THE REGULATION OF INTERACTIVE GAMBLING IN SOUTH AFRICA: A COMPARATIVE STUDY.

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ABSTRACT

This dissertation seeks to provide some regulatory perspective on the future of interactive gambling in South Africa. It reviews the difficulties facing the legislature concerning the regulation of interactive gambling by using comparative methods. The jurisdictions used in this dissertation are purposefully chosen because of the different legislative models applied in the regulation of interactive gambling so as to critically analyse the most practicable models that can be applied in South Africa. Many countries have opted for legislative inactivity and others a system of total prohibition; however there are countries that have taken a further difficult step to regulate interactive gambling. The National Gambling Amendment Act 10 of 2008 proposes to regulate interactive gambling; however, parliament has not implemented this piece of legislation and as such interactive gambling remains a fallacy.

Research in this area of gambling is close to non-existent but the fact is, gambling has transformed from a relatively rare phenomenon limited to land-based casinos, bingo halls and racing and sports betting to an industry driven by the technological evolution of the internet, growing at a rapid rate each year. This form of gambling revolutionises the way people gamble by creating an opportunity for them to bring gambling into their homes.

The purpose of this dissertation was to make a comparative analysis of different jurisdictions and put the South African legislative model into perspective. This study made a distinction between online casinos and other forms of gambling, and further looked at the different legislations in South Africa and how they have changed through replacement, repeal and amendment.

The study concluded that interactive gambling would be in a better position regulated as it has materialised as a significant public policy issue of extensive financial importance. Therefore, the sooner the legislation is promulgated the easier it will be to better understand the impact of interactive gambling in this country and assess the extent of problem gambling and money-laundering.

Key words: *Gambling; Interactive Gambling; Online Casinos, Land-based Casinos, The National Gambling Act, Racing and Sports Betting; Gambling Regulation, Legislative Models; Problem Gambling.*

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CHAPTER 1

INTRODUCTION

1.1 BACKGROUND

> "Gambling and Betting was legalised in our country following research conducted by a Commission led by the late Prof. Wiehann in 1995, which concluded that this form of entertainment bears a great potential for economic growth in the form of job creation, investment, contribution to the growth of own-revenue base, tourism promotion and business development. This Commission also concluded that if this form of entertainment is not properly regulated, it may create serious social and economic problems. It is against this background, that it was resolved that regulation of gambling and betting operations should be a shared and concurrent responsibility between National and Provincial governments in order to safeguard potential ills which may come with its legalisation."[1]

Gambling, in South Africa, was restricted from as early as 1673[2]. In terms of the Roman Dutch common law,[3] gambling was not prohibited per se but, in order to discourage gambling and wagering, gambling contracts were unenforceable in the courts[4]. The various pieces of legislation that regulated gambling[5] were consolidated in the Gambling Act 51 of 1965 in terms of which gambling was prohibited, with the notable exception of wagering on horseracing.[6]

Although prohibited in South Africa, in the late 1970s, licensed casinos began operating in the Bantustans of Bophuthatswana, Ciskei, Transkei and Venda, what were in the South African legal system at the time regarded as "independent, sovereign states". These casinos continued to operate legally after 1994[7]. However, according to the Gambling Review

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[1] The Department of Trade and Industry *The Gambling Review Report* (2011) 10, available at *http://www.thedti.gov.za/news2011/Gambling_review.pdf*, accessed on 14 June 2012. [Hereinafter referred to as the 2011 Report]
[2] S V Hoctor & P J Schwikkard *The Exemplary scholar: Essays in Honour of John Milton* (2007) 263.
[3] S V Hoctor & P J Schwikkard *The Exemplary scholar: Essays in Honour of John Milton* (2007) 263.
[4] *Halsey* v *Jones* 1962 3 SA 484 (A) 490; *Dodd* v *Hadley* 1905 TS 439, 440.
[5] Inter alia the betting Houses, Gaming Houses and Brothel Suppression Act 36 of 1902; (Natal) law to provide for the Discouragement of Gambling Act 25 of 1875; and the (Transvaal) Wet Tegen Hazardspelen 6 of 1889.
[6] The National Gambling Act 51 of 1965
[7] Constitution of the Republic of South Africa, Act 200 of 1993 (interim constitution) s229. After 1994 the different legislations remained applicable until specifically amended.

Report, almost 2000 illegal casinos were functioning in other areas in South Africa in 1995.[8] This was regarded by the Commission as an indication that the traditional viewpoint regarding gambling had changed.

In a country whereby gambling and gambling games have traditionally been strongly disapproved of, public policy and legislation have radically changed over the past decades.[9] With the implementation of the Constitution of the Republic of South Africa, 1993[10] (Interim Constitution) and following the reincorporation of the TBVC states into South Africa, it was ruled that existing license-holders in those territories were, in terms of section 229 of the Constitution, to conduct legal gambling.[11] This provision was confirmed in the final constitution by the Transitional agreements[12] read with section 243[13] and followed by the different National legislations.

Since gambling became legal in South Africa in 1996[14], the industry has grown and evolved substantially. In 1996, the National Gambling Act[15] replaced the 1965 Act. The 1996 Act regulated gambling and provided for the oversight of matters that related to casinos, gambling and wagering.[16] It provided for, ‗the promotion of uniform norms and standards applying generally throughout the Republic with regards to casinos, gambling and wagering;[17] and was intended to prevent provincial laws from materially prejudicing the economic interests of other provinces and the country as a whole.'[18] This Act also made provision for the establishment of the National Gambling Board.[19]

The National Gambling Act of 2004[20] repealed the 1996 Act. This Act also makes provision for the oversight of matters relating to casinos, gambling, betting and wagering and it

[8] The 2011 Report 10.
[9] M Carnelley ‗A Précis of the South African Gambling Industry' (2000) 5 (1) *GLR* 3, 3.
[10] Constitution of the Republic of South Africa, Act 200 of 1993 (interim constitution).
[11] Carnelley (note 9 above) 3.
[12] 1996 Constitution Schedule 6(2).
[13] 1996 Constitution.
[14] The National Gambling Act 33 of 1996, which was passed following the recommendations of the Wiehahn commission.
[15] The 1996 Act.
[16] The 1996 Act, preamble.
[17] The 1996 Act, preamble.
[18] The 1996 Act, preamble.
[19] The 1996 Act, section 2.
[20] National Gambling Act 7 of 2004.

promotes uniform norms and standards in relation to gambling throughout South Africa.[21] Since the 1996 Act was repealed by the 2004 Act, technology has advanced on existing forms of gambling; new forms of gambling have emerged since then and have created challenges for regulators and policy makers.[22] In addition, some forms of illegal gambling have persisted and appear to be growing in popularity.[23] In this regard, the Act[24] makes provisions for the regulation of some of these illegal gambling activities; s11 of this Act prohibits any form of interactive games, unless a license is granted in terms of the Act.[25] The development towards the regulation of interactive gambling commenced in 1999.The South African National Gambling Board (hereinafter referred to as the NGB) released a report in this year that estimated that South Africa could capture a large international export market if it regulated interactive gambling and positioned South Africa as a base for international interactive gambling operators.[26] In 2006 the NGB released a second report outlining the necessity for legalising interactive gambling in South Africa and highlighting the fact that land-based gambling and online sports betting were already in existence.[27]

As a result of this attention being paid to the question of interactive gambling, the legislature drafted the National Gambling Amendment Bill, 2006. This bill culminated in the National Gambling Amendment Act of 2008,[28] which aimed at updating the 2004 Act. This amendment Act proposes to regulate interactive gambling; however, it has not yet been promulgated and remains inactive. The amendment intends changes to certain definitions and the insertion of new definitions to make provision for interactive gambling in South Africa.[29] The intention of the provisions of the Amendment Act is to protect the public from possible criminal activity and also to manage youth and problem gambling.[30]

[21] The 2004 Act, preamble.
[22] The 2011 Report 15.
[23] The 2011 Report 15.
[24] The 2004 Act.
[25] The 2004 Act, section 11.
[26] The National Centre for Academic research into Gaming *Interim Report for the National Gambling Board. Internet Gaming and South Africa: Implications, Costs & Opportunities* (August 1999) 5. [Hereinafter referred to as the 1999 Report] 22.
[27] South Africa releases the Interactive Gambling Tax Bill 2008.' Casino News 26 April 2009, available at http://www.amuse.co.za/2009/04/, accessed on 12 June 2012.
[28] The National Gambling Amendment Act 10 of 2008.
[29] The 2008 Amendment Act, Preamble.
[30] The 2008 Amendment Act, Preamble.

Four years after the release of the Interactive Gambling Tax Act, there has still been no change and no solid legislation that either outlaws or legalises online casinos and gambling in this country. The fact that the 2008 Amendment Act, indicating the regulation of interactive gambling remains inactive through non- promulgation, is the main rationale for this research. One of the aims is to determine the rationale behind the prolonged promulgation of this Act. Prohibition and regulation is clearly a problem for lawmakers; as stated by Rose:[31]

> "There is general agreement that a complete prohibition [of interactive gambling] is impossible to enforce, while complete legalisation without regulation would cause untold social harm, particularly for children and compulsive gamblers. Lawmakers at all levels and in all branches of government are now faced with the necessity of finding a way to control this constantly evolving invention."

Thus the legality of online casinos and interactive gambling has been an unsettled issue: on the one hand, although currently prohibited, regulation is anticipated by the 2008 Amendment Act; yet on the other hand it has been stalled through non-promulgation for many years. The question of the legality of interactive gambling in South Africa became the focus in the *Casino Enterprise v Gauteng Gambling Board*.[32] The question in this matter was whether a foreign website would contravene any South African legislation if it allowed South Africans to gamble on unlicensed websites – specifically unlicensed in South Africa. The court confirmed the illegality thereof in light of s 11 of the National Gambling Act.[33]

The very existence of interactive gambling in its present form creates major questions of law, policy and jurisdiction. In addition, these current developments create difficulties because of the variety of laws which are possibly applicable.[34] Although the activities of land based casinos are becoming increasingly regulated throughout the world, virtual casinos, by contrast, are at the heart of an on-going controversy concerning the regulation of betting through the internet.[35] Developments in technology and global interconnections have changed the problem. While throughout the history of mankind, gambling has been a national matter,

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[31] R Nelson ‗Gambling Law: The Future of Internet Gambling' (2000) 7(1) *Jeffrey S. Moorad Sports LJ* 1, 25.
[32] *Casino Enterprise* v *Gauteng Gambling Board* 2010 (6) SA 38 (GNP).
[33] The 2004 Act.
[34] I N Rose & M D Owens Jr. *Internet Gaming Law* (2005) 12.
[35] A M Aronovitz et al Research conducted by the Swiss Institute of Comparative law, with contributions by *Cross-Border Gambling on the Internet, Challenging National and International Law* Schulthess Jristische Medien AG, Zürich-Basel-Genf 2004 28.

it has now become an international issue.[36] South Africa is in a position where it is uncertain whether the legislature will eventually promulgate the 2008 Act[37] or will withdraw the draft legislation.

As mentioned above, one of the important issues are ones concerning vulnerable persons. These problems are more prominent in an online environment. Although the development of virtual casinos may be seen as the extension of a form of amusement, it also extends exposure to gambling that could be to the detriment of pathological gamblers and minors.[38] Gambling over the internet is quite different from gambling in a land-based casino.[39] The player is alone in front of his computer and, as a result, free from all social pressure.[40] Nothing exists but the game.[41] This situation, unmonitored, unlike in a land-based casino where there are cameras everywhere, would most likely encourage the behavior of compulsive gambling.[42] In addition, imposing age restrictions—a key element in the regulation of land-based casinos—is more difficult as the person is not visible. How, indeed, can it be determined that it is not a minor, using a parent's credit card, who is seated in front of the computer?[43] Interactive gambling presents a particularly significant danger in this area since for many other countries, like the United States, virtual casinos, at least for the moment, are subject to no governmental oversight.[44]

Prosecution of illegal interactive gambling will be likely to encounter constitutional challenges pertaining to the right to privacy, freedom of trade, occupation and profession and freedom of association as interactive gambling not only allows privacy, it is convenient and it increases recreational value to the gambler with its variety of gambling opportunities.[45] Also, there may be conflict between national and provincial legislation should a certain province not want to allow internet gambling for reasons of regulation or competition with land-based gambling; since land-based gambling is regulated provincially, with interactive gambling the

[36] Aronovitz et al 28.
[37] The 2008 Amendment Act
[38] Aronovitz et al 28.
[39] Aronovitz et al 28.
[40] Aronovitz et al 28.
[41] Aronovitz et al 29
[42] Aronovitz et al 29.
[43] Aronovitz et al 29.
[44] Aronovitz et al 29.
[45] M Carnelley Interactive Gambling A South African Comparative Perspective Part I- Universal Legal Challenges' 2001 (1) *Obiter* 273, 277.

legislation has to be more fully and clearly expressed.[46] Practical difficulties imposed by offshore operations, encryption, remailers and the likes will probably pose a more substantial obstacle.[47]Enforcement, however, may be uncertain.[48] Interactive gambling cannot be raided in a traditional sense and gambling is rarely a high priority even without the complications that it can bring to the table; on the other hand it may be easier to follow as there will always be an electronic trail.[49]

The actual situation currently is that many interactive gambling sites are (illegally) available in South African homes, student residences, places of work and even cell phones and it appears that banning it completely will not be possible because it is a –social evil" and it is hard to control any information transferred over the internet; nor is it sufficient to simply permit it just because it is in demand. Thus the need for careful consideration of the issue is called for. As noted above, interactive gambling is already a part of our lives in many ways. In the United States of America, where interactive gambling is prohibited but is still a topic of interest for many, the Government has stated the following on this issue;

> –Washington DC (Nov 18, 2011) Rep. Frank Wolf (R-VA) warned a House subcommittee that the legalizing of internet poker would enable the spread of gambling to every computer, iPad, iPhone, Blackberry, Android and Windows phone in the country"[50].

It is clear then that interactive gambling is a major issue internationally, because not only is it hard to control if prohibited, but also the extent at which interactive gambling can rapidly manifest itself in our lives through technology can also make the decision to regulate a difficult one.

Although criminal prosecutions and legislation can cause the volume of interactive gambling to fluctuate in the short run, the track record shows that the demand for online gambling remains and offshore operators will figure out ways to meet that demand.[51] *The Casino*

[46] The 1999 Report 17.
[47] A Cabot et al *Internet Gambling Report* 11 ed (2008) 63.
[48] A Cabot et al 64.
[49] A Cabot et al 101.
[50] Frank. R. Wolf: Press Release. Wolf: Legalizing Internet Gambling would be a mistake, State News Services, November 18, 2011 Issue.
[51] American Gaming Association White paper, Online Gambling Five Years after UIGEA; David O. Stewart, Ropes & Gray, LLP, 2011; www.americangaming.org.

Enterprise case[52] is the only case so far where an offshore company operating within South Africa was challenged; there is countless more still operating even though there is clear legislation[53] prohibiting interactive gambling in South Africa. The internet does not have borders. Until a way to control the offshore operations present in South Africa by either promulgating the Amendment Act, or withdrawing such legislation, there are still going to be criminal prosecutions.

The recent debates[54] about the possible legalization and regulation of interactive gambling have opened up broader questions about the appropriateness of current gambling policy, regulation and the proliferation of gambling opportunities. To consider these broad questions, as well as specific challenges around the regulation of particular forms of gambling, the Minister of Trade and Industry appointed a Gambling Review Commission (–the Commission") in December 2009 with a broad responsibility to –econsider if the currently legalised gambling activities can/should be expanded or curtailed considering the number of casinos, limited payout machines and bingo outlets already licensed",[55] having regard for the –socio-economic consequences attached to gambling, such as problem gambling, youth gambling and other social concerns".[56]

The initiative taken by the Minister of Trade and Industry in South Africa is a step in the right direction to finding a way to protect the public from foreign websites and other international issues; considering that gambling has never been an issue of uniform agreement between states, for instance the case of *Antigua v The United States at the WTO*[57]. _Government policies on the subject differ as greatly as people's opinions;[58] one thing is certain, almost all governments regulate gambling in some fashion, whether it is legal or illegal.'[59] For instance,

[52] *Casino Enterprise* v *Gauteng Gambling Board* 2010 (6) SA 38 (GNP).
[53] The 2004 Act, section 11.
[54] R McGowan *The Gambling Debate* 2008.
[55] AA Ligthelm _Socio-economic impact of legalised Gambling in South Africa' 2009 available at *http://www.ngb.org.za/SiteResources/documents/SocioEconomicImpactofLegalisedGamblinginSouthAfrica.pdf*, accessed on 10 May 2012.
[56] AA Ligthelm _Socio-economic impact of legalised Gambling in South Africa' 2009 available at *http://www.ngb.org.za/SiteResources/documents/SocioEconomicImpactofLegalisedGamblinginSouthAfrica.pdf*, accessed on 10 May 2012.
[57] *The U.S- Measures affecting the Cross-border supply of Gambling and betting services; dispute Settlement with Antigua and Barbuda* (2005) (1), WT/DS285/AB/R. [Hereinafter referred to as Antigua v U.S. at the World Trade Organization (WTO), The appeal].
[58] A Cabot et al 65.
[59] A Cabot et al 65.

Nevada permitted casino gambling since as early as 1931, at the same time it has extensive laws that regulate its casinos.[60] Utah, which permits no form of legal gambling, has criminal laws that regulate the conduct of its citizens by attempting to detect and prosecute those who place or accept wagers.[61] South Africa permits all forms of gambling excluding interactive gambling, and it will be noted later in this study how the issue of regulation either nationally or provincially has brought much to debate about. One also needs to take a look at society's boni mores when considering gambling. Furthermore it is important not to look at these in one set of lenses, but to look at each in its own set of lenses, philosophically, theologically, socially, economically and legally.[62] In the case of this dissertation two lenses will be most beneficial in order to critically analyse the regulation of interactive gambling, that is, legally and socially; however an economic lens will be beneficial when looking at tax issues.

Studies have shown that not only is interactive gambling a problem of legality here in South Africa but a world-wide issue that continues to grow every day.[63] There are currently seventy-six jurisdictions,[64] which offer licenses for online gambling including lotteries, sports betting and casinos. Among these seventy-six jurisdictions, Asia and Africa are the least represented, despite the fact that these continents are known for the passion of their populations for betting, notably for horse races.[65] When it comes to regulation or prohibition, there are two basic lines of thought; the first line holds that, ~~"~~interactive gambling cannot be entirely stopped, so it must be regulated."[66] The opposing argument is that, ~~"~~it cannot be regulated, so it must be prohibited."[67] Nevertheless, interactive gambling is difficult to regulate or to prohibit.

