

FACULTY OF LAW

**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



Supervisor: Mr Pieter Koornhof

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.

Student: Kirsty Kate Morgan

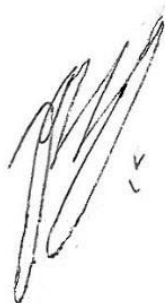
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CHAPTER 1

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 commission⁸ and the resultant Lotteries and Gambling Board Act,⁹ gambling became legal in South Africa.¹⁰

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 Monnye 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.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.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, *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...’¹³

Gambling, due to its nature and origins, presents certain universal concerns including the need to protect vulnerable parties,¹⁴ responsible gambling¹⁵ and the issue of criminality.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,¹⁷ pathological gamblers¹⁸

¹¹ *Gaming Associations of South Africa (Kwazulu-Natal)* case at pg 499 para h.

¹² *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.

¹³ National Gambling Act No. 33 of 1996, s 13(1).

¹⁴ Snail SL, ‘Online gambling in South Africa’ (2007) volume 15, part 3 *The Quarterly Law Review for Persons in Business* 114 at 115, Monnye SL (2012) at 241 – 242, Devaney M ‘Online gambling and international regulation: an outside bet’ (2009) volume 18 no. 3 *Information & Communications Technology Law* 273 at 274 and Carnelley M ‘Recent cases Gambling Law’ (2010) volume 3 *SACJ* 439 at 444.

¹⁵ Monnye SL (2012) at 241 and Devaney M (2009) at 274.

¹⁶ Snail SL (2007) at 115 – 116, Monnye SL (2012) at 241, Devaney M (2009) at 274 and Koos G ‘Online gambling in the case-law of the European Court of Justice’ *54 Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae Sectio Computatorica* (2013) 225 at 226 and Carnelley M (2010) at 444

¹⁷ Koos G (2013) at 226, Carnelley M (2010) at 444 and Devaney M (2009) at 274.

and people who are unable to control their gambling activities.¹⁹ In the South African context vulnerable parties include the impoverished²⁰ and historically disadvantaged people.²¹ Our Constitutionally enshrined principles of fairness, substantive equality and justice demand that the interests of these vulnerable parties be given specific notice.²² The economic resources necessary to provide recovery and support programs them creates further incentive to ensure their interests are protected.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.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.²⁵

Internationally, the issue of criminality receiving focus is money laundering.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).

¹⁹ Koos G (2013) at 226, Devaney M (2009) at 274 and Snail SL (2007) at 115.

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.

²² Constitution of the Republic of South Africa 1996, Chapter 2 Bill of Rights.

²³ Devaney M (2009) at 274.

²⁴ Snail SL (2007) at 115 – 116.

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

²⁶ Snail SL (2007) at 115 – 116, Rodrigues C, ‘The gaming spider spins its web’ (2008) *Without Prejudice* 24 at 24 and Monnye SL (2012) at 241, Bana A ‘Online Gambling: An Appreciation of Legal Issues’ (2011) volume 12 *Business Law International* 335 at 339.

activities or any interest which anyone has in such proceeds.²⁷ Money laundering is an international issue; it erodes legitimate economies and has the potential to corrupt governmental structures.²⁸ The seriousness with which the international community views money laundering can be seen by the establishment of the Financial Action Task Force.²⁹ The purpose of this inter-governmental body includes overseeing the effective implementation of anti-money laundering strategies by countries who have endorsed their recommendations.³⁰ Money laundering has become an even greater concern due to the advent of online gambling and its inherent anonymity and easy access.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 casinos³² and the potential for revenue creation were significant considerations in the legalisation of gambling in South Africa as well as in other jurisdictions.³³

²⁷ Financial Intelligence Centre Act 38 of 2001, s 1 definitions.

²⁸ United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (hereinafter referred to as the 'Vienna Convention') at page 1.

²⁹ 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.

³⁰ 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.

³¹ Bana A (2011) at 339 and Snail L (2007) at 115.

³² *Thuo Gaming Western Cape (Proprietary) Limited* case at para 12 – 13.

³³ Devaney M (2009) at 274 and Bana A (2011) at 336.

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...'.³⁴ The NGAs framework provides for the licensing and regulation of certain gambling activities.³⁵ Any gambling activity not licensed in terms of the NGA is unlawful.³⁶ This includes, for the most part,³⁷ providing and participating in online gambling activities.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.³⁹ In *Casino Enterprises v The Gauteng Gambling Board*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.⁴¹ The plaintiff argued as its servers operated from Swaziland, the gambling activity took place there and the relevant legislation was not applicable.⁴² The defendant (the respondent in the Supreme Court of Appeal case) argued input from the consumer

³⁴ The National Gambling Act 7 of 2004, as amended (hereinafter referred to as the NGA), preamble.

³⁵ NGA, ch 3.

³⁶ NGA, s 8.

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 licence 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.

³⁸ NGA, s 11.

³⁹ *Casino Enterprises (Pty) Limited (Swaziland) v Gauteng Gambling Board and Others* 2010 (6) SA 38 (GNP) and *Casino Enterprises v The Gauteng Gambling Board* (653/10) [2011] ZASCA 155 (28 September 2011).

⁴⁰ 2010 (6) SA 38 (GNP) and (653/10) [2011] ZASCA 155 (28 September 2011).

⁴¹ See generally *Casino Enterprises* and *Casino Enterprises Appeal*.

⁴² *Casino Enterprises*, para 7 -8 and *Casino Enterprises Appeal*, para 17.

was essential, this took place in South Africa, thus the legislation was applicable.⁴³ The Court agreed with the defendant and gave judgement in their favour.⁴⁴ The Court reviewed the meaning of ‘gambling’ as used by both the provincial and national acts.⁴⁵ The potential extra-territorial application⁴⁶ and the purpose of the legislation were also considered.⁴⁷

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’.⁴⁸ The Court concluded the games were, in part, played in South Africa and accordingly ‘struck by the prohibitions.’⁴⁹ 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*.⁵⁰ Seemingly neither the court *a quo* nor the Appeal Court gave a reason for the prohibition.⁵¹ 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.⁵²

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

⁴³ *Casino Enterprises*, para 57-58 and *Casino Enterprises Appeal*, para 24.

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.⁵³

The National Gambling Amendment Act (NGAA) was enacted to discharge this obligation.⁵⁴ It provides for the legalisation and regulation of online gambling.⁵⁵ The NGAA was accompanied by Interactive Gambling Regulations (IRG) published and made available for comments until 7 May 2009.⁵⁶ The IRG applied only to games played over the internet⁵⁷ with sports and horse race betting excluded.⁵⁸ The IRG included regulations regarding consumer funds,⁵⁹ the introduction of mandatory consumer age and identity verification,⁶⁰ the availability of information relating to exclusion requests⁶¹ and responsible gambling.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.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.⁶⁴

⁵³ NGA, ss 5 (1) and 5(2) Schedule 1.

⁵⁴ The National Gambling Amendment Act 10 of 2008 (hereinafter referred to as the NGAA).

⁵⁵ NGAA preamble, ss 10-12, 15, 17 and 18.

⁵⁶ The Interactive gambling regulations, General Notice 211 of 2009, GG 31956 published 27 February 2009 (hereinafter referred to as the IGR).

⁵⁷ IRG s3 (1).

⁵⁸ IRG s3(3).

⁵⁹ IRG ss 6, 7 and 8.

⁶⁰ IRG ss 9 and 10.

⁶¹ IRG s 15.

⁶² IRG s 16.

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.

⁶⁴ Monnye SL (2012) at 226 - 227.

Despite the NGAA still seemingly being on the books,⁶⁵ in April 2014 the Remote Gambling Bill of 2014 (RGB) was introduced into Parliament.⁶⁶ The RGB proposed the regulation and licensing of online gambling in South Africa as well as certain issues incidental thereto.⁶⁷ As of March 2016, the RGB was still before Parliament as a private member's Bill.⁶⁸ The RGB did not receive the support of the Department of Trade and Industry, which may have been a significant obstacle to its enactment.⁶⁹ The RGB was not passed by Parliament, signalling the continued prohibition of online gambling.⁷⁰ An approach at variance with that of most international jurisdictions.⁷¹

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

The online gambling market is showing significant growth in overseas jurisdictions.⁷² 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.⁷³ For example,⁷⁴ on 1 November 2014, the United Kingdom (UK) introduced stricter regulations to their online

⁶⁵ Monnye SL (2012) at 227.

⁶⁶ See generally the Remote Gambling Bill of 2014, published in GG No. 31956, 29 February 2009 (hereinafter referred to as the RGB).

⁶⁷ The RGB, preamble and s 2 (a).

⁶⁸ Parliament of the Republic of South Africa 'Bills before Parliament'

http://www.parliament.gov.za/live/content.php?Category_ID=72&fYear=2014&fMonth=4&BillStart=10&BillStart=20&BillStart=30&BillStart=40&BillStart=50&BillStart=60&BillStart=70&BillStart=80 (Accessed 5 March 2016).

⁶⁹ Department of Trade and Industry (hereinafter referred to as the 'DTI'), Responses to Remote Gambling Bill and Stakeholder Submission, Parliament Cape Town, 2 June 2015.

⁷⁰ Evans J 'DA's bid to regulate online gambling fails' 26 May 2016 News24 available at <http://www.news24.com/SouthAfrica/News/das-bid-to-regulate-online-gambling-fails-20160526> [accessed 9 June 2017].

⁷¹ Snail SL, 'Online gambling in South Africa' (2007) volume 15, part 3 *The Quarterly Law Review for Persons in Business* 114 at 121.

⁷² European Commission 'Gambling' http://ec.europa.eu/growth/sectors/gambling/index_en.htm (Accessed 5 March 2016) and 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).

⁷³ Snail SL (2007) at 121.

⁷⁴ Other examples include Australia, Canada, the states of Nevada, New Jersey and Delaware in the United States of America (US), Austria, Spain, Denmark and Finland (although limited to state-owned enterprises).

gambling sector.⁷⁵ Most of these regulations focus on responsible gambling⁷⁶ and protecting vulnerable parties such as persons under the age of 18.⁷⁷ Prior to the introduction of the Gambling (Licensing and Advertising) Act 2014 (GLAA), the UK had a very liberal approach to online gambling.⁷⁸ The GLAA brought with it the UK Gambling Commissions Licence Conditions and Codes of Practice (February 2015 as amended in April 2015) ('LCCP').⁷⁹ These regulations are divided into three parts with particular focus on so-called 'social responsibility' provisions.⁸⁰ The importance of the social responsibility provisions is clear: non-complying licensees risk losing their licence and possibly prosecution.⁸¹

The UK Parliament echoes the concerns of the South African Parliament relating to the adverse effects of gambling and specifically protecting vulnerable parties.⁸² 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 regulate⁸³ whereas the South African Parliament has chosen to prohibit.⁸⁴

⁷⁵ Gambling (Licensing and Advertising) Act 2014 (hereinafter referred to as the GLAA'), S 6 (5) read with Gambling (Licensing and Advertising) Act 2014 (commencement No.1) Order 2014, s 2 and Gambling (Licensing and Advertising) Act 2014 (commencement No.1) (Amendment and Consequential Amendments) Order 2014, s 2.

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,⁸⁵ Australia has prohibited such activities,⁸⁶ echoing the current South African position following the *Gauteng Gambling Board* case. The Interactive Gambling Act (IGA)⁸⁷ 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.⁸⁸ Some online gambling activities are not subject to this prohibition including ‘sports betting’ (provided the wager is placed before the sporting event begins)⁸⁹ and online lotteries.⁹⁰ The IGA further prohibits Australian based online casinos from providing services to certain countries that have been nominated by the Minister of Social Services.⁹¹

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.⁹² The issue of enforceability prompted the Australian government to commission a review of foreign online casinos.⁹³ Focusing on the impact to the Australian economy and vulnerable parties.⁹⁴ The Interactive Gambling Amendment Bill (IGAB)⁹⁵ resulted from this review although its provisions have not yet come into operation.⁹⁶

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.

⁹¹ S 15A of the Interactive Gambling Act 2001.

⁹² Legal Gambling and the Law ‘Australian Gambling Law’ available at <http://www.legalgamblingandthelaw.com.au> (Accessed 16 March 2016), Australian Gambling ‘Australian Online Gambling Laws’ available at <http://www.australiangambling.com.au/australian-gambling-laws/> (Accessed 16 March 2016) and Gambling Sites.com ‘Gambling Regulation in Australia’ available at <http://www.gamblingsites.com/online-gambling-jurisdictions/australia/> (Accessed 16 March 2016).

⁹³ MP O’Farrell B ‘Review of Illegal Offshore Wagering’ (2015) at 16.

⁹⁴ MP O’Farrell B (2015) at 16.

⁹⁵ Interactive Gambling Amendment Bill 2016 (hereinafter referred to as the ‘IGAB’).

⁹⁶ Parliament of Australia ‘Interactive Gambling Amendment Bill 2016’ available at http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5755 [accessed 9 June 2017].

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.⁹⁷ The IGA does not criminalise participating in online gambling for private individuals.⁹⁸ Australian consumers consequently rely on the certifications and other regulatory methods adopted by these independent regulators to protect them.⁹⁹

The adverse effects of gambling, while obviously important, cannot be considered in isolation.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.¹⁰¹ Comparatively the UK's gambling sector directly contributed £2.3 billion in 2015 and a further £2.7 billion indirectly.¹⁰² It should be noted that these figures do not include the tax revenue generated, although this is an important factor to be considered.

⁹⁷ eCogra 'About us, Introduction' available at <http://www.ecogra.org/srs/introduction.php> (Accessed 16 March 2016) and Australian Gambling 'Australian Online Gambling Laws' available at <http://www.australiangambling.com.au/australian-gambling-laws/> (Accessed 16 March 2016).

⁹⁸ The Interactive Gambling Act 2001, Legal Gambling and the Law, 'Australian Gambling Law' available at <http://www.legalgamblingandthelaw.com.au> (accessed 16 March 2016), Australian Gambling, 'Australian Online Gambling Laws' available at <http://www.australiangambling.com.au/australian-gambling-laws/> (accessed 16 March 2016) and Gambling Sites.com 'Gambling Regulation in Australia' available at <http://www.gamblingsites.com/online-gambling-jurisdictions/australia/> (accessed 16 March 2016).

⁹⁹ eCogra 'Services, Safe and Fair Seals' available at 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').

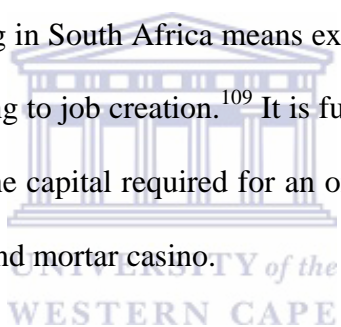
¹⁰⁰ See generally NGA.

¹⁰¹ National Gambling Board, Research Bulletin, March 2014, Issue 4.

¹⁰² William Hill 'Betting and gaming are enjoyed the world over by millions of people' available at <http://www.williamhillplc.com/responsibility/about-the-gambling-industry/> (Accessed 5 March 2016), Titanbet Casino 'How the gambling industry is affecting the UK economy' <http://www.growthbusiness.co.uk/growing-a-business/business-regulations/2484481/how-the-gambling-industry-is-affecting-the-uk-economy.shtml> (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' <http://www.abb.uk.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.¹⁰³ South Africa is currently experiencing an employment crisis with the latest statistics placing unemployment at 26.5 percent.¹⁰⁴ Enterprises within South Africa are already providing services to online casinos licensed and operating overseas.¹⁰⁵ To name one, Microgaming Software Systems Ltd is a software company currently registered in the Isle of Man.¹⁰⁶ They are considered the market leaders in the provision and maintenance of online gambling software.¹⁰⁷ While registered in the Isle of Man, its origins are South African and a large portion of the company operates in South Africa.¹⁰⁸

The legalisation of online gambling in South Africa means existing companies have the potential for further growth inevitably leading to job creation.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

¹⁰³ The Gauteng Gambling Amendment Act 6 of 2001, preamble.

