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*Balancing the odds:  
A law to legalise and regulate online gambling on casino games in South Africa*

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by

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submitted in accordance with the requirements

for the degree of

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at the

University of the Witwatersrand

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## DECLARATION

Student Number: 2631992

I declare **BALANCING THE ODDS: A LAW TO LEGALISE AND REGULATE ONLINE GAMBLING ON CASINO GAMES IN SOUTH AFRICA** is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.



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Dr David John Bate

26 October 2023

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The author dedicates this study to his parents, John and Marilyn Bate. It was completed on the day his father died. The importance of education was taught to the author's father by his father, neither of whom completed tertiary studies but who were wise men. It was an important ideal to his father and one of the last things that the author and his father spoke about before his death. It is a value that the author will pass down to his children. Qualis pater, talis filius.

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<sup>1</sup> *SALJ House Style: Editor's Guide* available at <https://blogs.sun.ac.za/iplaw/files/2018/02/SALJ-Style-Guide.pdf>, accessed 23 July 2022.

<sup>2</sup> Juta & Company Limited. *House Style for Juta Publications* 2 ed (2008) available at <https://lawofthesea.mandela.ac.za/lawofthesea/media/Store/documents/JOLGA/20160407-juta-house-style.pdf>, accessed 23 July 2022.

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## ABSTRACT

Online gambling has become a pervasive phenomenon across the world. Yet South Africans enjoy limited scope to participate legally in this activity. Current legislation permits online betting on sports events (including horse racing) but prohibits all other forms of online gambling. Despite this prohibition, online gambling on casino games is widespread in South Africa. The Government has a choice: continue to criminalise the activity or follow international trends and allow the same. It initially attempted to legalise and regulate online gambling through legislation without success. It subsequently opposed (and continues to publicly oppose) any legalisation of the activity. Significant adverse consequences arise from continued prohibition of online gambling on casino games in South Africa including, inter alia: the spread of illegal gambling sites; loss of confidence in law enforcement; loss of tax revenues; discrimination against casino operators; loss of job opportunities; and inability to monitor and regulate online gambling activities.

This study proposes key features for a law and licensing and regulatory framework to legalise and regulate online gambling on casino games in South Africa. It reviews regulation of online gambling on casino games in a representative sample of international jurisdictions to identify issues and best practices that may be germane to South Africa's circumstances. It examines and analyses current and proposed legislation and stare decisis in South Africa to identify challenges and opportunities for further consideration as part of any process to legalise and regulate online gambling on casino games. It summarises and analyses public interest concerns that likely require redress as part of any such process. Based on these efforts, this study highlights fourteen areas of law and makes recommendations regarding specific interventions in those areas that may merit further consideration in development of any 'made in South Africa' solution to legalise and regulate online gambling on casino games in the country.

**KEY TERMS**

Online Gambling; Interactive Gambling; Remote Gambling; iGaming; Online Casino Games; Online Gambling Law; Legalisation of Online Gambling; Regulation of Online Gambling; Online Gambling Policy; Regulatory Law; Tax Law; Public Interest Law

Subject Category: 0398

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## CHAPTER 1:

### INTRODUCTORY CHAPTER

#### 1.1 INTRODUCTION

People have gambled<sup>3</sup> since the early days of recorded time.<sup>4</sup> Authorities have regulated gambling since the early days of recorded time.<sup>5</sup> Although often prohibited as an undesirable undertaking throughout history, gambling as a social activity and its consequent regulation progressively increased in the last half of the 20<sup>th</sup> century to become well-established phenomena by the second decade of this century.<sup>6</sup> An estimated 70 per cent to 90 per cent of the world's population have engaged in some form of gambling.<sup>7</sup>

South Africa is witness to this evolution of the prevalence of gambling and regulation of the gambling industry. Gambling has become a popular pastime for many South

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<sup>3</sup> 'At its most basic, gambling can be defined as making a stake on an uncertain future event.' National Gambling Board *Research to Determine the Potential Impact of the Fourth Industrial Revolution on the Current and Future Regulation of Gambling in South Africa* (2020) 17 available at <https://www.ngb.org.za/SiteResources/documents/2020-21/Rsearch/Impact%20of%204IR%20on%20current%20and%20future%20gambling%20Final%20Comprehensive%20Report%202020.pdf>, accessed 3 March 2022. In South Africa, various statutory prescriptions delineate a 'gambling activity' that broadly fall within the ambit of this definition. Infra c 3 for further consideration of the statutory definition and regulation of 'gambling activity' in South Africa.

<sup>4</sup> The earliest evidence of gambling comes from a dice game that existed in Mesopotamia in 3000 BC. Jennifer L Stratford 'History and psychology of gambling: Mesopotamia and ancient Egypt' at 1, available at <https://historyandpsychologyofgambling.weebly.com/mesopotamia-and-ancient-egypt.html>, accessed 2 March 2022.

<sup>5</sup> Gambling was regulated in ancient China, Egypt, Greece and Rome. It is referenced in the writings of Judaism, Christianity, Islam and Buddhism, among other faiths. Dan Glimne 'History of gambling' *Britannica* at 1, available at <https://www.britannica.com/topic/gambling/History>, accessed 12 March 2022.

<sup>6</sup> Ibid at 3.

<sup>7</sup> Max W Abbott, Rachel A Volberg and Stenn Rönnerberg 'Comparing the New Zealand and Swedish national surveys of gambling and problem gambling' *J Gambl Stud* (2004) 20(3) 237–58 available at <https://doi.org/10.1023/B:JOGS.0000040278.08853.c0>, accessed 28 July 2022; Namrata Raylu and Tian PS Oei 'Pathological gambling: A comprehensive review' *Clin Psychol Rev* (2002) 22(7) 1009–61 available at [https://doi.org/10.1016/S0272-7358\(02\)00101-0](https://doi.org/10.1016/S0272-7358(02)00101-0), accessed 12 July 2022; Heather Wardle, Alison Moody, Suzanne Spence, Jim Orford, Rachel Volberg, Dhirti Jotangia, Mark Griffiths, David Hussey and Fiona Dobbie *British Gambling Prevalence Survey* (2010) available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/243515/9780108509636.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/243515/9780108509636.pdf), accessed 23 July 2022.

Africans.<sup>8</sup> The regulation of gambling has become an accepted (and important) responsibility of the national government and its provincial counterparts.<sup>9</sup>

Yet South Africans have limited scope to gamble legally in the country. The National Gambling Act 7 of 2004 permits the operation of land-based casinos,<sup>10</sup> limited pay-out machines, bingo, lotteries and bookmakers.<sup>11</sup> Largely as a legacy of legalised betting on horse racing, it also permits online betting on sports events.<sup>12</sup> However, such legislation prohibits any online gambling on casino games.<sup>13</sup> With the growing prevalence of online gambling<sup>14</sup> and increasing exercise of government regulation of online gambling across the world, South Africa stands still in a shrinking pool of

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<sup>8</sup> Infra s 3.1.

<sup>9</sup> Part A of Schedule 4 of the Constitution of South Africa 1996 confirms that ‘casinos, racing, gambling and wagering, excluding lotteries and sports pools’ are concurrent national and provincial legislative competence. Constitution of the Republic of South Africa 1996 GN 2083 of GG 17678 of 18 December 1996 available at [https://eeducation.gov.za/files/modules/000/000/118/1602061683\\_84lpylI6Xa\\_SA-CONSTITUTION.pdf](https://eeducation.gov.za/files/modules/000/000/118/1602061683_84lpylI6Xa_SA-CONSTITUTION.pdf), accessed 15 May 2022. The specific division of such concurrent competence remains open to debate, with the National Council of Provinces objecting to a proposed enlargement of national powers in recent legislation. Sabinet ‘National gambling amendment bill sent to mediation committee’ *Go Legal* 20 December 2021 at 1, available at <https://www.golegal.co.za/national-gambling-bill-mediation/> at 1, accessed 23 May 2022.

<sup>10</sup> References to ‘land-based casinos’ and ‘brick and mortar casinos’ and ‘destination casinos’ each refer to ‘premises where gambling games are played, or are available to be played’ consistent with the definition of ‘casino’ in s 1 of the National Gambling Act 2004. They are synonymous terms. National Gambling Act 7 of 2004 GG 26670 of 12 August 2004 available at <https://www.gov.za/documents/national-gambling-act-0>, accessed 28 February 2022.

<sup>11</sup> Loc cit. Infra s 3.2.2. for further consideration of the statutory definitions of these activities in South Africa.

<sup>12</sup> Loc cit. For the purpose of this study, horse racing is considered a sporting event and reference to ‘sports’ or ‘sports events’ or ‘sporting events’ includes horse races and horse racing.

<sup>13</sup> Loc cit. Casino games are broadly defined as ‘any and all [t]able and [c]asino-style games played with cards, dice, or equipment, for money, credit, or any representative of value; including, but not limited to, roulette, blackjack, big six, craps, poker, baccarat, Pai Gow [or] any banking or percentage game.’ Rhode Island Lottery ‘Rules and regulations’ at 77, available at <https://www.rilot.com/content/dam/interactive/ilottery/pdfs/about-us/RILotteryRules.pdf>, accessed 27 March 2022. Casino games are generally divided into three types of games: electronic gaming machines; table games; and random number games. Tori Silvia ‘Three general categories of casino games’ *Starfire* 30 June 2016 at 1, available at <https://classiccasinogameess.blogspot.com/2016/06/three-general-categories-of-casino-games.html>, accessed 26 July 2022.

<sup>14</sup> Online gambling is broadly defined as ‘any form of online, internet or mobile phone gambling, gaming and betting services including, without limitation, remote gambling, mobile phone gambling, online sports betting and online fixed odds gaming.’ Law Insider ‘Online gambling definition’ at 1, available at <https://www.lawinsider.com/dictionary/online-gambling>, accessed 27 March 2022. It is also called ‘interactive gambling’ in South Africa. For the purpose of this study, a distinction is made between ‘online betting’ on sports and horse racing (which is legal in South Africa) and ‘online gambling’ on all other gambling games, including casino games (which is illegal in South Africa). This is consistent with the approach followed by the Gambling Review Commission which adopted the 2001 Budd Report by the Department of Culture, Media and Sport in the United Kingdom which distinguished between the two forms of online gambling. Stephen Louw, Adheera Bodasing, Astrid Ludin, Clement Mannya and Sphiwe Nzimande ‘Review of the South African gambling industry and its regulation’ at 175, available at <https://static.pmg.org.za/docs/110829gambling-review.pdf>, accessed 12 June 2022.

countries that prohibit online gambling on casino games.<sup>15</sup> Yet it is a commonplace activity in the country, either through ‘sleight of hand’ licensing of online casino games by provincial licensing authorities (‘PLAs’) or illegal means.<sup>16</sup> The Government has a choice: continue to prohibit online gambling on casino games or follow international trends and permit the same.

The Government is aware of its choice. Certain Government members, including ministers and National Assembly members, oppose legalisation of online gambling.<sup>17</sup> Other Government members, including ministers and National Assembly members, support legalisation and regulation of online gambling.<sup>18</sup> A Gambling Review Commission (‘GRC’) recommended legalisation and regulation of online gambling in toto as part of a holistic approach to regulation of gambling in South Africa.<sup>19</sup> The National Gambling Board (‘NGB’) and PLAs favour legalisation and regulation of online gambling on casino games.<sup>20</sup> A major political party (Democratic Alliance) supports this view.<sup>21</sup>

The Government initially supported legalisation and regulation of online gambling. Between 2008 and 2010 it adopted legislation and proposed regulations to legalise and regulate online gambling.<sup>22</sup> For different reasons, such legislation and regulations have never come into effect.<sup>23</sup> Since 2010, it has steadfastly (at least publicly) opposed legalisation and regulation of online gambling.<sup>24</sup> Yet it also appears unwilling or unable to assure meaningful enforcement of the current prohibition on this activity.<sup>25</sup>

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<sup>15</sup> Online Gambling.ca ‘Worldwide differences’ at 1, available at <https://www.onlinegambling.ca/guides/regulation.php>, accessed 5 June 2022.

<sup>16</sup> *Infra* ss 3.1 and 5.2.5.

<sup>17</sup> *Infra* ss 4.3.1 through 4.3.7.

<sup>18</sup> *Loc cit*.

<sup>19</sup> Louw et al *op cit* note 14 at 183.

<sup>20</sup> *Infra* s 5.1.

<sup>21</sup> *Infra* s 3.2.5 and 5.1.

<sup>22</sup> National Gambling Amendment Act, 2008 Number 10 of 2008 GG 31245 of 14 July 2008 available at <https://www.wcgrb.co.za/wp-content/uploads/2019/08/National-Gambling-Amendment-Act-No10-of-2008.pdf>, accessed 29 October 2021; Interactive Gambling Regulations GN 211 of GG 31956 of 27 February 2009 available at [https://www.gov.za/sites/default/files/gcis\\_document/201409/31956211.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/31956211.pdf), accessed 27 July 2022.

<sup>23</sup> *Infra* s 3.2.3.

<sup>24</sup> *Infra* s 3.2.2.

<sup>25</sup> For example, National Gambling Board ‘Socio-economic impact of illegal and online gambling in South Africa summary’ at 5–6 and 25–8, available at

Significant adverse consequences arise from these circumstances, including the following effects:

- Many illegal online gambling sites exist which leave consumers without legal protections against unscrupulous practices.<sup>26</sup>
- Law enforcement agencies do not view prosecution of the current prohibition on online gambling as a policing priority resulting in erosion of the rule of law and loss of confidence in the commitment of such agencies to uphold the law.<sup>27</sup>
- Government is not charging or collecting taxes and levies available through regulation and licensing of online gambling sites.<sup>28</sup>
- The business of facilitating online sports betting by licensed operators is unfairly disadvantaged by the availability of online betting and gambling opportunities through unlicensed operators who pay no tax or levies and have no cost of compliance with applicable laws.
- The Government is discouraging job creation in the formal economy by disavowing localisation opportunities for international online gambling sites.
- The Government is explicitly favouring one segment of the online gambling industry (sports betting) to the detriment of another segment (casino games) which likely skews the distribution of risks and benefits within the industry and society.
- The Government is unable to measure, monitor or regulate the full extent and impact of online gambling, including the social impact of gambling on society.<sup>29</sup>

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[https://www.ngb.org.za/SiteResources/documents/2016/Final%20Summary%20illegal%20gambling%20research%20report%20\(28%20Sep%202016\).pdf](https://www.ngb.org.za/SiteResources/documents/2016/Final%20Summary%20illegal%20gambling%20research%20report%20(28%20Sep%202016).pdf), accessed 31 July 2022.

<sup>26</sup> 'The rise in illegal gambling in South Africa' *Chatsworth Rising Sun* 15 January 2020 at 1, available at <https://risingsunchatsworth.co.za/150705/rise-illegal-gambling-south-africa/>, accessed 3 July 2022.

<sup>27</sup> National Gambling Board op cit note 25. The NGB has also noted that 'gambling crimes reported by regulators were not prioritised by enforcement agencies due to a lack of collaboration with the cluster of ministers dealing with illicit crime. Portfolio Committee on Trade & Industry, Parliament of the Republic of South Africa 'Report: Review of the national gambling legislation' at 5, available at <https://pmg.org.za/taled-committee-report/760/>, accessed 15 January 2023.

<sup>28</sup> *Chatsworth Rising Sun* op cit note 26 at 2.

<sup>29</sup> National Gambling Board op cit note 3 at 29.

The Government is aware of these consequences.<sup>30</sup> Yet it has failed to act publicly to mitigate them. Until it does, the country continues to suffer such adversities.

This study proposes key features of a law and licensing and regulatory framework to legalise and regulate online gambling on casino games that resolve such adversities and account for other opportunities and challenges associated with this activity.<sup>31</sup> It reviews regulation of online gambling on casino games in a representative sample of international jurisdictions<sup>32</sup> to identify key issues and best practices that may (or may not) be germane to South Africa's circumstances. It examines and analyses current and proposed legislation and stare decisis in South Africa to identify challenges and opportunities for further consideration as part of any process to legalise and regulate online gambling on casino games. It summarises and analyses public interest concerns that likely require redress as part of any such process. Based on these efforts, this study highlights fourteen areas of law and makes recommendations regarding specific interventions in those areas that may merit further consideration in development of any 'made in South Africa' solution to legalise and regulate online gambling on casino games in the country.

## 1.2 PROBLEM STATEMENT, AIM AND RESEARCH QUESTIONS

This study poses a central problem. The aim of the study is to solve the central problem. Efforts to solve the problem and achieve the aim are guided by four sets of research questions.

### 1.2.1 Problem statement

The central problem addressed by this study is:

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<sup>30</sup> Department of Trade, Industry & Competition *Gambling in South Africa* (2020) 5 available at <http://www.thedtic.gov.za/wp-content/uploads/Gambling-in-South-Africa.pdf>, accessed 29 October 2021; Louw et al op cit note 14 at 183–5.

<sup>31</sup> The constitutionality of Parliament's prohibition on online gambling beyond sports betting has not been challenged to date and is therefore not considered by this study as a viable means to achieve the legalisation of online gambling on casino games in South Africa. The subject is briefly considered by Segoeane Lawrence Monnye 'The legality of banning online gambling in South Africa: is online gambling not a component of gambling?' *UNLV Gam LJ* (2012) 3 221–42 at 236–9, available at <https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1042&context=glj>, accessed 29 October 2021.

<sup>32</sup> Seven countries are considered: five mature economies (United States, Australia, United Kingdom, Netherlands and Sweden) and two emerging economies (Chile and Kenya). *Infra* s 2.2.

Online gambling on casino games is prohibited by law in South Africa. Yet it is a widespread phenomenon that occurs with the explicit endorsement of provincial licensing authorities and on an illegal basis across the country. The Government has a choice: continue to criminalise online gambling on casino games or legalise the activity.

If the Government legalises online gambling on casino games, what are key features likely required of any ‘made in South Africa’ law and licensing and regulatory framework for the activity in the country?

### **1.2.2 Aim**

To address the central problem, the overall aim of the study is to review and analyse best practices in select international jurisdictions, the substance and form of current and previously proposed legislation in South Africa and nature of public interests associated with online gambling to highlight relevant areas of law and make recommendations related thereto that may merit further consideration as part of any *lex ferenda* that legalises and regulates the activity in the country.

### **1.2.3 Research questions**

To address the central problem and achieve the aim, four sets of research questions are answered as part of the study:

- What is the nature of legislation governing online gambling on casino games in international jurisdictions? What lessons can be learned from these jurisdictions that may (or may not) be applied to consideration of the legalisation and regulation of the activity in South Africa?
- What is the nature of current laws and previously proposed legislation regarding online gambling on casino games in South Africa? How do such laws and proposals affect prospective legalisation and regulation of the activity in the country?
- What public interest concerns require consideration as part of any legalisation of online gambling on casino games in South Africa? Are there any *sui generis* concerns that require particular consideration as part of any licensing and regulation of the activity in the country?

- Based on analyses of the legalisation and regulation of online gambling on casino games in international markets, current and previously proposed legislation and regulations regarding such activities in South Africa and relevant public interest concerns, what areas of law and recommendations related thereto may answer the central problem posited by this study?

### **1.3 RESEARCH DESIGN AND METHODOLOGIES**

Research conducted for this study consists of secondary research (also called desk research) comprised of a literature review. The review conducted for this study focuses on collection, analyses and interpretations of qualitative and quantitative data from seven principal sources of information: public sector institutions; private sector participants; courts; consultants and research firms; public policy houses; academia; and commercial publishers. Information collected from these seven sources of data is subsequently divided into two geographies of information about gambling: data sourced from and about international jurisdictions and data sourced from and about South Africa.

#### **1.3.1 Literature review of regulation of online gambling internationally**

This study includes a literature review of the legalisation and regulation of online gambling on casino games in developed countries in North America (United States), Oceania (Australia), Europe (United Kingdom, Netherlands and Sweden) and developing countries in South America (Chile) and Africa (Kenya).

The purpose of this part of the literature review is twofold:

- Acquire an understanding of recent trends in the legalisation and regulation of online gambling on casino games in international jurisdictions.
- Identify key features of regulatory regimes in international jurisdictions that may (or may not) be germane to consideration of the legalisation and regulation of online gambling on casino games in South Africa.

Comparative analyses of case studies is a common way of structuring literature reviews.<sup>33</sup> The suite of countries analysed as case studies constitutes a representative sample of the world's different legal gambling markets based on 11 key parameters: geography (every continent except Asia and Antarctica); economy (small to large); population (small to large); population distribution (urban to rural); economic development (developing to developed); gambling commercial environment (oligopolistic to liberal); gambling regulatory environment (nascent to sophisticated); gambling market size (small to large); online gambling market segment size (small to large); gambling market value (small to large); and gambling taxes (low to high).

### **1.3.2 Literature review of regulation of online gambling in South Africa**

This study includes a literature review of the regulation of online gambling on casino games in South Africa. The purpose of this part of the literature review is twofold:

- Acquire an understanding of the regulation of online gambling on casino games in South Africa.
- Identify key variables that may have affected and may continue to affect the legalisation and regulation of online gambling on casino games in South Africa, particularly relevant public interest concerns.

Taken together, the two parts of the review facilitate an understanding, consideration and comparison of the substance and form of legislation and regulations and pertinent public interest priorities in different jurisdictions and South Africa that may assist determination of key areas of law that likely require further consideration in development of any 'made in South Africa' solution to legalise and regulate online gambling on casino games in the country.

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<sup>33</sup> Johann Mouton *How to Succeed in your Master's and Doctorate Studies: A South African Guide and Resource Book* (2001) 91–5.

## 1.4 LIMITATIONS

This study is a master's dissertation. It provides a selective rather than comprehensive history of gambling, including online gambling, in South Africa. It provides a nuanced rather than encompassing comparison of different facets of regulatory models adopted in international jurisdictions to regulate online gambling on casino games. While it acknowledges the constitutionality of gambling in South Africa, it does not consider any nascent issues arising therefrom. It does not comment on any emerging conflicts of law that may apply to regulation of international online gambling sites in South Africa. Although it considers tax matters, it does not provide any comprehensive analyses of tax policy related to gambling, including online gambling, nor propose tax rates for the same. It does not consider regulation of betting on sports or lotteries, bingo, limited pay-out machines or other forms of illegal gambling such as greyhound racing, bush racing or fahfee unless relevant to discussion of online gambling on casino games.<sup>34</sup>

## 1.5 OVERVIEW OF CHAPTERS

The study comprises of five chapters. Further particulars of each chapter are found in the following paragraphs:

### 1.5.1 Chapter 1: Introductory chapter

Chapter 1 introduces the study. The chapter outlines the background and rationale for the study. It confirms the problem statement, aim and research questions of the study. It outlines the research design and methodologies used in the study. The introductory chapter includes an overview of each of the study's chapters.

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<sup>34</sup> The GRC concisely reviewed other forms of legal and illegal gambling in South Africa, including fahfee (also 'fafi'), an illegal lottery widely available in South Africa, particularly former townships. Louw op cit note 14 at 39–72 and 142–184.

### **1.5.2 Chapter 2: Regulation of online gambling on casino games internationally**

Chapter 2 highlights the evolution of online gambling in international markets. It reviews key features of legislation governing online gambling on casino games in a representative sample of international jurisdictions. The chapter evaluates precedents that may (or may not) be germane to any *lex ferenda* that legalises and regulates online gambling on casino games in South Africa.

### **1.5.3 Chapter 3: Regulation of online gambling on casino games in South Africa**

Chapter 3 describes the online gambling environment in South Africa. It summarises past, current and previously proposed legislation, regulations and other policy documents related to online gambling in the country. It reviews relevant *stare decisis*. The chapter identifies key questions that likely need answers as part of any *lex ferenda* that legalises and regulates online gambling on casino games in the country.

### **1.5.4 Chapter 4: Public interests related to online gambling in South Africa**

Chapter 4 discusses seven public interest concerns historically linked to consideration of any legalisation and regulation of online gambling in South Africa. It examines treatment of these concerns in current and previously proposed legislation. It evaluates the adequacy of such treatment in addressing these concerns. The chapter considers other means prospectively available to redress such concerns as part of any *lex ferenda* that legalises and regulates online gambling on casino games in South Africa.

### **1.5.5 Chapter 5: Recommendations for a law for online gambling in South Africa**

Based on analyses of common characteristics of international precedents, the substance and form of current and previously proposed legislation related to online gambling in South Africa and nature of public interest concerns, this chapter highlights fourteen areas of law that may merit further consideration in development of any ‘made in South Africa’ solution to legalise and regulate online gambling on casino games. It makes recommendations regarding specific interventions in those areas and identifies five imperatives to underpin successful introduction of any *lex ferenda* governing the activity in the country.

## **1.6 CONCLUSION**

This chapter introduces the study. It notes the prevalence of online gambling internationally and within South Africa. It highlights the Government's prohibition of online gambling on casino games in contrast to growing international acceptance of such activity. It chronicles the Government's initial efforts to legalise and regulate online gambling on casino games and its subsequent opposition to the same. This chapter describes some of the adverse consequences arising from the Government's failure to legalise online gambling on casino games or meaningfully enforce prohibition of this activity. The central problem, aim, research questions, research design, methodologies and limitations of this study are discussed in this chapter. Having established such foundation in this chapter, Chapter 2 describes common characteristics of the international online gambling market. It considers key facets of the regulation of online gambling in a representative sample of international jurisdictions to identify precedents that may (or may not) be applicable to the subject in South Africa.

## CHAPTER 2:

### REGULATION OF ONLINE GAMBLING ON CASINO GAMES IN INTERNATIONAL JURISDICTIONS

#### 2.1 INTRODUCTION

The global online gambling market broadly consists of three segments: betting on sports; playing casino games; and playing lotteries.<sup>35</sup> The industry traces its origins back to 1994 when Microgaming Systems Limited,<sup>36</sup> a company incorporated in the Isle of Man, created the ‘world’s first true online casino software.’<sup>37</sup> This development was followed in the same year by launch of the first online casino<sup>38</sup> which sparked the subsequent establishment of over 700 online casinos by the end of 1997.<sup>39</sup>

Regulation of online gambling mirrored these developments. In November 1994, the Government of Antigua & Barbuda (‘Antigua’) promulgated the Free Trade and Processing Act 1994 (No 12 of 1994). Section 11(4) of this legislation permitted the licensing of any ‘business or enterprise . . . not specifically prohibited by law.’ As the operation of casinos and gambling were not prohibited by law in Antigua, this legislation was used to create ‘a licensing system for the newly formed industry of

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<sup>35</sup> The regulation of online betting on sports events and playing lotteries is outside the scope of this study. It is considered only to the extent that it intertwines with the regulation of online gambling on casino games. Arnold Lewis ‘Sports betting is the fastest growing segment of online casino industry’ at 1, available at <https://www.foottheball.com/news/sports-betting-online-casino-industry-gambling-fastest-growing-segment-industry/>, accessed 22 July 2022. For market characteristics, see IMARC ‘Online gambling market: Global industry trends, share, size, growth, opportunity and forecast 2022–2027’ at 1, available at <https://www.imarcgroup.com/online-gambling-market>, accessed 22 July 2022.

<sup>36</sup> Microgaming Systems Limited changed its name to Microgaming Software Systems Limited in 1999. See Isle of Man Government ‘Online services. Companies registry. Company summary’ at 1, available at <https://services.gov.im/ded/services/companiesregistry/viewcompany.iom?Id=%2bdNgia8eCINFYptS6Q%2fqYQ%3d%3d>, accessed 21 July 2022. Microgaming Software Systems Limited changed its name to Apricot Investments Limited in 2018. See Adam Morgan ‘Big changes at Microgaming Software Systems Limited’ in *Latest Casino and Gambling News World Casino News* 28 Jun 2018 at 1, available at <https://news.worldcasinodirectory.com/big-changes-at-microgaming-software-systems-limited-56561>, accessed 22 July 2022.

<sup>37</sup> Microgaming ‘Microgaming supplies legendary online gaming platforms systems and services’ at 1, available at <https://www.microgaming.co.uk/about>, accessed 22 July 2022; Isle of Man Government op cit note 35 at 1.

<sup>38</sup> The Gaming Club ‘First class action at Gaming club Online Casino’ at 1, available at <https://www.gamingclub3.com/>, accessed 22 July 2022; Isaac Wohl ‘The Antigua-United States online gambling dispute’ (July 2009) 332 *United States International Trade Commission Journal of International Commerce and Economics* at 1, available at [https://www.usitc.gov/publications/332/journals/online\\_gambling\\_dispute.pdf](https://www.usitc.gov/publications/332/journals/online_gambling_dispute.pdf), accessed 22 July 2022.

<sup>39</sup> Charles Ingel ‘Overview of the US online gambling industry in 2022’ at 1, available at <https://www.nodeposit365.com/features/online-gambling-industry-overview/>, accessed 22 July 2022.

online gambling’<sup>40</sup> and led the jurisdiction to have ‘more licences than any other licensing authority in the industry’ for a time.<sup>41</sup> The Kahnawake Gaming Commission, the licensing and regulating authority for gaming activities within and from the sovereign Mohawk Territory of Kahnawake in the Province of Québec, Canada,<sup>42</sup> was another early jurisdiction to permit online gambling through enactment of its Regulations concerning Interactive Gaming on 8 July 1999 which permitted online gambling from that jurisdiction.<sup>43</sup>

The online gambling market has grown exponentially since its humble origins in 1994. It is the fastest growing segment of the global gambling industry.<sup>44</sup> The market was valued by revenues at USD 72.3 billion in 2021 and projected to grow at a 9.96 per cent compound annual growth rate (‘CAGR’) to earn USD 131.4 billion of revenues by 2027.<sup>45</sup> While sports betting is the largest segment of the global online gambling market and expected to register 11 per cent CAGR between 2020 and 2026,<sup>46</sup> gambling on online casino games is rapidly catching up with a 17% CAGR predicted to value the sector at USD 67 billion by 2025.<sup>47</sup>

Growth of the global online gambling market has largely been driven by the development and confluence of new technologies. The availability of affordable mobile communications devices, particularly smart phones, along with roll out of data-capable communication technologies such as 5G bandwidth, have enabled significant portions of the world’s population to connect and interact with online platforms, including online

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<sup>40</sup> Loc cit.

<sup>41</sup> Audrey Weston ‘Antigua’ in ‘Online gambling laws and jurisdictions’ at 5, available at <https://www.gamblingsites.com/online-gambling-jurisdictions/>, accessed 22 July 2022.

<sup>42</sup> Kahnawake Gaming Commission ‘Welcome’ at 1, available at <http://www.gamingcommission.ca/>, accessed 22 July 2022.

<sup>43</sup> Kahnawake Gaming Commission ‘Regulations’ at 1, available <http://www.gamingcommission.ca/interactiverregs.htm>, accessed 22 July 2022.

<sup>44</sup> IMARC op cit note 34.

<sup>45</sup> Research and Markets ‘Online gambling market: global industry trends, share, size, growth, opportunity and forecast 2022-2027’ at 1, available at <https://www.researchandmarkets.com/reports/5547054/online-gambling-market-global-industry-trends>, accessed 2 March 2022.

<sup>46</sup> Facts & Factors ‘By 2026, online gambling & betting (casino) industry size statistics will grow over USD 100 billion by 2026, says Facts & Factors’ *GlobeNewswire* 15 November 2021 at 2, available at <https://www.globenewswire.com/news-release/2021/11/15/2334289/0/en/By-2026-Online-Gambling-Betting-Casino-Industry-Size-Statistics-Will-Grow-Over-USD-100-Billion-by-2026-Says-Facts-Factors.html>, accessed 22 July 2022.

<sup>47</sup> ‘The future growth of online casinos by 2025’ at 1, available at <https://www.brightstarcasino.com/blog/the-future-growth-of-online-casinos-by-2025/>, accessed 22 July 2022. ‘Is 2021 the year for online casino growth in the USA? *Game Haus* 9 June 2021 at 1, available at <https://thegamehaus.com/gaming/is-2021-the-year-for-online-casino-growth-in-the-usa/2021/01/12/>, accessed 22 July 2022.

betting sites.<sup>48</sup> Emerging use of blockchain technologies has expanded the scope and quality of products available for consumers to purchase through online platforms, including online betting sites. Development and accessibility of mobile payment technologies and online payment gateways have made it easier for consumers to purchase products on online platforms, including online betting sites. The increasing popularity of social media and its integration and interaction with other media channels have fueled use of online platforms, including online betting sites.<sup>49</sup>

Social and demographic factors have contributed to the popularity of online gambling. The increasing urbanisation of populations in many countries has amplified appetite for online commerce, including transactions with online betting sites. The rising number of educated, affluent or internet-savvy female consumers has spurred use of online platforms, including online gambling sites. Growing use of celebrity endorsements has increased traffic to online platforms, including online betting sites.<sup>50</sup>

Regulation of the online gambling market has grown at a similarly exponential pace since conception of the industry in 1994. As of May 2022, 61 countries allow online casino sites to conduct business under a licensing regime and 93 countries neither prohibit nor permit online casino sites. On the other hand, 39 countries prohibit online casino sites while 32 countries ban online casino sites from conducting business within their national boundaries but permit gambling by citizens through international sites.<sup>51</sup> In increasing numbers, ‘most jurisdictions around the world have decided to regulate online gambling, instead of outlawing it for economic, social, and practical reasons.’<sup>52</sup>

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<sup>48</sup> ‘Global gambling market opportunities and strategies report 2022’ *Businesswire* 17 March 2023 at 2–3, available at <https://www.businesswire.com/news/home/20220316005705/en/Global-Gambling-Market-Opportunities-and-Strategies-Report-2022-Market-is-Expected-to-Grow-from-674703.9-Million-in-2025-to-895720.3-Million-in-2030---ResearchAndMarkets.com>, accessed 17 March 2022; Grand View Research ‘Online gambling market size, share & trends analysis report by type (sports betting, casinos, poker, bingo), by device (desktop, mobile), by region (North America, Europe, APAC, Latin America, EMA), and segment forecasts, 2022–2030’ at 1, available at <https://www.grandviewresearch.com/industry-analysis/online-gambling-market>, accessed 12 May 2022.

<sup>49</sup> Loc cit.

<sup>50</sup> Loc cit.

<sup>51</sup> Online gambling.ca op cit note 15. For an list of major jurisdictions which permit online gambling as of 2022, see Audrey Weston ‘Online gambling laws and jurisdictions’ available at <https://www.gamblingsites.com/online-gambling-jurisdictions/>, accessed 22 July 2022.

<sup>52</sup> Sizwe Lindelo Snail ‘Online gambling in South Africa’ *Juta’s Business Law* 15(3) 2007 114–121 at 121, available at <https://journals.co.za/doi/abs/10.10520/EJC52600>, accessed 2 June 2022.

Any consideration of the means to legalise and regulate online gambling of casino games in South Africa benefits from consideration of precedents in international jurisdictions. Many of the challenges associated with legalisation and regulation of online gambling on casino games are not unique to South Africa. Prior to enactment of applicable legislation and regulations, it is likely that authorities in international jurisdictions contemplated recent trends, best practices and governance tools available to effectively legalise and regulate online gambling on casino games, particularly those jurisdictions which previously prohibited the activity for many of the same reasons cited to preserve prohibition of online gambling on casino games in South Africa.

As such, comparative consideration of legislation used to license and regulate online gambling on casino games in some of the most recent jurisdictions to permit (or about to permit) such activities may offer lessons that instruct evaluation of the same in South Africa. Indeed, in its past efforts to legalise and regulate online gambling, the South African Government has passed (but not promulgated) legislation<sup>53</sup> that permitted ‘foreign and international law [and] international conventions, declarations and protocols relating to gambling’ to be considered in application of such legislation.<sup>54</sup> While exhaustive analysis of international law is beyond the scope of this study, a nuanced dissection of key facets of legislation used to legalise and regulate online gambling on casino games in five mature economies (United States of America, Australia, United Kingdom, Netherlands and Sweden) and two emerging economies (Chile and Kenya) spanning five continents may stimulate consideration of the suitability of such facets to any ‘made in South Africa’ solution that legalises and regulates online gambling on casino games in the country.<sup>55</sup>

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<sup>53</sup> Interactive Gambling Regulations op cit note 22.

<sup>54</sup> Section 2 of the National Gambling Amendment Act 2008 introducing s 1A of the National Gambling Act 2004.

<sup>55</sup> Supra s 1.3.1 for consideration of the representativeness of such sample.

## 2.2 COMPARATIVE JURISDICTIONS

The seven countries selected as comparative case studies for consideration of their treatment of the legalisation and regulation of online gambling on casino games have generally responded to a perceived need to control an increasingly popular and prevalent activity within their jurisdictions.<sup>56</sup> Many commonalities exist between approaches adopted by each country to govern online gambling on casino games, particularly with respect to consumer protections and problem gambling.<sup>57</sup> Many differences exist between approaches adopted by each jurisdiction to govern online gambling on casino games, particularly treatment of offshore online gambling sites and taxation of the activity.<sup>58</sup> Consideration of commonalities and differences between such international precedents may yield insights and lessons that may (or may not) inform consideration of any ‘made in South Africa’ solution that legalises and regulates online gambling on casino games in the country.

### 2.2.1 United States of America

Legalisation and regulation of online gambling has a controversial and highly litigious lineage in the United States of America.<sup>59</sup> The conduct of gambling within the boundaries of any state is a settled state right<sup>60</sup> while US federal law regulates online gambling on an interstate basis.<sup>61</sup> This jurisdictional arrangement was uncontested for much of US history as gambling was not widely supported by state governments or most state populations.<sup>62</sup> Even the State of Nevada’s emergence as a casino destination in the 1950s, legalisation of casino gambling in New Jersey in 1978 and establishment

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<sup>56</sup> Infra ss 2.2.1 through 2.2.7.

<sup>57</sup> Loc cit. See also Maris Catania and Mark D Griffiths ‘Analyzing consumer protection for gamblers across different online gambling operators: a replication study’ *Int J Ment Health Addiction* 21 (2023) 1882–97 available at <https://doi.org/10.1007/s11469-021-00695-9>, accessed 1 July 2024.

<sup>58</sup> Loc cit.

<sup>59</sup> For example, Ingel op cit note 39.

<sup>60</sup> Wohl op cit note 38 at 1.

<sup>61</sup> ‘The origin of the Wire Act’ in ‘What is the Wire Act?’ *Legal Sports Betting* 5 October 2022 at 2, available at <https://www.legalsportsbetting.com/what-is-the-wire-act/>, accessed 7 October 2022.

<sup>62</sup> ‘History of Gambling in the United States’ in Roger Dunstan *Gambling in California* at 1–3, available at <https://web.archive.org/web/20091012172449/http://www.library.ca.gov/CRB/97/03/Chapt2.html>, accessed 22 July 2022.

of casino operations within indigenous<sup>63</sup> territories in the 1980s represent relatively recent phenomena.<sup>64</sup>

The US Government initially prohibited all interstate gambling, including sports betting. To prosecute international and interstate online gambling operators, the US Government relied on the Wire Act, 18 USC § 1084 (the ‘Wire Act’) which was originally passed in 1961 to combat organised crime syndicates.<sup>65</sup> The Act stipulates:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest or for the transmission of a wire communication which entitles the recipient to receive any money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.<sup>66</sup>

Under the Wire Act, fines range from the greater of not more than twice the gain or loss associated with any offence or USD 250,000 for individuals and not more than USD 500,000 for organisations.<sup>67</sup>

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<sup>63</sup> Beyond consideration of the legalisation and regulation of online gambling on casino games in countries recognised as members of the United Nations, consideration of casino gambling regulated by indigenous territories within Canada, the United States and elsewhere represents a worthwhile effort which unfortunately remains beyond the scope of this study. Terms such as ‘Indian’, ‘Indian gaming’, ‘tribal gaming’ and ‘tribal casino’ remain widely used to describe such activities or jurisdictions, particularly in the United States (for example, Dunstan op cit note 62) but considered offensive by many indigenous communities. See Michael Yellow Bird ‘What we want to be called: Indigenous peoples’ perspectives on racial and ethnic identity labels’ *American Indian Quarterly* 23(2) (Spring 1999) 1–21 available at <https://doi.org/10.2307/1185964>, accessed 24 July 2022. While an imperfect solution, the term ‘indigenous’ has been used as an alternative expression in this study in every applicable circumstance. For specific consideration of the applicability and relevance of this phenomenon in South Africa, see Jeffrey J Sallaz ‘Gambling with development: casino capitalism in South Africa and on Indian lands in California’ in Sytze F Kingma *Global gambling: Cultural perspectives on gambling organizations* (2009) 64–8 available at <https://doi.org/10.4324/9780203870396> and Jeffrey Sallaz *The labor of luck: Casino capitalism in the United States and South Africa* (2009) available at <http://www.jstor.org/stable/10.1525/j.ctt1pp7px>, both accessed 1 January 2023.

<sup>64</sup> Dunstan op cit note 62 at 3.

<sup>65</sup> *United States v. Ross*, 1999 WL 782749 (SDNY 16 Sept 1999); *People v. World Interactive Gaming Corp.*, 1999 WL 591995 (NY Sup Ct 22 July 1999); cf *United States v. D’Ambrosia*, 313 F 3d 987, 987–89 (7th Cir 2002); *United States v. Tedder*, 2003 WL 23204848 (WD Wis 22 Aug 2003); GamblingLaws.org ‘The DOJ’s 2011 formal opinion and interpretation of the Federal Wire Act of 1961 at 2, available at <https://www.gamblinglaws.org/us/doj-2011-opinion/>, accessed 23 July 2023; Legal Sports Betting op cit note 61 at 2.

<sup>66</sup> 18 USC § 1084.

<sup>67</sup> 18 USC §§ 1084(a) and 3571(b) and (d).

In the same year, the US Government adopted the Interstate Transportation of Wagering Paraphernalia Act, 18 USC § 1953 (the ‘Wagering Paraphernalia Act’) which generally outlaws interstate transportation of records, tickets, slips and other devices used for bookmaking, sports betting and other forms of gambling excluding lotteries and raffles.<sup>68</sup> Under this legislation, offenders were subject to fines or imprisonment for not more than five years or both. Convictions under either the Wire Act or Wagering Paraphernalia Act supported prosecutions under other legislation designed to thwart online gambling.<sup>69</sup> To buttress its prosecutions of US citizens and others associated with international online gambling sites that engaged in sports betting and wagering on online casino games, particularly poker, the US Department of Justice confirmed in 2001 that the Wire Act ‘outlawed all domestic and international online gambling.’<sup>70</sup>

Although the centrepiece of law enforcement efforts, the applicability of the Wire Act to prosecution of interstate online gambling was subject to significant debate and litigation.<sup>71</sup> If the Wire Act applied to online gambling, the legal fraternity was divided over whether such prohibition was restricted to online gambling on sports events<sup>72</sup> or covered other forms of online gambling such as wagering on casino games.<sup>73</sup> In 2002, the US Court of Appeals for the Fifth Circuit ultimately upheld a lower court ruling that limited application of the Wire Act to interstate gambling on sports events or contests.<sup>74</sup> Notwithstanding opposition from the US Government, this reasoning was similarly

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<sup>68</sup> 18 USC §§ 1053(a) and 1053(b).

<sup>69</sup> Such as the International Travel Act of 1961, 22 USC § 2121 et seq; the Illegal Gambling Business Act of 1970, 18 USC § 1955; the Illegal Money Transmitting Business Act of 1992, 18 USC §§ 1960; and notably the Racketeer Influenced and Corrupt Organizations Act of 1970, 18 USC §§ 1961–1968.

<sup>70</sup> GamblingLaws.org op cit note 65 at 2.

<sup>71</sup> David G Schwartz *Cutting the Wire: Gaming Prohibition and the Internet* (2005); Bruce P Keller *The Game’s the Same: Why Gambling in Cyberspace Violates Federal Law*, 108 *Yale LJ* 1569, 1580 (1999); Jonathan Gottfried *The Federal Framework for Internet Gambling*, 10 *Richmond J of L & Tech* 26, 46 (2004); Michael P Kailus, Note, *Do Not Bet on Unilateral Prohibition of Internet Gambling to Eliminate Cyber-Casinos*, 1999 *Univ of Ill L Rev* 1045, 1057; Scott M Montpas *Gambling On-Line: For a Hundred Dollars, I Bet You Government Regulation Will Not Stop the Newest Form of Gambling*, 22 *Univ of Dayton L Rev* 163, 180 (1996); Harley J Goldstein *On-Line Gambling: Down to the Wire?* 8 *Marq Sports LJ* 1, 18 (1997); General Accounting Office, *Internet Gambling: An Overview of the Issues* 11 (Dec 2002); GamblingLaws.org op cit note 65 at 2.

<sup>72</sup> *In re MasterCard International Inc.*, 132 F Supp 2d 468, 480 (ED La 2001), *aff’d*, 313 F 3d 257, 262 (5th Cir 2002); *United States v. Cohen*, 260 F 3d 68 (2d Cir 2001), cert denied, 536 US 922 (2002).

<sup>73</sup> *United States v. Lombardo*, 639 F Supp 2d 1271, 1281 (D Utah 2007); *New York v. World Interactive Gaming Corp.*, 714 NYS 2d 844, 847, 851-52 (NY Sup Ct 1999).

<sup>74</sup> Note 20 in *In re MasterCard International, Inc. Internet Gambling Litigation*, 313 F 3d 257 (5th Cir 2002), citing *In re MasterCard*, 132 F Supp 2d 468, 480 (ED La 2001) available at <https://caselaw.findlaw.com/us-5th-circuit/1342249.html>, accessed 23 July 2022.

reached by the US Court of Appeals for the First Circuit in 2021 to preserve judicial coherence on the matter.<sup>75</sup>

In 2002, the US Court of Appeals for the Fifth Circuit issued a decision that directly contradicted the Department of Justice's 2001 opinion.<sup>76</sup> To wit, the Court upheld a lower court ruling that: "Plain reading of the statutory language [of the Wire Act] clearly requires that the object of the gambling be a sport event or contest."<sup>77</sup> Despite this decision, it took the Office of Legal Counsel of the Department of Justice until 2011 to issue a new opinion that reversed its 2001 position and concurred with the Court's findings. The updated opinion stated that '[i]nterstate transmissions of wire communications that do not relate to a "sporting event or contest" fall outside the reach of the Wire Act.'<sup>78</sup>

The Department of Justice's updated 2011 opinion may have been motivated by enactment of the Unlawful Internet Gambling Enforcement Act of 2006, 21 USC § 5361 et seq ('UIGEA').<sup>79</sup> Subject to certain exceptions, UIGEA 'prohibits gambling businesses from knowingly accepting payments in connection with the participation of another person in a bet or wager that involves the use of the Internet and that is unlawful under any federal or state law.'<sup>80</sup> UIGEA targets the regulation of payments associated with online gambling. The law:

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<sup>75</sup> *NH Lottery Comm'n v Rosen*, No 19-1835 (1st Cir 20 Jan 2021) available at <https://cases.justia.com/federal/appellate-courts/ca1/19-1835/19-1835-2021-01-20.pdf?ts=1611158403>, accessed 24 July 2022.

<sup>76</sup> *In re MasterCard* supra note 72.

<sup>77</sup> Loc cit.

<sup>78</sup> Office of Legal Counsel of the US Department of Justice 'Whether proposals by Illinois and New York to use the internet and out-of-state transaction processors to sell lottery tickets to in-state adults violate the Wire Act' at 1, available at <https://www.justice.gov/sites/default/files/olc/opinions/2011/09/31/state-lotteries-opinion.pdf>, accessed 22 July 2022.

<sup>79</sup> GamblingLaws.org 'The Unlawful Internet Gambling Enforcement Act Law of 2006' at 1, available at <https://www.gamblinglaws.org/us/uigea/>, accessed 24 July 2022.

<sup>80</sup> US Treasury Department 'Summary' in *Examination Handbook 770, Unlawful Internet Gambling Enforcement Act, May 20, 2010* 1 available at [https://web.archive.org/web/20100601165540/https://www.ots.treas.gov/\\_files/422372.pdf](https://web.archive.org/web/20100601165540/https://www.ots.treas.gov/_files/422372.pdf), accessed 23 July 2022.

... allowed for the placement of payment processing regulations to curb fraud, money-laundering, and other illegal financial crimes committed through unsanctioned online gambling activities. The law was written so that gambling businesses could not knowingly accept betting or wagering payments online through and to unlawful means and portals under federal or state gambling laws. This law was mainly used to prosecute online gambling payment processors as nowhere in the UIGEA did it state the prohibition of access to legal online gambling sites for US players. In essence, the law provides regulatory oversight regarding how online gambling transactions can or cannot be processed.<sup>81</sup>

As such, the law did not outlaw online gambling ‘initiated and received or otherwise made exclusively within a single state’<sup>82</sup> despite “[t]he intermediate routing of electronic data” through other states.<sup>83</sup>

UIGEA ‘changed the landscape of online gambling in the US and affected internet gambling around the world. The Act was the most publicly debated legislation at its time by players in the US and operators worldwide.’<sup>84</sup> The effect of UIGEA was immediate as ‘nearly all online gambling site operators exited from the US gaming market’ so as to ‘not risk compliance issues and violations.’<sup>85</sup> Those operators and their principals who continued to conduct business in the US often faced criminal prosecution, including indictments handed down on 15 April 2011 against three major international online casino site operators, their associates and bankers<sup>86</sup> under UIGEA and other laws including the Illegal Gambling Business Act<sup>87</sup> in a day known in the industry as ‘Black Friday’.<sup>88</sup>

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<sup>81</sup> GamblingLaws.org op cit note 79 at 1.

<sup>82</sup> 31 USC § 5362(10)(B).

<sup>83</sup> 31 USC § 5362(10)(E).

<sup>84</sup> GamblingLaws.org op cit note 79 at 1.

<sup>85</sup> Ibid at 4.

<sup>86</sup> *United States v Scheinberg* 10 Cr 336 (2011) available at <https://cases.justia.com/federal/district-courts/new-york/nysdce/1:2011cv02564/377900/218/0.pdf?ts=1376348832>, accessed 25 July 2022; *United States v. PokerStars et al* 11 Civ 2564 (2011) available at <https://www.scribd.com/document/53170382/3bb-Civil-Complaint-DOJ-vs-PokerStars-Full-Tilt-UB-AP-et-al>, accessed 25 July 2022.

<sup>87</sup> 18 USC § 1955.

<sup>88</sup> PokerLaws ‘United States v. Scheinberg’ at 1, available at <https://www.pokerlaws.org/court-cases/united-states-v-scheinberg/>, accessed 25 July 2022.

Yet UIGEA achieved its primary objective: it ‘did allow for positive effects for online gambling such as creating safer gambling environments, flushing away seedy sites, and creating more reliable payment methods.’<sup>89</sup> As with most private sector industries affected by legislation, the international online gambling market adjusted to UIGEA and ‘the market has since stabilized due to online payment solutions and a healthy selection of legal offshore casinos.’<sup>90</sup>

Combined with its regulation of the banking of online gambling through UIGEA, the US Government revisited the Wire Act as a means to exercise its regulation of online gambling. In late 2018, the Department of Justice issued a new memorandum which asserted that ‘the statutory prohibitions [of the Wire Act] are not uniformly limited to gambling on sporting events or contests’ and prohibits all interstate wire-facilitated gambling activities.<sup>91</sup> This position was found to be without merit by the US Court of Appeals for the First Circuit which ruled in 2021<sup>92</sup> that this ‘more expansive construction of the Wire Act’<sup>93</sup> suffered from a ‘lack of coherence’<sup>94</sup> and concluded that the legislation only applies to ‘sporting events or contests.’<sup>95</sup> Due to the consistency of ratio decidendi shared between the 2021 decision of the US Court of Appeals for the First Circuit and earlier 2002 decision of the US Court of Appeals for the Fifth Circuit, there does not appear to be any grounds for appeal to the Supreme Court of the United States. Furthermore, the incumbent US administration does not appear inclined to challenge stare decisis.<sup>96</sup>

Supported by complementary laws, UIGEA currently stands as the definitive piece of federal legislation to prohibit interstate (and international) online gambling on casino games in the United States.<sup>97</sup> With certain exceptions, the Wire Act continues to stand

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<sup>89</sup> GamblingLaws.org op cit note 79 at 4.

<sup>90</sup> Loc cit.

<sup>91</sup> US Department of Justice ‘Reconsidering whether the Wire Act applies to non-sports gambling’ 42 Op OLC \_\_\_\_\_ at 23, 2018 WL 7980165 2 Nov 2018 at 1, available at <https://www.justice.gov/olc/file/1121531/download>, accessed 23 July 2022.

<sup>92</sup> *NH Lottery Comm’n* supra note 75.

<sup>93</sup> Ibid, slip op at 4.

<sup>94</sup> Ibid, slip op at 40.

<sup>95</sup> Ibid, slip op at 49.

<sup>96</sup> Ira Rapaelson and Kevin M Bolan, ‘First Circuit Reject’s DOJ’s Expansion View of Wire Act’ 1 February 2021 at 1, available at <https://www.whitecase.com/publications/alert/first-circuit-rejects-doj-s-expansive-view-wire-act>, accessed 24 July 2022.

<sup>97</sup> 18 USC §§ 1301–1303, 1307 and 1953.

as the dominant piece of federal legislation to prohibit interstate gambling on sports.<sup>98</sup> The Department of Justice continues to prosecute offshore gambling operations, including internet service providers ('ISPs'), under both laws.<sup>99</sup>

Since clarification of the regulatory environment in the United States, 31 states have enacted legislation to permit sports betting, including 21 states that permit online betting.<sup>100</sup> Four states have concurrently legalised and regulated online gambling on casino games: Delaware; West Virginia; Pennsylvania; and New Jersey.<sup>101</sup> Further evaluation of regulatory approaches to the governance of online gambling on casino games in those jurisdictions may yield insights into areas that merit consideration as part of development of any 'made in South Africa' solution for the same.

### 2.2.1.1 Delaware

The State of Delaware was the first US state to adopt online gambling in 2013 and permits online casinos, sports betting, poker, lotteries and fantasy sports<sup>102</sup> to complement land-based casinos.<sup>103</sup> Delaware is signatory to a Multi-State Internet Gaming Agreement ('MSIGA') with Nevada, New Jersey and Michigan which allows for interstate online poker games.<sup>104</sup> Any online gambling site is required to

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<sup>98</sup> The legalisation and regulation of sports betting in the United States experienced its own intertwined yet independent evolution which is beyond the scope of this study but centres around the constitutionality of the Professional and Amateur Sports Protection Act of 1992, 28 USC § 3701 which was struck down by the US Supreme Court in 2018. See *Philip D. Murphy, Governor of New Jersey, et al v. National Collegiate Athletic Association, et al* 584 US \_\_\_\_ 138 S Ct 1461; 200 L Ed 2d 854; 61 F Supp 3d 488 (DNJ); *aff'd* 799 F 3d 259 (2d Cir 2015); *aff'd* on rehearing en banc 832 F 3d 389 (3<sup>rd</sup> Cir 2016) granted 137 S Ct 2327 (2017), available at <https://www.law.cornell.edu/supremecourt/text/16-476>, accessed 23 July 2022.