1.2 DEFINITION OF KEY TERMS

[60] A Cabot et al 65.
[61] A Cabot et al 65.
[62] A Cabot et al 65.
[63] J Mcmillen _Online Gambling: Challenges to National Sovereignty and Regulation' (2000) 18(4) *Prometheus* 391, 392.
[64] _The Gambling Licenses, Jurisdictions' available at *http://www.gamblinglicenses.com/,* accessed on 05 May 2012.
[65] Aronovitz et al 27.
[66] A Parke & M Griffiths _Why Internet Gambling Prohibition Will Ultimately Fail' (2004) 8 *GLR* 295, 298
[67] Steven Crist _All Bets Are Off' Sports Illustrated 26 January 1998 at 82, available at *http://sportsillustrated.cnn.com/vault/article/magazine/MAG1011843/index.htm*, accessed on 20 July 2012

The study revolves around a number of key concepts, namely gambling, interactive gambling, interactive games, interactive gambling service provider, land-based gambling, license, player, player account and placing a bet or wager. The way in which these fundamental terms will be defined with regards to this study is considered below:

1.2.1 Gambling

Gambling, as concerned with this study is defined as any activity involving placing or accepting any bet or wager.[68] Gambling is defined as staking something valuable in the hope of winning a prize where the outcome is unknown to the participant.[69] Gambling consists of _any activity with these three elements: consideration, chance and prize; where one or more of these elements is lacking, it is not gambling'.[70] Gambling does not include bona fide business transactions valid under the law of contract.[71]

1.2.2 Interactive gambling

Interactive gambling has no precise definition in any legislation or South African writing, However, interactive gambling was defined by Carnelley[72] widely and rather loosely to include operations providing opportunities to people using interactive, multimedia information-technology and telecommunication services outside the traditional gambling structures and includes, but is not limited to gambling on the internet, networked computer games and interactive television quizzes.[73] For purposes of this research, the terms _online gambling', _internet gaming' and _interactive gaming' will be deemed to have the same meaning as the term _interactive gambling' in this definition.

1.2.3 Interactive gambling service provider

An interactive gambling service provider is defined as a person who is licensed to make an interactive game available to be played.[74] Interactive service provider does not specifically mean that such person is licensed as required by the National Gambling Act. Further, the

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[68] The 2004 Act, Section 3.
[69] P Collins & G Barr _*Gambling and Problem Gambling in South Africa*' November 2001 at 5, available at *http://www.responsiblegambling.co.za/media/user/documents/gamblingreport_pretext%20design.pdf,* accessed on 09 August 2012.
[70] Nelson & Owen (note 34 above) 11.
[71] Code of Alabama 1975 Title 13A (Criminal) Code, Section 4.
[72] Carnelley (note 45 above) 274.
[73] Carnelley (note 45 above) 274.
[74] The 2004 Act, section 1.

term ‗operator' will be presumed to mean the same thing as the term ‗interactive gambling service provider'.

1.2.4 Interactive games

An interactive gambling game means a gambling game that can be played or is available to be played on an electronic device and is accessed over the internet.[75]

1.2.5 Land-based gambling

Land-based gambling is defined as ―traditional gambling that occurs at a physical location rather than on a website"[76]. It is owned by an individual or corporations, which have their gambling operations overseen by a state control board or state gambling commission.[77] In South Africa, these are Monte Casino, which is controlled by the Gauteng Gambling Board, the Vodacom Durban July, licensed by the Kwazulu Natal Gambling Board and the different types of sports betting.

1.2.6 License

A license includes the notion of registering, approving or certifying in terms of any applicable law.[78] A license is a permit from an authority to carry on a trade or to provide a service.[79]

1.2.7 Placing a bet or wager

Placing a bet or wager is defined as ―staking money or anything of value, or accepting a stake or anything of value on a fixed-odds bet or an open bet, with a bookmaker or on any contingency."[80] An example would be when a person risks something of value, (e.g. money/

[75] The 2004 Act, section 1.
[76] Hendrik J M Van Deventer *A Critical Analysis of the Taxation of Interactive income earned by Resident South African Individuals* (unpublished LLM thesis, University of Pretoria, 2010) 5.
[77] Web definition ‗Gambling Terminology (According to IRS)' available at *www.insidervlv.com/gamble/termsIRS.html,* accessed on 08 August 2012.
[78] The 2004 Act, section 1.
[79] Web definition ‗Gambling Terminology (According to IRS)' available at *www.insidervlv.com/gamble/termsIRS.html,* accessed on 10 September 2012.
[80] The 2004 Act, section 4 (1).

a car) on the outcome of an uncertain event in which the bettor does not exercise control and which is determined predominately by chance.[81]

1.2.8 Player

A player is defined as an individual who places a bet or wager.[82] For purposes of this research, the term ‗gambler' is presumed to mean the same as the term ‗player'.

1.2.9 Player account

A player account is defined as an account held in the name of the player with an interactive provider.[83]

1.3 PURPOSE STATEMENT

This dissertation will focus on the regulation of interactive gambling and, inter alia, why the legislature has not ensured the promulgation of the 2008 Amendment Act[84]. Furthermore, it will explore whether internet gambling should be legalised or not. Gaming and the internet, have over the last decade, grown rapidly. Increasingly, ―policy-makers and gaming regulators are taking the view that to allow unregulated gambling over the internet is to allow the negative characteristics of gambling to predominate in a medium where usage is growing at an extraordinary rate."[85] However, regulating gambling over the internet is to allow the country to be exposed to more pathological gamblers who cannot easily be traced because of the difficulties of finding information about people who do not want to be found on the internet. Hence these two possibilities will be considered separately:

- If interactive gambling remains as it currently is, prohibited, the question to be considered is whether it will be possible to enforce this prohibition; or
- If the amendment is promulgated and the legislation aims to legalise, regulate and licence interactive gambling, the question is how this regulation should be implemented. Specifically, the enforcement problems relating to the control of

[81] A Cabot et al 10.
[82] The 2004 Act, section 4; Hendrik J M Van Deventer *A Critical Analysis of the Taxation of Interactive income earned by Resident South African Individuals* (unpublished LLM thesis, University of Pretoria, 2010) 6.
[83] The 2004 Act, section 1.
[84] The 2008 Amendment Act.
[85] The1999 Report 4.

illegal/ foreign websites will be considered as well as the licensing and regulatory process, including operator integrity, the taxation system, payment systems, management of players' time, registration and their privacy right. The prevention of gambling by minors and vulnerable persons will also be examined. Other issues such as a testing period, scope of a licence and whether the regulator should be national or provincial gambling boards will also be discussed.

1.4 IMPORTANCE AND BENEFIT OF THE STUDY

This study will make a contribution to an academic understanding of the regulation process in the future of the interactive gambling industry in South Africa, as well as an understanding of the legal challenges of online casinos. It critically analyses the legal and regulatory framework of the interactive gambling industry in South Africa, examining the different reports produced in South Africa by the Gambling Commission, as well as the Department of Trade and Industry, in their attempt to find ways to legalise interactive gambling in the least harmful manner. The study also considers the different gambling industries around the world, in Australia and New Zealand in particular, that have either attempted to legalise interactive gambling and failed; or those that have attempted and succeeded; as well as those that have concluded with complete prohibition. Finally the study will suggest possible solutions to the problems of legalising interactive gambling and will suggest reasons why South Africa has been waiting for the promulgation of the National Gambling Act 10 of 2008.

1.5 RESEARCH OBJECTIVES

The first objective of this study is to consider the legal position in South Africa with regard to interactive gambling regulation. Thereafter, the aim is to investigate interactive gambling and the reasons why the legislature has not yet made a decision to implement the legalisation and regulation of interactive gambling. While there has been silence from the legislature, many South Africans have been exposed to the new technology and the variety of aspects that come with the internet. There is an obligation on the State to identify and implement solutions to the many challenges that interactive gambling brings. Moreover, the aim of this dissertation is also to find out to what extent the legislature will ensure the confidence in the integrity of

interactive gambling. At the same time make recommendations for the possible outcome of making internet gambling legal or completely prohibiting it.

From the outset it should be noted that this study will not be considering the dangers and or consequences of the legalization of interactive gambling. The study will confine itself to a critical analysis of the outcome of the final decision whether to legalise interactive gambling or not. This study also investigates the extent to which regulation would be able to enforce responsible gambling operations, as well as the extent to which online casinos would affect land-based casino.

1.6 RESEARCH METHODOLOGY

This study is largely based on desktop research making use of legislation, case law, academic journal articles, reports and parliamentary debates. The research will extend to material from other jurisdictions in the particular areas that have been chosen. In particular it will involve using the National Gambling Board reports in South Africa, conducted between the years 1999 to 2012, to find a way in which the legislature can come to a conclusion on how to deal with the legalisation and regulation of interactive gambling. Debates in Europe on the regulation of interactive gambling will also be considered, as well as in Australia, a country which has only legalised internet gambling for foreigners, and New Zealand. The last mentioned country has conducted research on the legalisation of interactive gambling and decided against the legalising of such internet gambling. In addition, how some States in the US are dealing with interactive gambling operators that are operating sites from Nevada, Antigua and the Caribbean will be considered and how the prohibition of internet gambling has frustrated the industry for these three entities. These investigations would assist in making a finding on how South Africa can move forward with the regulation or not of interactive gambling.

An additional aspect of this study will be conducted by means of interviews and questionnaires. The interviews will be conducted with the members of the Gambling Review commission as it is their role to review the gambling industry and make recommendations for the industry. These interviews will provide a national perspective on the direction they are taking regarding the legalising of interactive gambling, as well as what has been done since

the Interactive Gambling Regulations, which were published for comments with the deadline being on 07 May 2009. The aim is to obtain their perspectives on what would be the better option for the legalisation and regulation of interactive gambling.

1.7 LIMITATIONS OF THE STUDY

It must be noted that this study will be limited to the following:

- the legal position of interactive gambling in South Africa;
- whether interactive gambling should be legalised, licensed and regulated in South Africa or, alternatively, whether it should be prohibited ;
- the resources intended to protect minors and other vulnerable persons, specifically pathological gamblers, from the negative effects of interactive gambling;
- possible ways the interactive gambling industry could be taxed;
- the protection of interactive gambling service providers; and
- the effects that online gambling could have on traditional land-based gambling.

It must also be noted that this study will not include the following:

- the dangers of the legislature‘s prohibiting interactive gambling;
- the dangers of the legislature‘s legalising interactive gambling; or
- statistics on the current interactive gambling industry in operation illegally.

1.8 CONCLUSION

South Africa has come a long way from complete prohibition of gambling to draft legislation for interactive gambling. The controversy of gambling as a ‗social evil‘ has become more acceptable over the years. This is not to say that it has been an easy task. The South African legislature has been in over its head since 1999 trying to find a way to regulate interactive gambling. Four years ago legislation, namely the National Gambling Amendment Act 10 of 2008, was drafted to accommodate legalised interactive gambling. However, this legislation four years later has still not been promulgated, hence this dissertation.

The structure of the dissertation will be as follows:

Chapter 1 introduces the focus and provides the background of the study. Definitions of the key terms to be used throughout this dissertation are also presented. The importance and the benefits of the study are highlighted, as well as the objectives that this study hopes to achieve. In addition the research methods used are set out, as well as the limitations to the scope of the study.

Chapter 2 outlines the history of internet gambling in South Africa as a whole and the legislation that has been drafted with regard to this industry. Thereafter, internet gambling is discussed more generally in selected jurisdictions, placing South Africa in the global internet gambling market. The regulation of interactive gambling is discussed in terms of the requirements of making this form of gambling controllable. A distinction is made between online casinos and land-based casinos, as well as a distinction between online casinos and other types of internet games. A technological perspective is added with the discussion of online casinos and the possible criminal activities that come with them.

Chapter 3 discusses the legislation in detail in order to analyse the prospects of legalising interactive gambling in South Africa. This chapter investigates what the best possible solutions are in respect of regulating the interactive gambling industry. To elucidate the problems, data from interviews conducted with the members of the gambling review commission will be included. The one case involving interactive gambling in South Africa will be unpacked and discussed, along with similar cases in other jurisdictions, for purposes of the position of this form of gambling. Finally, this chapter will also evaluate the taxation of interactive gambling and the legislation concerning taxation thereof.

The next two chapters provide a more in depth exploration of the system of regulation of interactive gambling in two other jurisdictions. Chapter 4 focuses on the Australian situation and concludes with recommendations for South Africa, based on the solutions found in the Australian legislation and Chapter 5 concentrates on the New Zealand system, dealing with their investigations into the regulation for interactive gambling and their choices in this regard. The chapter concludes with recommendations for the South African system based on the New Zealand experience.

In chapter 6 the policy implications associated with the outcome of the legislation will be scrutinised and the various recommendations will be synthesized for the South African interactive gambling industry. In addition, the chapter concludes with an examination of the objectives of the study and whether they have been achieved and the research questions answered. This chapter will also include suggestions for further research in this area. The dissertation concludes with a Bibliography: a list of references, legislation and court cases.

CHAPTER 2
INTERACTIVE GAMBLING IN GENERAL

2.1 INTRODUCTION

In order to understand the extent of interactive gambling in general and in South Africa; as well as the impact that it has and will have in the future, it is critical to reflect and acknowledge how this phenomenon developed. This chapter will start off by giving a brief overview of online casinos, defining them and the way they operate and the application will follow. Thereafter a distinction between online casinos and land-based casinos as well as online casinos and other forms of gambling that exist will be made. This will then be followed with a brief explanation of the technological perspective of interactive gambling and an examination of the possible criminal activity concerned with this form of gambling. This chapter will then make an analysis of a broad overview of the history of interactive gambling in South Africa and abroad; following which, an analysis of the legislation of interactive gambling in South Africa will be made. This portion includes a brief discussion of three laws, or proposed laws that impact interactive gambling; these laws include the National Gambling Act 7 of 2004, the Interactive Gambling Tax Bill and the National Gambling Amendment Act 10 0f 2008. Furthermore this chapter will look at the way in which South African intends to regulate and enforce such regulations. Finally, the chapter closes with a discussion of interactive gambling regulation around the world.

2.2 DEFINITION OF ONLINE CASINOS AND APPLICATION THEREOF

Online casino has no precise definition in any legislation, South African writing or any other jurisdiction; however, the Casino Review Bank[86] defines it as basically ~~a~~ virtual counterpart of the casino people know about; it is called as such because it enables gamblers to play games on the internet, meaning, they do not have to go out of their way to go out and visit a

[86] CRB Dictionary- Online casinos _What is an online gambling' available at *http://www.casinoreviewbank.com/dictionary/guide/Online_Casino.html,* accessed on 12 September 2012.

land-based gambling arena."[87] Online casinos operate the same way brick-and-mortar casinos do, basically, "online casinos are online adaptations of traditional brick-and-mortar casinos, the odds, the paybacks, the rules and the regulations operate the same way."[88] The only difference is the place at which the game is being played and the fact that it is done on the computer rather than the casino environment[89]

Online casinos are audited and regulated by gambling authorities,[90] in South Africa it would be the National Gambling Board. They would then go through a process of scrutiny to ensure that fair gaming is observed, and the guidelines set for online casinos are conformed so as to ascertain the security and protection of online gamblers.[91] "A special consideration is in the safety measure that keeps internet frauds and pranksters in check."[92] Interactive gambling operators of online casinos need to be sure that the account details of their clients are not getting through a third party source.[93]

In South Africa where the internet is a new technology, it is without a doubt that many people have attempted to use the net for gambling purposes, more so online casinos. The promise of its proper regulation makes this a very prominent industry, also because it is so easy to access.

2.3 DISTINGUISHING BETWEEN ONLINE CASINOS AND LAND-BASED CASINOS

This sections deals with the differences between land-based casinos and online casinos. Accordingly it would be best to give a brief definition of land-based casinos as online casinos

[87] CRB Dictionary- Online casinos _What is online gambling' available at *http://www.casinoreviewbank.com/dictionary/guide/Online_Casino.html,* accessed on 12 September 2012.
[88] CRB Dictionary- Online casinos _What is online gambling' available at *http://www.casinoreviewbank.com/dictionary/guide/Online_Casino.html,* accessed on 12 September 2012.
[89] CRB Dictionary- Online casinos _What is online gambling' available at *http://www.casinoreviewbank.com/dictionary/guide/Online_Casino.html,* accessed on 12 September 2012.
[90] CRB Dictionary- Online casinos _What is online gambling' available at *http://www.casinoreviewbank.com/dictionary/guide/Online_Casino.html,* accessed on 12 September 2012.
[91] CRB Dictionary- Online casinos _What is online gambling' available at *http://www.casinoreviewbank.com/dictionary/guide/Online_Casino.html,* accessed on 12 September 2012.
[92] CRB Dictionary- Online casinos _What is online gambling' available at *http://www.casinoreviewbank.com/dictionary/guide/Online_Casino.html,* accessed on 12 September 2012.
[93] CRB Dictionary- Online casinos _What is online gambling' available at *http://www.casinoreviewbank.com/dictionary/guide/Online_Casino.html,* accessed on 12 September 2012.

have been defined above. In the National Gambling Act[94] casino is defined as a premises where gambling games are played or available to be played.[95] Premises include land and any building, structure, vehicle, ship, boat, vessel, aircraft and container. Therefore, a land-based casino is a building which will generally have hotels, restaurants, shops and other holiday attractions that accommodate certain types of gambling games and have gambling facilities as well. These games would include slot machines, blackjack, keno, poker slots, roulette etc.

In order to play a casino game, whether for fun or for money, a gambler would have to dress up and travel to the actual casino. All the choosing of a game, betting and winning are done by a qualified administrative person. Players can meet other players and choose their opponents for the games that they want to play. Online casinos on the other hand use software downloaded by players on their computers or on their phones, and the players can buy credits on any bank using their credit cards to play the games.

However with the new technology, everything seems to have changed. The proliferation of the internet can be seen everywhere, most if not everything can now be done on line including gambling. There are a number of reasons that will be listed below on the major differences between online casinos and land-based casinos. These are:-

- **Convenience:** Online casinos allow you the pleasure of being anywhere while you are playing your games, whilst land-based casinos require you to go out of your way to find a casino and mingle with other gamblers. For many people the occasional vacation is always pleasant, however for others it is either expensive or not possible because of other commitments and therefore, online casinos provide the convenience of being at home whilst enjoying the games you like. Further, most if not all land based casinos prohibit smoking in their premises and hence one has to leave their game and go outside for a smoking break. Another point would be the noise and other drunken gamblers in a land-based casino could drive many gamblers away from the casino, whereas at home or in your office, one can gamble in peace.

[94] The 2004 Act.
[95] The 2004 Act, section 1.