¹⁰⁴ Statistics South Africa 'Work and Labour Force' available at http://www.statssa.gov.za/?page_id=737&id=1 [accessed 1 June 2017].

¹⁰⁵ Gambling Africa 'South African Entrepreneurs Have Been Pioneers of Online Casino Gambling' <http://www.gamblingafrica.com/indepth/south-african-online-casino-pioneers.asp> (Accessed 6 March 2016).

¹⁰⁶ Microgaming 'Our Story' <http://www.microgaming.co.uk/our-story> (Accessed 6 March 2016).

¹⁰⁷ Tops Casino Online 'Microgaming Casinos' <http://www.casinotopsonline.com/microgaming-casinos> (Accessed 6 March 2016), Best Online Casinos 'Online Casino Software' <http://www.bestonlinecasinos.com/software/> (Accessed 6 March) and Microgaming 'Our Story' <http://www.microgaming.co.uk/our-story> (Accessed 6 March 2016).

¹⁰⁸ Gambling Africa 'South African Entrepreneurs Have Been Pioneers of Online Casino Gambling' <http://www.gamblingafrica.com/indepth/south-african-online-casino-pioneers.asp> (Accessed 6 March 2016) and Microgaming 'Our Team' <http://www.microgaming.co.uk/our-team> (Accessed 6 March 2016).

¹⁰⁹ Gauteng Gambling Amendment Act 6 of 2001, preamble.

this industry means legislatures are already playing catch-up.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.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.¹¹² As a result he adopts the position that online gambling can be seen as a component of gambling.¹¹³ In contrast, Miller rightly recognises the online gambling environment is too disparate from land-based gambling to be governed by the same regulations.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.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.¹¹⁶ The article was published in 2012, consequently the latest

¹¹⁰ Miller KC, 'How Should the Past Inform the Future? Reviewing Regulating Internet Gaming Challenges and Opportunities' (2014) 5 *UNLV Gaming Law Journal* 49 at 79.

¹¹¹ Monnye SL (2012) at 232.

¹¹² Monnye SL (2012) at 232-233.

¹¹³ Monnye SL (2012) at 224-225.

¹¹⁴ Miller KC (2014) at 55.

¹¹⁵ Monnye SL (2012) at 242.

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.¹¹⁷

Snail also shies away from recommending specific regulations, though he does provide an instructive discussion of a number of differing regulatory models,¹¹⁸ and further recommends a restrictive prohibitive model for South Africa.¹¹⁹ This model allows for online gambling on the condition that the provider of these services is appropriately licenced often excluding foreign online casinos.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.'¹²¹ Snail highlights concerns relating to protecting vulnerable parties, money laundering and a host of possible misdeeds by unscrupulous service providers.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.¹²³ It should be noted this article was written before it became clear the NGAA would not come into

¹¹⁷ See generally Monnye SL (2012).

¹¹⁸ Snail SL (2007) at 116-117.

¹¹⁹ Snail SL (2007) at 121.

¹²⁰ Snail SL (2007) at 117.

¹²¹ Snail SL (2007) at 121.

¹²² Snail SL (2007) at 115-116.

¹²³ Rodrigues C, 'The gaming spider spins its web' (2008) *Without Prejudice* 24 at 24 - 25.

operation.¹²⁴ It nevertheless serves as an overview of the more salient provisions of the NGAA.¹²⁵

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.¹²⁶ Responding to the RGB and submission from various stakeholders, the DTI raised a number of concerns including unscrupulous service providers allowing underage gambling.¹²⁷ As well as concerns the '[b]ill creates unfair competition' no clarity regarding the victim(s) or the basis for this unfairness is provided.¹²⁸ 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.¹²⁹

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.¹³⁰ Regarding the maintenance of a complete prohibition the DTI indicated '[t]he decision to ban was taken a long time back...' ¹³¹ and further '[t]he *status quo* should be maintained as the harm by over-stimulation to gamble out-weighs the benefits.'¹³² The DTI lists

¹²⁴ Monnye SL (2012) at 232 – 233.

¹²⁵ Rodrigues C (2008) at 24 – 25.

¹²⁶ DTI, Responses to Remote Gambling Bill and Stakeholder Submission, Parliament Cape Town, 2 June 2015 at page 4.

¹²⁷ DTI, Responses to Remote Gambling Bill and Stakeholder Submission, Parliament Cape Town, 2 June 2015 at page 5.

¹²⁸ DTI, Responses to Remote Gambling Bill and Stakeholder Submission, Parliament Cape Town, 2 June 2015 at page 8.

¹²⁹ DTI, Responses to Remote Gambling Bill and Stakeholder Submission, Parliament Cape Town, 2 June 2015 at page 10.

¹³⁰ DTI, Responses to Remote Gambling Bill and Stakeholder Submission, Parliament Cape Town, 2 June 2015 at page 11 and 21.

¹³¹ DTI, Responses to Remote Gambling Bill and Stakeholder Submission, Parliament Cape Town, 2 June 2015 at page 14.

¹³² DTI, Responses to Remote Gambling Bill and Stakeholder Submission, Parliament Cape Town, 2 June 2015 at page 20.

factors that have influenced this decision, in addition to those mentioned above, the increasing rate of poverty, inequality and indebtedness.¹³³

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 Acts¹³⁴ and Bills¹³⁵ will be extensively reviewed, including subordinate legislation¹³⁶ 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.¹³⁷ 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 IGA¹³⁸ and the consumer's reliance on independent regulators is a unique.¹³⁹ For the purposes of this paper Australia provides an

¹³³ DTI, Responses to Remote Gambling Bill and Stakeholder Submission, Parliament Cape Town, 2 June 2015 at page 14.

¹³⁴ The NGA, NGAA, GA and GLAA.

¹³⁵ The RGB.

¹³⁶ The IGR and LCCP.

¹³⁷ The GLAA and LCCP.

¹³⁸ IGA, s15.

¹³⁹ Legal Gambling and the Law 'Australian Gambling Law' available at <http://www.legalgamblingandthelaw.com/au> (Accessed 16 March 2016), Australian Gambling 'Australian Online Gambling Laws' available at <http://www.australiangambling.com.au/australian-gambling-laws/> (Accessed 16 March 2016) and Gambling Sites.com 'Gambling Regulation in Australia' available at <http://www.gamblingsites.com/online-gambling-jurisdictions/australia/> (Accessed 16 March 2016).

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.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.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.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.¹⁴³ The NGA was introduced to ensure the adverse effects of this legalisation were, wherever possible, mitigated.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

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.

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

¹⁴² See generally Significance of the Study above.

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).

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.

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.¹⁴⁷ Land-based casino and other forms of gambling are legalised and regulated under the National Gambling Act (NGA).¹⁴⁸ Currently online or interactive gambling is prohibited in terms of the NGA.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)¹⁵⁰ and the Remote Gambling Bill (RGB).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.¹⁵² In respect of land-based gambling this balance is achieved through the NGA.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.

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.

¹⁴⁸ Excluding online (interactive) gambling, see generally NGA.

¹⁴⁹ NGA s 11.

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.

¹⁵¹ The Remote Gambling Bill was published in gg 37569 on 23 April 2014.

¹⁵² Bana A 'Online Gambling: An Appreciation of Legal Issues' (2011) volume 12 *Business Law International* 335 at 339

¹⁵³ NGA preamble.

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.¹⁵⁴

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.¹⁵⁵ 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.¹⁵⁶

It should be noted that studies examining the positive effects of gambling suffer from similar quantitative issues as those above.¹⁵⁷ Eggert asserts those in favour of legalisation as well as those against, tend to exaggerate their findings in order to support their particular conviction.¹⁵⁸ These issues are further exacerbated by a research deficit in the online gambling field.¹⁵⁹ There is however consensus among industry stakeholders regarding certain universal concerns associated with (online) gambling.¹⁶⁰ These include the spread of problem (and pathological) gambling, underage gambling and money-laundering.¹⁶¹ These are the adverse effects that need to be

¹⁵⁴ Eggert K 'Truth in gaming: toward consumer protection in the gambling industry' (2004) 63 *Maryland Law Review* 217 at 227 - 228.

¹⁵⁵ Eggert K (2004) at 227 - 228.

¹⁵⁶ 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.

¹⁵⁷ Eggert K (2004) at 227 - 228.

¹⁵⁸ Eggert K (2004) at 227 - 228.

¹⁵⁹ Gainsbury S *Internet Gambling Current Research Findings and Implications* (2012) at 5.

¹⁶⁰ MP O'Farrell B 'Review of Illegal Offshore Wagering' (2015) at 147.

¹⁶¹ 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 Nominatae 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 minors¹⁶⁴ 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

Communications Technology Law 273 at 274, Kelly J 'Internet Gambling Law' (200) 26 *William Mitchell Law Review* 117 and Eggert K (2004).

¹⁶² Nzimande S, Louw S & Manny C *et al* 'Review of the South African gambling industry and its regulation A report prepared by the Gambling Review Commission' (2010) Gambling Review Commission at 89.

¹⁶³ Nzimande S, Louw S & Manny C *et al* (2010) at 89.

¹⁶⁴ A minor is defined by the NGA as 'a person under the age of 18 years' NGA, s 1 definitions.

¹⁶⁵ NGA ss12, 15, 16 and 17 and Nzimande S, Louw S & Manny C *et al* 'Review of the South African gambling industry and its regulation A report prepared by the Gambling Review Commission' (2010) Gambling Review Commission at 90.

¹⁶⁶ NGA s12(1)(a).

¹⁶⁷ NGA s12(1)(b).

¹⁶⁸ NGA s12(3)(a)-(d).

¹⁶⁹ NGA s12 and Nzimande S, Louw S & Manny C *et al* 'Review of the South African gambling industry and its regulation A report prepared by the Gambling Review Commission' (2010) Gambling Review Commission at 90.

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

The quantitative issues alluded to by Eggert are certainly applicable here.¹⁷³ The 2010 report indicates the above conclusion is based on information provided by industry stakeholders.¹⁷⁴ No other source or evidence is provided in support of this conclusion.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.¹⁷⁶ The trouble with this is best illustrated by Gilbert who provides two case studies: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

¹⁷⁰ Nzimande S, Louw S & Manny C et al ‘Review of the South African gambling industry and its regulation A report prepared by the Gambling Review Commission’ (2010) Gambling Review Commission at 90.

¹⁷¹ Nzimande S, Louw S & Manny C et al (2010) at 90.

¹⁷² Nzimande S, Louw S & Manny C et al (2010) at 90.

¹⁷³ Eggert (2004) at 227 -228.

¹⁷⁴ Nzimande S, Louw S & Manny C et al (2010) at 90.

¹⁷⁵ Nzimande S, Louw S & Manny C et al (2010) at 90.

¹⁷⁶ Nzimande S, Louw S & Manny C et al ‘Review of the South African gambling industry and its regulation A report prepared by the Gambling Review Commission’ (2010) Gambling Review Commission at 90.

¹⁷⁷ Gilbert F ‘Age Verification as a shield for minors on the Internet : a quixotic search’ (2008-2009) 5 *Shidler Journal of Law and Commerce* 6 at 7.

victim to sexual predators that were not aware they were minors.¹⁷⁸ They were 14 and 13 at the time and both cases involved face to face encounters.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 casinos¹⁸⁰ or accessing online gambling websites.¹⁸¹ In addition ensuring minors do not frequently encounter inappropriate advertising material is vital.¹⁸² This approach has displayed some success in reducing underage smoking.¹⁸³ Research indicates although minors have the cognitive ability to understand and evaluate the advertisements, they are particularly susceptible to emotionally charged messages.¹⁸⁴ Accordingly, the NGA expressly prohibits advertising that is designed to entice minors to gamble.¹⁸⁵ The content and placement of any gambling advertisements is also regulated to further this end.¹⁸⁶

Section 16 removes the economic incentive for both the underage gambler¹⁸⁷ and licensee.¹⁸⁸ The NGA contains an express provision declaring any gambling debt incurred by a minor to be unenforceable.¹⁸⁹ Any economic incentive for licensees to allow underage gambling is thereby

¹⁷⁸ Gilbert F (2008-2009) at 7.

¹⁷⁹ Gilbert F (2008-2009) at 7.

¹⁸⁰ NGA s12.

¹⁸¹ NGAA s12, RGB s 40.

¹⁸² Gainsbury (2012) at 91.

¹⁸³ Liddell P, Watson S, Eshee, W & Moore R 'Internet Gambling on a Roll?' (2004) 28 *Seton Hall Legislative Journal* 315 at 353.

¹⁸⁴ Gainsbury (2012) at 91.

¹⁸⁵ NGA s 15 (1)(a)-(b).

¹⁸⁶ NGR reg 3.

¹⁸⁷ NGA s 16 (2), (3) and (4).

¹⁸⁸ NGA s 16 (1).

¹⁸⁹ NGA s 16 (1) (d) (i).

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).

¹⁹³ See Chapter 1 and Monnye 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 224-225.

¹⁹⁴ Gilbert F (2008 – 2009) at 6.

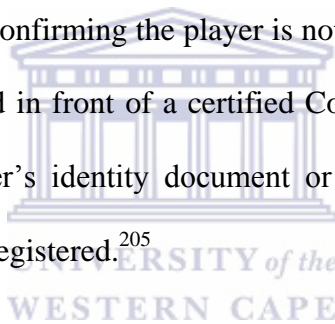
¹⁹⁵ Bana A (2011) at 339, Snail L (2007) at 115, Gilbert (2008 – 2009) at 6 and Miller KC, 'How Should the Past Inform the Future? Reviewing Regulating Internet Gaming Challenges and Opportunities' (2014) 5 *UNLV Gaming Law Journal* 49 at 59.

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)¹⁹⁷ which were intended to complement the NGAA and inform the latter's implementation and application.¹⁹⁸

The NGAA restricts online gambling to persons who have registered an account with a licensee.¹⁹⁹ The NGAA obliges licensees in terms of section 12 to not knowingly allow a minor to register as a player.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.²⁰¹

The IGR goes further, prescribing a form to be submitted along with the above documentation.²⁰² The form includes a statement confirming the player is not younger than 18.²⁰³ This statement must be made and the form signed in front of a certified Commissioner of Oaths.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.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.²⁰⁶ Especially as the allure of online gambling stems from being able to play '...casino games from the comfort of your own home...' ²⁰⁷ and its ease of access.²⁰⁸ This may undermine the revenue potential of legalising and

¹⁹⁷ The Interactive gambling regulations, General Notice 211 of 2009, GG 31956 published 27 February 2009 (hereinafter referred to as the IGR).

¹⁹⁸ See generally IGR.

¹⁹⁹ NGAA s11.

²⁰⁰ NGAA s12.

²⁰¹ IGR reg 9 (1) (a).

²⁰² IGR reg 10, see Form NGR 10.

²⁰³ IGR reg 10, see Form NGR 10.

²⁰⁴ IGR reg 10, see Form NGR 10.

²⁰⁵ IRG reg 9 and 10, see Form NGR 10.

²⁰⁶ Nzimande S, Louw S & Manny C et al (2010) at 180.

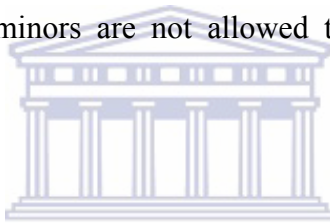
²⁰⁷ *Casino Enterprises v The Gauteng Gambling Board* (653/10) [2011] ZASCA 155 (28 September 2011) at para 36.

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 000.²⁰⁹

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.²¹⁰ 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.²¹¹ Akin to the NGAA, the RGB requires that prospective players register an account before being allowed to engage in remote gambling activities.²¹² The licensee is again obliged to take ‘reasonable measures’ to ensure minors are not allowed to access and participate in online gambling activities.²¹³



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.²¹⁴ The author submits that the use of government-issued ID databases is the current best practice for reliable age verification.²¹⁵ Following the registration of an account the prospective players details are verified against the information contained in one or more of these databases.

²⁰⁹ This is a non-refundable fee, IRG reg 42 (1).

²¹⁰ RGB preamble, see RGB generally.

²¹¹ RGB, ss 2, 7, 13, 40, 44 and 45.

²¹² NGAA s 11 and RGB s 44(1) (a).