<sup>99</sup> American Gaming Ass'n 'Illegal sports betting: how offshore operators — and those who support them — break US law' available at <https://www.americangaming.org/illegal-sports-betting/>, accessed 24 July 2022.

<sup>100</sup> Don Preciado 'States where sports betting is legal' *Forbes.com* 5 July 2022 at 1, available at <https://www.forbes.com/betting/sports-betting/legal-states/>, accessed 25 July 2022; Dan Lust 'Legal U.S. online sports betting: bill and law tracker for 2023' *Sports Betting Report* 2 February 2023 available at <https://www.sportsbettingreport.com/online-sports-betting-bill-tracker/>, accessed 5 March 2022.

<sup>101</sup> Game Haus op cit note 47 at 1.

<sup>102</sup> Fantasy sports are defined as 'games in which you choose a team of real sports players from different teams and win points according to how well the players play each week.' *Cambridge Dictionary* 'Fantasy Sport' at 1, available at <https://dictionary.cambridge.org/us/dictionary/english/fantasy-sport>, accessed 14 March 2023.

<sup>103</sup> US Gaming Review 'Delaware online gambling' at 1, available at <https://usgamingreview.com/online-gaming/delaware/>, accessed 25 July 2022.

<sup>104</sup> Alex Weldon 'Michigan joins the multi-state internet poker agreement' at 1, available at <https://cdcgaming.com/brief/michigan-joins-the-multi-state-internet-poker-agreement/>, accessed 5 July 2022.

operate a land-based operation as a condition of its license and only allow players physically present within the State to gamble on its site.<sup>105</sup>

Governance of online casino games in Delaware is administered by the State Lottery Office with regulations that feature many customary best practices including responsible gambling provisions such as self-exclusion, deposit limits and bet limits as well as privacy protections.<sup>106</sup> Access to offshore gambling sites are not blocked but such sites operate illegally.<sup>107</sup> Casinos in Delaware pay a 20 per cent effective tax rate on table games, including online casino games.<sup>108</sup> By mandate, casinos and the State each contribute funds which may represent up to 1 per cent of table game revenues to fund problem gambling and responsible gaming programs.<sup>109</sup>

### 2.2.1.2 West Virginia

The State of West Virginia has permitted online casinos, sports betting, poker and fantasy sports to complement land-based casinos since 2019.<sup>110</sup> Every online gambling operation is required to partner with a land-based casino licensed to operate within the State.<sup>111</sup> Every online gambling site is required to have a head office in the United States.<sup>112</sup> Access to licensed online gambling sites is restricted to players within the State using geolocation technologies.

Governance of online casino games in West Virginia is administered by a Lottery Corporation<sup>113</sup> with regulations that feature customary best practices such as age limits, time limits, deposit limits, betting limits, self-exclusion lists and privacy protections. Offshore gambling sites are illegal but access to such sites does not appear constrained by regulatory measures.<sup>114</sup> Under the Lottery Racetrack Tables

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<sup>105</sup> US Gaming Review op cit note 103.

<sup>106</sup> Loc cit.

<sup>107</sup> Loc cit.

<sup>108</sup> 29 Del C § 4815(a).

<sup>109</sup> American Gaming Association ‘Delaware’ at 3, available at [https://www.americangaming.org/wp-content/uploads/2019/07/AGAGamingRegulatoryFactSheet\\_Delaware-2022.pdf](https://www.americangaming.org/wp-content/uploads/2019/07/AGAGamingRegulatoryFactSheet_Delaware-2022.pdf), accessed 18 December 2022.

<sup>110</sup> US Gaming Review ‘West Virginia online gambling’ at 1, available at <https://usgamingreview.com/online-gaming/west-virginia/>, accessed 25 July 2022.

<sup>111</sup> Ibid at 4.

<sup>112</sup> Loc cit.

<sup>113</sup> State Lottery Act § 29–22–4 and 5.

<sup>114</sup> US Gaming Review op cit note 110 at 1.

Games Act, a 35 per cent tax is levied on table game revenues<sup>115</sup> while a 15 per cent ‘privilege tax’ is imposed on gross interactive gaming receipts under the Lottery Interactive Wagering Act.<sup>116</sup> A Compulsive Gambling Treatment Fund is funded by gambling operations and supports problem gambling programs.<sup>117</sup> Among other advertising restrictions, West Virginia requires pre-approval of all sports betting advertisements.<sup>118</sup>

### 2.2.1.3 Pennsylvania

The Commonwealth of Pennsylvania is one of the most liberal online gambling jurisdictions in the United States and permits online casinos, sports betting, poker, lotteries and fantasy sports to complement land-based casinos since 2019.<sup>119</sup> All land-based casinos in the State were issued with online gambling licenses upon introduction of the activity in the jurisdiction. Any online gambling site is required to be a US incorporated company subject to US laws and partner with a land-line casino to operate within the State.<sup>120</sup> Offshore gambling sites are illegal but access to the market does not appear blocked by regulatory measures.<sup>121</sup>

Governance of online casino games in Pennsylvania is administered by the Pennsylvania Gaming Control Board with regulations that feature customary best practices such as self-exclusion lists, promotion of responsible gambling and support for problem gambling programs. Access to licensed online gambling sites is restricted to players within the State using geolocation technologies.<sup>122</sup> The State imposes a 54 per cent tax on gross gaming revenues (‘GGR’)<sup>123</sup> collected from slot

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<sup>115</sup> Lottery Racetrack Tables Games Act § 29–22C–26.

<sup>116</sup> West Virginia Lottery Interactive Wagering Act § 29–22E–16(a).

<sup>117</sup> American Gaming Association ‘West Virginia’ at 3, available at [https://www.americangaming.org/wp-content/uploads/2021/10/AGAGamingRegulatoryFactSheet\\_WestVirginia-2022.pdf](https://www.americangaming.org/wp-content/uploads/2021/10/AGAGamingRegulatoryFactSheet_WestVirginia-2022.pdf), accessed 18 December 2022.

<sup>118</sup> WV Code R § 179-9-21.

<sup>119</sup> US Gaming Review ‘Pennsylvania online gambling’ at 1, available at <https://usgamingreview.com/online-gaming/pennsylvania/>, accessed 25 July 2022.

<sup>120</sup> Ibid at 1 and 4.

<sup>121</sup> Ibid at 4.

<sup>122</sup> Ibid at 4 and 6.

<sup>123</sup> Gross gaming revenues, also called gross gaming yield and sometimes gross game yield (both ‘GGY’), reflect the difference between the amount of money that players wager minus the amount that players win and typically equate to ‘sales’ or ‘revenues’ in accounting practice. See Corporate Finance Institute ‘Gross gaming revenue’ at 1, available at <https://corporatefinanceinstitute.com/resources/knowledge/finance/gross-gaming-revenue-ggr/>, accessed 3 April 2022.

machines and a 34 per cent tax on online table game revenues.<sup>124</sup> Tax proceeds are allocated to a State Gaming Fund and redirected towards a wide range of general purposes including property tax relief, education and local economic development programs.<sup>125</sup> Pennsylvania also funds a Compulsive and Problem Gambling Treatment Fund from such moneys.<sup>126</sup>

#### 2.2.1.4 New Jersey

The State of New Jersey led the charge in the United States to legalise and regulate online gambling, particularly sports betting. It permits online casinos, sports betting, poker and fantasy sports to complement land-based casinos with the earliest forms of online gambling legalized in 2013.<sup>127</sup> The State is signatory to the MSIGA.<sup>128</sup> Online casinos are the dominant form of legal gambling in New Jersey.<sup>129</sup> To conduct online gambling within the State, land-based casinos are required to partner with iGaming operators.<sup>130</sup> Similarly, iGaming providers are required to partner with land-based operators to offer online gambling.<sup>131</sup> Atlantic City casinos have expanded aggressively into online gambling, including gambling on casino games, through partnerships with international operators.<sup>132</sup> Offshore gambling sites are illegal but access to the market does not appear blocked by regulatory measures.<sup>133</sup>

Governance of online casino games in New Jersey is administered by a two tier system comprised of the Casino Control Commission ('CCC') with significant ex cathedra powers vested to the Division of Gaming Enforcement within the state

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<sup>124</sup> American Gaming Association 'Pennsylvania' at 3, available at [https://www.americangaming.org/wp-content/uploads/2022/02/AGAGamingRegulatoryFactSheet\\_Pennsylvania-2022.pdf/](https://www.americangaming.org/wp-content/uploads/2022/02/AGAGamingRegulatoryFactSheet_Pennsylvania-2022.pdf/), accessed 18 December 2022.

<sup>125</sup> Loc cit.

<sup>126</sup> Ibid at 4.

<sup>127</sup> US Gaming Review 'New Jersey online gambling' at 1, available at <https://usgamingreview.com/online-gaming/new-jersey/>, accessed 28 July 2022.

<sup>128</sup> Weldon op cit note 104 at 1.

<sup>129</sup> US Gaming Review op cit note 127 at 2.

<sup>130</sup> NJ Casino 'Casino Licensing' at 1, available at <https://www.njcasino.com/info/casino-legal-overview#Casino-Licensing>, accessed 25 July 2022.

<sup>131</sup> Ibid at 2.

<sup>132</sup> Loc cit.

<sup>133</sup> US Gaming Review op cit note 127 at 5.

attorney general's office.<sup>134</sup> Access to licensed gambling sites is restricted to players in the State using geolocation technologies.<sup>135</sup>

New Jersey has an unusual tax system for gambling activities. Gambling tax rates vary by type of casino: land-based casinos pay an 8 per cent annual tax on GGR<sup>136</sup> while online casinos pay a 15 per cent tax on GGR<sup>137</sup> which are paid into a Casino Revenue Fund.<sup>138</sup> Under the statute that created the Casino Revenue Fund:

Moneys in the Casino Revenue Fund shall be appropriated exclusively for reductions in property taxes, rentals, telephone, gas, electric, and municipal utilities charges of eligible senior citizens and disabled residents of the State, and for additional or expanded health services or benefits or transportation services or benefits to eligible senior citizens and disabled residents, as shall be provided by law.<sup>139</sup>

Elderly citizens of New Jersey are principal beneficiaries of gaming tax collections.

Yet New Jersey also imposes a secondary tax on gambling operations. Land-based casinos are obligated to pay an additional 1.25 per cent of GGR and online casinos an additional 2.5 per cent of GGR as an investment alternative tax by purchasing bonds from the Casino Reinvestment Development Authority ('CRDA') or investing in any CRDA approved project.<sup>140</sup> These funds are allocated to improve the lives of people affected by the casino industry with projects that include the rehabilitation of low income housing in communities affected by the same.<sup>141</sup>

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<sup>134</sup> State of New Jersey Casino Control Commission 'The regulations' at 1, available at <https://www.nj.gov/casinos/law/reg/> and New Jersey Department of Law and Public Safety 'Division of Gaming Enforcement' at 1, available at <https://www.njoag.gov/about/divisions-and-offices/division-of-gaming-enforcement-home/>, accessed 18 December 2022.

<sup>135</sup> Loc cit.

<sup>136</sup> NJ Rev Stat § 5:12–144.

<sup>137</sup> New Jersey Division of Gaming Enforcement Atlantic City Gaming Industry 'Summary of gaming and Atlantic City taxes and fees' at 4, available at <https://www.nj.gov/oag/ge/docs/Financials/QuarterlyFinRpt2022/AC%20Specific%20Taxes%20and%20Fees%201978-2022.pdf>, accessed 18 December 2022.

<sup>138</sup> Office of the Attorney General New Jersey Department of Law and Public Safety 'Industry gaming revenues' at 1, available at <https://www.nj.gov/oag/ge/docs/Financials/PressRelease2021/September2021.pdf>, accessed 18 December 2022.

<sup>139</sup> Casino Revenue Fund NJ Rev Stat § 5:12–45(c).

<sup>140</sup> NJ Rev Stat § 5:12–144.1.

<sup>141</sup> American Gaming Association 'New Jersey' at 2, available at [https://www.americangaming.org/wp-content/uploads/2021/03/AGAGamingRegulatoryFactSheet\\_NewJersey-2022.pdf](https://www.americangaming.org/wp-content/uploads/2021/03/AGAGamingRegulatoryFactSheet_NewJersey-2022.pdf), accessed 18 December 2022.

New Jersey also imposes a myriad of other specific taxes. Beyond certain taxes on sports betting and racetrack activities, operators of progressive slot machines pay an additional 8 per cent tax on GGR derived from such machines.<sup>142</sup> The State levies hotel room occupation fees, hotel room surcharge fees, parking fees and tourism promotion fees and collects expired slot machine vouchers and proceeds that remain in dormant internet gaming accounts.<sup>143</sup> Proceeds of these tax measures are generally paid into the Casino Revenue Fund or distributed to the CRDA or both.<sup>144</sup> A luxury tax on alcohol, hotel room rentals and entertainment cover charges support operations of the Atlantic City Convention Center and Boardwalk Hall.<sup>145</sup>

New Jersey's regulatory framework includes customary best practices such as self-exclusion lists, promotion of responsible gambling and data protection provisions.<sup>146</sup> Every licensee is required to make an annual contribution to address problem gambling: USD 600,000 per license comprised of USD 500,000 to the Council on Compulsive Gambling of New Jersey and USD 100,000 for compulsive gambling treatment programs. Online gambling licensees are required to make an additional USD 250,000 contribution.<sup>147</sup> Customary advertising standards exist and advertisements in certain locations (such as within any casino) are required to include disclaimers or taglines which discourage irresponsible gambling and advertise problem gambling assistance programs.<sup>148</sup>

### 2.2.2 Australia

As with many other jurisdictions, the Government of the Commonwealth of Australia wrestled with legalisation and regulation of online gambling.<sup>149</sup> The division of jurisdiction over gambling in Australia largely mirrors other international precedents. While the conduct of gambling within the boundaries of any province is an established

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<sup>142</sup> New Jersey Division of Gaming Enforcement op cit note 137 at 4.

<sup>143</sup> Loc cit.

<sup>144</sup> Loc cit.

<sup>145</sup> Loc cit.

<sup>146</sup> US Gaming Review op cit note 127 at 5.

<sup>147</sup> American Gaming Association op cit note 141 at 2.

<sup>148</sup> Jeremy Kleiman 'Gambling laws and regulations USA–New Jersey' at 7, available at <https://iclg.com/practice-areas/gambling-laws-and-regulations/usa-new-jersey>, accessed 19 December 2022.

<sup>149</sup> Kim Jackson 'Gambling policy and regulation' available at [https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/Publications\\_Archive/archive/gamblingebrief](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/gamblingebrief), accessed 22 December 2022.

provincial right, the federal government enforces criminal laws related to online gambling on a national basis.<sup>150</sup> The primary regulator of online gambling is the Australian Communications and Media Authority ('ACMA').<sup>151</sup>

The legalisation and regulation of online gambling occurred in 2001 through promulgation of the Interactive Gambling Act 2001. Section 5 of this law prohibited domestic gambling establishments from offering online products and services to citizens except for sports betting, lotteries and keno. However, s 9A of the legislation permitted establishments to offer online services into certain designated countries. Section 7A of the Act banned the advertising of all gambling products and services (amended in subsequent legislation).<sup>152</sup> Operators were subject to relevant consumer protection laws under the Competition and Consumer Act 2010<sup>153</sup> enforced, with respect to gambling, by the ACMA.<sup>154</sup> Gambling taxes varied by state and types of gambling, with slot machines attracting an approximately 25 per cent tax and table games generally attracting less than a 20 per cent tax in most states.<sup>155</sup>

The Interactive Gambling Act has twice been amended. The Interactive Gambling Amendment Act 2017<sup>156</sup> bans almost all forms of online gambling whether originating through domestic or international operators. Gambling on online casino games remains illegal in Australia.<sup>157</sup> It prohibits or limits the credit available to online gamblers. It forbids all forms of gambling advertisements during sports events.<sup>158</sup> Notwithstanding the above, the number of television advertisements related to gambling increased by

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<sup>150</sup> GamblingLaws.org 'Gambling laws in Australia' at 1, available at <https://www.gamblinglaws.org/au/>, accessed 3 May 2022.

<sup>151</sup> Victor 'Online gambling and casino regulation in Australia' at 1, available at <https://bestleather.org/online-gambling-and-casino-regulation-in-australia/>, accessed 12 November 2022.

<sup>152</sup> Section 7A of the Interactive Gambling Act 2001.

<sup>153</sup> Competition and Consumer Act 2010, No 51 of 1974 available at <https://www.legislation.gov.au/Details/C2011C00003>, accessed 22 December 2022.

<sup>154</sup> Julian Hoskins and Daniel Lovecek 'Gambling laws and regulations Australia 2023' at 7, available at <https://iclg.com/practice-areas/gambling-laws-and-regulations/australia>, accessed 22 December 2022.

<sup>154</sup> Anti-Money Laundering and Counter-Terrorism Financing Act 2006, No 169 2006 (c 48) available at <https://www.legislation.gov.au/Details/C2019C00011>, accessed 22 December 2022.

<sup>155</sup> Brooke Keaton 'The highest and lowest gambling taxes around the world' at 3, available at <https://www.casino.org/blog/comparing-gambling-taxes-around-the-world/>, accessed 18 December 2022.

<sup>156</sup> Interactive Gambling Amendment Act 85 of 2017 available at <https://www.legislation.gov.au/Details/C2017A00085>, accessed 3 July 2022.

<sup>157</sup> Victoria Responsible Gambling Foundation 'Is online gambling legal in Australia?' at 1, available at <https://responsiblegambling.vic.gov.au/resources/legislation-and-regulation/online-gambling/>, accessed 16 December 2022.

<sup>158</sup> Loc cit.

150 per cent in the five year period to 2021 with the domestic gambling industry tripling its advertising spend over a ten year period ending in 2021.<sup>159</sup>

The Interactive Gambling Amendment (National Self-exclusion Register) Act 2019 introduced a national self-exclusion register.<sup>160</sup> This register is supported by an industry code which establishes procedures for internet service providers to comply with applicable laws.<sup>161</sup> As part of this code, the onus is placed on ISPs to enable customers to restrict access to unlicensed and illegal gambling sites and allows the ACMA to compel ISPs to ‘block consumers from accessing illegal gambling content.’<sup>162</sup> The policy purpose of this code is self-evident: ‘By shifting responsibility for blocking gambling content from the companies themselves to the ISPs, the government makes it less likely consumers can easily access offshore gambling services.’<sup>163</sup> Since promulgation of the registration requirement and introduction of the industry code, over 180 online gambling services have withdrawn from operating in Australia to November 2022<sup>164</sup> while 324 illegal gambling sites were blocked through ACMA action in a two year period from November 2019 to November 2021.<sup>165</sup>

The ACMA enjoys broad authorities to regulate gambling, including online gambling. It has authority to commence civil proceedings against parties offending relevant legislation and distribute the names of directors and principals of illegal offshore gambling operators to border protection agencies to deny entry into Australia.<sup>166</sup> Under the Anti-Money Laundering and Counter-Terrorism Financing Act 2006, certain

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<sup>159</sup> Kyamil Nasuf ‘Australia to implement taglines of harm in gambling ads’ *Gambling News* 2 November 2022 at 10, available at <https://www.gamblingnews.com/news/australia-to-implement-taglines-warning-of-harm-in-gambling-ads/>, accessed 15 December 2022.

<sup>160</sup> Interactive Gambling Amendment (National Self-exclusion Register) Act 127 of 2019 available at <https://www.legislation.gov.au/Details/C2019A00127>, accessed 13 July 2022.

<sup>161</sup> Internet Industry Association ‘The Interactive Gambling Industry Code 2001’ available at [https://commsalliance.com.au/\\_\\_data/assets/pdf\\_file/0019/44605/gambling\\_code\\_nov2010.pdf](https://commsalliance.com.au/__data/assets/pdf_file/0019/44605/gambling_code_nov2010.pdf), accessed 13 July 2022.

<sup>162</sup> Gamble Australia Online ‘2107 update to Australian online gambling laws’ at 1, available at <https://www.gambleonlineaustralia.com/interactive-gambling-act-2001-explained/>, accessed 14 July 2022.

<sup>163</sup> Loc cit.

<sup>164</sup> Australian Communications and Media Authority ‘About the Interactive Gambling Act’ at 1, available at <https://www.acma.gov.au/about-interactive-gambling-act#changes-to-the-act-2017>, accessed 12 December 2022.

<sup>165</sup> Australian Communications and Media Authority ‘More illegal gambling sites blocked’ at 1, available at <https://www.acma.gov.au/articles/2021-10/more-illegal-gambling-sites-blocked>, accessed 16 December 2022.

<sup>166</sup> Hoskins and Lovecek op cit note 154 at 7.

gambling activities constitute ‘designated services’ which require gambling operators to register with relevant authorities and report qualifying transactions to the Australian Transaction Reports and Analysis Centre (‘Austrac’),<sup>167</sup> including threshold reports and suspicious matter reports.<sup>168</sup>

Australia is the largest market in the world by average spend for online gambling. It has the highest rate of problem gambling in the world with a twofold increase in incidences of problem gambling in the past ten years to 2022.<sup>169</sup> In September 2022 the Government commenced a parliamentary inquiry into online gambling.<sup>170</sup> By November 2022, the Government proposed ‘taglines’ similar to health warnings on tobacco to warn consumers of the dangers of gambling.<sup>171</sup>

### 2.2.3 United Kingdom

In the United Kingdom of Great Britain except Northern Ireland,<sup>172</sup> the Gambling Act 2005<sup>173</sup> is the omnibus legislation governing the conduct of gambling, including online gambling on casino games. Local authorities retain jurisdiction over premise licenses.<sup>174</sup> Beyond unlicensed family entertainment centres, all establishments that offer gambling within the UK require a license issued by the Gambling Commission (‘UKGC’).<sup>175</sup> Offshore gambling operators were not originally required to obtain a license unless they had at least one piece of equipment located within the country under a ‘point of supply’ system.<sup>176</sup>

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<sup>167</sup> See s 6 of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006.

<sup>168</sup> Hoskins and Lovecek op cit note 154 at 7.

<sup>169</sup> Nasuf op cit note 159 at 3.

<sup>170</sup> Ibid at 1.

<sup>171</sup> Ibid at 2.

<sup>172</sup> In Northern Ireland, legislation based on the Gaming Act 1968 continues to apply with proposed amendments under consideration to resolve this anomaly. Chris Elliott ‘Gambling laws and regulations in the United Kingdom 2023’ at 1, available at <https://iclg.com/practice-areas/gambling-laws-and-regulations/united-kingdom>, accessed 15 December 2022.

<sup>173</sup> Gambling Act 2005 c 19, available at <https://www.legislation.gov.uk/en/ukpga/2005/19/data.pdf>, accessed 17 July 2022.

<sup>174</sup> Elliott op cit note 172 at 1.

<sup>175</sup> GamblingLaws.org ‘UK Gambling Act 2005’ at 1, available at <https://www.gamblinglaws.org/uk/gambling-act-2005/>, accessed 12 July 2022.

<sup>176</sup> GamblingLaws.org ‘The UK Gambling Licensing and Advertising Act of 2014’ at 1, available at <https://www.gamblinglaws.org/uk/gambling-act-2014/>, accessed 17 July 2022.

The Act was amended through the Gambling (Licensing and Advertising Act) 2014<sup>177</sup> to close the ‘point of supply’ loophole and enforce a ‘point of consumption’ scheme which criminalised the offering of any gambling services to patrons within the United Kingdom by any operator not holding a license therein.<sup>178</sup> This amendment specifically requires the licensing of online gambling operators regardless of whether they maintain any equipment within the country.<sup>179</sup> Online gambling operators pay a tax of 21 per cent of GGR from UK-based customers to the UKGC.<sup>180</sup>

The UK legislation features customary public interest protections found elsewhere in the world. The prevention of crime, assurance of fair play and protection of children and other vulnerable persons from harm arising from gambling represent three central public policy priorities explicitly pronounced in legislation.<sup>181</sup> Additional obligations imposed on licensees require compliance with legislation related to money laundering, terrorism financing and consumer protections.<sup>182</sup> All operators are subject to standards set by the British Advertising Standards Authority while the gambling industry is subject to the ‘Industry Group for Responsible Gambling’.<sup>183</sup> The Act prohibits any advertisements by offshore online gambling sites unless licensed in the country.<sup>184</sup>

The United Kingdom is the fifth largest market by average spend for online gambling.<sup>185</sup> In November 2020, the UK Government launched a Gambling Act Review with a focus on creating a safe gambling environment, including reconsideration of consumer protection, advertising, sponsorship and branding

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<sup>177</sup> Gambling (Licensing and Advertising) Act 2014, c 17, available at <https://www.legislation.gov.uk/ukpga/2014/17/enacted>, accessed 21 July 2022.

<sup>178</sup> Elliott op cit note 172 at 3. ‘Point of consumption’ broadly refers to the place at which the bettor is located at the time that they consume the gambling opportunity (point of consumption) regardless of the location at which the gambling opportunity originates or gambling operator resides (point of supply). For an illustration of a ‘point of consumption’ tax in gambling, see Department of Treasury and Finance, Government of Victoria ‘Review of the Point of Consumption Tax on wagering and betting’ 26 November 2020 available at <https://apo.org.au/node/309913>, accessed 1 July 2024.

<sup>179</sup> Loc cit.

<sup>180</sup> Ibid at 7.

<sup>181</sup> Part 4 of the Gambling Act 2005.

<sup>182</sup> Elliott op cit note 172 at 1.

<sup>183</sup> Ibid at 6.

<sup>184</sup> See ss 3, 4, and 5 of the Gambling (Licensing and Advertising) Act 2014; Part 16 of the Gambling Act 2005; Elliott op cit note 172 at 8.

<sup>185</sup> Nasuf op cit note 159 at 8.

regulations.<sup>186</sup> The central focus of an impending White Paper is to ‘[adapt] gambling regulation to the digital age and for protections to be put in place to safeguard individuals that are most vulnerable.’<sup>187</sup> Public interest groups (such as Gambling With Lives) have called for a full ban on gambling advertising while football clubs have called for a ban on gambling sponsorships of football clubs and prohibition of gambling advertisements related to football.<sup>188</sup> Similar to Australian efforts, health warnings for gambling similar to health warnings for tobacco have been raised as part of the public consultation process.<sup>189</sup> Release of the White Paper has been repeatedly delayed to the mutual consternation of public interest and industry groups, with one researcher noting that: ‘They’re just saying “For Christ’s sake, just publish it.”’<sup>190</sup>

#### 2.2.4 The Netherlands

The Kingdom of the Netherlands is already the tenth largest market in the world by average spend for online gambling<sup>191</sup> despite only providing for legalisation and regulation of online gambling in 2021. Online gambling in any form was prohibited in the Netherlands prior to promulgation of the Remote Gambling Act 2021.<sup>192</sup> This Act establishes the basis for regulation of online gambling, including on casino games, and was accompanied by a suite of subordinate legislation.<sup>193</sup>

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<sup>186</sup> Rahul Rana ‘UK gambling white paper – an in-depth look at its impact on the industry’ *Varsity* 15 February 2023 at 1–3, available at <https://www.varsity.co.uk/sponsored/uk-gambling-white-paper-an-in-depth-look-at-its-impact-on-the-industry>, accessed 16 February 2023; Elliott op cit note 172 at 9.

<sup>187</sup> Silvia Pavlof ‘UK gambling minister offers no clarity on upcoming white paper’ *Gambling News* 9 December 2022 at 1, available at <https://www.gamblingnews.com/news/uk-gambling-minister-offers-no-clarity-on-upcoming-white-paper/>, accessed 15 December 2022; Elliott op cit note 135 at 9.

<sup>188</sup> Ibid at 4.

<sup>189</sup> Loc cit.

<sup>190</sup> Rob Davies ‘A gambling white paper by Easter would be a turn-up for the books’ *Guardian* 5 March 2023 at 3, available at <https://www.theguardian.com/business/2023/mar/05/a-gambling-white-paper-by-easter-would-be-a-turn-up-for-the-books?amp>, accessed 14 March 2023.

<sup>191</sup> Nasuf op cit note 159 at 8.

<sup>192</sup> Remote Gambling Act 2021 Decree of 26 January 2021 available at <https://wetten.overheid.nl/BWBR0044773/2022-07-15>, accessed 2 August 2022.

<sup>193</sup> Remote Gambling Decree Gazette 2021 37 of 26 January 2021 available at <https://zoek.officielebekendmakingen.nl/stb-2021-37.html#>, accessed 1 August 2022; Remote Gambling Regulations Official Gazette 2021 4507 of 1 February 2021 available at <https://zoek.officielebekendmakingen.nl/stcrt-2021-4507.html>, accessed 1 August 2022; Gambling Implementing Regulations Official Gazette 2021 4509 of 21 January 2021 available at <https://zoek.officielebekendmakingen.nl/stcrt-2021-4509.html>, accessed 1 August 2022.

The Remote Gambling Act and its regulations require all operators to obtain a license from the Netherlands Gambling Authority to offer online gambling in the country.<sup>194</sup> It further requires all licensees to be companies registered in the European Union, subject to the availability of an exemption which the Netherlands Gambling Authority has indicated that it will not grant at this time.<sup>195</sup> Online operators need to maintain operations within the European Union and a control database within the Netherlands.<sup>196</sup>

The Dutch legislation contains strict provisions related to prevention of problem gambling, assurance of consumer protection and prevention of gambling-related criminal activities<sup>197</sup> that represent ‘one of the most demanding [sets of] regulations in the world.’<sup>198</sup> Among other provisions, the legislation includes a Central Register for the Exclusion of Gaming (‘CRUKS’) and requires operators to maintain a representative presence in the Netherlands. Remote gambling licensees are subject to a 29 per cent tax on profits generated from products and services offered under the Dutch license and a 1.95 per cent gambling levy allocated to cover regulatory costs with a small portion earmarked for problem gambling programs.<sup>199</sup>

Under the legislation, the Netherlands Gambling Authority has the power to not only investigate illegal operators but consider ‘the entire chain of companies involved in the organisation of illegal online offerings’ including payment service providers and software technology providers.<sup>200</sup> It includes provisions that obligate payment companies to withhold services to illegal (unlicensed) operators and compel offshore operators to provide information to Dutch authorities on demand.<sup>201</sup>

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<sup>194</sup> Netherlands Gambling Authority ‘Remote Gambling Act in force’ at 1, available at <https://kansspelautoriteit.nl/nieuws/2021/april/remote-gambling-act/>, accessed 2 August 2022.

<sup>195</sup> Justin Franssen and Alan Littler ‘Remote gambling’ at 3, available at <https://iclg.com/practice-areas/gambling-laws-and-regulations/netherlands>, accessed 3 August 2022.

<sup>196</sup> Ibid at 4.

<sup>197</sup> Gambling Holland ‘Distance Gaming Act’ at 1, available at <https://www.gamblingholland.nl/the-dutch-gambling-act-wok/>, accessed 2 August 2022.

<sup>198</sup> Kalff Katz & Franssen ‘Dutch license for online gambling’ at 2, available at <https://www.kalffkatzfranssen.nl/en/sectors/gaming/dutch-licence-for-online-gambling/>, accessed 2 August 2022.

<sup>199</sup> Franssen and Littler op cit note 195 at 4.

<sup>200</sup> Alan Littler and Justin Franssen ‘Gaming law 2021: Netherlands’ at 2, available at <https://practiceguides.chambers.com/practice-guides/gaming-law-2021/netherlands>, accessed 2 August 2022.

<sup>201</sup> Machteld Robichon and Fransje Brouwer ‘Update remote gambling in the Netherlands: opening market 1 October 2021 and publication of final lower legislation’ at 1–4, available at

The Netherlands enforces various restrictions on advertising of gambling. It limits the hours available to promote gambling through television and radio. It prohibits the advertising of gambling during sports events. Since June 2020 it prohibits use of athletes to promote gambling other than through direct sponsorships. An Advertising Code for Online Games of Chance ('ROK') was published in December 2021 which sets further limitations on the scope of advertising permitted for online gambling. A decree was passed in 2022 that requires a complete ban on untargeted advertising of online gambling to commence in January 2023, a complete ban on sponsorship programs and events by online gambling to commence in 2024 and a complete ban on sponsorships of sports by online gambling sites to commence by 2025.<sup>202</sup> Implementation of the decree has been delayed,<sup>203</sup> partly due to criticism from industry participants regarding the reasonableness of these proposed bans.<sup>204</sup>

## 2.2.5 Sweden

The Kingdom of Sweden is the second largest market in the world by average spend for online gambling.<sup>205</sup> It has some of the world's strictest requirements for the regulation of online gambling. A historic monopoly over gambling held by the Government of Sweden ended with passage of the Gambling Act 2018<sup>206</sup> which came into effect on 1 January 2019. This Act sits at the apex of a suite of laws and regulations that govern this activity in the country.<sup>207</sup>

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<https://www.bureaubrandeis.com/update-remote-gambling-in-the-netherlands-opening-market-1-october-2021-and-publication-of-final-lower-legislation/>, accessed 3 August 2022.

<sup>202</sup> Alan Littler and Joris Crone 'Gambling laws and regulations Netherlands 2023' at 7 and 12, available at <https://iclg.com/practice-areas/gambling-laws-and-regulations/netherlands>, accessed 19 December 2022.

<sup>203</sup> Niji Narayan 'Dutch MPs propose tougher rules on gambling ads' *European Gaming* 21 February 2023 at 1, available at <https://europeangaming.eu/portal/compliance-updates/2023/02/21/130506/dutch-mps-propose-tougher-rules-on-gambling-ads/>, accessed 15 March 2023.

<sup>204</sup> Matthew Calleja 'Dutch advertising ban unjustified, claims gambling trade association' *Sigma* 11 January 2023 available at <https://sigma.world/news/dutch-advertising-ban-unjustified-claims-gambling-trade-association/>, accessed 15 March 2023.

<sup>205</sup> Nasuf op cit note 159 at 8.

<sup>206</sup> Gambling Act 2018 (2018:1138) available at [https://www.spelinspektionen.se/globalassets/dokument/engelsk/oversatt-spellagen/english-spellagen-sfs-201\\_1138.pdf](https://www.spelinspektionen.se/globalassets/dokument/engelsk/oversatt-spellagen/english-spellagen-sfs-201_1138.pdf), accessed 5 August 2022.

<sup>207</sup> Maria McDonald and Elvin Sababi 'Gambling laws and regulations in Sweden 2023' at 1, available at <https://iclg.com/practice-areas/gambling-laws-and-regulations/sweden>, accessed 5 August 2022.

The Act introduced a national licensing system for all gambling conducted in Sweden.<sup>208</sup> Online gambling is permitted by the Act and offshore online gambling sites are eligible to offer gambling services under license.<sup>209</sup> The Act requires ISPs to ‘block unlicensed offshore operators who try and circumvent gambling laws’<sup>210</sup> and interdict payments to and from such operators.<sup>211</sup> Offshore operators are required to maintain a representative presence and host servers in Sweden unless remote access is provided to servers in other recognised jurisdictions.<sup>212</sup> The law sets an 18 per cent tax on online gambling activities.<sup>213</sup>

Interestingly, the Act does not prohibit Swedish nationals from registering with unlicensed offshore online gambling operators.<sup>214</sup> However, the Swedish Gambling Authority may require unlicensed operators to post warnings on their sites that they are offering gambling services without the required license and players may be subject to tax on their winnings.<sup>215</sup> The Gambling Authority may block payments to and from players engaged with unlicensed operators.<sup>216</sup>

‘Responsible gambling and social responsibility are considered cornerstones of the Swedish Gambling Act.’<sup>217</sup> Protections include limits on the availability of discounts, rebates and promotions offered to consumers.<sup>218</sup> Operators are prohibited from extending credit to players, limits apply to deposits and a self-exclusion register is available to all players.<sup>219</sup> The Act regulates online gambling advertising to align Swedish practices with customary industry norms.<sup>220</sup>

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<sup>208</sup> Government Offices of Sweden, Ministry of Finance ‘About the government’s work for a re-regulated gambling market’ at 1, available at <https://www.government.se/articles/2021/01/about-the-governments-work-for-a-re-regulated-gambling-market/>, accessed 4 August 2022.

<sup>209</sup> Loc cit.

<sup>210</sup> April Bergman ‘Sweden’s Riksdag approves 2018 Swedish Gambling Act’ at 1, available at <https://www.bestonlinecasinos.com/news/swedens-riksdag-approves-2018-swedish-gambling-act/>, accessed 5 August 2022.

<sup>211</sup> GamblingLaws.org ‘Gambling laws in Sweden’ at 3, available at <https://www.gamblinglaws.org/se/>, accessed 4 August 2022.

<sup>212</sup> McDonald and Sababi op cit note 207 at 8.

<sup>213</sup> Bergman op cit note 210 at 1.

<sup>214</sup> McDonald and Sababi op cit note 207 at 9.

<sup>215</sup> Loc cit.

<sup>216</sup> Loc cit.

<sup>217</sup> Ibid at 4.

<sup>218</sup> Ibid at 6.

<sup>219</sup> Loc cit.

<sup>220</sup> Government Offices of Sweden op cit note 208 at 1.

A subsequent report delivered by a Gambling Market Inquiry on 14 December 2020 proposed further changes to legislation.<sup>221</sup> In terms of advertising, the Inquiry recommended further limitations on gambling advertising.<sup>222</sup> In terms of licensing, it proposed introduction of business to business ('B2B') licenses for online gambling software providers which prohibit non-licensed software companies from providing services to licensed operators and licensed software companies from providing services to non-licensed operators.<sup>223</sup> The Inquiry's proposals were met with scathing industry criticism for ineffectual regulation and lack of meaningful enforcement against unlicensed offshore online gambling operators:

[The approach adopted by Sweden] becomes particularly remarkable when the supervisory authorities have not succeeded in preventing or prosecuting a single gaming company that targets Swedish customers without a license.

Too few Swedes choose to play with licensed gaming companies. Every fourth Swedish Krona played on online games already goes to gaming companies without a Swedish license, without Swedish consumer protection.

It is not illegal for unlicensed gaming companies to accept Swedish players or to market themselves towards Swedish players. The government's ignorance of gambling . . . has led to a hollow licensing system. It leaks like a sieve. Since the re-regulation was implemented, too little has been done to make it more difficult for unlicensed gambling in Sweden.<sup>224</sup>

### 2.2.6 Chile

The Republic of Chile is the third largest gambling market in South America.<sup>225</sup> On 7 March 2022, the Government of Chile introduced legislation to legalise and regulate

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<sup>221</sup> Kindred 'The gambling market inquiry will push Swedish consumer protections out of play' at 1, available at <https://www.kindredgroup.com/globalassets/documents/corporate-governance-related-documents/fact-sheet-bos-1.pdf>, accessed 12 August 2022.

<sup>222</sup> Loc cit.

<sup>223</sup> Such measure are scheduled to come into effect during 2023. McDonald and Sababi op cit note 207 at 10.

<sup>224</sup> Kindred op cit note 221 at 2–3.

<sup>225</sup> Behind Argentina and Columbia. 'Ranked: the biggest gambling countries in Latin America' *News Americas* 25 September 2019 at 4, available at <https://www.newsamericasnow.com/ranked-the-biggest-gambling-countries-in-latin-america/>, accessed 13 August 2022.

online gambling in the country.<sup>226</sup> This legislative effort was driven by two imperatives. On the one hand, the Government recognised that the presence of at least 900 unregulated gambling sites offering services in the country should be formalised into the economy. On the other hand, the Government explicitly sought to capture some of the economic benefits generated by such sites.<sup>227</sup>

The proposed legislation establishes a national licensing system managed by a reconstituted national regulatory authority.<sup>228</sup> Operators may obtain a renewable five year license or a special 60 day online gambling license.<sup>229</sup> Operators are required to be incorporated in Chile<sup>230</sup> and lodge a financial guarantee to reimburse users in the event of closure of their online site.<sup>231</sup> Responsible gambling is a prominent feature of such legislation<sup>232</sup> which includes customary provisions related to player age, identification and self-exclusion mechanisms.<sup>233</sup> The proposed legislation prohibits gambling on credit and establishes advertising restrictions to discourage gambling by children.<sup>234</sup>

The legislation deems any online platform that allows any person to gamble from within Chile to operate in Chile irrespective of the location of the operator or infrastructure supporting any operations, systems or websites.<sup>235</sup> As such, online gambling sites are required to be licensed under the proposed legislation.<sup>236</sup> Pursuant to prior court order, the law empowers a reconstituted gambling authority to require ISPs to block internet access to unlicensed online gambling sites, compel payment processing companies to

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<sup>226</sup> Online Gambling Platforms Bill Bulletin 14838-3 of 7 March 2022, summary available at [www.cuatrecasas.com/resources/nl22-89-online-gambling-platforms-bill-4138-0037-7653-v.1-622a5972adb9a281288211.pdf?v1.22.0.202205251146](http://www.cuatrecasas.com/resources/nl22-89-online-gambling-platforms-bill-4138-0037-7653-v.1-622a5972adb9a281288211.pdf?v1.22.0.202205251146), accessed 14 August 2022.

<sup>227</sup> Erik Gibbs ‘Chile advances online gambling legislation, lays out potential regulations’ at 1, available at <https://www.casino.org/news/chile-advances-online-gaming-legislation-lays-out-potential-regulations/>, accessed 12 August 2022.

<sup>228</sup> Loc cit.

<sup>229</sup> Loc cit.

<sup>230</sup> Lucia Mouriño ‘Chile accelerates proposal to regulate the online gambling industry’ at 2, available at <https://sbcamericas.com/2022/03/08/chile-accelerates-proposal-to-regulate-the-online-gambling-industry/>, accessed 12 August 2022.

<sup>231</sup> Gibbs op cit note 227 at 1.

<sup>232</sup> Loc cit.

<sup>233</sup> Marese O’Hagen ‘Chile publishes first online gambling bill’ at 1, available at <https://igamingbusiness.com/legal-compliance/legal/chile-publishes-first-online-gaming-bill/>, accessed 14 August 2022.

<sup>234</sup> Ibid at 2.

<sup>235</sup> Cuatrecasas ‘Online gambling platforms Bill’ at 3, available at [www.cuatrecasas.com/resources/nl22-89-online-gambling-platforms-bill-4138-0037-7653-v.1-622a5972adb9a281288211.pdf?v1.22.0.202205251146](http://www.cuatrecasas.com/resources/nl22-89-online-gambling-platforms-bill-4138-0037-7653-v.1-622a5972adb9a281288211.pdf?v1.22.0.202205251146), accessed 14 August 2022.

<sup>236</sup> Loc cit.

block transactions with unlicensed online gambling sites and enjoin media companies from publishing advertising of unlicensed online gambling sites.<sup>237</sup>

The proposed legislation imposes a 20 per cent tax on gross annual gambling revenues in lieu of any value added tax ('VAT').<sup>238</sup> It requires operators to allocate 1 per cent of annual gross revenues to responsible gambling programs.<sup>239</sup> Gamblers pay a 15 per cent tax on income earned from online gambling sites payable every time funds are withdrawn from their account.<sup>240</sup> Promulgation of the legislation in 2022 appears to have stalled due to concerns over insufficient attention to the tax regime embedded within law, with the Undersecretary for Finance noting 'visible flaws' with the tax framework and general concerns with 'its failure to explain how the country's local and commercial taxes would be applied to international operators, who should be subject to equal tax terms as domestic incumbents.'<sup>241</sup>

### 2.2.7 Kenya

After South Africa and Nigeria, the Republic of Kenya is the third largest gambling market in Sub-Saharan Africa.<sup>242</sup> Kenya was the second country in Africa (after Ghana) to legalise all forms of betting and gambling on casino games.<sup>243</sup> Regulation of gambling in Kenya dates back to 1966 with promulgation of the Betting, Lotteries and Gaming Act which was most recently amended in 2018.<sup>244</sup> A series of complementary laws support this legislation.<sup>245</sup> Pursuant to the Fourth Schedule of the Constitution of

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<sup>237</sup> Felipie von Unger V 'New bill on online gambling platforms' at 2, available at <https://alessandri.legal/en/new-bill-on-online-gambling-platforms/>, accessed 14 August 2022.

<sup>238</sup> Mourinho op cit note 230 at 1.

<sup>239</sup> Loc cit.

<sup>240</sup> Cuatrecasas op cit note 235 at 2.

<sup>241</sup> Nick Ware 'Chile's online gambling bill on ice after 'visible flaws' in tax framework' at 2, available at <https://lotterydaily.com/2022/08/04/regulation/chiles-online-gambling-bill-on-ice-after-visible-flaws-in-tax-framework/>, accessed 15 December 2022.

<sup>242</sup> 'Kenya restricts gambling to 5 star hotels' *Business Insider Africa* 3 March 2022 at 1, available at <https://africa.businessinsider.com/local/lifestyle/kenya-restricts-gambling-to-5-star-hotels/cqw34qx?op=1>, accessed 8 March 2022.

<sup>243</sup> Michelle Wangari 'New bill seeks to restrict daytime gambling in Kenya' at 1, available at <https://mpasho.co.ke/entertainment/2022-01-27-new-bill-seeks-to-restrict-daytime-gambling-in-kenya/>, accessed 18 August 2022.

<sup>244</sup> Betting, Lotteries and Gaming Act c 131 [2018] available at <https://bclb.go.ke/wp-content/uploads/2019/03/BettingLotteriesandGamingAct9of1966.pdf>, accessed 18 August 2022.

<sup>245</sup> Such laws include but are not limited to the following statutes and supporting regulations as in force and effect and amended from time to time: the Bribery Act 47 of 2016; the Bribery Regulations, 2022; the Computer Misuse and Cybercrimes Act 5 of 2018; the Consumer Protection Act 46 of 2012; the Data Protection (Complaints Handling Procedure and Enforcement Regulations, 2021; the Data Protection (General)

Kenya, the regulation of online gambling in Kenya is divided between the federal government and county governments coordinated under the auspices of the Betting Control and Licensing Board ('BCLB').<sup>246</sup> The national government is vested with overarching responsibility for regulation of gambling but county governments 'issue various approvals, permits or licenses based on the product to be offered, size of the premises, number of employees, location of the premises, and other products provided or sold other than those directly regulated' by the federal government.<sup>247</sup>

Online gambling was legalised in 2011 and subject to a monopoly held by Betkenya operated by Amaya Gaming Group Inc. of Canada until 2020.<sup>248</sup> Based on prevailing legislation, online casinos who hold a remote gambling license issued by the BCLB are eligible to offer gambling in Kenya.<sup>249</sup> Under the Betting, Lotteries and Gaming (Online Gaming) Regulations 2019, operating in conjunction with the Data Protection Act, any international operator is required to maintain a customer care centre in Kenya.<sup>250</sup> However, the Government does not appear to block access to the market by unlicensed operators.<sup>251</sup>

To gain greater control over the gambling industry, the Kenyan Government proposes to replace the Betting, Lotteries and Gaming Act with new legislation. Under the

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Regulations, 2021; the Data Protection (Regulation of Data Controllers and Data Processors) Regulations, 2021; the Data Protection Act 24 of 2019; the Income Tax (Transfer Pricing) Rules, 2006; the Excise Duty Act 23 of 2015; the Kenya Citizenship and Immigration Act 12 of 2011; the Kenya Citizenship and Immigration Regulations, 2012; the Kenya Information Communications Act 4 of 2012; the Proceeds of Crime and Anti-Money Laundering Act 9 of 2009; Proceeds of Crime and Anti-Money Laundering Regulations, 2013; the Betting, Gaming and Lotteries (Regulations), 2019; the Income Tax Act (c 470); the Trade Mark Rules, 2003; the Trade Marks Act 51 of 1955; the Unclaimed Financial Assets Act 40 of 2011; the Unclaimed Financial Assets Regulations, 2016; the Value Added Tax Act 35 of 2013; and the Finance Act 23 of 2019.

<sup>246</sup> John Ohaga and Michelle Koske 'Gambling laws and regulation Kenya 2022' at 1, available at <https://iclg.com/practice-areas/gambling-laws-and-regulations/kenya>, accessed 18 August 2022.

<sup>247</sup> Ombo Malumbe and Jack Ong'anya 'Gambling laws and Regulations Kenya 2023' at 3, available at <https://iclg.com/practice-areas/gambling-laws-and-regulations/kenya>, accessed 15 December 2022.

<sup>248</sup> Iwo Bulski 'The future of online gambling in Kenya' at 2, available at <https://e-playafrica.com/the-future-of-online-gambling-in-kenya/>, accessed 11 September 2022; HapaKenya 'Online gambling regulation in Kenya' at 1, available at <https://hapakenya.com/2018/04/16/online-gambling-regulation-in-kenya/>, accessed 16 May 2022.

<sup>249</sup> Wangari op cit note 243 at 1.

<sup>250</sup> Malumbe and Ong'anya op cit note 247 at 8.

<sup>251</sup> 'What are the gambling regulations in Kenya' *The Star* 30 November 2020 at 1, available at <https://www.the-star.co.ke/sports/2020-11-30-what-are-the-gambling-regulations-in-kenya/>, accessed 18 August 2022.

Gambling Bill 2020,<sup>252</sup> a new National Gambling Authority is charged with regulation, control and licensing of all gambling operators, including online gambling sites.<sup>253</sup> The legislation proposes to limit access of foreign online operators and require at least 30 per cent local ownership to ensure that the economic benefits of online gambling are retained in the domestic economy.<sup>254</sup> It otherwise contains many customary provisions related to the governance of gambling found in other jurisdictions.<sup>255</sup>

The Gambling Bill 2020 is notable for its strict approach to gambling advertising. The Government plans to ban all gambling advertisements on social media and outdoor locations.<sup>256</sup> It proposes to restrict the hours of gambling advertising.<sup>257</sup> All gambling advertisements are to be approved by the regulatory authority prior to publication and include a sizeable warning message about the addictive dangers of gambling.<sup>258</sup> Celebrity endorsements are banned.<sup>259</sup> The legislation taxes gambling advertisements since ‘most of the revenue generated by the products advertised is currently allowed to leave the country and benefit foreign nationals.’<sup>260</sup>

Although the Gambling Bill 2020 has yet to become law, the Government sought to pre-emptively introduce such measures as policy under current legislation.<sup>261</sup> A prominent celebrity and several gambling operators challenged the legality of such efforts. The Kenya High Court subsequently held that such prohibitions were ‘tainted

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<sup>252</sup> Gaming Bill Number 38 of 2019 Kenya Gazette Supplement 74 of 27 May 2019 at 501, available at [http://www.parliament.go.ke/sites/default/files/2019-06/Gaming%20Bill%2C%202019\\_compressed.pdf](http://www.parliament.go.ke/sites/default/files/2019-06/Gaming%20Bill%2C%202019_compressed.pdf), accessed 22 August 2022.

<sup>253</sup> ‘What are the gambling regulations in Kenya’ *The Star* 30 November 2020 at 1, available at <https://www.the-star.co.ke/sports/2020-11-30-what-are-the-gambling-regulations-in-kenya/>, accessed 18 August 2022.

<sup>254</sup> Dennis Milanzi ‘The 2019 Kenyan Gambling Bill’ at 2, available at <https://news365.co.za/the-2019-kenyan-gambling-bill/>, accessed 18 August 2022.

<sup>255</sup> Ohaga and Koske op cit note 246 at 6–8.

<sup>256</sup> ‘Kenya high court strikes down gambling ads ban’ *Casino News Daily* 28 May 2019 at 1, available at <https://www.casinonewsdaily.com/2019/05/28/kenya-high-court-strikes-down-gambling-ads-ban/>, accessed 18 August 2022.

<sup>257</sup> *The Star* op cit note 253 at 3.

<sup>258</sup> Loc cit.

<sup>259</sup> *Casino News Daily* op cit note 256 at 1.

<sup>260</sup> ‘Kenya preps fresh new gambling restrictions’ *Casino News Daily* 30 May 2019 at 1, available at <https://www.casinonewsdaily.com/2019/05/30/kenya-preps-fresh-new-gambling-restrictions/>, accessed 19 August 2022.

<sup>261</sup> Loc cit.

with illegality, unreasonableness, and procedural impropriety’ and annulled the adoption of such restrictions.<sup>262</sup>

Kenya’s tax policy towards gambling, including online gambling, has been fraught with similar challenges. Based on concerns for the prevalence of gambling among impoverished and young Kenyans, the Government introduced a 35 per cent tax on gambling stakes and winnings in 2017.<sup>263</sup> The ‘burdensome taxes forced two of the most reputable bookmakers . . . to leave the market [and] betting revenue significantly plummeted.’<sup>264</sup> The Government subsequently reduced the tax to 15 per cent in 2020.<sup>265</sup> Litigation between the Government and operators over the vires of charging a withholding tax on gamblers’ winnings has resulted in the revocation of some online licenses.<sup>266</sup> As part of the new legislation, the Government proposes a 20 per cent tax which is ‘expected to trigger a massive exodus of operators.’<sup>267</sup>

## 2.3 ANALYSES

Nuanced analyses of the legalisation and regulation of online gambling on casino games in the representative sample of international jurisdictions may yield insights into key issues and regulatory paradigms which may require consideration as part of any discussion of legalisation and regulation of the activity in South Africa. The cursory review of international jurisdictions canvassed by this study betrays the currency of the legal environment. Many jurisdictions under review have only passed enabling legislation or regulations within the past three years while other jurisdictions which wrestled with the issue in the early years of this century have undertaken significant amendments or reviews of legislation within the same period. The representative sample of international jurisdictions further suggests that regulation of online gambling represents a significant commercial concern to private sector actors with many industry participants commenting on or criticising proposed regulatory reforms.

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<sup>262</sup> Loc cit.

<sup>263</sup> Ohaga and Koske op cit note 246 at 5.

<sup>264</sup> Bulski op cit note 248 at 3.

<sup>265</sup> Ohaga and Koske op cit note 246 at 5; Bulski op cit note 248 at 3.

<sup>266</sup> Ohaga and Koske op cit note 246 at 6.

<sup>267</sup> Loc cit.