- **Privacy:** Online casinos guarantee a person the privacy of being at home when they gamble and also they can be unknown to their opponents, whereas in a land-based casino the player is amongst other gamblers in person.
- **Learning:** For one to be able to play a casino game they must have some kind of knowledge of the game. In land-based casinos, it is much harder since there are other people there and they usually know what they are doing. Whereas online casinos usually provide one with a trial run for each game and there are no other players around to be irritated and rude with you. It is also easier to read the rules on your computer and understand them better before you play the games.
- **Control:** In land-based casinos you have no control over the game as there is a dealer there laying out the cards or the chips, and you are playing at the pace of the other players. Whilst in online casinos you can control the game as you play and you can play all night if you please.
- **Internet Connection:** This is very important for online casinos as they need a reliable connection in order to play the games. Online gambling means you are actively participating in a game that costs money on your bank account and therefore one requires that it be reliable and not have any technical disturbances. Land-based casinos do not need an internet connection and one does not have to log out when they are done, they can just leave and go and cash out their chips.
- **Variety:** Online casinos provide a variety of games that can be played and a player can leave a poker table whenever he pleases and move on to the next, or a player can choose a different gambling site as he pleases. Land-based casinos have limited space to lay out their tables and players only have a choice based on the games available in that particular casino and cannot just go to another casino without having to travel a certain distance.
- **Practice runs:** Online casinos offer countless practise games without playing with or for money and players can improve on their skills and prepare to play for real money. One need not blow their life savings on one game, especially first time gamblers; they have the opportunity to practise as many times as they please.
- **Security:** This issue is more difficult for online casinos as one can never know which sites are fraudulent until one has actually tried and had to find out the hard way. It is very important that the regulators have a list of their official sites for online gambling.

In land-based gambling it is much easier to secure gamblers as there are cameras everywhere and there are dealers all over the casino.

- **Social aspect:** Online casinos offer convenience, however land-based casinos offer much more, it is an opportunity to go out and have a good time, there are other things beyond gambling that a person can focus on and they can have other people that they can communicate with whilst on vacation. Online casinos can be dangerous in this aspect because the game can consume a person, especially because he is alone and it is quieter.

Choosing between an online casino and a land-based casino depends on what different players prefer, although there are many benefits to playing online, it is without a doubt that land-based casinos are still very attractive. Both land-based and online casinos have their pros and cons and it will all be completely up to the player to define their goals in terms of what or where they would rather gamble.

2.4 DISTINGUISHING BETWEEN ONLINE CASINOS AND OTHER FORMS OF INTERACTIVE GAMBLING.

Whether you have played online or not, it is very obvious that online casinos are the most advertised, especially online poker. However online casinos are not the only games available online as interactive games, there are a few others including, online lotteries and bingo and online sports wagering and betting.

Racing and sports betting are an integral part of gambling in South Africa.[96] ―Wagering is on physical and specific sporting events such as a horse race, soccer, tennis, rugby, or a cricket game and through an ‗online bookie or totaliser'."[97] ―Online betting potentially allows bets to be made interactively in ‗real time', and thus allows players to change their bets as the game progresses."[98] Sports' betting has been offered legally in South Africa for several years and is administered by national[99] and provincial gambling boards, for instance, the Western Cape

[96] The National Gambling Board, Racing and Betting, available at *www.ngb.org.za*, accessed on 24 April 2012.
[97] S L Snail ‗Online gambling in South Africa, Comparative perspectives' (2007) 15 *Juta's Bus L* 114.
[98] Snail (note above 189) 114.
[99] The 2004 Act, section 44 as read with parts D and E of the Act, regulates sports wagering.

Gambling and Racing Law Act[100] as amended and the Gauteng Gambling Act[101], makes provision for horse racing and other forms of sport betting. In this regard however, the National gambling Amendment Act[102] specifically excludes electronic betting and wagering on horse racing and sports as a form of electronic communication for the purposes of the regulation.[103]

Bingo means ~~a~~ game, including a game played in whole or in part by electronic means, it is played using cards or any other devices which are divided into spaces with different numbers, pictures or symbols in which an operator or announcer calls out or displays the series of numbers, pictures and devices."[104] Online lotteries and bingo sites are the ~~v~~irtual equivalent of the physical bingo game and lottery, they have proved very popular in the United States of America and new ones have been emerging in other countries as well."[105] Bingo is not a very big industry in South Africa and generally makes less of a contribution to the gambling industry.[106]

Interactive gambling is still a relatively new industry, however large it has become in the past decade, it requires reliable regulations and the proper authorities to control it. In South Africa there is a need for a legitimate authority to govern interactive gambling, and although there is a National Gambling Board and different Provincial gambling Boards, they have all dealt with traditional gambling. Interactive gambling will require more people to be trained and much more research conducted in order for it to be a successful industry.

2.5 A TECHNOLOGICAL PERSPECTIVE

[100] The Western Cape Gambling Racing Act 4 of 1996 (as amended).
[101] The Gauteng Gambling Act 4 of 1995.
[102] The 2008 Amendment Act.
[103] A Louw *Sports Law in South Africa* (2010) 161; (Interactive Gambling Draft regulations in GG 31956 of 27 February 2009 reg 3 (3)).
[104] Snail (note above 189) 115.
[105] Snail (note above 189) 115.
[106] The National Responsible Gambling Programme *Responsible Gambling Digest'* 25 July 2011 Issue 7/11, 1.

> "Technology has begun to change the face of gambling no less than it is changing the way we work, the way we study and the way we do our banking. Most importantly, the advent of internet gambling has brought about a proliferation of gambling opportunities which were previously unimaginable."[107]

Technology has always played an important role in the development of gambling, now more so than ever because of the recent developments of interactive gambling. Technology is and will continue to provide market opportunities. If a person has a computer, blackberry, android, tablet whatever the case may be, he can have access to interactive gambling sites in South Africa and around the world. The interconnectivity of the internet is recognised as trans-jurisdictional in scope, this phenomenon allows it the net to escape or override conventional regulation.[108] The major problem with this is that unless you can control the location of the site at which the interactive gambling servers are controlled, you have no control at all.

By its very nature, the internet knows no boundaries, it grows exponentially and it is hard to know even worse, harder to predict. This makes it close to impossible for countries to prohibit interactive gambling, or regulate the sites that operate in that country. It is not possible, technologically, to determine what information is being transmitted on the internet; purely because of the volume of information transmitted. Unlike traditional casinos, interactive gaming sites cannot be shut down by merely chaining the doors; in fact, unlike gaming of the past, internet gambling does not even need to be hosted in the country where the player logs in.[109]

One of the consequences of technology has been to reduce the fundamentally social nature of gambling to an activity that is essentially more remote. According to Carnelley,[110] from a technological perspective interactive gambling experience seems not yet on par with the experience in land-based gambling operations. To be able to compete with other forms of

[107] J McMillen & P Grabosky ‗Internet Gambling' (1998) 88 *Australian Institute of Criminology trends & issues in crime and Criminal Justice* 1, 1.
[108] R Woolley ‗Mapping Internet Gambling: Emerging Modes of Online Participation in Wagering & sports betting (2003) 3(1) 3, 3.
[109] J M Schwartz ‗The Interactive Gambling Fallacy craps Out' (1999) 14 Berkeley Tech. L.J 1021.
[110] Carnelley (note 45 above) 279.

gambling, the experience must be entertaining and interesting with regard to the game concept, visuals, sound and speed.[111]

A detailed analysis of the technological perspectives exceeds the scope of this dissertation, but the importance of technology in this regard cannot be over emphasised since the mere existence of interactive gambling is a technological development.

2.6 CRIMINAL ACTIVITY

Interactive gambling sites are not as well regulated as land-based operations. A gambling site in another country may or may not be legitimate. There may be very little that can be done ~~to~~ prevent the provider of interactive gambling services from taking one's money and shutting down the site, or failing to pay winnings; and without the protection of government licensing and regulation, the loser has very little recourse if any at all."[112]

Interactive gambling sites can also be used as a means for money laundering, as it is easy to disguise the origins of illegally gained currency. Money laundering has been described by Sue Schneider[113] as: ~~th~~e conversion of illegally obtained funds into funds whose source appears legitimate, i.e. conventional washing of dirty money; the disguise of illegally obtained funds, i.e. misrepresenting dirty money to a recipient; or the disposal of illegally obtained funds, i.e. receiving or spending dirty money."[114] Hence interactive gambling can be used to disguise proceeds of crime as winnings or can be used by terrorist to make transfers for an attack on a particular country.

Interactive gambling encourages the possibility of other frauds, such as unauthorised use of bank or credit card details.[115] In this instance, credit card and account details are easily accessible to hackers who may steal money from the players or may use players account

[111] Carnelley (note 45 above) 279.
[112] McMillen & Grabosky (note 198 above) 2.
[113] Sue Schneider is the editor-at-large of *Gaming Law Review and Economics* and is a principal of *www.egamingbrokerage.com*. Based in St. Louis, she consults on a variety of other independent projects in the industry. She is a former owner of River City Group, which produced I-Gaming events as well as industry trade publications such as *iGamingNews.com* and the *Internet Gambling Report*.
[114] S Schneider _Money Laundering and Terrorist Financing in the I-Gaming World' (2010) 14(9) *GLRE* 657, 657.
[115] McMillen & Grabosky (note 198 above) 2.

details to blackmail them. Operators can also cheat players, refuse to pay winnings or even abscond the player's deposits. This problem can be seen often in instances where interactive gambling is not regulated and therefore making it more difficult for players or governments to seek recourse.

Furthermore, players are not the only ones who can be cheated, they can cheat too. This can be done by collusion between online poker players playing at the same table.[116] Hackers have successfully been able to interchange online sites in order to pay wins.[117] The biggest problem reported by industry representatives is blackmail by individuals and criminal organisations demanding payments as not to disrupt the site's online service prior to major sporting events, tournaments etc.[118] Still on the sporting issue, players on sporting events can be corrupt in that they may offer bribes to players to underperform in a game that they have an interest in, this is called match-fixing, making the integrity of the game lost to gambling.

Another issue that is of concern is gambling addiction, this is not so much a crime in itself, however it could lead to certain crimes where the player loses all the time and ends up not performing well at work, which could lead him into a state of stress pushing him into circumstances where he has to conduct fraud or steal in order to settle his gambling debts.

2.7 HISTORY OF INTERACTIVE GAMBLING IN SOUTH AFRICA

"The internet has grown tremendously in the past decade as individuals have utilised its wide variety of communication and information and retrieval methods. As a result, the accessibility and convenience of Internet usage has spawned a new method of gambling. Thanks to the internet, gamblers can partake in their choice of gambling from the confines of their own homes."[119] The history of interactive gambling is not a long and mysterious one. In fact in South Africa interactive gambling dates back to the late 1990s. With the extensive growth of the gambling industry and the evolution of technology it is well within reason that the new wave of gambling is occurring over the internet. It is difficult to put an exact date to technology; however "by the late 1990s, in South Africa, the US, Canada, the European

[116] Wood & Williams (note 127 above) 499.
[117] Wood & Williams (note 127 above) 499.
[118] Wood & Williams (note 127 above) 499.
[119] *Reno* v. *American Civil Liberties Union* 1997 521 U.S. Supreme Court 849.

community, Asia, and Australia, there has emerged a substantial increase in the legal and social acceptance of gambling and commercial gaming."[120] Albeit, interactive gambling is a new revelation, it has taken the world by storm in a way that very few industries have. The on-going development and the accumulation of influence of the internet led gambling to transit online. Thus, a new industry was born in the late 1990s when the first known online casino in this country, Piggs Peak, began to operate its business in South Africa.

In 1999 e-commerce's value in the world economy, in monetary terms, already stood at more than $200-billion, and the International Data Corporation estimated that this number would grow to over $300-billion by the year 2002.[121] Just as fast as internet usage is growing so is the rate of gambling over the internet. By virtue of its illegality and or lack of regulation in different parts of the world it is intractable to get the exact size of the industry. "Even the more reliable states estimate the value of the industry to be between $2-billion and $10-billion per annum."[122] "In the U.S. in 2000, internet gambling brought forth an estimated $2.2-billion in world-wide revenues,[123] a figure that dwarfed the estimated $300-billion gambled online in 1997."[124] "Consumer spending in traditional gambling generated a $61.2 billion input in the U.S. economy in 2000."[125] Whereas in South Africa, no less than 15.6 billion was invested by the gambling sector between 1997 and 2005, representing 1.2% of the total South African capital formation during this period.[126]

Interactive gambling is controversial; some jurisdictions prohibit it altogether. "Whilst other countries are paving a way for online gambling at this time including Argentina, which

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[120] The 1999 Report 5.

[121] W R Markowitz "Internet Gambling: Legal or not?' available at *http://www.gamblinglicenses/PDF/Internet%20gambling-%20legal%20or%20%not.pdf,* accessed on 15 May 2012.

[122] The 1999 Report 6.

[123] D Bedell "Millions Lay Money Down in World of Virtual Casinos' Dallas Morning News 5 July 2001, available at *http://www.dallasnews.com/technology/410879netgambling05.html,* accessed on 18 September 2012.

[124] Statement of Hon. Ben Nighthorse Campbell, Chairman of the Comm. on Indian Affairs "National Gambling Impact Study Commission Final Report: Hearing Before the Senate Comm. on Indian Affairs' 1999 106th Cong. 1 at 21 [hereinafter NGISC], available at *http://www.ngisc.gov*, accessed on 06 September 2012.

[125] Statement of Sebastian Sinclair, Vice-President, Christiansen Capital Advisers, LLC "*Gambling on the internet: Hearing before the Subcomm. On Oversight and Investigations before the House Comm. on Fin. Servs'* 2001 107th Cong. 2 available at *http://www.house.gov/financialservices/071201ss.pdf*, accessed on 23 May 2012.

[126] AA Ligthelm "Socio-economic impact of legalised Gambling in South Africa' March 2005 at xiii, available at http://www.ngb.org.za/SiteResources/documents/SocioEconomicImpactofLegalisedGamblinginSouthAfrica.pdf , accessed on 10 May 2012.

licensed its first online casino, as well as the UK territories, Isle of Man and Gibraltar, which both began issuing licenses to internet sports betting websites."[127] ~~I~~In Africa, Sun International Hotels makes a pact with Boss Media to use their software for an online version of the African-based brick 'n mortar casino."[128] Why is interactive gambling attracting so much government attention? Many authors have given a number of different explanations; however, the focus here will be on the South African context.

2.8 LEGISLATION REGULATING INTERACTIVE GAMBLING IN SOUTH AFRICA

Gambling in South Africa is traditionally regulated provincially; but all the provincial laws must comply with the national legislation. Gambling has come a long way since its restriction in 1673. However the lack of legal certainty on the national level for interactive gambling, has led to the lack of an acceptable regulatory environment.[129] The legalisation of gambling in 1996 brought an evolutionary change in the social understanding of gambling;

> ~~O~~nline gambling utilises advanced telecommunications technology to provide access across national borders, presenting unprecedented opportunities for the industry and new challenges for government regulation and national sovereignty. It also promises to revolutionaries the way people gamble, raising critical issues about social and economic impacts. Nations have taken a variety of approaches to online gambling, ranging from unregulated legislation to prohibition, creating a perplexing and uncertain legal environment."[130]

The National Gambling Act of 2004,[131] which repealed the 1996 Act[132] ~~r~~egulates various forms of gambling activities in order to: protect the public against the adverse effects of gambling;[133] limit, control and monitor the possible proliferation of gaming and illicit

[127] Antigua v U.S. at the World Trade Organization (WTO), The appeal.
[128] Antigua v U.S. at the World Trade Organization (WTO), The appeal.
[129] Carnelley (note 45 above) 2788.
[130] Mcmillen (note 63 above) 391.
[131] The 2004 Act.
[132] The 1996 Act.
[133] N Maseti & M Mosing _Presentation to select committee on Trade and International Relations, Overview of Gambling Act and challenges' The Department of Trade and Industry The Gambling Review Report 2009, available at *(http://www.thedti.gov.za/news2009/Gambling_review.pdf*, accessed on 16 May 2012.

gambling activities;[134] enforce responsible gambling operations by requiring operators to contribute to social development initiatives, SMME development and access to business and facilitate empowerment of historically disadvantaged individuals and B-BBEE;[135] contribute to infrastructure development in rural communities for example, limited pay-out machines."[136] Section 11 of the Act[137] makes interactive gambling unlawful in South Africa; accordingly, "A person may not engage in, facilitate or make available an interactive game except as authorised in terms of this Act or any other national law"[138]. However, this Act required the Minister of Trade and Industry to introduce into Parliament, within 2 years of the effective date, legislation for the regulation of interactive.[139] "In 2006 the National Gambling Board in South Africa released a report outlining the necessity for legalising online gambling in South Africa; highlighting the fact that land-based gambling and online sports betting were already in existence."[140]

As a result of this requirement, the introduction of the National Gambling Amendment Act[141] authorises the operation of interactive gambling. "The nature of interactive gambling required extensive regulations in order to safeguard minors and other vulnerable sectors of society against the negative effects of gambling and to ensure that gambling operators adhered to certain conditions of social corporate investment."[142]

An activity is a gambling activity if it involves making available for play or playing an interactive game.[143] An interactive game is a "gambling game played or available to be played through the mechanisms of an electronic agent accessed over the internet other than a

[134] N Maseti & M Mosing 'Presentation to select committee on Trade and International Relations, Overview of Gambling Act and challenges' The Department of Trade and Industry The Gambling Review Report 2009, available at *(http://www.thedti.gov.za/news2009/Gambling_review.pdf*, accessed on 16 May 2012.
[135] N Maseti & M Mosing 'Presentation to select committee on Trade and International Relations, Overview of Gambling Act and challenges' The Department of Trade and Industry The Gambling Review Report 2009, available at *(http://www.thedti.gov.za/news2009/Gambling_review.pdf*, accessed on 16 May 2012.
[136] N Maseti & M Mosing 'Presentation to select committee on Trade and International Relations, Overview of Gambling Act and challenges' The Department of Trade and Industry The Gambling Review Report 2009, available at *(http://www.thedti.gov.za/news2009/Gambling_review.pdf*, accessed on 16 May 2012.
[137] The 2004 Act.
[138] The 2004 Act, section 11.
[139] D Gamedi 'Interactive Gambling Regulations – briefing by the Department of Trade and industry' 16 June 2009, available at *www.pmg.org.za/report/2009*, accessed on 28 May 2012.
[140] South Africa releases the Interactive Gambling Tax Bill 2008, Casino News 26 April 2009, available at *http://www.amuse.co.za/2009/04/,* accessed on 23 June 2012.
[141] The 2008 Amendment Act.
[142] D Gamedi 'Interactive Gambling Regulations – briefing by the Department of Trade and industry' 16 June 2009, available at *www.pmg.org.za/report/2009*, accessed on 28 May 2012.
[143] The 2004 Act section 3(c), as amended by section 5(b) of the 2008 Amendment Act.

game that can be accessed for play in licensed premises, and only if the licensee of any such premises is authorised to make such game available for play."[144] The Act, as amended by the amendment Act; - ―provides for the regulation of interactive gambling; so as to protect society against the over-stimulation of the demand for gambling and to provide for the protection of minors and other vulnerable persons".[145] This Act aims also, ―to impose extensive obligations on gambling providers with regards to player identification and credit extensions and player registration";[146] ―to impose standards for gambling websites";[147] ―to regulate the advertising of gambling activities";[148] to regulate the ―payment of prizes and the remittance of profits and winnings";[149] to allow for tax in respect of interactive gambling activities to be imposed in terms of appropriate legislation;[150] and set out dispute resolutions and complaints procedures.[151] In order to achieve these aims by legalising online gambling and at the same time make gambling accessible to minors and potential gambling addicts, the Amendment Act makes provisions in section 11 which sets out the restrictions and requirements relating to the provision of online gambling. This section basically requires ―every person participating in interactive gambling to be registered with a licensed online gambling service provider".[152] The registration process imposes certain obligations on the players and the service providers.[153] The Amendment Act in turn imposes duties on the service provider to ensure the integrity of the games played.[154]

In April of 2009, it was reported[155] that the then Minister of Finance, Trevor Manual, released for comment the Interactive Tax Bill,[156] a special tax law on interactive gambling, which would impose tax on gross gambling revenue from interactive gambling.[157] The tax is

[144] The 2004 Act, section 1.
[145] The 2004 Act, section 1.
[146] The 2008 Amendment Act, section 11A (1)(a)(i).
[147] The 2008 Amendment Act, section 17.
[148] The 2008 Amendment Act, section 15(2).
[149] The 2008 Amendment Act, section 6A.
[150] The 2008 Amendment Act, section 88A.
[151] The 2008 Amendment Act, section 6B.
[152] The 2008 Amendment Act, section 11A (a)(i).
[153] The 2008 Amendment Act, section 11A (a)-(c)
[154] The 2008 Amendment Act, section 11A (d).
[155] ‗South Africa releases the Interactive Gambling Tax Bill 2008.' Casino News 26 April 2009, available at http://www.amuse.co.za/2009/04/, accessed on 12 June 2012.
[156] Interactive Gambling Tax Bill of 2008; ‗South Africa releases the Interactive Gambling Tax Bill 2008.' Casino News 26 April 2009, available at http://www.amuse.co.za/2009/04/, accessed on 12 June 2012.
[157] ‗South Africa releases the Interactive Gambling Tax Bill 2008.' Casino News 26 April 2009, available at http://www.amuse.co.za/2009/04/, accessed on 12 June 2012.

provided for in s88A of the Amendment Act. This Bill, like the Amendment Act has also not been promulgated.

