger* 15 March 2017 8.

Bogardus K ‘Lotteries, casinos unite against push to ban Internet Gambling’ *The Hill* 20 November 2013 15.

Hirst N ‘Commission calls for online gambling safeguards’ *European Voice* 17 July 2014.

Tummarello K ‘Lawmakers show their hand in fight over online gaming’ *The Hill* 27 March 2014.

10. **REGULATIONS**

10.1. **Australia**


10.2. **South Africa**

Interactive gambling regulations, General Notice 211 of 2009, GG 31956 published 27 February 2009 (hereinafter referred to as the IGR).


10.3. **United Kingdom**

UK Gambling Commission Licence Conditions and Codes of Practice (February 2015 as amended in April 2015).

11. **REVIEWS**


12. WEBSITES


European Commission ‘Gambling’


Parliament of the Republic of South Africa ‘Bills before Parliament’


Queensland Government ‘Australian Gambling Statistics’ available at

Statistics South Africa ‘Work & Labour Force’

Taborda J ‘South Africa GDP Annual Growth Rate’ Trading Economics available at

The Association of British Bookmakers ‘New report reveals Britain’s betting industry is key contributor to the UK economy, directly generating £2.3 billion towards UK GDP’

Titanbet Casino ‘How the gambling industry is affecting the UK economy’

Tops Casino Online ‘ Microgaming Casinos’
Transunion ‘Account Verification Services’ available at
http://www.transunion.co.za/business/serviceSolutions/riskMgmt/accountVerifications.html
(accessed 8 August 2016).

UNCITRAL ‘Status UNCITRAL Model Law on Electronic Commerce’ UNCITRAL
available at
(accessed 4 June 2017).

Van Zyl G ‘Data Prices How SA Compares to the rest of the world’ Finance24 available at
(accessed 1 June 2017).

Versace C ‘The Time Is Here For Online Gaming’
http://www.forbes.com/sites/chrisversace/2014/02/26/the-time-is-here-for-online-gaming/#6438523652ee
(Accessed 5 March 2016).

William Hill ‘Betting and gaming are enjoyed the world over by millions of people’ available