### 2.3.1 Complex legislation

The methods used to legalise and regulate online gambling in the representative sample of international jurisdictions considered by this study suggest that this activity is typically governed by a series of intertwined laws. Beyond an overarching law enforced by a federal government and local regulations regarding specific operations enforced by provincial or county governments, there are common threads among complementary pieces of federal legislation that often address issues of consumer protection, money laundering, terrorism financing, financial transactions (particularly payments), privacy, data protection and advertising. This interlinked network of laws demonstrates the complexity and challenges associated with legalisation and regulation of online gambling. As such, the utility and suitability of the existing suite of complementary legislation in South Africa likely require discussion as part of any consideration of legalisation and regulation of online gambling of casino games in the country.<sup>268</sup>

### 2.3.2 Offshore gambling sites

A central challenge associated with legalisation and regulation of online gambling on casino games (and any other forms of online gambling) is the presence of offshore gambling sites.<sup>269</sup> These operators often have the ability to function without licenses in many jurisdictions in which players may access their sites.<sup>270</sup> Such operators often fail to meet minimum privacy and data protection standards, have insufficient player protections, inadequately safeguard player funds, provide unsatisfactory customer

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<sup>268</sup> Such suite of legislation includes the following statutes: Financial Intelligence Centre Act of 2021 GG 22886 of 2 December 2021 available at [https://www.gov.za/sites/default/files/gcis\\_document/201409/a38-010.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/a38-010.pdf), accessed 15 May 2022; Regulation of the Interception of Communications and Provision of Communications-Related Information Act 70 of 2002 GG 24286 of 22 January 2003 available at [https://www.gov.za/sites/default/files/gcis\\_document/201409/a70-02.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/a70-02.pdf), accessed 15 May 2022; Prevention of Organized Crimes Act 121 of 1998 GG 19553 of 4 December 1998 available at [https://www.gov.za/sites/default/files/gcis\\_document/201409/a121-98.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/a121-98.pdf), accessed 15 May 2022; National Payment Systems Act 78 of 1998 GG 19402 of 28 October 1998 available at [https://www.gov.za/sites/default/files/gcis\\_document/201409/a78-98.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/a78-98.pdf), accessed 15 May 2022; Electronic Communications and Transactions Act 25 of 2002 GG 23708 of 2 August 2002 available at [https://www.gov.za/sites/default/files/gcis\\_document/201409/a25-02.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/a25-02.pdf), accessed 15 May 2022.

<sup>269</sup> Jake Patel 'Offshore gambling' at 1, available at <https://www.compare.bet/en-us/offshore-gambling>, accessed 15 December 2022.

<sup>270</sup> Ibid at 1 and 3.

service, offer no guarantee of fair play and employ predatory advertising practices. They also do not contribute any benefit to the local economy.<sup>271</sup>

Many countries considered by this study make it illegal for any gambling operator to offer services within their jurisdictions without a license.<sup>272</sup> This ‘point of consumption’ regulatory approach accounts for the existence of offshore gambling sites. Many jurisdictions require online gambling operators to partner with or operate land-based casinos as a condition for receipt of an online gambling license. Several jurisdictions require international operators to incorporate, establish a physical presence, maintain operations (servers) or a customer care centre within their jurisdictions as conditions of online gambling licenses. If observed by operators, such measures enable regulatory authorities to exercise jurisdiction over online gambling activities, including those offered by offshore gambling sites. Such measures may warrant further consideration in any contemplation of the licensing and regulation of online gambling on casino games in South Africa, particularly to overcome concerns with prospective erosion of the commercial viability of existing land-based casinos and protection of employment opportunities at such establishments.

Yet the effectiveness of these measures are subject to debate. While these requirements are generally satisfied by large and reputable offshore operators, many small or unscrupulous offshore gambling sites ignore such requirements and, despite the illegality of their operations, often remain accessible within such jurisdictions.<sup>273</sup> Industry participants have expressed concern that the burden and cost of compliance with such measures encourage offshore gambling sites to remain outside the regulatory framework to the detriment of licensed operators and players within such jurisdictions.<sup>274</sup> For example, Chile has been praised by analysts for an offshore-friendly regulatory regime: ‘It ticks most, if not all, of the standard boxes: all product categories permitted, no servers on the ground required, the overall tax rate . . . no

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<sup>271</sup> Loc cit.; Sally M Gainsbury, Alex MT Russell and Alex Blaszczyński ‘Consumer engagement with and perceptions of offshore online gambling sites’ *New Media & Society* 20(8) 2990–3010 available at <https://doi.org/10.1177/1461444817738783>, accessed 15 December 2022.

<sup>272</sup> Supra ss 2.2.1 through 2.2.7.

<sup>273</sup> Patel op cit note 269 at 1–3.

<sup>274</sup> Kindred op cit note 221 at 2. Martin Lycka ‘Chile and Peru gambling regulations is a trek’ at 2, available at <https://sbcamericas.com/2022/08/17/martin-lycka-peru-gambling-chile-regulation/>, accessed 15 December 2022. See also supra s 2.2.5.

onerous corporate setup on the ground, etc.<sup>275</sup> Moreover, most of these jurisdictions do not appear to engage in any meaningful enforcement efforts to restrict access to the local market or sanction illegal gambling sites.<sup>276</sup> In discussion of any legalisation and regulation of online gambling on casino games in South Africa, consideration likely needs to be given to creating conditions that make it convenient for licensed operators to participate in the regulatory environment and inconvenient for unlicensed operators to remain outside this environment.

### 2.3.3 Regulation of financial transactions

In lieu of or in tandem with various ‘residence based’ requirements, many international jurisdictions discourage accessibility to unlicensed offshore gambling sites through regulation of financial transactions.<sup>277</sup> In the United States, the Netherlands, Australia, United Kingdom, Sweden and Chile, for example, it is illegal for payment processors to facilitate payments from gambling sites not licensed in their jurisdictions. Payment companies may be less likely to risk their business or reputations by haphazard participation in such transactions. While ‘payment blocking is an important regulatory tool,’<sup>278</sup> the effectiveness of disrupting payment systems remains open to debate.<sup>279</sup>

Regulatory authorities or law enforcement agencies in several countries may deny entry to or arrest the owners, directors or principals of unlicensed offshore gambling sites upon arrival in the country. Such powers represent a particularly popular enforcement tactic in the United States.<sup>280</sup> As with blocking of payments, however, the effectiveness of such measures remains open to debate.<sup>281</sup>

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<sup>275</sup> Lycka op cit note 274 at 3.

<sup>276</sup> For example, the Swedish authorities have not prosecuted a single unlicensed gambling site. Kindred op cit note 221 at 2.

<sup>277</sup> Beyond the representative sample considered by this study, 16 member states of the European Union have adopted measures to require payment processing companies to block transactions with unlicensed gambling operators. United Kingdom Gambling Commission ‘National Strategic Assessment 2020’ at 2, available at <https://www.gamblingcommission.gov.uk/strategy/national-strategic-assessment-2020/the-provider-of-facilities-for-gambling-what-are-the-issues-unlicensed>, accessed 16 December 2022.

<sup>278</sup> Ibid at 2.

<sup>279</sup> Loc cit. ‘[M]ost regulators have reported mixed success in combatting gambling payment processing, with challenges when operators use accounts located outside the territories in which their gamblers live.’

<sup>280</sup> For example, see discussion of ‘Black Friday’ in the United States supra s 2.2.1 and the ACMA powers in Australia supra 2.2.2.

<sup>281</sup> The continued accessibility of illegal gambling sites in the United States speaks to the scale of the problem. C P Simon ‘Illegal gambling’ at 1 in US Department of Justice Office of Justice Programs *National Criminal*

### 2.3.4 Regulation of internet connectivity

Beyond restrictions on payments or freedom of movement, regulation of internet access by unlicensed online gambling sites through ISPs appears to represent an emerging regulatory trend. In Australia, the Netherlands, Sweden and Chile, for example, authorities enjoy the power to compel ISPs to block unlicensed gambling sites. Such measures may improve compliance and cooperation with regulations as few ISPs are likely to risk their business or reputation by ignoring enforcement orders from statutory authorities. Any consideration of the legalisation and regulation of online gambling on casino games in South Africa may consider implementation of similar measures enforced in tandem with existing legislation in relevant areas.

### 2.3.5 Regulation of players

While many countries make it illegal for offshore gambling sites to offer services within their jurisdictions without a license, none of the countries considered as part of this study appear to make it illegal for players within their jurisdictions to access unlicensed offshore gambling sites.<sup>282</sup> Players are often enticed to engage with unlicensed operators who extend introductory offers and better bonuses, do not enforce any know your client ('KYC') requirements for deposits, wager limits or responsible gambling restrictions (such as limitations on spin intervals on slots games) and award higher payouts than licensed operators.<sup>283</sup> While several jurisdictions tax winnings and require licensed operators to report such gains, there appears to be lax enforcement of such measures.<sup>284</sup> Players have few incentives to avoid unlicensed sites beyond the perils of dealing with unlicensed operators and potential forfeiture of winnings due to an inability to financially transact with such sites. As noted by a large Swedish licensed online gambling operator:

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*Justice Reference Service* 86868 available at <https://www.ojp.gov/ncjrs/virtual-library/abstracts/illegal-gambling>, accessed 16 December 2022.

<sup>282</sup> This phenomenon is not limited to countries of the representative sample considered by this study and represents a pervasive circumstance, including in the Europe. Noah Eriksson 'Pros and cons of playing at casinos without license' at 5, available at <https://unlicensedcasino.com/>, accessed 16 December 2022.

<sup>283</sup> Ibid at 5; Nonstop Casino 'Offshore online casinos' at 6, available at <https://nonstopcasino.org/offshore-casinos/>, accessed 18 December 2022.

<sup>284</sup> Stan Fox 'Online gambling tax guide (updated for 2022)' at 1, available at <https://www.letsgambleusa.com/online-gambling-taxes/>, accessed 18 December 2022.

In a digital world, neither the government nor the gaming companies decide where gaming consumers play. It is up to the consumers themselves. If the gaming experience deteriorates with extensive restrictions and prohibitions, licensed gaming is perceived as monotonous or complex, which in turn increases interest in the unlicensed games that are never further away than a push of a button on the computer or mobile phone.<sup>285</sup>

As such, further consideration of any legalisation and regulation of online gambling on casino games in South Africa may wish to evaluate the position of players in any licensing and regulatory framework.

### 2.3.6 Tax policies

Tax policy represents a high profile consideration in any discussion of the legalisation of gambling, including online gambling. The desire of governments to capture financial benefits associated with the new digital economy of online gambling represents a theme of international precedents considered by this study. While not universally applied across the sample population of international precedents, most jurisdictions appear to impose a tax on operators based on gross gambling revenues (as opposed to turnover) and specific taxes based on types of gambling (such as table games) or both.<sup>286</sup> There is often a further distinction between taxes applied to land-based casinos (which may include other levies) and taxes applied to online operations.<sup>287</sup>

Different methodologies adopted by different jurisdictions for the calculation of taxes on online gambling affect the overall tax rates imposed on operators in those jurisdictions. At the high end of the taxation spectrum, West Virginia's 54 per cent tax on slot games and 35 per cent tax on table games are the highest rates and Kenya's 15 per cent general gambling tax is the lowest rate is the surveyed jurisdictions. The sample

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<sup>285</sup> Kindred op cit note 221 at 2.

<sup>286</sup> Keaton op cit note 155 at 2–5. Supra ss 2.2.1 through 2.2.7. The distinction between tax rates on different types of gambling is valid. Table games, for example, are a highly labour intensive form of gambling with much lower margins than slot machines. Michael Pollock 'Casino tax policy: identifying the issues that will determine the optimal rate' at 8–9, available at <https://spectrumgaming.com/wp-content/uploads/2018/05/spectrumnationaltaxassociation.pdf>, accessed 18 December 2022.

<sup>287</sup> Keaton op cit note 155 at 2–5.

population generally reflects the spread among international gambling markets both by tax calculation methodologies and tax rates.<sup>288</sup>

Based on prevailing tax regimes and rates, online gambling sites that operate in jurisdictions without a license enjoy a preferential financial position (and therefore competitive advantage) over online gambling sites licensed in those jurisdictions. Since many online gambling sites are licensed in offshore jurisdictions that impose no or low tax on international operations and such operators do not offer any domestic services otherwise taxable in those jurisdictions,<sup>289</sup> they often avoid paying tax in international jurisdictions where they bid their services. The larger the tax burden on licensed operators, the greater the incentive for operators to avoid regulation and chance their business, especially if countries are unable to effectively police internet access to their markets. Any discussion of legalisation and regulation of online gambling on casino games in South Africa likely requires consideration of this moral hazard.

As in many other areas of tax policy, competitive considerations often play a role in setting tax rates. Once the regulation of gambling gained traction in the United States, for example, early gambling-friendly jurisdictions such as New Jersey established tax rates based on prevailing thresholds in Nevada which legalised gambling in 1931.<sup>290</sup> Yet such competitive considerations do not appear to cross the Atlantic into the European Union.<sup>291</sup>

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<sup>288</sup> For example, online casinos are taxed at: 40.8 per cent of GGR in France (poker); 40 per cent of GGR in Austria; 25 per cent of GGR in Italy; and 20 per cent of GGR in Denmark. Keaton op cit note 155 at 2–5. In the United States, the industry average approximates 20 per cent for table games, 54 per cent for slot machines with an average 40 per cent blended tax rate for casinos. Michael Pollock ‘Grabbing the third rail: as gaming evolves, tax policy needs to keep pace’ *Gam L Rev* 2018 22:3 175–7 available at <https://doi.org/10.1089/glr.2.2018.2234>, accessed 18 December 2022.

<sup>289</sup> Nerds of Gambling ‘70% of the top online gambling websites have been licensed by the top 8 major online gambling jurisdictions.’ ‘The top 8 online gambling jurisdictions in the world’ at 1, available at <https://www.nerdsofgambling.com/top-8-online-gambling-jurisdictions-world/>, accessed 18 December 2022. Coincidentally, those jurisdictions generally do not charge any tax on income derived from international operations with some countries regarded among the top low tax jurisdictions in the world. Katie Warren ‘The top 14 tax havens around the world’ *Business Insider US* 7 December 2019 at 1–4, available at <https://www.businessinsider.co.za/tax-havens-for-millionaires-around-the-world-2019-11?r=US&IR=T>, accessed 18 December 2022.

<sup>290</sup> Pollock op cit note 288 at 6 and 8.

<sup>291</sup> Based on the disparate tax rates within the European Union, including the two member states considered as part of this study (31% tax on GGR in the Netherlands and 18% tax on GGR in Sweden). *Supra* ss 2.2.4 and 2.2.5.

The disparity between tax rates in major gambling markets superficially suggests that no correlation exists between tax rates and the commercial viability of licensed gambling operators, including online sites. In jurisdictions considered as part of this study, for example, licensed online operators appear to operate with commercial success in markets with tax rates ranging between 20 per cent and 32 per cent and, in some areas, at higher thresholds.<sup>292</sup> At the same time, Kenya faced an industry revolt when it introduced a 35 per cent tax rate with operators expected to exit even after it reduced this rate to 20 per cent.<sup>293</sup> Yet the success (or failure) of licensed operators only accounts for a small fraction of online gambling sites available in each jurisdiction. Thousands of unlicensed sites available in such markets do not pay any local tax and appear to suffer no consequences arising therefrom.

Online gambling challenges three public policy considerations often involved in deliberations over creation of optimal tax rates for gambling activities: incentives for capital investment; encouragement of employment opportunities; and promotion of tourism through destination-based casinos.<sup>294</sup> The online gambling medium does not readily lend itself to satisfaction of such public policy ambitions. In many respects, online gambling requires consideration of a completely distinct set of tax imperatives.

Introduction of a digital sales tax may represent one of the policy tools available to tax online gambling, including on casino games. In the United States, ‘approximately 30 states tax some form of digital services’ while ‘approximately 16 states generally exempt digital goods and services from sales tax.’<sup>295</sup> As licensed online casinos are taxed through a separate fiscal policy and unlicensed online casinos are illegal under US federal law (and there is no sales tax imposed at the federal level in the United States), unlicensed online gambling sites are not subject to any digital tax in the United States. Due to the illegal standing of unlicensed operators, similar circumstances arise in Australia, the United Kingdom, the Netherlands, Sweden and Chile.<sup>296</sup>

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<sup>292</sup> Supra ss 2.2.1 to 2.2.7.

<sup>293</sup> Ohaga and Koske op cit note 246 at 6.

<sup>294</sup> Pollock op cit note 288 at 9–10.

<sup>295</sup> Avalara ‘US digital services sales tax’ at 1, available at <https://www.avalara.com/vatlive/en/country-guides/north-america/us-sales-tax/us-digital-services-sales-tax.html>, accessed 18 December 2022.

<sup>296</sup> Supra ss 2.2.2 to 2.2.6.

In jurisdictions considered by this study, only Kenya imposes a digital tax that may (or may not) apply to unlicensed online gambling sites. In amendments to the Income Tax Act (c 470) and Value Added Tax Act 35 of 2013, as amended, the concept of a ‘digital marketplace’ was introduced through the Finance Act 23 of 2019<sup>297</sup> while a ‘digital service tax’ (‘DST’) was enacted through the Finance Act 8 of 2020.<sup>298</sup> The Income Tax (Digital Service Tax) Regulations came into effect on 2 January 2021 to guide implementation of the tax.<sup>299</sup>

In general terms, the Kenya DST is payable by any party who earns income from provision of any goods or services including any ‘digital service’ provided through any digital marketplace including any ‘digital platform’.<sup>300</sup> The scope of digital services includes downloadable and streamed media; sales of user data; marketplace services; search engine services; subscriptions to online publications; e-learning; and any other service provided through a digital marketplace.<sup>301</sup> The DST does not apply to certain financial institutions and online services provided by government institutions.<sup>302</sup>

Non-resident companies providing a digital service to any user in Kenya are required to pay DST where services are consumed through any terminal (computer, mobile phone, tablet) with a Kenya internet protocol address, any mobile phone with a Kenya country code, any credit or debit card with a Kenya address and any invoice with a Kenya address.<sup>303</sup> Non-resident digital service providers are required to pay VAT on any ‘digital marketplace supply’ which is defined as ‘any supply of a service made over

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<sup>297</sup> Sections 3, 14 and 18 of the Finance Act 23 of 2019 GG Supplement 178 of 7 November 2019 available at [kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2019/FinanceAct\\_No23of2019.PDF](http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2019/FinanceAct_No23of2019.PDF), accessed 19 December 2022.

<sup>298</sup> Sections 4, 9 and 19 of the Finance Act 8 of 2020 GG Supplement 104 of 30 June 2020 available at [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/2020/TheFinanceAct\\_No.8of2020.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/2020/TheFinanceAct_No.8of2020.pdf), accessed 19 December 2022.

<sup>299</sup> The Income Tax (Digital Service Tax) Regulations 2020 LN 207 of 2020.

<sup>300</sup> A ‘digital marketplace’ is ‘a platform that enables the direct interaction between buyers and sellers of goods and services through electronic means.’ Section 3(c) of the Finance Act 2019 amending s 3(3)(ba) of the Income Tax Act. A ‘digital service’ is defined as ‘any service that is delivered or provided over a digital marketplace’ while a ‘platform’ is defined as ‘any electronic application that allows digital services to be connected to users of the services, directly or indirectly, and includes a website and mobile application.’ Section 2 of the Income Tax (Digital Service Tax) Regulations 2020.

<sup>301</sup> Section 3(1) of the Income Tax (Digital Service Tax) Regulations 2020.

<sup>302</sup> Sections 3(1), (2) and (3) of the Income Tax (Digital Service Tax) Regulations 2020.

<sup>303</sup> RSM ‘The digital service tax overview’ at 4, available at <https://www.rsm.global/kenya/insights/tax-insights/tax-alerts/digital-service-tax-overview>, accessed 19 December 2022.

a platform that enables the direct interaction between buyers and sellers of services through electronic means.’<sup>304</sup>

The Kenya DST is set at 1.5 per cent of the gross amount of invoiced transactions and payable at the time of transactions with remission made by the middle of the following month for tax reporting purposes.<sup>305</sup> Non-residents of Kenya are required to appoint a tax representative in Kenya responsible for remission of the DST to the Kenya Revenue Authority.<sup>306</sup> It may be offset against other income tax payable in Kenya in the same fiscal period provided that DST paid by any non-resident party without any permanent establishment in Kenya represents a final tax unless subject to withholding tax.<sup>307</sup> Registration is facilitated through a simplified iTax platform operated by the Kenya Revenue Authority pursuant to the Tax Procedures Act 29 of 2015.

Kenya’s DST is not unique among African countries. Tunisia adopted a 3 per cent digital service tax and Zimbabwe a 5 per cent DST in January 2022.<sup>308</sup> Nigeria imposed a 6% digital service tax while Tanzania adopted a 2 per cent DST commencing in January 2022.<sup>309</sup> In June 2022 the Africa Tax Administrative Forum (‘ATAF’) undertook to provide a standard approach for implementation of DST in Africa and suggested that any such tax ‘will be designed not to be an income tax’ but constitute a separate tax based on ‘gross turnover attributable to the in-scope business activities’ and ‘paid in addition to a country’s income tax charge, so it is not in any way in lieu of income tax.’<sup>310</sup>

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<sup>304</sup> A ‘digital marketplace supply’ is defined as ‘any supply of a service made over a platform that enables the direct interaction between buyers and sellers of services through electronic means.’ Section 2 of the Value Added Tax (Digital Marketplace Supply) Regulations 2020 LN 190 of 2020.

<sup>305</sup> Section 9 of the Finance Act 2020.

<sup>306</sup> RSM op cit note 303 at 2.

<sup>307</sup> Ibid at 3.

<sup>308</sup> Richard Asquith ‘Kenya 1.5% digital services tax DST limited to non-residents’ at 3, available at <https://www.vatcalc.com/kenya/kenya-1-5-digital-services-tax-dst-limited-to-non-residents/>, accessed 19 December 2022; Deloitte ‘Digital services tax in Africa – the journey so far’ at 2, available at <https://www2.deloitte.com/za/en/pages/tax/articles/digital-services-tax-in-africa-the-journey-so-far.html>, accessed 19 December 2022.

<sup>309</sup> Loc cit.

<sup>310</sup> African Tax Administration Forum *Domestic Resource Mobilisation–Digital Services Taxation in Africa (Policy Brief)* at 2 available at [https://events.ataftax.org/includes/preview.php?file\\_id=61&language=en\\_US](https://events.ataftax.org/includes/preview.php?file_id=61&language=en_US), accessed 19 December 2022.

A major obstacle to implementation of any DST are reforms proposed by the Organization for Economic Co-operation and Development ('OECD') pursuant to its base erosion and profit shifting ('BEPS') initiative which effectively repeal and replace any digital service tax.<sup>311</sup> Among other countries, Kenya has 'refused to accept the OECD-backed global tax deal on reforms' as it believes that a DST 'would bring in revenues from many more companies – an estimated 89 compared to just 11 under the OECD deal.'<sup>312</sup> The US Government has initiated investigations against DST regimes in Australia, Brazil, Czechia, European Union, India, Indonesia, Italy, Spain, Turkey and United Kingdom for anti-competitive behavior that may attract tariff sanctions.<sup>313</sup>

South Africa is considering a DST:

South Africa was one of the first African countries to bring digital services within its indirect tax (VAT) net. However, developments on the direct tax front have been placed on the backburner. . . . it would not be surprising for the South African government to explore the possibility of introducing a direct digital tax [as] most of the groundwork has already been covered by the Davis Tax Committee (DTC).<sup>314</sup>

The Davis Tax Committee and the ATAF both recognised that any DST needs to strike a balance between taxation of international digital services offered in domestic markets and encouragement of foreign direct investment.<sup>315</sup>

Consistent with digital service taxes introduced in the rest of Africa, the DTC recommended that South Africa amend its source-based taxation rules to accommodate taxation of suppliers of digital goods and services based on the location of consumers of such goods and services rather than locations of suppliers of such services, particularly in respect of non-resident vendors.<sup>316</sup> However, the DTC recommended

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<sup>311</sup> For example, see Kelsey O'Gorman 'OECD on digital service tax: what's ahead for 2021?' available at <https://sovos.com/blog/trr/oecd-on-digital-service-tax-whats-ahead-for-2021/> and OECD 'The sharing and gig economy: effective taxation of platform sellers' available at <https://www.oecd-ilibrary.org/sites/574b61f8-en/index.html?itemId=/content/publication/574b61f8-en>, accessed 19 December 2022.

<sup>312</sup> Asquith op cit note 308 at 1.

<sup>313</sup> African Tax Administration Forum op cit note 310 at 3.

<sup>314</sup> Deloitte op cit note 308 at 3.

<sup>315</sup> African Tax Administration Forum op cit note 310 at 3 and Deloitte op cit note 308 at 3.

<sup>316</sup> Davis Tax Committee *Interim Report: Addressing Base Erosion and Profit Shifting in South Africa* (2014) 28–9, available at

that South Africa delay any DST implementation until resolution of OECD tax reform efforts.<sup>317</sup> The South African Government appears to have heeded such advice as no action seems to have been taken in respect of any DST in South Africa to date. Notwithstanding these challenges and political obstacles, the applicability of a DST to gambling sites operating from extraterritorial jurisdictions, whether consistent with OECD efforts or otherwise, appears to merit consideration as part of any discussion of the legalisation and regulation of online gambling on casino games in South Africa.

### 2.3.7 Advertising policies

The regulation of advertising is a prominent concern associated with legalisation and regulation of gambling, including online gambling. Every jurisdiction considered by this study imposes restrictions on the gambling advertising. The range of regulatory measures spans from a ban on all advertising during sports events (Australia) to a prohibition of all advertising by unlicensed gambling sites (United Kingdom and Chile) to the power to compel unlicensed operators to include consumer warnings (Sweden).

Advertising of gambling is often limited to certain hours through certain media, particularly to protect vulnerable persons such as minor children (The Netherlands, Sweden and Kenya). While several jurisdictions (such as New Jersey) require responsible gambling disclaimers and helpline information on some advertising, Australia recently recommended the introduction of ‘taglines’ equivalent to health warnings imposed on tobacco advertising for all forms of gambling advertising by licensed operators. A similar measure has been proposed by public interest groups in the United Kingdom.<sup>318</sup> Kenya’s efforts to ban most forms of gambling advertisements, including celebrity endorsements, require pre-approval of all advertisements prior to publication and include health warnings consistent with precedents adopted in other jurisdictions.<sup>319</sup> Notwithstanding the spectrum of such measures, each jurisdiction

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[https://www.taxcom.org.za/docs/New\\_Folder/2%20DTC%20BEPS%20Interim%20Report%20on%20Action%20Plan%201%20-%20Digital%20Economy,%202014%20deliverable.pdf](https://www.taxcom.org.za/docs/New_Folder/2%20DTC%20BEPS%20Interim%20Report%20on%20Action%20Plan%201%20-%20Digital%20Economy,%202014%20deliverable.pdf), accessed 19 December 2022.

<sup>317</sup> Ibid at 27.

<sup>318</sup> Supra ss. 2.2.1 through 2.2.7.

<sup>319</sup> While such efforts were annulled by a court, the grounds for annulment related to the process used by the Government to enact such restrictions and not the constitutionality or validity of such restrictions per se. *Casino News Daily* op cit note 256.

examined by this study subjects gambling advertising to prescriptions imposed by an advertising standards authority.<sup>320</sup>

Due to a complicated concurrence of jurisdiction between the federal government and its state counterparts over gambling activities, the regulation of gambling advertising in the United States represents a more complex issue.<sup>321</sup> Advertisements for gambling, including online gambling, are ubiquitous on televisions, radio stations, search engines and other media across the United States.<sup>322</sup> On 11 June 2003 the US Department of Justice issued a warning letter to the National Association of Broadcasters which, inter alia, expressly confirmed the illegality of advertisements by unlicensed operators and expressed concern with their complicity in such illegality:

Notwithstanding their frequent claims of legitimacy, Internet gambling and offshore sportsbook operations that accept bets from customers in the United States violate Sections 1084, 1952, and 1955 of Title 18 of the United States Code, each of which is a Class E felony. Additionally, pursuant to Title 18, United States Code, Section 2, any person or entity who aids or abets in the commission of any of the above-listed offenses is punishable as a principal violator of those statutes. The Department of Justice is responsible for enforcing these statutes, and we reserve the right to prosecute violators of the law.

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Broadcasters and other media outlets should know of the illegality of offshore sportsbook and Internet gambling operations since, presumably, they would not run advertisements for illegal narcotics sales, prostitution, child pornography or other prohibited activities.<sup>323</sup>

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<sup>320</sup> Supra ss. 2.2.1 through 2.2.7.

<sup>321</sup> Ron Mendelson 'Rules around online gambling advertising and why they are getting tighter' *Casino City Times* 13 July 2021 at 3, available at <https://www.casinocitytimes.com/ron-mendelson/article/rules-around-online-gambling-advertising-and-why-theyre-getting-tighter-67533>, accessed 19 December 2022.

<sup>322</sup> Brett Smiley 'The Times, they aren't a-changing: offshore sportsbooks still have their hooks in mainstream media' *Sportshandle* 7 August 2020 at 7, available at <https://sportshandle.com/offshore-legal-sportsbooks-media-nytimes/>, accessed 19 December 2022.

<sup>323</sup> John G Malcolm, Deputy Assistant Attorney General 'Advertising for internet gambling and offshore sportsbooks operations; at 1–2, available at <https://sportshandle.com/wp-content/uploads/2020/08/dojltr2003.pdf>, accessed 19 December 2022.

The Department of Justice subsequently prosecuted or harangued media companies for contravention of the statutes mentioned in the letter.<sup>324</sup> As recently as November 2019 the New Jersey Director of Gaming Enforcement issued a letter:

. . . to inform news and media outlets and other entities that engage in sportsbook advertising in New Jersey about the importance of not endorsing or referencing internet sportsbook operators that are not authorized to accept wagers from customers located in New Jersey.<sup>325</sup>

Several class action lawsuits appear to have been launched in the United States against search engines that accept payments for advertisements by unlicensed online gambling sites.<sup>326</sup> However, case law could not be located on these cases which appear to have been settled or withdrawn. As of 2004 it appears that at least Google and Yahoo! decided to stop accepting advertisements for online casinos<sup>327</sup> along with large outdoor advertising companies such as Viacom Outdoor.<sup>328</sup>

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<sup>324</sup> *United States et al v Edge Broadcasting Co T/A Power* 94 509 US 418 (1993) which prohibited broadcasting of advertisements for state-run lotteries by broadcasters in non-lottery states. See also the settlement reached between *The Sporting News* and the US Government for similar criminality. Manatt, Phelps & Phillips, LLP ‘The Sporting News and DOJ agree to \$7.2M settlement regarding acceptance of offshore gambling site ads’ available at [https://www.martindale.com/legal-news/article\\_manatt-phelps-phillips-llp\\_213640.htm](https://www.martindale.com/legal-news/article_manatt-phelps-phillips-llp_213640.htm), accessed 19 December 2022. See also discussion of federal grant jury subpoenas issued to media companies accepting advertisements from online gambling sites beginning September 2003. IGN ‘US court subpoenas gaming portals’ *Casino City Interactive Gaming News* 30 September 2002 at 1, available at <http://www.igamingnews.com/index.cfm?page=artlisting&tid=4553>, accessed 19 December 2022. The US Government has seized millions of US dollars from Discovery Channel ‘as illegal profits from the advertisement of Internet Gambling.’ Linda E Shorey, Ashley J Cameron, Dennis MP Ehling and Warren L Phelops ‘Internet gaming–advertising and internet gambling in the U.S.: what’s new’ available at <https://files.klgates.com/files/publication/198bf1fe-c505-4f54-8a59-27976ff2e7ba/presentation/publicationattachment/5badf4ca-1bbf-4a65-b8aa-3aa948394088/iga0306.pdf>, accessed 19 December 2022. See also *Casino City Inc v United States Department of Justice*, MD La No 04-557-B-M3 available at <http://online.casinocity.com/firstamendment/legaldocuments.cfm>, accessed 19 December 2022.

<sup>325</sup> David Rebeck ‘Media references to unauthorized sports wagering websites’ at 1, available at <https://www.nj.gov/oag/ge/docs/Bulletins/DABMediaReportingAdvertising112619.pdf>, accessed 19 December 2022.

<sup>326</sup> Chuck Humphrey ‘Advertising internet gambling’ at 6, available at <http://www.gambling-law-us.com/Articles-Notes/advertising-online-casinos/>, accessed 19 December 2022; John Ottaviana ‘Web gambling advertising suit against search engines allowed to proceed’ at 1, available at [https://blog.ericgoldman.org/archives/2005/06/web\\_gambling\\_ad.htm](https://blog.ericgoldman.org/archives/2005/06/web_gambling_ad.htm), accessed 19 December 2022.

<sup>327</sup> Matt Richtel ‘Web engines plan to end online ads for gambling’ *New York Times* 5 April 2004 at 1, available at <https://www.nytimes.com/2004/04/05/business/web-engines-plan-to-end-online-ads-for-gambling.html>, accessed 19 December 2022.

<sup>328</sup> Matt Richtel ‘Companies aiding internet gambling feel U.S. pressure’ *New York Times* 15 March 2004 at 1, available at <https://www.nytimes.com/2004/03/15/us/companies-aiding-internet-gambling-feel-us-pressure.html>, accessed 19 December 2022.

The topic continues to garner attention from US lawmakers: on 13 February 2020 the Prevention of Deceptive or Child-Targeted Advertising in Violation of the Unlawful Internet Gambling Enforcement Act was introduced as a bill (but did not come to a vote) in the Senate of the United States.<sup>329</sup> Yet the United States continues to be awash in advertisements for unlicensed offshore gambling sites which begs the question: ‘Why have so few U.S. Attorneys taken enforcement action? . . . for the most part, state and federal authorities have done little to stop the advertising of Internet gambling.’<sup>330</sup>

The European Union appears to be leading the charge to regulate gambling advertisements. On 28 April 2022 the European Gaming & Betting Association published a pan-European Code of Conduct on responsible advertising for online gambling. The Code ‘is broad in scope and introduces essential standards for advertising content, across all media platforms, and dedicated measures for social media. The Code has a particular focus on minor protection’ and has been adopted by several European states to date.<sup>331</sup>

In 2021 the University of Nevada Las Vegas International Gaming Institute issued a report<sup>332</sup> which suggested that gambling companies ‘get a grip on how they advertise their product before the government steps in and tells them how to do so.’<sup>333</sup> While pertaining to gambling on sports events in the United States, the Report made six recommendations for the regulation of advertisements equally applicable to regulation of gambling advertisements in international markets, including South Africa:

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<sup>329</sup> Govtrack ‘S. 3322 (116<sup>th</sup>): Prevention of Deceptive or Child-Targeted Advertising in Violation of the Unlawful Internet Gambling Enforcement Act’ at 1, available at <https://www.govtrack.us/congress/bills/116/s3322/text>, accessed 19 December 2022.

<sup>330</sup> Shorey et al op cit note 324 at 3.

<sup>331</sup> European Gaming & Betting Association ‘First pan-European code on responsible advertising for online gambling’ at 1, available at <https://www.egba.eu/news-post/first-pan-european-code-for-responsible-advertising-for-online-gambling/>, accessed 19 December 2022.

<sup>332</sup> Jennifer Shatley, Kasra Ghaharian, Bo Bernhard, Alan Feldman, Becky Harris *The marketing moment: Sports, wagering and advertising in the United States* University of Nevada, Las Vegas Institute of International Gaming available at [https://www.unlv.edu/sites/default/files/page\\_files/2693/IGI-TheMarketingMoment-UNLVIGIReport.pdf](https://www.unlv.edu/sites/default/files/page_files/2693/IGI-TheMarketingMoment-UNLVIGIReport.pdf), accessed 19 December 2022.

<sup>333</sup> Jeff Edelstein ‘Sports betting and gambling advertising bans in America? Not bloody likely’ *Sportshandle* 19 April 2021 at 1, available at <https://sportshandle.com/gambling-advertising-bans-america/>, accessed 19 December 2022.

- (a) gambling operators should ensure that advertising does not target vulnerable populations, particularly youth;
- (b) media coverage of unlicensed operators should carry a disclaimer which highlights the illegality of such sites, confirms that they pay no tax in US jurisdictions, create few employment opportunities and operate outside of US responsible gambling programs;
- (c) advertising on social media platforms, particularly sites frequented by young people such as Instagram, TikTok and Snapchat, should be severely restricted;
- (d) the industry should convene a cross-disciplinary summit to tackle issues germane to gambling advertising;
- (e) universities should engage in gambling education programs and problem gambling programs; and
- (f) the industry should engage in robust self-regulation beyond the American Gaming Association's Responsible Marketing Code for Sports Wagering.<sup>334</sup>

Given increasing scrutiny on gambling advertising, the application of such guidance likely requires further consideration as part of any discussion of legalisation and regulation of online gambling in South Africa.

## 2.4 CONCLUSION

Discussion of the complexities of licensing and regulating online gambling on casino games exhibited in the representative sample of international jurisdictions considered by this study suggests that many similarities and differences exist between the regulation of online and offline gambling. The entanglement of intertwined legislation in international jurisdictions betrays the challenges of regulating online commerce in sectors encumbered by significant public policy concerns. An inability to 'police and patrol' access to markets by offshore gambling sites represents a particularly prominent challenge to effective regulation of online gambling, including on casino games.

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<sup>334</sup> Shatley et al op cit note 332 at 17–18.

Regulations that monitor and restrict financial transactions and internet connectivity represent viable but often ineffectual measures, perhaps encumbered by the inherent volume and complexity of transactions and internet access points and lack of institutional capacity or will to implement or enforce powers in these areas.

The treatment of players represents a further conundrum for regulation of online gambling. Few jurisdictions appear to criminalise the conduct of players who access unlicensed offshore gambling sites. Detection and enforcement challenges often neuter the collection of taxes on player winnings in those jurisdictions that attempt to capture such economic benefit. A DST based on a 'point of consumption' policy may warrant further consideration for any legalisation and regulation of online gambling on casino games in South Africa but such tax suffers from OECD disapproval and US legal obstacles. The importance of regulating gambling advertisements is a prominent concern in international markets, with public interest groups, policy makers and industry participants recognising the need for responsible restrictions on pervasive advertising by gambling operators, including online gambling sites.

Having established and evaluated key facets of the licensing and regulation of online gambling on casino games in a representative sample of international jurisdictions, Chapter 3 considers the substance and form of past, current and previously proposed legislation in South Africa related to this activity. It reviews relevant *stare decisis*. The purpose of Chapter 3 is to identify key questions that likely need answers as part of any *lex ferenda* that legalises and regulates online gambling on casino games in the country.

## CHAPTER 3:

### REGULATION OF ONLINE GAMBLING ON CASINO GAMES IN SOUTH AFRICA

#### 3.1 INTRODUCTION

South Africans like to gamble.<sup>335</sup> One in every ten adult South Africans<sup>336</sup> identified as a gambler in 2020.<sup>337</sup> There are more South African gamblers than registered rugby players (600 000) and registered cyclists (35 000).<sup>338</sup> More than 90 per cent of adult South Africans expressed an interest in gambling<sup>339</sup> of some kind in 2021.<sup>340</sup> A YouGov America survey of global gambling attitudes conducted in 2021 found that ‘more than one in two (56%) adults in South Africa say they “really enjoy betting”’<sup>341</sup> which was the highest among respondents from 24 surveyed countries and significantly above the 21 per cent average country response.<sup>342</sup> By 2022 nearly 50 per cent of adult South Africans reported that they regularly engaged in sports betting<sup>343</sup> while 70 per cent of adult South Africans played a lottery on a daily basis.<sup>344</sup> As such, gambling appears entrenched as a popular pastime for many adults in South Africa.

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<sup>335</sup> Thurgood Mashiane ‘How large is the gambling industry in South Africa?’ *Tech Financials* 28 February 2020 available at <https://techfinancials.co.za/2020/02/28/how-large-is-the-gambling-industry-in-south-africa/>, accessed 13 April 2022; ‘Which Africans gamble the most? Comparing Africa’s gambling markets’ *The Punch* 22 September 2021 available at <https://punchng.com/which-africans-gamble-the-most-comparing-africas-gambling-markets/>, accessed 3 March 2022; Rishad Dsouza ‘Global: a peek into gambling attitudes’ *YouGov America* 7 July 2021 available at <https://today.yougov.com/topics/sports/articles-reports/2021/07/07/global-peek-gambling-attitudes>, accessed 6 May 2022; Sesan ‘Strongest African gambling markets in 2022’ *The Punch* 6 June 2022 available at <https://www.msn.com/en-xl/africa/other/strongest-african-gambling-markets-in-2022/ar-AAyBpW>, accessed 6 June 2022; and Lotter ‘The ultimate guide to South African lotteries’ available at <https://www.thelotter.com/south-african-lottery-guide/>, accessed 21 March 2022.

<sup>336</sup> Individuals nineteen years of age or older.

<sup>337</sup> Mail & Guardian ‘Online gambling laws in South Africa’ 31 August 2022 at 1, available at <https://mg.co.za/partner-content/2022-08-31-online-gambling-laws-in-south-africa/>, accessed 1 June 2023.

<sup>338</sup> Nelly Gachanja ‘8 most popular sports in Africa’ *africa.com* 12 May 2020 at 1 and 3, available at <https://www.africa.com/8-most-popular-sports-in-africa/>, accessed 3 April 2022.

<sup>339</sup> ‘At its most basic, gambling can be defined as making a stake on an uncertain future event.’ National Gambling Board op cit note 3 at 17.

<sup>340</sup> *The Punch* op cit note 335 at 1.

<sup>341</sup> Dsouza op cit note 335 at 1.

<sup>342</sup> Loc cit.

<sup>343</sup> Sesan op cit note 335 at 1.

<sup>344</sup> Lotter op cit note 335 at 1.

Gambling is big business in South Africa. The country is the largest gambling market in Africa with an estimated 79.4 per cent share of the continent's legal gambling market.<sup>345</sup> The total value of money wagered<sup>346</sup> in licensed gambling operations in South Africa increased from ZAR 326 billion for the twelve month period to 31 March 2021 to reach ZAR 559 billion for the twelve month period to 31 March 2022.<sup>347</sup> Gross gaming revenues earned by licensed operators increased from ZAR 23.1 billion for the twelve month period to 31 March 2021 to reach ZAR 34.4 billion for the twelve month period to 31 March 2022.<sup>348</sup> While improvements in turnover and GGR are largely attributable to a rebound from effects of the Covid-19 pandemic, including intermittent shuttering of land-based casinos as part of lockdown measures,<sup>349</sup> the industry's latest financial performance exceeded pre-pandemic levels<sup>350</sup> which may reflect robust underlying demand for gambling activities. Indeed, '[m]oney wagered in the betting industry in FY 2021/22 (R 245 billion) was more than double the amount wagered in the previous period FY 2020/21 (R 118 billion) and even surpassed money wagered in the FY 2019/20 (R 75.7 billion), before the COVID-19 pandemic existed.'<sup>351</sup>

Gambling generates significant tax revenues in South Africa. Excluding corporate tax and VAT, gambling taxes and levies collected by PLAs from legal gambling activities reached ZAR 3.1 billion for the twelve month period to 21 March 2022.<sup>352</sup> This amount represents a significant increase from the ZAR 2 billion paid by the gambling industry for the twelve month period to 31 March 2021<sup>353</sup> but a marginal decrease from the ZAR

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<sup>345</sup> Astute Analytics 'Africa gambling market'—(by type—digital and offline; by product—casino, lotteries, poker and betting; and by country)—industry dynamics, market size, opportunity and forecast to 2030' at 6, available at <https://www.astuteanalytica.com/industry-report/africa-gambling-market>, accessed 7 March 2022.

<sup>346</sup> '[I]ncludes "recycling" which refers to amounts that are staked on more than one occasion'. National Gambling Board 'National gambling statistics' at 4, available at <https://ngb.org.za/SiteResources/documents/2020-21/Stats%20Presentation%20FY2019-20%20pdf.pdf>, accessed 3 March 2022.

<sup>347</sup> National Gambling Board *Annual Report 2021/2022* (2022) 15 available at <http://www.thedtic.gov.za/wp-content/uploads/NGB-AR-2022.pdf>, accessed 10 February 2023; National Gambling Board 'National gambling statistics, FY2020/21' at 49, available at <https://www.ngb.org.za/SiteResources/documents/2021-22/Stats/National%20Gambling%20Statistics%20Financial%20Year%20Ending%2031%20March%202021-%20Audited.pdf>, accessed 3 March 2022.

<sup>348</sup> Loc cit.

<sup>349</sup> National Gambling Board 'National gambling statistics, FY2020/21' op cit note 347 at 49.

<sup>350</sup> National Gambling Board *Annual Report 2021/2022* op cit note 347 at 15; National Gambling Board 'National gambling statistics, FY2020/21' op cit note 347 at 49.

<sup>351</sup> National Gambling Board *Annual Report 2021/2022* op cit note 347 at 15.

<sup>352</sup> Loc cit.

<sup>353</sup> National Gambling Board 'Gambling sector performance in South Africa, FY 2020/21' at 35, available at <https://www.ngb.org.za/SiteResources/documents/2021-22/GSP/Gambling%20Sector%20Performance,%20FY2021.pdf>, accessed 12 March 2022.

3.27 billion surrendered to provincial fiscis by the industry for the twelve month period to 31 March 2020.<sup>354</sup> Measured by taxes paid before, during or after the Covid-19 pandemic, South Africa's gambling operators collectively represent a significant source of revenues for provincial governments.

Gambling supports a large number of jobs in South Africa. The gambling industry directly employed 31 997 people in South Africa to 31 March 2022.<sup>355</sup> The Casino Association of South Africa ('CASA') touts 'the creation of 100 000 direct and indirect job opportunities' to 2010.<sup>356</sup>

The gambling industry enjoys respectable broad-based black economic empowerment ('B-BBEE') credentials. As a whole, the industry sustained an average 3.2 score card to 31 March 2021 based on the Code of Good Practice published by the Department of Trade, Industry & Competition.<sup>357</sup> The casino segment enjoys a Level 6 Empowerdex rating 'with 46% of the economic interest and 46% of all voting rights being held by black individuals.'<sup>358</sup> Among the 100 000 direct and indirect jobs created by the gambling industry to 2010, the CASA claims that these positions were filled by 'more than 80% previously disadvantaged individuals.'<sup>359</sup> The industry invests in corporate social responsibility initiatives including the creation of broad-based community trusts.<sup>360</sup> Overall, the CASA asserts that:

. . . gambling activities have largely had a positive impact on the economy through income generation, employment opportunities, and its contribution to tax revenue, infrastructure development and corporate social investment . . . [with] significant opportunities provided for black economic empowerment and small business development.<sup>361</sup>

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<sup>354</sup> National Gambling Board op cit note 346 at 7.

<sup>355</sup> National Gambling Board *Annual Report 2021/2022* op cit note 347 at 47.

<sup>356</sup> Portfolio Committee on Trade & Industry op cit note 27 at 11.

<sup>357</sup> National Gambling Board *Annual Report 2021/2022* op cit note 347 at 41.

<sup>358</sup> Portfolio Committee on Trade & Industry op cit note 27.

<sup>359</sup> Loc cit.

<sup>360</sup> Loc cit.

<sup>361</sup> Portfolio Committee on Trade & Industry op cit note 27 at 1. This assertion is supported by PWC which asserts that: 'The industry remains an important contributor to the economy through the creation of jobs, continued capital expansion and the payment of taxes to both provincial and national government [sic].' *Gambling Outlook 2017-2021* (2021) 32 available at <https://www.pwc.co.za/en/publications/gambling-outlook.html>, accessed 3 March 2022.

Yet key characteristics of this industry are changing in ways that threaten the commercial sustainability of existing operators. While gambling at land-based casinos historically dominated the South African gambling industry, sports betting has emerged as the preferred form of gambling in recent years. The GGR earned by the 38 land-based casinos (out of a maximum of 41 permitted licenses) which operated as of 31 March 2022<sup>362</sup> have declined from 84.4 per cent of total GGR in FY 2010 to 39.9 per cent of total GGR by FY 2022.<sup>363</sup> Across the same period, the growth of GGR earned by bookmakers grew from 9.9 per cent to 44.9 per cent of total GGR.<sup>364</sup> The pandemic resulted in negative GGR growth for all gambling segments except sports betting which experienced a 21.2 per cent GGR increase from 2020 to 2021.<sup>365</sup> Such growth cannot be entirely attributed to a boost in online activity due to Covid-19 pandemic restrictions as sport betting experienced a robust 21.3 per cent GGR increase from 2019 to 2020<sup>366</sup> prior to onset of the pandemic and market shares for each gambling segment have remained relatively static since that time.<sup>367</sup>

Notwithstanding the prohibition against online gambling other than sports betting, many South Africans appear to have embraced the opportunity to illegally engage in other forms of online gambling. While no recent empirical examination of this phenomenon that quantifies or qualifies the breadth or depth of illegal online gambling appears to exist,<sup>368</sup> the NGB admits that '[t]here are abundant opportunities for online gambling in South Africa.'<sup>369</sup> It has published the names of numerous unlicensed online gambling sites available in South Africa which offer opportunities to engage in

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<sup>362</sup> National Gambling Board 'National gambling statistics, FY2020/21' op cit note 347 at 40; National Gambling Board *Annual Report 2021/2022* op cit note 347 at 33.

<sup>363</sup> National Gambling Board *Annual Report 2021/2022* op cit note 347 at 35.

<sup>364</sup> Loc cit. Limited pay-out machines and bingo accounted for balance of GGR earned by licensed gaming operators.

<sup>365</sup> National Gambling Board 'National gambling statistics, FY2020/21' op cit note 347 at 33.

<sup>366</sup> National Gambling Board op cit note 346 at 34.

<sup>367</sup> National Gambling Board *Annual Report 2021/2022* op cit note 347 at 35.

<sup>368</sup> National Gambling Board op cit note 3 at 29 and National Gambling Board op cit note 347 at 5–6. However, the NGB's Chief Operations Officer indicated that 'about 9% of the population [was] involved in illegal interactive gambling activities' in 2009. Portfolio Committee on Trade & Industry, Parliament of the Republic of South Africa 'Interactive Gambling Regulations: Committee feedback & proposal, Committee's draft strategic plan and deliberations' at 4, available at <https://pmg.org.za/committee-meeting/10650/>, accessed 1 January 2023.

<sup>369</sup> National Gambling Board op cit note 3 at 32. In addition to online casino games illegally offered by unlicensed international operators, moreover, slight permutations of popular online casino games are legally offered by many licensed local operators through licenses approved by PLAs under existing regulations. *Infra* s 5.2.5.

gambling beyond sports betting.<sup>370</sup> A Google search for online gambling sites accessible in South Africa supports this thesis.<sup>371</sup>

Rapid adoption of online gambling by consumers in South Africa mirrors developments in international gambling markets. Many of the technological advances that have contributed to proliferation of online gambling in international jurisdictions, such as smart phones, are available in South Africa.<sup>372</sup> Many of the social and demographic factors that have contributed to the growth of online gambling in international markets, such as urbanisation of national populations, are present in South Africa.<sup>373</sup> Indeed, the availability and rapid adoption of new technologies in South Africa are cited by authorities as primary causes for the rapid expansion of and consumer participation in online gambling in the country.<sup>374</sup>

The shift of play in South Africa's gambling industry towards online gambling on casino games of legal and illegal varieties challenges the Government's historic regulation of gambling in the country, particularly its prohibition of online gambling on casino games. As such, the Government needs to re-consider the statutory framework for online gambling and account for judicial precedents related thereto as part of any *lex ferenda* that legalises and regulates this activity in the country.

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<sup>370</sup> Loc cit.

<sup>371</sup> For example, a single betting site ranks the top 100 betting sites accessible in South Africa. Bets.co.za 'Best South African betting sites' at 1–5, available at <https://www.bets.co.za/betting-sites/>, accessed 4 April 2022. See also Capeetc 'The rise of online gambling' at 1, available at <https://www.capetownetc.com/world/the-rise-in-illegal-gambling-in-south-africa/>, accessed 13 March 2022, passim.

<sup>372</sup> For example, 91.2 per cent of South Africa's population had smart phones as of 30 September 2019, an increase from 43.5 per cent since 30 September 2016. Independent Communications Authority of South Africa 'The state of the ICT sector report in South Africa 2020' at 33, available at <https://www.icasa.org.za/uploads/files/State-of-the-ICT-Sector-Report-March-2020.pdf>, accessed 4 May 2022.

<sup>373</sup> For example, 67.85 per cent of South Africa's population lived in urban areas in 2021, an increase from 62.75 per cent in 2011. Aaron O'Neill 'South Africa: urbanization from 2011 to 2021' at 1, available at <https://www.statista.com/statistics/455931/urbanization-in-south-africa/>, accessed 4 May 2022.

<sup>374</sup> For example, the National Gambling Board has dedicated an entire study to the influence of technology on the gambling sector. National Gambling Board op cit note 3, particularly 22–42.

### 3.2 STATUTORY FRAMEWORK FOR REGULATION OF ONLINE GAMBLING

Gambling has been as a controversial activity in South Africa since 1673.<sup>375</sup> At various times in various territories that now form the Republic of South Africa, gambling in various forms was unregulated, regulated or banned.<sup>376</sup> Some scholars have suggested that gambling was used as a means to oppress indigenous populations during colonial and Apartheid times.<sup>377</sup>

Gambling except for on-track betting on horse racing<sup>378</sup> was illegal in the country prior to the birth of democratic South Africa.<sup>379</sup> With the advent of democracy, the Government passed legislation that legalised and regulated gambling at destination casinos, betting on sports and playing of lotteries but prohibited all other forms of gambling, including online gambling on casino games.<sup>380</sup> Current legislation builds upon such early efforts and continues to prohibit all forms of online gambling except sports betting.<sup>381</sup> In 2008 the Government passed a law to legalise and regulate online gambling, including on casino games, but such legislation has languished as inoperable

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<sup>375</sup> Portfolio Committee on Trade & Industry, Parliament of the Republic of South Africa ‘Report: Review of the national gambling legislation’ at 1, available at <https://pmg.org.za/taled-committee-report/743/>, accessed 1 January 2023. For a popular history of gambling in South Africa, see Legit Gambling ‘The history of gambling in South Africa’ available at <https://www.legitgambling.com/sa/gambling-laws-in-south-africa>, accessed 14 September 2022, passim.

<sup>376</sup> For a concise legal history of gambling in South Africa, see Segoane Lawrence Monnye *Towards the Regulation of Interactive Gambling: An Analysis of the Gambling Regulatory Framework in South Africa* (unpublished LLD thesis, University of South Africa, 2016) at 32–56, available at [https://uir.unisa.ac.za/bitstream/handle/10500/21154/thesis\\_monnye\\_sl.pdf?isAllowed=y&sequence=1](https://uir.unisa.ac.za/bitstream/handle/10500/21154/thesis_monnye_sl.pdf?isAllowed=y&sequence=1), accessed 12 June 2022. For further information about the state of South Africa’s gambling environment in the years leading up to the birth of democratic South Africa, see Grant Kaplan ‘Gambling in South Africa’ *DR* Jun 1994 at 466, available at [https://journals.co.za/doi/pdf/10.10520/AJA02500329\\_8486](https://journals.co.za/doi/pdf/10.10520/AJA02500329_8486), accessed 15 January 2023.

<sup>377</sup> Sallaz op cit note 63.

<sup>378</sup> No scholarship has been identified that provides any rationale for the legality of on-track betting on horse racing except for general commentary about the sport’s ‘long and rich history’ as a socially accepted activity that predates the regulation of gambling. ‘Horse racing in South Africa’ at 1, available at <https://brandsouthafrica.com/109779/horse-racing-in-south-africa/>, accessed 2 September 2022. One may speculate a posteriori that on-track betting on horse races involved parimutuel betting against other participants that may have been regarded as a lesser vice than directly betting against the house or other players. Bets were typically placed at teller windows at race tracks with races often structured around popular social events which may have created an aura of respectability around betting on outcomes of horse races which distinguished the activity from denizens gathering in gambling dens to throw dice or play cards.