2.9 REGULATING INTERACTIVE GAMBLING IN SOUTH AFRICA

Interactive gambling has caused a lot of anxiety amongst legislatures, different institutions and players in South Africa in terms of its regulations, whereby the government has given hope of its legalisation:-

> ―According to the CEO of the National Gambling Board (NGB), Thembi Majola, the local online gambling market will finally be regulated in a couple of months after years of debates. 10 licenses will be granted to operate an online gambling casino in South Africa. The gaming servers of the operators must be in South Africa."[158]

Not only has it been the government making promises to come to a decision on online gambling, but also the legislator has made attempts to permit interactive gambling in South Africa:-

> ―Despite that there is still no definite law legalizing online casino gambling in South Africa, under the current National Gambling Act, the forthcoming passing of the National Gambling Amendment Bill is likely to bring with it a dramatic turnaround in the current situation. The bill has already been approved by the National Assembly, and only the approval of the National Council of Provinces is pending its go ahead. Part of the bill will include safer conditions for online casino gamblers in South Africa who currently face up to R10 million in fines or up to 10 years imprisonment."[159]

With all the assertions made and even proof of a certain future for legal interactive gambling, it is without a doubt that different institutions will be waiting in anticipation for the final draw, that is the promulgation of the promised National Gambling Amendment Act:-

[158] ―South Africa will regulate online gambling' *Casino News* 27 April 2009, available at *http://www.amuse.co.za/2009/04/*, accessed on 20 May 2012.
[159] T Gibson ―Update on Legal Landscape of Online Casino Gambling in SA' available at *http://www.southafricacasino.co.za/gambling-legislation.php,* accessed on 18 March 2012.

> South African gamblers are providing a ready market for illegal international internet casinos, which have thrived online while the government has delayed the implementation of legislation to regulate Internet gambling."[160]

In May 2008, the South African Parliament approved new legislation regulating interactive gambling in South Africa. This Act (bill at the time) was drafted in response to a report[161] conducted by South Africa's National Gambling Board, which found that the National Gambling Act of 2004 has to be amended to include regulations for interactive gambling. The National Gambling Amendment Act[162] (NGAA) legalises interactive gambling in South Africa and establishes a licensing and regulatory system for this industry. The NGAA curtails the negative socioeconomic implications of an unregulated interactive gambling industry by establishing an effective and efficient regulatory framework, based on sound policy objectives that are in line with the government's policy framework on the regulation of all forms of gambling. The NGAA is still pending its promulgation by the legislature.

In terms of the report[163] the primary objectives for regulating interactive gambling are as follows:

- To protect the South African citizens and other players, by providing an opportunity for players to engage in interactive gaming legally and safely;
- To preserve the country's reputation in the world community by reflecting international norms of good governance, preventing crime and promoting responsible gambling; and
- To promote a successful interactive gaming industry in South Africa, by attracting reputable South African companies to locate their interactive gaming operations in the country.

Furthermore the report addressed the principal issues that express good policy, good law and good regulations for the interactive gambling in South Africa, it went on to discuss the principles for regulating online gambling in South Africa, this is in line with the way in

[160] L Comins „Illegal online betting is thriving' available at *http://www.amuse.co.za/2010/03/*, accessed on 20 May 2012.
[161] The 1999 Report, 5.
[162] The 2008 Amendment Act.
[163] The 1999 Report, 5.

which land-based gambling has been regulated and the fact that interactive gambling has to be more explicit in its regulations.[164] These principles included:-

- Amending National Legislation, this required the National Gambling Act[165] to be amended so as to include interactive gambling. In terms of the current state of affairs in South Africa, the National Gambling Amendment Act[166] was established for this purpose; however it is not operating as yet.
- Competence and the National Gambling Board, which suggested that interactive gambling be regulated nationally rather than provincially because the primary success of this industry will depend on the generation of international trust.
- Taxation and other benefits to South Africa. With regards to this principal the National Gambling Board established the Interactive Gambling Tax Bill[167], which when interactive gambling is legalised will regulate its taxation.
- Licensing fees. The 2005 report[168] indicated a list of the criteria that should be used in terms of licensing interactive gambling. (This issue will be further discussed at a later stage in this study.
- Player protection. The success of interactive gambling is very much dependent on the players having integrity in the games that they play and trusting the site that they have made a decision to use. Not only is it integrity that is an issue, but problem gambling is also addressed as an integral part of protecting players.
- Underage gambling, this is a rather difficult issue considering there can be regulations in place, however there is only so much that can be done to prevent minors from actually using a computer at home and gambling. Therefore the report attempts to find a system in which minors can be prevented from gambling online by the registration process.
- South African citizens, when considering this issue it is important to look at other countries that have attempted to regulate interactive gambling and how they have managed to control their citizens gambling. In this instance, one can look at the Australian system whereby their citizens are excluded entirely from using the

[164] The 1999 Report, 5.
[165] The 2004 Act.
[166] The 2008 Amendment Act.
[167] Interactive Gambling Tax (Administration) Bill of 2008.
[168] The National Gambling Board Report on the Regulation of Interactive Gambling' 10 October 2005.

countries interactive sites; this has the advantage of bringing in money to the country rather than circulating the money that is within the country. However, many people have access to the internet and can therefore use that to gamble on foreign websites. Needless to say, it is also possible to permit South African citizens to play the games, but the issue of taxation would arise, that is, whether to tax higher or the same as foreign players.

- International recognition, this applies to the principles agreed by the Gaming Regulators European Forum (GREF) as well as those articulated by the Australians. This principle has to be in accordance with the World Trade Organisation (WTO) so as to avoid conflicts such as the case of Antigua and the US.[169]
- Crime prevention is a very essential issue with regards to interactive gambling, according to the report it ~~is~~ a matter of independently ensuring the integrity of all electronic systems to avoid fraud; of protecting player privacy to avoid improper use of information."[170]
- Banking issues, this will require examination by the Reserve Bank on the foreign exchange regulations. And further it will also require the licensed operators to arrange with the different banks a form of payment for online gambling for players.
- Financial Solvency, all operators granted licenses would have to prove that they are financially solvent and that they are stable. This means that they cannot be or have been sequestrated at least 10 years prior to applying for the license.
- Dispute Mechanisms, include the players being able to report their complaints to a dispute resolution board and these issues need to be dealt with expeditiously.
- Probity investigations will need to be conducted on applicants for licenses, the employees as well as the creators of gambling software. Licenses may be revoked if there is a violation of any law.

These regulations have been provided for in the Amendment Act and other reports have been conducted, however it is important to mention that from the time that they were developed in the first report they were and still are significant to the success of the industry and will continue to be developed with time and as the interactive gambling industry grows.

[169] *Antigua* v *U.S. at World Trade Organisation (WTO)*, the appeal- Internet gambling case, 2007.
[170] The 1999 Report, 16.

2.10 INTERACTIVE GAMBLING AROUND THE WORLD

The revolution of online gambling was so rapid, that as it became a reality, the now biggest and most successful companies in the industry were just starting up.[171] The catalyst happened in 1994, when the government of the Caribbean island of Antigua Barbuda, passed a law that would enable online casinos to operate from within the island to this day- the Free Trade and Processing Zone Act.[172] "This law effectively allowed U.S. bookmakers (based in Antigua) to accept bets by phone on horse racing and sports, theoretically immune from U.S. gambling prohibition laws."[173] The second was "the development of gambling software by Microgaming in 1994/1995."[174] The third was "the development of encrypted communication protocols by CryptoLogic in 1995 that allowed secure online monetary transactions." [175] In 1996 InterCasino, based in Antigua, became the first online casino to accept a real money wager online.[176] To better ensure legal protection, most online gambling companies chose to base their operations in small Caribbean or European jurisdictions with permissive gambling legislation.[177]

"In October 2006 there were over 2,500 Internet gambling websites owned by 465 different companies listed at *www.online.casinocity.com.* A few of these companies are publicly traded on the London Stock Exchange, but most are privately owned. There are many countries where no laws exist with respect to gambling or online gambling. Other countries have legalised online gambling, permitting both residents and non-residents to gamble on all forms of gambling both within and outside the country. Some countries have legislation making certain online forms of gambling legal and other forms illegal. Some countries prohibit non-residents from accessing jurisdiction-based online gaming sites (e.g. Finland, Canadian provinces). Some go further in also prohibiting residents from accessing online gambling sites located outside the country (e.g. the Netherlands). Other countries prohibit residents

[171] A Michalas & V Savakis *Enabling value – added betting services by employing Web services and Intelligent Processing Techniques* (Unpublished Master's Thesis, Athens Information Technology, 2008) 5.
[172] A Michalas & V Savakis *Enabling value – added betting services by employing Web services and Intelligent Processing Techniques* (Unpublished Master's Thesis, Athens Information Technology, 2008) 5.
[173] R T Wood & R J Williams "Internet Gambling: Past, Present and Future' in G Smith et al (eds) *Research and Measurement Issues in Gambling Studies* (2007) 491, 492.
[174] Wood & Williams (note 127 above) 492.
[175] Wood & Williams (note 127 above) 492.
[176] Wood & Williams (note 127 above) 492.
[177] Wood & Williams (note 127 above) 493.

from accessing jurisdiction-based online sites (e.g. Australia prohibits Australians from accessing their online casino site). Several Muslim countries prohibit all forms of gambling, including online gambling (e.g. Pakistan, Saudi Arabia, etc.)."[178]

United Kingdom

In the United Kingdom (UK), ~~i~~nteractive gambling is regulated by the National Gambling commission; online sports betting, horse race betting, betting exchanges, and games of skill can be legally operated in the UK and played by UK residents."[179] The previous Gaming Act of 1968 and the Lotteries and Amusements Act ~~p~~revented the establishment within the UK of online gambling or other remotely operated casinos; it was widely agreed that new legislation was needed to promote and regulate remote gambling in the UK whilst protecting customers."[180] However, UK citizens are permitted to place bets at offshore internet casinos of their choice without breaking any British laws according to the Gambling Commission of 2005.[181] This new legislation's role was to grant licenses to organisations able to meet the licensing objectives.[182] Further, ~~t~~he legislation introduced the concept of 'remote gambling' which covers not only internet gambling, but also using other devices such as mobile telephones, landlines, television, radio, or 'any other kind of electronic device or other technology for facilitating communication' when playing these games".[183] Therefore, in terms of its legality, ~~t~~here is nothing in the current UK legislation which makes it illegal, or seeks to prevent British residents gambling on the Internet in their own homes."[184]

Other European Countries.

According to *eubusiness.com*, online gambling is a fast developing business in Europe, with almost 15,000 websites already identified and total annual revenues exceeding EUR 6 billion

[178] Wood & Williams (note 127 above) 495.
[179] Wood & Williams (note 127 above) 495.
[180] Charles Hopper 'Remote Controlled? An overview of the UK Remote Gambling licensing regime' available at *www.taylorwessing.com/download/article_remote.html*, accessed on 16 August 2012.
[181] Wood & Williams (note 127 above) 495.
[182] Charles Hopper 'Remote Controlled? An overview of the UK Remote Gambling licensing regime' available at *www.taylorwessing.com/download/article_remote.html*, accessed on 16 August 2012.
[183] Charles Hopper 'Remote Controlled? An overview of the UK Remote Gambling licensing regime' available at *www.taylorwessing.com/download/article_remote.html*, accessed on 16 August 2012.
[184] Amanda Taylor *Gambling: 'A Respectable Hell" Has the Internet made a traditional pastime too accessible bringing with it inevitable problems?* (Unpublished LLM thesis, The University of Westminster, 2005) 12.

in 2008 and expected to double in size by 2013.[185] National legal frameworks vary enormously across the EU, with different rules applying to licensing, related online services, payments, public interest litigation and the fight against fraud.[186]

Wood and Williams conclude that, "Online ticket sales are permitted in Sweden, Germany, and Liechtenstein.[187] Finland allows online horse race betting; Austria permits online lottery sales, casino games, skill games and bookmaking;[188] *Holland Casinos* was recently granted a license to conduct online gambling in the Netherlands;[189] It is unlawful to facilitate participation in 'foreign games of chance' in the Czech Republic, Denmark, Germany, Hungary, the Netherlands, Slovakia and Sweden;[190] Cyprus, Greece and Portugal explicitly prohibit the granting of online gambling licenses."[191] Today online gambling services are widely offered and used in the EU and the economic significance of the sector is growing rapidly.[192]

Australia

Australia was actually one of the first countries to adopt a regulatory scheme for interactive gambling.[193] Online gambling in Australia is regulated at the federal level by the Interactive Gambling Act of 2001; this federal legislation allows Australian residents to legally operate and take part in certain types of games such as online sports books, race books, poker rooms and skill game sites.[194] Although online lotteries are permitted, games such as keno-style games, scratch tickets and instant lotteries are not.[195] In as much as the different states have the ability to formulate state specific policies and legislation, federal legislation takes

[185] Eub2 'Online gambling in Europe-guide' available *http://www.eubusiness.com/topics/singlemarket/gambling-4,* accessed on 16 August 2012.
[186] Eub2 'Online gambling in Europe-guide' available *http://www.eubusiness.com/topics/singlemarket/gambling-4,* accessed on 16 August 2012.
[187] Wood & Williams (note 127 above) 495.
[188] Wood & Williams (note 127 above) 495.
[189] Wood & Williams (note 127 above) 495.
[190] Wood & Williams (note 127 above) 495.
[191] Wood & Williams (note 127 above) 495.
[192] Eub2 'Online gambling in Europe-guide' available *http://www.eubusiness.com/topics/singlemarket/gambling-4,* accessed on 16 August 2012.
[193] W R Markowitz 'Internet Gambling: Legal or not?' available at *http://www.gamblinglicenses/PDF/Internet%20gambling-%20legal%20or%20%not.pdf,* accessed on 15 May 2012.
[194] Wood & Williams (note 127 above) 496.
[195] Wood & Williams (note 127 above) 496.

precedent and this includes the fact that Australian residents are not permitted to gamble at government licensed online casino.[196]

New Zealand

The New Zealand government has granted ~~-e~~xclusive operating rights for online racebooks and sportsbooks to the Racing Board, formerly known as Totalisator Agency Board (TAB)".[197] Online lotteries may be run by the Lotteries Commission.[198] It is illegal to organise, manage, or promote any other source of online gambling in New Zealand.[199] Section 9(2)(b) of the Gambling Act 0f 2003 ~~-p~~rohibits remote interactive gambling; the definition of remote interactive gambling includes, gambling by a person at a distance by interaction through a communication device."[200] The prohibition is on remote interactive gambling conducted within New Zealand and therefore does not prohibit gambling conducted overseas; for example, it is not illegal for someone in New Zealand to participate over the internet if that website is based overseas.[201]

United States of America

The United states has taken a different turn from the rest of the world which is headed to a more accepting, regulatory and more profitable system for interactive gambling, the US opted for the domestic prohibition. The US government takes the view that internet gambling is a _vice' much like pornography and drugs, and as such it differs fundamentally from other forms of ecommerce.[202] According to a study by Mcmillen,[203] ~~-i~~n 1999 the National Gaming Impact Study Commission (NGISC) rejected the idea that prohibition will not deter either operators or players; rather it will make criminals of everyone involved in the activity and that with technology, this prohibition is most likely to be ineffective."[204] Instead _the NGISC

[196] Wood & Williams (note 127 above) 496.
[197] Wood & Williams (note 127 above) 496.
[198] Wood & Williams (note 127 above) 496.
[199] Wood & Williams (note 127 above) 496.
[200] The Gambling Act 51 of 2003.
[201] The Department of Internal Affairs _Remote Interactive Gambling prohibited' available at *http://www.dia.govt.nz/Services-Casino-and-Non-Casino-Gaming-Prohibited-Gambling#one,* accessed on 07 May 2012.
[202] Mcmillen (note 63 above) 396.
[203] Mcmillen (note 63 above) 396
[204] Mcmillen (note 63 above) 396.

recommended that Congress prohibit all forms of Internet gambling in the US'.[205] The political debates by US analysts suggest that this total prohibition of Internet gambling by federal legislation may be unconstitutional and unenforceable, they have even gone as far as suggesting that such legislation only applies to cross-border wagering and not gaming; however, many states legal systems have chosen to support this system and thereby strengthening the actions of the US federal enforcement authorities.[206] The Unlawful Internet Gambling Amendment Act of 2006 (UIGEA) was passed after congress in the US ignored policy findings that individual states should decide the legality of gambling within their respective borders.[207] In passing this Act, the US was sending a clear message: "they have no interest in a global regulation plan and the United States will no longer be a provider of Internet gambling revenues."[208] This act basically prevents all American financial institutions from facilitating online wagers.

The technological advancement in America has resulted in Internet gambling activity being specifically high in the U.S. market by making it physically possible and not because of America's greater thirst for action.[209]

2.11 CONCLUSION

On the basis of the above, it may be concluded that interactive gambling could be legally provided in South Africa after careful consideration of the different countries and how they have dealt with the issue of interactive gambling. Even if interactive gambling does prove to cause a lot of problems, there is some evidence that, after time and more research conducted, this industry has a potential to succeed if regulated rather than prohibited. The interactive gambling industry is still very immature, and suffice to say that more research is required, a solution needs to be reached, because the industry awaits no legality, it is growing every day and possibly to the detriment of the country's economy.