²¹³ RGB 40(4).

²¹⁴ Miller KC (2014) at 70.

²¹⁵ Miller KC (2014) at 70.

South Africa boasts several reliable databases for the confirmation of identity and other details such as marital status and judgement debts.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.²¹⁷ Alternatively permission could simply be granted by the player directly. Participation in online gambling, as with all forms of gambling, is voluntary.²¹⁸

The RGB also contains a prohibition against advertising designed to entice minors to gamble.²¹⁹ Section 43(1)(b) of the RGB echoes the contents of the NGA.²²⁰ Prohibiting advertising that encourages an activity '...that is unlawful in terms of this Act...'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.²²²

Additionally, the RGB contains comparable provisions to those in the NGA designed to remove the economic incentive for underage gambling.²²³ The RGB declares any gambling debt incurred by a minor to be unenforceable.²²⁴ The payment of any winnings to a minor is similarly

²¹⁶ Transunion 'Account Verification Services' available at <http://www.transunion.co.za/business/serviceSolutions/riskMgmt/accountVerifications.html> (accessed 8 August 2016), Experian 'Protect your business and proactively manage risk' available at <http://www.experian.co.za/decision-analytics/fraud/index.html> (accessed 8 August 2016) and Compuscan 'Account verification services' available at https://www.compuscan.co.za/wp-content/PDF/Info%20Sheet_Account%20Verification%20Services.pdf (accessed 8 August 2016).

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

²¹⁸ Eggert (2004) at 223, Carnelly M 'Gambling Law' (2010) 3 *SACJ* 439 at 439 and Gambling Review Commission (2010) at 9.

²¹⁹ RGB s 43.

²²⁰ NGA s 15(1)(a)(ii) and RGB s 43(1)(b).

²²¹ RGB s 43 (1) (b).

²²² RGB ss 43(1)(b) and 45 (2) (a).

²²³ NGA s 16(1)(d)(i) and RGB s 7(1)(c)(i).

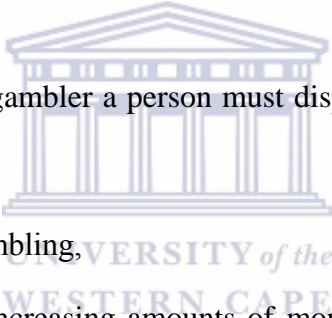
²²⁴ RGB s 7 (1) (c) (i).

prohibited by the RGB.²²⁵ Winnings not paid in terms of these provisions are dealt with in the same manner as laid out in the NGA.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.²²⁷ Pathological gambling is an impulse control disorder.²²⁸ Problem gambling in turn is not classified as a disorder but when escalated will become pathological gambling in most instances.²²⁹

To be classified as a pathological gambler a person must display at least five out of a set of ten factors.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,

²²⁵ RGB s 7 (2) (a).

²²⁶ NGA ss 16 (3) and 16(4)(a) and RGB ss 7 (3) and 7(4)(a) and (b).

²²⁷ Gambling Review Commission (2010) at 36.

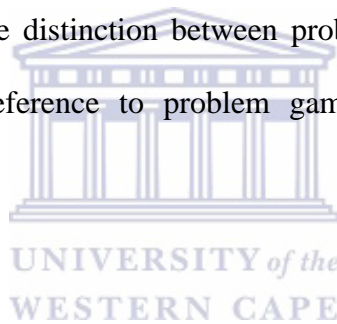
²²⁸ Eggert (2004) at 224 and *Gottfried J* 'The federal framework for Internet Gambling' (2003 – 2004) 10 *Richmond Journal of Law & Technology* 1 at 9.

²²⁹ Eggert (2004) at 9.

²³⁰ *Gottfried* (2003-(2004) at 9.

- (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.



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

²³¹ Gottfried (2003 – 2004) at 9.

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).

As mentioned above, pathological gambling is an impulse control disorder.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.²³⁷ The National Gambling Regulations (NGR) do require ‘...documentary proof that the excluded person has complied with all requirements of any rehabilitation programme.’²³⁸ There are worryingly no legislative requirements or prerequisites for the rehabilitation programme mentioned in regulation 2(3) (e).²³⁹

It is heartening to note that the NGA does make provision for a family member or other interested party²⁴⁰ to apply to have a person registered in terms of section 14.²⁴¹ 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.²⁴² This is a marked improvement from section 14(2) which does not demand any inquiry into the reasonableness and justness of such removal.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

²³⁶ Eggert (2004) at 224 and Gottfried (2003 – 2004) at 9.

²³⁷ NGA s 14 (2) and NGR reg 2 (3).

²³⁸ NRG reg 2(3) (e).

²³⁹ See NGA generally, see NGR generally.

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).

²⁴¹ NGA s 14 (4) – (6).

²⁴² NGA s 14 (6).

²⁴³ NGA s 14(6).

submitted that the lack of accreditation requirements for these programmes undermines the purpose of the regulation.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.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.²⁴⁶ The NGA prescribes certain steps be taken to ensure this prohibition is enforced.²⁴⁷ These steps are detailed in the NGR where once again a system of observation is prescribed.²⁴⁸ Employees of the licensee are provided with access to the register of excluded persons.²⁴⁹ Thereafter one such employee is posted at every entrance to control and monitor access to any area where gambling activities take place.²⁵⁰

The NGR requires a colour photograph be included with the relevant form when a person is added to the register of excluded persons.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.²⁵²

²⁴⁴ NGR reg 2(3)(e).

²⁴⁵ NGA s 17(2).

²⁴⁶ NGA s 14 (10)(a)–(e).

²⁴⁷ NGA s 14(11)(a).

²⁴⁸ NGR reg 2(7).

²⁴⁹ NGR reg 2(7)(b).

²⁵⁰ NGR reg 2(7)(a).

²⁵¹ NGR reg 2 (2).

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.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.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.²⁵⁵

Being in a dire financial situation due to gambling is one of the ten factors displayed by pathological gamblers.²⁵⁶ Another factor is using crime to support their gambling activities, often forgery or embezzlement.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.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.²⁵⁹ That argument does however lose some legitimacy when section 16 of the NGA is considered.²⁶⁰ This

²⁵³ NGA s 14(11)(b).

²⁵⁴ NGA s 16 (1) (a) and 16 (1)(d)(ii).

²⁵⁵ NGA s 16(1)(d)(ii).

²⁵⁶ Gottfried J (2003-2004) at 9.

²⁵⁷ Gottfried J (2003-2004) at 9.

²⁵⁸ Gottfried J (2003 -2004) at 9 and NGA s 16 (1)(d)(ii).

²⁵⁹ NGA s 16(1)(d)(ii).

²⁶⁰ NGA s 16(2)-(4).

provision prohibits the payment of winnings to an excluded person.²⁶¹ The same procedure as in respect of a minor's winnings is followed.²⁶²

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.²⁶³ The IGR further confirms registration and removal of a person from the register of excluded persons remains the same.²⁶⁴

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.²⁶⁵ 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.²⁶⁶ As noted above regarding minors, part of this registration process is providing a copy of the prospective player's identity document or passport.²⁶⁷ The IGR stipulates that an account must be registered in the name of the prospective player.²⁶⁸ Coupled with the prohibition against allowing excluded persons to take part in gambling activities,²⁶⁹ it is safe to assume that a prospective player's identity (as verified by both

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 NGAA s11.

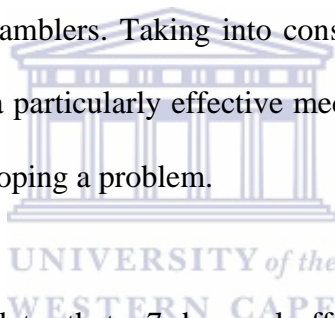
²⁶⁷ IGR reg 9(1)(a).

²⁶⁸ IGR Reg 11(1).

²⁶⁹ NGA s 14 (10).

an identity document/passport²⁷⁰ and affidavit²⁷¹) would be confirmed against the register of excluded persons as kept by the National Gambling Board.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.²⁷³ This account is the only account from which the player is able to pay for the gambling activities offered by licensees.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.²⁷⁵ This acts as a safeguard against overspending, especially in respect of problem gamblers. Taking into consideration the compulsive nature of problem gambling²⁷⁶ 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.²⁷⁷ A requested decrease will however be immediately effective.²⁷⁸ The impulsive nature of problem gambling²⁷⁹ naturally means that changing these financial limits cannot be instantaneous, and this provision is to be welcomed.

2.2.3. The Remote Gambling Bill (RGB)

²⁷⁰ IGR reg 9(1)(a).

²⁷¹ IGR reg 10(2)(e).

²⁷² NGA s 14(7)(a).

²⁷³ IRG reg 6(1).

²⁷⁴ IGR regs 6 and 6(6).

²⁷⁵ IGR regs 7(1).

²⁷⁶ Eggert (2004) at 224 and Gottfried J (2003 – 2004) at 9.

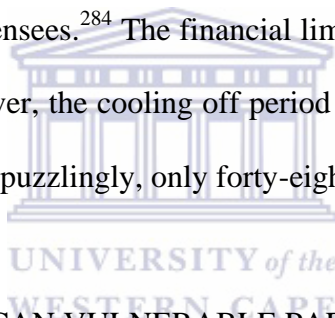
²⁷⁷ IGR reg 7(4).

²⁷⁸ IGR reg 7(5).

²⁷⁹ Eggert (2004) at 224 and Gottfried J (2003 – 2004) at 9.

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.²⁸⁰ It has also not amended the process stipulated in the NGA and the NGR for the registration of excluded persons.²⁸¹ The same applies for the notice requirements of the NGA as they are again only altered to include websites.²⁸² The RGB requires licensees make the necessary registration forms available on their websites in respect of section 14 of the NGA.²⁸³

The RGB again echoes the provisions of the NGA designed to remove the economic incentive for both problem gamblers and licensees.²⁸⁴ The financial limitations provided for by the NGAA are included in the RGB.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.²⁸⁶



3. 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.’²⁸⁷ There is however one further vulnerable party unique to South Africa’s socio-economic landscape, the poor.²⁸⁸ The South African poor gambler is similarly

²⁸⁰ RGB s 44(1)(a)(i).

²⁸¹ RGB s 42.

²⁸² NGA s 17(2) and RGB s 46(1).

²⁸³ RGB s 46(2)(a).

²⁸⁴ NGA ss 16(1)(a) and 16 (1)(d)(ii) and RGB ss 7(1)(a) and 7(1)(c)(ii).

²⁸⁵ IGR reg 7(4)-(5) and RGB s 52(5).

²⁸⁶ RGB s 52(5).

²⁸⁷ Liddell P, Watson S, Eshee, W & Moore (2004) at 334.

²⁸⁸ Dellis A, Spurrett D, Hofmeyr A *et al* ‘Gambling Participation and Problem Gambling Severity among Rural and Peri-Urban Poor South African Adults in KwaZulu-Natal’ (2013) 29 issue 3 *Journal of gambling Studies* 417 at 421.

unique.²⁸⁹ Research indicates they are ‘much poorer in financial terms, have significantly worse health indicators, and are less educated.’²⁹⁰

Gambling policy involves balancing the economic benefits against the associated societal ills.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.²⁹² Furthermore, 37.8 per cent had not matriculated and 29.4 per cent earned less than one thousand rand per month.²⁹³ These are the parties whose interests the constitutionally enshrined principles of fairness, substantive quality and justice demand are protected.²⁹⁴

Current research indicates the National Lottery is the most popular form of gambling amongst the impoverished.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.²⁹⁶ The impoverished are far less likely to frequent casinos, with 3.3 per cent of the same demographic opting for it.²⁹⁷ This preference for the National Lottery may stem from its availability and accessibility.²⁹⁸ The poor gambler shows a preference for gambling forms that are easily accessible.²⁹⁹ The appeal of online gambling stems from its ease of access.³⁰⁰

²⁸⁹ Dellis A, Spurrett D, Hofmeyr A *et al* (2013) at 421.

²⁹⁰ Dellis A, Spurrett D, Hofmeyr A *et al* (2013) at 421.

²⁹¹ Bana A (2011) at 336.

²⁹² National Gambling Board ‘The Less Affluent and Gambling’ (2014) 4 *Research Bulletin* at 2.

²⁹³ National Gambling Board (2014) at 2.

²⁹⁴ Constitution of the Republic of South Africa 1996, Chapter 2 Bill of Rights.

²⁹⁵ National Gambling Board (2014) at 2, Dellis A, Spurrett D, Hofmeyr A *et al* (2013) at 425 and National Gambling Board ‘The Economic Impact of Legalised Gambling in South Africa’ (2013) at 12.

²⁹⁶ Nzimande S, Louw S & Manny C *et al* (2010) at 77.

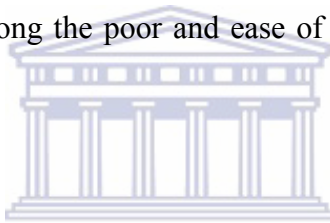
²⁹⁷ Nzimande S, Louw S & Manny C *et al* (2010) at 77 and Dellis A, Spurrett D, Hofmeyr A *et al* (2013) at 425.

²⁹⁸ Dellis A, Spurrett D, Hofmeyr A *et al* (2013) at 425 and Nzimande S, Louw S & Manny C *et al* (2010) at 77.

²⁹⁹ Dellis A, Spurrett D, Hofmeyr A *et al* (2013) at 425

³⁰⁰ Monnye S (2012) at 241.

Naturally, online gambling requires an internet connection as well as an electronic device.³⁰¹ Increasing internet connectivity and broadband penetration has played an integral role in the growth of the online gambling market.³⁰² The poor are generally underrepresented on the internet.³⁰³ In South Africa this issue is exacerbated by the expensive fees charged by internet service providers.³⁰⁴ As a result, the legalisation and regulation of online gambling is ‘unlikely to impact or target the poor on a large scale.’³⁰⁵ 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.³⁰⁶ This popularity may also be due to their ease of access.³⁰⁷ Due to the abovementioned practical impediments the correlation between popularity among the poor and ease of access shouldn’t translate to online gambling.³⁰⁸



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.’³⁰⁹ This choice involves finding a balance between the positive effects and adverse effects of gambling.³¹⁰ It is submitted that South Africa, in respect of land-based gambling, has already achieved this balance.

³⁰¹ Nzimande S, Louw S & Manny C *et al* (2010) at 181.

³⁰² Gainsbury (2012) at 116.

³⁰³ Craig A ‘Gambling on the Internet’ (1998) *Computer Law Review and Technology Journal* 61 at 69.

³⁰⁴ Van Zyl G ‘Data Prices How SA Compares to the rest of the world’ *Finance24* available at <http://www.fin24.com/Tech/Multimedia/data-prices-how-sa-compares-to-the-rest-of-the-world-20160930> [accessed 1 June 2017].

³⁰⁵ Nzimande S, Louw S & Manny C *et al* (2010) at 180 and Craig A (1998) at 69.

³⁰⁶ Nzimande S, Louw S & Manny C *et al* (2010) at 77.

³⁰⁷ Nzimande S, Louw S & Manny C *et al* (2010) at 77.

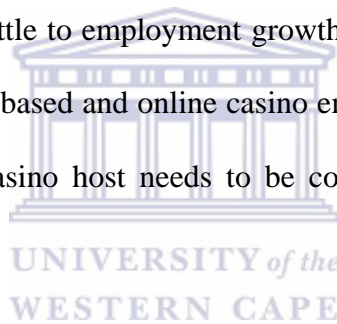
³⁰⁸ Nzimande S, Louw S & Manny C *et al* (2010) at 180 and Craig A (1998) at 69.

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.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.³¹² In 2010 the gambling industry employed 59 958 people.³¹³ One of the positive effects of legalised and regulated (online) gambling is job creation.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.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.³¹⁶ The capital necessary to start an online casino is significantly less than that required for a brick and mortar casino.³¹⁷ The opportunity for entrepreneurship is of particular importance for South Africa. Research shows that ‘entrepreneurship is one the most effective means of alleviating

³¹¹ *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.

³¹² Statistics South Africa ‘Work and Labour Force’ available at http://www.statssa.gov.za/?page_id=737&id=1 [accessed 1 June 2017].