<sup>379</sup> Sections 2 and 6 of the Gambling Act 51 of 1965, GG 1108 of 1965 of 12 May 1965, available at <https://namiblii.org/akn/na/act/1965/51/eng@1992-07-31>, accessed 19 August 2022. Section 3 of the Act prohibited advertisements of gambling activities while s 4 prohibited distribution of notices of gambling activities.

<sup>380</sup> *Infra* s 3.2.1.

<sup>381</sup> *Infra* s 3.2.2.

law for nearly fifteen years.<sup>382</sup> Various policy initiatives, national commissions and draft legislation and regulations have arisen in the intermittent period that addressed gambling, including online gambling, but none of these efforts have resulted in legalisation of online gambling on casino games in South Africa.<sup>383</sup>

### 3.2.1 Early legislation

Gambling in democratic South Africa was legalised and regulated through The Lotteries and Gambling Board Act 210 of 1993 (assented to on 14 January 1994) which recognised existing operations of any licensed lottery, sports pool, casino or gambling game as a lawful activity in the reconstituted country.<sup>384</sup> Section 20 of the Act preserved the illegality of all other forms of gambling and proprietors of illegal operations were subject to a fine or imprisonment not exceeding five years.<sup>385</sup> As online gambling was not offered in any applicable territory prior to enactment of this legislation, it constituted ipso facto an illegal form of gambling.

The Lotteries and Gambling Board Act 1993 was a thin piece of legislation. It gave a new Lotteries and Gambling Board broad powers to legalise pre-existing gambling operations, including brick and mortar casinos, lotteries and certain fundraising activities.<sup>386</sup> Given the specificity of language used in the law,<sup>387</sup> it was likely enacted out of necessity to account for the presence of casinos in the Bantustans<sup>388</sup> in advance of their imminent reintegration into democratic South Africa.<sup>389</sup> It was likely informed by recommendations of the 1992 Howard Commission which proposed a limit of ten

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<sup>382</sup> *Infra* s 3.2.3.

<sup>383</sup> *Infra* ss 3.2.4 through 3.2.7.

<sup>384</sup> Sections 9(1) and 9(2) of The Lotteries and Gambling Board Act 1993.

<sup>385</sup> *Loc cit*.

<sup>386</sup> The Lotteries and Gambling Board Act 1993 *op cit* note 384.

<sup>387</sup> Section 9(1) of The Lotteries and Gambling Board Act 1993 specifically considered lawful gambling operations conducted 'on or before 30 November 1993 in a state, the territory of which formerly formed part of the Republic' which is 'reincorporated into the Republic.'

<sup>388</sup> At the time of the legislation, casinos operated in Bophuthatswana, Ciskei, Transkei and Venda. Portfolio Committee on Trade & Industry *op cit* note 375 at 2. Casinos also operated in Swaziland, Lesotho and Botswana. In each instance, all casinos were operated by Sun International except one. Kaplan *op cit* note 376 at 465.

<sup>389</sup> The history of Bantustans is well beyond the scope of this study. For a brief overview, see Laura Phillips 'History of South Africa's Bantustans' *Oxford Research Encyclopedias* at 1, available at <https://doi.org/10.1093/acrefore/9780190277734.013.80>, accessed 17 September 2022.

casinos in the country.<sup>390</sup> No regulations appear to have been promulgated under this legislation.<sup>391</sup>

The Lotteries and Gambling Board Act 1993 was repealed and replaced by the National Gambling Act 33 of 1996.<sup>392</sup> This Act provided for regulation and coordination of casinos, gambling and wagering including through ‘uniform norms and standards’ and established the National Gambling Board.<sup>393</sup> It explicitly acknowledged the existence of casino games such as ‘roulette . . . twenty-one, black-jack, chemin de fer and baccarat’ in its definition of ‘gambling game.’<sup>394</sup> The law introduced the land-based concept of gambling through its definition of ‘casino’ as ‘any premises in or which gambling is conducted under a casino license issued by a provincial licensing authority.’<sup>395</sup>

Consistent with guidelines of the 1995 Wiehahn Commission which recommended legalisation of gambling in the country but a ‘limitation of opportunities’ to gamble therein,<sup>396</sup> ss 11(b) and 17(1)(a) of the National Gambling Act 1996 contemplated a maximum number of gambling licenses while s 13(1)(j) specified a maximum of 40 casino licenses with specific directions regarding the distribution of such licenses across each province. Section 10 of the Act introduced inspection, monitoring and research objectives for the National Gambling Board. Section 11 of the legislation contemplated the licensing, regulation, control, audit, tax, types of games and minimum standards for games.<sup>397</sup> Section 13(a) specifically stipulated that ‘[g]ambling activities shall be effectively regulated, controlled, policed and licensed.’<sup>398</sup> Section 16 prescribed significant consequences for any contravention of the Act.<sup>399</sup>

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<sup>390</sup> Kaplan op cit note 376 at 466.

<sup>391</sup> Based on a comprehensive literature review concluded on 26 October 2023.

<sup>392</sup> National Gambling Act 33 of 1996 GN 1098 GG 17307 of 3 July 1996 available at [http://www.saflii.org/za/legis/num\\_act/nga1996156/f](http://www.saflii.org/za/legis/num_act/nga1996156/f), accessed 11 October 2022.

<sup>393</sup> Loc cit.

<sup>394</sup> Section 1(v).

<sup>395</sup> Section 1(iii).

<sup>396</sup> Department of Trade, Industry & Competition op cit note 30 at 5.

<sup>397</sup> Section 11(c)(x).

<sup>398</sup> There do not appear to be any regulations promulgated under this legislation other than regulations related to limited pay-out machines. Regulation of Limited Payout Machines GN 1425 of RG 6977 of 21 December 2000 available at <https://www.ngb.org.za/SiteResources/documents/LPM%20regs.pdf>, accessed 19 August 2022.

<sup>399</sup> A fine or imprisonment for a period not exceeding ten years or both.

The National Gambling Act 1996 was silent about online gambling. Enacted under the interim constitution of South Africa,<sup>400</sup> it is enlightening for its acknowledgement of the division of responsibilities for regulation of gambling between the national government and its provincial counterparts.<sup>401</sup> The composition of the NGB outlined in section 3 of the Act contemplated representatives from each province while s 9(3) required reporting by the NGB to both Parliament and provinces. Section 11 explicitly noted the ‘powers of the provinces’ and role of the NGB to ‘advise and provide guidelines to the provincial authorities on the regulations and control of gambling or wagering activities.’ At the same time, section 10(a) tasked the NGB to ‘promote uniform norms and standards applying generally throughout the Republic, and to bring about uniformity in the legislation relating to gambling in force in the various provinces.’ Section 10(b) created a ‘national inspectorate’ and s 10(f) called for the NGB ‘to facilitate the resolution of any disputes which may arise between the provinces regarding gambling activities.’

### 3.2.2 Current legislation

The National Gambling Act 1996 was repealed and replaced by the National Gambling Act 7 of 2004. This legislation is the overarching legislation that currently governs gambling in South Africa. In terms of the scope of licensed gambling activities, the Act allows for operation of a limited number of land-based casinos,<sup>402</sup> limited pay-out

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<sup>400</sup> Constitution of the Republic of South Africa Act 200 of 1993 [since repealed].

<sup>401</sup> Section 126(1) of the Constitution of the Republic of South Africa 1993 [since repealed] stipulated that a ‘provincial legislature shall be competent, subject to subsections (3) and (4), to make laws for the province with regards to all matters which fall within the functional areas specified in Schedule 6.’ Schedule 6 specifies that the legislative competencies of provinces include ‘casinos, racing, gambling and wagering.’ Subsection 3 specified that:

A law passed by a provincial government in terms of this Constitution shall prevail over an Act of Parliament which deals with the matter referred to in subsection (1) or (2) except in so far as:

- (a) the Act of Parliament deals with a matter that cannot be regulated effectively by provincial legislation;
- (b) the Act of Parliament deals with a matter that, to be performed effectively, requires to be regulated or co-ordinated by uniform norms or standards that apply generally throughout the Republic.

<sup>402</sup> Section 1 of the National Gambling Act 2004 preserves the land-based concept of a ‘casino’ as a premise where ‘gambling games are played, or are available to be played’ excluding bingo, limited pay-out machines and social gambling. Section 45 of the Act provides for a maximum number of 45 land-based casino licenses in the country.

machines,<sup>403</sup> bingo,<sup>404</sup> lotteries<sup>405</sup> and bookmakers.<sup>406</sup> It provides for ‘certain uniform norms and standards applicable to national and provincial regulation and licensing of certain gambling activities.’<sup>407</sup> It vests responsibility to create and execute such standards to the National Gambling Board.<sup>408</sup>

The Act establishes a National Gambling Policy Council (‘NGPC’) consisting of ministers responsible for gambling in the national government and its provincial counterparts as voting members and chairpersons of the NGB and each PLA as non-voting members who are tasked, inter alia, with coordination of national gambling policy.<sup>409</sup> It retains the NGB but expands its objects, functions, inspection and enforcement powers broadly in line with principles found in the National Gambling Act 1996.<sup>410</sup>

The National Gambling Act 2004 explicitly contemplates online gambling. The activity is defined by s 1 of the Act as engaging in an ‘interactive game’ which is defined as:

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<sup>403</sup> Section 1 of the National Gambling Act 2004 defines ‘limited pay-out machine’ as ‘a gambling machine with a restricted prize’ as further contemplated by the legislation.

<sup>404</sup> Section 1 of the National Gambling Act 2004 defines ‘bingo’ as a specific type of game as further contemplated by the legislation.

<sup>405</sup> Section 1 of the National Lotteries Act, Number 57 of 1997 defines ‘lottery’ to include ‘any game, scheme, arrangement, system, plan, promotional competition or device for distributing prizes by lot or chance’ as well as any such other construct deemed as such under such law. National Lotteries Act 57 of 1997 GN 1514 of GG 18427 of 14 November 1997 available at [https://www.gov.za/sites/default/files/gcis\\_document/201409/a57-97.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/a57-97.pdf), accessed 27 March 2022.

<sup>406</sup> Section 1 of the National Gambling Act 2004 defines ‘bookmaker’ as a ‘a person who directly or indirectly lays fixed-odds bets or open bets with members of the public or other bookmakers, or take such bets with other bookmakers.’

<sup>407</sup> The Act devotes a significant amount of time to creating a regulatory framework for such standards. Most of Chapter 2 of the National Gambling Act 2004 addresses requirements for standards in the gambling industry: Part C (gambling premises), Part D (registration and certification of machines and devices) and Part E (licensing of persons employed in gambling industry) address technical standards related to gambling premises, equipment and personnel, respectively. Part D of Chapter 3 is dedicated to ‘licensing norms and standards’ while Part E of such Chapter deals exclusively with ‘additional norms and standards concerning non-employment licenses.’

<sup>408</sup> Part B of Chapter 3 of the National Gambling Act 2004 establishes standards for national licenses. Part C establishes provincial licenses that, pursuant to s 44(1) of the Act, mandates that every ‘provincial licensing authority must comply with the licensing standards set out in this Act’ and, pursuant to s 44(2) of the Act, further prescribes that it is ‘a condition of every provincial license that the licensee must comply with every applicable provision of this Act.’

<sup>409</sup> Sections 61 and 62 of the National Gambling Act 2004.

<sup>410</sup> Sections 65, 66, 76 and 77 of the National Gambling Act 2004.

. . . a gambling game [a defined term] played or available to be played through the mechanism of an electronic agent [a defined term] accessed over the Internet [a defined term] other than a game that can be accessed for play only in licensed premises [a defined term], and only if the licensee of any such premises is authorised to make such a game available for play.

Section 1 similarly defines an ‘interactive provider’ as ‘a person licensed to make an interactive game available to be played’.

Whereas online gambling was implicitly illegal under The Lotteries and Gambling Board Act 1993 and overlooked by the National Gambling Act 1996, the National Gambling Act 2004 explicitly makes online gambling an illegal activity. Section 11 of the Act stipulates that ‘[a] person must not engage in or make available an interactive game except as authorised in terms of this Act or any other national law.’ Section 15 of the Act prohibits advertising and promotion of gambling activities and granting of discounts. Beyond these general public interest provisions, s 15(1)(a)(ii) prohibits advertisement or promotion of any gambling activity that is unlawful under the Act or any provincial law. The combined effect of these provisions makes it a statutory offence to offer or advertise any online gambling beyond sports betting in South Africa. Significant consequences arise from contraventions of the Act.<sup>411</sup>

The prohibition of online gambling stipulated by the National Gambling Act 2004 has been affirmed by relevant authorities and agencies. In 2012 the Portfolio Committee on Trade and Industry of the Parliament of South Africa (‘Trade & Industry Portfolio Committee’) stated that ‘until there is implemented legislation on online gambling, all online gambling is banned.’<sup>412</sup> In 2015 the Department of Trade and Industry (‘DTI’) confirmed that: ‘Online gambling, or what others refer to as remote gambling, is not allowed in South Africa. . . . [and] there is no intention on the part of government to propose the legalisation of online gambling in South Africa.’<sup>413</sup> In September 2020 the

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<sup>411</sup> Section 83(1) of the National Gambling Act 2004 stipulates that: ‘Any person convicted of an offence in terms of this Act is liable to a fine not exceeding R10 000 000, or to imprisonment for a period not exceeding 10 years, or to both a fine and such imprisonment.’ Section 83(2) of the Act subjects any licensee convicted of such contravention to ‘an administrative penalty not exceeding 10 per cent of the annual turnover of the licensee’ while s 16 therein provides for forfeiture of winnings derived from unlawful activities.

<sup>412</sup> Portfolio Committee on Trade & Industry op cit note 27 at 6.

<sup>413</sup> Department of Trade & Industry ‘Trade and Industry warns against online gambling’ at 1, available at <https://www.gov.za/stern-warning-online-gambling-operators>, accessed 13 June 2022.

NGB confirmed that it ‘wishes to make it emphatically clear that the answer as to whether online or interactive gambling is legal in South Africa, is a simple and unequivocal NO with the exception of online sports betting’ [cap original].<sup>414</sup> The NGB clarified that:

Examples of such interactive gaming are casino-style gambling that is accessible through the use of a device such as a smartphone or tablet, as well as server-based gambling inside a physical establishment styled as an internet lounge. Casino games can only be enjoyed at licensed land based casinos. Any establishment that is unable to display a valid gambling license issued by a provincial licensing authority is operating illegally.<sup>415</sup>

The prohibition of online gambling beyond sports betting therefore precludes online gambling on casino games outside the walls of any licensed gambling establishment.

Notwithstanding its prohibition of online gambling beyond sports betting, the National Gambling Act 2004 explicitly anticipated the regulation of online gambling. Schedule 5 of the Act required the NGB to establish a committee to ‘consider and report on national policy to regulate interactive gambling . . . and may include with its report any draft national law.’<sup>416</sup> This committee was obligated to jointly report to the NGB and NGPC within one year after the Act came into effect.<sup>417</sup> The Minister of Trade & Industry, following consideration of such report and any recommendations of the NGB or NGPC, was obligated to ‘introduce legislation in Parliament to regulate interactive gambling’ within two years of the effective date of the Act.<sup>418</sup>

### 3.2.3 Inoperable and draft legislation

The Minister of Trade & Industry duly satisfied his obligation under Schedule 5 of the National Gambling Act 2004. The National Gambling Amendment Act 2008 and subsequent Interactive Gambling Regulations (‘IGR’) heralded legalisation and

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<sup>414</sup> Bryan Arumugam ‘Is online gambling legal in South Africa?’ at 1, available at <https://ngb.org.za/SiteResources/documents/2020-21/September/Is%20online%20gambling%20legal%20in%20South%20Africa.pdf>, accessed 13 November 2021.

<sup>415</sup> Loc cit.

<sup>416</sup> Section 5(1) of the Schedule (Transitional Provisions) of the National Gambling Act 2004.

<sup>417</sup> Ibid at s 5(4).

<sup>418</sup> Ibid at s 5(5).

regulation of online gambling on casino games in South Africa. The principal purpose of such legislation was summarised by the DTI as follows:

Internet gambling was a reality in South Africa, and this sector of the industry was not yet regulated. Players would be protected from dishonest and unfair practices. Money that was being spent outside of the country would remain in South Africa. Players would be registered, thus denying access to minors while enable the monitoring of problem gamblers. Attention would be given to implementing Black Economic Empowerment and socio-economic upliftment principles. Operators would have to comply with the provisions of the Finance Intelligence Centre Act. Advertising of service providers would be limited.<sup>419</sup>

The DTI confirmed collateral objectives of the legislation included a desire to stimulate local competition and account for ‘the cost of regulation and monitoring.’<sup>420</sup> Unfortunately, the trumpeted effects and benefits of such legislation have never come into force and effect in South Africa.

### 3.2.3.1 National Gambling Amendment Act 2008

The National Gambling Amendment Act 2008 explicitly sought to legalise and regulate online gambling in South Africa by amending the National Gambling Act 2004 to include online gambling within the existing licensing regime. It amended or introduced certain definitions in the National Gambling Act 2004 to account for online gambling.<sup>421</sup> Among other new terms, section 1 defined an ‘interactive

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<sup>419</sup> Portfolio Committee on Trade & Industry, Parliament of the Republic of South Africa ‘National Gambling Amendment Bill: briefing’ 8 August 2007 at 1, available at <https://pmg.org.za/committee-meeting/10133/>, accessed 1 January 2023.

<sup>420</sup> Loc cit.

<sup>421</sup> The definition of ‘gambling device’ was expanded to include ‘software’ and definitions introduced for ‘interactive gambling software’, ‘interactive gambling equipment’ and ‘electronic betting or wagering.’ Sections 1(f), 1(h) and 1(c) of the National Gambling Amendment Act 2008. It acknowledged unique elements of online gambling by incorporating definitions of ‘website’, ‘home page’, ‘data’ and ‘electronic communication’ from other legislation into the Act. Sections 1(m) and 1(i) of the National Gambling Amendment Act 2008 amending s 1 of the National Gambling Act 2004 through reference to the Electronic Communications and Transactions Act 25 of 2022 GN 1046 of GG 23708 of 2 August 2022 available at [https://www.gov.za/sites/default/files/gcis\\_document/201409/a25-02.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/a25-02.pdf); the Financial Intelligence Centre Act 38 of 2001 GN 1262 of GG 22886 of 3 December 2021 available at [https://www.gov.za/sites/default/files/gcis\\_document/201409/a38-010.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/a38-010.pdf); the Banks Act 94 of 1990 GN 1597 of GG 12617 of 11 July 1990 available at [https://www.gov.za/sites/default/files/gcis\\_document/201503/act-94-1990s.pdf](https://www.gov.za/sites/default/files/gcis_document/201503/act-94-1990s.pdf); and the Companies Act 61 of 1973 GN 1200 in GG 3972 of 13 July 1973 available at <https://www.wylie.co.za/wp-content/uploads/COMPANIES-ACT-NO.-61-OF-1973.pdf>, all accessed 4 September 2022.

gambling license’ as a new license category and introduced the concepts of ‘registered player’, ‘player account’ and ‘nominated account’. Section 10 amended s 11 of the National Gambling Act 2004 to stipulate that: ‘A person must not engage in, facilitate or make available an interactive game other than an interactive game provided under a license issued in terms of this Act.’

The National Gambling Amendment Act 2008 expanded the scope of the National Gambling Act 2004 to govern ‘all gambling activities within the Republic’ except lotteries.<sup>422</sup> It included ‘interactive game’ as a category of gambling activity governed by the National Gambling Act 2004<sup>423</sup> and gave the responsible minister authority to make regulations governing interactive games and forms of electronic communications contemplated by the Act.<sup>424</sup> It created a distinction in respect of fixed-odds bets between South Africans and ‘foreign nationals.’<sup>425</sup> It enabled foreign companies to remit dividends and profits provided that they provisioned for liabilities in South Africa and complied with exchange control and tax laws.<sup>426</sup>

Section 11 of the National Gambling Amendment Act 2008 introduced s 11A of the National Gambling Act 2004 to establish requirements for delivery of interactive games by licensed interactive providers. These requirements included an obligation to only offer interactive games to registered players who have opened a player account with an authorised financial institution. They also established certain player protection provisions including player verification protocols, minimum age requirements<sup>427</sup> and protections in the event of interruptions in delivery of interactive games. Section 13 of the National Gambling Amendment Act 2008 amended its counterpart in the National Gambling Act 2004 to prohibit granting of credit by any interactive provider to any player in respect of any interactive game (consistent with existing legislation in respect of other forms of gambling). Section 12 of the National

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<sup>422</sup> Section 3 of the National Gambling Amendment Act 2008 amending s 2 of the National Gambling Act 2004.

<sup>423</sup> Section 5 of the National Gambling Amendment Act 2008 amending s 3 of the National Gambling Act 2004.

<sup>424</sup> Section 7 of the National Gambling Amendment Act 2008 amending s 5 of the National Gambling Act 2004.

<sup>425</sup> Section 1(e) of the National Gambling Amendment Act 2008 amending s 1 of the National Gambling Act 2004.

<sup>426</sup> Section 9 of the National Gambling Amendment Act 2008 introducing s 6C of the National Gambling Act 2004.

<sup>427</sup> Protection of minors was also contemplated by s 12 of the National Gambling Amendment Act 2008 amending s 12 of the National Gambling Act 2004.

Gambling Act 2004 was amended by s 12 of the National Gambling Amendment Act 2008 to extend self-exclusion opportunities to players of interactive games.

The National Gambling Amendment Act 2008 did not ban advertisements for online gambling. Section 15 of the Act extended the regulation of gambling advertising contemplated by s 15 of the National Gambling Act 2004 to interactive games. It gave the responsible minister broad discretion to ‘prescribe the manner and form for interactive gambling advertising’ and preserved such minister’s discretion to exempt advertising that ‘is not targeted at the general public’.

Section 18 of the National Gambling Amendment Act 2008 introduced s 18A(1) of the National Gambling Act 2004 which required the NGB to maintain a registry of all websites that offered interactive games in South Africa. A new s 18A(2)(a) compelled interactive providers to display their licenses on their websites. While s 18(2)(b) of the amended National Gambling Act 2004 required interactive providers to maintain ‘adequate control and supervision of their website at all times’, a new s 17(4) authorised the relevant minister to ‘prescribe the standards for the security, access and maintenance of an interactive provider’s website and the requirements for the disclosure of information that must be met.’

The National Gambling Amendment Act 2008 incorporated ‘server location’ provisions into the National Gambling Act 2004 similar to legislation found in several international jurisdictions considered by this study. These provisions required interactive providers to locate interactive gambling equipment used to provide interactive games within the country.<sup>428</sup> Section 36(b) of the National Gambling Amendment Act 2008 introduced s 56(c) of the National Gambling Act 2004 which empowered the NGB to refuse to issue any license if any website or proposed location of any interactive gambling equipment was deemed unfit for purpose.

In terms of governance, the National Gambling Amendment Act 2008 endowed the NGB with sole jurisdiction to issue interactive gambling licenses. The National Gambling Act 2004 previously distinguished between provincial and national

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<sup>428</sup> Section 24 of the National Gambling Amendment Act 2008 introducing s 37(4) of the National Gambling Act 2004.

licenses granted by provincial authorities<sup>429</sup> and empowered the NGB to evaluate and oversee any national licenses issued by PLAs.<sup>430</sup> Among other amendments, s 21 of the National Gambling Amendment Act 2008 substituted s 32 of such legislation to grant the NGB ‘exclusive jurisdiction’ to ‘investigate and consider applications for, and issue . . . national licenses for interactive gambling’ and ‘conduct inspections to ensure compliance with . . . the conditions of national licenses for interactive gambling’ with attendant enforcement powers.

Section 22 of the National Gambling Amendment Act 2008 substituted s 33 of the National Gambling Act 2004 to effectively grant the NGB responsibility to regulate interactive gambling in South Africa, including broad responsibilities for the prevention, detection and prosecution of unlawful interactive gambling and enforcement of license conditions imposed on various industry participants, including broad inspection powers over websites, gambling equipment and gambling software.<sup>431</sup> Section 24 of the Act introduced s 37(1A) of the National Gambling Act 2004 to confirm that interactive gambling licenses may only be issued as national licenses. Along with other provisions related to other forms of gambling, the interactive licensing provisions de jure ‘[r]eposition[ed] the National Gambling Board to be a National Gambling Regulator’.<sup>432</sup>

Section 24 of the National Gambling Amendment Act 2008 introduced s 37(3) of the National Gambling Act 2004 which enabled the relevant minister to prescribe conditions on interactive gambling licenses. Similar to limitations imposed on other

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<sup>429</sup> Parts A and B of c 3 of the National Gambling Act 2004.

<sup>430</sup> Section 33 of the National Gambling Act 2004.

<sup>431</sup> It also vested the NGB with responsibility for investigating and ensuring compliance with the Financial Intelligence Centre Act in relation to interactive gambling, including the power to issue offence notices. While Part B of the National Gambling Act 2004 continued to enable provincial authorities to issue national licenses, s 26 of the National Gambling Amendment Act 2008 introduced a new s 38(2A)(b) of the National Gambling Act 2004 which limited such authority to the issue of interactive gambling employment licenses. This limitation was confirmed by a new s 38(2A)(a) of the National Gambling Act 2004 which reserved the issue of ‘an interactive gambling operator license, or a license as a manufacturer, supplier or maintenance provider of interactive gambling software and equipment’ to the NGB. This limitation of provincial authority was confirmed by s 27 of the National Gambling Amendment Act 2008 which amended s 39 of the National Gambling Act 2004 to prescribe that: ‘A provincial licensing authority may issue a national license except a license contemplated in section 38(2A)(a), to an applicant that meets the requirements of this Act.’

<sup>432</sup> Rob Davies, Minister of Trade & Industry Notice of Intention to Introduce the National Gambling Amendment Bill 2018 into Parliament GN 742 of GG 41787 of 20 July 2018 available at [https://www.gov.za/sites/default/files/gcis\\_document/201808/41787gon742.pdf](https://www.gov.za/sites/default/files/gcis_document/201808/41787gon742.pdf), accessed 31 December 2022.

forms of gambling, s 25 of the amending legislation introduced s 37A of the National Gambling Act 2004 to empower the minister to establish a maximum number of interactive gambling licenses. Section 38 of the National Gambling Amendment Act 2008 amended s 65 of the National Gambling Act 2004 to expand the remit of the NGB to include making recommendations to the NGPC in respect of ‘guidelines for an effective, uniform and consistent implementation of this Act throughout the Republic and changes to bring about uniformity in the laws of the various provinces in relation to casinos, racing, gambling and wagering.’ Section 43 of the National Gambling Amendment Act 2008 introduced s 88A of the National Gambling Act 2004 which prescribed that: ‘Tax in respect of interactive gambling activities will be imposed in terms of appropriate legislation.’

The National Gambling Amendment Act 2008 was passed by the National Assembly and ratified by the Presidency. Section 44 of the Act stipulates that it ‘comes into operation on a date fixed by the President by proclamation in the *Gazette* [ital original].’ No President has published such proclamation<sup>433</sup> and this Act remains in limbo until satisfaction of this suspensive condition. Among other speculation, it has been suggested that the Trade & Industry Portfolio Committee’s decision to spurn approval of the Interactive Gambling Regulations is one of the reasons for successive President’s failures to invoke operation of this law.<sup>434</sup> This assertion may have merit. Although not directly cited in any published source, the Presidency of successive administrations may have deferred proclamation of the operation of this Act due to the absence of regulations in deference to *stare decisis* originating from the 2000 constitutional law case of *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others*.<sup>435</sup>

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<sup>433</sup> Arumugam op cit note 414.

<sup>434</sup> Geordin Gwyn Hill-Lewis ‘Memorandum on the objects of the Remote Gambling Bill of 2013 in Remote Gambling Bill: Publication and invitation for public comment GN 319 of GG 37589 of 23 April 2014 available at [https://www.gov.za/sites/default/files/gcis\\_document/201409/37569gen319.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/37569gen319.pdf), accessed 3 September 2022. The resistance of land-based casino owners is cited as another reason. Thurgood Mashiane ‘The state of gambling industry in South Africa’ *Tech Financials* 30 December 2021 at 2, available at <https://techfinancials.co.za/2021/12/30/the-state-of-gambling-industry-in-south-africa/>, accessed 1 January 2023.

<sup>435</sup> *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* (CCT31/99) ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February

### 3.2.3.2 Interactive Gambling Tax Bill and Interactive Gambling Tax (Administration) Bill

In 2008, the Government published a draft Interactive Gambling Tax Bill for public comment.<sup>436</sup> It was thin piece of legislation: ss 2 through 4 proposed a 6 per cent tax to be paid into the National Revenue Fund on GGR earned by interactive providers from registered players in South Africa exclusive of VAT or any other tax. At the same time, the Government published a draft Interactive Gambling Tax (Administration) Bill for public comment.<sup>437</sup> It was a more substantive piece of legislation that empowered the NGB to administer the Act, including collection of the proposed tax on a monthly basis, and provided for various compliance and penalty provisions related thereto.<sup>438</sup> Neither of these prospective laws appear to have been submitted to the National Assembly or received further legislative consideration to date.<sup>439</sup>

### 3.2.3.3 Interactive Gambling Regulations

As a follow up to the National Gambling Amendment Act 2008, the Government drafted interactive gambling regulations in 2009 to complement the Act. Approximately 100 pages of regulations broadly divided between fifty pages of substantive requirements and fifty pages of standard forms to be used in the administration of such regulations were published by Government.

The licensing framework for interactive gambling licenses was clarified by the Interactive Gambling Regulations. Beyond general license conditions,<sup>440</sup> Reg 26 of the IGR permitted a maximum of ten interactive operator licenses to be issued at any

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2000) available at <https://www.saflii.org/za/cases/ZACC/2000/1.html>, accessed 23 November 2023. In *casu*, the President proclaimed operation of an amending law prior to adoption of regulations essential to implementation of such law. Chaskalson P noted at 86 that: ‘In the present case, the Act was not brought into force with the appropriate regulatory infrastructure in existence or ready to be put in place’ and held at 89 that proclamation of the operation of such law without requisite regulations by the President ‘cannot be found to be objectively rational on any basis whatsoever.’

<sup>436</sup> Interactive Gambling Tax Bill, B-2008 of 9 June 2008 available at <https://static.pmg.org.za/bills/081113interactivegamblingtaxbill.pdf>, accessed 29 December 2022.

<sup>437</sup> Interactive Gambling Tax (Administration) Bill, B-2008 of 9 June 2008 available at <https://static.pmg.org.za/bills/081113%20DraftInteractiveGamblingTaxAdministration%20Bill.pdf>, accessed 29 December 2022.

<sup>438</sup> Section 10 empowered the NGB ‘for administering the [proposed] Act and the [proposed] Interactive Gambling Tax Act.’

<sup>439</sup> Based on literature review concluded on 26 October 2023.

<sup>440</sup> Reg 23 of the Interactive Gambling Regulations.

one time. Regulation 23 confirmed that operator licenses were available for a period not to exceed five years and applicable tariffs were prescribed for such licenses.<sup>441</sup> Similar provisions governed licenses for manufacturers, suppliers and maintenance providers to interactive providers.<sup>442</sup> Regulation 53 established a process for the registration of employees of interactive providers and other value chain participants. Regulation 52 codified the applicability of VAT to relevant transactions.

The IGR addressed a number of technical issues related to the conduct of online gambling. Regulations 17 and 18 addressed standards for the design, use, security, access and maintenance of websites. Regulation 19 assured the protection and confidentiality of player information. Regulations 20 to 22 imposed standards and obligations on interactive providers in relation to internal control systems.

Player identification was a significant concern. Every prospective player was required to complete a standard form to register with the interactive provider that confirmed their identity (including age of majority) and contact information as well as particulars of their nominated account with an authorised financial institution (a cheque or credit card account).<sup>443</sup> Every prospective player was required to provide proof of identity (ID document or passport) as well as proof of address to be verified according to the interactive provider's approved control systems.<sup>444</sup>

Significant protections were included in the regulations to ensure the proper administration of player accounts by interactive providers.<sup>445</sup> The standard onboarding form required players to specify transfer limits between their nominated account and their player's account and daily and monthly gambling limits.<sup>446</sup>

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<sup>441</sup> Reg 42 established a ZAR 500,000 non-refundable application fee; Reg 43 established a ZAR 350,000 investigation fee (with any unused portion potentially available as a refund); Reg 44 established a ZAR 200,000 upfront non-refundable licensing fee; Reg 45 established a ZAR 300,000 non-refundable annual license renewal fee.

<sup>442</sup> Reg 47 established a ZAR 300,000 non-refundable application fee; Reg 48 established a ZAR 150,000 investigation fee (with any unused portion potentially available as a refund); Reg 49 established a ZAR 80,000 upfront non-refundable licensing fee; Reg 50 established a ZAR 150,000 non-refundable annual license renewal fee.

<sup>443</sup> Regs 6 and 10 and Form NGB 10 of the Interactive Gambling Regulations.

<sup>444</sup> Reg 9 of the Interactive Gambling Regulations. Proof of address was required in a form compliant with requirements of the Financial Intelligence Centre Act.

<sup>445</sup> Reg 11 of the Interactive Gambling Regulations.

<sup>446</sup> Reg 7(1) and Form NGB 10 of the Interactive Gambling Regulations.

Interactive service providers were required to immediately transfer any credit above ZAR 20,000 from a player's account into their nominated bank account.<sup>447</sup> The regulations imposed a seven day 'cooling off period' for any player request to increase limits but gave immediate effect to any player request to decrease limits.<sup>448</sup> Players could set time limits on amounts of wagers and frequency of play.<sup>449</sup>

Significant consideration was given to responsible gambling provisions. As part of the onboarding process, every interactive provider was required to notify every prospective player of prohibitions against underage play and post such prohibitions on their websites and advertisements and operate a filter program to prevent underage access to their websites.<sup>450</sup> Every interactive provider was required to post warnings in the field of play of every game and maintain and publish a responsible gambling policy with links to the National Responsible Gambling Programme ('NRGP').<sup>451</sup> The IGR mandated the availability of self-exclusion opportunities for a minimum twelve month period.<sup>452</sup> The Regulations included requirements for interactive providers to report and prevent money laundering in compliance with the Financial Intelligence Centre Act ('FICA').<sup>453</sup> Interactive service providers and websites were subject to responsible advertising principles.<sup>454</sup>

### 3.2.4 Gambling review commission

Perhaps as a result of the significant divisions within its ranks regarding the ethos of gambling, including online gambling,<sup>455</sup> the Government established a Gambling Review Commission in 2010 to review gambling in the country.<sup>456</sup> With respect to online gambling, the GRC noted two significant shortcomings of the National Gambling Amendment Act 2008 and Internet Gambling Regulations. Firstly, the focus of legislation on online gambling on casino games to the exclusion of sports provided

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<sup>447</sup> Reg 8 of the Interactive Gambling Regulations.

<sup>448</sup> Regs 7(4) and 7(5) of the Interactive Gambling Regulations.

<sup>449</sup> Reg 7(2) of the Interactive Gambling Regulations.

<sup>450</sup> Regs 10(3), 16(5) and 17(2) of the Interactive Gambling Regulations.

<sup>451</sup> Reg 16(1), 16(3) and 16(4) of the Interactive Gambling Regulations.

<sup>452</sup> Reg 15, particularly Reg 15(3), of the Interactive Gambling Regulations.

<sup>453</sup> Reg 14 of the Interactive Gambling Regulations.

<sup>454</sup> Reg 17 of the Interactive Gambling Regulations.

<sup>455</sup> Portfolio Committee on Trade & Industry op cit note 27 at 12.

<sup>456</sup> Louw et al op cit note 14.

opportunities for purveyors of sports betting (including horse racing), online poker and betting exchanges<sup>457</sup> to offer online betting.<sup>458</sup> Second, the exclusion of gambling that did not involve any connection to the internet (such as through televisions, phones and text messaging services) emboldened operators to offer online betting through their websites.<sup>459</sup> As a result of these deficiencies:

. . . various unscrupulous interactive gambling operators have been offering and advertising their gambling products to the South African public. These services are widely advertised on the National Television Broadcaster, the SABC, on satellite television, and even in national magazines.<sup>460</sup>

The Commission recommended that:

. . . a holistic view of online gambling should be taken to its regulation that includes interactive gambling and all forms of remote gambling, such as telephone or cell phone gambling. The online gambling regulation should also provide for intermediaries, such as betting exchanges and include online betting through bookmakers and the totalisator via the Internet.<sup>461</sup>

The Trade & Industry Portfolio Committee found fault with the GRC's Report. In terms of the Commission's general approach to the evolution of regulation of gambling in South Africa, the Committee concluded that 'the socio-economic impacts of legalised gambling were inadequately represented and appeared to be biased in favour of the gambling industry.'<sup>462</sup> The Committee appeared to take a softer approach to the regulation of online gambling. Although it asserted that 'the proliferation of gambling should be halted until a thorough review of the national gambling legislation was conducted,'<sup>463</sup> it noted many of the Commission's recommendations.<sup>464</sup>

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<sup>457</sup> Betting exchanges essentially facilitate direct peer-to-peer betting through a platform and 'differ from traditional sportsbooks by allowing customers to bet with one another rather than against the house.' Betting USA.com 'Sports betting exchanges in the USA' at 1, available at <https://www.bettingusa.com/sports/exchanges/>, accessed 27 February 2023.

<sup>458</sup> Ibid at 175.

<sup>459</sup> Ibid at 175–6.

<sup>460</sup> Ibid at 176.

<sup>461</sup> Ibid at 183.

<sup>462</sup> Portfolio Committee on Trade & Industry op cit note 27 at 1.

<sup>463</sup> Loc cit.

<sup>464</sup> Loc cit.

### 3.2.5 Private member's bills

Two private member's bills (1994 and 2022) have been introduced in the National Assembly by the Democratic Alliance to achieve the legalisation and regulation of online gambling. In 2014, a Democratic Alliance MP introduced the Remote Gambling Bill 2014 as a private member's bill in an effort to legalise and regulate online gambling in the country.<sup>465</sup> In 2022, another Democratic Alliance MP published notice of his intention to introduce the Remote Gambling Bill 2022.<sup>466</sup>

The Remote Gambling Bill 2014 incorporated many of the features of the National Gambling Amendment Act 2008 but included new provisions which addressed many of the criticisms of earlier legislation. While it operated as a stand-alone piece of legislation independent from the National Gambling Act 2004, cl 3(2) of the Bill required holders of licenses issued under the Remote Gambling Bill 2014 to 'comply with any other law or legal requirement in relation to the business in question, or any applicable provision of the National Gambling Act.' At the same time, it repealed some provisions of the National Gambling Act 2004, such as certain definitions, which conflicted with new definitions or provisions found in the Bill.<sup>467</sup>

The Remote Gambling Bill 2014 expanded the scope of online gambling to include those activities excluded from previously proposed legislation. Among other games, the definition of 'casino game' included poker<sup>468</sup> and the definition of 'remote gambling activity' included virtual gambling games (a defined term), person-to-person gambling

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<sup>465</sup> Geordin Gwyn Hill-Lewis Remote Gambling Bill: Publication and invitation for public comment GN 319 of GG 37589 of 23 April 2014 available at [https://www.gov.za/sites/default/files/gcis\\_document/201409/37569gen319.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/37569gen319.pdf), accessed 3 September 2022 which appears to have been republished in identical form as GN 1057 of GG 38221 of 12 November 2014 available at [https://www.gov.za/sites/default/files/gcis\\_document/201411/38221gen1057.pdf](https://www.gov.za/sites/default/files/gcis_document/201411/38221gen1057.pdf), accessed 10 March 2023.

<sup>466</sup> Dean MacPherson Remote Gambling Bill publication and invitation for public comment GN 1268 of GG 46847 of 2 September 2022 available at <https://gazettes.africa/akn/za/officialGazette/government-gazette/2022-09-02/46847/eng@2022-09-02>, accessed 14 September 2022. The text of the proposed legislation does not appear to have been published as of 26 October 2023.

<sup>467</sup> Clause 66 of the Remote Gambling Bill 2014.

<sup>468</sup> Clause 1 of the Remote Gambling Bill 2014 defined 'casino game' as:

... any game, irrespective of whether or not the result thereof is determined by chance or a measure of skill, played with playing cards, dice, a gaming machine or any other device used to determine win or loss in the outcome of a wager for money or other valuable consideration, and includes, without derogating from the generality of the foregoing, roulette, keno, twenty-one, blackjack, bingo, poker, chemin de fer, baccarat, or any other game whose rules closely resembles that of the foregoing.

(a defined term), equal chance gambling (a defined term) and ‘participation in a casino game, bingo game or sports betting’ but excluded lotteries and fundraising from the scope of online gambling through the definition of ‘gambling’ contained in the Bill.<sup>469</sup> Clause 4 of the Bill made it illegal for any person to engage in any online betting in the country except through a licensed remote gambling operator. Clause 7 of the Bill made any debts incurred by minors or players through any unlicensed remote gambling activity unenforceable in South Africa.

In terms of regulatory authority, cl 16 explicitly granted authority to issue remote gambling operator, manufacturer, supplier, maintenance provider and employment licenses to the NGB. However, cl 10 and chap 6 of the Bill vested PLAs with the power to accept and review applications and make recommendations to the NGB in respect of remote gambling licenses.<sup>470</sup> PLAs were also charged with the monitoring of remote gambling licensees and enforcement of associated license requirements within their jurisdictions, including collection of taxes. At the same time, cl 13 of the Bill empowered the NGB to grant remote gambling licenses and supervise enforcement obligations of provincial authorities in respect of remote gambling. It endowed the NGB with concurrent authority to monitor the activity and conduct enforcement actions against PLAs and license holders.

The Remote Gambling Bill 2014 addressed the taxation of online gambling. Clause 65 imposed a tax on online gambling to be enacted under provincial legislation. While it left specific thresholds of tax to be imposed on remote gambling to provincial authorities, cl 65 required 70 per cent of all revenues generated by online gambling to be allocated to applicable provincial coffers with 30 per cent of such funds delivered to the national fiscus.

The Remote Gambling Bill 2014 contained customary protections of vulnerable populations and responsible gambling provisions. Clauses 40 and 45 provided protections to minors. Clause 41 prohibited the granting of any credit to players. Clause

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<sup>469</sup> Clause 1 of the Remote Gambling Bill 2014.

<sup>470</sup> Chapter 6 of the Remote Gambling Bill 2014, specifically cls 18 through 37, dealt with applications, refusals, disqualifications, renewals, cancellations, transfers and surrenders of licenses which generally vested the initial application and investigation powers to provincial authorities and subsequent issuance, suspension, cancellation and transfer authorities to the NGB.

42 incorporated self-exclusion provisions. Clause 43 contemplated responsible advertising provisions which generally mirrored requirements found in earlier legislation. Clause 44 adopted many of the player identification and nominated account provisions found in the National Gambling Act 2004 and IGR while cls 49 through 54 and cl 56 included customary player protections found in earlier proposed legislation.

The Remote Gambling Bill 2014 never received meaningful consideration as legislation. Facing long odds to become law due to introduction as a private member's bill from an opposition party, the Bill was jointly condemned by the DTI and the NGB:

Online gambling is not desirable and the dti [sic] has raised its objection to the proposal by the Democratic Alliance to legalise online gambling. In our view, no amount of control will adequately curb the harm that may be caused to South African citizens by online gambling, hence we reiterate that it must remain a banned activity.<sup>471</sup>

The Bill was condemned from Government benches: 'One MP criticised the DA's bill as an attempt to take food away from families. Another said it would increase white-collar crime.'<sup>472</sup>

The Democratic Alliance resurrected efforts to legalise and regulate online gambling through publication of a notice on 2 September 2022 of its intention to introduce the Remote Gambling Bill 2022.<sup>473</sup> Beyond publication of a notice substantially similar to the notice accompanying the Remote Gambling Bill 2014, provisions of this latest private member's bill do not appear to have been released as of 26 October 2023.

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<sup>471</sup> Department of Trade & Industry op cit note 413.

<sup>472</sup> 'South Africans losing out on billions in online gambling taxes' *My Broadband* 12 March 2023 at 1, available at <https://mybroadband.co.za/news/internet/483545-south-africa-losing-out-on-billions-in-online-gambling-taxes.html>, accessed 13 March 2023.

<sup>473</sup> MacPherson op cit note 466.

### 3.2.6 National gambling policy 2016

Based on outcomes of the Gambling Review Commission and subsequent consultation processes, the Government published the National Gambling Policy 2016 on 1 April 2016.<sup>474</sup> A major change arising from this Policy was the proposed repositioning of the NGB as the National Gambling Regulator ('NGR').<sup>475</sup> It also recommended establishment of a national treatment programme.<sup>476</sup> While the Policy canvassed a wide range of subjects related to regulation of gambling in South Africa, it was concise in its treatment of online gambling. The Policy confirmed that 'no new forms of gambling will be allowed at this point' because the 'capacity to regulate online gambling is currently not adequate' and recommended increased enforcement measures to block online gambling sites.<sup>477</sup> It recognised and asserted that:

Introduction of online casino gambling requires a policy shift in regard to the destination approach to gambling as it proposes bringing gambling activities more closer [sic] to people. This aspect is considered against the concern regarding problem gambling in South Africa, and measures to combat it successfully.<sup>478</sup>

As such, this Policy preserved the prohibition of online gambling on casino games as codified in the National Gambling Act 2004.

### 3.2.7 National Gambling Amendment Bill 2018

The Government's commitment to continued prohibition of online gambling on casino games appears to have carried through into the National Gambling Amendment Bill 27 of 2018.<sup>479</sup> Supporting ambitions of the Gambling Policy 2016, this legislation contemplated significant changes to the governance of gambling in South Africa.

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<sup>474</sup> Department of Trade & Industry 'National gambling policy, 2016' GN 389 of GG 39887 of 1 April 2016 at 4 and 5, available at [https://www.gov.za/sites/default/files/gcis\\_document/201604/39887gon389.pdf](https://www.gov.za/sites/default/files/gcis_document/201604/39887gon389.pdf), accessed 2 April 2022.

<sup>475</sup> Ibid at 1.

<sup>476</sup> Loc cit.

<sup>477</sup> Ibid at 4–5.

<sup>478</sup> Ibid at 9.

<sup>479</sup> National Gambling Amendment Bill, Number 27 of 2018 GG 41787 of 20 July 2018 available at [https://www.gov.za/sites/default/files/gcis\\_document/201808/b27-2018nationalgamblinga.pdf](https://www.gov.za/sites/default/files/gcis_document/201808/b27-2018nationalgamblinga.pdf), accessed 29 October 2021.

Among other matters, it followed through on recommendations of the National Gambling Policy to propose the reconstitution of the NGB as the NGR guided by a Chief Executive Officer ('CEO') and Deputy CEO.<sup>480</sup> It extended application of the National Central Electronic Monitoring System ('NCEMS') beyond limited pay-out machines to all forms of gambling.<sup>481</sup> This expanded system was funded through expansion of the 6 per cent monitoring fees levied in respect of limited pay-out machines to all forms of gambling.<sup>482</sup> It provided for forfeiture of unlawful winnings to the NGR to be used to address problem gambling.<sup>483</sup>

The National Gambling Amendment Bill 2018 preserved the prohibition of online gambling beyond sports betting.<sup>484</sup> The legislation included provisions that enhanced the powers of the national inspectorate administered by the NGR to 'fight unlawful gambling practices' that included 'illegal online gambling.'<sup>485</sup> The spectre of online gambling loomed large over deliberations of the Bill. The Trade & Industry Portfolio Committee 'raised concerns about online gambling and wanted to know if it could be regulated.'<sup>486</sup> One Committee member expressed frustration that:

DTI wanted to protect punters but would not protect online gamblers and online gambling was taking place every single day and from which punters had zero protection. DTI wanted to confiscate the illegal winnings of underage gamblers but had no ability to deal with unlawful winnings via online gambling.<sup>487</sup>

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<sup>480</sup> National Gambling Amendment Bill 2018, particularly cl 1 and Part B (cls 38 to 54) thereof amending the National Gambling Act 2004.

<sup>481</sup> Clause 19 of the National Gambling Amendment Bill 2018 amending s 27 of the National Gambling Act 2004.

<sup>482</sup> Portfolio Committee on Trade & Industry, Parliament of the Republic of South Africa 'National Gambling Amendment Bill: DTI response to submissions' available at <https://pmg.org.za/committee-meeting/27373/> at 9, accessed 4 January 2023.

<sup>483</sup> Clause 7 of the National Gambling Amendment Bill 2018 amending s 16 of the National Gambling Act 2004.

<sup>484</sup> With respect to online gambling, 'the issue was not in the ambit of the current bill.' Portfolio Committee on Trade & Industry op cit note 482 at 5.

<sup>485</sup> Para 3.27 of the 'Memorandum on the objects of the National Gambling Amendment Bill, 2018' at 23. See cls 50 and 51 of the National Gambling Amendment Bill 2018 introducing s 76A and amending s 77 of the National Gambling Act 2004.

<sup>486</sup> Loc cit.

<sup>487</sup> D Macpherson in Portfolio Committee on Trade & Industry op cit note 482 at 9.

The DTI confirmed that: ‘online gambling is not allowed in the country, and that this was something that needed to be looked into.’<sup>488</sup>

Although the Bill was approved by the Trade & Industry Portfolio Committee and passed by the National Assembly, it was twice rejected by the National Council of Provinces (‘NCOP’).<sup>489</sup> The provinces noted that the legislation appeared to subrogate provincial powers to a national regulatory authority.<sup>490</sup> The matter was ultimately referred for mediation in December 2021 pursuant to applicable administrative structures.<sup>491</sup> As the mediation committee was unable to resolve outstanding issues within the prescribed 30 day period, the legislation lapsed and may only be resurrected by a two-thirds vote of the National Assembly.<sup>492</sup> Underscoring the dual sensitivities of gambling as an economic interest and public interest and tension between the national government and its provincial counterparts in both areas, the NCOP’s failure to reconcile legislation proposed by the other house of Parliament apparently represented an event “that has never occurred in the history of the National Council of Provinces.”<sup>493</sup>

### 3.3 JUDICIAL PRECEDENTS ON THE REGULATION OF ONLINE GAMBLING

There is one case on the subject of the legality and regulation of online gambling in South Africa. In 2010 in *Casino Enterprises (Pty) Ltd (Swaziland) v. Gauteng Gambling Board and Others*,<sup>494</sup> an online casino (trading as Piggs Peak) licensed in the Kingdom of eSwatini (the Kingdom of Swaziland at that time) advertised opportunities to gamble through its online casino to South Africans through South African radio

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<sup>488</sup> Sibongile Maputi ‘NCOP committee revisits National Gambling Amendment Bill’ at 1, available at <https://www.parliament.gov.za/news/ncop-committee-revisits-national-gambling-amendment-bill>, accessed 5 January 2023.

<sup>489</sup> Democratic Alliance ‘NCOP rejects flawed National Gambling Amendment Bill’ at 1, available at <https://content.voteda.org/blog/2021/12/ncop-rejects-flawed-national-gambling-amendment-bill/>, accessed 5 January 2023.

<sup>490</sup> Maputi op cit note 488 at 1.

<sup>491</sup> Sabinet ‘National gambling amendment bill sent to mediation committee’ available at <https://www.golegal.co.za/national-gambling-bill-mediation/> at 1, accessed 23 May 2022. See also Democratic Alliance op cit note 489 at 1.

<sup>492</sup> Sections 76(1)(d) and (e) of the Constitution. The National Assembly has not taken any such action as of 26 October 2023.

<sup>493</sup> M Rayi, Chairperson, Select Committee on Trade & Industry, Economic Development, Small Business Development, Tourism, Employment and Labour, National Council of Provinces in Maputi op cit note 488 at 1.

<sup>494</sup> *Casino Enterprises (Pty) Ltd (Swaziland) v. Gauteng Gambling Board and Others* (28704/04) [2010] ZAGPPHC 89; 2010 (6) SA 38 (GNP) 1 [2011] 1 All SA 205 (GNP) (16 August 2010) para 4, available at <http://www.saflii.org/za/cases/ZAGPPHC/2010/89.html>, accessed 29 October 2021.

stations. The Gauteng Gambling Board (‘GGB’) threatened such radio stations with prosecution for contravention of s 71(1) of the Gauteng Gambling Act 4 of 1995.<sup>495</sup> The GGB asserted that the online casino was not licensed to operate in Gauteng in contravention of s 77(1) of the Gauteng Gambling Act 1995 which stipulates that: ‘No person shall gamble at any place other than the licensed premises.’ The GGB also alleged contravention of the National Gambling Act 2004.<sup>496</sup> The operator sought a declaratory order that ‘gambling takes place solely in Swaziland because that is where its computer equipment is situated and where its online casino is licensed’ and that such activity and advertising related thereto was not unlawful under specified provincial and national legislation.<sup>497</sup> The GGB opposed the application on the basis that gambling occurred ‘where the player and his [sic] computer are situated.’<sup>498</sup>

As the court of first instance, the North Gauteng High Court affirmed the destination based regulatory model contemplated by relevant legislation. It held, *inter alia*, that the Gauteng Gambling Act 1995 prohibited any gambling except at a location which constitutes a licensed premise or between a gambler and a license holder.<sup>499</sup> Tuchten J also found that online gambling constituted an ‘interactive game’ currently prohibited by s 11 of the National Gambling Act 2004 because the ‘section prohibits engaging in or making available *the game as a whole* [ital original], it matters not in my view whether the critical elements are to be found or are generated within the borders of South Africa or not.’<sup>500</sup> With respect to the advertising of such gambling opportunities, the court held that: ‘The radio stations could not lawfully do so because persons in Gauteng interacting with the plaintiff’s online casino are engaged in gambling in the Province in respect of which a license is not in force.’<sup>501</sup>

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<sup>495</sup> Section 71(1) of the Gauteng Gambling Act 1995 states that: ‘No person shall, by way of advertisement or with intent to advertise, publish or otherwise disseminate or distribute any information concerning gambling in the Province in respect of which a license in terms of this Act is not in force.’ It complements s 15 of the National Gambling Act 2004. Gauteng Gambling Act 4 of 1995 available at <https://www.ggb.org.za/wp-content/uploads/2019/03/GAUTENG-GAMBLING-ACT-NO4-1996.pdf>, accessed 15 January 2023.

<sup>496</sup> Supra note 494 para 3.

<sup>497</sup> Supra paras 3 and 4.

<sup>498</sup> Supra para 3.

<sup>499</sup> Supra paras 35 and 39.

<sup>500</sup> Supra para 66.

<sup>501</sup> Supra para 63.