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[205] Mcmillen (note 63 above) 396.
[206] A Cabot "International chaos: the emerging battle over bets and bytes' in IQPC Gaming In Cyberspace Conference, Sydney, 9-10 August 1999, Internet Gambling Report.
[207] N M Wajda "Over-playing a weak hand: Why giving individual Sates a choice is a better bet for internet gambling in the United States' (2006-2007) 29 Thomas Jefferson Law Review 313, 313.
[208] Wajda (note 161 above) 313.
[209] P Shaker "America's bad bet: How the Unlawful Internet Gambling enforcement Act of 2006 will hurt the house' (2007)12 Fordham J. Corp. & Fin. L 1183, 1184.

"To participate in Internet gambling is to participate in a global, dynamic market. Whether they know it or not, and whether they like it or not, state governments do not have the last word here. They may participate, but none of them can control it totally. And so whether any given jurisdiction decides to learn to swim, or to move to higher, drier ground, the Internet gambling tide is not only coming in—it is already here."[210]

Eventually more countries will license interactive gambling and allow South African citizens to wager online. This will force the South African government to make a decision on its regulation of interactive gambling, whether it wants to strike out the National Gambling amendment Act 10 of 2008 or it wants to promulgate it. Whatever the case may be South Africa needs to be ready for this fast growing industry.

[210] M D Owens Jr. 'A Close-up Look at the Beast, Part II: Internet Security for State-Licensed Internet Gambling Systems' (2011) 7/8 *GLRE* 455, 459.

CHAPTER 3
THE SOUTH AFRICAN INTERACTIVE GAMBLING MODEL IN PERSPECTIVE

3.1 INTRODUCTION

> While the rate of internet gambling is relatively low in every jurisdiction, that rate is likely to increase as more jurisdictions opt to regulate and legalise internet gambling, and as citizens are thereby exposed in greater numbers to internet gambling as a legitimate and easily accessible gambling option. Unfortunately, however, in most jurisdictions, the expansion of internet gambling is out-pacing the creation of effective regulatory policies. Consequently, we find ourselves in a situation where we have insufficient knowledge of internet gambling, including the characteristics and game preferences of internet gamblers, the social and psychological dynamics of internet gambling behaviour, and the potential link between internet gambling and problem gambling. Moreover, and more importantly, we have limited knowledge on the extent to which internet gamblers systematically differ from their land-based counterparts.[211]

Even though interactive (online) gambling is prohibited in South Africa, it is readily available to everyone; provided by foreign operators outside of South Africa. The South African legal system does not currently allow for the licensing of online gambling thereby following the prohibitive model. This chapter looks at the different legislative models applied in other jurisdictions to interactive gambling and how these models compare to the current state of South Africa concerning interactive gambling as well as this country's intentions with regards to the future of regulation. After this a critical analysis of the National Gambling Amendment Act[212] will be made and the regulations provided thereafter. Due to the immaturity of this industry, there have been very few cases on interactive gambling, so this study is limited to one South African case, that is, the *Casino Enterprises* case[213] which will be discussed thoroughly in terms of the final decision and its impact on the way forward on the interactive gambling industry; other similar cases in different jurisdictions will be discussed therewith. This chapter will also discuss the taxation legislation and finally conclude on the remarks made by the Interactive Gambling Review Commission in South Africa during the interviews

[211] R Woods and R Williams ‗A comparative profile of the internet gambler: Demographic characteristics, game-play patterns and problem gambling status' (2011) 13 *New Media and Society* 1123, 1124.
[212] The 2008 Amendment Act.
[213] *Casino Enterprise* v *Gauteng Gambling Board* (6) 2010 SA 38 (GNP) and *Casino Enterprises* v *The Gauteng Gambling Board* case no 653/10 2011 ZASCA 155 (28 September 2011).

conducted, pertaining to the reasons for the delaying of the legislation dealing with the regulation of interactive gambling.

3.2 LEGISLATIVE MODELS APPLIED TO INTERACTIVE GAMBLING

"The basic attitudes of national jurisdictions vis-à-vis interactive gambling is far from being homogenous," says Alberto M Aronovitz.[214] It is clear that geographical borders are disappearing, thereby causing conflicting views on ways to regulate interactive gambling.[215] As a result of "seemingly irreconcilable social, moral and cultural differences in attitudes of EU member states towards gambling, there is no harmonised European gambling law."[216] On that account, according to the philosophical principles of each jurisdiction, a state's position may fluctuate between the following:-

- An attitude of legislative inactivity;
- Regulation of interactive gambling through a system of licensing; or
- The establishment of a regime of total prohibition.

Each country has different sociological/philosophical perceptions of gambling more so now because legislation concerning interactive gambling is rare and this area is but sparsely regulated.[217] Moreover, the problem of sovereignty emerges from situations whereby, for example, an interactive provider in South Africa does not respect the framework in Australia, a question then arises on what Australia can do to enforce its own gambling legislation followed by which legislation would then be applicable in the field of interactive gambling.[218] The Court of Justice of the European Union (CJEU) gave member states a broad margin of discretion to regulate gambling services within their respective territories; though, such discretion is not boundless, the regulation of gambling in individual states is subject to compliance with (Article 49 and 56 of the Treaty on the Functioning of the European Union)[219] (TFEU)[220] which all member states should adhere to.[221] The contrasting

[214] Aronovitz et al 33.
[215] Aronovitz et al 17.
[216] M Lycka "Online Gambling: Towards a Transnational Regulation' (2011) 15 *GLRE* 179, 183.
[217] Aronovitz et al 17.
[218] Aronovitz et al 103.
[219] Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01; Article 49: Within the framework of the provisions set out below, restrictions on the freedom of

approaches considered by jurisdictions have led to an astonishing amount of legislation in this field. Consequently, a ‗national' model could only work if each national system respected the borders of the other; which does not happen as it is.[222] It has thus been suggested that a more realistic solution would be an international agreement setting up the minimum standards for the different legal questions of gambling worldwide.[223] For instance, in many of their decided cases, the CJEU has held that member states introducing restrictions in this sector have to show imperative reason in the general interest consistent with their goals, in order to be compatible with EU law.[224]

Whichever way this field can be viewed the stakes— be they human, legal, economic or fiscal—are high.[225] The different strategies that jurisdictions have developed in order to tackle cross-border gambling and to enforce the regime they have chosen therefore merits a closer look.[226] This will assist in giving the South African government an overview of how other jurisdictions deal with cross-border gambling and assist interactive gambling providers to assess the risks that can arise from offering their services to foreign players.[227]

3.2.1 Legislative Inactivity

This is a situation whereby there is a lack of specific regulation. As opposed to jurisdictions that totally ban e-gaming, there is a group of states that, without specifically prohibiting it, do not even regulate interactive gambling at all.[228] In this situation jurisdictions can either; (a) refrain from legislation due to an attitude of apathy towards the phenomenon of interactive

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establishment of nationals in Member States in the territory of another Member State shall be prohibited. Such prohibitions shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities of self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provision of the Chapter relating to capital; and Article 59: (1) In order to achieve the liberalisation of a specific service, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall issue directives; (2) As regards the directives referred to in paragraph 1, priority shall as a general rule be given to those services which directly affect production costs or the liberalisation of which helps to promote trade in goods.

[220] Lycka (note 308 above) 183.
[221] Lycka (note 308 above) 183.
[222] Aronovitz et al 103.
[223] Aronovitz et al 28.
[224] Lycka (note 308 above) 183.
[225] Aronovitz et al 17.
[226] Aronovitz et al 103.
[227] Aronovitz et al 103.
[228] Aronovitz et al 33.

gambling, most states that fall under this model are usually not familiar with interactive gambling or conversely have poor computer and telecommunications infrastructure, even lack of widespread access to the internet; or (b) while aware of the dimensions and potential of interactive gambling, wilfully refrain from taking specific legislative steps because they have a _wait-and-see' policy which serves to postpone the imposition of legislation in order to review the way in which other jurisdictions regulate/prohibit interactive gambling, or alternatively.[229] The problem with this particular model is that foreign operators who want to operate in such a jurisdiction may either; (i) take advantage of the ambiguous legal situation created by the absence of express legislative prohibition or, (ii) operate their sites on the basis of existing legislation that was not originally conceived for this aim, but that can be mutatis mutandis applied to interactive gambling.[230]

In certain instances governments of states have no particular inclination towards interactive gambling within their borders; in fact they may just want to gain financial or economic benefits for such investments, consequently, such states may apply a pre-existing regulatory framework from other fields, for instance the laws governing foreign corporations, offshore companies, banks and financial enterprises and so on.[231]

3.2.2 Regulation of interactive gambling

This model focuses primarily on protecting the states citizens and their economy as well as controlling the interactive gambling operators.[232] The main tool for implementing these regulations is the establishment of a licensing regime pursuant to which gambling provided either without a license or outside the scope of its terms will be illegal.[233] States that regulate interactive gambling through this licensing regime are keen to submit that, _due to the very existence (and appropriate implementation) of such an instrument, the rights and interests of interactive gamblers are better protected as compared with remote, exotic and/or non-regulated jurisdictions'. [234] Inherently, whenever a state regulates interactive gambling it clears the ambiguity that is caused by legislative inactivity by expressly including in its

[229] Aronovitz et al 33.
[230] Aronovitz et al 33.
[231] Aronovitz et al 41.
[232] Aronovitz et al 43.
[233] Aronovitz et al 43.
[234] Aronovitz et al 44.

legislation a prohibition against unlicensed interactive gambling.[235] "Licensing is the process by which a government decides on who will be permitted to operate in their interactive gambling industry in that particular state."[236] A jurisdiction that opts for licensing may do so in one of these two systems: (a) Administrative authorisation, whereby the state fixes a list of requirements that the candidates must fulfil in order to be permitted to operate in the interactive gambling industry, once granted the license, the administration loses its discretionary power to prevent them from operating or; (b) Concessions, whereby in the initial stage, the licensing authority lists the applicants fulfilling the basic prerequisites required by law and secondly, the same (or another) authority— exercising its discretion— elects one or several of the candidates.[237] Several if not all states that have chosen to regulate interactive gambling would preferably apply the system of concession because states want to retain the final say in selecting who will be entitled to operate interactive gambling services within their jurisdictions and under which conditions thereof.[238] Concessions go further than administrative authorisation by leaving the state greater discretionary power and affording unsuccessful candidates a very limited and sometimes non-judicial means to appeal.[239]

Completely liberal systems

Jurisdictions falling under this system are characterised by the fact that they expressly authorise interactive gambling and do not set any limitations concerning nationality, residence of players or the origin of an operator.[240] If an operator is not licensed in such jurisdictions he does not face any legal or technical barriers for providing his services and local operators have no rules preventing them from operating outside of the country.[241] This system portrays interactive gambling as a business that should be regulated by the market. An example of such a system, amongst others, would be the United Kingdom (UK) which has adopted this system.[242] The UK has a large home market for interactive gambling (referred to as remote gambling) and their approach is based on the idea that players can choose probity and integrity rather than being based on prohibition and protectionist.[243] The government of

[235] Aronovitz et al 28.44.
[236] A Cabot & M Balestra *Internet Gambling report* 6 ed (1997) 200.
[237] Aronovitz et al 46/7.
[238] Aronovitz et al 47.
[239] Aronovitz et al 48.
[240] Aronovitz et al 115.
[241] Aronovitz et al 115.
[242] Aronovitz et al 117.
[243] Aronovitz et al 117.

the UK commissioned the Gambling Review Body to undertake a study of the gambling situation in the UK.[244] Mid 2001 the "Budd report" (under Sir Alan Budd) was published, and as a response the government reported that the legislation would be brought before parliament in 2003/4.[245] According to this report, prohibition would be impractical and costly to enforce, for this reason then, gambling activities will be permitted through the system of licensing under the authority of a special gambling commission.[246] The government's response to the report in this regard was as follows: "There is a potentially vast international market for which gambling operators based in this country will be encouraged to compete. Consumers, both here and abroad, will be able to access a full range of gambling sites licensed and located here, safe in the knowledge that the probity and integrity of the gambling operators and the products they offer are assured by the Gambling Commission".[247] In 2005 the Gambling Act was passed into British law.

Restrictive liberal systems

Jurisdictions in this system are essentially liberal systems with one important difference; licensed operators are prohibited from operating in jurisdictions where gambling on foreign sites is not allowed.[248] That is, operators in such jurisdictions may offer their services to anyone in and across borders where interactive gambling is not forbidden for foreign operators or in general.[249] A practical example falling under this system is Australia. Section 15a of the Interactive Gambling Act of 2001[250] "prohibits the provision of Australian-based interactive gambling services to customers in 'designated' countries."[251] A 'designated' country is a country whereby the government has made a request to the Australian Minister to make such declaration and possess legislation which mirrors the provisions of section 15 of the Act by prohibiting the provision of interactive gambling services to its residents internally.[252] According to G. Neil of the Australian Federal Department of Communications, the reciprocity is not a requirement.[253]

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[244] Aronovitz et al 117.
[245] Aronovitz et al 117.
[246] Aronovitz et al 118.
[247] *The U.S- Measures affecting the Cross-border supply of Gambling and betting services; dispute Settlement with Antigua and Barbuda* (2005) (1), WT/DS285/AB/R, (First Submission of Antigua and Barbuda) 5.
[248] Aronovitz et al 118.
[249] Aronovitz et al 118.
[250] Interactive Gambling Act 84 of 2001.
[251] Aronovitz et al 118.
[252] Aronovitz et al 121.
[253] Aronovitz et al 121.

Liberal prohibitive systems

This system allows interactive gambling from their territory yet they prohibit it for local residents.[254] The aim of such legislation is twofold: on the one hand, this prohibition guarantees the protection of law and order and public morality, while, on the other hand, the government may benefit from all the fiscal and commercial revenues which the gambling industry generates for the country.[255] The system in Australia may also be described as liberal prohibitive as the Interactive Gambling Act of 2001[256] prohibits Australian interactive gambling operators from providing services to Australian residents, however, anyone from outside the country may access these services.[257] Moreover, the Interactive Gambling Act,[258] with regard to the relation between Federal, Australian State or Territory laws, stipulates that ―it is not intended to exclude or limit the operation of a law of a state or territory to the extent that the law is capable of operating concurrently with the Act", that is, ―states can continue to license interactive gambling service providers" as long as the license under state law does not interfere with federal law.[259] Building on this legislation, the industry has elaborated a code of conduct which aims at enabling internet users to filter out prohibited overseas gambling sites.[260]

3.2.3 System of total prohibition

Absolute prohibition of installing interactive gambling businesses in local territories is a strategy adopted by some jurisdictions (e.g. Switzerland, Israel, the federal government of the U.S.A, as well as some of the individual American States as well as South Africa); this excludes any possibility for interactive gambling operators to establish their businesses within the territories of such jurisdictions.[261]

Prohibitive system

On one hand there are jurisdictions with total prohibition, known as the protectionists' jurisdictions.[262] One example of such would be the Arab countries who, due to their religious

[254] Aronovitz et al 121.
[255] Aronovitz et al 121.
[256] Interactive Gambling Act 84 of 2001.
[257] Aronovitz et al 122.
[258] Interactive Gambling Act 84 of 2001, section 6A.
[259] Aronovitz et al 122
[260] Aronovitz et al 122.
[261] Aronovitz et al 43 fn 35.
[262] Aronovitz et al 104.

attitudes towards gambling, take a restrictive approach towards interactive gambling; in Saudi Arabia, there is only a single government-controlled ISP, which allows the government to dictate which sites are available and monitor the home user's activity.[263] Prohibitive systems are characterised by the fact that interactive gambling is prohibited, that is, the offer, commercial exploitation and practise of gaming.[264] The protectionist prohibitive systems permit gambling, but only if the operator is licensed domestically. They form part of the prohibitive systems because the restriction of licensing to home-based casino operators means that gambling services from abroad are illegal.[265] Jurisdictions that have this system in place want to create a national system for gambling and want to protect their local markets from foreign intruders.[266] Such an approach may be chosen in particular due to fiscal reasons, so that only the national government benefits from any tax revenues incurred in connection with gambling activities by residents of that country. [267] A good example for this system is the Netherlands, which doesn't at this point have any legislation covering interactive gambling, however, a proposal bringing about major changes into this industry was brought about by the government, and although it has not been put into place it could bring about a change to the current state of affairs.[268] Should this legislation be considered, it will need further elaboration and must be approved by parliament.[269] The noteworthy elements of this proposal are that interactive gambling would be granted on a limited national scale; licenses will be granted for 2/3 years; a spread of supervisory commission will be set up between representatives of the state department of Economic Affairs, the department of Public welfare and sports etc., restrictions on the age limit, digital monitoring of players, registration of operators, as well as ensuring fair play and maintain the integrity of gaming.[270] Furthermore, the profits will be used for charitable purpose, however, safeguards will be in place with regards to the gambling operators; an independent organ would verify the games offered to ensure they comply with the criteria relating to the probability of winning, or the average hourly loss, the money that may be risked by players and the way in which the winnings are

[263] Aronovitz et al 105.
[264] Aronovitz et al 118.105.
[265] Aronovitz et al 109.
[266] Aronovitz et al 109
[267] Aronovitz et al 111.
[268] Stephen Ketteley ‗Netherlands: With regulation of interactive gambling looming, the relevance to sports integrity comes into play' available at *http://blog.dlapiper.com/gambling/entry/netherlands_with_regulation_of_interactive*, accessed on 18 May 2013.
[269] Aronovitz et al 111.
[270] Aronovitz et al 111.

paid out.[271] Finally, there will be controls conducted at random to ascertain whether the operators are competent and adhere to the requirements of the license.[272]

South Africa follows a prohibitive system, that is, residents cannot offer interactive gambling games, they cannot take part in any games and no form of commercial exploitation of this type of gaming is permitted. The National Gambling Act of 2004 prohibits any form of gambling over the internet. However, as per the reason for this dissertation, the legislature has been for the past four years drafting and debating on a piece of legislation that would change this model. The South African legislature drafted the NGAA of 2008 so as to regulate interactive gambling and follow a more liberal model. The regulation of interactive gambling in South Africa would be by way of concession as will be stated under 3.3, this will include the ways in which the legislature intends to maintain its discretionary power as well as the regulation of interactive gambling under 3.4 which will provide the list of criteria for the application process and how the government intends to ascertain that unsuccessful candidates have no way of operating so as to maintain the power within government. The way in which the legislature intends to tax this industry is also discussed below. However, it is very important to note that South Africa needs to promulgate this legislation soon, as the point of its creation was to change the model of interactive gambling, and the rate of interactive gambling is increasing at a faster pace and people are being exposed to it more and more. The regulatory policies will be more effective implemented, and any loopholes will be visible when the legislation is in operation. The promulgation will also make sure that the government can start receiving the taxes due to this country that are unaccounted for through illegal gaming.