³¹³ Nzimande S, Louw S & Manny C et al (2010) at 39.

³¹⁴ Eggert K (2004) at 227.

³¹⁵ Department of Trade and Industry ‘Responses to Remote Gambling Bill and Stakeholder Submission’ Parliament Cape Town, 2 June 2015 at page 11 and 21.

³¹⁶ Liddell P, Watson S, Eshee, W & Moore (2004) at 351.

³¹⁷ Liddell P, Watson S, Eshee, W & Moore (2004) at 351.

poverty in developing and transitional countries...'.³¹⁸ Fostering entrepreneurs has shown a positive impact on employment and personal economic empowerment.³¹⁹

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.³²⁰ 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.³²¹ This is seemingly the approach followed by the NGA. The NGA provides for legalised and regulated gambling activities within the Republic of South Africa.³²² It does however contain provisions designed to 'safeguard people...against the adverse effect[s] of gambling...'.³²³

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

³¹⁸ Friedrich C 'Universities should grow entrepreneurs' *Tygerburger* 15 March 2017 page 8.

³¹⁹ Friedrich C 15 March 2017.

³²⁰ Thompson B 'Internet Gambling' (2001) 2 issue 1 *North Carolina Journal of Law & Technology* 81 at 103.

³²¹ Bana A (2011) at 336.

³²² See generally NGA.

³²³ NGA preamble.

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)³²⁴, the Gambling (Licensing and Advertising) Act (GLAA)³²⁵ as well as the Gambling Commission's (GC) licence conditions and codes of practice (LCCP).³²⁶ The UK's recent introduction of stricter online gambling regulations was aimed at protecting the interests of vulnerable parties.³²⁷ This was modelled on the success of the GA's social responsibility focus.³²⁸ This provides a useful comparative for South Africa, bearing the research deficit in mind.³²⁹ The UK's long history of legislative regulation³³⁰ with the attendant reviews, reforms and research³³¹ 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,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.

³²⁴ Gambling Act 2005 (c. 19) (hereinafter referred to as the 'GA').

³²⁵ Gambling (Licensing and Advertising) Act 2014 (c. 17) (hereinafter referred to as the 'GLAA').

³²⁶ Gambling Commission, licence conditions and codes of practice, February 2015 (Updated April 2015) (hereinafter referred to as the 'LCCP').

³²⁷ LCCP part 2, page 28, as seen by compliance with the social responsibility provisions being a condition of operator's licenses read with GA part 5 s 82(1).

³²⁸ Miers D 'The Gambling Review Report: Redefining the Social and Economic Regulation of Commercial Gambling' (2003) vol 66 *The Modern Law Review* 604 at 605.

³²⁹ Gainsbury S *Internet Gambling: Current Research Findings and Implications* (2012) at 5.

³³⁰ Gambling Review Commission 'International study of gambling jurisdictions' (2010) at 11.

³³¹ Miers D (2003) at 605, the GA resulted from two concurrent reviews of the industry amidst concerns that online gambling threatened public revenue.

³³² Bana A 'Online Gambling – An Appreciation of legal issue' (2011) 12 *Business Law International* 335 at

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 GC³³⁴ 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

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).

³³⁹ Gainsbury S (2012) at 4 and 27 and Miller K ‘How should the past inform the future? Reviewing Regulating Internet Gambling Challenges and Opportunities’ (2014) 5 *UNLV Gaming Law Journal* 49 at 79.

³⁴⁰ Loscalzo T & Shapiro S ‘Internet Gambling Policy: Prohibition versus Regulation’ (2000) 7 *Villanova Sports and Entertainment Law Journal* 11 at 19 – 21.

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.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.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.³⁴⁴

Another purpose of the GA is to ensure gambling is fair and transparent.³⁴⁵ Wisely then, the gambling software industry is also regulated by the GA.³⁴⁶ Section 41(1) criminalises the production, sale *et cetera* of gambling software without an appropriate license.³⁴⁷ No distinction is made between a software operating licence and a remote operating licence in this regard.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.³⁴⁹ The GA distinguishes between a young person, someone between 16 and 18 years old, and a child, someone younger than 16 years.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

³⁴² GA part 3, s 33(1) read with 33(2)&(3).

³⁴³ GA part 3, s 36(3) prior to amendment by GLAA s 1(2).

³⁴⁴ GLAA s 1(2).

³⁴⁵ GA part 1, s 1(b), the RGB, s 15(b), similarly intends to license and regulate the gambling software sector.

³⁴⁶ GA part 5 s 65(2)(i).

³⁴⁷ GA part 3, s 41(1).

³⁴⁸ GA part 5 s 82 (1) and LCCP part 2, page 28.

³⁴⁹ GA part 1 s 1 (c).

³⁵⁰ GA part 4 s 45 (1) – (2).

persons and children.³⁵¹ In section 48 the distinction becomes important. It is an offence for a young person to gamble.³⁵² The offence carries a fine upon conviction.³⁵³ No similar offence exists for a child. Section 82(1) of the South African Act³⁵⁴ also criminalises a minor's participation in gambling.³⁵⁵ There is however no distinction between the penalty in respect of an adult who commits an offence and a minor.³⁵⁶ The Remote Gambling Bill (RGB) does not contain a distinction between young persons and children either.³⁵⁷ It does however distinguish between penalties in respect of a first offence³⁵⁸ and a second or subsequent offence.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.³⁶⁰ The GA requires that licensees return the stake of a minor.³⁶¹ The RGB does list a litany of valuables forfeitable to provincial licensing authorities in the case of contraventions.³⁶² While the NGA remains silent on the stake of a minor, any minor's winnings are forfeitable to the National Gambling Board.³⁶³ The GA remains silent on the fate of a minor's winnings. Except to confirm, like the NGA and RGB,³⁶⁴ that they may not be paid out to the minor.

³⁵¹ GA part 4 ss 46 (1), 46 (3) and 47 (1) respectively.

³⁵² GA part 4 s 48 (1).

³⁵³ GA part 4 s 62 (2).

³⁵⁴ National Gambling Act 7 of 2004 (hereinafter referred to as the 'NGA').

³⁵⁵ NGA s 12 (1) (a) - (e).

³⁵⁶ NGA s 83.

³⁵⁷ RGB s 41.

³⁵⁸ RGB s 62(3)(a).

³⁵⁹ RGB s 62(3)(b).

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.

³⁶¹ GA part 5 s 83 read with s 58.

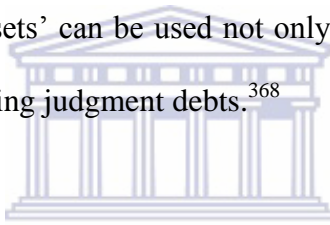
³⁶² RGB s 62(4) and NGA

³⁶³³⁶³ NGA s 16(2)-(4).

³⁶⁴ RGB s 7(2)(a), s 7(3)-(4) stipulates unlawful winnings will be forfeited to the National Gambling Board.

As mentioned above, the GA regulates the gambling software industry. The GC furthermore has the authority to make regulations relating to gambling machines,³⁶⁵ specifically relating to the standards designed to ‘discourage repetitive play or to protect children or other vulnerable persons from harm.’³⁶⁶

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.³⁶⁷ 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.³⁶⁸



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.³⁶⁹ The anonymity provided by the internet is often cited as an appreciably valid argument for prohibition.³⁷⁰ As will be discussed below, this paper submits that Miller’s ‘golden standard’ for identity verification is the lynchpin of any regulatory regime.³⁷¹

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

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.

³⁷⁰ Loscalzo T & Shapiro S (2000) at 13–14, Gainsbury S (2012) at 95.

³⁷¹ Miller K (2014) at 70.

monitor their effectiveness, including by way of providing staff training and keeping any technologies updated.³⁷² The identity verification process applies to all consumer. Those that choose to use a payment method other than a credit card³⁷³ 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.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.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.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.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.³⁷⁸ Once the self-

³⁷² LCCP part 2 social responsibility code provision (hereinafter referred to as 'SRCP') 3.2.11(1), (2)(c) – (d).

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 of identification is required to acquire one. Barclays Bank 'What do I need to open a bank account' available at <http://www.barclays.co.uk/validid> (accessed 3 March 2017), Lloyds Bank 'Lloyds Bank proof of identity' available at <http://www.lloydsbank.com/legal/proof-of-identity.asp?snum=1> (accessed 3 March 2017).

³⁷⁴ LCCP part 2 SRCP 3.2.11(2)(f)(i).

³⁷⁵ LCCP part 2 SRCP 3.2.11(2)(f)(iv).

³⁷⁶ Eggert K 'Truth in Gambling Industry towards consumer protection' (2004) 63 *Maryland Law Review* 217 at 251.

³⁷⁷ LCCP part 2 SRCP 3.5.3(1) and (5).

³⁷⁸ LCCP part 2 SRCP 3.5.3(2) and (3), Ordinary code provision (hereinafter referred to as 'OCP') 3.5.4(5)(g).

exclusion period has expired the licensee cannot automatically resume sending marketing material to the consumer unless explicitly requested.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.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.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,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.³⁸³ Online gambling allows licensees to accurately track every action on a consumer's account, including the money and time they've spent.³⁸⁴ The LCCP further makes provision for refusing consumer's service and / or admission.³⁸⁵

³⁷⁹ LCCP part 2 OCP 3.5.2(7)(f).

³⁸⁰ LCCP part 2 SRCP 3.5.3(6)(a)-(b).

³⁸¹ LCCP part 2 SRCP 3.5.5(1).

³⁸² LCCP part 2 SRCP 3.4.1.

³⁸³ LCCP part 2 SRCP 3.4.1(e)(i).

³⁸⁴ Kelly J M 'Internet Gambling Law' (2000) 26 (1) *William Mitchell Law Review* 117 at 175.

³⁸⁵ LCCP part 2 SRCP 3.4.1(c).

Problem gambling is an impulse control disorder.³⁸⁶ For this reason measures such as prohibiting directed marketing material, customer interactions and self-exclusion procedures may be effective.³⁸⁷ 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.³⁸⁸

The most effective regulations are based on evidence.³⁸⁹ Evidence of the abovementioned compulsive nature of problem gambling has given rise to other regulatory measures.³⁹⁰ 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.³⁹¹ 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.³⁹² 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.³⁹³

³⁸⁶ Eggert K (2004) at 224.

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).

³⁸⁹ MP O'Farrell B 'Review of Illegal Offshore Wagering' (2015) at 150.

³⁹⁰ Blankenship M (2008) at 502.

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.³⁹⁴ They will also be able to access and engage in gambling activities following a further 24-hour cooling off period.³⁹⁵ 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.³⁹⁶

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.³⁹⁷ 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...’³⁹⁸ Continuous play has a tendency to create a dissociative state wherein the consumer doesn’t notice the passage of time.³⁹⁹ 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.⁴⁰⁰

There is widespread evidence suggesting a strong link between underage and problem gambling.⁴⁰¹ 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.

³⁹⁸ Gainsbury S (2012) at 94.

³⁹⁹ Gainsbury S (2012) at 94.

⁴⁰⁰ LCCP part 2 SRCP 3.3.1(2)(a)-(b).

⁴⁰¹ Gambling Review Commission (2010) at 36.

shown a willingness to take advantage of technological improvements. Licensees must for example permit filtering software to be used by parents and/or schools.⁴⁰² 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.⁴⁰³ Adolescents are more likely to take risks, they are also more easily swayed by the emotional message of gambling advertisements.⁴⁰⁴ The LCCP, through the advertising rules, as a result demands no person in gambling advertisements appear younger than 25.⁴⁰⁵

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.”⁴⁰⁶ 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.⁴⁰⁷ 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)(e).

⁴⁰³ LCCP part 2 SRCP 5.1.7(2).

⁴⁰⁴ Gainsbury S (2012) at 90.

⁴⁰⁵ LCCP part 2 OCP 5.1.6(3).

⁴⁰⁶ Essa A ‘THE PROHIBITION OF ONLINE- CASINOS IN AUSTRALIA : IS IT WORKING?’ (2005) 4 *Queensland University of Technology, Law and Justice Journal* 88 at 94.

⁴⁰⁷ Kelly J (2000) at 177 and Gambling Review Commission ‘International study of gambling jurisdictions’ (2010) at 29.

Before examining the specific provisions, it is necessary to discuss unlicensed operators. Unlicensed operators have no incentive to implement responsible gambling measures.⁴⁰⁸ Collectively, unlicensed operators are referred to as the black market. This black market furthermore does not keep records or report criminal transactions.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.⁴¹⁰ This leaves ordinary consumers with no practical recourse against fraudulent unlicensed operators.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.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.⁴¹³ Exhaustive regulation of the industry, whether through overly strict regulations or granting monopolies, encourages the growth of the black market.⁴¹⁴ Whether legalising and regulating online gambling would completely eradicate the illegal market

⁴⁰⁸ Loscalzo T & Shapiro S (2000) at 19.

⁴⁰⁹ Blankenship M (2008) at 515.

⁴¹⁰ Thompson B 'Internet Gambling' (2001) 2 issue 1 *North Carolina Journal of Law & Technology* 81 at 102.

⁴¹¹ Gottfried J 'The Federal Framework for Internet Gambling' (2004) Vol 10 issue 3 *Richmond Journal of Law & Technology* 1 at para 16.

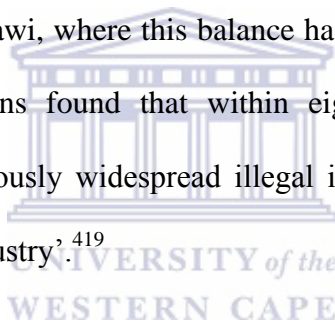
⁴¹² Alexander G 'The U.S. on Tilt Why the Unlawful Internet Gambling Enforcement Act is a Bad Bet' (2008) 5 *Duke Law & Technology Review* 1 at 21.

⁴¹³ Gainsbury S (2012) at 34.

⁴¹⁴ Gainsbury S (2012) at 34.

depends on whether regulators are able to achieve a balanced approach. Regarding both regulation and taxation.⁴¹⁵

If this balance is achieved, consumers are overall more likely to patronise lawful operator.⁴¹⁶ 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.⁴¹⁷ 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.⁴¹⁸ 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'.⁴¹⁹



Eradicating the black market is necessary for one further reason, namely to ensure a proper comparative basis is allowed.⁴²⁰ Regulators and legislators must beware of comparing unlicensed (and unregulated) online casinos with licensed brick and mortar casinos.⁴²¹ As mentioned above, online casinos have shown a willingness to comply with regulations.⁴²² Thus, when the protections afforded to vulnerable parties are discussed below the proper comparative basis must

⁴¹⁵ Nzimande S, Louw S & Manny C et al 'Review of the South African gambling industry and its regulation A report prepared by the Gambling Review Commission' (2010) Gambling Review Commission at 181.

⁴¹⁶ Kelly J M (2000) at 176.

⁴¹⁷ Gainsbury S (2012) at 39.

⁴¹⁸ Kelly J M (2000) at 176.

⁴¹⁹ Gambling Review Commission (2010) at 15.

⁴²⁰ Gottfried J (2004) at para 13.

⁴²¹ Gottfried J (2004) at para 13.

⁴²² 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

⁴²³ Gottfried J (2004) at para 13.

⁴²⁴ Liddell P, Watson S & Eshee W D et al 'Internet Gambling on a Roll?' (2004) 28 *Seton Hall Legislative Journal* 315 at 334.

⁴²⁵ Gainsbury S (2012) at 90.

⁴²⁶ Liddell P, Watson S & Eshee W D et al (2004) at 334.

⁴²⁷ Liddell P, Watson S & Eshee W D et al (2004) at 336.

⁴²⁸ Vener M J 'Internet Gambling Law: is prohibition really good policy?' (2009) 15 *Southwestern Journal of Law & Trade in the Americas* 199 at 219.

⁴²⁹ Blankenship M 'The Unlawful Internet Gambling Enforcement Act: A Bad Gambling Act? You Betcha' (2008) 60 *Rutgers Law Review* 486 at 501.