In 2011 the Supreme Court of Appeal (‘SCA’) upheld the High Court decision.<sup>502</sup> The penultimate Court affirmed the court a quo’s conclusion that application of South African statutes to transactions entered into by persons in South Africa with foreign parties outside of South Africa does not constitute the extraterritorial enforcement of any South African law or infringement of the principle of comity between nations.<sup>503</sup> Writing for the majority of the bench, Heher JA found that ‘it is notorious that gambling is no respecter of international boundaries’<sup>504</sup> and concluded that:

In construing the NGA as a remedial statute designed to meet the challenges posed by, for example, the internet as a developing platform for cross-border gambling activities, its terms should be understood in a broad rather than a narrow sense where such extension is feasible.<sup>505</sup>

The locus of any transaction was determined to be the place that a gambler enters any transaction and therefore South African law applies without any need for consideration of extraterritorial application of any law in the matter at hand.<sup>506</sup> Heher JA wrote that:

. . . the prospective player is ‘seduced’ in South Africa, he or she takes and activates the crucial decision to gamble here, he or she is impoverished here; the internet casino intrudes upon the field of licensed operators here and it does so without payment of dues to the State. The legislature is concerned with substance, not form, and if gambling takes place in South Africa it is of no consequence what means are employed to facilitate it and whether those means are employed outside the country.<sup>507</sup>

The SCA further considered the applicability of South Africa’s gambling legislation to online gambling. The Court found both the National Gambling Act 2004 and, in the

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<sup>502</sup> *Casino Enterprises (Pty) Ltd (Swaziland) v. Gauteng Gambling Board and Others* (SCA) [2011] ZASCA 155; 2011 (6) 614 (SCA); [2011] 4 All SA 573 (SCA) (28 September 2011) available at <http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZASCA/2011/155.html&query=%20Casino%20Enterprises>, accessed 29 October 2021.

<sup>503</sup> Supra para 35 and note 494 para 16.

<sup>504</sup> Supra para 23.

<sup>505</sup> Loc cit.

<sup>506</sup> Supra paras 33 to 36.

<sup>507</sup> Supra para 35.

matter at hand, the Gauteng Gambling Act 1995, apply to regulation of online gambling in the jurisdiction at hand.<sup>508</sup>

### 3.4 ANALYSES

The South African Government has expended significant public capital wrestling with the legalisation and regulation of online gambling in the country in the past fifteen years. As demonstrated by this chapter, its efforts to resolve this matter represent a tale of two times: an initial period between 2004 and 2010 that supported legalisation and regulation of online gambling followed by a subsequent period from 2010 to date that opposed (and continues to publicly oppose) legalisation and regulation of this activity. A parsing of existing legislation, inchoate legislation, previously proposed legislation and regulations, recommendations of three national commissions, a national policy document and judicial treatment of online gambling suggests that nine key sets of questions need to be answered regarding the substance and form of any *lex ferenda* that legalises and regulates online gambling on casino games in South Africa. In different ways, each of these questions arises because of challenges presented to Government by the borderless nature of online gambling relative to the territorial constraints endemic to offline gambling.

#### 3.4.1 Scope of online gambling

Are there any forms of online gambling that should be included or excluded as a permitted online gambling activity in South Africa? The GRC was critical of the limitation of online gambling to casino games in the National Gambling Amendment Act 2008.<sup>509</sup> It recommended that online gambling activities include the interactive forms of all types of gambling legally available in South Africa.<sup>510</sup> The Trade & Industry Portfolio Committee concurred with this view.<sup>511</sup> The Remote Gambling Bill 2014 proposed a similar view.<sup>512</sup> Broad consensus therefore appears to exist between

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<sup>508</sup> Supra para 40.

<sup>509</sup> Supra s 3.2.4.

<sup>510</sup> Loc cit.

<sup>511</sup> In March 2012, the Portfolio Committee explicitly ‘recommend[ed] that the following legal gambling activities be legalised as online gambling activities: slot machines and tables (including poker) as part of interactive gambling; bingo; sports betting; betting against the totalizator.’ Portfolio Committee on Trade & Industry op cit note 27 at 20.

<sup>512</sup> Supra s 3.2.5.

two major political parties (African National Congress and Democratic Alliance) that, in the event of any legalisation and regulation of online gambling, online versions of all types of gambling legally available in South Africa should constitute permitted gambling activities.

### **3.4.2 Means and methods of online gambling**

Are there any means or methods of online gambling that should be included or excluded as permitted online gambling activities in South Africa? The GRC was critical of the exclusion of online gambling conducted through means other than the internet (such as televisions, mobile phones and text messages) and certain methods (such as betting exchanges) from the scope of online gambling contemplated by the National Gambling Amendment Act 2008.<sup>513</sup> The Trade & Industry Portfolio Committee concurred with this view.<sup>514</sup> The Remote Gambling Bill 2014 accounted for this view.<sup>515</sup> Broad consensus therefore appears to exist between two major political parties (African National Congress and Democratic Alliance) that, if online gambling is legalised in the country, regulation of this activity should occur through a technologically and transactionally agnostic approach that is neutral towards the means of communications and methods of commerce used to engage in online gambling (and implicitly withstands technological developments).

### **3.4.3 Availability of online gambling**

How can Government control the availability of online gambling if legalised and regulated in South Africa? The Government historically limited the availability of gambling opportunities in the country.<sup>516</sup> The 1992 Howard Commission, The Lotteries and Gambling Board Act 1993, the 1995 Wiehahn Commission, the National Gambling Act 1996 and the National Gambling Act 2004 successively contemplated restrictions on the number of gambling licenses granted in the country.<sup>517</sup> This approach carried forward into contemplation of the licensing of online gambling which, through the

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<sup>513</sup> Supra s 3.2.4.

<sup>514</sup> Loc cit.

<sup>515</sup> Supra s 3.2.5.

<sup>516</sup> Supra ss 4.2.3 and 4.3.3 for discussion of concerns arising from stimulation of demand for gambling.

<sup>517</sup> Supra ss 3.2.1 and 3.2.2.

National Gambling Amendment Act 2008 and Interactive Gambling Regulations, ultimately prescribed a maximum of ten online gambling licenses to grant in the country.<sup>518</sup> As noted by the GRC, the Government's policy approach to date 'conforms largely to a sumptuary model' that 'seeks to contain excessive demand for gambling and to satisfy only existing demand.'<sup>519</sup>

If the South African Government proceeds to legalise and regulate online gambling and limits opportunities to legally offer the activity to a handful of licensed sites, it is likely that an abundance of international gambling sites will continue to illegally offer the activity in the country. The Trade & Industry Portfolio Committee conceded as much in 2010:

The illegal use of interactive gambling sites, even if regulated in South Africa, will be hard to curb and monitor due to continuous technology development. On the one hand, regulation would provide a legally protected space for South African adults to engage in recreational online gambling activities. This space could allow government to identify problem gamblers. However, regulating the activity will not necessarily inhibit the use of 'illegal' foreign sites that could still be accessed by the very individuals that the legislation seeks to protect, such as minors and problem gamblers.<sup>520</sup>

As such, the licensing and regulation of a handful of online gambling sites among hundreds (if not thousands) of sites that remain unlicensed and unregulated but accessible to consumers in South Africa may limit the Government's ability to realise stated public policy objectives. Moreover, the limited availability of online gambling licenses and likely inability of authorities to police illegal online gambling may discourage participation in any local regulatory framework by international operators. Given such realities, any limitation on the number of online gambling licenses likely represents a sub-optimal means to restrict or regulate online gambling in the country.

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<sup>518</sup> Supra ss 3.2.3.1 and 3.2.3.3.

<sup>519</sup> Louw et al op cit note 14 at 2–3; Portfolio Committee on Trade & Industry, Parliament of the Republic of South Africa 'Gambling commission review into South Africa gambling industry and its regulation' at 1, available at <https://pmg.org.za/committee-meeting/13199/>, accessed 16 March 2023.

<sup>520</sup> Portfolio Committee on Trade & Industry op cit note 375 at 10.

### 3.4.4 Licensing of online gambling

Who should license online gambling operators in South Africa? The National Gambling Amendment Act 2008 proposed the NGB as the exclusive authority to license and regulate online gambling.<sup>521</sup> Since ‘internet gambling had a borderless nature’, the DTI asserted that ‘licensing should occur on a national rather than a provincial basis.’<sup>522</sup> In passing this inchoate legislation, the Parliament of South Africa implicitly endorsed this position. The Trade & Industry Portfolio Committee agrees that the NGB is optimally positioned to act as a single regulator for online gambling.<sup>523</sup> Although nuances exist in terms of the processing and review of applications for online gambling licenses and monitoring and enforcement thereof, the Remote Gambling Bill 2014 preserves the NGB as the sole arbiter, issuer and custodian of online gambling licenses.<sup>524</sup> Broad consensus therefore appears to exist between two major political parties (African National Congress and Democratic Alliance) that the NGB should issue online gambling licenses as a national license.

### 3.4.5 Uniform standards for online gambling

Who should set standards for online gambling licenses in South Africa? The National Gambling Act 2004 endows the NGB with authority to create, monitor and enforce uniform national standards for the conduct of gambling.<sup>525</sup> The stillborn National Gambling Amendment Act 2008 and forlorn Remote Gambling Bill 2014 preserved existing responsibilities of the NGB in respect of national standards for the conduct of online gambling.<sup>526</sup> In 2022 alone, the NGB issued five advisory reports related to the promotion of uniformity of legislation in the gambling industry.<sup>527</sup> Broad consensus therefore appears to exist between two major political parties (African National Congress and Democratic Alliance) that the NGB should continue to establish uniform national standards for the conduct of online gambling in the country.

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<sup>521</sup> Except in respect of employment licenses which remained under provincial purview pursuant. Supra s 3.2.3.1.

<sup>522</sup> Portfolio Committee on Trade & Industry op cit note 375 at 5.

<sup>523</sup> Ibid at 20.

<sup>524</sup> Supra s 3.2.5.

<sup>525</sup> Supra s 3.2.2.

<sup>526</sup> Supra ss 3.2.2, 3.2.3.1 and 3.2.5.

<sup>527</sup> National Gambling Board *Annual Report 2021/2022* op cit note 347 at 17.

### 3.4.6 Exercise of jurisdiction over online gambling sites

Who has the ability to exercise jurisdiction over online gambling activities in South Africa? This is a simple question with a complicated answer. It is settled law that the National Gambling Act 2004 governs gambling activities on a national basis.<sup>528</sup> It is settled law that each provincial gambling statute governs gambling activities within the applicable province on a concurrent basis.<sup>529</sup> Jurisprudence confirms that such statutes apply to the conduct of online gambling that originates from any player within South Africa regardless of any extraterritorial origin of the gambling opportunity.<sup>530</sup>

As the Trade & Industry Portfolio Committee noted, however, ‘the internet-based nature of interactive gambling allows it to cross borders, which impedes enforcement of compliance in the legislation including regulations.’<sup>531</sup> The jurisdiction of a PLA over a casino, bingo hall or betting shop located in premises within the PLA’s jurisdiction is easily discerned. The PLA’s jurisdiction over an online gambling site without any premises within its jurisdiction is not so easily discerned. How does a PLA exercise jurisdiction over an online gambling site with respect to a player in another province? How does a PLA deal with any breach of regulations by a player in another province? How do problem gamblers in one province access responsible gambling programs from an online gambling site regulated by another province? These jurisdictional challenges do not arise in regulation of land-based casinos and other physical gambling premises where transactions occur within the territory of applicable authorities.

Similarly, the jurisdiction of the NGB and any PLA over online gambling sites without premises in South Africa is not easily discerned. While relevant authorities may exercise jurisdiction over an operator’s commercial activities in South Africa, they suffer from a lack of any cost effective or expedient means to enforce jurisdiction on an extraterritorial basis. This fundamental difference between the operations of land-

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<sup>528</sup> Supra ss 3.2.2 and 3.3.

<sup>529</sup> Supra s 3.3.

<sup>530</sup> Loc cit.

<sup>531</sup> Portfolio Committee on Trade & Industry op cit note 375 at 1.

based gambling establishments and online gambling sites challenges the continued suitability of the ‘destination-based’ regulatory model for gambling in South Africa.<sup>532</sup>

Various solutions have been proposed to remedy this regulatory penury. Similar to provisions found in the legislation of several international jurisdictions considered by this study,<sup>533</sup> the National Gambling Amendment Act 2008 required licensed online gambling operators to locate servers that host domestic gambling activities within the borders of South Africa.<sup>534</sup> This concept has been condemned by operators as ‘onerous’ in terms of international regulatory best practices.<sup>535</sup> The GRC recommended that this provision be removed and replaced with provisions that enable South African authorities to audit the systems and information of licensees at any time.<sup>536</sup> The GRC did not posit any means to achieve this effect. The Financial Intelligence Centre disagreed with the GRC’s proposal because it ‘would complicate the determination of jurisdiction and could impede access by supervisors and investigators to records held by the operator and to assess the operator’s state of compliance with its obligations under South African law.’<sup>537</sup> Absent such requirement, the Centre advocated for ‘methods to ensure that transaction related information would be held in South Africa and be accessible to South African law enforcement agencies’<sup>538</sup> without specifying any means to achieve this ambition.

The Trade & Portfolio Industry Committee accommodated both positions. It recommended that licensed online gambling sites maintain a physical office and customer centre in South Africa in lieu of local servers which is accessible by South African regulatory agencies on a regular basis.<sup>539</sup> It recommended that ‘[l]icensed

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<sup>532</sup> There are other aspects of the destination-based model, such as a desire to isolate gambling activities away from urban centres, that form part of the regulatory approach. Further discussion of the destination-based regulatory approach in relation to online gambling may be found in Segoane Lawrence Monnye ‘Application of the destination approach as an impediment to the development of gambling policy and law in South Africa’ *SAHR* 2018 13 July 2018 available at <https://journals.co.za/doi/abs/10.10520/EJC-f89ad4dc7>, accessed 13 April 2022.

<sup>533</sup> For example, see discussion of Sweden, *supra* s 2.2.5.

<sup>534</sup> *Supra* note 428.

<sup>535</sup> Portfolio Committee on Trade & Industry *op cit* note 375 at 2 and Portfolio Committee on Trade & Industry *op cit* note 27 at 18.

<sup>536</sup> Portfolio Committee on Trade & Industry *op cit* note 27 at 14.

<sup>537</sup> *Loc cit*.

<sup>538</sup> *Loc cit*.

<sup>539</sup> Portfolio Committee on Trade & Industry *op cit* note 27 at 19.

operators must subject their operations to the jurisdiction of all South African laws and establish a presence in South Africa, including a locally based gateway to provide services to South African based gamblers.’<sup>540</sup> It prescribed that ‘transaction related information must be held in South Africa where it can be accessed by South African law enforcement agencies.’<sup>541</sup>

While any requirement to establish a local call centre may generate local employment and enhance the local customer service experience, many international operators may not comply with such requirement if it demands upfront investment prior to earning revenues in the market. Furthermore, there may be an insufficient number of players from South Africa on any given international gambling site to commercially justify creation and maintenance of a call centre by any operator. While any requirement to have a dedicated South Africa call centre may represent a well-intentioned public interest likely to deliver discernable local benefits, it may not make business sense for thousands of international gambling sites. The potential effect of any such requirement to act as a disincentive for operators to participate in any regulatory regime requires careful consideration.

### **3.4.7 Capacity and efficacy of monitoring and compliance efforts**

Are PLAs optimally positioned to monitor and enforce online gambling laws and regulations? The answer to that question appears to form part of a larger ‘turf war’ between the NGB and PLAs which surfaced during efforts to pass the National Gambling Amendment Bill 2018.<sup>542</sup> Section 21 of the National Gambling Amendment Act 2008 amended s 32 of the National Gambling Act 2004 to give the NGB exclusive authority for such matters. In this respect, the DTI conceded that the ‘provinces held a different view on this matter.’<sup>543</sup> Industry operators appear to favour the status quo.<sup>544</sup> The Trade & Industry Portfolio Committee acknowledged the ‘concurrency between

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<sup>540</sup> Portfolio Committee on Trade & Industry op cit note 375 at 8.

<sup>541</sup> Portfolio Committee on Trade & Industry op cit note 743 at 8.

<sup>542</sup> Supra 3.2.6.

<sup>543</sup> Portfolio Committee on Trade & Industry op cit note 419 at 2.

<sup>544</sup> Finance, Economic Opportunities and Tourism Committee of the Western Cape Provincial Parliament ‘National Gambling Amendment Bill: public hearings’ at 1, available at <https://pmg.org.za/committee-meeting/27945/>, accessed 5 January 2023.

the Provinces and the National Gambling Board.’<sup>545</sup> The Democratic Alliance appears to favour a hybrid model.<sup>546</sup>

While a PLA may be able to monitor the activities of a handful of licensed brick and mortar gambling establishments within its provincial borders, can it monitor the activities of hundreds (if not thousands) of unlicensed online gambling sites that operate across provincial borders? Does it have the resources to engage with national agencies that track money laundering, terrorism financing and other suspicious activities? Does it have the resources to interact with financial institutions that process transactions related to online gambling? As the GRC noted, ‘it is very resource intensive to enforce prohibitions in such an easily expanded area of gambling.’<sup>547</sup>

While PLAs may (or may not) be able to coordinate the monitoring of a handful of licensed online gambling sites that operate in South Africa and interact with relevant national agencies and financial institutions regarding that short list of operators, how do they jointly coordinate monitoring the activities of hundreds if not thousands of illegal operators and thousands if not millions of transactions related to those activities with national agencies and financial institutions? The GRC previously expressed concern that ‘resources are not necessarily targeted in the most efficient manner and that there may be excess capacity in regulatory institutions’ in respect of monitoring and enforcement of existing gambling activities by PLAs.<sup>548</sup> Any assumption of additional responsibilities for monitoring and enforcement of compliance actions associated with online gambling may compound such deficiencies.

Does each PLA have enough resources to police online gambling in South Africa? With only a handful of online gambling sites proposed to be licensed on a national basis, smaller provinces may only benefit from one or two licenses in their jurisdiction. It may not require meaningful scale to monitor, inspect and enforce regulations in respect of

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<sup>545</sup> Portfolio Committee on Trade & Industry op cit note 368 at 1.

<sup>546</sup> Supra s 3.2.5. The Remote Gambling Bill 2014 anticipated that provincial authorities shall accept, review and make recommendations in respect of applications for national online gambling licenses to the NGB. The Bill also vested authority to monitor online gambling activities, enforce license conditions and collect taxes in respect of such activities to provincial authorities. While the NGB retained sole authority to approve and issue national online gambling licenses and retained concurrent monitoring and enforcement powers, it was charged with policing provincial authorities in the execution of their concurrent responsibilities.

<sup>547</sup> Louw et al op cit note 14 at 182.

<sup>548</sup> Portfolio Committee on Trade & Industry op cit note 27 at 7.

one or two licensed online gambling sites in any province. However, it may be challenging to monitor, inspect and enforce regulations against thousands of illegal online gambling sites that flout licensing requirements and operate *contra legem terrae*, particularly since revenues from one or two licensed online gambling sites in a province are likely insufficient to fund meaningful compliance actions against many more unlicensed (illegal) operators.

Does a decentralised regulatory regime risk inconsistent enforcement of online gambling regulations between PLAs? The NGB and operators previously expressed concerns regarding the acceptance and adjudication of applications and uniform monitoring of compliance with and enforcement of regulations in respect of existing gambling activities by different PLAs.<sup>549</sup> The GRC found that: ‘In terms of illegal gambling, some provinces are committed and effective in clamping down on illegal operations while others have no will and no capacity to address this.’<sup>550</sup> Additional challenges associated with regulation of online gambling may exacerbate such concerns.

#### **3.4.8 Private sector burden**

Are there any regulatory restrictions that may discourage industry participation in any licensing of online gambling in South Africa? Any regulation of this activity depends upon the willingness of operators, particularly international gambling sites, to apply for licenses. It depends upon the readiness of operators to submit to the compliance burden associated with such regulations. It depends upon the willingness of operators to pay taxes and other costs associated with such compliance.

The Government has little leverage over online gambling sites. It may enjoy significant authority over licensed land-based gambling operators that venture into the online gambling market. However, the willingness of local operators to apply for licenses and comply with licensing terms and costs, including any limitations on advertising and tax obligations, may be dimmed if relevant authorities cannot curtail competition from an

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<sup>549</sup> Finance, Economic Opportunities and Tourism Committee op cit note 539 at 7–13; Portfolio Committee on Trade & Industry op cit note 375 at 12.

<sup>550</sup> Portfolio Committee on Trade & Industry op cit note 27 at 8. ‘[M]any provinces did not have the capacity to close down illegal gambling. This was often due to lack of political will.’ Dr S Louw in Portfolio Committee on Trade & Industry op cit note 519 at 9.

abundance of unlicensed operators without any limitation on their operations or any obligation to pay any tax on their revenues. The Government retains limited authority over international gambling sites with no cost effective or expedient means to enforce sanctions beyond the borders of South Africa. Indeed, challenges associated with monitoring the internet and internet-based transactions limit the Government's ability to enforce any sanctions even within the borders of the country.<sup>551</sup>

Given such realities, significant concerns have been raised by the industry with the compliance burden imposed by previously proposed regulations for online gambling. According to the Trade & Industry Portfolio Committee, 'the new gambling regulations have received a lot of backlash from stakeholders, with many industry and independent experts dubbing it as "restrictive" and "nonsensical."'<sup>552</sup> Sun International specifically observed that 'restrictive and cumbersome regulations in order to protect the public may deter users and operators from participating in South African licensed operations.'<sup>553</sup> Phumelela Gaming & Leisure Limited expressed concerns that 'the websites may be unattractive as the proposed regulation is too onerous compared to other jurisdictions.'<sup>554</sup> Moreover, the GRC received complaints from operators that the registration requirements of the National Gambling Amendment Act 2008 and IGR 'are highly inconvenient for the potential South African consumer compared to international alternatives (licensed or unlicensed), that generally perform identity checks but perform the entire registration process online.'<sup>555</sup> Similarly, requirements for prospective players to transact through a single nominated account with a maximum credit balance is not practical and may create "'compelled" transfers' that increase transaction costs.'<sup>556</sup>

Such concerns merit consideration. Unlike brick and mortar casinos, online gambling sites in South Africa do not operate in isolation from international peers. Licensed and unlicensed operators compete for the business of the same consumers. Players

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<sup>551</sup> Portfolio Committee on Trade & Industry op cit note 375 at 16.

<sup>552</sup> Brian Humphrey 'South Africa imposes firm new gambling regulations amid backlash' at 3, available at <https://bettingplanet.com/south-africa-imposes-firm-new-gambling-regulations-amid-backlash/>, accessed 1 January 2023.

<sup>553</sup> Portfolio Committee on Trade & Industry op cit note 375 at 16.

<sup>554</sup> Ibid at 13.

<sup>555</sup> Louw et al op cit note 14 at 180. 'The draft regulations require affidavits sworn in front of a commissioner of oaths and specific written instructions delivered by the consumer to their bank.'

<sup>556</sup> Loc cit.

compelled to jump through a myriad of rigorous administrative hurdles to sign up with a licensed operator may forego such inconvenience to sign up with an unlicensed operator not shackled by such constraints. Players unimpressed with the accessibility or scope of offerings of local gambling sites may gamble through more accessible and vibrant international sites. While cognisant of necessary public interest protections, any regulation of online gambling in South Africa likely needs to account for such market realities if Government expects operators to participate in any local licensing regime.

### 3.4.9 Tax

Should online gambling be taxed? Section 43 of the National Gambling Amendment Act 2008 contemplated taxation of online gambling. Regulation 52 of the Interactive Gambling Regulations confirmed the applicability of VAT on online gambling transactions. Sections 2 through 4 of the Interactive Gambling Tax Bill proposed the taxation of online gambling. Section 65 of the Remote Gambling Bill 2014 provided for taxation of online gambling. Broad consensus therefore appears to exist between two major political parties (African National Congress and Democratic Alliance) that online gambling constitutes a taxable activity.

If online gambling should be taxed, who should be taxed? Section 2 of the Interactive Gambling Tax Bill places this burden on gambling sites. A year after introduction of this Bill, however, the Government proposed a 15 per cent withholding tax on any amount over ZAR 25,000 won by any player from any form of gambling, including lotteries, as part of its budget plans.<sup>557</sup> This initiative does not appear to have been pursued thereafter.<sup>558</sup> Whether or not such a ‘winnings tax’ is introduced in South

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<sup>557</sup> ‘Gambling winnings to be taxed 15%’ *South African Government News Agency* 23 February 2011 at 1, available at <https://www.sanews.gov.za/south-africa/gambling-winnings-be-taxed-15>, accessed 7 March 2023.

<sup>558</sup> As of 26 October 2023, there does not appear to be any tax applicable on winnings received by any South African who engages in legal gambling in the country (unless engaged in such activity as an occupation). Winnings obtained through illegal gambling or gambling in foreign jurisdictions may merit different consideration. Onlinecasino-SouthAfrica.co.za ‘Tax on gambling’ available at <https://www.onlinecasino-southafrica.co.za/legal-status/tax/>, accessed 12 March 2023. Introduction of a gambling tax in South Africa has attracted academic attention. See, inter alia: Rudie Nel and Herman Albertus Viviers ‘Exploring tax options to curb excessive gambling in South Africa’ *Journal of Economics* 2015 6(2) 156-68, available at [https://www.researchgate.net/publication/344524226\\_Exploring\\_Tax\\_Options\\_to\\_Curb\\_Excessive\\_Gambling\\_in\\_South\\_Africa](https://www.researchgate.net/publication/344524226_Exploring_Tax_Options_to_Curb_Excessive_Gambling_in_South_Africa), accessed 12 March 2023; Milton Segal and Warren Maroun ‘The introduction of gambling tax in South Africa: What are the odds of the implementation thereof?’ *Journal of Economic and Financial Sciences* 2014 7(2) 361-74 available at 10.4102/jef.v7i2.145, accessed 12 March 2023; Justin Esrom Roberts *The Proposed New Gambling Tax in South Africa* (unpublished Master of Commerce thesis, Nelson

Africa, it is likely that such tax will augment rather than replace any existing or future taxes on licensees of gambling operations in the country.

If online gambling sites are taxed, how much should they be taxed? Section 3 of the Interactive Gambling Tax Bill proposed a 6 per cent tax on GGR earned by interactive providers from facilitation of such activity. The gambling industry in South Africa did not appear to resist the methodology or threshold of this tax when published by Government. The CEO of the CASA noted that: “‘It is the prerogative of government to set taxes’ and that “[t]he success of the Bill will depend on whether local operators will find the rate of 6% competitive with international operators, who are also operating within a regulated environment.”<sup>559</sup> Indeed, the industry appeared more concerned that online gambling may be taxed differently than land-based gambling. Sun International has advocated a consistent ‘rate of taxation to prevent “arbitrage” from local operators of land-based play to online.’<sup>560</sup>

Yet there is only a tenuous correlation between taxes levied on online gambling and taxes levied on land-based gambling, particularly since different forms of gambling generally attract different forms of tax in international markets.<sup>561</sup> Such industry concerns appear to dismiss key difference between the operations of online casinos and land-based casinos. International gambling sites represent highly transient businesses that are frequently located in regulated but low tax jurisdictions. Local land-based gambling establishments suffer from significant tax obligations. Given the disparity in business models, it is unlikely that any way exists to apply the same tax rate to online gambling sites and land-based gambling premises that does not materially discourage participation in any licensing regime by international gambling sites and frustrate the effectiveness of relevant regulations.

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Mandela Metropolitan University, 1 January 2011) available at <https://docslib.org/doc/1124883/the-proposed-new-gambling-tax-in-south-africa-by>, accessed 2 January 2022; C Mtwana ‘Tax on gambling winnings’ *DR Dec* 2011 35, available at <https://collections.concourt.org.za/handle/20.500.12144/25317>, accessed 12 March 2023.

<sup>559</sup> Derek Auiet, CEO of the Casino Association of South Africa in Audra Mahlong ‘Tax laws for interactive gambling’ *ITWeb* 17 November 2008 at 1, available at <https://www.itweb.co.za/content/o1Jr5MxjZRWvKdWL>, accessed 12 March 2023.

<sup>560</sup> Portfolio Committee on Trade & Industry op cit note 375 at 16. The National Gambling Policy also noted: ‘Higher tax rate for online gambling is not an option as that may even give rise to constitutional challenges.’ Department of Trade & Industry op cit note 474 at 31.

<sup>561</sup> Supra notes 286 and 288.

Who should receive proceeds of any tax on online gambling? Notwithstanding its opinion that '[g]ambling was an immoral activity, and the government should not be planning on deriving income from this source,'<sup>562</sup> the Trade & Industry Portfolio Committee supported a GRC recommendation for 'a revenue-sharing formula . . . between provincial and national regulators.'<sup>563</sup> Clause 65 of the Remote Gambling Bill 2014 proposed a 70 per cent to 30 per cent split between provincial coffers and the national fiscus. Broad consensus therefore appears to exist between two major political parties (African National Congress and Democratic Alliance) that revenues from the taxation of online gambling should be divided between the national government and its provincial counterparts.

Who should collect gambling revenues? In contrast with the private member's bills which vested provinces with authority to set tax rates and fulfil tax collection responsibilities, the Trade & Industry Portfolio Committee recommended that 'provinces should be allocated revenue on a formula basis through the National Revenue Fund.'<sup>564</sup> This view corresponded with the NGB's position that:

. . . there was a need to regulate and ensure that a national taxation structure is achieved. The overall tax burden imposed by regulators/government had a significant impact on the likely long term success of regulatory policies. The different, adopted taxation models and structures created disharmony and there was a need to ensure uniformity and synergies through appropriate national economic policies. It was critical for government, through the National Treasury, to ensure that a national taxing model and structure was achieved within the gambling industry as a whole.<sup>565</sup>

The Committee's recommendation appeared to address DTI concerns that 'the provinces saw only the money-making aspect of gambling.'<sup>566</sup>

On what basis would revenues be shared between the national government and individual provinces? Is it fair and equitable for PLAs to receive tax revenues based on the

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<sup>562</sup> Trade & Industry Portfolio Committee op cit note 419 at 2 and 3–5.

<sup>563</sup> Ibid at 20.

<sup>564</sup> Portfolio Committee on Trade & Industry op cit note 27 at 18.

<sup>565</sup> Ibid at 6.

<sup>566</sup> Portfolio Committee on Trade & Industry op cit note 482 at 1.

activities of players in other provinces? Unlike land-based gambling activities that require players to bet while physically present in a licensed establishment within the province that collects revenues from such establishment, online gambling allow players to bet from the comfort of their homes or other locations which may not be within the province responsible for the regulation of such activities. If revenues from online gambling sites are earned through engagement with players in other provinces, are those provinces entitled to a portion of revenues that originate in their jurisdictions regardless of the province of registration of such online gambling sites?

It may be challenging to leave the taxation of online gambling in the hands of provincial authorities. Notwithstanding prospects of uniform standards for the sharing of online gambling taxes between the national government and its provincial counterparts, provinces with authority to set tax rates may engage in tax arbitrage to undercut other provinces and lure online gambling sites to register in their jurisdictions. Furthermore, PLAs may enjoy limited capacity to collect, process and audit financial statements of international gambling sites and enforce compliance with provincial tax obligations. Given further complications that may arise from any concurrent VAT obligations, enforcement of a uniform national tax on online gambling by the NGB or another national agency appears to represent an optimal regulatory approach.

Even a national authority is likely to confront significant challenges in the collection of taxes from international online gambling sites unless a user-friendly regulatory regime encourages self-compliance with local obligations. Indeed, it is likely difficult for the Government to meaningfully tax an international operator absent incorporation of a business in South Africa. As observed in international markets, however, monitoring and regulation of financial transactions between players and gambling sites may represent a suitable means to capture and tax interactions between players and such sites. As practiced in some international jurisdictions, however, a form of source-based digital services tax (that does not offend the OECD or American authorities) may merit consideration as an effective means to tax online gambling in South Africa.<sup>567</sup>

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<sup>567</sup> Supra s 2.2.6.

### 3.5 CONCLUSION

Review and analyses of the evolution of the legalisation and regulation of gambling in South Africa suggest that, notwithstanding the current prohibition of online gambling, there is a general recognition by public and private actors that, in the words of the GRC, ‘online gambling is unlikely to disappear.’<sup>568</sup> The Government is therefore faced with two choices: continue to prohibit and attempt to crackdown on a widely available activity or transform such illegality into a regulated market through legalisation of online gambling on casino games for the public good.

A significant body of inchoate legislation, previously proposed legislation and regulations, commission recommendations and national and provincial policies have considered the legalisation and regulation of online gambling in South Africa. The judiciary has counselled on such matters. Consequent deliberations thereon have highlighted concerns, challenges and questions about the substance and form of any legislation and regulation of the activity that likely need to be answered as part of any future effort to legalise and regulate online gambling on casino games in the country.

Yet any consideration of the legalisation and regulation of online gambling on casino games in South Africa likely needs to extend beyond reviews and analyses of the substance and form of laws and guidance of jurisprudence. It likely needs to consider the nature of public interests that compel the prohibition (or regulation) of online gambling on casino games in the first place. Chapter 4 therefore reviews and analyses various public interest concerns raised in evaluation of past, current and previously proposed legislative and regulatory efforts that likely need redress as part of any *lex ferenda* that legalises and regulates online gambling on casino games in South Africa.

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<sup>568</sup> Louw et al op cit note 14 at 182.

## CHAPTER 4:

### PUBLIC INTERESTS RELATED TO ONLINE GAMBLING ON CASINO GAMES IN SOUTH AFRICA

#### 4.1 INTRODUCTION

The statutory framework for the regulation of gambling and stare decisis in South Africa clearly confirm the illegality of online gambling on casino games under current circumstances. Interwoven in the evolution of past, current and previously proposed legislation and regulations (and deliberations thereon) and judicial precedents is a general recognition that any legalisation and regulation of gambling, particularly online gambling, creates certain public interest challenges (and opportunities) for the local population. Furthermore, any legalisation and regulation of the activity likely offends the values, ethics or morals<sup>569</sup> of some people for which no recourse other than the continued prohibition of online gambling (and, in some cases, a total prohibition of all forms of gambling) is a satisfactory outcome.<sup>570</sup> Given such realities, any future effort to legalise and regulate online gambling on casino games in South Africa likely needs to account for these public interests.

#### 4.2 KEY PUBLIC INTEREST CONSIDERATIONS

From a public interest perspective, societal benefits arising from any legalisation of online gambling need to outweigh societal costs.<sup>571</sup> In considering this proposition, there are seven social, economic, financial and moral concerns that have been broadly raised by constituencies in South Africa in respect of gambling, particularly online gambling. Any *lex ferenda* that legalises and regulates online gambling on casino games in South Africa likely requires redress of such concerns.

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<sup>569</sup> For general discussion of the distinction between values, ethics and morals, see Jennifer Gunner 'What's the difference between ethics, morals and values?' available at <https://examples.yourdictionary.com/difference-between-ethics-morals-and-values.html>, accessed 15 January 2023.

<sup>570</sup> S Rasmeni in Portfolio Committee on Trade & Industry op cit note 419 at 2.

<sup>571</sup> Caroline Kongwa 'Balancing the economic gain versus the negative impact of gambling' at 9, available at <https://www.ngb.org.za/SiteResources/documents/2016/Presentations/Gambling%20Indaba%20Caroline%20Kongwa.pdf>, accessed 2 January 2023; Portfolio Committee on Trade & Industry op cit note 375 at 3.

#### 4.2.1 Problem gambling

Some constituencies in South Africa cite concerns for the proliferation of problem gambling<sup>572</sup> as justification for prohibition of online gambling except for sports betting.<sup>573</sup> Problem gambling is a well studied but perhaps inadequately understood phenomenon in the gambling industry.<sup>574</sup> Consequences of problem gambling often include personal financial ruin, neglect of personal responsibilities, substance abuse, destruction of work or school life, accumulation of debt, creation of legal problems and engagement in criminal activity such as theft by gamblers seeking to finance their gambling addiction.<sup>575</sup>

Online gambling may give rise to greater opportunities for problem gambling than offline gambling. Unlike gambling at brick and mortar casinos, online gambling may be conducted from anywhere at any time on an anonymous basis due to the pervasiveness of communications technologies and applications that empower the availability and accessibility of online gambling and ease of payments on a real time

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<sup>572</sup> The term ‘problem gambling’ is a colloquial term ‘used as a more inclusive category that encompasses a continuum of gambling difficulties, with pathological gambling at one end of the spectrum.’ New York Council on Problem Gambling ‘The definition of gambling disorder’ at 1, available at <https://nyproblemgambling.org/resources/what-is-problem-gambling/>, accessed 2 March 2022. For the purposes of this study, ‘problem gambling’ is broadly defined as ‘gambling that is disruptive or damaging to you or your family, or interferes with your daily life.’ National Health Service ‘Problem gambling’ at 1, available at <https://www.nhsinform.scot/healthy-living/mental-wellbeing/addictions/problem-gambling>, accessed 12 April 2022. In South Africa, it has been ‘broadly defined as gamblers who spend more time and money than they are able to afford on gambling and more narrowly as pathological or compulsive gamblers.’ Portfolio Committee on Trade & Industry op cit note 27 at 16. At its most severe level, problem gambling constitutes a mental condition called a ‘gambling disorder’ (previously called ‘pathological gambling’) by the American Psychiatric Association which requires the presence of four of nine symptoms to diagnose a clinical condition. American Psychiatric Association *Diagnostic and Statistical Manual of Mental Health Disorders* 5 ed (2013) available at <https://doi-org.ezproxy.frederick.edu/10.1176/appi.books.9780890425596>, accessed 27 March 2022.

<sup>573</sup> Portfolio Committee on Trade & Industry op cit note 375 at 1.

<sup>574</sup> As an example of a comprehensive study on problem gambling, the US Government passed the National Gambling Study Commission Act of 1996 Pub L 104-169 110 Stat 1482 which established the National Gambling Impact Study Commission to conduct a comprehensive study of the phenomenon in the United States which was published in June 1999. See National Gambling Impact Study Commission *National Gambling Impact Study Commission Final Report* (1999) available at <https://govinfo.library.unt.edu/ngisc/reports/fullrpt.html>, accessed 2 August 2022. For discussion of the reliability of research on problem gambling, see Max W Abbott and Rachel A Volberg ‘The measurement of adult problem and pathological gambling’ *Int Gambl Stud* (2006) 6 175-200 available at <https://doi.org/10.1080/14459790600928678>, accessed 12 July 2022.

<sup>575</sup> ‘Is gambling addiction more harmful than substance abuse?’ *Daily Hawker* 19 February 2022 at 1, available at <https://www.dailyhawker.com/entertainment/is-gambling-addiction-more-harmful-than-substance-addiction/>, accessed 17 May 2022. See also National Gambling Board op cit note 25.

basis.<sup>576</sup> Compared to offline gambling, online gambling may give rise to greater opportunities for problem gambling due to unique psychological aspects of online gambling: ‘The ability for large wagers, continuous gambling, rapid feedback and instant, easy access to a vast number of betting options has resulted in concerns that Internet gambling could contribute to excessive gambling.’<sup>577</sup> Indeed, ‘Internet Gaming Disorder’ was reclassified from an ‘impulse control disorder’ to an ‘addiction disorder’ in the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders*.<sup>578</sup>

Existing South African gambling legislation incorporates many of the customary protections afforded players from problem gambling found in international precedents. For example, the National Gambling Act 2004 provides for self-exclusion by players who identify as problem gamblers. Sections 14(1) through 14(3) of the Act places the onus on such individuals to register as an excluded person with the NGB. Section 14(4) enables certain related parties to apply for a court order with the same substantial effect. Section 14(10) of the Act prohibits any licensed operator from knowingly permitting any self-excluded person to enter any licensed premises or engage in any gambling. Every exclusion period lasts for six months and the NRGPF offers counselling to excluded persons within this period.<sup>579</sup> Various other responsible gambling initiatives govern the industry, including statutory requirements to publish warning messages about the dangers of irresponsible gambling and positive messages about the availability of problem gambling relief programs and helplines.<sup>580</sup>

Proposed legislation related to online gambling strengthens efforts to curb and mitigate problem gambling in South Africa. Section 4 of the National Gambling Amendment Act 2008 introduced section 2A(c) of the National Gambling Act 2004 which specified

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<sup>576</sup> Grand View Research op cit note 48 at 1–3.

<sup>577</sup> Sally Gainsbury and Robert Wood ‘Internet gambling policy in critical comparative perspective: the effectiveness of existing regulatory frameworks’ *Int Gambl Stud* 2011 (11) 309–23 available at doi: 10.1080/14459795.2011.619553, accessed 2 May 2022; Sally Monaghan ‘Responsible gambling strategies for Internet gambling: the theoretical and empirical base of using pop-up messages to encourage self-awareness’ *Comput Hum Behav* 2009 25(1) 202–207 available at doi: 10.1016/j.chb.2008.08.008, accessed 20 May 2022; Michela Ghelfi, Paola Scattola, Gilberto Guidici and Veronica Velasco ‘Online Gambling: a systematic review of risk and protective factors in the adult population’ *J Gambl Stud* 2023 1–27 available at <https://doi.org/10.1007/s10899-023-10258-3>, accessed 1 July 2024.

<sup>578</sup> American Psychiatric Association op cit note 572 at s 3.

<sup>579</sup> South African Responsible Gambling Foundation ‘Self exclusion’ at 1, available at <https://responsiblegambling.org.za/self-exclusion-2/>, accessed 2 January 2023.

<sup>580</sup> See s 17(2) of the National Gambling Act 2004; supra s 3.4.3.

that one of its nine purposes was to ‘promote the development of a responsible gambling industry in the Republic.’ Since inclusion of self-exclusion provisions was identified as an important public policy priority by the GRC for any regulation of gambling and represents an important protection required by the Trade & Industry Portfolio Committee,<sup>581</sup> the National Gambling Amendment Act 2008 extended self-exclusion provisions to online gambling. Section 14 of the amending legislation altered s 14 of the National Gambling Act 2004 to require publication of the availability of self-exclusion opportunities and problem gambling assistance programs on websites of licensed online operators. Sections 15 and 16 of the IGR prescribed specific operator obligations to fulfil such requirements.

Beyond statutory requirements, significant resources appear available in South Africa that are dedicated to addressing and managing problem gambling. The NRGPF ‘integrates research and monitoring, treatment and counselling, public education and awareness, as well as industry training.’<sup>582</sup> It is managed by the South African Responsible Gambling Foundation (‘SARGF’), a joint public-private partnership which reports to the South African Council on Responsible Gambling (‘SACREG’).<sup>583</sup> It is the ‘only programme of its kind in the world that is jointly controlled by a public/private sector partnership which involves government regulators and the industry.’<sup>584</sup>

#### 4.2.2 Protection of vulnerable persons (including minors)

The protection of vulnerable persons,<sup>585</sup> including people who have not reached the age of majority (minors), represents another major public interest concern raised in relation to gambling (generally) and online gambling (specifically).<sup>586</sup> Jurisprudence on online gambling in South Africa confirms that, in the regulation of gambling ‘of greatest

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<sup>581</sup> Portfolio Committee on Trade & Industry op cit note 27 at 21.

<sup>582</sup> National Gambling Board ‘Responsible gambling’ at 1, available at <https://www.ngb.org.za/organisational-areas/national-responsible-gambling-programme/responsible-gambling.aspx>, accessed 16 January 2023.

<sup>583</sup> Loc cit.

<sup>584</sup> Loc cit.

<sup>585</sup> In many instances, people affected by problem gambling are discussed as part of the ‘vulnerable persons’ community adversely affected by gambling. For the purpose of this study, those individuals have been discussed separately (supra s 4.2.1 and infra s 4.3.1) to give adequate attention to their unique challenges and enable discussion on the protection of other constituencies, particularly youth, pensioners and those suffering from poverty, which may require different protections to those measures implemented to address problem gambling, particularly in relation to online gambling.

<sup>586</sup> Portfolio Committee on Trade & Industry op cit note 375 at 3.

importance, is the risk posed to vulnerable individuals and, by extension, their families'<sup>587</sup> and that, with respect to online gambling:

The vulnerabilities of individuals and the risk of harm to their families are if anything greater where the gambling takes place in a private home rather than in a public place, where limitations on reckless gambling and access, eg by children and other vulnerable persons, can be prevented or regulated.<sup>588</sup>

The DTI stated that: 'There are arguments that the government is losing on the opportunity to generate revenue through online gambling in the form of taxes, however, generating tax revenue cannot be at the expense of the South African citizens, some of whom are over indebted and living in poverty.'<sup>589</sup> For the Trade & Industry Portfolio Committee, the protection of vulnerable persons represents a key public interest consideration.<sup>590</sup>

Existing legislation addresses this concern. One of the explicit purposes of the National Gambling Act 2004 is to ensure that 'members of the public who participate in any licensed gambling activity are protected.'<sup>591</sup> Section 12 of the Act explicitly prohibits minors from entering any licensed premises or engaging in any gambling activity and requires license operators to prevent minors from gaining such access and engaging in such activity. Section 87(f)(ii) provides for regulations to 'protect minors from exposure to gambling activities'.

Inoperative or previously proposed legislation extended such protections to online gambling activities. Section 4 of the National Gambling Amendment Act 2008 confirmed that one of its purposes was to 'protect minors and other vulnerable persons from the negative effects of gambling.' The IGR contained extensive provisions related to the protection of children. The onboarding process for registered players required proof of identification and proof of a registered bank account that needed to be independently verified by operators.<sup>592</sup> A unique username and password governed all

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<sup>587</sup> Supra note 494 para 48.

<sup>588</sup> Supra para 51.

<sup>589</sup> Department of Trade & Industry op cit note 413.

<sup>590</sup> For example, Trade & Industry Portfolio Committee op cit note 30 at 1–5.

<sup>591</sup> Bullet point two of the preamble to the National Gambling Act 2004.

<sup>592</sup> Supra s 3.2.3.3.

interactions between players and any online casino which discouraged appropriation of access by children. The National Gambling Amendment Act 2008 and IGR prohibited payment of any winnings to underage players and imposed significant penalties on operators who provided children with access to its online offering.<sup>593</sup> Such protections incorporated the three mechanisms recommended by the GRC to ensure player protection: mandatory self-limitations for players; enforcement of a seven day ‘cooling off period’ for upward changes to betting limits; and rigorous identity verification procedures.<sup>594</sup>

#### 4.2.3 Protection from over-stimulation

The protection of South Africans from over-stimulation of demand for gambling has been a recurrent theme in deliberations over the legalisation and regulation of online gambling in the country. Among other objectives, the National Gambling Act 2004 seeks to ensure that ‘society and the economy are protected against over-stimulation of the latent demand for gambling.’<sup>595</sup> One of the objectives of the National Gambling Amendment Act 2008 was to ‘provide for the regulation of interactive gambling so as to protect society against the stimulation of demand for gambling.’<sup>596</sup>

Beyond limiting the number of operating licenses,<sup>597</sup> the Government’s regulation of gambling advertising represents a significant policy intervention to curb over-stimulation of demand for gambling. Section 11 of the National Gambling Act 2004 imposes certain restrictions on gambling advertisements, including provisions that require such advertisements to be honest, avoid targeting children, warn against the dangers of problem gambling and exclude inducements to encourage gambling.<sup>598</sup> Specific requirements associated with these obligations are found in s 3 of the National Gambling Regulations 2004.<sup>599</sup>

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<sup>593</sup> Portfolio Committee on Trade & Industry op cit note 368 at 3.

<sup>594</sup> Portfolio Committee on Trade & Industry op cit note 27 at 21.

<sup>595</sup> Preamble to the National Gambling Act 2004.

<sup>596</sup> Preamble to the National Gambling Amendment Act 2008.

<sup>597</sup> Supra ss 3.2.1, 3.2.2, 3.2.3.1 and 3.2.3.3.

<sup>598</sup> Section 15 of the National Gambling Act 2004.

<sup>599</sup> National Gambling Regulations 2004 GN R 1342 of GG 26994 of 12 November 2004 available at [https://www.gov.za/sites/default/files/gcis\\_document/201409/26994.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/26994.pdf), accessed 23 October 2023.

In 2012 the Government updated the National Gambling Regulations 2004 to stiffen restrictions on advertising, including provisions that specifically targeted online gambling.<sup>600</sup> A new regulation 3A restricted dissemination of advertisements to certain time periods and media programs to avoid exposure to children.<sup>601</sup> Perhaps in response to the *Casino Enterprises* litigation,<sup>602</sup> a new regulation 3(B)(1) of the National Gaming Regulations 2004 targeted online gambling advertising, including by international gambling sites.<sup>603</sup> Such efforts appear to represent a deliberate policy choice of Government in respect of problem gambling. As the GRC noted, the sumptuary model

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<sup>600</sup> Amendment of regulations regarding gambling advertising and exclusions register GN R 386 of GG 35439 of 15 May 2022 available at [https://www.gov.za/sites/default/files/gcis\\_document/201409/35349rg9752gon386.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/35349rg9752gon386.pdf), accessed 15 January 2023.

<sup>601</sup> Regulation 4 of the Amendment of regulations regarding gambling advertising and exclusions introducing reg 3(A) of the National Gambling Regulations 2004 which stipulates:

No person may advertise or cause to be advertised all gambling related advertisements related to licensed or unlicensed gambling activities in the Republic in terms of the Act or provincial legislation unless such gambling activities are advertised between 20h00 on any particular day until 06h00 on the following day: Provided further that such advertisements should not be broadcast between programmes where the audience is expected to be below the age of 18 years.

<sup>602</sup> Supra notes 494 and 502.

<sup>603</sup> Regulation 4 of the of the Amendment of regulations regarding gambling advertising and exclusions introduced reg 3(B) of the National Gambling Regulations 2004 which stipulates that:

(3)(B)(1) No person is permitted to:

- (a) advertise any interactive games in the Republic until enabling legislation is enacted and promulgated by the President;
- (b) place on the internet links or advertise material inviting or encouraging . members of the public to access gambling internet site or take any other action that may reasonably be regarded as directed at the members of the public inviting them to gamble on such internet site;
- (c) place on the internet links directed at the members of the public inviting or encouraging them to enter the gambling internet site or takes other action that may reasonably be regarded as inviting another person to gamble under false pretences or by providing false information or documentation;
- (d) advertise or cause to be advertised any gambling activities except if such person is a holder of a license issued in terms of the Act or provincial legislation: and [sic]
- (e) advertise any gambling activity if such gambling operator is licensed in terms of foreign legislation and not in terms of the Act or provincial legislation the Republic of South Africa. [sic]
- (f) provide, display, or distribute any promotional material related to interactive gambling activities or games unless such a person holds a license issued in terms of the laws of the Republic; and
- (g) provide sponsorships, gifts, prizes or scholarships related to illegal activities and interactive game in exchange for the promotion of a gambling activity, product, trademark, brand or name of a gambling operator, manufacturer or supplier.

(2) No gambling learning material shall be posted on the internet if it intended to teach members of the public how to play a gambling game.

(3) No gambling education site where a person is learning how to play a game shall route that person to a gambling site in order for such a person to gamble.

adopted by Government to date ‘is consistent with restrictions on the advertising of gambling’ whereas a revenue maximisation approach ‘imposes few restrictions on advertising’ as found in the model adopted to govern the National Lottery.<sup>604</sup>

#### 4.2.4 Economic development

Legalisation of gambling in international jurisdictions, including online gambling, has often been motivated by a public policy ambition to leverage gambling activities to stimulate economic development.<sup>605</sup> The opportunity to ‘promote economic growth, development and employment’ was one of five policy guidelines issued by the 1995 Wiehahn Commission which recommended legalisation of gambling in South Africa.<sup>606</sup> Section 45(2)(b)(iii)(bb) of the National Gambling Act 2004 contemplates ‘job creation’ as one criteria that may be considered in any decision to prescribe the maximum number of online casino licenses granted in the country. Section 53(1)(b) of the Act requires a PLA to ‘consider the potential socio-economic impact on the community’ as part of its evaluation of any license application.’

The NGB states that the gambling industry in South Africa ‘stimulates the local economy and contributes to government revenues (taxes/levies), Gross Domestic Product, investment and employment.’<sup>607</sup> It notes that gambling in South Africa facilitates the ‘enhancement of public services (taxes used for education, roads, health, schools, infrastructure and development in communities, services to the public, etc.’<sup>608</sup> It further notes that gambling in the country ‘attracts tourism and results in increased revenue’ and an ‘increase in property values (e.g. around a casino).’<sup>609</sup> The gambling industry corroborates such benefits, indicating that ‘operators had over R53 billion

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<sup>604</sup> Louw et al op cit note 14 at 2–3.

<sup>605</sup> In the United States, for example, see Meir Gross ‘Legal gambling as a strategy for economic development’ *Econ Dev Q* 2016 12 (3) 203–213 available at <https://doi.org/10.1177/089124249801200301>, accessed 11 November 2022. In Macau, for example, see Theodore Metaxas and Sotiris Folinas ‘Gambling tourism and economic development: Some lessons from Macao’ *MPRA Paper* 72397 6 July 2016 available at <https://mpra.ub.uni-muenchen.de/72397/>, accessed 11 November 2022.

<sup>606</sup> Department of Trade, Industry & Competition op cit note 30 at 5.

<sup>607</sup> Kongwa op cit note 571.

<sup>608</sup> Ibid at 10.

<sup>609</sup> Loc cit.

invested in world-class entertainment infrastructure as at March 2018.’<sup>610</sup> The High Court of South Africa confirms such benefits.<sup>611</sup>

Economic development through the gambling industry remains a public policy priority in South Africa. In 2022, the NGB conducted ‘analysis of the gambling industry value chain to identify the enablers of economic growth’ and explored ‘industrialisation and localisation opportunities.’<sup>612</sup> It studied ‘export opportunities for the gambling industry and possible partnerships to promote export of local products to the rest of the African continent, as well as new regulatory and policy requirements to support investment facilitation and growth.’<sup>613</sup>

#### 4.2.5 Black economic empowerment

Development and regulation of the gambling industry in South Africa as a tool of economic transformation is part of the origin story of gambling in the country. The opportunity to ‘encourage economic empowerment of the historically disadvantaged’ was one of five policy guidelines issued by the 1995 Wiehahn Commission which recommended legalisation of gambling in South Africa.<sup>614</sup> Early legislation codified this guideline. Section 11(c)(x) of the National Gambling Act 1996 contemplated the ‘advancement, upliftment and economic empowerment, through the gambling industry, of persons or groups or categories of persons disadvantaged by unfair discrimination.’

Current legislation continues such ambitions. Section 45(2)(b)(ii) of the National Gambling Act 2004 contemplates the opportunity to ‘promote black economic

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<sup>610</sup> Finance, Economic Opportunities and Tourism Committee op cit note 544 at 7; see also Casino Association of South Africa ‘Survey of casino entertainment in South Africa media briefing’ available at <https://www.slideshare.net/LindoSibiya/casa-survey-of-casino-entertainment-in-south-africa>, accessed 13 March 2023.

<sup>611</sup> Tuchten J said that ‘regulated gambling had become and surely still is a vital generator of revenue, job creation and infrastructure development in South Africa.’ *Casino Association of South Africa v Minister of Trade and Industry and Others* (82407/16) [2018] ZAGPPHC 569 (10 August 2018) para 19 available at <http://www.saflii.org/za/cases/ZAGPPHC/2018/568.html>, accessed 10 March 2023. The case involved a challenge to the Minister’s decision to allocate an additional casino license to North West Province and largely revolves around principles and applications of administrative law. It is notable, however, for the judiciary’s continued emphasis on protection of vulnerable persons, particularly problem gamblers, in the gambling industry.