As mentioned above there is no one law that confines all jurisdictions to comply with it, however each jurisdiction has adopted at least one of the models listed above. These models vary according to the reasons a particular government has chosen to regulate or prohibit interactive gambling. It is important to note that each jurisdiction is guided by certain values or characteristics when choosing a particular model. Most, if not all governments aim to protect their citizens at all costs, however it is done. Some choose to prohibit with the hope that people will not be exposed to interactive gambling, others because they are religiously

[271] Aronovitz et al 109.
[272] Aronovitz et al 111.

inclined, while others prohibit their own residents while permitting their operators to provide such games to foreign gamblers. On the other hand some governments choose to regulate in order to control the way in which their citizens gamble or the types of games they are exposed to as well ensuring the safety of the sites used. A further reason would be to protect the economy of such jurisdiction; this is done by way of taxation of the gambling operators and the gamblers. Moreover, ensuring that the jurisdiction can benefit from the regulating or prohibiting of interactive gambling.

3.3 THE NATIONAL GAMBLING AMENDMENT ACT

In 2007 the Portfolio committee processed the National Gambling Amendment Act which sought to introduce internet-based gambling as part of gambling, effectively amending the National Gambling Act 7 of 2004. Section 11 of the National Gambling Act[273], prohibits interactive gambling until such time that thorough investigation on the readiness of South Africa for this industry has been done. As a result of this section, parliament issued a directive to the Department of Trade and Industry, herein after referred to as the DTI that within 2 years of this legislation the DTI can bring the issue of interactive gambling before parliament.[274] The National gambling Amendment Act was drafted then signed by the president and passed into law in 2008. Following the passing of this Amendment Act, the DTI was required to table before parliament regulations as subordinate legislation so that parliament could provide input on the regulations, particularly on the concerns that were raised at the time when the legislation was processed in parliament.[275] The principle aim of this Act is to amend the National Gambling Act, 2004[276] by basically inserting and changing certain definitions and to provide for the regulation of interactive gambling in terms of all the requirements of legal gambling. The Act also aims to ensure that the gambling industry complies with the Financial Intelligence Centre Act so as to avoid gambling associated crimes. A further purpose of the Amendment Act is to regulate all forms of gambling activities with the sole purpose of protecting the public, particularly where gambling is

[273] The 2004 Act.
[274] Nomfundo Maseti, (Chief Director of the Department of Trade and Industry) *The National Gambling Act regulations on interactive gambling deliberations* (audio) 23 June 2009.
[275] Nomfundo Maseti, (Chief Director of the Department of Trade and Industry) *The National Gambling Act regulations on interactive gambling deliberations* (audio) 23 June 2009.
[276] The 2004 Act.

practised illegally; it also puts measures in place which seek to guard against the adverse effects of gambling. The Act also deals with the possible proliferation of gambling where these gambling activities are being practised, as well as to employ responsible behaviour on the part of the operator, i.e. the criteria used in granting licenses must ensure that the responsibility bestowed on the operator more so with regard to socio-economic development will be fulfilled. Further, the Act also seeks to ensure that problem gamblers are kept in check in terms of providing associations that assist them by way of educating them about the adverse effects of gambling and providing counselling for problem gamblers or even prohibiting them from proceeding with further engagement in any form of gambling activities.

According to the Department of Trade and Industry, the regulation of gambling puts in place measures to avoid the overstimulation and demand for gambling and provides a measure of control for those who choose to engage in such gambling activities by providing registration in order for players to be permitted to gamble in a more safe and secure gambling environment. The DTI also adds that legislating and regulating tries to clarify the issues that operators should guard against, particularly with the view of prohibiting minors from gambling. Furthermore, legislation tries to align the Financial Intelligence Centre Act on ways to prohibit money laundering activities and prevent terrorist activities.

The National Gambling Amendment Act[277] recognises that interactive gambling exists; however, it _provides very little insight into the regulation of the interactive gambling industry'. This Act stipulates that _only interactive gambling service providers licensed in terms of the National Gambling Act[278] may legally provide gambling services within South Africa'. Should this Amendment Act[279] be promulgated, it will allow South African citizens to participate in interactive gambling with service providers that are licensed in terms of the National Gambling Act[280] of which there are currently none that are legitimate. The regulations proposed by the DTI for interactive gambling aim to regulate the industry by _taking initial steps which seek to protect players from dishonest and unfair practises, and keep money from being spent on foreign gambling sites'.

[277] The 2008 Amendment Act.
[278] The 2004 Act.
[279] The 2008 Amendment Act.
[280] The 2004 Act.

3.4 INTERACTIVE GAMBLING REGULATIONS

The regulations provided by the NGB and the DTI make provisions in terms of the games that will be permitted and/ or prohibited as well as the process for player protection. A number of issues raised in the previous chapter are provided for in the regulations and therefore will assist in formulating a more critical analysis of the interactive gambling industry. A basic overview of these issues include:-

- Advertising, more specifically the issue of the content that is contained in the advert,
- The licensing process for the operators,
- The issue of compliance and enforcement to ensure that all licensed operators adhere to the obligations stipulated,
- Access of interactive gambling to minors,
- Measure in place to deal with problem gambling as well as the responsibilities of the operators herein, and
- Money laundering and the revenue process for the operators in line with the Money Bill.

3.4.1 Advertising

In terms of the provisions of the interactive gambling games and the operators, the games will have certain rules or procedures and certain standards that will be required in respect to the types of games. Section 15 of the 2008 Amendment Act[281] amends Section 15(2) and (4) of the 2007 Act[282] to include the words –or website" and allow the Minister to prescribe the manner and form of interactive gambling advertising. The Interactive Gambling Regulation[283](herein after referred to as the _2009 regulations') in GN 211 GG 31956 of 27 February 2009, regulation 17 (1) to (8), provides that only licensed interactive gambling service providers are permitted to advertise interactive games that have been approved,[284] the advert must convey a clear message that prohibits minors from taking part in the interactive game;[285] the service provider must not send emails whether through its own operation or by

[281] The 2008 Amendment Act.
[282] The 2004 Act.
[283] The 2004 Act, Interactive gambling regulations.
[284] Interactive Gambling regulations in GN 211 *GG* 31956 of 27 February 2009, reg 17(1) (a) & (b) [Hereinafter referred to as the 2009 regulations.
[285] The 2009 Regulations, regulation 17(2).

the intervention of a third party,[286] it is the prerogative of the NGB to determine whether an advert contravenes the regulations, and if so, the board has the right to either prohibit the advert or change it.[287] A number of issues arose from these provisions, firstly the way in which the NGB will ascertain that the advert is in line with the regulations and secondly how the NGB intends to prevent other public entities such as the South African Broadcasting Commission (SABC) from entering into contractual agreements with illegal interactive gambling advertising.[288] The NGB stated that each advert will go through the NGB first before it is broadcast to the public.[289] Secondly, that the Intergovernmental Relations Act[290] stipulates that public entities have to ensure that they engage other public entities to ascertain that they exhaust all reasonable measures in place prior to the pursuing of any litigious matters, therefore, the NGB will ensure that there is a correlation between itself and the advertising companies or bodies.[291]

3.4.2 Licensing

The second issue pertains to the licensing process. In terms of regulation 23,[292] the NGB is responsible for the licensing process; they have the duty to ensure that the licences comply with the purposes of the 2004 Act[293] and the authority to impose conditions on the interactive games to be played.[294] Having mentioned that, the Minister, in terms of the 2008 Amendment Act[295], section 25 (insertion of section 37A) may, by regulations made in section 87, consider the number of interactive gambling licenses that may be provided in South Africa. However, it has been suggested by the NGB that a limitation of 10 licences should be issued in the first 5 years of regulating interactive gambling;[296] these licences will be renewable annually, this is done to ensure that the operators are still complying with the regulations.[297] Pursuant to

[286] The 2009 Regulations, regulation 17(5).
[287] The 2009 Regulations, regulations 17(6) & (7).
[288] Nomfundo Maseti, (Chief Director of the Department of Trade and Industry) *The National Gambling Act regulations on interactive gambling deliberations* (audio) 23 June 2009.
[289] Interactive Gambling regulations committee feedback and proposal, Committees draft Strategic Plan deliberation (audio), 12 August 2009.
[290] Intergovernmental Relations Framework Act 13 of 2005, section 40(a).
[291] Interactive Gambling regulations committee feedback and proposal, Committees draft Strategic Plan deliberation (audio), 12 August 2009.
[292] The 2009 Regulations, regulation 23.
[293] The 2009 Regulations, regulation 23 (1) read with s2A of the 2004 Act.
[294] The 2009 Regulations, regulation 23 (2).
[295] The 2008 Amendment Act.
[296] The 2009 Regulations, regulation 26 (1).
[297] Interactive Gambling regulations committee feedback and proposal, Committees draft Strategic Plan deliberation (audio), 12 August 2009.

the application for a license process, the board will provide a scoring methodology to evaluate the licenses; when the evaluation occurs, if the prerogative of the board is to decentralise the licenses, opportunity, for example, will go to the most economically disadvantaged provinces. The licensing process should be the foundation of the interactive gambling regulation.[298] Additionally, due to the borderless nature of Interactive gambling, section 19 of the 2008 Amendment Act[299] amends section 30 of the 2004 Act[300] by requiring that the interactive gambling licensing process is conducted at a national level, and not at a provincial level. The board is also granted authority by section 28 of the 2008 Amendment Act[301] (by the insertion of section 39) to issue licenses as contemplated in section 38(2A)(a) to an interactive gambling operator who meets the requirements of this Act.[302] The provincial licensing authority is only permitted, by section 28 of the Amendment Act[303] to issue interactive gambling employment licenses to the employees or members of staff of the interactive gambling provider.[304]

The licensing process defines who is entitled to provide interactive games in this country, and provides that the regulators have to ensure that the operators (as applicants at the time) are fit and proper people and exhibit appropriate behaviour in all respects. The 2009 regulations[305] provides that the board has to conduct investigations on the applicants, relevant entities and individuals associated with the applicant in order to establish whether the applicant is eligible for a license and complies with regulation 27 (1) and (2).[306] Further, the board can indicate as a condition for the license, that the interactive gambling equipment should be located in a particular province,[307] and the main server has to be located in South Africa, however, an operator can interact and replicate with servers located outside of the country.[308] Finally, in keeping with the rules of good practice, members of the NGB are prohibited from making applications to be licensees, or to have any association with the licensed interactive gambling

[298] Interactive Gambling, Report on the Regulation of Interactive gambling, 10 October 2005.
[299] The 2008 Amendment Act.
[300] National Gambling Act 7 of 2004.
[301] The 2008 Amendment Act
[302] The 2008 Amendment Act, section 28(1).
[303] The 2008 Amendment Act, section 28.
[304] The 2008 Amendment Act, section 28(2).
[305] The 2009 Regulations, regulation 27(1).
[306] The 2009 Regulations, regulation 28(2) & (4).
[307] The 2009 Regulations, regulation 28(2).
[308] The 2009 Regulations, regulation 28(3).

service providers in terms of the operation of interactive gambling, as this would lead to corruption within the industry.[309]

3.4.3 Compliance and enforcement

The 2008 Amendment Act[310] places an obligation on the NGB to ensure that the licensed stakeholders of interactive gambling comply with all the provisions of the Act. Section 21 of the 2008 Amendment Act[311] substitutes section 32 of the 2004 Act[312] to include the exclusive jurisdictional power of the NGB to investigate and consider applications, and issue national licenses for interactive gambling.[313] These investigations must comply with the 2008 Amendment Act[314] as well as the conditions of the national licenses for interactive gambling.[315] Furthermore the board has to ensure that the compliance is in line with the Financial Intelligence Centre Act (FICA)[316] in so far as it applies to the gambling industry. The board is also responsible for ensuring that unlawful activities are prevented;[317] that the equipment used for interactive gambling is registered and certified in terms of this Act;[318] and that the interactive gambling equipment suppliers are licensed in terms of the Act,[319] amongst other things listed in section 22 of the 2008 Amendment Act[320] which substitutes section 33 of the 2004 Act. Moreover, section 22 of the 2008 Amendment Act[321] makes the board responsible for the inspection of interactive gambling websites, the equipment and software used for interactive gambling as well as the location of the premises holding the equipment.[322] Additionally, the board is also responsible for the supervision and enforcement of compliance by the licensees with the obligation of accountable institutions with the FICA, to the extent required by this Act.[323] The list is endless with countless ways in where the NGB has set out ways in which they will ensure compliance and ascertain that interactive

[309] Interactive Gambling regulations committee feedback and proposal, Committees draft Strategic Plan deliberation (audio), 12 August 2009.
[310] The 2008 Amendment Act.
[311] The 2008 Amendment Act.
[312] The 2004 Act.
[313] The 2008 Amendment Act, section 21(a).
[314] The 2008 Amendment Act.
[315] The 2008 Amendment Act, section 2(b).
[316] Financial Intelligence Centre Act 38 of 2001.
[317] The 2008 Amendment Act, section 33(a)(i).
[318] The 2008 Amendment Act, section 33(a)(iii).
[319] The 2008 Amendment Act, section 33(a)(iv).
[320] The 2008 Amendment Act.
[321] The 2008 Amendment Act, section 33(a)(i).
[322] The 2008 Amendment Act, section 22(c) & (d).
[323] The 2008 Amendment Act, section 22(f).

gambling laws are enforced in terms of the regulations provided. Moreover, the board may ~~-r~~evoke or suspend interactive gambling licenses for non-compliance with license conditions and any applicable law and as part of cooperative governance may delegate some of its enforcement and compliance issues to the provincial licensing authorities."[324] Finally, law enforcement in South Africa is not highly dependable and since this form of gambling is hi-tech, fraud will increase rapidly because of the system of payment (i.e. credit cards) and there will be a large spam influx.[325] Cellphones are not included in the documentation (i.e. the NGAA or the 2009 regulations); however, it is worth mentioning that any permission granted for interactive gambling on cellphones will result in uncontrollable gambling of minors.[326] Reports on effectiveness of the regulations, the prosecutions and law enforcement must be submitted to parliament on a term basis.[327]

3.4.4 Minors

This issue seems to be the most difficult to answer purely because the minors are the technology generation. The first and best solution to this issue, at first instance, would be to prohibit interactive gambling completely, it has even been suggested by the parliamentary committee, that enforcement will be impossible to control and rather prohibition is more viable, making interactive gambling as difficult as possible to access; and any adult who makes interactive gambling available to a minor should be prosecuted.[328] However, interactive gambling has always been illegal in this country, yet there is already an issue of minors gambling over the internet. The NGB suggests that if there are legal operators in place, you can monitor them and at least control the number of minors that go beyond the scope of regulation to take part in interactive games.[329] Firstly the registration process provided in the 2008 Amendment Act[330] plays a big part in controlling underage gamblers. In

[324] The 2008 Amendment Act, section 22(h).
[325] Interactive Gambling regulations committee feedback and proposal, Committees draft Strategic Plan deliberation (audio), 12 August 2009.
[326] Interactive Gambling regulations committee feedback and proposal, Committees draft Strategic Plan deliberation (audio), 12 August 2009.
[327] Interactive Gambling regulations committee feedback and proposal, Committees draft Strategic Plan deliberation (audio), 12 August 2009.
[328] Nomfundo Maseti, (Chief Director of the Department of Trade and Industry) *The National Gambling Act regulations on interactive gambling deliberations* (audio) 23 June 2009.
[329] Nomfundo Maseti, (Chief Director of the Department of Trade and Industry) *The National Gambling Act regulations on interactive gambling deliberations* (audio) 23 June 2009.
[330] The 2008 Amendment Act.

terms of regulation 9,[331] a person who wants to register as an interactive gambling player needs to provide the necessary documents required by the interactive provider, who then has to verify the player's identity under the interactive provider's approved control system. Moreover, regulation 10[332] requires that a player submit an application form containing, but not limited to the following; proof of identification, proof of residence, valid contact details, statements under oath confirming his age, as well as the players nominated account details.[333] In essence, the responsibility of preventing minors from taking part in interactive gambling is heavily laid upon the interactive operators, and the operators are monitored by the board. In addition the player has to open two different accounts, the player account (which is essentially, the account that the player holds with the interactive provider)[334] and the nominated account (which the player has nominated and is held in his name with a chosen bank)[335]. Both these accounts have to be verified, the player account must have login details with security settings, i.e. a password and username that is only known to the player.[336] The nominated account has to be verified by that particular financial institution and must contain a bank stamp for submission during the registration process.[337] These two processes are control measures that are put in place by the board to prevent minors from taking part in interactive games; these processes are designed in such a way that it is very difficult for a minor to register as a player, or to even log in to the games using the parents account details. Owing to the burdensome responsibility laid upon the operators to prevent minors from gambling, the operators will be very alert in ensuring that this is achieved in order to avoid their licenses being suspended or revoked.

3.4.5 Problem Gambling and Operator Responsibility

The South African Bill Of Rights aims at protecting the citizen of this country and provides safety and security so that all can exercise their full potential,[338] how can this be achieved through the current gambling laws and regulations?[339] The purpose of the Act and the

[331] The 2009 Regulations, regulation 9(1) & (2).
[332] The 2009 Regulations, regulation 9(1) & (2).
[333] The 2009 Regulations, regulation 10(1) & (2).
[334] The 2008 Amendment Act, section 1(k).
[335] The 2008 Amendment Act, section 1(j).
[336] Interactive Gambling regulations committee feedback and proposal, Committees draft Strategic Plan deliberation (audio), 12 August 2009.
[337] The 2009 Regulations, regulation 9(1) & (2)6.
[338] 1996 Constitution.
[339] Interactive Gambling regulations committee feedback and proposal, Committees draft Strategic Plan deliberation (audio), 12 August 2009.

Amendment Act is to regulate all forms of gambling in South Africa with the purpose to protect the public by, amongst other things, employing responsible behaviour on the part of the operators and ensuring that the problem gamblers are kept in check.[340] According to regulation 16 of the 2009 regulations, the interactive provider has the responsibility to: warn players of the dangers of gambling as well as the possibilities of addiction; employ trained personnel to monitor and advice problem gamblers; display the responsible gambling link on their website; provide on the homepage the restriction of underage gambling including a filtering programme that allows the interactive provider to prevent minors from playing the games; noticeably display a notice directing players to the NRGP site and help-line numbers, player protection measures as well as self-assessment processes.[341] Furthermore, section 13 of the Amendment Act restricts an interactive provider from extending credit to players, so as to avoid uncontrollable gambling.[342] In terms of section 13 of the 2008 Amendment Act, an operator may not provide/extend any credit for any player or to a player for gambling purposes.[343] The DTI also suggested that the interactive providers need to contain a notice of a programme on their website that allows players to diagnose themselves as well as one that allows players to voluntarily exclude themselves from being permitted to gamble online and a notice directing them to the treatment of addiction.[344] Additionally, operators should provide audit reports to the NGB and the NRGP about the pattern and behaviour of the interactive gamblers on their sites.[345] Players can exclude themselves voluntarily or may be excluded by the National Responsible Gambling agents on the basis of the assessment they make upon receipt of the audit reports from the operators.