⁴³⁰ See generally Mcallister L K 'Regulation by Third Party Verification' (2012) 53 *Boston College Law Review* 1, Vener M J (2009) at 501, Carran M 'Minors and Gambling Regulation' (2013) 4 *European Journal of Risk Regulation* 509 and Gottfried J (2004) at 1.

jurisdictions with insufficient funds, resources or skills to implement the regulatory regime themselves.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.⁴³²

While the above method is not infallible,⁴³³ it is submitted that it is a significant improvement from its counterpart in brick and mortar casinos⁴³⁴ which rely on systems of observation.⁴³⁵ Gottfried contends regular online underage gambling is unlikely due to the difficulty identity verification presents and lack of financial benefit.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.'⁴³⁷ However adolescents show a marked susceptibility to the emotionally charged messages of advertising campaigns⁴³⁸ despite a demonstrated cognitive ability to understand and evaluate the information provided.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.⁴⁴⁰ The

⁴³¹ Mcallister L K (2012) at 2-3.

⁴³² Blankenship M (2008) at 501.

⁴³³ Blankenship M (2008) at 504 and Gottfried (2004) at para 35.

⁴³⁴ Gilbert F 'Age Verification as a Shield for Minors on the Internet: A Quixotic Search?' (2009) 5 Shindler Journal of Law, Commerce & Technology 1 at 11, Gottfried (2004) at para 35 and Carran M (2013) at 516.

⁴³⁵ LCCP part 2 SRCP 3.2.1(5), Gottfried (2004) at para 35.

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.

⁴³⁷ Miller K (2014) at 70.

⁴³⁸ Gainsbury (2012) at 91.

⁴³⁹ Gainsbury (2012) at 91.

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.⁴⁴¹ Additionally adolescents are risk-takers, apt to over-estimating their own abilities.⁴⁴² They are thus uniquely at risk of being taken advantage of by gambling advertisements.⁴⁴³

3.2. Problem Gambling

Self-exclusion processes are the most common regulatory strategy for protecting the interests of problem gamblers.⁴⁴⁴ Antolak-Saper in her 2010 article discusses the effectiveness of self-exclusion programmes in brick and mortar casinos, highlighting several key issues.⁴⁴⁵ The author indicates the lack of reporting requirements means a true measure of the efficacy of these programs is difficult to obtain.⁴⁴⁶ 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.⁴⁴⁷ Lastly, the author suggests without cooperation between licensees, particularly sharing information relating to self-excluded consumers, these programs cannot effectively protect the problem gambler.⁴⁴⁸

Applying these same concerns to the online environment, the identity verification process becomes pertinent. Its absence would undermine any attempts to implement these protections.⁴⁴⁹

Recent technological developments have allowed the development of reliable fast identity

⁴⁴¹ Gainsbury (2012) at 91.

⁴⁴² Gainsbury (2012) at 90.

⁴⁴³ Gainsbury (2012) at 91.

⁴⁴⁴ Miller K 'THE UTILITY AND LIMITS OF SELF- EXCLUSION PROGRAMS' (2016) vol 6 *UNLV Gaming Law Journal* 29 at 49.

⁴⁴⁵ Antolak-Saper N 'THE LEGAL EFFECT OF VOLUNTARY SELF-EXCLUSION PROGRAMS FOR PROBLEM GAMBLERS' (2010) vol 15 *Deakin Law Review* 169 at 171.

⁴⁴⁶ Antolak-Saper N (2010) at 171.

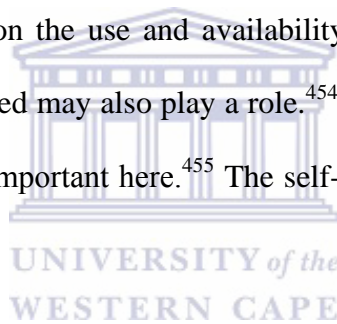
⁴⁴⁷ Antolak-Saper N (2010) at 172.

⁴⁴⁸ Antolak-Saper N (2010) at 181.

⁴⁴⁹ Miller K (2016) at 39 – 40.

verification systems.⁴⁵⁰ In turn licensees are able to share information regarding self-excluded consumers between themselves. This process has subsequently been adopted by regulatory regimes.⁴⁵¹ Implementing this protective strategy is undemanding and virtually effortless in the online environment.⁴⁵²

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.⁴⁵³ 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.⁴⁵⁴ The tone and nature of interactions with the licensees' employee are important here.⁴⁵⁵ 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.⁴⁵⁶ Licensees must also provide staff training to ensure consumers are directed towards counselling and/or other support initiatives.⁴⁵⁷ Miller recommends compliance with these provisions a prerequisite for licensees. The LCCP has done just that.⁴⁵⁸

⁴⁵⁰ Carran M (2013) at 515.

⁴⁵¹ LCCP part 2 SRCP 3.5.5.

⁴⁵² Nzimande S, Louw S & Manny C et al (2010) at 181.

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).

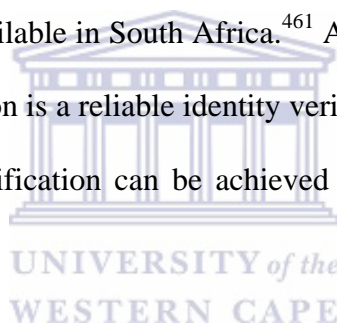
⁴⁵⁷ LCCP part 2 SRCP 3.4.1(1)(d) and 3.5.3(7).

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.⁴⁵⁹ 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.⁴⁶⁰

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.⁴⁶¹ 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.⁴⁶²



Zhang argues a different approach to regulation is necessary for the online environment.⁴⁶³ Legislators should begin using computer code to drive behaviour.⁴⁶⁴ 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.⁴⁶⁵

⁴⁵⁹ Liddell P, Watson S & Eshee W D et al (2004) at 350-351.

⁴⁶⁰ Liddell P, Watson S & Eshee W D et al (2004) at 349-351.

⁴⁶¹ Transunion 'Account Verification Services' available at <http://www.transunion.co.za/business/serviceSolutions/riskMgmt/accountVerifications.html> (accessed 8 August 2016), Experian 'Protect your business and proactively manage risk' available at <http://www.experian.co.za/decision-analytics/fraud/index.html> (accessed 8 August 2016) and Compuscan 'Account verification services' available at https://www.compuscan.co.za/wp-content/PDF/Info%20Sheet_Account%20Verification%20Services.pdf (accessed 8 August 2016).

⁴⁶² Transunion 'Account Verification Services' available at <http://www.transunion.co.za/business/serviceSolutions/riskMgmt/accountVerifications.html> (accessed 8 August 2016).

⁴⁶³ Zhang C 'Regulation of the Internet – New Laws & New Paradigms' (2016) 17 *Journal of Law, Information & Science* 53 at 55.

⁴⁶⁴ Zhang C (2016) at 56.

⁴⁶⁵ Liddell P, Watson S, Eshee, W & Moore (2004) at 351.

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

⁴⁶⁶ Gambling Commission (2010) at 30 and Nzimande S, Louw S & Manny C et al (2010) at 181.

⁴⁶⁷ Blankenship (2008) at 500.

⁴⁶⁸ Vener M (2009) at 2019.

⁴⁶⁹ Blankenship (2008) at 502.

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).⁴⁷⁰ The recent introduction of the Interactive Gambling Amendment Bill (IGAB)⁴⁷¹ 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 32nd edition.⁴⁷² Illustrating Australia has one of the largest gambling industries internationally.⁴⁷³ During the 2014-15 period Australians spent AUS\$10 481.83 *per capita* on legal forms of gambling.⁴⁷⁴ Despite the ubiquity of gambling in Australia, the prevalence of problem gamblers is on par with international standards.⁴⁷⁵ 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

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’).

⁴⁷² Queensland Government ‘Australian Gambling Statistics’ available at <http://www.qgso.qld.gov.au/products/reports/australian-gambling-stats/index.php> [accessed 29 March 2017].

⁴⁷³ Interactive Gambling Amendment Bill, explanatory memorandum (2016) at page 16 (hereinafter referred to as the ‘IGAB explanatory memorandum’).

⁴⁷⁴ Queensland Government ‘Australian Gambling Statistics Summary Tables’ (2014-2015) 32 ed page 2, the abovementioned AUS\$10 481.83, except in the case of sports betting, doesn’t include wagers on interactive gambling.

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.

⁴⁷⁷ Essa A (2004) at 92.

⁴⁷⁸ Essa A (2004) at 92.

⁴⁷⁹ IGA part 2 s 15(1).

⁴⁸⁰ Essa A 'The prohibition of online-casinos in Australia Is it working?' (2004) 4 *Queensland University of Technology, Law and Justice Journal* 88 at 92.

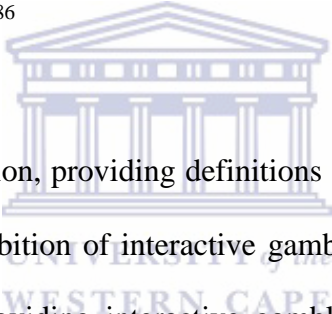
⁴⁸¹ Light R 'The Gambling Act 2005: Regulatory Containment and Market Control' (2007) 70 *Modern Law Review* 626 at 627.

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.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...’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.’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.⁴⁸⁶



Part 1 of the IGA acts as introduction, providing definitions and establishing its applicability.⁴⁸⁷ Parts 2 and 2A focus on the prohibition of interactive gambling services and offences.⁴⁸⁸ The criminalisation of intentionally providing interactive gambling services to persons physically present in Australia is the first offence created by this part.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.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

⁴⁸³ See generally IGA.

⁴⁸⁴ IGA Part 1 ss 5(1)(b)(i) and 4.

⁴⁸⁵ IGA Part 1 s 6(1)(b).

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.

⁴⁸⁷ IGA Contents and Part 1, see above paragraph.

⁴⁸⁸ IGA Part 2.

⁴⁸⁹ IGA Part 2 ss 15(1)(a)-(b) read with Part 1 s 8.

⁴⁹⁰ IGA Part 2 s 15(1)(a)-(b).

useful. The UK prohibits both the participation in and the provision of underage gambling facilities.⁴⁹¹ The IGA's prohibition, by contrast, lacks incentive for persons physically present in Australia to refrain from engaging in prohibited online gambling services.⁴⁹² South African legislation, which does prohibit interactive gambling, also criminalises engaging, conducting and/or providing unlicensed gambling activities.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.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.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.⁴⁹⁶ Personal information (if provided)⁴⁹⁷ as well as any network data information may also be considered.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.⁴⁹⁹

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').

⁴⁹² See generally IGA part 2 and 2A.

⁴⁹³ National Gambling Act 7 of 2004 s 8 (hereinafter referred to as the 'NGA').

⁴⁹⁴ IGA Part 2 s 15(1)(a) and Essa A (2004) at 91.

⁴⁹⁵ IGA Part 2 s 15(3).

⁴⁹⁶ IGA Part 2 s 15(4)(d).

⁴⁹⁷ IGA Part 2 s 15(4)(c).

⁴⁹⁸ IGA Part 2 s 15(4)(d).

⁴⁹⁹ Gottfried J 'The Federal Framework for Internet Gambling' (2004) 10 *Richmond Journal of Law and Technology* 1 at para 26.

The Australian population are eager and avid gamblers⁵⁰⁰ with a preference for sports betting.⁵⁰¹ In 2002, Datamonitor placed the sports betting market value at 40.8% of the online gambling market in Australia.⁵⁰² The prohibition contained in the IGA does not extend to an interactive gambling service whereby consumers bet on sporting events,⁵⁰³ provided the event has not already begun when the bet is placed.⁵⁰⁴ Allowing interactive sports betting but not in-play⁵⁰⁵ 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.⁵⁰⁶

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

⁵⁰⁰ Essa A (2004) at 92.

⁵⁰¹ Datamonitor 'Market Profile: Australian Online Gambling' (2002) at 4.

⁵⁰² Datamonitor (2002) at 4.

⁵⁰³ IGA Part 1 s 8A(1)(a)(iv).

⁵⁰⁴ IGA Part 1 ss 8A(2)(a)-(b).

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...' IGAB Part 1 s 32 (10B(a)).

⁵⁰⁶ Miller K 'The Utility and Limits of Self-exclusion Programs' (2016) 6 *UNLV Gaming Law Journal* 29 at 51.

⁵⁰⁷ IGA Part 3 s 16(1).

⁵⁰⁸ IGA Part 3 s 16(1).

⁵⁰⁹ IGA Part 3 s 21(1).

⁵¹⁰ IGA Part 3 s 24(1)(a)-(c).

⁵¹¹ IGA Part 3 s 21(1).

In addition to these investigative powers, the ACMA is entitled to set industry standards.⁵¹² 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.⁵¹³ The ACMA makes use of the scheme to inform internet service providers of websites offering prohibited interactive gambling services.⁵¹⁴ The IGA requires the provider to take all reasonable steps to prevent end-users from accessing such content.⁵¹⁵ The internet service provider may be notified of this content by way of the abovementioned scheme or by the ACMA itself.⁵¹⁶

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.⁵¹⁷ Section 39 of the IGA empowers the ACMA to request the abovementioned group provide it with an industry code.⁵¹⁸ If no industry code is provided thereafter or if the code provided is deficient, the ACMA may set an industry standard.⁵¹⁹ If, on the other hand, the industry code is satisfactory the ACMA will register and keep a copy of it.⁵²⁰

Part 5 of the IGA deals with enforcing the above industry codes and standards.⁵²¹ Section 54(1) of the IGA creates online provider rules.⁵²² These rules relate to contraventions of access

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 s39(1)(a).

⁵¹⁹ IGA Part 4 ss 46 -47 and 44.

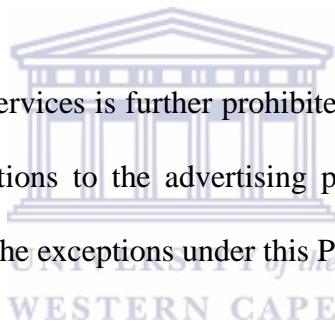
⁵²⁰ IGA Part 4 s 53(1)(a)-(e).

⁵²¹ *See generally* IGA Part 5.

⁵²² IGA Part 5 s 54(1).

prevention notices,⁵²³ industry codes⁵²⁴ and standards.⁵²⁵ Contraventions of an industry code or standard - regarding notices of prohibited internet gambling content⁵²⁶ are dealt with in two ways.⁵²⁷ Internet service providers may implement a designated alternative access prevention arrangement.⁵²⁸ This arrangement will then be implemented in lieu of compliance with the abovementioned notice.⁵²⁹ If no designated alternative access prevention arrangement exists the IGA allows for written directions from the ACMA requiring that internet service providers comply.⁵³⁰ If the internet service provider continues to be uncooperative,⁵³¹ 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.⁵³²

Advertising interactive gambling services is further prohibited under Part 7 of the IGA.⁵³³ 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.⁵³⁴



2.2. Interactive Gambling Amendment Bill (IGAB)

The IGAB was introduced on 10 November 2016⁵³⁵ as a result of a review of the prohibited interactive gambling market and its impact.⁵³⁶ A large portion of the IGAB is dedicated to

⁵²³ IGA Part 5 ss 54(a)-(b) read with Part 3 ss 28(1)-(2).

⁵²⁴ IGA Part 5 s 54(c) read with Part 4 s 42(2).

⁵²⁵ IGA Part 5 s 54(d) read with Part 4 ss 48(a)-(b).

⁵²⁶ IGA Part 4 s 37(3) read with ss 24(1)(b) and 26.

⁵²⁷ IGA Part 5 ss 56, 59(1)-(2) and Part 4 s 37(3).

⁵²⁸ IGA Part 4 s 37(3).

⁵²⁹ IGA Part 4 s 37(4).

⁵³⁰ IGA Part 5 s 56(2).

⁵³¹ It should be noted that non-compliance with a section 56(2) direction is not a precondition for the application mentioned below. IGA Part 5 ss 56, 57 and 59.

⁵³² IGA Part 5 s 59(1)-(2).

⁵³³ IGA Part 7A ss 61DA(1)-(2) 61EA(1)-(2).