<sup>612</sup> Caroline Kongwa ‘Forward by the Accounting Authority’ in *National Gambling Board Annual Report 2021/22* 7 available at <http://www.thedtic.gov.za/wp-content/uploads/NGB-AR-2022.pdf>, accessed 10 February 2023.

<sup>613</sup> Loc cit.

<sup>614</sup> Department of Trade, Industry & Competition op cit note 30 at 5.

empowerment.’ Section 45(2)(b)(iii)(cc) prescribes ‘diversity of ownership within the gambling industry’ as a criteria to consider in any decision to prescribe the maximum number of online casino licenses granted in the country. Section 53(1)(a)(i) of the Act requires a PLA to consider ‘black economic empowerment’ as part of its evaluation of any license application.

Proposed legislation extended such ambitions to online gambling. Section 4 of the National Gambling Amendment Act 2008 introduced section 2A(g) of the National Gambling Act 2004 which specified that one of its nine purposes was to ‘protect and advance the interests of historically disadvantaged persons.’ Section 24 of the Act introduced a new s 37A to the National Gambling Act 2004 to extend the provisions of s 45 of that legislation to online gambling licenses.

Realisation of meaningful B-BBEE participation in the domestic gambling industry remains an important public interest. In 2022 the NGB conducted ‘analysis of draft amendments to the National Gambling Policy to address issues relating to transformation, economic and social development issues.’<sup>615</sup> It ‘channeled strategic focus to promote economic development inclusion by pursuing enhancement of economic participation by historically disadvantaged individuals’ which included drafting a transformation agenda.<sup>616</sup>

#### 4.2.6 Financial probity

Assurance of gaming integrity in the domestic gambling industry represents a long held public interest priority in South Africa.<sup>617</sup> Operators have abundant opportunities to engage in dishonest practices in brick and mortar casinos.<sup>618</sup> Unfortunately for online gambling, operators have exponentially more opportunities to cheat players through

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<sup>615</sup> Kongwa op cit note 612 at 7–8.

<sup>616</sup> National Gambling Board *Annual Report 2021/2022* op cit note 347 at 15 and 17.

<sup>617</sup> The requirement to ‘protect players and the integrity and fairness of the industry through strict control and supervision’ was one of the five policy guidelines issued by the 1995 Wiehahn Commission which recommended the legalisation of gambling in South Africa. Department of Trade, Industry & Competition op cit note 30 at 5.

<sup>618</sup> Some popular ways for land-based casinos to cheat players include false dealing (mechanic’s grip); false advertising; card tricks (false shuffling or cold decks); rigged balls or wheels (roulette); illegally use of house rules; crooked dice; and bait and switch (falsely luring players to a casino). Jeff Grant ‘In which ways casinos cheat with the players?’ at 1–2, available at <https://www.onlinecasinoselite.org/post/top-7-ways-casinos-cheat-with-players>, accessed 3 January 2023.

online casinos.<sup>619</sup> An overarching purpose of the National Gambling Act 2004 is to protect players against such maleficence. The provisions of ss 8 through 10 of the Act that require gambling to occur as a licensed activity at licensed premises in accordance with uniform national standards as well as corollary legislation incorporated by reference into the Act provide players with significant protections in this regard.<sup>620</sup> As part of such safeguards, the protection of players from financial crimes is a specific public interest that surfaces in consideration of the regulation of gambling, particularly online gambling.

Risks of money laundering, financial crimes and terrorist financing through gambling establishments, including online casinos, are well documented in international jurisdictions.<sup>621</sup> The cloud-based nature of online gambling amplifies such risks:

. . . cybercrime in the industry is increasing. Signal manipulation through phony applications and software hacking are some of the significant risks challenging the market growth. The online gaming business is also experiencing a growing risk of app-based theft.<sup>622</sup>

Online gambling is susceptible to unscrupulous business practices, such as a lack of transparency and accounting for pay-outs, and may be more accessible to children and vulnerable persons than offline gambling.<sup>623</sup>

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<sup>619</sup> Many online casinos are not regulated and therefore enjoy greater latitude than licensed online casinos to engage in unscrupulous business practices. The means for online casinos to cheat players are often virtual extensions of the same illicit practices conducted by online casinos but executed through illegal software manipulation, particularly rigged random number generator ('RNG') programs. Other common practices include not paying out winnings; false advertising; hacking due to lack of encryption technology; and exposing hole cards. 'How can online casinos cheat?' at 1–5, available at <https://regulatedcasinos.com/how-can-online-casinos-cheat/>, accessed 3 January 2023.

<sup>620</sup> Supra s 3.4.5.

<sup>621</sup> Financial Action Task Force 'FATF Report: vulnerabilities of casinos and gaming sector' available at <https://home.treasury.gov/system/files/246/vulnerabilities-casinos-gaming-sector-032009.pdf>, accessed 14 December 2022. For more colloquial contemplation of the subject, see David Fickling 'Casinos' Buggy Siegal problem never really went away' *Bloomberg* 14 February 2021 at 1, available at <https://www.bloomberg.com/opinion/articles/2021-02-15/cleaning-up-casinos-and-money-laundering-is-an-endless-process?leadSource=uverify%20wall>, accessed 27 December 2022; Brooke Keaton 'How money laundering really works and why it's a problem in the gambling industry' available at <https://www.casino.org/blog/how-money-laundering-really-works/>, accessed 28 December 2022.

<sup>622</sup> Grand View Research op cit note 48 at 3.

<sup>623</sup> Getsafeonline 'Online gambling' at 1, available at <https://www.getsafeonline.org/personal/articles/online-gambling/>, accessed 12 March 2022; National Gambling Board *Annual Report 2021/2022* op cit note 347 at 35.

Current legislation contains substantial provisions to discourage money laundering and commission of financial crimes including terrorist financing. In relation to gambling and the conduct of license holders, s 30(2)(b) and s 31(1)(e) of the National Gambling Act 2004 empowers PLAs to supervise, ensure and enforce compliance, conduct investigations and issue offence notices related to the Financial Intelligence Centre Act. Section 37(2)(b) of the Act requires every national license holder to comply with such legislation while ss 43(1)(c)(ii) and (iii) empower PLAs to suspend license holders who contravene either the FICA or Prevention of Organised Crime Act.

Previously proposed legislation related to online gambling enhanced anti-money laundering and financial crime protection provisions. The introduction to the National Gambling Amendment Act 2008 expressly sought to ‘prevent gambling from being associated with crime, money laundering or financing of terrorist and related activities.’ Section 4 of the Act introduced section 2A(i) of the National Gambling Act 2004 which specified that one of its new purposes was to ‘prevent gambling from being a source of, or associated with crime or disorder, or used to support crime, disorder or money laundering.’ Section 1 of the Act integrated the Banks Act 1990 and Electronic Communications and Transactions Act 2022 into s 1 of the National Gambling Act 2004 and made explicit reference to ‘money laundering’ as contemplated by the FICA.

In respect of online gambling, ss 19 and 21 of the National Gambling Amendment Act 2008 altered ss 30 and 32 of the National Gambling Act 2004 to give exclusive jurisdiction for compliance monitoring, administration and enforcement of the FICA, including the conduct of license holders related thereto, to the NGB. Various additional restrictions on the eligibility for licenses and qualifications of employees and people with financial interests in any license holder were added through amendments to ss 49(f) and 50(i) of the National Gambling Act 2004 by ss 33 and 34 of the National Gambling Amendment Act 2008, including through specific references to the Prevention and Combating of Corrupt Activities Act, the FICA and Protection of Constitutional Democracy Against Terrorist and Related Activities Act. Sections 33(c) and 34(c) of the National Gambling Amendment Act 2008 introduced the conviction for any ‘computer or computer software related crime’ as a prohibition to holding licenses and financial interests in licensees.

Through requirements for online gambling to be conducted by registered players transacting through nominated accounts with authorised financial institutions,<sup>624</sup> the National Gambling Amendment Act 2008 imposed substantial obligations on players, license holders, financial institutions and relevant regulatory authorities to collectively discourage money laundering and commission of financial crimes in the gambling industry. The Interactive Gambling Regulations reinforced such provisions. The IGR established rules to ensure that online gambling only involved registered players (cls 9 and 10) through nominated accounts with authorised financial institutions (cls 6 and 11) and compelled licensees to withhold prizes and report suspicious behavior if they suspected illegal activities (cls 13 and 14). Operators were compelled to maintain internal controls designed, inter alia, to detect money laundering (cl 21(5)(f)(iv)).

#### 4.2.7 Morality

Beyond social, economic and financial concerns arising from any legalisation and regulation of online gambling on casino games in the country, online gambling offends the values, ethics or morals of some people in South Africa. At one time the Trade & Industry Portfolio Committee concluded that: ‘Gambling was an immoral activity, and the government should not be planning on deriving income from this source’ with one Committee member noting that legalisation of online gambling ‘was a moral issue for the country’ and ‘[g]ambling activities were often verging on crime. This was a questionable industry, similar to prostitution. Internet gambling was being treated as an ordinary industry while it was in fact a social evil.’<sup>625</sup> The member subsequently compared the activity to use of illegal narcotics ‘saying that drugs such as crystal methamphetamine (tik) were not regulated, but banned entirely due to the consequences that flowed from its use.’<sup>626</sup>

Another Committee member expressed similar concerns and stated that ‘[g]ambling was against the moral fibre of the nation’ and asked if ‘regulations were a form of transit to a point where gambling could be phased out entirely’ and noted that ‘[a] commitment

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<sup>624</sup> Supra s 3.2.3.1.

<sup>625</sup> Portfolio Committee on Trade & Industry op cit note 419 at 17; Prof B Turok in Portfolio Committee on Trade & Industry op cit note 419 at 3.

<sup>626</sup> Prof B Turok in Portfolio Committee on Trade & Industry op cit note 368 at 3.

was needed from the dti [sic] towards doing away with gambling.’<sup>627</sup> A third Committee member concurred with such sentiments and asked ‘if internet gambling should not just be prohibited.’<sup>628</sup> Among constituencies consulted during the evaluation of previously proposed legislation, the Justice Alliance of South Africa, a coalition of churches and like-minded individuals, was ‘strongly opposed to legalising interactive gambling’ as ‘this is a moral issue and gambling has been seen to destroy lives.’<sup>629</sup>

### 4.3 ANALYSES

Opposition to legalisation and regulation of online gambling in South Africa is often grounded in concerns that the activity will exacerbate undesirable social and economic conditions, facilitate financial crimes and encourage immoral activities. As such, an examination of these concerns, the adequacy of approaches adopted to address them in current or previously proposed laws and identification of further mechanisms to account for them in any *lex ferenda* merit consideration as part of any discussion of the legalisation and regulation of online gambling on casino games in South Africa.

#### 4.3.1 Problem gambling

Opponents of legalisation of online gambling in South Africa intuitively suggest that the availability of the activity likely increases incidents of problem gambling in the country.<sup>630</sup> Is there any truth to that proposition or is online gambling a *non causa pro causa*? Would legalisation and regulation of online gambling on casino games increase the incidents of problem gambling in South Africa?

The National Centre for the Study of Gambling last commissioned a report in 2006 which considered, *inter alia*, the prominence of problem gambling in South Africa.<sup>631</sup> Among other objectives, it sought to address the question ‘[d]oes increased availability

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<sup>627</sup> S Rasmeni in Portfolio Committee on Trade & Industry op cit note 419 at 3.

<sup>628</sup> L Labuschagne in Portfolio Committee on Trade & Industry op cit note 419 at 3.

<sup>629</sup> Portfolio Committee on Trade & Industry op cit note 375 at 17.

<sup>630</sup> Ibid at 1.

<sup>631</sup> Peter Collins and Graham Barr *Problem Gambling Prevalence Study: Gambling and Problem Gambling in South Africa* (2006) available at <https://web.archive.org/web/20061009013005/http://www.responsiblegambling.co.za/media/user/documents/NRGP%20Prevalence%20Study%202006.pdf>, accessed 5 April 2022.

of gambling opportunities lead to an increase in the prevalence of problem gambling?’<sup>632</sup> It succinctly summarised the significance of such question:

This is the \$64 000 question to which all politicians want to know the answer. It is also the question which all those with religious or moral or other principled objections to legalised gambling claim should be answered with a large affirmative. Conversely, it is the question which industry professionals do their utmost to persuade us should be answered negatively. This question generates a huge amount of passion and much name-calling on both sides, much of it justified.<sup>633</sup>

After analysis, the study proposes that ‘the picture of a straightforward causal connection between increases in the availability of gambling opportunities and increases in the number of problem gamblers is an over-simplification.’<sup>634</sup> Consistent with findings of research in international gambling markets,<sup>635</sup> the study places great importance on effective public awareness campaigns to mitigate problem gambling:

If a jurisdiction introduces new forms of gambling *and does nothing else* it will most likely experience an increase in the incidence of problem gambling. However, if the jurisdiction combines the introduction of new forms of gambling especially with an effective public awareness campaign about the dangers of gambling and how to avoid them, it is likely to experience a decrease in problem gambling numbers and even in the numbers of people who gamble regularly as well [ital original].<sup>636</sup>

The study’s results indicate that the prevalence of problem gamblers among sample populations of gamblers in South Africa declined from 6.8 per cent in 2003 to 4.8 per cent in 2006 which, the study notes, coincides with efforts of the NRGP to educate people about the perils of gambling.<sup>637</sup> It further notes that ‘[i]t is therefore not in fact

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<sup>632</sup> Ibid at 5.

<sup>633</sup> Loc cit.

<sup>634</sup> Loc cit.

<sup>635</sup> For example, see Rachel A Volberg ‘Fifteen years of problem gambling prevalence research: What do we know? Where do we go?’ in *J Gambl Stud* (2004) 10(1) 1–19 available at <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.202.1236&rep=rep1&type=pdf>, accessed 2 August 2022.

<sup>636</sup> Collins and Barr op cit note 631 at 6.

<sup>637</sup> Loc cit.

as surprising as might initially appear that we have witnessed . . . a decline in problem gambling numbers despite the authorisation of a considerable increase in legalised gambling.’<sup>638</sup>

More recent evidence tends to support this hypothesis. In the twelve month period between 1 April 2021 and 31 March 2022, the NRGP problem gambling hotline received 38,850 calls of which 33,649 were the ‘wrong number’ and only 1,749 related to problem gambling by players or their families that required assistance. By gambling preference, less than 20 calls related to illegal online gambling.<sup>639</sup> Consistent with findings in international markets,<sup>640</sup> such statistics appear to support assertions by the NRGP and the SARGF that ‘problem gambling was a phenomenon that affected a small percentage of gamblers’ and that ‘the public generally accept [gambling] as a recreational activity.’<sup>641</sup> The GRC arrived at a similar conclusion.<sup>642</sup>

Technology is improving the industry’s ability to mitigate and manage problem gambling. With advances in artificial intelligence and data analytics, online operators have the capability to monitor individual player performance. As the CEO of one of South Africa’s leading online gambling sites noted: “‘We can see if a person’s behavior is problematic. We take the gambling risks very seriously. We know our customers and we understand their profiles’ and echoed the NRGP and SARGF by concluding that: ‘I can say that people are quite responsible; for most, this is entertainment and fun.’”<sup>643</sup>

Notwithstanding such findings and industry environment, any legalisation and regulation of online gambling on casino games in South Africa likely needs to address two aspects associated with problem gambling. First, such measures need to protect against the development of problem gambling in respect of online gambling. While

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<sup>638</sup> Loc cit.

<sup>639</sup> National Gambling Board *Annual Report 2021/2022* (2022) op cit note 347 at 48 and 51.

<sup>640</sup> A 2020 Gallup Poll found that 71% of Americans ‘said gambling is morally acceptable.’ Casino.org ‘Gambling acceptance at all time-high, Americans say in Gallup poll’ at 1, available at <https://www.casino.org/news/gallup-gambling-as-morally-acceptable-as-pot-premarital-sex/>, accessed 12 March 2023. Joint research by Stanford University and the University of Michigan concluded that ‘gambling is, for the vast majority of people, entertainment.’ Alice LaPlante ‘Most gamblers are just out for fun’ at 2, available at <https://www.gsb.stanford.edu/insights/most-gamblers-are-just-out-for-fun>, accessed 12 March 2023.

<sup>641</sup> Portfolio Committee on Trade and Industry op cit note 375 at 3.

<sup>642</sup> Portfolio Committee on Trade & Industry op cit note 519 at 1.

<sup>643</sup> Simon Gregory, CEO of SunBet (Pty) Limited, the online gambling subsidiary of Sun International Limited, in Norman Cloete ‘Saffers paid out millions after Boks’ WC triumph’ *Saturday Star* 4 November 2023 at 3.

there may be no confirmed correlation between proliferation of gambling opportunities and proliferation of problem gambling, Tuchten J aptly noted in *Casino Association of South Africa v Minister of Trade and Industry and Others* that the ‘undeniable fact is that every gambling venue *potentially increases* the potential for gambling of a kind and to the extent which can adversely impact gamblers and their families’ [ital mine].<sup>644</sup> In this regard, the National Gambling Amendment Act 2008 and IGR contained significant restrictions on online gambling (such as daily limits) and required meaningful warnings about the dangers of problem gambling (including on websites).<sup>645</sup> Second, such measures need to require meaningful support programs to deal with problem gambling.<sup>646</sup> The National Gambling Act 2004, the National Gambling Amendment Act 2008 and the IGR extended the existing scope of support programs available to problem gamblers to online gambling activities. These protections and safeguards are consistent with international best practices.<sup>647</sup>

In its deliberations over gambling in the country, however, the Trade & Industry Portfolio Committee concluded that ‘those with gambling addictions were not adequately protected and/or supported by the current legislation.’<sup>648</sup> It is difficult to contemplate any additional measures, either drawn from international precedents or created on an independent basis, that may increase the level of protection against problem gambling and scope of support programs available to problem gamblers beyond existing or previously proposed legislation and programs. Indeed, the legalisation of online gambling on casino games would extend protections and assistance to problem gamblers currently playing on illegal gambling sites that may help them to better manage their illness.

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<sup>644</sup> Supra note 611 para 19.

<sup>645</sup> Supra s 3.2.3.3.

<sup>646</sup> Supra s 4.2.1 and earlier herein.

<sup>647</sup> Supra ss 2.2.1 through 2.2.7.

<sup>648</sup> Portfolio Committee on Trade & Industry op cit note 375 at 1.

### 4.3.2 Vulnerable persons

The GRC found ‘no crisis with underage gambling’ and associated such activity with gambling at illegal land-based casinos rather than illegal online gambling.<sup>649</sup> The risks of gambling appear well known to South African youth.<sup>650</sup> The GRC further found ‘no evidence of people who were reliant on pensions or social grants spending their money at casinos. There was, however, a correlation between receiving social grants and informal social gambling.’<sup>651</sup>

Notwithstanding such findings, the Trade & Industry Portfolio Committee expressed significant reservations with the adequacy of previously proposed legislation in respect of the ‘prevention of access to interactive gambling by minors and verification of the age threshold.’<sup>652</sup> The Committee’s concerns highlight a key operational difference between land-based gambling and online gambling. From an operational perspective, it is possible to physically prevent underage access to a brick and mortar casino. It is similarly possible to physically verify the age of any person attempting to enter such establishment. Such capabilities cannot be deployed for online gambling sites.

The National Gambling Amendment Act 2008 and IGR accounted for such challenges. They contained highly prescriptive provisions and procedures related to access to online gambling by minors and age verification requirements.<sup>653</sup> Such provisions discouraged underage access by requiring sufficient proof of identification and provision of bank account information unlikely to be available to minor children in South Africa.<sup>654</sup>

While concern for access by youth and other vulnerable persons to online gambling represents a significant public interest, the protection of such persons needs to be

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<sup>649</sup> Portfolio Committee on Trade & Industry op cit note 519 at 3. ‘[T]here was a correlation between youth gambling and unregulated gambling.’ Dr S Louw in Portfolio Committee on Trade & Industry op cit note 519 at 16. Such correlation suggests that the regulation of gambling ipso facto discourages gambling.

<sup>650</sup> ‘A South African survey in 2004 showed that [the] country was in line with international trends on under-age gambling. A study in 2009 showed that the youth were aware of the problems associated with gambling.’ Ms J Fubbs in Portfolio Committee on Trade & Industry op cit note 519 at 11. See National Gambling Board ‘Youth gambling in South Africa 2004’ available at <https://ngb.org.za/SiteResources/documents/A%20Profile%20of%20Youth%20Gambling%20in%20South%20Africa.pdf>, accessed 21 March 2023.

<sup>651</sup> Dr S Louw in Portfolio Committee on Trade & Industry op cit note 519 at 5.

<sup>652</sup> Portfolio Committee on Trade & Industry op cit note 368 at 1.

<sup>653</sup> Supra s 4.2.2.

<sup>654</sup> Loc cit.

considered in the context of the online gambling environment. To wit, much less onerous age verification and banking information is typically required by international gambling sites to onboard clients. Any regulatory regime that imposes onerous provisions designed to protect youth and vulnerable persons from the perils of online gambling may stimulate the opposite effect by driving youth and vulnerable persons to illegal online gambling sites that offer easy access and convenient financial terms. Moreover, onerous administrative provisions may discourage gambling sites from participating in any licensing and regulatory framework and preserve the prevalence of unregulated (illegal) sites that may afford fewer protections to South African players and fewer safeguards against access by minors or other vulnerable persons.

### 4.3.3 Over-stimulation of demand for gambling

Beyond limiting the number of gambling licenses, the imposition of limits on gambling advertising has been a key policy tool historically used by Government to curb over-stimulation of demand for gambling. Yet it is much more difficult to curb advertising for online gambling than other forms of gambling. Notwithstanding jurisprudence which confirmed the prohibition of advertisements for unlicensed gambling in South Africa,<sup>655</sup> the Trade & Industry Portfolio Committee expressed concern that ‘overseas interactive gambling operators were currently advertising in South Africa, and also the issue around the SABC flighting advertisements in this regard.’<sup>656</sup>

The Trade & Industry Portfolio Committee regarded restrictions on advertising in existing and previously proposed legislation to inadequately address concerns for over-stimulation of demand for gambling.<sup>657</sup> The Committee generally felt that ‘current warnings about the addictive nature of gambling should be far stronger’<sup>658</sup> and that ‘warning labels as used on cigarette packets were meaningless.’<sup>659</sup> One Committee member proposed ‘a prohibition against well-known personalities promoting casinos.’<sup>660</sup> Overall, the Committee recommended that ‘[i]nteractive gambling

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<sup>655</sup> Supra note 494 para 63.

<sup>656</sup> Portfolio Committee on Trade & Industry op cit note 368 at 6.

<sup>657</sup> Ibid at 3.

<sup>658</sup> Ibid at 1.

<sup>659</sup> Trade & Industry Portfolio Committee op cit note 419 at 4.

<sup>660</sup> A van der Westhuizen in Trade & Industry Portfolio Committee op cit note 368 at 4.

advertisements and sponsorships in South Africa should be prohibited, in the absence of any regulations.’<sup>661</sup>

The Committee’s concerns for the impact of online gambling advertisements echo concerns raised in international jurisdictions.<sup>662</sup> Historically operating without much regulation, the international online gambling market has been slow to adopt responsible advertising standards.<sup>663</sup> It is beginning to suffer for its irresponsibility. In March 2023, for example, the Federal Government of Belgium imposed a ban on all gambling advertising on television, radio, cinemas, magazines, newspapers and in public spaces as well as on websites and social media platforms effective 1 July 2023.<sup>664</sup> It banned gambling advertising in stadiums from 1 January 2025 and prohibited sponsorships of professional sports clubs by gambling companies from 1 January 2028. Gambling companies are no longer be able to claim sponsorship expenses as tax deductions.<sup>665</sup>

Consistent with the wishes of the Trade & Industry Portfolio Committee, South Africa could follow the Belgian model. Although not self-evident based on past history,<sup>666</sup> it may be manageable for regulatory authorities to ban advertisements on television channels and radio stations. It may be manageable to prohibit advertisements in magazines, newspapers, cinemas and public spaces. It may be manageable to restrict advertisements on major social media platforms such as Google and LinkedIn which have already adopted prohibitions against gambling advertisements.<sup>667</sup> It may be more difficult to eliminate advertisements on platforms such as Facebook (Meta) which permit gambling advertising under certain circumstances.<sup>668</sup> It may be more difficult to block domestic internet access by unlicensed online gambling sites.<sup>669</sup> As the GRC

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<sup>661</sup> Portfolio Committee on Trade & Industry op cit note 375 at 11.

<sup>662</sup> Supra ss 2.2.1 through 2.2.7 and 2.3.7.

<sup>663</sup> Supra s 2.3.7.

<sup>664</sup> Marine Strauss ‘Belgium bans gambling advertising from 1 July’ available at <https://www.reuters.com/world/europe/belgium-bans-gambling-advertising-july-1-2023-03-09/>, accessed 12 March 2023.

<sup>665</sup> Loc cit.

<sup>666</sup> Portfolio Committee on Trade & Industry op cit note 368 at 6; supra s 3.2.4.

<sup>667</sup> Richtel op cit note 337. ‘LinkedIn advertising policies’ at 3, available at <https://www.linkedin.com/legal/ads-policy>, accessed 16 March 2023;

<sup>668</sup> ‘About Meta’s online gambling and gaming advertising policy’ available at [https://web.facebook.com/business/help/345214789920228?id=434838534925385&\\_rdc=1&\\_rdr](https://web.facebook.com/business/help/345214789920228?id=434838534925385&_rdc=1&_rdr), accessed 16 March 2023.

<sup>669</sup> As in Australia, supra s 2.2.2. Infra s 5.10 for further discussion of this matter.

noted: ‘Unlike land-based activities, online gambling operations can be relaunched within minutes.’<sup>670</sup>

As with other aspects of any licensing regime for online gambling in South Africa, the Government likely needs to balance its desire to curtail online gambling advertisements with a willingness to provide well-prescribed opportunities to advertise online gambling to those sites willing to participate in any licensing and regulatory framework. A wholesale ban or stringent restrictions on gambling advertisements may otherwise encourage online sites to remain outside the framework and bet on unrestricted advertising opportunities that would, in such circumstances, not only disadvantage licensed operators but defeat the purpose of regulations seeking to limit gambling advertisements in the country.

An excuse to engage the gambling industry in dialogue over restrictions on advertising for online gambling presents the Government with two unique opportunities. First, limitations on online gambling advertising intuitively should apply to land-based gambling advertising and vice-versa as a matter of uniformity and administrative fairness. By opening the door to discussion on the scope of restrictions to online gambling advertisements, Government may negotiate additional restrictions to offline gambling advertisements. Second, the industry is hungry for legalisation of online gambling on casino games in the country. It is likely receptive to stringent restrictions on gambling advertisements as a condition to secure the ultimate prize.

As in other regulatory matters, the benefits of compliance need to outweigh the benefits of non-compliance. Government needs to permit gambling advertising sufficient enough to encourage gambling sites to subscribe to such restrictions while building capacity to punish non-compliant operators. In this regard, the number of licenses becomes an important consideration. It is likely easier for Government to monitor and regulate compliance with advertising regulations by thousands of known licensed operators than detect and defend against thousands of unknown unlicensed operators flouting such restrictions.

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<sup>670</sup> Louw et al op cit note 14 at 182.

#### 4.3.4 Economic development

Legalisation of online gambling on casino games in South Africa is unlikely to deliver many of the economic benefits associated with the current gambling industry in the country.<sup>671</sup> There is little investment required to establish and operate an online casino relative to a brick and mortar casino. There are few jobs created through establishment and operation of an online casino relative to construction and operation of a brick and mortar casino.

The DTI touts trickle-down employment benefits from legalisation and regulation of online gambling: while ‘it would not mean mass employment’, it would mean ‘that small operators would hire 15 to 20 people, while the larger operators would only need to hire 30 to 40 people. However, greater benefits would accrue to the wider ICT environment in which they operated.’<sup>672</sup> The DTI also postulated that online operators would be required to satisfy the same community contribution obligations imposed on land-based operators.<sup>673</sup> At the same time, a DTI Deputy Director-General indicated that: “‘The view from research indicated that online gambling may allow for greater returns, but could not contribute meaningfully to job creation.’”<sup>674</sup> As such, any regulatory regime for online gambling on casino games in South Africa likely needs to recognise that the activity will not deliver the same benefits available through other forms of gambling, including economic development and employment opportunities.

The protection of infrastructure investments and employment associated with land-based casinos likely represents a material public interest that needs to be addressed as part of any legalisation and regulation of online gambling.<sup>675</sup> Anecdotal evidence suggests that operability of the National Gambling Amendment Act 2008 and adoption of the IGR may have stalled ‘because it received strong resistance from land-based casinos.’<sup>676</sup> While proliferation of online gambling on casino games may result in loss

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<sup>671</sup> Supra ss 3.1 and 4.2.4 for discussion of economic benefits of gambling industry in South Africa.

<sup>672</sup> Portfolio Committee on Trade & Industry op cit note 368 at 4.

<sup>673</sup> Loc cit.

<sup>674</sup> Ms Evelyn Masoja, Deputy Director-General: Corporate, Consumer and Regulatory Division, Department of Trade & Industry in Maputi op cit note 488 at 1.

<sup>675</sup> Chatsworth op cit note 26 at 1; Department of Trade, Industry & Competition op cit note 30 at 11; Portfolio Committee on Trade & Industry op cit note 27 at 11; Portfolio Committee on Trade & Industry op cit note 368 at 1, 3 and 8.

<sup>676</sup> Mashiane op cit note 434.

of some business for brick and mortar casinos,<sup>677</sup> there does not appear to be any empirical evidence to suggest that legalisation and regulation of the activity would drive land-based casinos into bankruptcy or result in any meaningful job losses at such establishments.<sup>678</sup> Moreover, international precedents suggest that legalisation of online gambling enables land-based casinos to leverage their entrenched market presence to capture a significant share of domestic online gambling activities.<sup>679</sup>

Notwithstanding the above, any legalisation of online gambling on casino games in South Africa likely needs to acknowledge the position of land-based casinos and create opportunities for them to meaningfully participate in legalised online gambling in the country. The Casino Association of South Africa has suggested that ‘land-based casinos should be given priority to bid for online gambling licenses.’<sup>680</sup> While this proposition may encourage support for legalisation of online gambling by some casinos, perhaps industry support may be strengthened by adopting the Pennsylvania model which granted a license to every land-based casino upon legislation of the activity in that state.<sup>681</sup> At the same time, jurisdictions that have required online gambling sites to partner with land-based casinos<sup>682</sup> have suffered from continued market penetration by illegal gambling sites.<sup>683</sup> Any requirement for international gambling sites to partner with land-based casinos may attract some large international operators into the licensing regime but represent ‘a bridge too far’ for small or medium sized operators who may

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<sup>677</sup> For further discussion see Zengwei Yuan and Ruixuan Zhao ‘Does online gambling threaten land-based casinos? Evidence from Macau’ *International Journal of Contemporary Hospitality Management* 2019 31(3) 1267–85 passim, available at <https://doi.org/10.1108/IJCHM-09-2017-0569>, accessed 12 January 2023; Kahil S Philander and BJ Bernard ‘The impact of internet gambling on the casino industry’ *UNLV Gaming Research & Review Journal* 2016 20(1) 21–34 passim, available at <https://digitalscholarship.unlv.edu/grrj/vol20/iss1/3/>, accessed 12 January 2023.

<sup>678</sup> Based on literature review to 26 October 2023.

<sup>679</sup> For further discussion see Peter TL Popkowski Leszczyc and Patrick Roger ‘Market structure and online gambling: an empirical investigation’ *Journal of Gambling Studies* 2018 34(4) 1197–1211, available at <https://doi.org/10.1007/s10899-018-9759-6>, accessed 12 January 2023; Kahil S Philander and Fen Shi ‘The impact of brick and mortar casino presence on online gambling’ *Journal of Gambling Studies* 2017 33(2) 543–57, available at <https://doi.org/10.1007/s10899-016-9644-5>, accessed 12 January 2023.

<sup>680</sup> Department of Trade, Industry & Competition op cit note 30 at 45.

<sup>681</sup> Supra s 2.3.1.3.

<sup>682</sup> Such as West Virginia, Pennsylvania and New Jersey. Supra ss 2.2.1 through 2.2.3.

<sup>683</sup> See American Gaming Association ‘Sizing the illegal and unregulated gaming markets in the U.S.’ passim, available at <https://www.americangaming.org/wp-content/uploads/2022/11/Sizing-the-Illegal-and-Unregulated-Gaming-Markets-in-the-US.pdf>, accessed 4 May 2023.

remain outside of such regime and prevent authorities from capturing a meaningful share of market activity.

#### 4.3.5 Black economic empowerment

The gambling industry in South Africa has significant B-BBEE credentials.<sup>684</sup> Yet use of online gambling to uplift previously disadvantaged persons troubles some constituencies. A Trade & Industry Portfolio Committee member expressed concerns that: ‘The linkage of interactive gambling to social commitment was also unacceptable.’<sup>685</sup> Another Committee member noted that ‘service providers were all white owned, and blacks should benefit. They were being robbed at present.’<sup>686</sup>

Legalisation of online gambling on casino games is unlikely to deliver many of the B-BBEE benefits associated with the current gambling industry in South Africa.<sup>687</sup> Beyond online gambling sites associated with brick and mortar casinos who remain subject to other obligations, any requirement for operators to establish local operations or concede meaningful equity ownership to empowerment partners likely discourages international operators from participating in any licensing and regulatory framework. There are no obvious local management, employment or procurement needs required to operate an international gambling site accessible from South Africa. To create such commercial obligations likely discourages participation in any licensing regime and assures the continued presence of many unlicensed (illegal) operators in the country.

Ironically, advertising by online gambling sites may present B-BBEE opportunities. As seen in other jurisdictions, online gambling companies sponsor professional sports teams and, as part of such sponsorships, often support youth sports leagues. Unlike sponsorships from other industries, however, significant concerns exist with the association of sports teams with online gambling companies and efforts are afoot to restrict such activities in other markets.<sup>688</sup> It may be less than ideal for online gambling

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<sup>684</sup> Supra s 3.1.

<sup>685</sup> Portfolio Committee on Trade & Industry op cit note 419 at 3.

<sup>686</sup> Loc cit.

<sup>687</sup> Supra s 3.1.

<sup>688</sup> In the United Kingdom, for example, see Louise Taylor ‘Premier League clubs ban gambling sponsors on front of shirts from 2026-27’ *The Guardian* 13 April 2023 at 1, available at <https://www.theguardian.com/football/2023/apr/13/premier-league-clubs-ban-gambling-sponsors-on-front-of-shirts-from-2026-27>, accessed 4 May 2023.

companies to sponsor South African football teams or support development of youth football programs, particularly given prominent public concerns over the exploitation of youth by the gambling industry.<sup>689</sup>

As with other differences between regulation of land-based gambling and online gambling, it may be necessary to acknowledge that legalisation and regulation of online gambling may not generate the same empowerment benefits as land-based gambling. It may generate other social benefits, including the protection of vulnerable persons currently not protected from illegal online gambling sites. It may generate other economic benefits, including the capture of ‘greater returns’ due to the larger market addressed by online gambling sites relative to land-based establishments.’<sup>690</sup> While land-based gambling establishments may generate ‘high value’ returns, online gambling sites may generate ‘high volume’ returns. Perhaps the capture and allocation of such returns to social and economic programs that benefit previously disadvantaged communities represent the principal means through which any legalisation and regulation of online gambling achieves B-BBEE objectives in the country.

#### **4.3.6 Financial probity**

The Trade & Industry Portfolio Committee expressed significant concerns with the inadequacy of monitoring and compliance provisions related to financial transactions as found in the National Gambling Amendment Act 2008 and IGR. The Committee recommended that ‘[t]he FIC need [sic] to set up stronger measures, in co-operation with South African banks, to prevent cross-border flow of funds due to interactive gambling activities, specifically also from credit card transactions.’<sup>691</sup> It also ‘emphasised that service providers such as banks and payment agencies should have a mandatory duty to monitor payments and receipts related to online gambling.’<sup>692</sup>

Somewhat ironically, the operability of the National Gambling Amendment Act 2008 and adoption of the IGR may have stalled not because of inadequate financial integrity provisions but because of concerns for the practicality of such provisions. Anecdotal

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<sup>689</sup> Supra ss 4.2.2 and 4.3.2.

<sup>690</sup> Maputi op cit note 488 at 1.

<sup>691</sup> Portfolio Committee on Trade & Industry op cit note 375 at 11.

<sup>692</sup> Loc cit.

evidence suggests that such legislation has yet to come into force ‘because it received strong resistance from anti-money laundering authorities.’<sup>693</sup> From a public sector perspective, the Financial Intelligence Centre expressed three key challenges with the inchoate legislation and draft regulations: the inability to verify that a registered account is used by the registered user and not another party; limited access to customer records and transaction information held by international online gambling websites; and the inability to supervise and enforce sanctions against unlicensed international gambling sites.<sup>694</sup> From a private sector perspective, Standard Bank explained its conundrum with the inoperative National Gambling Amendment Act 2008 and associated draft regulations:

Section 2.16 of the Exchange Control Regulations prohibits cross border gambling activities including the participation in foreign lotteries and betting organisations. The Bank has been advised to hand over all proceeds received from foreign gambling but can only verify the source of the funding based on the client’s declaration.

. . . [t]he Bank is not in a position to differentiate between a service provider that transacts at a land-based site and an online casino simultaneously. Thus, compliance with all the provisions of the [legislation] was difficult.<sup>695</sup>

One of the greatest challenges to legalisation of online gambling on casino games in South Africa therefore appears to be the ability of financial authorities and financial institutions to meet obligations imposed on them by proposed regulations, particularly in respect of the prevention of money laundering and other illicit financial transactions.

Any legalisation and regulation of online gambling on casino games in South Africa likely needs to address three aspects associated with the prevention of financial crimes. First, regulations need to specifically acknowledge concerns with money laundering and other financial crimes. Current and previously proposed legislation likely satisfied this requirement.<sup>696</sup> Second, regulations need to contain specific provisions that deal

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<sup>693</sup> Mashiane op cit note 676 at 2.

<sup>694</sup> Portfolio Committee on Trade & Industry op cit note 375 at 5.

<sup>695</sup> Ibid at 3.

<sup>696</sup> Supra s 4.2.6.

with such matters. Current and proposed legislation likely satisfied this requirement.<sup>697</sup> Third, such provisions need to be capable of fulfilment by relevant public and private sector actors. Current and proposed legislation likely did not satisfy this requirement.<sup>698</sup> Indeed, the ‘greylisting’ of South Africa by the Financial Action Task Force in February 2022 alludes to the systemic challenges facing public authorities and private institutions in regulating financial transactions that extend well beyond the gambling sector.<sup>699</sup> Such matters likely require further consideration as part of any *lex ferenda* that legalises and regulates online gambling on casino games in South Africa.

The integrity of any governance of financial transactions associated with online gambling on casino games in South Africa likely depends on the ability of relevant financial authorities and financial institutions to regulate and interact seamlessly with international operators. At least half of the fourteen recommendations made by the Trade & Industry Portfolio Committee regarding proposed interactive gambling legislation deal with regulation of international operators.<sup>700</sup> Some of these recommendations are easily codified in any legalisation of online gambling on casino games in the country, such as adoption of a ‘location-based’ test which deems gambling sites operating in South Africa to fall under *lex loci* in respect of local transactions.<sup>701</sup> Some recommendations appear easily enforceable, such as a requirement for operators to retain transaction records accessible to South African law enforcement agencies.<sup>702</sup> Yet other proposals appear unlikely to invite participation by international gambling sites, such as the obligation for operators to establish a physical presence in South Africa ‘including a locally based gateway to provide services to South African based gamblers.’<sup>703</sup> In contemplating any legalisation and regulation of online gambling on casino games in the country, consideration likely needs to be given to enacting a

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<sup>697</sup> Loc cit.

<sup>698</sup> Supra ss 3.4.7 and 3.4.8.

<sup>699</sup> Department of National Treasury ‘Fact sheet: what does greylisting mean for a country?’ available at [https://www.treasury.gov.za/comm\\_media/press/2023/2023022501%20FATF%20Grey%20Listing%20Fact%20Sheet.pdf](https://www.treasury.gov.za/comm_media/press/2023/2023022501%20FATF%20Grey%20Listing%20Fact%20Sheet.pdf), accessed 7 March 2023.

<sup>700</sup> Trade & Industry Portfolio Committee op cit note 375 at 7, specifically recommendations 6.4.2, 6.4.6, 6.4.8, 6.4.9, 6.4.10, 6.4.13 and 6.4.14 as well as 9.6.

<sup>701</sup> Ibid at 6.4.2. This effectively codifies existing jurisprudence. Supra ss 3.2.3.1 and 3.4.6.

<sup>702</sup> Ibid at 6.4.13.

<sup>703</sup> Ibid at 6.4.10.

statutory framework that enforces public interests but encourages participation by international gambling sites in such framework.

#### 4.3.7 Morality

Is the state *custos morum* of the people? The role of morality in law-making is subject to debate.<sup>704</sup> Opponents of any legalisation of online gambling generally adopt the natural law school of thought to characterise the activity as ‘wrong’ or ‘evil’ on moral grounds.<sup>705</sup> Even if consideration of the morality of online gambling merits consideration, morality can change.<sup>706</sup> The majority of South Africans gamble.<sup>707</sup> South Africans are ‘morally accepting of gambling’ or view gambling as ‘not being a moral issue’.<sup>708</sup> Such views generally correspond to societal trends in international jurisdictions.<sup>709</sup> Subject to responsible gambling behavior, the Catholic Church now recognises that ‘[g]ambling, whether it involves games of chance (e.g. card games), wagers or betting, or even lotteries, is not intrinsically evil.’<sup>710</sup>

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<sup>704</sup> Several philosophies of law exist on this subject with the two major schools of jurisprudence divided between natural law (law is motivated by morality) and positive law (law is motivated by societal rules). For further consideration of each philosophy, see Lon L Fuller *The Morality of Law* 2 ed (1969) passim; HLA Hart *The Concept of Law* 3 ed (1997) passim; Yves Caron ‘The legal enforcement of morals and so-called Hart-Devlin controversy’ 15 *McGill Law J* 1 (1969) 9–47 available at <https://lawjournal.mcgill.ca/article/the-legal-enforcement-of-morals-and-the-so-called-hart-devlin-controversy/>, accessed 16 October 2023.

<sup>705</sup> For example, see Prof B Turok op cit note 625.

<sup>706</sup> Joseph Raz ‘Can moral principles change?’ *King’s College London Dickinson School of Law Legal Studies Research Paper Series* 2017-40; *Oxford Legal Studies Research Paper* 58/2017 (2017) available at: [https://scholarship.law.columbia.edu/faculty\\_scholarship/2052](https://scholarship.law.columbia.edu/faculty_scholarship/2052), accessed 10 March 2023. See also Jacob Poushter ‘What’s morally acceptable? It depends on where in the world you live’ *Pew Research Center* 15 April 2014 available at <https://www.pewresearch.org/fact-tank/2014/04/15/whats-morally-acceptable-it-depends-on-where-in-the-world-you-live/>, accessed 10 March 2023.

<sup>707</sup> Supra s 3.1.

<sup>708</sup> BusinessTech ‘Morality in SA vs the world’ *BusinessTech* 22 August 2014 at 1 and 2, available at <https://businesstech.co.za/news/trending/66406/morality-sa-vs-the-world/>, accessed 10 March 2023. Only 40 per cent of South Africans found gambling morally unacceptable (along with divorce) with premarital sex (48 per cent), abortion (61 per cent), homosexuality (62 per cent) and extramarital affairs (65 per cent) earning higher disapproval ratings as morally unacceptable activities. Alcohol use (36 per cent) and contraception use (15 per cent) earned lower disapproval ratings as morally unacceptable activities. Among all activities, gambling was regarded as ‘not a moral issue’ by the most South Africans (27 per cent). Pew Research Center ‘Global morality: South Africa’ at 1, available at <https://www.pewresearch.org/global/interactives/global-morality/>, accessed 10 March 2023.

<sup>709</sup> For example, only 28 per cent of Americans viewed gambling as ‘morally wrong’ in 2018. Statista ‘Do you consider gambling morally acceptable or morally wrong?’ at 1, available at <https://www.statista.com/statistics/579729/americans-moral-stance-towards-gambling/>, accessed 10 March 2023.

<sup>710</sup> Catholic Straight Answers ‘What does the church teach concerning gambling?’ at 1, available at <https://catholicstraightanswers.com/what-does-the-church-teach-concerning-gambling/>, accessed 10 March 2023.

Shifting societal values may influence consideration of the morality of online gambling:

The legislators when they formulate their laws and the judges when they give their decisions are not working in a vacuum. They are guided by the values recognized in society. Values are the social ideal which form the matrix from which legal principles are evolved by the judges or legislators. Values are more than potential materials for the legislative law-maker. They serve as critique of proposed measures of law making. . . . These values may themselves change with the progress of society. When values change law tends to change. Then the attitude of the legislators and the judges will also undergo a metamorphosis.<sup>711</sup>

Indeed, changing societal values appear to have softened opposition to legalisation of online gambling in South Africa among lawmakers. For example, evolution of the composition and policy positions of the Trade & Industry Portfolio Committee over the past two decades appears to favour legalisation of online gambling on casino games, albeit with stringent regulations. The Committee has recognised that ‘it was impossible to ban this practice [online gambling]’ so ‘it should be regulated.’<sup>712</sup> It concluded that, in consideration of the legalisation of online gambling:

. . . it must be clear on what types of activities should be allowed to be played online. The committee is of the view that online gambling should be regulated using the principles of non-proliferation and protection of consumers and minors.<sup>713</sup>

As far back as 1994, the Wiehahn Commission noted that continued prohibition on gambling ‘no longer reflects the true moral viewpoint of the majority of South Africans and that the Government should legalise lotteries and gambling in the Republic of South Africa.’<sup>714</sup> Nearly 30 years later, the same sentiment may apply to legalisation of online gambling on casino games in the country. Online gambling may no longer be

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<sup>711</sup> A Raghunadha Reddy ‘Role of morality in law-making: a critical study’ *Journal of the Indian Law Institute* 49(2) 2007 194-211, available at <http://www.jstor.org/stable/43952105>, accessed 10 March 2023. See also GCV Subba Rao *Jurisprudence and Legal Theory* 9 ed (2020) 304–6 available at [https://librarysearch.nirmauni.ac.in/cgi-bin/koha/opac-detail.pl?biblionumber=3066&shelfbrowse\\_itemnumber=3869](https://librarysearch.nirmauni.ac.in/cgi-bin/koha/opac-detail.pl?biblionumber=3066&shelfbrowse_itemnumber=3869), accessed 10 March 2023.

<sup>712</sup> Portfolio Committee on Trade & Industry op cit note 419 at 1.

<sup>713</sup> Portfolio Committee on Trade & Industry op cit note 27 at 20.

<sup>714</sup> Cited in Portfolio Committee on Trade & Industry op cit note 375 at 2.

considered *malum in se* by the majority of South Africans.<sup>715</sup> As such, the changing tides of societal values may ultimately temper moral objections to online gambling on casino games and allow legalisation and regulation of the activity in South Africa.

#### 4.4 CONCLUSION

This chapter reviews and analyses the substance and merits of public interest concerns expressed during previous consideration of the legalisation and regulation of online gambling in South Africa. These matters broadly address societal welfare (problem gambling; protection of vulnerable persons; over-stimulation of demand for gambling), economic benefits (investment; empowerment), financial probity (financial crimes) and conscience-based objections (immorality). Each of these matters have been addressed, to varying degrees, in past or previously proposed efforts to legalise and regulate online gambling on casino games in the country. Some of the means proposed to account for such concerns have been criticised for being too onerous, cumbersome or impractical.<sup>716</sup> In some cases, differences in the business models between gambling at land-based casinos and gambling through online sites may require adjustments to the nature and expectations for satisfaction of such public interest concerns.

Preceding identification and analyses of such public interests in this chapter, earlier chapters of this study evaluated challenges with the substance and form of past or previously proposed legislation in respect of online gambling in South Africa and examined the nature of international best practices regarding the activity. Building upon these efforts, the next chapter highlights fourteen areas of law that likely require adjudication as part of any ‘made in South Africa’ solution to legalise and regulate online gambling on casino games in the country. It makes recommendations regarding specific interventions in those areas that account for the concerns, challenges and best practices canvassed in previous chapters and identifies five imperatives to underpin successful introduction of any *lex ferenda* governing the activity in the country.

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<sup>715</sup> *Supra* s 3.1

<sup>716</sup> *Supra* s 3.4.8.

## CHAPTER 5:

### RECOMMENDATIONS FOR A LAW TO LEGALISE AND REGULATE ONLINE GAMBLING ON CASINO GAMES IN SOUTH AFRICA

#### 5.1 INTRODUCTION

The South African Government has expended significant amounts of time and resources wrestling with legalisation and regulation of online gambling between 1996 and 2023. Despite initial efforts to legalise and regulate the activity in the first decade of this century, it has ardently opposed the same throughout the second decade. In the early years of the third decade, however, momentum may be shifting back towards legalisation and regulation of online gambling on casino games in the country.

The GRC recommended legalisation and regulation of additional forms of gambling, including online gambling on casino games.<sup>717</sup> The Trade & Industry Portfolio Committee, a fervent historic critic of the enterprise, has conceded that online gambling needs to become a licensed and regulated activity.<sup>718</sup> The NGB has recognised that ‘the need for the establishment of [a] clear regulatory environment with respect to interactive gambling is urgent.’<sup>719</sup> The GGB published a Gauteng Gambling Policy in 2022<sup>720</sup> which initiated a review of provincial legislation to, inter alia, ‘facilitate the implementation of interactive gaming.’<sup>721</sup> Indeed, the GGB has ‘made an urgent request to the Provincial Command Council for the Premier of Gauteng to motivate, at a national level, the licensing and regulation of interactive gambling by existing licensees.’<sup>722</sup> This request appears to be part of a broader effort by PLAs to legalise online gambling on casino games for existing license holders. As of March 2022:

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<sup>717</sup> Portfolio Committee on Trade & Industry op cit note 375 at 16.

<sup>718</sup> Portfolio Committee on Trade & Industry op cit note 27 at 16 and 20; Portfolio Committee on Trade & Industry op cit note 419 at 1.

<sup>719</sup> Portfolio Committee on Trade & Industry op cit note 375 at 7.

<sup>720</sup> Gauteng Department of Economic Development ‘Publication of the Final Gauteng Gambling Policy’ GN 296 of 2022 in Gauteng Provincial Gazette 72 of 4 March 2022, available at <https://fedhasa.co.za/wp-content/uploads/2022/03/Gambling-Act.-Gauteng.-2022.-Final-Gauteng-Gambling-Policy-4-March-2022.pdf>, accessed 13 March 2023.

<sup>721</sup> Anthea Platt, Chairperson of the Board, Gauteng Gambling Board ‘Forward by the Chairperson’ in *Gauteng Gambling Board Annual Report 2021/2022* 7, available at [https://www.ggb.org.za/wp-content/uploads/2022/10/GGB\\_AR\\_2022.pdf](https://www.ggb.org.za/wp-content/uploads/2022/10/GGB_AR_2022.pdf), accessed 13 March 2023.

<sup>722</sup> Gauteng Department of Economic Development op cit note 720 at 5.

Discussions are at an advanced stage with all the other gambling boards, including the National Gambling Board (NGB) on the possibilities of legalisation of internet gambling. All parties are in agreement that the proposal has to be canvassed, through the provincial governments, with the Minister of Trade Industry and Competition [sic] to allow our current licensees to offer their products (games) through [the] internet without necessarily issuing new forms of licenses. This is to be contemplated in the legislative framework. The regulator's flexibility in implementing change is to be imputed into the legislation, in order to make further gambling opportunities available to the industry in a sustainable manner.<sup>723</sup>

In the meantime, bookmakers have contorted formats of conventional online casino games to fit within definitions of betting events permitted by the National Gambling Act 2004 and PLAs have accommodated such contortions to effectively license online gambling on casino games in South Africa. For example, SunBet, a leading South African online bookmaker, recently reported that 80 percent of its business involves online gambling on casino games – an illegal activity in the country – but legally offered by it under license from a PLA.<sup>724</sup> As one bookmaker notes, 'although we're all regulated as bookmakers, we're pretty much full-blown online casinos now.'<sup>725</sup>

While online gambling on casino games therefore remains an illegal activity on a de jure basis, it now represents a widely available legal activity on a de facto basis. The beast is only growing bigger: the number of online bookmakers in South Africa increased by 23.5% between March 2022 and March 2023 and by 41.9% in the previous comparable year.<sup>726</sup> It is an open secret admitted by the NGB that such bookmakers

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<sup>723</sup> Gauteng Department of Economic Development op cit note 720 at 4.

<sup>724</sup> 'Sports betting makes up about 20% of our business, with online games such as blackjack, roulette and slot machines making up the rest.' Simon Gregory, CEO of SunBet, in Cloete op cit note 643.

<sup>725</sup> Daniel O'Boyle 'South Africa in focus: a strange regulatory position' *iGamingBusiness* 15 December 2022 at 3, available at <https://igamingbusiness.com/legal-compliance/regulation/south-africa-in-focus-a-strange-regulatory-position/>, accessed 12 July 2023. *Infra* s 5.2.2.1.

<sup>726</sup> NGB in Thabiso Mochiko 'Desperation drives gambling growth' *Sunday Times* 22 October 2023 at 1, available at <https://times-e-editions.pressreader.com/article/282265260107259>, accessed 22 October 2023.

offer online casino games.<sup>727</sup> It is not surprising that the number of financial transactions related to gambling has matched such growth.<sup>728</sup>

The law needs to change: *cessante ratione legis cessat ipsa lex*. Any legalisation of online gambling on casino games will, in large part, simply acknowledge the current availability of the activity in South Africa. This recognition falls far short of realising the best interests of the people, Government, industry participants and players. Any legalisation and regulation of online gambling on casino games offers opportunities to achieve many more significant results, including formalisation of specific regulations for the activity, generation of tax revenues and protection of public interests.

Realisation of such opportunities likely requires completion of a complicated, multi-faceted process. This process should assess relationships with a significant number of interlinked laws not adequately addressed by previously proposed legislation. It should account for recent best practices in international jurisdictions. It would benefit from analyses of the substance, form and criticisms of previously proposed legislation and regulations. It should respect relevant *stare decisis*. It requires drafting a complex law and comprehensive set of subordinate regulations. It likely involves a review of such law and regulations by the Trade & Industry Portfolio Committee.<sup>729</sup> Based on precedent, it likely includes a meaningful public consultation process.<sup>730</sup>

In anticipation of such process, this chapter makes recommendations about the prospective nature, substance, form and implementation of any future legislation and regulations to legalise and regulate online gambling on casino games in South Africa.

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<sup>727</sup> Ibid at 1. ‘Companies offer lottery, casino and sports betting.’