The operator is responsible for the information provided by the player and therefore is prohibited by regulation 20 of the interactive regulations[346] to disclose this information for any purpose other than what it was initially provided for. However, there is an exception where the player has consented or the information is required for purposes of National security or even when authorised by a Court of law for the provision of such information by

[340] The 2004 & The 2008 Amendment Act, section2A(c), (f) & (h).
[341] The 2009 Regulations, regulation 16.
[342] The 2008 Amendment Act, section 13(2).
[343] The 2008 Amendment Act, section 13 (1 & 2).
[344] Nomfundo Maseti, (Chief Director of the Department of Trade and Industry) *The National Gambling Act regulations on interactive gambling deliberations* (audio) 23 June 2009.
[345] Nomfundo Maseti, (Chief Director of the Department of Trade and Industry) *The National Gambling Act regulations on interactive gambling deliberations* (audio) 23 June 2009.
[346] The 2009 Regulations, regulation 20(1).

the operator.[347] Finally, the operator needs to show a certain level of responsibility towards contributing to the poor communities, i.e. they need to demonstrate socio-economic benefits or initiatives that they will undertake in order to develop these communities.[348] The operator, when applying for a license has to state to the board the way in which he intends to contribute to SMME development, and show measures on how he will ensure player protection as well as the undertakings and commitments with regard to empowerment in areas such as HDI's and BEE standards.[349] Operators need to demonstrate strategies on how their accounting systems and records of betting's, winnings and the auditing of such records will be conducted.[350]

3.4.6 Money-laundering and the Revenue process

The last concern involves the prevention of money-laundering and the process in which the NGB intends to tax this form of gambling as well as how such revenue will be distributed. The 2008 Amendment Act[351] provides for the Minister to proscribe a criteria or framework that will allow for flexibility in dealing with the technological developments with respect to money-laundering here in particular. The first key aspect involves the two accounts that a player has to have when registering for interactive gambling as mentioned above, the nominated account (with regard to regulation 6 of the interactive gambling regulations) are created for the purpose of winnings, of which the threshold is R20 000 in the player account, if exceeded then the remainder amount will be transferred to this account; this is done in order that the money can be tracked at all times so as to ascertain that money-laundering is avoided.[352] Should the nominated account become inactive, the operator is to transfer the balance of that account to a trust fund established by the NGB;[353] the monies in this trust account are then transferred to the National Responsible Gambling Fund if they are unclaimed for a period of 3 years.[354] The audit reports required from the operators are also a

[347] The 2009 Regulations, regulation 20(2).
[348] Nomfundo Maseti, (Chief Director of the Department of Trade and Industry) *The National Gambling Act regulations on interactive gambling deliberations* (audio) 23 June 2009.
[349] Nomfundo Maseti, (Chief Director of the Department of Trade and Industry) *The National Gambling Act regulations on interactive gambling deliberations* (audio) 23 June 2009.
[350] Nomfundo Maseti, (Chief Director of the Department of Trade and Industry) *The National Gambling Act regulations on interactive gambling deliberations* (audio) 23 June 2009.
[351] National Gambling Amendment Act, section 24(3), substitutes section 37 of the National Gambling Act 7 of 2004.
[352] Nomfundo Maseti, (Chief Director of the Department of Trade and Industry) *The National Gambling Act regulations on interactive gambling deliberations* (audio) 23 June 2009.
[353] The 2009 Regulations, regulation 11(6).
[354] The 2009 Regulations, regulation 11(6).

deterrence of money-laundering.[355] The registration of players, in terms of the oaths that are signed and the certification of all documents to be submitted to the interactive gambling provider and the process in which this is done makes it easier for the NGB to monitor any sort of illegal activity taking place.[356] There is a further obligation on the operator to withhold prizes should he have any reason to believe there is suspicious activity involving foul play, he must immediately report this to the NGB for investigation.[357] The operator also has a duty, in terms of FICA, to establish a system whereby the operator is able to detect and prevent any unlawful transactions whether it is withdrawals or deposits of illegally obtained monies; this system requires constant monitoring by the operators employees in order to detect money-laundering schemes, unusual betting patterns concerned with money-laundering and any attempts to evade the threshold, and must be reported to the Financial Intelligence Centre.[358] The operator must also keep the past gambling database for purposes of investigations of money-laundering by forensic investigations.[359] Regulation 26 of the 2009 regulations requires as a condition, that the interactive gambling equipment and servers be located in South Africa, although, the servers may interact or replicate with others outside of the country;[360] this is done so that the NGB may be able to control and monitor the activities of interactive gambling within South Africa and prevent money-laundering schemes.

Section 88A of the 2008 Amendment Act is inserted after section 88 of the 2004 Act to make provisions for the taxation of interactive gambling; this section provides that taxation will be imposed in terms of the appropriate legislation.[361] In 2008 the Interactive Gambling Tax Bill was released, the purpose of which is to tax interactive gambling with the tax falling on the interactive provider.[362] The interactive gambling tax imposed on the interactive gambling provider will be in respect of the gross revenue income of the interactive providers gambling transactions; the players will also be taxed, however it will not be visible as it will be charged through the pricing structure and odds of winning; furthermore, this tax will be charged per

[355] The 2009 Regulations, regulation 21(5)(f)(iv).
[356] The 2009 Regulations, regulation 10.
[357] The 2009 Regulations, regulation 13.
[358] The 2009 Regulations, regulation 14(1, 2 & 3).
[359] The 2009 Regulations, regulation 14(5).
[360] The 2009 Regulations, regulation 26 (2 &3)
[361] The 2008 Amendment Act, section 43.
[362] Explanatory memorandum for the (draft) Interactive Gambling Tax Bill, 2008, Preamble.

assessment period.[363] This Bill proposes that a 6% indirect tax be imposed, and this does not include value-added tax in order to avoid _tax on tax'.[364]

3.5 CASE LAW: CASINO ENTERPRISES

In the *Casino Enterprises (Pty) Limited (Swaziland) v Gauteng Gambling Board and Others*[365] (2010 Case), the plaintiff advertised its online casino through radio stations broadcasting in the Gauteng province, the Gauteng Gambling Board (herein after referred to as the GGB), the defendant, warned the radio stations to stop the Casino Enterprise (plaintiff) advertisements.[366] The plaintiff in this case sought a declaratory order to confirm that its online gambling was legal and did not take place in South Africa, more specifically, Gauteng where the gamblers were, but in Swaziland where the computer equipment is situated and where online gambling is licensed; while the defendant took the view that gambling takes place where the player and his computer are situated. [367] The plaintiff argued that since the online gambling took place in Swaziland and did not contravene the Provincial and National Acts, no license was required under South African law and therefore the advertisement in Gauteng were not unlawful.[368] They further argued that online gambling at the Casino Enterprises casinos was not an _interactive game' as contemplated by the National Act as what happens within the Republic of South Africa's borders is not unlawful under either the NGA or the GGA; and if that not be so, that such interactive gambling is only made available in Swaziland and not in Gauteng or anywhere else in the Republic of South Africa in any manner that contravenes the National Act and the Provincial Act.[369] The defendant asserted that plaintiffs internet casino operation was conducted in contravention of section 77(1) of the

[363] Explanatory memorandum for the (draft) Interactive Gambling Tax Bill, 2008, section 2.
[364] Explanatory memorandum for the (draft) Interactive Gambling Tax Bill, 2008, section 3 & 4(2).
[365] *Casino Enterprises (Pty) Limited (Swaziland)* v *Gauteng Gambling Board and Others* 2010 ZAGPPHC 89; 2010 (6) (GNP) 38; (2011) 1 All SA 305 (GNP) (16 August 2010).
[366] *Casino Enterprises* (note 365 above) 2.
[367] *Casino Enterprises* (note 365 above) 3.
[368] *Casino Enterprises* (note 365 above) 7.
[369] *Casino Enterprises* (note 365 above) 8.

Gauteng Gambling Act 4 of 1995[370] (Provincial Act) and section 11 of the National Gambling Act 7 of 2004[371] (National Act).

The main issue considered by the court was ‗whether and to what extent that which takes place when a player in Gauteng interacts through the internet with the plaintiff's servers in Swaziland constitutes gambling for the purposes of the Provincial Act and the National Act'.[372] A further question arose within the enquiry, whether to the extent that such gambling does take place, does it take place in both South Africa and Swaziland or only in Swaziland.[373]

The court considered the technical evidence given by the experts on how online casinos operate.[374] Basically, the casino in Swaziland maintains and operates several servers which are connected to the internet, where the plaintiff makes available to the gambler an application which the gambler loads to his own electronic device which for the purpose of this case is physically located in Gauteng.[375] The gambler then connects to the servers in Swaziland where the plaintiff then registers an account with the gambler, who then obtains a unique username, password and ‗wallet',[376] the gambler then chooses the online option and the software on his/her device allows him to choose the game he wishes to play.[377] Once the game is chosen the screen appears with graphics approximating the visual appearance of the game as it would appear in the real world, the gambler at that point will select the wager and make his bet, thereafter he can press the spin button and his electronic device screen will show spinning wheels or whatever is best suited to stimulate the operation of the gambling device in a land-based casino game.[378] Upon the activation of the spin button, a packet data is transmitted over the internet to the plaintiff's servers in Swaziland where the data are

[370] Section 77(1) reads: ―No person shall gamble at any place other than the licensed premises: Provided that gambling by means of the placing of telephone bets on all sporting events where the holder of a licence accepts and records the bet at the licensed premises shall be deemed to have occurred at the licensed premises."
[371] Section 11 reads: ―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."
[372] *Casino Enterprises* (note 365 above) 12.
[373] *Casino Enterprises* (note 365 above) 13.
[374] P Makakaba ‗South African regulation of online casinos in foreign jurisdictions' (2012) 28 *Computer Law and Security Review* 445, 447.
[375] *Casino Enterprises* (note 365 above) 14.
[376] ‗Wallet' is an electronic account with the online casino, into which the aspirant player transfers money in the form of South African rands.
[377] *Casino Enterprises* (note 365 above) 17-19.
[378] *Casino Enterprises* (note 365 above) 17-19.

validated to establish that they have been sent and the balance in the gamblers wallet is updated at that point.[379] The results are then sent from the casino via the internet to the gamblers electronic device, thereafter, the simulated wheels stop spinning and the results are displayed on the gamblers device.[380] The defendant contended that the game starts when the gambler in Gauteng communicates his selection to the plaintiff's servers and ends when the results of the game are reported to the gambler in Gauteng;[381] and, the operation of the electronic equipment of the gambling device on which the outcome of the wager is decided (analogous to the roulette wheel) takes place solely in Swaziland.[382] The question that had to be determined was whether any of what happens in Gauteng is in contravention of the legislation in question?[383]

Upon evaluation of the evidence it was submitted that the Provincial Act does not deal with electronic gambling, that under the provincial statute, gambling within the province may only take place at licensed premises.[384] In terms of section 77(1) of the Provincial Act it is unlawful, within the province, to gamble at a location which is not a licensed premises as defined in this Act, or to gamble with a person other than the license holder.[385] The High court held therefore, that it would be unlawful for a person in Gauteng to gamble on an unlicensed online casino, whether situated in the country or outside of South Africa, as in the case of Casino Enterprises.[386] Equally, any gambling as defined by the GGA, that takes place between the gambler and a person other than the license holder, is unlawful.[387] Counsel for the plaintiff argued that the Provincial Act and the National Act do not have extra-territorial application and were limited to the situation where all the participants in the game are playing it in Gauteng; also, as the gambler's involvement is an ~~in~~significant portion of the entire gambling process," his actions do not create a real and substantial link from a jurisdictional perspective, as required by international law.[388] In rejecting this argument, the court with reference to the aims of the gambling statutes, confirmed that there are uniform norms and

[379] *Casino Enterprises* (note 365 above) 21-23.
[380] *Casino Enterprises* (note 365 above) 24-25.
[381] *Casino Enterprises* (note 365 above) 30.1.
[382] *Casino Enterprises* (note 365 above) 30.2.
[383] *Casino Enterprises* (note 365 above) 31.
[384] *Casino Enterprises* (note 365 above) 33.
[385] *Casino Enterprises* (note 365 above) 35.
[386] *Casino Enterprises* (note 365 above) 39.
[387] *Casino Enterprises* (note 365 above) 39.
[388] M Carnelley Online Gambling in South Africa—One More Battle in the Ongoing War: *Casino Enterprises (Pty) (Swaziland) and the Gauteng Gambling Board (GN), unreported case number 28704/04, dated. 16, 2010* (2011) 15(3) *GLRE* 121, 124; Read with *Casino Enterprises* (note 365 above) 40.

standards that apply in the country, which are aimed at safeguarding the people that partake in gambling and their communities against the adverse effects of gambling.[389] These norms and standards include effectively regulating, licensing and policing gambling activities so as to balance the positive contribution of gambling (economic growth, employment and advancement of deprived communities through public revenue) with the risks inherent thereto which justify the imposition of appropriate restrictions and controls.[390] In the same place, the court referred to two previous judgements (with reference to jurisdiction, here the court held that the question of jurisdiction should be determined by South African law; if in terms of the law, the South African courts have jurisdiction, it is irrelevant whether another state may also claim jurisdiction.[391] The court also held that, "South African gambling market is finite, therefore, it would be subversive of their own declared purposes for the legislature to allow a foreign organisation to benefit from the local gambling market without fiscal compensation, whether in the form of licenses, infrastructure, job creation or otherwise."[392] Moreover, the court sought to highlight the harmful consequences in the present context to include, the unregulated access to gambling; the movement of money out of the South Africa with no concomitant local benefit and the potential loss of revenue from taxation and from license fees.[393]

Additionally, counsel for the plaintiff submitted that s11 of the National Act was not engaged in because gambling at Casino Enterprises' online casino was not an interactive game, as contemplated by the National Act.[394] The plaintiff argued that an interactive game, as defined, is only one where both the gambler and the casino are physically situated within South Africa's territorial borders, further, plaintiff pointed to the different elements of the definition of 'interactive game', particularly in relation to the elements of the game identified in section 5(1)(a)(i) and (ii) and submitted that if the critical elements are not to be found within South Africa, the game is not an interactive game as defined.[395] The judge disagreed with this submission and held that the critical elements identify a game which is a gambling game; once the critical elements exist the game in question is a gambling game and thus, for

[389] Carnelley (note 388 above) 124; Read with *Casino Enterprises* (note 365 above) 41.
[390] Carnelley (note 388 above) 124; Read with *Casino Enterprises* (note 365 above) 42-44.
[391] *Casino Enterprises* (note 365 above) 55-56.
[392] *Casino Enterprises* (note 365 above) 49.
[393] *Casino Enterprises* (note 365 above) 54.
[394] *Casino Enterprises* (note 365 above) 65.
[395] *Casino Enterprises* (note 365 above) 65.

present purposes, an interactive game.[396] Section 11 does not merely prohibit engaging in or making available the critical elements of the game, the section prohibits engaging in or making available the game as a whole.[397] The court held further, that it matters not whether the critical elements are to be found or are generated within the borders of South Africa or not, section 11 proscribes both –engaging in the game, which happens each time a gambler presses the spin button and making available the game which takes place at least when the plaintiffs servers in Swaziland make it possible for the gambler in Gauteng to connect interactively with them through the internet."[398]

In discussing the outcome of this judgement, Carnelley[399]noted two reasons why this judgement was important for the regulated South African Gambling industry; she noted firstly that this was the first time the court had actually made a decision about where gambling takes place when a person gambles online; and secondly that this case reiterated the importance of the South African national gambling regulatory regime. She further submitted that the decision by the court was correct from a regulatory policy point of view, as a different finding would negate the underlying aims and principles of the South African gambling regulatory provisions.[400] The National Gambling Act[401] prohibits interactive gambling in South Africa and this case whether it starts in South Africa and ends in Australia, the High Court made a decision that has affected all illegal foreign gambling websites operating unlawfully in South Africa. This judgement was ultimately a push in the right direction for the legislature, as both the GGA and the NGA do not make any provision for foreign jurisdictions to operate in South Africa. Although the appeals are still to be discussed, it is important to note from this judgement that the need to regulate online gambling is a pressing issue in South Africa whether it shall be legalised or prohibited, it is important that there are regulations in place because as it stands Swaziland is not the only foreign jurisdiction that was operating illegally in this country. The court dismissed the plaintiff's case and the matter went on appeal.

[396] *Casino Enterprises* (note 365 above) 66.
[397] *Casino Enterprises* (note 365 above) 66.
[398] *Casino Enterprises* (note 365 above) 66.
[399] Carnelley (note 388 above) 126.
[400] Carnelley (note 388 above) 126.
[401] The 2004 Act.