⁵³⁴ IGA 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.⁵³⁷ 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.⁵³⁸

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,⁵³⁹ greatly simplifying complaints procedures. Another welcome substantive change is the introduction of civil penalty provisions.⁵⁴⁰ These apply to contraventions of the prohibition on interactive gambling services, the internet service provider rules, as well as the advertising prohibition.⁵⁴¹ The civil penalty provisions empower the ACMA to bring a court application for the award of a monetary penalty.⁵⁴² Interestingly, section 64B(4) appears to be an attempt to extend this punitive power outside Australia's borders.⁵⁴³

⁵³⁵ Parliament of Australia 'Interactive Gambling Amendment Bill 2016' available at http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5755 [accessed 9 June 2017].

⁵³⁶ IGAB Explanatory Memorandum Outline page 1.

⁵³⁷ IGAB Explanatory Memorandum at 2.

⁵³⁸ IGAB Part 1 ss 8, 9, 19-23A.

⁵³⁹ IGAB Part 1 s 51, IGA Part 3 s 16(1)-(2) and IGAB Explanatory Memorandum at 2.

⁵⁴⁰ IGAB Part 1 s 139.

⁵⁴¹ IGAB Part 1 s 139 (64A(a)-(i)).

⁵⁴² IGAB Part 1 s 139 (64B(1)-(2)).

⁵⁴³ IGAB Part 1 s 139 (64B(4)).

The review that gave rise to the IGAB did not focus on the prohibition model itself.⁵⁴⁴ 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.⁵⁴⁵ While it acknowledged the enforcement failures of the IGA, the review report did not recommend expanding the scope of services available.⁵⁴⁶ Puzzlingly, this was notwithstanding finding that one of the key factors driving Australian consumers to offshore operators is a wider range of products.⁵⁴⁷ The Government in its response to the review acknowledged that the enforcement measures within the IGA were ‘ineffective and outdated’.⁵⁴⁸

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.⁵⁴⁹ The Government agreed with this recommendation and has made provision for the ACMA to share information with international regulators and extend their investigative powers.⁵⁵⁰

The IGAB amendments are based on the expectation that a robust regulatory regime will significantly minimise illegal offshore wagering.⁵⁵¹ This is the outcome achieved in both the UK and France.⁵⁵² 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

⁵⁴⁴ MP O’Farrell B, ‘Review of Illegal Offshore Wagering, Terms of reference’ (2015) at 2 and Essa A (2004) at 98.

⁵⁴⁵ MP O’Farrell B ‘Review of Illegal Offshore Wagering’ (2015) at 2.

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.

⁵⁴⁷ MP O’Farrell B (2015) at 96.

⁵⁴⁸ Australian Government ‘Response Government Response to the 2015 Review of the Impact of Illegal Offshore Wagering’ (2016) at 3.

⁵⁴⁹ MP O’Farrell B (2015) at 16 and 159.

⁵⁵⁰ Australian Government (2016) at 12, recommendation 17 and IGAB Explanatory Memorandum (2016) at 2.

⁵⁵¹ Australian Government (2016) at 6.

⁵⁵² Australian Government (2016) at 3 and 12 and MP O’Farrell B (2016) at 75-76.

decrease in illegal operators.⁵⁵³ 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.'⁵⁵⁴ 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,⁵⁵⁵ with its dedicated regulatory body (the Gambling Commission)⁵⁵⁶ and well-funded regulatory regime, against the prohibitive approach of the Australian government.⁵⁵⁷ The lack of a dedicated regulatory body is another concern raised by the review.⁵⁵⁸ 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.⁵⁵⁹

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.⁵⁶⁰ The 2010 review as requested by Australian government furthermore recommended the

⁵⁵³ Australian Government (2016) at 75.

⁵⁵⁴ MP O'Farrell (2015) at 75.

⁵⁵⁵ MP O'Farrell (2015) at 74.

⁵⁵⁶ See Chapter 3 above.

⁵⁵⁷ Gambling Review Commission (2010) at 23-24.

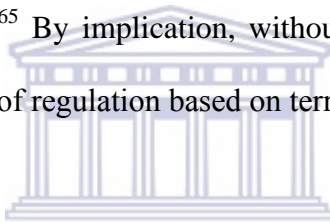
⁵⁵⁸ MP O'Farrell (2015) at 105.

⁵⁵⁹ MP O'Farrell (2015) at 75.

⁵⁶⁰ MP O'Farrell (2015) at 177-178.

implementation of robust responsible gambling policies.⁵⁶¹ 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.⁵⁶² These impediments contribute to the possibility of regulatory failure.⁵⁶³ To maintain authority the law must be capable of enforcement.⁵⁶⁴ Zhang argues that - much like Antarctica, outer space and international seas - the internet is a unique shared international environment.⁵⁶⁵ By implication, without adapting to and allowing for the internet's nature, existing methods of regulation based on territoriality (land) will fail.⁵⁶⁶



3.1. The borderless and anonymous nature of the Internet

The anonymous and borderless nature of the internet presents unique difficulties for regulators.⁵⁶⁷ 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.⁵⁶⁸ Unscrupulous service providers may also benefit. Without the threat of recourse there is an incentive for

⁵⁶¹ MP O'Farrell (2015) at 177-178.

⁵⁶² Each impediment will be discussed in greater detail below.

⁵⁶³ Mcallister L (2012) at 2.

⁵⁶⁴ Zhang C (2006) at 54.

⁵⁶⁵ Zhang C (2006) at 73.

⁵⁶⁶ Zhang C (2006) at 54.

⁵⁶⁷ Loscalzo T & Shapiro S 'Internet Gambling Policy Prohibition versus Regulation' (2000) 7 *Villanova Sports and Entertainment Law Journal* 11 at 13 – 14, Gainsbury S (2012) at 4.

⁵⁶⁸ Gottfried J 'The federal framework for Internet gambling' (2004) 10 issue 3 *Richmond Journal of Law and Technology* 1 at para 24, 33 and 38.

operators to defraud consumers.⁵⁶⁹ This anonymity further allows enforcement efforts to be evaded by simply relocating to a liberal jurisdiction or ‘disappearing.’⁵⁷⁰

Technological innovations in the area of online privacy⁵⁷¹ and the increasing popularity of cryptocurrencies,⁵⁷² exacerbates the difficulties facing regulators.⁵⁷³ Identity verification, however, is increasingly a cost-effective and reliable cure for the anonymity issue.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.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.’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 environment⁵⁷⁷

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.

⁵⁷⁰ Gottfried J (2004) at 16 and Essa A (2004) at 93.

⁵⁷¹ Essa A (2004) at 94.

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.

⁵⁷³ Boto A (2013) at 36.

⁵⁷⁴ See Chapter 3 above.

⁵⁷⁵ Devaney M ‘Online Gambling and International Regulation an outside bet’ (2009) 18 issue 3 *Information & Communications Technology Law* 273 at 274 and MP O’Farrell (2015) at 72.

⁵⁷⁶ Alexander G (2008) at 19.

⁵⁷⁷ Alexander G (2008) at 19.

This inconsistency results in unscrupulous service providers flouting prohibitions. Considering themselves beyond the enforcement capabilities of national governments.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.⁵⁷⁹

3.3. 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.⁵⁸⁰ The reality of dwindling regulatory resources in the public sector further contributes to this deficiency.⁵⁸¹ Regulatory measures such as identity verification can be privatised relatively hassle-free.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’.⁵⁸³ Cryptocurrencies and e-wallets⁵⁸⁴ add even more to the evidentiary load of struggling regulators.⁵⁸⁵

⁵⁷⁸ MP O’Farrell B (2015) at 107.

⁵⁷⁹ MP O’Farrell B (2015) at 109.

⁵⁸⁰ Australian Government (2016) at 3.

⁵⁸¹ Mcallister L (2012) at 2.

⁵⁸² Mcallister L (2012) at 2.

⁵⁸³ Pfeffer J ‘Your digital footprint What is it & How you can manage it?’ Rasmussen College 21 October 2014 available at <http://www.rasmussen.edu/student-life/blogs/main/your-digital-footprint/> [accessed 5 April].

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].

⁵⁸⁵ Alexander G (2008) at 14.

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

⁵⁸⁶ Kelly J ‘Internet Gambling Law’ (2000) 26 *William Mitchell Law Review* 125.

⁵⁸⁷ Shapiro S & Loscalzo T (2000) at 27.

⁵⁸⁸ Shapiro S & Loscalzo T (2000) at 18 and Kelly J (2000) at 175.

⁵⁸⁹ Shapiro S & Loscalzo T (2000) at 19 and 20.

⁵⁹⁰ Shapiro S & Loscalzo T (2000) at 19 -20.

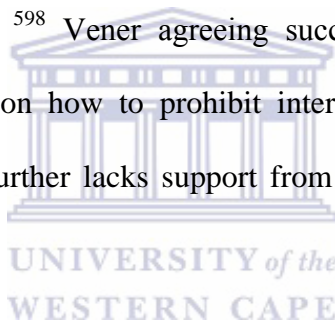
⁵⁹¹ Shapiro S & Loscalzo T (2000) at 19 - 20.

⁵⁹² Shapiro S & Loscalzo T (2000) at 20 and Kelly J (2000) at 175.

⁵⁹³ Essa A (2004) at 88-89.

maintain the complete prohibition.⁵⁹⁴ 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...’⁵⁹⁵

Bogardus reiterates the position of the above authors confirming that a total prohibition merely encourages the black market,⁵⁹⁶ echoing the concerns of Shapiro and Loscalzo regarding unscrupulous operators.⁵⁹⁷ 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.⁵⁹⁸ Vener agreeing succinctly states ‘[a] rational internet gambling policy must not focus on how to prohibit internet gambling it simply cannot be done.’⁵⁹⁹ The prohibition model further lacks support from a law enforcement perspective, as noted by Griffiths.⁶⁰⁰



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.⁶⁰¹ As mentioned above, the growth of popularity in using cryptocurrencies has further complicated prohibition attempts.⁶⁰²

⁵⁹⁴ Nzimande S, Louw S & Manny C et al ‘Review of the South African gambling industry and its regulation’ (2010) *Gambling Review Commission* at 181.

⁵⁹⁵ Nzimande S, Louw S & Manny C et al (2010) at 181.

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

⁵⁹⁷ Shapiro S & Loscalzo T (2000) at 19 -20.

⁵⁹⁸ Bana A ‘Online Gambling: An appreciation of legal issues’ (2011) *Business Law International* at 343.

⁵⁹⁹ Vener D ‘Internet Gambling Law Is Prohibition really good policy?’ (2009) 15 *Southwestern Journal of Law and Trade in the Americas* 199 at 216.

⁶⁰⁰ Griffiths M D ‘Internet Gambling and Crime’ (2000) 73 *The Police Journal* 25 at 29.

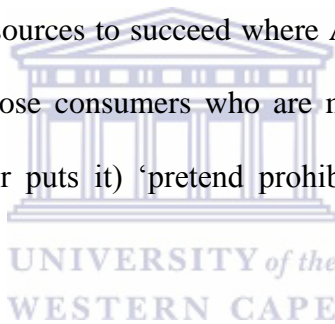
⁶⁰¹ Craig A ‘Gambling on the Internet’ (1998) *Computer Law Review and Technology Journal* 61 at 102.

⁶⁰² MP O’Farrell (2015) at 4 and Alexander G (2008) at 14.

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.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.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.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.’⁶⁰⁶



Valuable and meaning 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.

⁶⁰⁴ Vener D (2009) at 216 and MP O’Farrell B (2015) at 109.

⁶⁰⁵ Kelly J (2000) at 175, Alexander G (2008) at 16-18 and 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.⁶⁰⁷ The internet has irrevocably changed both commercial and social spheres of everyday life.⁶⁰⁸ It enables the traversing of traditional terrestrial borders with ease and speed.⁶⁰⁹ It ‘defies traditional, border-based sovereign control by states,’ presenting new challenges for regulators and law enforcement officials.⁶¹⁰

Zhang argues a new approach to regulation should be developed to address the above deficiencies.⁶¹¹ 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.⁶¹² The internet has certainly bred new crimes,⁶¹³ though existing crimes have also found ways to use it advantageously.⁶¹⁴ One of the most pertinent examples of such a crime is that of money laundering.⁶¹⁵ Money launderers are keen to add an international element to their crimes, and the borderless nature of the internet creates new opportunities for exploitation.⁶¹⁶

⁶⁰⁷ See chapter 4.

⁶⁰⁸ Zhang C ‘Regulation of the Internet – New Laws & New Paradigms’ (2006) 17 *Journal of Law Information and Science* 53 at 53-4.

⁶⁰⁹ Zhang C (2006) at 70 and Gottfried J ‘The Federal Framework for Internet Gambling’ (2004) 10 issue 3 *Richmond Journal of Law & Technology* 1 at para 20.

⁶¹⁰ Zhang C (2006) at 53&70.

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.

⁶¹³ Zhang C (2006) at 54.

⁶¹⁴ Millard D & Vergano V ‘Hung out to Dry? Attorney-Client Confidentiality and the Reporting Duties imposed by the Financial Intelligence Centre Act 38 of 2001’ (2013) 34 *Obiter* 389 at 393 and Unger B ‘What is Money Laundering?’ *Black Finance: The Economics of Crime* Edward Elger, Cheltenham at (2007) 144.

⁶¹⁵ Trehan J ‘Mechanics and Typologies of Money Laundering – The Indian Perspective’ (2004) Kluwer Law International, The Hague/ London/New York 103 at 110.

⁶¹⁶ Trehan J (2004) at 110.

As briefly introduced in chapter one, the relationship between online gambling and crime is a universal concern,⁶¹⁷ in particular the crime of money laundering through online casinos.⁶¹⁸ 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.⁶¹⁹ 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.⁶²⁰ Whilst this submission certainly has merit there are a number of potentially fatal impediments.⁶²¹ 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.⁶²² The process typically takes place in three phases.⁶²³

Placement is the first phase during which the economic fruits of criminal activities are injected

⁶¹⁷ Liddell P, Watson S, Eshee, W & Moore R 'Internet Gambling on a Roll?' (2004) 28 *Seton Hall Legislative Journal* 315 at 344.

⁶¹⁸ Unger B (2007) 134.

⁶¹⁹ Bana A 'Online Gambling – An Appreciation of Legal Issue' (2011) 12 *Business Law International* 335 at 336.

⁶²⁰ Devaney M 'Online gambling and International Regulation: an outside bet' (2009) 18 *Information & Communications Technology Law* 273 at 273.

⁶²¹ Bana A (2011) at 336.

⁶²² Unger B (2007) at 105.

⁶²³ Unger B (2007) at 104.

into the legitimate economy.⁶²⁴ Next, during the Layering phase, the origin of those fruits is deliberately hidden,⁶²⁵ although this process may take varying forms the aim is always concealment.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.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.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.⁶²⁹ Casinos have in the past provided criminals with a one-stop-shop to place, layer and integrate their funds simultaneously.⁶³⁰ Adding an international element to this particular mode of money laundering was, however, particularly difficult until the emergence of online gambling.⁶³¹

Proponents of online gambling prohibition submit that online gambling coupled with increasing consumer confidence and the prevalence of electronic payment systems⁶³² provides an easy avenue for money launderers to exploit.⁶³³ This argument may hold water in respect of the black

⁶²⁴ Unger B (2007) at 104 and Millard D & Vergano V (2013) at 392.

⁶²⁵ Unger B (2007) at 104-105 and Millard D & Vergano V (2013) at 392.

⁶²⁶ Schendther B 'Is the South African effort toward reducing money laundering optimal?' (2014) 17 *Journal of Money Laundering Control* 17 at 20.

⁶²⁷ Unger B (2007) at 104-105 and Millard D & Vergano V (2013) at 392-393.

⁶²⁸ Schendther B (2014) at 18.

⁶²⁹ Trehan J (2004) at 110.

⁶³⁰ Unger B (2007) at 133 and Trehan J (2004) at 105.

⁶³¹ Unger B (2007) at 134.

⁶³² Unger B (2007) at 146 and Gainsbury S 'Internet Gambling and Pathological Gambling' (2013) *The Wiley Blackwell Handbook on Pathological Gambling* 361 at 367.