<sup>728</sup> Loc cit. For example, financial transactions at Capitec Bank related to gambling increased 35 per cent on a year on year basis to August 2023.

<sup>729</sup> Acknowledging reservations expressed by the Trade & Industry Portfolio Committee about its exclusion from consideration of subordinate legislation related to the National Gambling Amendment Act 2008 (the last time the Government attempted to legalise online gambling), it is likely that this Committee may lobby for its evaluation of any forthcoming legislation and subordinate regulations which may or may not include its coordination of any public consultation process. Portfolio Committee on Trade & Industry op cit note 375 at 1.

<sup>730</sup> For example, in consideration of legislation that ultimately became the National Gambling Amendment Act 2008, the Portfolio Committee on Trade & Industry expressed concern that ‘[t]he consultation process had not been comprehensive enough’ and that ‘the Committee members agreed that public hearings should be held.’ Portfolio Committee on Trade & Industry op cit note 419 at 1. The Committee subsequently undertook a public consultation process which involved the opportunity to make written submissions or participate in public hearings held in November 2009, January 2010 and February 2010. Portfolio Committee on Trade and Industry op cit note 375 at 2. The Committee also held public hearings on the Gambling Review Commission’s report in 2011. Portfolio Committee on Trade and Industry op cit note 27 at 1

Such recommendations fall far short of discussion of the myriad of intricate and interrelated topics that need consideration as part of such process.<sup>731</sup> However, they hopefully contribute, in small part, to stimulating deliberations between stakeholders that help resolve competing interests and build consensus towards the optimal means to legalise, license and regulate online gambling on casino games in the country.

## 5.2 RECOMMENDATIONS

This study identifies and assesses the nature of key issues that likely require consideration as part of any process to legalise and regulate online gambling on casino games in South Africa. It makes specific recommendations about *de lege ferenda* that may inform any ‘made in South Africa’ solution for licensing and regulating the activity in the country. Some of these recommendations build upon international best practices. Some of these recommendations represent independent thought. In both circumstances, such proposals acknowledge and account for key characteristics of online gambling tempered by the particular circumstances of the population, prevailing socio-economic conditions and current dynamics of the gambling market in South Africa.

Clarification of the division of powers and relationships between the NGB (whether in its current form or as a national gambling regulator) and PLAs is a likely precondition to the efficient and effective regulation of all forms of gambling in South Africa, including online gambling on casino games. It is a complex matter that likely requires trade-offs between the NGB and its provincial counterparts due to entrenched political positions and regulatory realities.<sup>732</sup> The legalisation (and regulation) of online

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<sup>731</sup> These recommendations exclude further consideration of *de rigueur* protections customarily afforded players betting on online gambling sites (and often through other forms of gambling or gambling establishments) including, *inter alia*, player identification requirements, age limits, deposit limits, credit limits, bet limits, time limits, self-exclusion opportunities, data protection and privacy provisions and prohibitions on the offering of discounts, rebates, promotions or other inducements. Many of these provisions are found in *lex lata* or would, inevitably, be included in any further consideration of any *lex ferenda* due to their prevalence in international markets. For discussion of such provisions, *supra* ss 2.2 and 3.2.

<sup>732</sup> According to the GRC, the NGB articulates a vision for a national regulatory body:

It was critical to maintain a national regulatory, advisory and oversight body with oversight powers and authority to create harmonisation and uniform gambling norms and standards for the country with strategic direction from the Ministry. It considered that its role was to facilitate processes of aligning legislations notwithstanding that PGRAs [PLAs] should retain their provincial permutations. Such alignment should allow for flexibility for ease of amending legislations.

gambling on casino games may be delayed if it becomes associated with any larger realignment of the regulatory environment and relationships between relevant authorities. Given the pervasiveness of online gambling on casino games and desideratum to regulate the activity, it may be desirable to accommodate regulatory responsibilities within the existing environment, either through national regulations or by way of a memorandum of understanding that defines key arrangements and assures ‘uniformity in implementing the national and provincial legislation’ as suggested by the Trade & Industry Portfolio Committee as far back as 2012.<sup>733</sup>

Beyond likely trade-offs between authorities over governance of gambling in South Africa, further trade-offs are likely required between these authorities and online operators to create a viable licensing and regulatory framework. A framework that governs few market participants is not a successful framework – an effective regime needs to regulate as many market participants as possible. To achieve this objective, any regulatory architecture likely needs to balance the aspirations of public interests with the realities of commercial interests. It likely depends on a ‘carrot and stick’ approach that promotes participation by online sites in the framework and punishes those sites that elect to remain outside the framework. As succinctly summarised by a GRC member: ‘The idea would be to encourage participation through incentives, and providing disincentive[s] to deter gamblers from accessing illegal sites.’<sup>734</sup>

Realisation of a grand bargain between regulatory authorities and between such authorities and market participants will not be easy. Troubled attempts by the Government to initially legalise and regulate online gambling and its impotent efforts to subsequently prohibit the activity ipso facto confirm as much. To forestall further pitfalls and smooth the process towards legalisation of online gambling in casino games, if desired, the following fourteen areas of law and recommendations related

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While PLAs ‘acknowledged the need for co-ordination and co-operation at a national level by an institution like the NGB. . . . they did not support the NGB’s oversight function and another mechanism to achieve accountability of individual provinces must be found.’ Portfolio Committee on Trade & Industry op cit note 27 at 5. See also discussion of the proposed transformation of the NGB into a national regulatory agency pursuant to the National Gambling Amendment Act 2018 at Portfolio Committee on Trade & Industry op cit note 482 *passim*.

<sup>733</sup> Portfolio Committee on Trade & Industry op cit note 27 at 6.

<sup>734</sup> Dr Louw in Louw et al op cit note 14 at 2–3; Portfolio Committee on Trade & Industry op cit note 519 at 1.

thereto may help inform debate about the substance, form and implementation of such grand bargain:

### 5.2.1 Legislative path to legalisation of online gambling

How should online gambling on casino games be legalised in South Africa? The President's proclamation of the National Gambling Amendment Act 2008 would immediately legalise the activity in South Africa as of such date. Yet one of the principal reasons for lack of proclamation of this legislation was the Trade & Industry Portfolio Committee's concerns with the inadequacy of this law and, in particular, the IGR proposed to support the same.<sup>735</sup> Similarly, the GRC highlighted significant deficiencies with such legislation and regulations.<sup>736</sup> The National Gambling Amendment Act 2008 also drew heavy criticism from public interest groups.<sup>737</sup> As such, it is unlikely that the political will exists to simply proclaim a patently deficient law that legalises online gambling in the country, with or without any amendment to its equally flawed subordinate regulations.

It is more likely that legalisation of online gambling on casino games in South Africa may be achieved through a new stand-alone act or legislation that amends the National Gambling Act 2004 or National Gambling Amendment Act 2008. The Government preferred to use amending legislation in its earlier attempt to legalise online gambling in the country. At that time, the DTI's Director Legislative Drafting indicated that 'using an amendment Bill was a method of choice' because '[m]ost of the general issues were already contained in the Act. To have a separate Bill would require a large number of cross-references, and a great deal of duplication. The State Law Advisor thought that a new Bill was not necessary.'<sup>738</sup> Contrarily, the Democratic Alliance proposed successive private member's bills as stand-alone legislation which effectively defaults to the National Gambling Act 2004 in areas not contemplated therein.<sup>739</sup>

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<sup>735</sup> Portfolio Committee on Trade & Industry op cit note 27 at 15.

<sup>736</sup> Loc cit.

<sup>737</sup> See 'Annexure C: summary of written submissions' in Portfolio Committee on Trade & Industry op cit note 375 at 9–28.

<sup>738</sup> Brian Muthwa in Portfolio Committee on Trade & Industry op cit note 419 at 4.

<sup>739</sup> Supra s 3.2.5.

While different in form and method, there is little difference in substance and effect between the two approaches. For political reasons, it may be expedient for the ANC Government to continue along its path of amending existing legislation rather than adopt its own stand-alone law that appears to kowtow to the preferred approach of an opposition political party.<sup>740</sup> Regardless of whether legalisation of online gambling on casino games occurs through amending law or stand-alone statute, any such act requires explicit disposition of the inoperable National Gambling Amendment Act 2008 to avoid confusion over the standing of this moribund statute.

Irrespective of the way in which any superordinate legislation is promulgated to legalise online gambling in South Africa, implementation of this law requires significant subordinate legislation to clarify and confirm the terms and conditions governing the licensing and regulation of the activity in the country. The Government previously proposed the IGR which, notwithstanding criticism,<sup>741</sup> achieved this objective in relation to the National Gambling Amendment Act 2008. Given evolution of the online gambling industry in South Africa since 2008, more extensive regulations that account for current market conditions are likely required to assure effective governance of the activity in the country. As with adoption of any primary legislation, the Government may elect to publish an amended version of the IGR or incorporate parts of previously proposed regulations into any new secondary legislation.

Passage of the National Gambling Amendment Act 2008 by the Parliament of South Africa but failure by the President to proclaim such legislation and the subsequent failure by Parliament to enact the IGR are sometimes cited as twin causes of popular confusion over the legality of online gambling on casino games in the country.<sup>742</sup> A repeat of such circumstances represents a sub-optimal outcome of any effort to legalise the activity. As such, any further legislative activity likely benefits from simultaneous publication and consideration of any statute alongside subordinate regulations to

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<sup>740</sup> It is unlikely that any opposition bill will become law. O'Boyle op cit note 725.

<sup>741</sup> Portfolio Committee on Trade & Industry op cit note 27 at 15.

<sup>742</sup> Sam Gascoyne 'Online gambling is definite NO says National Gambling Board' *NoWagering.com* at 1, available at <https://nowagering.com/news/industry/south-africa-online-casinos-illegal>, accessed 12 July 2023.

provide immediate clarity, if not certainty, regarding the proposed means and methods of implementing the primary legislation.

A material amount of policy making (and lawyering) is likely required to construct consensus around the content of any *lex ferenda* that legalises online gambling in South Africa. Development of a comprehensive set of regulations that licenses and regulates the activity is a prerequisite to any credible effort to legalise the activity in the country. People will want to know how it works. Many of the public interest concerns raised in relation to online gambling likely need to be addressed through subordinate regulations. Other than the discredited Interactive Gambling Regulations, scant attention has been paid to the substance of regulations required to underpin legalisation of online gambling on casino games in the country. The Casino Association of South Africa has not proposed any laws or regulations. The NGB and the PLAs have not proposed any laws or regulations. The Remote Gambling Bill 2014 only offered a high level framework that defaults to existing regulations or empowers the minister to create new regulations.

It makes common sense to consider the substance of regulations with any legislation as part of a holistic evaluation of (and perhaps public consultation process regarding) the merits of legalising the activity by lawmakers, policy makers, regulatory authorities, civil society and private market participants. While this may slow the timetable for any legalisation on online gambling on casino games in the country, it may avoid the spectre of confusion sown by earlier discombobulated efforts to legalise and regulate the activity on a piecemeal basis. It may provide greater assurance that online gambling on casino games will be regulated through a comprehensive and transparent regulatory regime at the outset of any legalisation of the activity in the country.

### **5.2.2 Forms and methods of online gambling**

What forms of online gambling on casino games should be permitted as part of any legalisation of the activity in South Africa? Existing legislation contains loopholes that permit the conduct of certain types of online gambling in the country. The definition of an ‘interactive game’ in the National Gambling Amendment Act 2004 permits online poker and betting exchanges to operate outside the prohibition of online gambling.<sup>743</sup>

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<sup>743</sup> Louw et al op cit note 14 at 175.

These loopholes have been exploited by licensed operators to offer online gambling beyond betting on sports and horse racing:

. . . certain licensed bookmakers and totalisators, are offering betting and wagering via their Internet websites. More recently, there has been a trend for licensed bookmakers and totalisators . . . to offer punters the ability to bet via their cell phone or via FNB Internet banking. The use of cell phones to bet is not any different than using the Internet. . . . Due to the accessibility of mobile phones, this can be expected to lead to the proliferation of licensed online betting by these operators, without proper assessment of the risks.<sup>744</sup>

The inoperable National Gambling Amendment Act 2008 failed to close these loopholes. The proposed Interactive Gambling Regulations affirmed this exception for online poker, betting exchanges and other ‘transactions between two or more persons that are facilitated by a third party.’<sup>745</sup> The IGR confirmed that ‘electronic data devices, that are not connected to the internet, such as interactive television, telephone, text messaging service (SMS), will not be regarded as a form of electronic communication for the purposes of these regulations.’<sup>746</sup> Such corroboration effectively excluded bookmakers and totes from the scope of such legislation.

The GRC recommended amendment to the proposed definition of ‘interactive game’ to remove the “gray” status of interactive gambling.’<sup>747</sup> The Trade & Industry Portfolio Committee concurred with such recommendations.<sup>748</sup> The private member’s bills proposed by the Democratic Alliance closed such loopholes.<sup>749</sup> Any further legislation aimed at legalisation of online gambling on casino games in South Africa should similarly account for such circumstances.

### 5.2.3 Scope of licensing regime

Who should be governed by any licensing regime for online gambling on casino games in South Africa? Previous discussions about legalisation of the activity have generally

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<sup>744</sup> Ibid at 176.

<sup>745</sup> Regulation 2 of the Interactive Gambling Regulations.

<sup>746</sup> Loc cit.

<sup>747</sup> Louw et al op cit note 14 at 177.

<sup>748</sup> Portfolio Committee on Trade & Industry op cit note 27 at 15.

<sup>749</sup> Supra s 3.2.5.

focused on licensing and regulation of the domestic market and ways to exclude unlicensed gambling sites from this market.<sup>750</sup> Such considerations appear pertinent to further discussions of the same. At the same time, the Government may wish to expand consideration of the scope of licensing and regulation of online gambling to permit use of the country as an international hub for licensing online gambling sites notwithstanding any activity or lack of activity in the domestic market.

#### **5.2.3.1 Domestic licenses**

Current and previously proposed gambling legislation in South Africa contemplates the licensing of gambling operators, including their premises and employees, as well as manufacturers, suppliers and maintenance providers to gambling devices and testing agents for such devices.<sup>751</sup> The breadth of industry participants captured by this licensing net has been supported by the GRC and the Trade & Industry Portfolio Committee.<sup>752</sup> The Remote Gambling Bill 2014 sponsored by the Democratic Alliance contemplated a similar licensing regime.<sup>753</sup> While differences of opinion exist between stakeholders regarding the nature of and application procedures for such licenses as well as standards and administrative accountabilities for such licenses,<sup>754</sup> any legislation and regulations aimed at legalisation of online gambling on casino games in South Africa should account for such matters.

#### **5.2.3.2 International licenses**

The Government may be missing an opportunity to establish South Africa as an international hub for licensing and regulating online gambling. Many countries generally positioned at the periphery of international commerce have organically grown a profitable domestic economy around this activity.<sup>755</sup> South Africa has significant competitive advantages as a country which favour its position as a

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<sup>750</sup> Supra ss 3.3.2 and 3.3.

<sup>751</sup> For example, ss 1, 9 and Parts B, C, D and E of the National Gambling Act 2004.

<sup>752</sup> Portfolio Committee on Trade & Industry op cit note 27 at 14.

<sup>753</sup> For example, ss 15, 38 and 39 and c 9 of the Remote Gambling Bill 2014.

<sup>754</sup> Infra ss 5.2.4, 5.2.5 and 5.2.6.

<sup>755</sup> For example, the top eight online gambling jurisdictions in the world are Alderney, a British Channel island; Antigua and Barbuda; Costa Rica; Gibraltar; Malta; Kahnawake; Curacao; and Isle of Man. Nerds of Gambling op cit note 289.

regional hub for commerce in Sub-Saharan Africa.<sup>756</sup> There is no African country among leading international jurisdictions for the licensing and regulation of online gambling.<sup>757</sup> Africa is rapidly growing as an epicentre of online gambling.<sup>758</sup> It is a fragmented continent of 54 countries<sup>759</sup> generally ill-equipped to deal with the penetration of online gambling sites in their markets: ‘African regulators are hard-pressed to ensure that effective measures are in place to protect players, understand the ever-changing playing field, while at the same time also ensuring that their tax net is cast as wide as possible.’<sup>760</sup> There is a market opportunity for South Africa to assert leadership in this area: ‘it is only a matter of time before regulation around online gaming and gambling in Africa is ramped up considerably.’<sup>761</sup>

South African authorities may derive benefits from anchoring, at a minimum, an African-centric regional licensing and regulatory regime similar to those adopted by leading online gambling jurisdictions. By expanding licensing and regulatory activities to include international markets, authorities likely achieve greater

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<sup>756</sup> South Africa is well-positioned as a regional and global commercial hub:

South Africa is the most advanced, diversified, and productive economy in Africa. Boasting one of the most pro-business environments on the continent, South Africa is a logical option for U.S. companies seeking to enter the Sub-Saharan Africa marketplace. . . . South Africa is well integrated into the regional economic infrastructure as formalized by membership in the Southern African Development Community (SADC). In addition, the Southern African Customs Union (SACU) agreement with Botswana, Namibia, Lesotho, and eSwatini (Swaziland) facilitates commercial exchanges. South Africa is a member of the World Trade Organization (WTO), the G20, and the informal BRICS (Brazil, Russia, India, China, and South Africa) association of emerging economies. South Africa is also the economically most significant ratifier of the nascent African Continental Free Trade Agreement (ACFTA).

International Trade Administration ‘South Africa – country commercial guide’ 6 May 2023 available at <https://www.trade.gov/knowledge-product/exporting-south-africa-market-overview>, accessed 15 October 2023.

<sup>757</sup> Nerds of Gambling op cit note 289.

<sup>758</sup> Revenues from online gambling in Africa are expected to reach USD 1.63 billion in 2023 based on 0.4 per cent user penetration with an 8.51 per cent CAGR between 2023 and 2027 to reach USD 2.26 billion by 2027. Statista ‘Online gambling – Africa’ at 1, available at <https://www.statista.com/outlook/dmo/eservices/online-gambling/africa#:~:text=Revenue%20in%20the%20Online%20Gambling,US%242.26bn%20by%202027>, accessed 15 October 2023.

<sup>759</sup> As prescribed by the United Nations. Worldometer ‘How many countries in Africa’ at 1, available at <https://www.worldometers.info/geography/how-many-countries-in-africa/#:~:text=There%20are%2054%20countries%20in,the%20United%20Nations%20official%20statistics>, accessed 15 October 2023.

<sup>760</sup> Roy Bannister in Jason Lane-Sellers ‘Regulatory landscape’ LexisNexus Risk Solutions at 2, available at <https://risk.lexisnexis.com/global/en/insights-resources/article/online-gaming-and-gambling-in-africa-why-greater-regulation-is-inevitable>, accessed 15 October 2023.

<sup>761</sup> Ibid at 1.

institutional capacity to meaningfully regulate the domestic gambling market. Such authorities may earn money from licensing and regulation of international online gambling sites that helps pay for domestic obligations. Licensing and regulation of international operators in South Africa may increase the number of gambling sites likely to participate in any local regime. It may encourage such sites to locate operations and personnel in South Africa in ways that improve the ability of local authorities to regulate such entities in the domestic market.

Creation of an international hub for licensing and regulation of online gambling in South Africa may address some of the public interest concerns expressed about legalisation of the activity in the country. Many international online gambling regulatory jurisdictions require the presence of a local workforce and operations by license holders.<sup>762</sup> While international operators may be reluctant to establish such a footprint on a stand-alone basis for the South African market, the equation may change if resources and infrastructure are deployed on a regional (or global) basis. Such collateral economic activities may address, in part, concerns expressed by some local stakeholders with anemic investment, employment and empowerment opportunities associated with online gambling.<sup>763</sup> The genesis of South Africa as an international hub for licensing online gambling is a regulatory extension of the NGB's efforts to develop an export market for the country's gambling industry.<sup>764</sup>

#### 5.2.4 Licensing authority

Who should license online gambling on casino games in South Africa? Consensus appears to exist between major political parties, the NGB and PLAs that a national license should be required to offer the activity in the country.<sup>765</sup> However, a lack of consensus appears to exist regarding the optimal means and procedures to apply for

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<sup>762</sup> Nerds of Gambling op cit note 289.

<sup>763</sup> Supra ss 4.2.4, 4.2.5 and 4.3.4.

<sup>764</sup> Kongwa op cit note 612 at 7–8; National Gambling Board *Annual Report 2021/2022* op cit note 347 at 15 and 17.

<sup>765</sup> As proposed in the National Gambling Amendment Act 2008 and Remote Gambling Bill 2014. The GRC further recommended a single national regulator retain responsibility for the regulation of online gambling, a position supported by the Trade & Industry Portfolio Committee. Portfolio Committee on Trade & Industry op cit note 27 at 16. The NGB believes that online gambling should 'remain a regulated activity within the national sphere of government and regulation given its borderless nature.' Portfolio Committee on Trade and Industry op cit note 27 at 18. See also s 3.4.4.

such licenses, evaluate license applications, monitor the activities of licensed operators and enforce compliance with license requirements.<sup>766</sup> Divergences of opinion between the NGB and PLAs over such responsibilities may represent a significant stumbling block to legalisation of online gambling on casino games in the country.<sup>767</sup>

Although it reserved the right for the NGB to delegate certain authorities to its provincial counterparts, the National Gambling Amendment Act 2008 deemed the NGB the central authority to license online gambling on a national basis except for employment licenses.<sup>768</sup> While the Remote Gambling Bill 2014 gave the NGB similar authority to grant remote gambling licenses as national franchises, it adopted a decentralised approach that vested PLAs with responsibilities to accept and review applications, make recommendations regarding the NGB's adjudication of applications, monitor licensee performance, enforce license conditions and collect taxes in their jurisdictions.<sup>769</sup> The NGB retained concurrent authority to issue, monitor and enforce national licenses and supervise PLAs in discharge of their obligations.<sup>770</sup>

Based on the realities of current arrangements, greater opportunities likely exist for inconsistent standards to be applied to evaluation of online gambling license applications through a decentralised process managed by PLAs than through a centralised process managed by the NGB. While the ability of PLAs to accept and evaluate online gambling license applications and make recommendations to the NGB in relation thereto does not per se create the same opportunities for inconsistencies available under the current regulatory environment if the NGB remains the ultimate arbiter of the award of such licenses, any decisions by the NGB to decline recommendations of any PLA may exacerbate tensions between national and provincial authorities and frustrate cooperation in other areas essential to the efficient functioning of the concurrent regulation of gambling in South Africa.

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<sup>766</sup> cf National Gambling Amendment Act 2008 and Remote Gambling Bill 2014.

<sup>767</sup> Portfolio Committee on Trade and Industry op cit note 375 at 6; Portfolio Committee on Trade and Industry op cit note 482 at 4.

<sup>768</sup> Supra ss 3.2.3.1 and 3.4.4.

<sup>769</sup> Supra s 3.2.5.

<sup>770</sup> Loc cit.

Provinces may not retain sufficient administrative capabilities to receive and evaluate applications for national online gambling licenses in a timely manner even if such licences are restricted to existing licensees or a limited number of additional license holders. Industry participants have expressed significant concerns with the ‘limited capacity . . . of provincial gambling boards to process the relevant license applications in a timely manner’ under existing legislation.<sup>771</sup> In the event that any licensing regime aspires to capture hundreds if not thousands of currently unregulated gambling sites accessible in South Africa, existing capacity constraints likely aggravate such concerns, particularly in provinces with sparsely resourced licensing authorities. A centralised application process housed within the NGB likely supports creation of sufficient institutional capacity to effectively manage applications for online gambling licenses.

The licensing of gambling operators sits atop the licensing pyramid. However, the apex of any pyramid is only as stable as its foundation. Less attention has been given to the licensing (and regulation) of manufacturers, suppliers, maintenance providers and other industry participants aligned to gambling operators. For example, a leading global gambling machine manufacturer raised concerns with the current licensing framework for providers of goods and services to gambling operators, noting the onerous nature of ‘the requirement for a certificate of suitability to be issued to a supplier of goods or services, lender or lessor to a licensee or any borrower or lessee of a licensee by each individual provincial gambling board.’<sup>772</sup> The extent and consequences of this bureaucratic burden were explained as follows:

This requirement also extended to manufacturers that supplied peripheral equipment and services and the cost and administration for each provincial certificate of suitability was very prohibitive to these manufacturers. Therefore, they were limited in distributing their products directly to licensed operators except through national manufacturer licensed manufacturers.<sup>773</sup>

Such observations underscore the challenges associated with any decentralised framework for licensing of online gambling operators. Indeed, the manufacturer

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<sup>771</sup> Portfolio Committee on Trade & Industry op cit note 375 at 4.

<sup>772</sup> Aristocrat Leisure Limited in Portfolio Committee on Trade and Industry op cit note 27 at 7.

<sup>773</sup> Loc cit.

recommended that ‘the National Gambling Act and its Regulations should include a provision for National Certificates of Suitability.’<sup>774</sup> This position was endorsed by the Trade & Industry Portfolio Committee which expanded the recommendation to include other industry players: ‘testing companies, manufacturers and importers of gaming software and equipment should be licensed nationally and should not also be subjected to provincial certificates of suitability and approvals.’<sup>775</sup>

Any national licensing regime may facilitate investment by international gambling vendors in the domestic market. The Trade & Industry Portfolio Committee recommended that ‘local manufacturing of gaming equipment should be encouraged.’<sup>776</sup> These recommendations invite further consideration as part of any evaluation of the optimal means to license (and regulate) the supporting cast of market participants in the gambling industry in South Africa.

Yet the division of responsibilities between the NGB and PLAs remains a cardinal concern that extends beyond licensing of online gambling to broader consideration of the optimal means to regulate all forms of gambling in South Africa.<sup>777</sup> Disagreements over the governance of gambling underpin principal objections to the proposed conversion of the NGB into a national gambling regulator pursuant to the National Gambling Amendment Act 2018.<sup>778</sup> Any reconfiguration of governance structures likely needs to reconcile differing views of the concurrent powers shared between the NGB (in whatever form) and its provincial counterparts and necessarily affects the regulation of online gambling on casino games in the country.

PLAs are unlikely to readily cede ground in their regulation of gambling, including online gambling. Leveraging concurrency of powers between national and provincial spheres of government over the industry, PLAs have become increasingly proactive in licensing and regulating gambling in their jurisdictions.<sup>779</sup> The DTI has criticised PLAs

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<sup>774</sup> Loc cit.

<sup>775</sup> Loc cit.

<sup>776</sup> Loc cit.

<sup>777</sup> For example, see discussion of the National Gambling Amendment Act 2018 by Portfolio Committee on Trade & Industry *op cit* note 482.

<sup>778</sup> Loc cit.

<sup>779</sup> O’Boyle *op cit* note 725 at 4.

for their perceived focus on revenues.<sup>780</sup> The Democratic Alliance has suggested that ‘provincial gambling councils [sic] changed their views about online gambling when they realised how much revenue it could generate if it were legalised.’<sup>781</sup>

The GRC acknowledged that ‘political willingness at [the] provincial level was a problem.’<sup>782</sup> Concurrently, the NGB expressed frustration with its inability to implement initiatives on a national basis due to the intransigence of some provincial counterparts. In the area of financial standards and impact on enforcement actions against illegal gambling, for example, it noted that:

The NGB could set standards and, although it had the authority to manage the conduct of licensees, it could not do so because it had to be invited by provinces. The NGB would have the authority to set the financial standards but not manage conduct and yet the expectation was that the NGB should deal with illegal gambling.<sup>783</sup>

The PLAs are not without support. In response to a perception that ‘the NGB was bashing the PLAs’ during a Trade & Industry Portfolio Committee meeting, one Committee member admonished the NGB:

The NGB should be careful about the relationship with provinces. There was a law and that had to be respected but it was also a matter of corporate governance. The more the NGB bashed them, the more the PLAs would respond negatively. The NGB had to be cautious.<sup>784</sup>

The Committee Chairperson subsequently noted that regulation of gambling ‘was very sensitive legislation and most Members knew what it felt like to be in a province and to be told by those at national level that certain things could not be done.’<sup>785</sup>

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<sup>780</sup> Portfolio Committee on Trade & Industry op cit note 482.

<sup>781</sup> ‘South Africa losing out on billions in online gambling taxes’ *My Broadband* 12 March 2023 at 1, available at <https://mybroadband.co.za/news/internet/483545-south-africa-losing-out-on-billions-in-online-gambling-taxes.html>, accessed 13 March 2023.

<sup>782</sup> Portfolio Committee on Trade & Industry op cit note 519 at 16.

<sup>783</sup> Portfolio Committee on Trade & Industry op cit note 482 at 16.

<sup>784</sup> Mahlobo Ruda in Portfolio Committee on Trade & Industry op cit note 482 at 15.

<sup>785</sup> J Fubbs in Portfolio Committee on Trade & Industry op cit note 482 at 15.

It may be difficult to amend current regulatory structures governing gambling in any way that meaningfully erodes existing provincial activities, particularly revenue collection. In the narrower context of online gambling, the push by PLAs to license online gambling through existing licensees favours continued provincial control over related regulatory actions, including revenue collection. As the GRC noted, the inherent tension between the NGB and PLAs:

. . . created a challenge in obtaining agreement on a national policy relating to gambling; thus undermining the fine balance between the conflicting objectives of revenue maximisation from the provincial perspective and limiting the proliferation and social impact [of gambling] from the national perspective.<sup>786</sup>

In this turbulent political environment, any resolution of amendments to the regulatory structure governing the conduct of gambling in South Africa are likely to involve trade-offs between competing interests. The DTI seems amenable to some form of power-sharing between the NGB and PLAs when it conceded that: '[i]t is possible that the NGB might delegate some powers to provincial authorities.'<sup>787</sup> Ongoing dialogue between the NGB and GGB appear to reflect such realities.<sup>788</sup>

Given such challenges and concerns, it appears likely that licensing of online gambling on casino games, whether under existing or amended governance structures, benefits from centralisation of responsibilities for national licenses within the NGB.<sup>789</sup> However, functions may be realised through a decentralised organisational structure that bases resources within PLAs and promotes close cooperation between NGB resources and PLA personnel. The precise form of such collaboration remains subject to debate. However, it is a promising sign that the GGB, a leading PLA in the country,<sup>790</sup>

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<sup>786</sup> Portfolio Committee on Trade & Industry op cit note 27 at 5.

<sup>787</sup> Loc cit.

<sup>788</sup> Gauteng Department of Economic Development op cit note 720 at 21.

<sup>789</sup> Likely alongside responsibilities for creation and enforcement of national standards through a national inspection division and accountability for interactions with other national agencies such as the Financial Intelligence Centre ('FIC') and national financial institutions.

<sup>790</sup> Gauteng Gambling Board 'Information brochure' at 1, available at [www.ggb.org.za/wp-content/uploads/2019/03/Info-brochure-English.pdf](http://www.ggb.org.za/wp-content/uploads/2019/03/Info-brochure-English.pdf), accessed 21 October 2023.

appears amenable to partner with the NGB in the regulation of online gambling in a way that ‘tak[es] into account the role of the National Gambling Board.’<sup>791</sup>

### 5.2.5 Setting standards and testing of standards

How should national standards be achieved and enforced in respect of online gambling on casino games in South Africa? Any legalisation of the activity likely requires a review and determination of minimum national standards for the operation of gambling devices and software that facilitate online gambling. Once such standards have been determined by any relevant authority, moreover, consideration needs to be given to the testing of such devices and software to assure their compliance with such standards. Evaluation of the optimal means to satisfy such requirements further challenges the division of responsibilities between the NGB and its provincial counterparts.

The current definition of ‘gambling device’ in the National Gambling Act 2004 appears to capture the licensing, registration, standards and testing of online casino game software. The National Gambling Amendment Act 2008 and IGR contemplated general standards for and licensing, registration and monitoring of gambling sites.<sup>792</sup> The Remote Gambling Bill 2014 similarly considered general regulation of online gambling sites and approval and licensing of remote gambling equipment.<sup>793</sup> Beyond these generic provisions, however, no comprehensive set of specific regulations have been proposed to provide certainty or clarity about minimum standards and means for monitoring and enforcing such standards.

Specific standards have been mooted for some activities. For example, the NGB has suggested that ‘a return-to-player ratio of 8% was a probable requirement’ for approval of all online games.<sup>794</sup> However, such specificity is lacking in any *lex lata* or *lex ferenda*. As such, the nature of specific standards and prescribed requirements for gaming devices and software require further consideration as part of any legalisation and regulation of gambling on online casino games in South Africa.

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<sup>791</sup> Gauteng Department of Economic Development op cit note 720 at 34.

<sup>792</sup> See ss 17 and 18 of the National Gambling Amendment Act 2008 amending s 17 and inserting s 18A of the National Gambling Act 2004 and cls 18, 19 and 23 of the Interactive Gambling Regulations.

<sup>793</sup> See ss 46 and 47 of the Remote Gambling Bill 2014.

<sup>794</sup> Thema Marasha, Acting NGB CEO, in Portfolio Committee on Trade & Industry op cit note 419 at 15.

The current decentralised approach to administration of gambling licenses in South Africa may have engendered inconsistent application and enforcement of existing standards for gaming devices by individual PLAs. The GRC found that ‘there appeared to be a lack of uniformity in the application of licensing criteria and a lack of compliance with the norms and standards’ set out in the National Gambling Act 2004.<sup>795</sup> Industry participants have lodged grievances about differing compliance standards between PLAs under existing regulations.<sup>796</sup>

It appears that some operators have exploited a lack of uniformity in standards to ‘forum shop’ for the most market-friendly PLA to approve their games and software systems. Since ‘a license from one regulator allows games to be offered nationwide . . . operators only need to find one regulator that is willing to permit, for example, slots under the existing legislation. That regulator is often the Western Cape Gaming [and Racing] Board, which has typically been the most progressive in the country.’<sup>797</sup> As one industry veteran confirmed:

“So the Western Cape has the Western Cape board and for whatever reason a lot of operators are licensed under it. . . . They seem to approve a lot of games where others might not. For instance, RNG [random number generator] games approved by the Western Cape board – there and Mpumalanga.”<sup>798</sup>

Exploiting the permissive culture of some PLAs, domestic market participants have used provisions of existing legislation to apply for and receive licenses to offer and operate modified versions of online casino games despite the prima facie illegality of such games in South Africa.<sup>799</sup> The connivance of some PLAs with bookmakers to

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<sup>795</sup> Portfolio Committee on Trade & Industry op cit note 27 at 7.

<sup>796</sup> Ibid at 6. One industry participant highlighted:

. . . specific aspects that created unnecessary barriers and costs for manufacturers and suppliers in the gambling industry. These included differing interpretations and applications between provinces of the same requirements written in their provincial gambling rules and regulations as the national legislation. This negatively impacted in areas such as the (i) application for approval to transport gambling machines and devices; (ii) application for approval for gambling equipment; and (iii) different gambling boards have different requirements and different turnaround times when it comes to the above.

<sup>797</sup> O’Boyle op cit 725 at 5 and 8.

<sup>798</sup> James Everett, BetGames Sales Director for Africa, in O’Boyle op cit note 725 at 6.

<sup>799</sup> O’Boyle op cit note 725.

effectively legalise online gambling on casino games under existing licenses underscores the dangers of any decentralised licensing framework.

Capacity constraints further challenge the efficacy of any decentralised approach to the testing of gaming devices permitted under national licenses. Industry participants have already complained of lengthy lead times (six months to one year) to obtain approvals for testing and approval of games and software.<sup>800</sup> Any legalisation of online gambling on casino games is likely to accelerate demand for introduction of new games and software systems that may exacerbate existing bureaucratic bottlenecks. The retesting of older equipment may further aggravate capacity constraints.<sup>801</sup>

A lack of qualified personnel and integrity of testing facilities may challenge the efficacy of any decentralised testing regime. The NGB has acknowledged such threats to the probity of the regulatory regime in its evaluation of the GRC's findings:

. . . the GRC report did not refer to the need for skills development and technical knowledge for regulators. The lack of a government-owned laboratory for gaming machines opened regulators up to all forms of new products being tested with no ability to verify the test results independently. A further weakness of independent technical, gaming machines and software testing laboratories was that they could undermine the objective of developing skills in the industry.<sup>802</sup>

The NGB recommended that creation of a 'government-owned laboratory for testing gambling machines should be explored so that skills were sought from within and outside the country to contribute to skills development and to keep abreast of emerging technologies.'<sup>803</sup> The Trade & Industry Portfolio Committee favoured the South African Bureau of Standards ('SABS') as the central agency to 'play a role in independently verifying test reports for gaming equipment, as a service to regulators.'<sup>804</sup> Beyond

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<sup>800</sup> Ibid at 7.

<sup>801</sup> As the Trade & Industry Portfolio Committee noted, any legalisation and regulation of online gambling on casino games in South Africa should involve 'the retesting and recertification of older equipment [which] should be made mandatory for operators within a set period of time to ensure compatibility and compliance with monitoring systems and the latest gaming standards.' Portfolio Committee on Trade & Industry op cit note 760 at 7.

<sup>802</sup> Loc cit.

<sup>803</sup> Loc cit.

<sup>804</sup> Loc cit.

establishment of uniform national standards, the means to achieve uniform testing of gambling devices therefore requires further consideration as part of any evaluation of the legalisation and regulation of online gambling on casino games in the country.

### 5.2.6 Monitoring and enforcement of license conditions

Who should monitor and enforce license conditions on online gambling sites? Any legalisation and regulation of online gambling on casino games in South Africa likely increases obligations on regulatory authorities to monitor the performance of new games and software systems. The National Gambling Amendment Act 2008 proposed to extend the NCEMS administered by the NGB beyond regulation of limited pay-out machines to all gambling devices.<sup>805</sup> According to a member of the Trade & Industry Portfolio Committee, one of the reasons mooted for expansion of the NCEMS was ‘because the PLAs were not getting or giving information.’<sup>806</sup> Under current legislation, ‘the NGB could only deal with enforcement when invited to do so by the provinces. The NGB could therefore not fulfil the expectations one would expect of a national organisation.’<sup>807</sup> Although the DTI confirmed that costs of any expanded NCEMS would be borne by the NGB and not provinces or operators,<sup>808</sup> industry participants (unsurprisingly) expressed opposition to the existence of such system as unnecessary, expensive and anti-competitive.<sup>809</sup>

Yet existence of a comprehensive and cost effective means to monitor the performance of online gambling sites with license conditions and enforce remedies arising from any breach thereof represents a fundamental condition precedent to any effective regulation of online gambling on casino games in South Africa. A national monitoring system

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<sup>805</sup> Supra s 3.2.7.

<sup>806</sup> D Macpherson in Portfolio Committee on Trade & Industry op cit note 482 at 11.

<sup>807</sup> Caroline Kongwa, NGB Administrator, in Trade & Industry Portfolio Committee op cit note 482 at 6. According to the Trade & Industry Portfolio Committee, echoing findings of the GRC:

The NGB was established after the existence of PGRAs [PLAs]. This has contributed to its inability to fulfil key areas of its mandate, as it is dependent on co-operation and support from PGRAs [PLAs]. The GRC was of the view that the approach adopted by the NGB in some respects had not been helpful to PGRAs [PLAs] and they tended to default to provincial legislation, which did not always align with national legislation, leading to the compromised uniformity.

Portfolio Committee on Trade & Industry op cit note 27 at 5.

<sup>808</sup> Portfolio Committee on Trade & Industry op cit note 482 at 12.

<sup>809</sup> Ibid at 4.

administered by the NGB likely unlocks opportunities to achieve standardised procedures for monitoring and enforcement actions less available if such responsibilities were divided between PLAs. It likely unlocks opportunities for economies of scale and consistencies across regulatory actions less available if individual provinces retained such responsibilities. Given such possibilities, the adoption and administration of any national monitoring system likely depends on the ability of the NGB and PLAs, and their political masters, to structure a compromise through which the NGB operates such system but coordinates the results of such monitoring activities and enforcement of remedial actions arising therefrom with PLAs.

Online gambling sites with national licenses that allow them to offer games throughout the country do not have the same nexus with PLAs as land-based casinos who manage premises within specific provincial jurisdictions. As with evaluation of applications, the ability of PLAs to monitor websites and performance of software programs hosted by online sites may not present significant administrative challenges if national licenses are only awarded to current licensees or a handful of additional operators. However, any regulatory regime that aspires to capture hundreds (if not thousands) of unregulated online gambling sites currently accessible in South Africa likely presents capacity challenges for individual PLAs. Moreover, PLAs may find it arduous to remedy complaints about sites from consumers resident outside their jurisdictions. The Western Cape Gaming and Racing Board, for example, may find it difficult to investigate and enforce remedies associated with any complaint by a punter in Limpopo Province.

A lack of national coordination was previously highlighted by the NGB as a concern in the regulation of existing gambling.<sup>810</sup> This position was endorsed by the South African Police Service.<sup>811</sup> Given such sentiments, responsibility for monitoring and enforcing compliance with national license terms *prima facie* appears best placed with the NGB.

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<sup>810</sup> Ibid at 4. The NGB suggested that:

. . . the curtailment of illegal gambling remains a challenge to regulators and a more concerted effort was needed from all law enforcement agencies and government departments to ensure effective enforcement mechanisms were in place. It raised a concern that gambling crimes reported by regulators were not prioritised by enforcement agencies due to a lack of collaboration with the cluster of ministers dealing with illicit crime.

<sup>811</sup> Loc cit. The South African Police Service suggested that:

Beyond monitoring compliance with operating licenses, monitoring performance of software systems likely creates challenges for regulatory authorities. Under s 27 of the National Gambling Act 2004, the integrity of gambling devices are monitored by the NCEMS which was intended to be extended to all gambling devices under the National Gambling Amendment Act 2008 as funded by a 6 per cent tax imposed thereunder.<sup>812</sup> While it is likely that international operators who elect to participate in any regulated industry in South Africa may readily submit their software programs for testing and approval, it is likely more problematic to link such software to the NCEMS, particularly if sites operated by international operators remain located outside of the country.

Current and previously proposed legislation and regulations do not appear to include any provisions that set specifications for the minimum performance of gaming devices.<sup>813</sup> This lacuna should be remedied as part of any legalisation and regulation of online gambling on casino games in South Africa. Given the strain on provincial resources to discharge existing regulatory responsibilities, centralisation of such responsibilities within the NGB as the coordinating agency (relying on the SABS as the standards agency and the National Regulator for Compulsory Specifications (‘NRCS’) as the testing and certifying agency) appears to represent a suitable solution to such circumstances.<sup>814</sup>

### 5.2.7 Number of online gambling operator licenses

How many online gambling operator licenses should be issued in South Africa? A lack of consensus appears to exist regarding the number of national licenses to issue to online gambling operators in the event of any legalisation of online gambling on casino games in the country. The GGB proposes to limit online gambling licenses to existing

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. . . the lack of harmonisation between provincial and national legislation resulted in a lack of uniformity and consistency in applying the legal framework and thus on enforcement activities and police training. Therefore, it supported any initiatives to harmonise and standardise the gambling enforcement regime.

<sup>812</sup> National Gambling Amendment Bill 2018 op cit note 481; Portfolio Committee on Trade & Industry op cit note 482.

<sup>813</sup> Portfolio Committee on Trade & Industry op cit note 375 at 2.

<sup>814</sup> This position broadly aligns with recommendations of the Trade & Portfolio Industry Committee that ‘where there were similar or the same requirements between the different provinces in their provincial gambling legislation, those requirements should be removed from their legislation and placed in national gambling legislation or in norms and standards.’ Portfolio Committee on Trade & Industry op cit note 27 at 7.

licensees. The Democratic Alliance suggests that the opportunity should be opened to current and new license holders.

Successive iterations of enacted legislation restricted the number of operating licenses in other areas of gambling.<sup>815</sup> This approach was adopted in the National Gambling Amendment Act 2008 for online gambling operator licenses and through the IGR which subsequently capped that number at ten licenses.<sup>816</sup> The Trade & Industry Portfolio Committee supported this limit.<sup>817</sup> The GRC endorsed this approach.<sup>818</sup>

Such positions egregiously overlook the realities of the online gambling market in South Africa, including the unfettered ability of international gambling sites to access the local market. Significantly, any effort to limit the number of licensed online gambling sites in South Africa likely erodes the efficacy and utility of any regulation of online gambling on casino games in the country.

Efforts to limit access to unlicensed online gambling sites by issuing a limited number of online gambling licenses have proved ineffective in other jurisdictions. Many governments have outlawed access to unlicensed online gambling sites.<sup>819</sup> Many countries have required licensed online gambling sites to partner with land-based casinos.<sup>820</sup> Many jurisdictions have given authorities the power to block unlicensed sites through enforcement actions against ISPs or direct legal actions.<sup>821</sup> None of these measures appear to have effectively curtailed access to local markets by thousands of (locally) unlicensed online gambling sites.<sup>822</sup>

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<sup>815</sup> Supra ss 3.2.1, 3.2.2, 3.2.3.1 and 3.2.3.3.

<sup>816</sup> Supra ss 3.2.3.1 and 3.2.3.3.

<sup>817</sup> Portfolio Committee on Trade & Industry op cit note 27 at 16.

<sup>818</sup> Ibid at 20. The GRC noted that:

... a maximum number of licences should be determined for online gambling activities to allow for the controlled roll-out of online gambling. This would also allow for the monitoring of the socio-economic impact over time. However, there should be sufficient licences to cover licensed totes and bookmakers that were already in existence and offering online gambling.

<sup>819</sup> Such as Delaware, West Virginia, Pennsylvania, New Jersey, the United Kingdom, Australia, Chile and Sweden. Supra ss 2.2.1.1 through 2.2.1.4, 2.2.2, 2.2.3, 2.2.5 and 2.2.6.

<sup>820</sup> Such as Delaware, West Virginia, Pennsylvania and New Jersey. Supra ss 2.2.1.1, 2.2.1.2, 2.2.1.3 and 2.2.1.4.

<sup>821</sup> Such as Sweden and Australia. In Australia, for example, the ACTRA blocked 324 illegal online gambling sites over a two year period. Supra ss 2.2.2 and 2.2.5.

<sup>822</sup> National Gambling Board op cit note 3 at 32; Bets.co.za op cit note 371; Capeetc op cit note 371.

What is the point of licensing a handful of online gambling sites if consumers remain within the reach of thousands of unlicensed online gambling sites? The NGB and PLAs most effectively protect consumers and regulate the activity if they are able to regulate the conduct of the largest number of online gambling sites. Indeed, the legalisation of online gambling in South Africa may legitimise the activity and encourage more South Africans to experiment with online gambling. Many of those people may not appreciate the difference between a handful of licensed sites and thousands of unlicensed sites readily accessible through their internet browsers. As the Trade & Industry Portfolio Committee noted ‘regardless of the government’s stance on interactive gambling, foreign online gambling sites would continue to offer services within South Africa due to the inability to control access to these sites.’<sup>823</sup>

The provision of online gambling licenses to existing land-based casinos is a well-worn part of the licensing of online gambling in many jurisdictions.<sup>824</sup> This policy choice is highly applicable to South Africa given concerns for the impact of any legalisation of online gambling on the business of land-based casinos.<sup>825</sup> However, limiting the availability of online gambling licenses to existing land-based casinos likely does not stunt the ability of consumers to access unlicensed online gambling sites from within South Africa. Moreover, it likely defeats the efficacy and utility of regulation of the activity in the country, particularly since unlicensed sites will not be subject to the administrative and financial burdens placed on licensed operators.

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<sup>823</sup> Portfolio Committee on Trade & Industry op cit note 375 at 5. The inability to control access to international gambling sites is aggravated by the prevalence of virtual private networks (‘VPNs’) which enable users of such networks to cloak their location and effectively bypass any geo-location restrictions imposed on activities by service providers and regulatory authorities alike. For example, see Ademilade Shodipe Dosunmu ‘How to avoid restrictions when gambling online’ *PrivacySaavy* 7 June 2024 at 1 available at <https://privacysavvy.com/geoblocking/censorship/avoid-online-gambling-restrictions/>, accessed 1 July 2024 and Nancy William ‘VPNs and online betting – can you use it? Is it legal or allowed?’ *FastestVPN* 14 June 2024 at 1 available at <https://fastestvpn.com/blog/vpns-and-online-betting/>, accessed 1 July 2024.

<sup>824</sup> For example, Pennsylvania issued online licenses to every land-based casino as part of its legalisation of online gambling in that jurisdiction while other jurisdictions (Delaware, West Virginia, Pennsylvania, New Jersey) require partnerships between land-based casinos and online operators as a licensing condition. Supra ss 2.2.1.1, 2.2.1.2, 2.2.1.3 and 2.2.1.4.

<sup>825</sup> The Casino Association of South Africa proposes to give land-based casinos priority in the award of online gambling licenses. Portfolio Committee on Trade & Industry op cit note 27 at 18. Further consideration should be given to automatically granting such land-based casinos such licenses provided that they comply with other licensing conditions.

Any discussion of legalisation of online gambling in South Africa may need to disregard past precedents and adopt a licensing regime which does not limit the number of licenses available to qualified online gambling operators. There are hundreds if not thousands of online gambling sites available to consumers in South Africa.<sup>826</sup> They are not going away. It is likely better to design a licensing regime that encourages online sites to register and participate in the regulation of the activity in South Africa and make it painful to remain outside the same. In the case of the licensing of online gambling sites, the more the merrier.

### **5.2.8 Duration of licenses**

How long should operators be given a license to offer online gambling on casino games in South Africa? Previously proposed pieces of legislation considered the duration of such licenses<sup>827</sup> which appear pertinent to further discussion of the same. In addition to offering permanent licenses, however, the Government may wish to consider marketing special licenses that encourage international operators to experiment with the domestic market or enter the country for marquee betting events on a short term basis.

#### **5.2.8.1 Permanent licenses**

Section 32 of the National Gambling Amendment Act 2008 amended s 32 of the National Gambling Act 2004 to integrate the licensing of online gambling operators into the extant framework for operators of other forms of gambling. At the same time, it altered the regime to provide for issuance of permanent licenses and temporary licenses for all forms of gambling in the country. Temporary licenses were available as a bridge to receipt of permanent licenses following fulfilment of any required conditions. They were also available to authorise the conduct of gambling within specified periods. The NGB was required to establish the duration of every national license as part of its issuance thereof. In fulfilment of that requirement, Regulation 23 of the IGR prescribed a maximum five year term for online gambling operator licenses.

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<sup>826</sup> National Gambling Board op cit note 3 at 32; Bets.co.za op cit note 371; Capeetc op cit note 371.

<sup>827</sup> Infra s 5.2.8.1.

The Remote Gambling Bill 2014 did not specifically address the duration of operating licenses which thereby invoked cl 3(2) of the Bill which defaulted governance of such matters to the National Gambling Act 2004. Furthermore, cl 63 of the Remote Gambling Bill 2014 granted the relevant minister broad regulatory powers which presumably applied to such matters. As such, the duration of licenses to operate online gambling activities appears well canvassed in previously proposed legislation. It merits further scrutiny as part of any subsequent effort to legalise and regulate the activity in South Africa.

#### **5.2.8.2 Special licenses**

Beyond award of permanent licenses to operate online gambling sites in South Africa, the Government may wish to build upon the ‘temporary license’ regime conceived under the National Gambling Amendment Act 2008 to market the availability of special licenses to operate gambling sites on a short term basis. Special licenses ranging from 60 to 120 days may be offered to online gambling sites to ‘test drive’ the domestic market or establish local access for major betting events. A similar hybrid licensing scheme has been mooted in Chile.<sup>828</sup>

The availability of short term licenses likely appeals to international operators as a means to experiment with the South African market. Such licenses enable operators to enter the market on a legal basis without fear of penalties or prosecution. It enables them to gain first-hand familiarity with the nature of opportunities and challenges associated with the local market. It may (or may not) represent an opportunity for them to evaluate the economics of the market and their market position to determine if they wish to apply for a permanent license. On the downside, the availability of short term licenses may encourage some operators to ‘hop in and hop out’ of the local market to the detriment of permanently licensed operators. Along with appropriate application and license conditions, this moral hazard likely requires redress under any such scheme, perhaps by limiting the number of times any operator may obtain special licenses within any rolling period up to a maximum total amount.

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<sup>828</sup> Chile proposes to offer five year renewable licenses or special 60 day licenses. Supra s 2.2.6.

South African regulatory authorities may benefit from issuance of special licenses. Licenses that make it easy for online gambling sites to ‘dip their toes’ in the local market make it equally easy to bring them within the local regulatory framework. Once participants in this framework, such sites may be less inclined to abandon their position and revert to unlicensed ways. Moreover, authorities may regulate and earn economic benefits by capturing business conducted by online gambling sites around once-off marquee events that may otherwise constitute illegal activities by unlicensed operators that generate no local economic benefits. As such, evaluation of the merits of short term licences may warrant further consideration as part of any licensing framework associated with legalisation and regulation of online gambling on casino games in South Africa.

### **5.2.9 Nature of license conditions**

What kind of conditions should be imposed on licensed online gambling sites in South Africa? Previously proposed legislation and regulations posited a myriad of conditions that should be attached to online gambling licenses in the country.<sup>829</sup> The Trade & Industry Portfolio Committee proposed other conditions to attach to online gambling licenses.<sup>830</sup> Many of these requirements and proposals mirrored past and present international precedents.<sup>831</sup> While the substance and form of such requirements and proposals differ between them, they share two overriding policy objectives: (1) to seize jurisdiction over online gambling sites operating in South Africa; and (2) to gain regulatory control over such sites to ascertain and enforce compliance with South African law (including license conditions). Any consideration of the optimal means to regulate online gambling on casino games in South Africa likely needs to consider the efficacy of proposals in realising these objectives. It likely needs to prospect for other means that equally or more effectively achieve these objectives.

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<sup>829</sup> Supra s 3.2.3.1.

<sup>830</sup> Supra s 3.4.6.

<sup>831</sup> Supra s 2.3.

Any requirements for online gambling sites to locate servers or control database within South Africa are unlikely to achieve the policy objectives in any meaningful way.<sup>832</sup> Any obligation for online gambling sites to maintain a call centre in South Africa is unnecessary (as South Africans could access a toll free number for a call centre located in another jurisdiction) and unlikely achieves the policy objectives.<sup>833</sup> Moreover, these requirements impose additional conditions on gambling sites in areas already served or readily served by existing infrastructure or services. It is unlikely that international gambling sites will comply with such demands which defeats realisation of the policy objectives and undermines the efficacy of any regulation of online gambling on casino games in the country.

A requirement for online operators to establish a local company as a condition for obtaining an online gambling license in South Africa may further realisation of the overriding policy objectives. This obligation follows well-worn international precedents.<sup>834</sup> From a public sector perspective, such requirement establishes a *loci praesentia* for operators in the local market as governed by South Africa law. It may help create a level playing field between international operators and domestic operators sought by the NGB and industry participants.<sup>835</sup> From a private sector perspective, this obligation represents a readily realisable burden that may be achieved on a cost effective basis, particularly if operators are international entities functioning in foreign currencies. Disclosure of beneficial ownership information pursuant to ss 33, 50, and 56 of the Companies Act 71 of 2008<sup>836</sup> is unlikely to dissuade many operators who typically comply with the same in international markets.<sup>837</sup>

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<sup>832</sup> Supra ss 2.3.2 and 3.4.6.