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.’⁶³⁴

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.⁶³⁵ Secondly, the objective of the money launderer is to conceal the origin of their funds.⁶³⁶ Gottfried suggests regulating online gambling provides the opportunity to track every transaction a consumer makes.⁶³⁷ Thereby making online gambling an unattractive option for money launderers attempting to conceal the origin of their funds.⁶³⁸ 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.⁶³⁹

Notwithstanding the above, the threat posed by the relationship between online gambling and money laundering should not be underestimated.⁶⁴⁰ 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.⁶⁴¹ An identification rich online environment would obstruct the concealment of transactions.⁶⁴² Given

⁶³⁴ Craig A ‘Gambling on the Internet’ (1998) 1 *Computer Law Review & Technology Journal* 61 at 70.

⁶³⁵ Unger B (2007) at 133.

⁶³⁶ Schlendther B (2014) at 20.

⁶³⁷ Gottfried J (2004) at para 25.

⁶³⁸ Gottfried J (2004) at para 25.

⁶³⁹ Gottfried J (2004) at para 25.

⁶⁴⁰ Zhang C (2006) at 70.

⁶⁴¹ Zhang C (2006) at 68.

⁶⁴² Schlendther B (2014) at 20.

that the purpose of money laundering is to disguise the illicit source of funds,⁶⁴³ online casinos would become an unattractive option for money launderers as a result.⁶⁴⁴

The above approach cannot succeed in isolation. It should be coupled with national legislation and international agreements.⁶⁴⁵ Effective regulation of online gambling may be possible through this extra jurisdictional approach.⁶⁴⁶ National and international regulation has proved successful in combatting money laundering as regulated by the inter-governmental Financial Action Task Force (FATF).⁶⁴⁷

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.⁶⁴⁸ These policies are contained within the FATF recommendations.⁶⁴⁹ 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-cooperative countries and territories list (NCCT list) is published by the FATF.⁶⁵⁰ Being named on the NCCT list acts as a deterrent for potential investors.⁶⁵¹ In this way the FATF along with the 180 countries who have endorsed the recommendations ensure, encourage and foster compliance.⁶⁵²

⁶⁴³ Schlendther B (2014) at 20 and Gottfried J (2004) at para 25.

⁶⁴⁴ Gottfried J (2004) at para 25.

⁶⁴⁵ Gottfried (2004) at para 25 and Zhang C (2006) at 68.

⁶⁴⁶ Zhang C (2006) at 68 and Gottfried (2004) at para 25.

⁶⁴⁷ FATF Recommendations at 1.

⁶⁴⁸ FATF Recommendations at 1.

⁶⁴⁹ FATF Recommendations at 7.

⁶⁵⁰ Tuba D, 'Prosecuting Money Laundering the FATF way: An Analysis of Gaps and Challenges in South African Legislation from a Comparative Perspective' (2012) 2 *Acta Criminologica: Southern African Journal of Criminology* 103 at 106.

⁶⁵¹ Tuba D (2012) at 106-107.

⁶⁵² FATF Recommendations at 7.

Compliance with the FATF recommendations is monitored by way of self-evaluations and mutual evaluations between member countries.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.⁶⁵⁴

As mentioned above, the threat of money laundering from a licensed and regulated online gambling market is often grossly overstated.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.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.⁶⁵⁷ One of the pivotal impediments to the international regulation of online gambling is the divergent jurisdictional approaches.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

⁶⁵³ Moshi HPB, 'Fighting Money Laundering The challenges in Africa' (2007) *Institute for Security Studies* paper 152 at 4.

⁶⁵⁴ Moshi HPB (2007) at 6.

⁶⁵⁵ Gottfried J (2004) at para 25.

⁶⁵⁶ Zhang C (2006) at 68 and Gottfried (2004) at para 25.

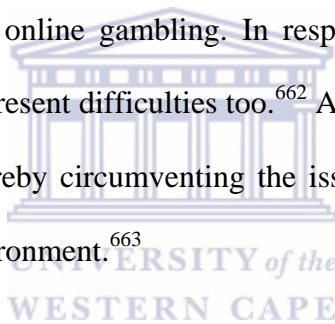
⁶⁵⁷ Zhang C (2006) at 74.

⁶⁵⁸ Bana A (2011) at 342.

jurisdictions.⁶⁵⁹ Notwithstanding this commonality the FATF recommendations still recognise and make provision for jurisdictional differences because of criminal justice systems.⁶⁶⁰ The recommendations provide a standard for anti-money laundering measures. How these standards are implemented is, however, up to each jurisdiction.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.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.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 model⁶⁶⁴ whilst others have accepted the inevitability of online gambling and regulated it instead.⁶⁶⁵ An international convention may still provide the best hopes of overcoming the difficulties created by the divergent approaches mentioned above and the

⁶⁵⁹ FATF Recommendations at 7.

⁶⁶⁰ Tuba D (2004) at 107 and FATF Recommendations at 7.

⁶⁶¹ FATF Recommendations at 7.

⁶⁶² Devaney M (2009) at 274.

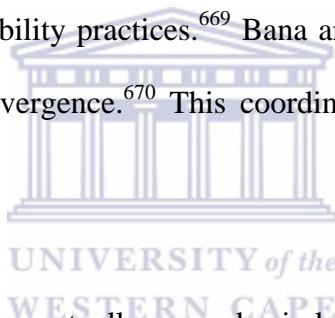
⁶⁶³ Zhang C (2006) at 70.

⁶⁶⁴ Liddell P, Watson S & Eshee W D et al (2004) at 347, Gambling Review Commission (2010) at 30 and Nzimande S, Louw S & Manny C et al (2010) at 177 and 182.

⁶⁶⁵ Gambling Review Commission (2010) at 30.

borderless nature of the internet.⁶⁶⁶ 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.⁶⁶⁷

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.⁶⁶⁸ 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.⁶⁶⁹ Bana argues it would first be necessary to coordinate the abovementioned divergence.⁶⁷⁰ This coordination may however violate one or more jurisdiction's sovereignty.⁶⁷¹



A forced cultural convergence may eventually occur due in large part to the declining practicality of maintaining a complete prohibition in a global marketplace.⁶⁷² Until then a compromise involving cooperation may present the best practical alternative.⁶⁷³ 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.⁶⁷⁴

⁶⁶⁶ Miller K 'How should the past inform the future? Reviewing Regulating Internet Gambling Challenges and Opportunities' (2014) 5 *UNLV Gaming Law Journal* 49 at 72.

⁶⁶⁷ Miller K (2014) at 73.

⁶⁶⁸ Bana A (2011) at 338, 342-343.

⁶⁶⁹ Bana A (2011) at 338, 342-343.

⁶⁷⁰ Bana A (2011) at 342.

⁶⁷¹ Blankenship M 'The Unlawful Internet Gambling Enforcement: A Bad Gambling Act? You Betcha' (2008) 60 *Rutgers Law Review* 486 at 499, in much the same way the 'impenetrable shield of sovereignty' is an impediment to the prohibition model at 499.

⁶⁷² Devaney M (2009) at 276.

⁶⁷³ Gambling Commission (2010) at 21.

⁶⁷⁴ Miller k (2014) at 72-73.

3.1. The United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce

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.⁶⁷⁵ The Model Law on Electronic Commerce has been adopted in 69 jurisdictions.⁶⁷⁶ South Africa has done so through the Electronic Communications and Transactions Act (ECTA).⁶⁷⁷

The purpose of the Model Law on Electronic Commerce is to provide uniformity and legal certainty.⁶⁷⁸ Currently electronic communications are the norm in respect of international commerce.⁶⁷⁹ Thus the Model Law is an effort to harmonise differing jurisdictional approaches, thereby facilitating international trade and economic prosperity.⁶⁸⁰ The above objectives are echoed by ECTA, South Africa's legislative implementation of the Model Law.⁶⁸¹ ECTA recognises the value of electronic communications particularly in relation to 'the economic and social prosperity of the Republic'.⁶⁸² As discussed in Chapter two, the South African economy

⁶⁷⁵ United Nations Commission on International Trade Law (hereinafter referred to as 'UNCITRAL') Model Law on Electronic Commerce 1997 (1997) 36 I.L.M. 197.

⁶⁷⁶ UNCITRAL 'Status UNCITRAL Model Law on Electronic Commerce' UNCITRAL available at http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html [accessed 4 June 2017].

⁶⁷⁷ Electronic Communications and Transactions Act 25 of 2002 (hereinafter referred to as 'ECTA') and UNCITRAL 'Status UNCITRAL Model Law on Electronic Commerce' UNCITRAL available at http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html [accessed 4 June 2017].

⁶⁷⁸ UNCITRAL Model Law on Electronic Commerce 1997 (1997) 36 I.L.M. 197 at 1-2.

⁶⁷⁹ UNCITRAL Model Law on Electronic Commerce 1997 (1997) 36 I.L.M. 197 at 1.

⁶⁸⁰ UNCITRAL Model Law on Electronic Commerce 1997 (1997) 36 I.L.M. 197 at 2.

⁶⁸¹ ECTA s 2(1).

⁶⁸² ECTA s 2(1)(a).

has shown little growth since the 2006 record setting low.⁶⁸³ Consequently, the importance of the information economy is particularly relevant.⁶⁸⁴

The Model Law is intended as a guideline for legislators.⁶⁸⁵ Variations may be necessary for its implementation in different jurisdictions.⁶⁸⁶ The Model Law is thus accompanied by an enactment guide intended to contextualise the interpretation and implementation of the former provisions.⁶⁸⁷ The Enactment guide confirms the recognition and implementation of the principle of functional equivalence.⁶⁸⁸ Briefly functional equivalence focuses on the function or purpose, rather than the medium.⁶⁸⁹ 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.⁶⁹⁰

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.⁶⁹¹ 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.’⁶⁹² Put differently the electronic functional equivalent should not be discriminated against purely because it is in an electronic form.

⁶⁸³ Taborda J ‘South Africa GDP Annual Growth Rate’ Trading Economics available at <https://tradingeconomics.com/south-africa/gdp-growth-annual> [accessed 4 June 2017].

⁶⁸⁴ ECTA s 2(1)(a).

⁶⁸⁵ UNCITRAL Model Law on Electronic Commerce 1997 (1997) 36 I.L.M. 197 at 1-2, 15 & 19 and UNCITRAL ‘Status UNCITRAL Model Law on Electronic Commerce’ UNCITRAL available at http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html [accessed 4 June 2017].

⁶⁸⁶ UNCITRAL Model Law on Electronic Commerce 1997 (1997) 36 I.L.M. 197 at 1-2, 15 & 19.

⁶⁸⁷ UNCITRAL Model Law on Electronic Commerce 1997 (1997) 36 I.L.M. 197 at 15.

⁶⁸⁸ UNCITRAL Model Law on Electronic Commerce 1997 (1997) 36 I.L.M. 197 at 20.

⁶⁸⁹ UNCITRAL Model Law on Electronic Commerce 1997 (1997) 36 I.L.M. 197 at 20.

⁶⁹⁰ UNCITRAL Model Law on Electronic Commerce 1997 (1997) 36 I.L.M. 197 at 1-2, 19-20.

⁶⁹¹ UNCITRAL Model Law on Electronic Commerce 1997 (1997) 36 I.L.M. 197 article 5.

⁶⁹² UNCITRAL Model Law on Electronic Commerce 1997 (1997) 36 I.L.M. 197 article 5.

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.⁶⁹³ 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.⁶⁹⁴ The EU indicated the earlier regime was excessive and inconsistent with the objectives sought by the French.⁶⁹⁵ 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.⁶⁹⁶

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.

⁶⁹³ 'Status UNCITRAL Model Law on Electronic Commerce' UNCITRAL available at http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html [accessed 4 June 2017].

⁶⁹⁴ Boto A 'A New Legislative Framework for Online Gaming in Spain' (2013) 4 *UNLV Gaming Law Journal* 11 at 33.

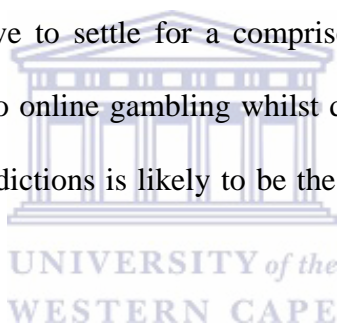
⁶⁹⁵ Boto A (2013) at 33.

⁶⁹⁶ Gainsbury S (2012) at 56.

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 jurisdiction's 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.

⁶⁹⁹ Loscalzo T & Shapiro S ‘Internet Gambling Policy Prohibition versus Regulation’ (2000) 7 *Villanova Sports and Entertainment Law Journal* 11 at 13 – 14.

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.

⁷⁰³ Craig A 'Gambling on the Internet' (1998) *Computer Law Review and Technology Journal* 61 at 65.

⁷⁰⁴ Gottfried J 'The federal framework for Internet Gambling' (2004) 10 issue 3 *Richmond Journal of Law & Technology* 1 at para 9.

⁷⁰⁵ Bana A 'Online Gambling – An Appreciation of legal issue' (2011) 12 *Business Law International* 335 at 336.

⁷⁰⁶ Gainsbury S *Internet Gambling Current Research Findings and Implications* (2012) at 5.

⁷⁰⁷ MP O'Farrell B 'Review of Illegal Offshore Wagering' (2015) at 149.

⁷⁰⁸ Gambling Review Commission 'International Study of Gambling Jurisdiction' (2010) at 7.

⁷⁰⁹ MP O'Farrell B (2015) at 150.

This deficit is exacerbated by issues regarding the independence and reliability of quantitative studies in the field.⁷¹⁰ There are outstanding issues regarding definitions and methodologies that further hamper the collection and verification of the abovementioned vital research and evidence.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.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.⁷¹³ The characteristically fast paced technological advancement of the industry often creates difficulty

⁷¹⁰ Eggert K 'Truth in Gaming Truth in the Gambling Industry towards Consumer Protection' (2004) 63 issue 2 *Maryland Law Review* 217 at 228-229.

⁷¹¹ Eggert K (2004) at 229.

⁷¹² MP O'Farrell (2015) at 143.

⁷¹³ Loscalzo T & Shapiro S 'Internet Gambling Policy Prohibition vs Regulation' (2000) 7 *Villanova Sports & Entertainment Law Journal* 11 at 13.

for slow moving legislatures who cannot keep up with the new developments.⁷¹⁴ This fast paced development can also be advantageous as inexpensive, reliable and efficient identity (and age) verification systems are now readily available for example.⁷¹⁵

The implementation of an effective identity verification system is a common feature of regulatory regimes that allow online gambling.⁷¹⁶ Global and market trends show that online casinos will implement the prescribed safeguards in return for the legitimacy (and marketing advantage) licensing provides.⁷¹⁷

The unlicensed black market has, however, no incentive to implement these safeguards.⁷¹⁸ This black market typically flourishes through prohibition.⁷¹⁹ Commercial pressure due in part to consumer preference for licensed competitors may yet succeed where law has failed.⁷²⁰ Effectively forcing unlicensed operators from the market,⁷²¹ With the consequence that underage gamblers searching for an opportunity to gamble online would be met with ever increasing difficulty.⁷²²

⁷¹⁴ Gainsbury S 'Internet Gambling and Pathological Gambling' (2013) *The Wiley Blackwell Handbook on Pathological Gambling* 361 at 362.

⁷¹⁵ Blankenship M 'The Unlawful Internet Gambling Act A Bad Gambling Act? You Betcha' (2008) 60 issue 2 *Rutgers Law Review* 486 at 504 and Vener M 'Internet Gambling Law Is Prohibition really good policy?' (2008) 15 *Southwestern Journal of Law & Trade in the Americas* 199 at 219.

⁷¹⁶ Gainsbury S (2013) at 366.

⁷¹⁷ Vener M (2008) at 218.

⁷¹⁸ Gainsbury S (2013) at 366.

⁷¹⁹ Thompson B 'Internet Gambling' (2001) 2 issue 1 *North Carolina Journal of Law & Technology* 81 at 102, 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 para 43 and Craig A (1998) at 102.

⁷²⁰ Vener M (2008) at 217.

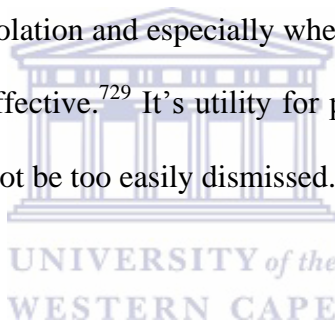
⁷²¹ Loscalzo T & Shapiro S (2000) at 24.

⁷²² Loscalzo T & Shapiro S (2000) at 23.

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 It's 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

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.

⁷²⁶ Essa A 'The prohibition of online-casinos in Australia – Is it working?' (2004) 4 *Queensland University of Technology, Law and Justice Journal* 88 at 93 and Craig A (1998) at 98.

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.

⁷²⁹ MP O'Farrell (2015) at 114, Gottfried (2004) at para 74 to 77 and Gainsbury S (2013) at 374.

⁷³⁰ Craig A (1998) at 77.

⁷³¹ Alexander G (2008) at para 6 and Essa A (2004) at 92.

⁷³² Alexander G (2008) at para 6, Gainsbury S (2013) at 366 and Liddell P, Watson S & Eshee W 'Internet Gambling on a roll?' (2004) 28 issue 2 *Seton Hall Legislative Journal* 315 at 340.

can be used for the purposes of identity (age) verification.⁷³³ A reasonable and economically competitive limitation on the number and / or types of payment methods available creates a stumbling block for underage gamblers.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.⁷³⁵ The recent emergence of cryptocurrencies is an example of this.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.⁷³⁷ A consumer requesting a self-exclusion period is essentially asking the (online) casino to bar them from gambling.⁷³⁸ There is evidence of the therapeutic benefit of these programs.⁷³⁹ This benefit is dependent on a number of factors primarily the successful enforcement of the requested exclusion.⁷⁴⁰

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

⁷³³ MP O'Farrell (2015) at 5 and Gottfried J (2004) at para 39.

⁷³⁴ Loscalzo T & Shapiro S (2000) at 19 and 23.

⁷³⁵ Liddell P, Watson S & Eshee W (2004) at 325 and Blankenship M (2008) at 503.

⁷³⁶ MP O'Farrell (2015) at 4 and Alexander G (2008) at 14.

⁷³⁷ Miller K 'The Utility and Limits of self-exclusion programs' (2016) 6 *UNLV Gaming Law Journal* 29 at 49.

⁷³⁸ Antolak-Saper N 'The legal effect of voluntary self-exclusion programs for problem gamblers' (2010) 15 *Deakin Law Review* 169 at 171.

⁷³⁹ Miller K (2016) at 31.

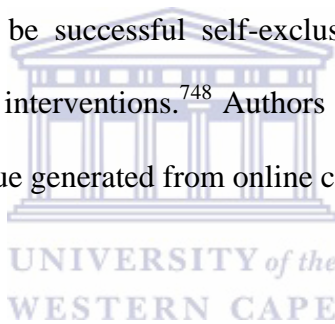
⁷⁴⁰ Antolak-Slaper (2010) at 171-172.

⁷⁴¹ Miller K (2016) at 40.

entering the casino based on a system of observation by the casinos employees.⁷⁴² Naturally having more than one entrance to the casino exacerbates this issue.⁷⁴³ Bottlenecking consumers into a single entrance as an alternative is not acceptable to most fire departments or casinos.⁷⁴⁴

In the online environment, the implementation of an identity verification process circumvents these practical challenges.⁷⁴⁵ As indicated above reliable, inexpensive and efficient identity verification processes are now readily available.⁷⁴⁶

Importantly self-exclusion schemes are not, on their own, sufficient to rehabilitate the problem gambler.⁷⁴⁷ Evidence suggests to be successful self-exclusion programs need to be used in conjunction with other therapeutic interventions.⁷⁴⁸ Authors suggest funding for these programs could be provided by the tax revenue generated from online casinos.⁷⁴⁹



3.2. Customer Interactions

Customer interactions are a proactive intervention to identify and offer assistance to consumers displaying compulsive behaviours.⁷⁵⁰ In the implementation of these processes online casinos again have an advantage.⁷⁵¹ Customer interactions have been introduced in the UK for both online and brick and mortar casinos.⁷⁵²

⁷⁴² Antolak-Slaper (2010) at 172.

⁷⁴³ Miller K (2016) at 40.

⁷⁴⁴ Miller K (2016) at 40.

⁷⁴⁵ Miller K (2016) at 39-40.

⁷⁴⁶ Blankenship M (2008) at 504 and Vener M (2008) at 219.

⁷⁴⁷ Miller K (2016) at 38.

⁷⁴⁸ Miller K (2016) at 38.

⁷⁴⁹ Vener M (2008) at 220, Essa A (2004) at 94, Thompson B (2001) at 102 and Liddell P, Watson S & Eshee W (2004) at 353.

⁷⁵⁰ LCCP Part 2 SRCP 3.4.1.

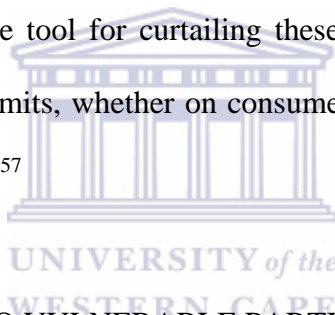
⁷⁵¹ Vener M (2009) at 220.

⁷⁵² LCCP Part 2 SRCP 3.4.1.

Online casinos track every transaction by the consumer, making the implementation of these schemes relatively easy.⁷⁵³ Online casinos, with the assistance of data analysis methods, can accurately detect at-risk consumers through their betting behaviour.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.⁷⁵⁵ Accordingly the availability of financial limits can be an effective tool for curtailing these impulses and preventing problem gambling.⁷⁵⁶ Enforcing financial limits, whether on consumer deposits or wagers, is once again simpler in the online environment.⁷⁵⁷



4. PROTECTION PROVIDED TO VULNERABLE PARTIES

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

⁷⁵³ Vener M (2009) at 220 and Kelly J 'Internet Gambling Law' (2000) 26 (1) *William Mitchell Law Review* 117 at 175.

⁷⁵⁴ MP O'Farrell (2015) at 137.

⁷⁵⁵ Eggert K (2004) at 224 and Gainsbury S (2012) at 94.

⁷⁵⁶ Gainsbury S (2013) at 378.

⁷⁵⁷ Gainsbury S (2013) at 378.

⁷⁵⁸ Gainsbury S (2012) at 5 and MP O'Farrell B (2015) at 147.

⁷⁵⁹ MP O'Farrell B (2015) at 147.

⁷⁶⁰ Koos G 'Online gambling in the case-law of the European Court of Justice' 54 *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae Sectio Computatorica* (2013) 225 at 226, Craig A (1998) at 64, Liddell P, Watson S & Eshee W (2004) at 344 and Devaney M (2009) at 274.

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.⁷⁶¹ Society's attitude towards gambling has however shifted.⁷⁶² Thus the prohibition model drives consumers towards unlicensed online casinos and fosters the growth of the black market.⁷⁶³ As mentioned above, the black market has no incentive to implement responsible gambling programs.⁷⁶⁴ These illegal operators are, further, often outside the jurisdictional reach of the consumer's law enforcement officials.⁷⁶⁵

The practical difficulties involved in enforcing this prohibition compound the above issues.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.⁷⁶⁷ With this observation in mind, the technology required to effectively enforce the prohibition model and provide vulnerable parties with protection 'does not exist.'⁷⁶⁸ Whilst (vulnerable) consumers making use of the existing technology to evade the prohibition are left unprotected and with no recourse.⁷⁶⁹

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.

⁷⁶² Craig A (1998) at 65, 77 and Blankenship M (2008) at 500.

⁷⁶³ Eggert K (2004) at 247, Thompson B (2001) at 102, Alexander G (2008) at para 43.

⁷⁶⁴ Gainsbury S (2013) at 366, Vener M (2009) at 220 and Loscalzo T & Shapiro S (2000) at 21.

⁷⁶⁵ MP O'Farrell B (2015) at 16 and Loscalzo T & Shapiro S (2000) at 11.

⁷⁶⁶ MP O'Farrell B (2015) at 16 and Liddell P, Watson S & Eshee W (2004) at 344.

⁷⁶⁷ Preventing the increase of underage and problem gambling, Loscalzo T & Shapiro S (2000) at 27.

⁷⁶⁸ Liddell P, Watson S & Eshee W (2004) at 344.

⁷⁶⁹ Liddell P, Watson S & Eshee W (2004) at 344, Gainsbury S (2013) at 366 and Vener M (2009).

4.2. The Regulation Model

The regulation model allows for licensed and regulated online gambling.⁷⁷⁰ Vener submits that online casinos are creatures of technology, and the technology exists to address concerns also related to them.⁷⁷¹ This technology means that online casinos have an advantage over their brick and mortar counterparts in the implementation of responsible gambling programs.⁷⁷²

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.⁷⁷³ 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.⁷⁷⁴ 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.⁷⁷⁵ Even with the correct comparative standard applied online gambling has an obvious advantage over brick and mortar casinos.⁷⁷⁶

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.⁷⁷⁷ This threat may be a real one in respect of the unregulated black market that prohibition has a tendency to create.⁷⁷⁸ 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

⁷⁷⁰ For a discussion on the different regulatory models see generally Snail S (2007) 114.

⁷⁷¹ Vener M (2009) at 218.

⁷⁷² Vener M (2009) at 220 and Gambling Review Commission (2010) at 30.

⁷⁷³ Miller K (2016) at 40.

⁷⁷⁴ Antolak-Slaper (2010) at 172 and Gottfried J (2004) at para 35.

⁷⁷⁵ As opposed to a comparison between regulated offline casinos and unregulated online casinos. Gottfried J (2004) at para 13.

⁷⁷⁶ Vener M (2009) at 220 and Gambling Review Commission (2010) at 30.

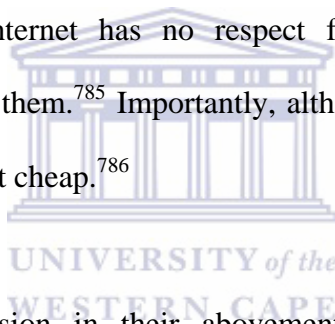
⁷⁷⁷ Gottfried J (2004) at para 20-24.

⁷⁷⁸ Craig A (1998) at 70.

market.⁷⁷⁹ The money-lauderer's objective is to conceal the source of their illegitimate funds.⁷⁸⁰ As mentioned above online casinos can effortlessly track every consumer transaction.⁷⁸¹ This makes laundering funds through regulated online casinos counterproductive, it defeats the objective, concealment.⁷⁸²

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.⁷⁸³ Equally as important for the protection of vulnerable parties is the realisation that a complete prohibition of online gambling is impossible to enforce.⁷⁸⁴ The internet has no respect for terrestrial borders or for any enforcement mechanism based on them.⁷⁸⁵ Importantly, although efforts to enforce to this kind of prohibition are futile they are not cheap.⁷⁸⁶



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

⁷⁷⁹ Gottfried J (2004) at para 13.

⁷⁸⁰ Schlendther B ‘Is the South African effort toward reducing money laundering optimal?’ (2014) 17 *Journal of Money Laundering Control* 17 at 20.

⁷⁸¹ Vener M (2009) at 220 and Kelly J (2000) at 175

⁷⁸² Vener M (2009) at 119 and Liddell P, Watson S & Eshee W (2004) at 353.

⁷⁸³ Vener M (2009) at 220, Gambling Review Commission (2010) at 30 and Eggert K (2004) at 247.

⁷⁸⁴ Liddell P, Watson S & Eshee W (2004) at 352, Gambling Review Commission (2010) at 30, Blackenship M (2008) at 516, Gottfried J (2004) 67-69, Craig A (1998) at 102, Alexander G (2008) at para 43-44 and Essa A (2004) at 93-95.

⁷⁸⁵ Gainsbury S (2012) at 42, Alexander G (2008) at para 43, Loscalzo T & Shapiro S (2000) at 23 & 27 and Liddell P, Watson S & Eshee W (2004) at 320.

⁷⁸⁶ Blankenship M (2008) at 516, Loscalzo T & Shapiro S (2000) at 23 and Thompson B (2001) at 102.

authorities in these jurisdictions it is unlikely that adequate resources will be allocated to prevent proliferation and or problem gambling prevalence⁷⁸⁷

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 become the prohibitive Interactive Gambling Act.⁷⁸⁹ South Africa's government has done no better. Choosing to ignore the recommendations of the Gambling Review Commission⁷⁹⁰ 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

⁷⁸⁷ Gambling Review Commission (2010) at 30.

⁷⁸⁸ Eggert K (2004) at 247 and Essa A (2004) at 94.

⁷⁸⁹ Essa A (2004) at 98 and Interactive Gambling Act 84 of 2001.

⁷⁹⁰ Gambling Review Commission (2010) at 7.

⁷⁹¹ National Gambling Act 7 of 2004 Schedule 1 ss 5(1) and 5(2).

⁷⁹² Essa A (2004) 97-98.

⁷⁹³ MP O'Farrell B (2015) at 28.

⁷⁹⁴ MP O'Farrell B (2015) at 28.

⁷⁹⁵ Blackenship M (2008) at 514.

⁷⁹⁶ Liddell P, Watson S & Eshee W (2004) at 344, Gainsbury S (2013) at 366 and Vener M (2009).

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.

⁷⁹⁷ Bana A (2011) at 336.

⁷⁹⁸ Vener M (2009) at 220 and Gambling Review Commission (2010) at 30.

⁷⁹⁹ Blankenship M (2008) at 504.

⁸⁰⁰ Statistics South Africa 'Work and Labour Force' available at http://www.statssa.gov.za/?page_id=737&id=1 [accessed 1 June 2017].

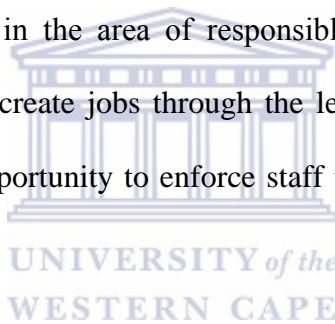
⁸⁰¹ The Department of Trade and Industry (hereinafter referred to as 'DTI'), Responses to Remote Gambling Bill and Stakeholder Submission, Parliament Cape Town, 2 June 2015 at page 11 and 21

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).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.⁸⁰⁴ The UK has mandated the upskilling of licensees' employees particularly in the area of responsible gambling.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.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'.⁸⁰⁷

⁸⁰³ Nzimande S, Louw S & Manny C *et al* 'Review of the South African gambling industry and its regulation A report prepared by the Gambling Review Commission' (2010) Gambling Review Commission at 181.

⁸⁰⁴ Miller K (2016) at 36, Gainsbury S (2012) at 38 and Gambling Review Commission (2010) at 27.

⁸⁰⁵ LCCP Part 2 SRCP 3.2.11(2)(d).

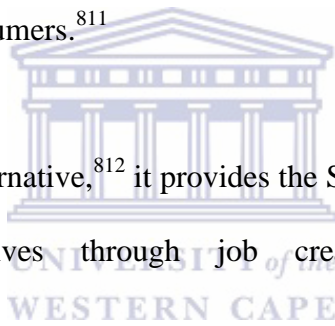
⁸⁰⁶ DTI Press Release 25 June 2015.

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.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.’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.⁸¹⁰ Instead maintaining a complete prohibition will continue to erode the rule of law, foster criminal activity and provide no protection for consumers.⁸¹¹

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



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⁸⁰⁸ Gambling Review Commission (2010) at 30.

⁸⁰⁹ RGB published in gg 37569 on 23 April 2014, memorandum on the objects of the Remote Gambling Bill point 1.

⁸¹⁰ Essa A (2004) 97-98, MP O’Farrell B (2015) at 28 and Blackenship M (2008) at 514.

⁸¹¹ RGB published in gg 37569 on 23 April 2014, memorandum on the objects of the Remote Gambling Bill point 1.

⁸¹² Loscalzo T & Shapiro S (2000) at 22.

⁸¹³ See Chapter 2.

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