<sup>833</sup> Supra s 3.4.6.

<sup>834</sup> Such as regulatory requirements in Pennsylvania, West Virginia, the Netherlands, Sweden and Chile. Supra s 2.2.

<sup>835</sup> Portfolio Committee on Trade & Industry op cit note 27 at 20.

<sup>836</sup> Companies Act 71 of 2008 GN 3444 of RG 11585 of 24 May 2023 available at <https://www.cipc.co.za/wp-content/uploads/2023/05/Companies-amendment-regulations-2023.pdf>, accessed 2 October 2023.

<sup>837</sup> For example, pursuant to Schedule 1A of the Companies Act 2006 and Schedule 2 of the Economic Crime (Transparency and Enforcement) Act 2022 in the United Kingdom. See Companies Act 2006 c 46 available at <https://www.legislation.gov.uk/ukpga/2006/46/contents>, accessed 2 October 2023; Economic Crime (Transparency and Enforcement) Act 2012 c 10 available at <https://www.legislation.gov.uk/ukpga/2012/10/contents>, accessed 2 October 2023.

The formation of local companies potentially realises several benefits for international operators. Through such entities, online sites may access local banking systems. If applicable, they may claim VAT. In the event that domestic proceeds of online gambling activities are taxed in South Africa, they may potentially incur local operating costs that offset part (or all) of their local tax burden.

Any obligation for international operators to employ a natural person domiciled in South Africa as their local representative may advance realisation of the policy objectives. It likely increases the nexus between the company and *lex loci*. It creates a local point of contact for regulatory authorities to coordinate efforts to access information and enforce compliance by the operator with South African law.

Any such local representative may or may not serve as a director of such company. Given the nature of the business, it may be prudent to establish qualifications for such persons, such as a requirement for any local representative to be a practicing attorney or qualified chartered accountant. It may be prudent to establish obligations for such persons, such as fulfilment of reporting requirements and access requests by authorities, under pain of penalties for non-compliance with such obligations. These measures likely give authorities greater comfort that such companies will be administered properly and any reporting and access requests receive diligent consideration and improve compliance outcomes. These measures may have a secondary effect of creating a market for such services that stimulates employment by specialist attorneys and accountants. Indeed, it may encourage use of South Africa as a regional hub for gambling operations in Sub-Saharan Africa by international operators with additional economic and employment benefits to the country.

Should formation of a local company and appointment of a local representative constitute mandatory conditions for receipt of an online gambling license in South Africa? While these measures may represent affordable and attractive propositions for large international gambling sites with opportunities to extract benefits from such arrangements, they may not appeal to other international sites without the scale to unlock such benefits. It may be necessary to create additional incentives for companies to comply with such measures. Specific incentives that may be offered to international operators to form a local company and appoint a local representative may be considered

as part of broader incentives and penalties included in any licensing and regulatory framework to govern online gambling on casino games in South Africa.

### 5.2.10 Regulation of market access

How can regulatory authorities control access to the local market by international gambling sites? The borderless nature of online gambling makes it difficult to regulate access to the South African market by international gambling sites.<sup>838</sup> It makes it difficult to punish sites that choose to evade any licensing and regulatory regime. As the GRC acknowledged, ‘there were few incentives for online operators to become licensed, as the tax implications were usually substantial and as it was already difficult to prevent their access to local punters.’<sup>839</sup> To license and regulate online gambling on casino games in South Africa, the Government needs the ability to exercise control over the activity. Reliance of gambling sites on internet connectivity to conduct business with their customers opens an opportunity for the Government to achieve such control.

As part of any consideration of legalisation and regulation of online gambling on casino games in South Africa, the Government may wish to adopt regulations that restrict the ability of ISPs to provide digital connectivity to online gambling sites. As the Chief Director in the Consumer and Corporate Regulation Division of the DTI once advised: “‘we can stop online gambling – by banning the Internet.’”<sup>840</sup> The absurdity of such measure underscores the senselessness of only licensing and regulating a handful of online gambling sites while thousands of unlicensed sites enjoy access to consumers. Although banning the internet is not a realistic option, regulation of internet access associated with unlicensed online gambling sites through ISPs represents an emerging international trend<sup>841</sup> that may be considered in South Africa as part of any regulation of online gambling on casino games in the country.

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<sup>838</sup> Supra s 3.4.4.

<sup>839</sup> Portfolio Committee on Trade & Industry op cit note 27 at 15.

<sup>840</sup> Attributed to MacDonald Netshitenzhe by Ghaleb Cachalia, Shadow Deputy Minister of Trade and Industry for the Democratic Alliance ‘The government is willing to “ban” the internet to stop online gambling’ *My Broadband* 5 December 2018 1, available at <https://mybroadband.co.za/news/government/288606-the-government-is-willing-to-ban-the-internet-to-stop-online-gambling.html>, accessed 13 March 2023.

<sup>841</sup> It has met with limited success in Australia and other jurisdictions, supra s 2.3.4.

Similar to powers given to counterparts in international jurisdictions,<sup>842</sup> the NGB may be granted authority to compel ISPs to block access to unlicensed gambling sites pursuant to transparent procedures. As recently as 2018 the NGB Administrator indicated that such a measure represented a viable regulatory tool in South Africa, albeit with some challenges:

. . . the Internet **Service Providers' Association (ISPA) which had agreed** that it would shut down the website on which there was illegal gambling but often websites were dotcom websites that did not fall under SA registries, which reported to the Department of Communications.

The NGB was currently looking at blocking or filtering those website [sic] but the country required the necessary legislation to do so. . . . It boiled down to a safety and security issue and the Republic would have to make a decision about how to deal with it. The NGB would have to filter the information coming into the country but it would require various government departments to assist in blocking websites. [bold original]<sup>843</sup>

As in other jurisdictions,<sup>844</sup> consumers in South Africa may be conferred an ability to report unlicensed gambling sites to authorities which, after due process, may compel ISPs to block such sites.

Yet thousands of extraterritorial gambling sites are likely to remain accessible by players from computers, tablets and phones within the borders of South Africa. Empowering authorities and consumers to block a few hundred gambling sites is unlikely to meaningfully protect South African consumers from predatory international gambling sites nor encourage market participants to accede to and comply with any local regulatory framework. What more can be done to strangle internet access by unlicensed gambling sites into South Africa?

Technological advancements are making it increasingly easy to block access to gambling sites. While traditional control means generally required identification of

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<sup>842</sup> Loc cit.

<sup>843</sup> Caroline Kongwa, NGB Administrator, paraphrased by Portfolio Committee on Trade & Industry op cit note 482 at 14.

<sup>844</sup> Supra s 2.2.2.

specific domain names or internet protocol ('IP') addresses (which remains a valid approach), several companies have developed algorithm-based blocking software and content controls which allow individuals to more broadly restrict access to gambling sites and gambling related advertisements.<sup>845</sup> Typically such software continues to allow users to override controls to enter the names or IP addresses of specific sites.<sup>846</sup> Although used by individuals (often with support of responsible gambling associations),<sup>847</sup> such technology is scalable for use by authorities as part of a national initiative. Search engines have already adopted similar controls through blocking extensions such as BlockSite or GamblingBlocker for Google Chrome.<sup>848</sup>

As part of any intervention focused on choking access to the domestic market by unlicensed gambling sites, South African authorities may wish to consider two regulatory initiatives that leverage such nascent technological capabilities. As an extension of existing responsible gambling requirements, the Government may wish to require blocking software to be available upon request to any individual at no cost as an extension of existing NRGP services.<sup>849</sup> As a more significant initiative, the Government may wish to require every ISP, search engine and social media platform (such as TikTok, SnapChat and Instagram) that operates in South Africa to affirmatively block all gambling sites and gambling advertisements as a condition of their continued commerce in the country. Every licensed gambling site would be placed on an exclusion list to avoid the effects of this latter initiative. Such a system may encourage gambling sites to participate in any licensing and regulatory regime as it provides certainty of internet access into South Africa for licensed sites while threatening continuity of internet access into the country for unlicensed sites. Subject to minimum age requirements and other restrictions, it respects the *juris privati* of South Africans to engage in online gambling on licensed sites in their homes similar to the current access they enjoy to gamble in licensed land-based casinos.

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<sup>845</sup> For example, Responsible Gambling 'How to completely block gambling websites on all your devices?' available at <https://rg.org/saferplay/blocking-gambling-sites>, accessed 4 October 2023.

<sup>846</sup> Ibid at 4.

<sup>847</sup> Ibid at 3. Such as TalkBanStop, a responsible gambling charity in the United Kingdom.

<sup>848</sup> Ibid at 4.

<sup>849</sup> Ibid. A similar program operates in the United Kingdom. However, challenges arising from use of VPNs may limit the effectiveness of such measures. Supra note 823.

These initiatives are technologically feasible. Numerous companies operate blocking software. Service providers are likely to seize upon the opportunity to partner with the NRGF to offer blocking software to individuals and implement system-wide ISP programs. Search engines and social media platforms already have such capabilities.<sup>850</sup>

As technology reaches deeper into people's lives, Government intervention in the commerce of search engines and social media platforms is becoming more commonplace.<sup>851</sup> Adopting regulatory trends in international markets, these initiatives place the onus on private sector actors to implement public interest priorities rather than encumber under-capacitated, under-staffed and under-funded public agencies with this burden. Private sector actors may resist this burden. However, responsible regulation of gambling is a sound public interest pursuit and such actors may find few friends internationally or domestically to support such resistance. As long as the costs of compliance are materially less than the benefits received from continuing commerce in South Africa, these private sector actors are likely to comply with their obligations. The presence of suitable penalties to discourage non-compliance with such initiatives may further persuade such actors to accede to the same.

Any such intervention likely achieves significant public policy goals. From a regulatory perspective, it enables authorities to exercise meaningful influence over online gambling sites by leveraging control over their internet access into the country through domestic service providers. It increases opportunities for authorities to enforce consumer protection legislation and financial probity laws. From an administrative perspective, it likely reduces the number of online gambling sites accessible in the country which likely eases the burden of regulating online gambling. From a public

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<sup>850</sup> Loc cit.

<sup>851</sup> For example, Australia has intervened to compel search engines to pay news companies for their content. See Bryon Kaye 'Australia says law making Facebook and Google pay for news has worked' *Reuters* 2 December 2022 available at <https://www.reuters.com/technology/australia-says-law-making-facebook-google-pay-news-has-worked-2022-12-02/>, accessed 4 October 2023. Canada has embarked on a similar effort. 'Canada to start planning how it will make internet giants pay for news' *Reuters* 24 August 2023 available at <https://www.reuters.com/technology/canada-start-planning-how-it-will-make-internet-giants-pay-news-2023-08-24/>, accessed 4 October 2023. Meta is being sued in federal and state courts by attorneys general representing 42 states in the USA which allege that 'features on its Facebook and Instagram social media platforms are addictive and are aimed at kids and teens' in contravention, inter alia, of the Children's Online Privacy Protection Act of 1998, 15 USC §§ 6501–6506. Laura Feiner 'Meta sued by 42 attorneys general alleging Facebook, Instagram features are addictive and target kids' *CNBC* 24 October 2023 at 1, available at <https://www.cnbc.com/2023/10/24/bipartisan-group-of-ags-sue-meta-for-addictive-features.html>, accessed 25 October 2023.

interest perspective, the intervention likely curtails over-stimulation opportunities, reduces availability of betting for problem gamblers, increases protection of vulnerable persons and limits unethical behavior (if gambling is considered *contra bonos mores*).

Would such an intervention contravene any constitutional rights in South Africa? The current prohibition on online gambling on casino games likely passes constitutional muster.<sup>852</sup> Moreover, it is settled law that unlicensed international gambling sites do not have any right to engage with customers in South Africa.<sup>853</sup> Any affirmative limitation placed on internet access to unlicensed online gambling sites *prima facie* falls within the *ratio decidendi* of such *stare decisis*.

Would such intervention contravene any international agreements? South Africa is signatory to the General Agreement on Trade in Services,<sup>854</sup> among other compacts, and consideration needs to be given to its obligations thereunder.<sup>855</sup> Such intervention does not appear to deviate from blocking activities undertaken by other authorities in other countries subject to similar conventions.<sup>856</sup> It appears that a properly constituted intervention is unlikely to run afoul of any of South Africa's treaty obligations.

Would such intervention encourage participation by online gambling sites in a domestic licensing and regulatory framework? The success of any intervention likely depends upon effective implementation and enforcement of the same. Coordination is likely required between the NGB, PLAs and other public sector stakeholders such as the Independent Communications Authority of South Africa ('ICASA') and Department of Communications, among others. Significant interactions are likely required with ISPs, search engines and social media platforms. Assuming successful implementation of this intervention, the cost to remain outside the licensing and regulatory framework (loss of internet access into South Africa) appears sufficiently detrimental to the conduct of

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<sup>852</sup> For discussion of this matter see Monnye *op cit* note 31.

<sup>853</sup> *Supra* s 3.3.

<sup>854</sup> World Trade Organization *General Agreement on Trade in Services* available at [https://www.wto.org/english/tratop\\_e/serv\\_e/gatsintr\\_e.htm](https://www.wto.org/english/tratop_e/serv_e/gatsintr_e.htm), accessed 18 October 2023.

<sup>855</sup> Consistent with recommendations of the Trade & Industry Portfolio Committee. Portfolio Committee on Trade & Industry *op cit* note 30 at 33.

<sup>856</sup> *Supra* s 2.2.

their business to encourage online gambling sites to participate in such framework, particularly if bundled with other benefits.<sup>857</sup>

### 5.2.11 Regulation of financial transactions

How can any *lex ferenda* capture financial transactions associated with online gambling on casino games in South Africa in a way that addresses public interest concerns over money laundering, terrorism financing and contraventions of local laws? The most widespread and likely most successful efforts to induce gambling sites to participate in regulatory regimes in international jurisdictions have focused regulatory actions on financial institutions and other payment companies that facilitate financial transactions between players and such sites.<sup>858</sup> Among other powers, authorities have been endowed with broad discretion to interdict payments<sup>859</sup> and block payments<sup>860</sup> between them. Financial institutions and payment processors that facilitate transactions for unlicensed gambling sites face steep penalties.<sup>861</sup>

South African authorities have studied this approach. There has been considerable debate over the roles of the Financial Intelligence Centre Act and other collateral legislation in the regulation of online gambling licenses, including in the areas of financial probity, money laundering and terrorism financing.<sup>862</sup> Draft legislation and regulations have placed onerous obligations on financial institutions, public sector agencies, gambling sites and players to ensure that financial transactions occur on a highly regulated basis.<sup>863</sup> Such proposals have received a poor reception from these stakeholders. Regulatory authorities and financial institutions have expressed concerns for their abilities to execute additional obligations associated with the regulation of online gambling, particularly detection of payments between account owners and

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<sup>857</sup> Internet connectivity may form part of a package of market incentives that includes advertising advantages, financial system access and tax benefits. *Infra* ss 5.2.10, 5.2.12 and 5.2.13.

<sup>858</sup> *Supra* ss 2.2.1 and 2.3.4.

<sup>859</sup> *Loc cit.*

<sup>860</sup> United Kingdom Gambling Commission *op cit* note 277.

<sup>861</sup> *Supra* s 2.3.3.

<sup>862</sup> *Supra* ss 2.3.1, 3.2.3.3 and 4.2.6.

<sup>863</sup> *Supra* ss 3.2.3.1, 3.2.3.3, 3.4.8 and 4.3.2 *passim*.

unlicensed gambling sites.<sup>864</sup> Online gambling operators have expressed concerns with the practicality of such requirements.<sup>865</sup>

Previous proposals to regulate financial transactions related to online gambling in South Africa do not appear to have accounted for the spectrum of financial channels available to South Africans to engage in illegal online gambling.<sup>866</sup> They do not appear to have addressed the full range of financial channels available to South Africans to engage (without any financial limits) in legal online gambling.<sup>867</sup> For example, people may buy over-the-top ('OTT') vouchers to use on licensed gambling sites at major retail stores, petrol stations and other sales outlets in the same way that they buy airtime vouchers to use on their mobile phones.<sup>868</sup> People may even use airtime vouchers to purchase gambling vouchers for use on such sites.<sup>869</sup> These vouchers completely bypass use of any bank accounts, although major banks offer opportunities to purchase vouchers using funds drawn from bank accounts.<sup>870</sup> Such purchases do not appear to be regulated any differently from customary financial transactions.<sup>871</sup>

In reviewing the interconnectivity of financial services with online gambling in South Africa, authorities may wish to return to the drawing board and examine the objectives behind regulation of such services vis-à-vis the gambling industry given the nature of today's financial services market in the country. Based on international precedents, regulation of such services appears to arise from a desire to permit, monitor, regulate and exercise compliance and enforcement powers over financial transactions involving gambling sites.<sup>872</sup> Such international precedents further suggest a desire to prohibit

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<sup>864</sup> Supra s 4.3.6.

<sup>865</sup> Supra s 3.4.8.

<sup>866</sup> For example, South Africans enjoy the opportunity to bank with unlicensed online casinos through credit cards, debit cards, bitcoin, e-wallets, electronic funds transfers and prepaid vouchers, PayPal, wire transfers and many other payment gateways. Top Online Casinos 'Casino banking in South Africa' available at <https://www.toponlinecasinos.co.za/casino-banking/>, accessed 12 October 2023.

<sup>867</sup> BettingGuideZA 'Hollywoodbets deposits | how to buy Hollywoodbets vouchers in-store or online' available at <https://www.bettingguide.co.za/tips/how-to-buy-hollywoodbets-vouchers-hollywoodbets-deposits/>, accessed 12 October 2023.

<sup>868</sup> Ibid at 1.

<sup>869</sup> Online Betting 'Where and how to buy Hollywoodbets vouchers' available at <https://onlinebettingsa.co.za/hollywoodbets-review/hollywoodbets-voucher/>, accessed 12 October 2023.

<sup>870</sup> Loc cit. For example, Hollywoodbets vouchers may be purchased through Nedbank, FNB, TymeBank and Capitec Bank.

<sup>871</sup> Based on a literature review conducted on 26 October 2023. See also Mochiko op cit note 728.

<sup>872</sup> For example, UIGEA supra s 2.2.1.

financial transactions involving unlicensed gambling sites and punish payment companies and gambling sites associated therewith.<sup>873</sup>

What are the reasons behind these desires to regulate financial transactions associated with online gambling? Examination of international precedents suggests three central objectives: (1) a determination to achieve transparency of financial flows in the online gambling industry to curtail money laundering, terrorism financing and other criminal malfeasance associated with such flows; (2) a resolve to protect players from unscrupulous practices by gambling sites and themselves; and (3) the opportunity to tax gambling.<sup>874</sup> South African authorities may wish to consider these imperatives when evaluating the nature of regulations to govern financial transactions related to online gambling on casino games in the country.

Concerns for laundering of money, terrorism financing and financial flows related to other criminalities are not limited to the gambling industry. Such concerns represent pervasive public interest priorities that extend to all types of economic activities.<sup>875</sup> Any regulation of financial transactions related to online gambling may build upon the same recipe used for other economic sectors, including the existing gambling industry. While money laundering and terrorism financing risks may be more prevalent in the industry,<sup>876</sup> there may not be a need to invent an entirely new financial transaction ecosystem to regulate financial flows associated with online gambling as proposed by the National Gambling Amendment Act 2008 and IGR.<sup>877</sup> Mitigation of money laundering, terrorism financing and other criminal conduct in the online gambling industry is likely addressed through rigorous attention to enforcement of compliance with existing legislation and regulations, including provisions that apply to existing licensed operators (particularly bookmakers) as well as any additional monitoring and compliance obligations adopted to supplement existing laws.

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<sup>873</sup> Loc cit.

<sup>874</sup> Supra s 2.2 in toto, ss 2.3.1, 2.3.3 and 2.6 passim.

<sup>875</sup> As evidenced by the extensive scope of stand-alone legislation in South Africa addressing such matters. cf note 268.

<sup>876</sup> This includes the land-based casinos in South Africa. Financial Intelligence Centre ‘Gambling Sector: Assessment of the inherent money laundering and terrorist financing risks’ March 2022 available at <https://www.fic.gov.za/Documents/Gambling%20Sector%20Risk%20Assessment%20Report%20FINAL.pdf>, accessed 12 October 2023.

<sup>877</sup> Supra ss 3.2.3.1 and 3.2.3.2.

To entice gambling sites to participate in any regulatory framework in South Africa, authorities likely need to make it as easy for customers to sign up to play on licensed sites as signing up to play on unlicensed sites. South Africans often sign up for accounts with retail stores, mobile phone networks, petrol companies, banks and other companies in the ordinary course of their lives.<sup>878</sup> Strict consumer protection laws govern the operation of such accounts.<sup>879</sup> Rather than imposing restrictive account conditions on players that likely encourage use of illicit gambling sites which offer more user-friendly account terms, authorities may wish to allow licensed gambling sites to make it as easy for consumers to open accounts with them as it is for consumers to open accounts with Makro or Cell C, particularly since no credit is likely extended to players through any gambling accounts.<sup>880</sup>

Consistent with international precedents, South African authorities may wish to focus on transactional relationships between gambling sites and financial service providers<sup>881</sup> as a cardinal feature of any regulation of online gambling on casino games in the country. Any licensing and regulatory framework that makes it easy for online gambling sites to open bank accounts in South Africa may go a long way towards satisfying the three public policy objectives (financial supervision, player protection, tax collection) sought to be realised through regulation of financial transactions in the gambling industry. Indeed, the opening of local bank accounts by international gambling sites appears to generate benefits for three key constituencies: gambling operators; financial institutions; and regulatory authorities.

Gambling sites likely benefit from access to local banks. The convenience of receiving deposits and making payments to players in local currency without the need to erode value and absorb compliance and transaction costs of thousands of relatively small

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<sup>878</sup> Londiwe Buthelezi 'New store accounts are surging as cash-strapped South Africans buy on credit' *News 24* 29 June 2023 at 1-2 available at <https://www.news24.com/fin24/companies/new-store-accounts-are-surging-as-cash-strapped-south-africans-buy-on-credit-20230629>, accessed 12 October 2023.

<sup>879</sup> Such as the Consumer Protection Act 68 of 2008 GG 32186 of 29 April 2008 available at [https://www.gov.za/sites/default/files/32186\\_467.pdf](https://www.gov.za/sites/default/files/32186_467.pdf), accessed 12 October 2023.

<sup>880</sup> Based on previously proposed legislation, it is highly likely that any regulation of online gambling on casino games in South Africa would restrict the extension of credit to players. For example, s 13 of the National Gambling Amendment Act 2008 and cl 13 of the Remote Gambling Bill 2014. Furthermore, any ease of account opening does not limit the ability of authorities to impose certain account conditions, such as the right of account holders to self-limit and self-restrict activity on their accounts.

<sup>881</sup> *Supra* s 2.2.1.

foreign exchange transactions likely generates financial gains for operators. The ability to deploy various types of accounts, from current accounts to customer foreign currency ('CFC') accounts, and readily expatriate profits through compliance with exchange control laws without fear of prosecution or penalties likely delivers similar benefits. The opportunity to earn interest on surplus funds in local accounts in a high interest rate environment may appeal to operators. Consolidation of financial transactions for local business within a single set of accounts may constitute a further advantage arising from access to the local banking system by international gambling sites.

Local financial institutions and payment companies likely benefit from use of local accounts by gambling sites. It likely improves their ability to execute and monitor financial transactions associated with online gambling. It likely improves their ability to assure compliance with local laws, including exchange control provisions. It likely results in more local currency staying in the country as international gambling sites use local balance of payments to settle local obligations. It may peripherally strengthen the balance sheet of and create additional business for local financial institutions and payments companies. It potentially creates additional marketing, transactional and compliance jobs at such institutions and companies.

Use of local bank accounts by international gambling sites likely improves the integrity of any regulation of online gambling on casino games in South Africa. It heightens the nexus between international operators and the local jurisdiction which may increase the ability of authorities to govern the conduct of gambling sites due to their proximity to their financial resources. It likely improves the ability of authorities to monitor and enforce compliance with *lex loci* through access to records at local financial institution and payment companies. If desired, it may facilitate a requirement for online gambling sites to maintain a minimum deposit to cover potential obligations to South African customers that mitigates any 'duck and run' default risks associated with extraterritorial sites operating in the country. It likely improves the ability of authorities to impose fees or taxes on such operations and monitor and enforce compliance therewith. Although not directly linked to operation of local bank accounts, it may improve the ability of authorities to detect compliance or non-compliance by operators with non-financial license conditions such as self-limit and self-exclusion requests by players,

By focusing regulation of financial transactions between players and online gambling sites on operator accounts, authorities likely overcome many of the objections raised by public sector agencies and financial institutions tasked with regulation and execution of such transactions.<sup>882</sup> It makes it easy for financial institutions to monitor and manage cross-border flows of funds, including credit card transactions. It likely resolves the principal concerns raised by the Financial Intelligence Centre regarding proposed provisions of the National Gambling Act 2009 and IGR by improving the ability of financial institutions to identify players, preserve customer records at monitor transactions involving online gambling. It likely offers a cost effective and efficient means for financial institutions and relevant authorities to supervise and enforce sanctions arising from non-compliance with license terms and local law.

Would access to local financial institutions and payment companies represent a sufficient incentive to induce international gambling sites to submit to regulation of their presence in South Africa? If not, how could authorities further motivate such sites to participate in the local regulatory regime? Most obviously, the threat of penalties and punishment against operators who choose to stay outside of the local banking system may tip the scales towards participation in such framework. As such, any evaluation of the optimal means to regulate online gambling on casino games in South Africa likely needs to consider the introduction of severe penalties to unlicensed gambling sites caught operating in South Africa. Based on international precedents, punitive measures may include confiscation of all funds and criminal penalties which, as recommended by the Portfolio Committee on Trade & Industry, may include jail terms.<sup>883</sup>

#### **5.2.12 Personal liability**

Can South African authorities target owners, directors, officers and employees of unlicensed gambling sites as part of any regulation of online gambling on casino games in the country? International precedents exist for such measures.<sup>884</sup> In several countries, such individuals are subject to detention on arrival in countries where their companies

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<sup>882</sup> Supra s 4.3.6.

<sup>883</sup> Portfolio Committee on Trade & Industry op cit note 375 at 6.

<sup>884</sup> Supra s 2.3.3.

operate without license.<sup>885</sup> Indeed, the prosecution of such individuals for contravention of domestic gambling laws has met with some success, particularly in America.<sup>886</sup>

South Africa is the largest economy in Africa.<sup>887</sup> It is a difficult market for companies to ignore if looking to grow business on the continent, including in the online gambling market. It is a popular tourism destination which offers world-class wildlife viewing, winelands, golfing and other leisure activities.<sup>888</sup> The authority to restrict owners and associated personnel of online gambling companies from visiting South Africa or the power to arrest such individuals on arrival in the country represent juridical instruments that may be included in any ‘made in South Africa’ regulatory toolbox to motivate such individuals to license their operations in the country. Even if such discretion is rarely or never used, the availability of these remedies in terrorem may constitute a viable means to encourage participation of international gambling sites in any local licensing and regulatory framework.

While availability of criminal sanctions against owners and personnel of (locally) unlicensed gambling sites likely represents a suitable regulatory ‘stick’ consistent with international precedents, authorities may not wish to extend the option of criminal prosecution as a remedy against locally licensed gambling sites or personnel except for conduct that constitutes a criminal offence under other domestic laws, including statutes dealing with white collar crimes such as Prevention and Combatting of Corrupt Activities Act 2004, Financial Intelligence Centre Act 2011 and Prevention of Organised Crime Act 1998. The prospect of criminal conviction for non-compliance with any domestic regulatory framework by licensed operators (other than through criminal conduct) may discourage them from participating in the same.<sup>889</sup> The prospect of criminal conviction of any local personnel of licensed gambling sites arising from non-compliance by their sites with any license conditions may discourage qualified and

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<sup>885</sup> Loc cit.; Hoskins and Lovecek op cit note 154 at 7.

<sup>886</sup> See discussion of ‘Black Friday’ in the United States supra s 2.2.1 and ACMA powers in Australia supra 2.2.2.

<sup>887</sup> Monique Vanek ‘South Africa set to topple Nigeria to regain mantle as continent’s biggest economy’ *Bloomberg* 17 October 2023 available at <https://www.bloomberg.com/news/articles/2023-10-17/south-africa-may-topple-nigeria-as-africa-s-biggest-economy?srnd=all#xj4y7vzkg>, accessed 17 October 2023.

<sup>888</sup> ‘Tourism’ available at <https://www.gov.za/about-sa/tourism#Guide>, accessed 17 October 2023.

<sup>889</sup> For an interesting discussion on corporate criminal liability in South Africa, see Dorothy Mmakgwale Farisani ‘Corporate criminal liability in South Africa: what does history tell us about the reverse onus provision?’ *Fundamina* 23(1) 1–19 available at [https://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S1021-545X2017000100001](https://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1021-545X2017000100001), accessed 17 October 2023.

competent people from working for such companies, including local representatives such as attorneys and chartered accountants. As such, careful consideration needs to be given to use of criminal sanctions as remedies against local entities and personnel under any framework governing online gambling on casino games in South Africa.

### 5.2.13 Regulation of advertising

How should authorities regulate advertising by online gambling sites in South Africa? Beyond connecting with customers through the internet and transacting with customers through payment service providers, online gambling sites need to advertise to attract customers and sustain their business. Given the lack of any brick and mortar storefront, it is not surprising that online gambling sites spend a lot of money on advertising.<sup>890</sup> Given the impact of advertising on fueling demand for online gambling,<sup>891</sup> it is not surprising that authorities spent a lot of time seeking to ban or curb such advertising.<sup>892</sup>

Regulation of advertising by online gambling sites was addressed as part of previously proposed legislation that attempted to legalise and regulate online gambling on casino games in South Africa. The National Gambling Amendment Act 2008 and IGR extended existing laws and regulations that restricted advertising by licensed gambling operators to licensed online gambling sites.<sup>893</sup> Proposed private member's bills echoed this sentiment.<sup>894</sup> While the Trade and Industry Portfolio Committee initially sought an outright ban on online gambling advertisements,<sup>895</sup> a consensus subsequently appeared to emerge around the GRC's position that 'the regulation [of online gambling] could allow licensed operators to advertise their services, granted that there was strict

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<sup>890</sup> In the United States alone, online gambling advertising is estimated to reach USD 1.9 billion in 2023. 'Online gambling ad spend in the U.S. 2021-2023' *Statista* 9 October 2023 at 2, available at <https://www.statista.com/statistics/1350628/online-gambling-ad-spend-usa/#:~:text=The%20source%20projected%20that%20the,to%201.9%20billion%20U.S.%20dollars.,> accessed 18 October 2023.

<sup>891</sup> For further discussion, Morgane Guillo-Landreat, Karine Gallope-Morvan, Delphine Lever, Delphine Le Goff and Jean-Yves Le Reste 'Gambling marketing strategies and the internet: what do we know? A systemic review' *Frontiers in Psychology* (2021) 12 1–21 available at <https://www.frontiersin.org/articles/10.3389/fpsy.2021.583817/full>, accessed 18 October 2023.

<sup>892</sup> The importance of the regulation of advertising in online gambling is reflected by its pervasive discussion throughout this study, including throughout ss 2.2, 2.3.1, 3.2, 4.3.2 and, in particular, s 2.3.7 (international jurisdictions) and s 4.3.3 (South Africa), among other sections.

<sup>893</sup> Supra ss 3.2.3.1 (National Gambling Amendment Act 2008) and 3.2.3.3 (Interactive Gambling Regulations).

<sup>894</sup> Supra s 3.2.5.

<sup>895</sup> Supra s 4.3.3.

enforcement of illegal advertising by unlicensed operators.’<sup>896</sup> Furthermore, the ability of licensed online gambling sites to advertise their games in the country is consistent with recommendations of the Financial Intelligence Centre which noted that ‘service providers should not be allowed to advertise online gambling in South Africa if they did not have a local footprint’<sup>897</sup> as licensed operators would ipso jure have a local footprint by virtue of their domestic licenses. In terms of advertising by unlicensed operators, existing legislation and stare decisis explicitly prohibit the same.<sup>898</sup>

Who should regulate advertising of online gambling in South Africa? The decentralised regulation of advertising for other forms of gambling based on provincial geographies has not been effective to date. The GRC noted that ‘current restrictions on advertising and their enforcement in South Africa were not very effective’ due to ‘inconsistencies in the application of the national norms and standards regarding advertising and the promotion of gambling in line with the overall regulatory model and objectives by provinces and gambling modes.’<sup>899</sup> Market participants expressed similar views, noting ‘disparities among provinces in terms of advertising guidelines for differing gambling industries.’<sup>900</sup> It appears that adoption and enforcement of advertising standards for gambling, including online gambling, likely benefit from centralisation of these functions in a national agency.

What kind of regulations should govern advertising of online gambling in South Africa? Existing regulations related to other forms of gambling already restrict, inter alia, the content, placement and time periods permitted for such advertisements.<sup>901</sup> These restrictions would presumably carry forward to advertisements related to online gambling on casino games in the country. As part of any consideration of the optimal means to regulate gambling advertising on a national basis, including promotion of online gambling, authorities may wish to consider the following additional measures:

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<sup>896</sup> Portfolio Committee on Trade & Industry op cit note 27 at 15.

<sup>897</sup> Ibid at 14.

<sup>898</sup> Supra ss 4.2.3 and 3.3, respectively.

<sup>899</sup> Portfolio Committee on Trade & Industry op cit note 27 at 6.

<sup>900</sup> Loc cit.

<sup>901</sup> Supra s 4.2.3.

- Prohibit advertising during live sports events (as enacted in Australia).<sup>902</sup>
- Prohibit sponsorships of any kind by gambling companies (as enacted in the Netherlands and recommended by the Trade & Industry Portfolio Committee) including sporting teams (as proposed in the United Kingdom).<sup>903</sup>
- Adopt specific advertising provisions to protect vulnerable persons (as recommended by the Trade & Industry Portfolio Committee) such as terms found in the pan-European Code of Conduct on responsible advertising for online gambling and proposals of the Las Vegas Institute of International Gaming Institute.<sup>904</sup>
- Enact specific legislation to protect children similar to the Prevention of Deceptive or Child-Targeted Advertising in Violation of the Unlawful Internet Gambling Enforcement Act proposed in the United States and broader legislation such as the Children's Online Privacy Protection Act passed in the United States.
- Require advertisements to comply with the Code of Advertising Practice and Consumer Protection Act 2008.<sup>905</sup>
- Enforce consistent application and enforcement of national advertising standards through pre-approval of gambling-related advertisements (as enacted in West Virginia and proposed in Kenya) by authorities such as the Advertising Regulatory Board ('ARB') as recommended by the Trade & Industry Portfolio Committee.<sup>906</sup>
- Prohibit endorsements of gambling by individuals, which would capture celebrity endorsements (as proposed in Kenya and recommended by the Trade & Industry Portfolio Committee) and athletes (as enacted in the Netherlands).<sup>907</sup>

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<sup>902</sup> Supra s 2.2.2.

<sup>903</sup> Supra ss 2.2.3, 2.2.4 and 4.3.3.

<sup>904</sup> European Gaming & Betting Association op cit note 331; Shatley op cit note 332; Portfolio Committee on Trade & Industry op cit note 375 at 11.

<sup>905</sup> As recommended by the Trade & Industry Portfolio Committee. Portfolio Committee on Trade & Industry op cit note 375 at 9.

<sup>906</sup> Loc cit.; supra ss 2.2.1.2 and 2.2.7. As recommended by the Trade & Industry Portfolio in relation to ARB's predecessor, the Advertising Standards Authority ('ASA').

<sup>907</sup> Supra ss 2.2.4, 2.2.7 and 4.3.3; *Casino News Daily* op cit note 256. The prohibition on celebrity endorsements in Kenya was judicially overturned on grounds of process rather than substance.

- Limit the medium available to advertise gambling to specific media channels less likely to be seen or heard by vulnerable persons, including young people. For example, search engines and social media platforms are prohibited from accepting gambling advertisements accessible in South Africa under pain of penalties.<sup>908</sup>
- Beyond existing requirements, mandate more comprehensive disclaimers at the end of every gambling advertisement (as enacted in Australia and prospectively the United Kingdom) under pain of penalties to media companies that do not assure compliance with such obligations.<sup>909</sup>
- Limit the frequency of gambling advertisements as a proportion of advertisements on any media channel within prescribed periods. For example, only 10 per cent of advertisements featured per hour on any multimedia channel and only 10 per cent of space within any outdoor advertising portfolio may be related to gambling with significant penalties against media companies that contravene such restrictions.
- Beyond customary media fees, impose a surcharge on the cost of online gambling advertisements that is ring-fenced and paid directly to the NRGF who is required to spend such funds on responsible gambling advertisements.<sup>910</sup>

Among other measures, such conditions appear to appropriately balance the need to allow licensed gambling sites to advertise to targeted customers and sustain their business against the competing need to enforce restrictions that ensure responsible advertisements that protect against over-stimulation of gambling and targeting of vulnerable persons. They appear consistent with recent dicta from ARB's CEO who said: "We never advocate for a complete ban of a particular type of advertising, but rather for industry-agreed rules that protect consumers while allowing legal businesses the right to trade and advertise."<sup>911</sup> At the same time, the CEO noted that "[t]his has now become an area of interest for the ARB, and we will be engaging with the gambling

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<sup>908</sup> This policy has already been adopted by many social media platforms. Richtel op cit note 327. In some markets, major outdoor advertising companies have also adopted this policy. Richtel op cit note 328.

<sup>909</sup> Supra s 2.2.2 and 2.2.3. To a lesser extent, variations of this practice are already prevalent in South Africa. For example, Tsogo Sun 'Responsible gambling' available at <https://www.tsogosun.com/casinos/responsible-gambling/>, accessed 20 October 2023.

<sup>910</sup> Similar to the withholding tax on gambling advertisements proposed in Kenya. Supra s 2.2.7.

<sup>911</sup> Gail Schimmel, ARB's CEO, in Mochiko op cit note 726.

board to ensure that we have rules that are in line with the law, international standards and existing standards.”<sup>912</sup>

No business succeeds without advertising<sup>913</sup> and that principle likely applies to online gambling sites. Any successful regulation of gambling advertisements likely requires the ability to prohibit advertising by unlicensed gambling sites in the country. It is a tall order. Enforcement of any ban on online gambling advertisements by unlicensed operators likely needs to consider two different challenges: (1) regulation of advertisements originating from outside of South Africa; and (2) regulation of advertisements originating from within South Africa.

The first challenge has flummoxed regulators in many jurisdictions.<sup>914</sup> However, the proposed power of authorities to control internet access into South Africa by gambling sites may improve prospects for addressing this challenge.<sup>915</sup> The second challenge is likely overcome through introduction of stringent regulations that focus on media companies that enable gambling sites to advertise in the country. This has been a surprisingly hard challenge for authorities to satisfy in the past.<sup>916</sup>

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<sup>912</sup> Loc cit. Schimmel indicated that ‘one of the trends in consumer complaints about advertising worldwide is online gambling. South Africa initially wasn’t showing the same trend, but over the past year or two, “we have seen a number of complaints”. These are varied – from complaints about the very existence of gambling to misleading advertising.’ The ARB has adjudicated complaints regarding online gambling as recently as 18 October 2023 when it dismissed a consumer complaint about online sports betting against Greatodds (Pty) Ltd t/a Sportingbet South Africa which alleged that its advertisement encouraged reckless behavior in contravention of cl 13 of s II of the Code of Advertising Practice. Advertising Regulatory Board ‘Decision of the Advertising Regulatory Board’ 2821 – Sportingbet – Gering 18 October 2023 available at <https://www.arb.org.za/2023.html>, accessed 25 October 2023.

<sup>913</sup> Wolters Kluwer ‘Business success depends upon successful marketing’ available at <https://www.wolterskluwer.com/en/expert-insights/business-success-depends-upon-successful-marketing#:~:text=most%20small%20businesses.-,It's%20really%20impossible%20for%20you%20to%20be%20successful%20without%20good,about%20your%20products%20or%20services.,> accessed 18 October 2023.

<sup>914</sup> For example, Sweden supra s 2.2.5.

<sup>915</sup> Supra s 5.2.9.

<sup>916</sup> For example, J Fubbs, Chairperson of the Portfolio Committee on Trade & Industry, noted:

. . . a problem encountered with the South African Broadcasting Corporation (SABC), where the NGB had no success in restraining the SABC from flighting advertisements for foreign interactive gambling operators. She noted that this was illegal, that both parties were aware of the illegality, and could not understand, in view of the fact that it appeared to be quite straightforward, why it was so difficult to stop such advertisements.

Portfolio Committee on Trade & Industry op cit note 368 at 4.

It is unclear why the NGB was unsuccessful in previous attempts to regulate this activity. As part of regulation of gambling in South Africa, including online gambling, severe penalties should be considered as remedies against media companies that facilitate gambling advertisements by unlicensed operators or in contravention of applicable advertising standards by licensed operators. Threats of such penalties may encourage companies to comply with relevant obligations. At the same time, effective monitoring and enforcement of such standards and penalties arising from contraventions of such standards likely remain key success factors. Allocation of such responsibilities to a national body such as the ARB may focus greater efforts on fulfilment of these functions and alleviate any lack of expertise, institutional capacities or funds by the NGB or PLAs in this area.

#### **5.2.14 Tax regime**

Should authorities tax online gambling on casino games? If so, what principles should be considered as part of any discussion of the tax regime applicable to this activity in South Africa? What kind of regulatory regime balances any need to generate tax revenues from online gambling on casino games with the need to encourage participation by gambling sites in such regime and payment of such taxes?

It appears settled policy that online gambling on casino games, if legalised in South Africa, should constitute a taxable activity.<sup>917</sup> The tax system prospectively applied to online gambling on casino games, however, represents one of the most complicated and contested areas arising from legalisation and regulation of the activity in any jurisdiction.<sup>918</sup> In South Africa, the NGB noted the disparate tax models applied between provinces in respect of gambling and need to harmonise the same, ideally through the National Treasury.<sup>919</sup>

Beyond resolution of extant political and policy issues, consideration of the taxation of online gambling on casino games in South Africa likely needs to evaluate the larger impact that tax objectives may have on the willingness of international online gambling

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<sup>917</sup> Supra s 3.4.9.

<sup>918</sup> Supra s 2.2.6.

<sup>919</sup> Portfolio Committee on Trade & Industry op cit note 27 at 18.

sites to participate in any licensing and regulatory framework and pay any local taxes. A tax without any (or few) taxpayers is not an effective tax at all.

The 6 per cent tax mooted by section 3 of the Interactive Gambling Tax Bill did not appear to meet with much resistance from licensed operators in the country.<sup>920</sup> They are not the constituency that should concern Government. It is unlicensed international operators that need to buy into the tax regime, Why would international online gambling sites subject themselves to a South African tax? Despite prohibition of online gambling on casino games, many sites freely operate in the country without any need to comply with local regulations or pay any local taxes.<sup>921</sup> The benefits of compliance and costs of non-compliance must sufficiently motivate international gambling sites to participate in a domestic regulatory regime that includes payment of local taxes.

In the event that some of the recommendations made in this study are adopted as part of any legalisation and regulation of online gambling on casino games in South Africa, international operators who submit to a domestic regulatory framework likely benefit from the assurance of internet connectivity to their customers, access to local banks and ability to advertise for customers without fear of any business interruption or criminal prosecution arising from non-participation in such framework. Are those sufficient incentives and disincentives to motivate them to submit to a local licensing and regulatory framework? The tax regime applied to online gambling on casino games in South Africa may represent the determining factor in their decision-making process.

Given the ease of setting up online gambling sites and difficulty in monitoring and managing internet access and financial transactions associated with online gambling,<sup>922</sup> South African authorities may wish to minimise the tax that would apply to online gambling revenues regardless of whether or not sites establish any local operations.<sup>923</sup> A low tax rate likely induces more international sites to participate in a local regulatory framework and pay local tax. The participation of more international sites generates more substantial amounts of tax albeit at a lower rate from a larger base of taxpayers

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<sup>920</sup> Supra s 3.4.9.

<sup>921</sup> National Gambling Board op cit note 369 at 32; Bets.co.za op cit note 371 at 1–5; Capeetc op cit note 371 at 1.

<sup>922</sup> Louw et al op cit note 14 at 188; supra 2.3.4, 4.3.6, 5.2.10 and 5.2.11.

<sup>923</sup> Consideration of the merits of any corporate tax applicable to locally incorporated gambling sites is considered later in this section.

than through a higher rate from a smaller base of taxpayers. The resistance of current licensees to different (lower) tax rates for online gambling sites relative to taxes paid by land-based casinos does not reflect market realities.<sup>924</sup> Such resistance may be addressed, in part, by automatically granting every casino an online gambling license that benefits from the concessionary rate.

As with use of a digital tax in lieu of VAT in some markets,<sup>925</sup> South African authorities may wish to consider introduction of a source-based tax on gross gambling revenues in lieu of any corporate income tax payable by such operators. Although the Davis Tax Committee finished most of the spade work required to introduce a DST in South Africa, opposition from the OECD and United States to such a regime likely makes this option ‘dead on arrival’ in the country.<sup>926</sup> However, another configuration of a low source-based tax on online gambling revenues earned by local operations of international gambling sites in lieu of any corporate tax may encourage such sites participate in a local licensing and regulatory framework and pay such tax.

Resistance to any low tax rate for online gambling may arise from stakeholders opposed to introduction of the activity in the country. Such constituencies may argue that a low tax rate does not generate the kind of tax revenues necessary to justify the costs of additional responsibilities and capacities required to regulate the activity. Such constituencies may argue that a low tax rate is ill-suited to an enterprise that increases social costs (problem gambling, prejudice to vulnerable persons) and delivers few economic benefits (lack of capital investment, job creation, empowerment). Opponents of any legalisation of online gambling would likely need convincing that the advantages of including international gambling sites within a low tax framework outweigh the disadvantages of leaving thousands of unlicensed sites outside this framework to exploit citizens unprotected by regulatory safeguards. Given South Africa’s current socio-economic conditions, the granting any concessionary tax rate to online gambling sites likely remains a political obstacle to legalisation and regulation of online gambling on casino games in the country.

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<sup>924</sup> Supra s 3.4.9.

<sup>925</sup> Mouriño *op cit* note 230 at 1.

<sup>926</sup> Supra s 2.3.6.

In the event that international gambling sites elect to participate in any domestic licensing and regulatory framework and establish local operations, due consideration needs to be given to the applicability and impact of corporate tax and VAT on such operations. The payment of corporate income tax by international gambling sites on revenues generated by locally licensed operations likely mitigates any benefits derived from such operations.<sup>927</sup> The applicability and impact of VAT may have similar consequences. As such, careful consideration needs to be given to avoid uncompetitive taxation or double taxation of international operators who establish local operations.

### 5.3 CONCLUSION

Gambling on online casino games is already a prevalent activity in South Africa – not only through illegal international gambling sites but also through mutations of table games offered by locally licensed bookmakers.<sup>928</sup> The DTI concedes as much.<sup>929</sup> The NGB acknowledges as much.<sup>930</sup> The Trade & Industry Portfolio Committee concedes as much.<sup>931</sup> It is big business<sup>932</sup> – and beyond online casino games offered by licensed bookmakers, a business that the Government does not control or benefit from at this time.<sup>933</sup> Everyone suffers from the lacuna in legislation of this activity. Government suffers from its inability to protect citizens from illegal gambling sites and collect taxes from such sites. Licensed operators suffer from absence of a competitive playing field with illegal gambling sites. Regulatory authorities suffer from an inability to monitor and enforce compliance with local laws. Players suffer from exposure to unscrupulous sites that may not safeguard their winnings or protect their privacy. Although they may debate and disagree on the substance and form of any legalisation and regulation of

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<sup>927</sup> If local operations are used to manage international operations, careful consideration needs to be given to taxation of extraterritorial activities, as the top offshore gambling jurisdictions in the world impose nil tax on international income. Nerds of Gambling op cit note 289.

<sup>928</sup> Cloete op cit note 643; *Chatsworth Rising Sun* op cit note 26; O’Boyle op cit note 725; Portfolio Committee on Trade & Industry op cit note 482 at 9.

<sup>929</sup> Portfolio Committee on Trade & Industry op cit note 419.

<sup>930</sup> National Gambling Board op cit note 3; Bets.co.za op cit note 371.

<sup>931</sup> Portfolio Committee on Trade & Industry op cit note 27 at 8.

<sup>932</sup> National Gambling Board op cit note 3 at 29; National Gambling Board op cit note 347 at 5–6; Portfolio Committee on Trade & Industry op cit note 27; Portfolio Committee on Trade & Industry op cit note 519; Astute Analytics op cit note 345; National Gambling Board op cit note 347; Portfolio Committee on Trade & Industry op cit note 368.

<sup>933</sup> Loc cit.

online gambling on casino games, the NGB, PLAs, politicians and industry stakeholders generally agree that it is time to legalise and regulate this activity.<sup>934</sup>

Why has it not happened? There are vocal constituencies in South Africa that remain opposed to legalisation of online gambling on casino games. Such constituencies prefer to act like ostriches and keep their heads in the sand and ignore the online gambling on casino games going on all around them rather than participate in building a consensus towards the responsible regulation of this activity that protects the population and addresses, as far as possible, their public interest concerns. Opposition political parties propose a quick fix to the situation through private member's bills that score political points (*equo ne credite*) and garner press attention but are woefully inadequate in addressing the complexity of legislation and regulations required to legalise and regulate the activity in an effective and efficient manner.<sup>935</sup> The Government has a lot of other business on its table, such as resolution of the highest unemployment rate in the world,<sup>936</sup> a shrinking economy adversely affected by persistent power cuts (load shedding)<sup>937</sup> and a widening fiscal deficit driven by burgeoning public sector spending.<sup>938</sup> The legalisation of online gambling on casino games may simply not represent a political priority for the ruling ANC Government in a pre-election year.

Yet it is inevitable that online gambling on casino games will become a legalised and regulated activity in South Africa. It has become too large an economy to ignore for much longer. It is simply a question of time. When that time comes, it is important that the process used to usher in an era of legalised and regulated online gambling on casino games accounts for the complexity of the task at hand and, in the South African tradition, builds consensus around the nature of licensing and regulation of the activity.

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<sup>934</sup> Supra s 5.1.

<sup>935</sup> Supra s 3.2.5.

<sup>936</sup> Rédaction Africanews 'Experts warn South Africa's record unemployment is a "time bomb"' *Africa News* 14 August 2023 available at <https://www.africanews.com/2023/08/14/experts-warn-south-africas-record-unemployment-is-a-time-bomb/#:~:text=South%20Africa%20has%20the%20highest,West%20Bank%2C%20Djibouti%20and%20Kosovo.,> accessed 18 October 2023.

<sup>937</sup> Joseph Cotterill 'South Africa GDP shrinks 1.3% after power cuts strangle economy' *Financial Times* 7 March 2023 available at <https://www.ft.com/content/c1168eef-2869-47b3-a597-471f485b7009>, accessed 14 April 2023.

<sup>938</sup> 'South Africa has run out of money – finance minister responds' *BusinessTech* 11 October 2023 available at <https://businesstech.co.za/news/finance/724406/south-africa-has-run-out-of-money-finance-minister-responds/>, accessed 18 October 2023.

‘The devil is in the detail’ is a popular but pertinent idiom in relation to legalisation and regulation of online gambling on casino games in South Africa. While momentum appears to favour such event, any legalisation and regulation of the activity likely needs to satisfy at least the following five imperatives:

- It needs to introduce a transparent, practical and cost effective licensing and regulatory framework that makes it worthwhile for international gambling sites to submit to South African law. The benefits (and costs) of participation must outweigh the benefits (and costs) of non-participation in such framework which will require trade-offs between competing commercial interests and public interests.
- Notwithstanding the aspirations of any law and regulations, it needs to endow authorities with a toolbox of relevant and realisable means to implement, monitor and enforce compliance with applicable legislation and regulations.
- It needs to fund and realise sufficient institutional capacity at relevant regulatory authorities to set them up for success in the implementation, monitoring and enforcement of compliance with such legislation and regulations.
- It needs to explicitly address pertinent public interest concerns, including mitigation of problem gambling opportunities and protection of vulnerable persons, particularly young people.
- It needs to nurture other important public interest priorities, such as foreign direct investment, job creation and economic empowerment, with recognition that online gambling does not deliver the same kind of public interest benefits, in substance or style, as land-based casinos.

Realisation of these imperatives likely delivers net overall social and economic benefits to South Africa which, in the end, should be the only reason to consider any legalisation and regulation of online gambling on casino games in the country.

Realisation of an efficient and effective law to legalise and regulate online gambling on casino games in South Africa likely requires well-planned and well-executed public policy, legislative and regulatory drafting processes. It likely requires coordination of the consideration and drafting of wide range of provisions for new legislation and regulations. It likely requires consideration of the implications to and drafting of

amendments to provisions of existing interlinked laws and regulations. It likely requires engagement between Government, civil society and industry stakeholders through an extensive public consultation process.

The path towards legalisation and regulation of online gambling on casino games in South Africa ultimately requires realisation of a compact between the politicians and the people. Describing the purpose of such partnership, Aristotle (with echoes of ubuntu) wrote that:

It is clear that all partnerships aim at some good, and that the partnership that is most authoritative of all and embraces all the others does so particularly, and aims at the most authoritative good of all. This is what is called . . . the political partnership.<sup>939</sup>

This study has sought to inform any future discussion of the particulars of such partnership by identifying key matters that likely require consideration as part of any statutory framework to legalise and regulate online gambling on casino games in South Africa.<sup>940</sup> It has reviewed best practices in international jurisdictions, the substance and form of current and previously proposed legislation and nature of public interests associated with the activity that likely require redress as part of any ‘made in South Africa’ licensing and regulatory framework to realise the same.<sup>941</sup> It has proposed fourteen areas of law that may merit contemplation in further deliberations regarding any law to legalise the activity in South Africa. It has made numerous recommendations regarding measures for consideration in any accompanying licensing and regulatory framework. Ultimately, it up to the politicians and the people of South Africa to determine if they wish to formally legalise and regulate online gambling on casino games in the country and, if so, achieve consensus on the optimal means to realise the same for the *res publica*. Hopefully this study contributes to constructive consideration of the matter as part of such endeavours. *Acta est fabula plaudite*.

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<sup>939</sup> Aristotle in Carnes Lord (trans) *Aristotle's Politics* 2 ed (2013) 1252a3 (see also III.12).

<sup>940</sup> *Supra* s 1.2.1.

<sup>941</sup> *Supra* s 1.2.2. Throughout this study, the phrase ‘made in South Africa’ has been used to recognise that any legalisation or regulation of online gambling on casino games in the country likely needs to represent a bespoke solution that not only accounts for best practices and public interest concerns prevalent in international markets but realities and concerns unique to South Africa (whether in form, substance or process) including political principles associated with ubuntu.