The court of New York had a similar case to Casino Enterprises, *People v World Interactive Gaming Corp et al, Golden Chips Inc. (GCC),* [402]whereby a wholly owned subsidiary of World Interactive Gaming Corporation (WIGC) which had an office in New York was licensed to operate a land-based casino in Antigua.[403] WIGC's office in New York promoted a service which permits individuals to access and use computers located in Antigua to gamble, via their home computers.[404] Before a user could begin gambling, he had to first wire funds to GCC in Antigua and download software from the website, after which the user is then asked to supply his permanent address.[405] If the user provided an address from a state where land-based gambling was illegal he was not permitted to gamble; if he provided an address from a state where land-based gambling is legal he was permitted to gamble, however, no steps were taken to ensure that the information provided was accurate making this restriction easily evaded.[406] If the potential gambler is from a state where land-based gambling was legal the gambler will be permitted to play and the results of the game were reflected in the user's Antigua account.[407] GCC promoted the availability of this gaming service on its website over the internet and in a national gambling magazine.[408] The issue in this case was whether the gambling took place in New York or in Antigua.[409]

The court held that WIGC and GCC engaged in an advertising campaign all over New York to induce people to visit their website and gamble; and they had made no attempt to exclude New Yorker's from the propaganda although they knew that their advertisements were reaching thousands of New Yorkers.[410] The court determined that WIGC and GCC were clearly doing business in New York even without physical presence in New York; therefore, they were subject to the court's jurisdiction.[411] The court rejected the argument that the gambling at issue took place in Antigua, where it was legal and not in New York and held that their activities ran foul of various New York statutes designed to prohibit online gambling in New York. The court further held that the act of entering the bet and transmitting

[402] *The People of the State of New York v World Interactive Gaming Corp., et al* (1999) Misc. Lexis (NY County SC) 425.
[403] Makakaba (note 374 above) 451.
[404] Makakaba (note 374 above) 451.
[405] Makakaba (note 374 above) 451.
[406] Makakaba (note 374 above) 451.
[407] Makakaba (note 374 above) 451.
[408] Makakaba (note 374 above) 451.
[409] Makakaba (note 374 above) 451.
[410] Makakaba (note 374 above) 451.
[411] Makakaba (note 374 above) 451.

the information from New York over the internet was adequate to constitute gambling activities within New York, and further that the determination was consistent with New York Penal 225.00(2) which provides that if the person who engages in gambling is located in New York then New York is the location where the gambling occurs.[412] The court also held that WIGC and GCC violated New York Penal Law 225.05 which provides that a person is guilty of promoting gambling in the second degree when he knowingly advances or profits from the unlawful gambling activity.[413] The court concluded that the state of New York was entitled to injunctive relief as well as restitution, penalties and costs in accordance with New York Executive Law.[414]

In the appeal judgement of Casino Enterprises[415] similar arguments to those made previously in the High Court were brought forward, as such, the arguments will not be repeated here. The actual dispute in this appeal was whether the activities of the internet casino contravene the gambling laws of this country, that is, the GGA and the NGA.[416] The appellant (Casino Enterprises) argued in this court, firstly that neither statute has extra-territorial application and secondly, that neither statute was designed with the internet in mind; counsel for the appellant submitted that the evidence shows that the appellant‘s operation of its casino through that medium has consequences that were not foreseen by the legislators or catered for in the legislation.[417] The court considered the content and structure of the NGA first and found that there are three main aims that can be identified as the reasons for the regulation and control of gambling; (a) The protection of the public against the potentially harmful effects of gambling; (b) The protection of licensed gambling activities against competition from unlicensed operators; and, (c) The protection of the income which the State derives from the licensing of gambling.[418] The court considered a previous judgement in the same court, i.e. Lotto case[419] whereby it was held, ~~–it~~ is notorious that gambling is no respecter of international boundaries; adequate protection of the public against exploitation requires

[412] Makakaba (note 374 above) 451.
[413] Makakaba (note 374 above) 451.
[414] Makakaba (note 374 above) 451.
[415] *Casino Enterprises v the Gauteng Gambling Board* [2011] ZASCA 155 (28 September 2011).
[416] *Casino Enterprises v Gauteng Gambling Board* (note above 415) 3.
[417] *Casino Enterprises v Gauteng Gambling Board* (note above 415) 17-18.
[418] *Casino Enterprises v Gauteng Gambling Board* (note above 415) 22.
[419] *Online Lottery Services (Pty) Ltd and Others v National Lotteries Board and Others* 2010 (5) SA 349 (SCA) 357C.

proper regulation and licensing.[420] The court further looked at the elements of gambling, that is, (i) payment of a consideration (stake, bet or wager) and (ii) the chance (contingency) of becoming entitled to or receive a pay-out (the uncertain future event) and found that once these elements are satisfied in the context of S4(1) of the NGA, the player who places the stake is gambling and the other party/parties who make the gambling available or accept the wager is or are likewise engaged or involved in a gambling activity.[421] Thus, the criteria do not vary according to whether one is considering a terrestrial encounter between the player and casino or whether the meeting takes place in cyberspace.[422]

Then, the court in evaluating the evidence of the appellant on the activation of the game happening in Swaziland, found this to be irrelevant to the central issue and found that the reality is that the player at his or her computer, has, in South Africa committed him/herself to staking money on the chance that takes place in South Africa, where the player is and not in Swaziland.[423] Furthermore, the court held –the legislature is concerned with substance, not form, and if that 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."[424] Accordingly, the court found that the purpose of these two pieces of legislation is to control the effects of gambling of South Africans in South Africa whatever the source of the temptation may be and in this case the adverts by the appellants broadcast on South African radio stations which introduced South Africans to the ‗delights' and direct gambling from their homes or workplaces.[425] The court therefore concluded that persons in South Africa, who gamble with the appellant, as well as the appellant in its interactive participation, contravene the provisions of the Provincial Act and the National act, and further that advertising information concerning the appellant's casino is prohibited by both these statutes.[426]

These cases illustrate the importance of jurisdiction when regulating the gambling industry. The internet can be crafty as it is a borderless means of communication, making regulating

[420] *Casino Enterprises v Gauteng Gambling Board* (note above 415) 23.
[421] *Casino Enterprises v Gauteng Gambling Board* (note above 415) 29.
[422] *Casino Enterprises v Gauteng Gambling Board* (note above 415) 29.
[423] *Casino Enterprises v Gauteng Gambling Board* (note above 415) 34.
[424] *Casino Enterprises v Gauteng Gambling Board* (note above 415) 35.
[425] *Casino Enterprises v Gauteng Gambling Board* (note above 415) 36.
[426] *Casino Enterprises v Gauteng Gambling Board* (note above 415) 40.

gambling via the internet a more challenging task for legislators around the world. Jurisdiction is a mere segment of the issue at hand, but it is a helpful segment in that it demonstrates the vulnerability of a state that has no particular regulations. Whether the country decides to prohibit or legalise interactive gambling, it is crucial to note that clear regulations on issues such as jurisdiction, licensing, taxation and so forth will assist in preventing situations whereby lack of clear rules may invite illegal operation of online gambling by foreign interactive gambling providers.

3.6 TAXATION OF INTERACTIVE GAMBLING AND LEGISLATION THEREOF

While interactive gambling is currently illegal in South Africa, it is readily available here, provided by operators based outside of South Africa, stated Wendy Rosenberg.[427] An important development in the process of finalising the licensing and regulatory framework was the publication for comment of the Interactive Gambling Tax Bill, which proposes a tax on South African-based operators of online gambling sites at the rate of 6% of gross gambling revenues.[428] Wendy[429] also stated that the loss to revenue pending the finalisation of the framework could be considerable: gambling and betting taxes collected at the time by the GGB in respect of land-based gambling are the second largest contributor to the provincial revenue in the Gauteng province. She further added that the gambling industry in South Africa contributes billions annually to the national economy, and in nine years the gambling industry had created 100 000 jobs.[430]

One of the biggest concerns with interactive gambling is the form in which countries can ensure that they benefit from this industry, in fact, taxation is a pivotal if not central, aspect in the regulation of e-gaming.[431] Taxation is one of the most complex issues – including, as it does, many of the most difficult aspects such as geo-location and jurisdictional issues, to

[427] W Rosenberg ‗Interactive Gambling Tax Bill' *Werksmans Attorneys* 16 January 2009, available at *http://www.werksmans.com/keep-informed/our-publications/media-releases/*, accessed on 25 October 2012.
[428] W Rosenberg ‗Interactive Gambling Tax Bill' *Werksmans Attorneys* 16 January 2009, available at *http://www.werksmans.com/keep-informed/our-publications/media-releases/*, accessed on 25 October 2012.
[429] W Rosenberg ‗Interactive Gambling Tax Bill' *Werksmans Attorneys* 16 January 2009, available at *http://www.werksmans.com/keep-informed/our-publications/media-releases/*, accessed on 25 October 2012.
[430] W Rosenberg ‗Interactive Gambling Tax Bill' *Werksmans Attorneys* 16 January 2009, available at *http://www.werksmans.com/keep-informed/our-publications/media-releases/*, accessed on 25 October 2012.
[431] Aronovitz et al 351.

name only a few – of regulation of e-commerce.[432] These aspects put together make this perhaps the area in which it is most crucial – and by the same token, most difficult – to reach a multi-national consensus in order to impose global solutions.[433] Each country has reached its own conclusion on the taxation of interactive gambling with the main aim being to protect its citizens and at the same time making sure that the economy profits from its legalisation, if that is the case. Interactive gambling, unlike land-based gambling requires minimal personnel, much, if not all, may be located in another jurisdiction, and, aside from potential advertising, revenues will generate little, if any revenues from secondary sources. Different governments have made different decisions on the taxation of interactive gambling in order to maintain control of their revenue stream and avoid situations where revenues go into coffers of another jurisdiction.[434] It is a much more difficult task than any other to determine the geographical location that is specific to the internet, mostly because of the complexity of the internet and the fact that a person can claim to be anywhere in the world and actually be on the opposite side of what they stated.[435] This complexity then provides a challenge for jurisdictions when imposing taxes on the players as well as the operators. Jurisdiction is significant factor that must be considered when making a decision on the taxation of interactive gambling;[436] the nature of the internet is borderless thereby making it close to impossible to determine the more viable form of taxation. This issue then, is best tackled by having express characteristics/categories such as, the place of effective management or permanent establishment, that assist in what constitutes presence sufficient to justify the jurisdiction to tax.[437] Furthermore, on jurisdiction, the place at which the interactive gaming transaction takes place can cause an even bigger challenge for legislators.[438]

A European study found that there are two types of taxation: direct taxation and income tax (both of the income of the purveyors and of the players‘ winnings), and indirect taxation such as VAT or sales tax.[439] In terms of direct taxation countries such as Switzerland, tax individuals on the revenues whose source is within the country; and other countries such as

[432] Aronovitz et al 351.
[433] Aronovitz et al 351.
[434] Aronovitz et al 352.
[435] Aronovitz et al 352.
[436] Aronovitz et al 353.
[437] Aronovitz et al 353.
[438] Aronovitz et al 353.
[439] Aronovitz et al 352.

the United States, tax individuals on their worldwide income.[440] The Federal Income Tax Code broadly defines ‗gross income' as ―all income from whatever source derived"; it covers all ―accessions to wealth over which the taxpayers have complete dominion".[441] It was added further, that ―a gain constitutes taxable income when its recipients derives readily realizable economic value from it", lawful as well as unlawful, gains are included in the term ‗gross income' and thus making gambling winnings, prizes and lottery winnings ‗gross income,' and therefore taxable.[442] In the US taxpayers have a duty to report gambling winnings as gross income and take gambling losses as deductions; deductions from gambling losses are permitted ―only to the extent of the gain from such transactions".[443] If a gambler then fails to disclose their income derived from gambling, they are subject to criminal prosecution for tax evasion.[444] A number of issues arise from the way in which each jurisdiction goes about making the decision on taxation, some of them may clash with others, however, as mentioned above, online taxation is a daunting task. The mode of taxation used in Switzerland raises issues such as where the winnings from gambling are generated; whether they are generated at the casino (raising the question of the location thereof) or whether they are generated from the [445]player's computer.[446] On the other hand, the biggest concern not only for the US, but other jurisdictions, is enforcement.[447] Although, the mode of taxation used in the US can make sense in land-based casinos, in online casinos it may raise concerns not only related to identification of the relevant casino, but also to those concerning the Internal Revenue Services' (IRS') ability to exercise jurisdiction over such casino to require withholding and/or reporting of the relevant information.[448]

Moreover, there are some jurisdictions such as the Czech Republic that use a system of license fees rather than direct taxation, per se. In some jurisdictions, taxation is calculated as a percentage of gross or net profit or revenue, of bets placed, of amounts wagered or paid out,

[440] Aronovitz et al 353.
[441] J Weinberg ‗Everyone's a winner: Regulating, Not Prohibiting, Internet Gambling' (2005-2007) 35 *Southwestern Un LR* 293, 321.
[442] Weinberg (note 441 above) 321.
[443] Weinberg (note 441 above) 321.
[444] Weinberg (note 441 above) 321.
[445] Aronovitz et al 353.
[446] Aronovitz et al 353.
[447] Aronovitz et al 353.
[448] Aronovitz et al 353.

or of the number of (and/or type of) machines or gaming tables.[449] Rates vary considerably both within a given jurisdiction, based on total revenues or profits and/or type of gambling and to an even greater extent, among jurisdictions.[450] In jurisdictions like Denmark, gambling activities are taxed only at National level; in others, they are taxed at both the National and Regional level (e.g. Switzerland).[451] In Poland, although the current Polish Act does not specifically provide for a tax on online gambling, it can be expected that the tax imposed on offline pari-mutuel betting will also be applicable to its online cousin.[452] As it stands, the tax in Poland is 2.5 percent of the operator's turnover for horseracing and other animal racing competitions, and 12 percent of the turnover generated from all other sports competitions.[453] A turnover tax increases the price of gambling for customers and may lead to a drop in operator's margins beyond the level of sustainability; a turnover tax –particularly one with a tax rate as high as the Polish one—will not drive the existing clandestine market away and will not contribute to achieving the goals the Polish government, enshrined at the heart of the Polish Act.[454] Furthermore, in Romania the provisions of online gambling services will be subject to two fees, an annual license fee and an annual authorisation fee –the latter effectively acting as a tax on gambling.[455] The annual license fee will amount to RON 200, 000 (approximately R600 000) for online fixed-odds betting operators, and to RON 800, 000 (approximately R24 000 000) for other online games; and the annual authorisation fee on the other hand, will amount to whichever sum will be greater: 5 percent of the annual turnover of the fixed-odds betting operator, or RON 250 000 (approximately R732 600) and 1.5 percent of the annual turnover, or RON 1 000 000 (approximately 2 930 459 in case of the provider of other online games.[456]

In addition to the abovementioned, taxation on gambling activities has become a significant revenue earner for many western governments; to soften the social impact of gambling—and to promote the activity itself – some of this revenue is often spent on a good cause in addition to the money provided to these causes by the government.[457] Clubs Australia in an interim

[449] Aronovitz et al 354.
[450] Aronovitz et al 354.
[451] Aronovitz et al 353.
[452] M Lycka „Central and Eestern Europe: Dawn of New Online Gaming Regulation' (2011) 15(9) 521, 524.
[453] Lycka (note 452 above) 524.
[454] Lycka (note 452 above) 524.
[455] Lycka (note 452 above) 530.
[456] Lycka (note 452 above) 530.
[457] Amanda Taylor *Gambling: –A Respectable Hell" Has the Internet made a traditional pastime too accessible bringing with it inevitable problems?* (unpublished LLM thesis, The University of Westminster, 2005) 5.

report on online gambling found that legalising online gambling and creating an effective taxation regime could result in over $4.7 billion in additional taxation revenues in the next 10 years.[458] They also found that a balanced regulatory approach would see interactive gambling providers pay a similar level of tax to land-based gambling providers, as not to hand one form of gambling a distinct competitive advantage over the other.[459] Regulation by way of licensing could ensure consistency of interactive gambling with land-based gambling; and could help in avoiding destructive tax competition between state and territory governments.[460]

In South Africa the main connecting factor used is the residential principle of taxation.[461] This means, according to section 1 of the Income Tax Act[462] that the taxable income is a resident's world-wide income including any income earned offshore; however, this is subject to the exceptions in this section.[463] Therefore, when a gambler gambles online using a website in a foreign jurisdiction, they are still considered a South African resident for the purpose of the South African Income Tax Act.[464] In the same place, South Africans are taxed on the taxable income, that is, what is left of the taxpayer's income after deductions.[465] The Income tax Act defines income as "the amount remaining of the gross income of any person for any year or period of assessment after deducting therefrom any amounts exempt from normal tax under part I of Chapter II'.[466] The "gross income" is defined as, in relation to any period or year of assessment, in the case of any resident, the total amount, in cash or otherwise, received by or accrued to, or in favour of such resident; or in the case of any person other than a resident, "the total amount, in cash or otherwise, received by or accrued to or in favour of such person from a source within the in the Republic."[467] An in depth analysis of the principles of taxation is beyond the scope of this study, however, it is

[458] Clubs Australia Submissions, *Interim Report Review of the Interactive Gambling Act 2001*, 4 July 2012 7.
[459] Clubs Australia Submissions (note 458 above) 7.
[460] Clubs Australia Submissions (note 458 above) 7.
[461] Hendrik J M Van Deventer *A Critical Analysis of the Taxation of Interactive income earned by Resident South African Individuals* (unpublished LLM thesis, University of Pretoria, 2010) 21.
[462] The Income Tax Act 28 of 1997.
[463] Hendrik J M Van Deventer *A Critical Analysis of the Taxation of Interactive income earned by Resident South African Individuals* (unpublished LLM thesis, University of Pretoria, 2010) 21.
[464] Hendrik J M Van Deventer *A Critical Analysis of the Taxation of Interactive income earned by Resident South African Individuals* (unpublished LLM thesis, University of Pretoria, 2010) 21.
[465] Silke J et al *Silke: South African income tax* (2012) 21.
[466] The Income Tax Act, section 1.
[467] The Income Tax Act, section 1.

important to note that the taxation of interactive gambling in South Africa will be determined by the calculation of the gross income of the player who is resident in South Africa; and where a resident uses a foreign interactive gambling site, the proceeds received therein should be subject to capital gains tax.[468] That is, interactive gambling will be taxed based on the principles of the Income tax Act,[469] based on the regulations of the Interactive gambling Tax Bill. This is the position as it stands, however, the promulgation of the Amendment Act[470] could result in a change to the principles of taxation of interactive gambling, moreover, the South African Revenue Services (SARS) will need to make an assessment of the Amendment Act to determine who will be permitted to operate interactive gambling in South Africa and make a decision on how to tax foreign operators as well.

3.7 REASONS FOR THE DEFERMENT OF THE NATIONAL GAMBLING AMENDMENT ACT OF 2008

The Minister of Trade and Industry in 2008, appointed the Gambling Review Commission, which consists of various members of the legal fraternity. The reason for the establishment of the commission was to assist the NGB in determining the prospects, advantages and disadvantages of interactive gambling, as well as to review the Act that was drafted by the NGB as well as make a valuable contribution to the regulations that are required for the legalisation of the interactive gambling industry in South Africa. Part of this dissertation required an input from the members of the commission on the status of interactive gambling and their suggestions on the governance of this industry. Only two of the members from the GRC were available for comment, Adheera Bodasing[471] and Dr Stephen Louw[472]. The aim of this dissertation is to determine the challenges that the regulation of interactive gambling is

[468] Hendrik J M Van Deventer *A Critical Analysis of the Taxation of Interactive income earned by Resident South African Individuals* (unpublished LLM thesis, University of Pretoria, 2010) 34.
[469] The Income Tax Act 28 of 1997.
[470] The 2008 Amendment Act.
[471] Legal adviser and Public Affairs Consultant at Adheera Bodasing Consulting, LLM at the University of KwaZulu-Natal, Legal Services, Cape Town Area, South Africa, Commissioner at Gambling Review Commission (GRC), Chief Director Legal Services at National Treasury of South Africa, former Senior Associate at Edward Nathan (now ENS), former Attorney at Spoor and Fisher Attorneys, former Candidate attorney at Goodrickes Attorneys.
[472] Senior Lecturer in Politics at the University of Witwatersrand. Currently, his primary research interest is the social, economic and regulatory impact of gambling societies. He is a member of the Gambling Review Commission set up by the Minister for Trade and Industry in 2010, to review the impact of gambling in South Africa and make recommendations for the on-going regulation of the gambling sector. He has published papers in such journals as Economy and Society and The Philosophy of the Social Sciences. He is a former editor of Politikon.

faced with; and to try and deduce the commercial viability and socio-economic implications of a legalised interactive gambling industry. When asked about the reasons for the prolonged delay of the promulgation of the 2008 Amendment Act, the commission confirmed that even though the Act was passed and regulations taken to parliament, a much more extensive review needed to be conducted on such regulations.[473] The pressure from parliament, a number of social welfare ministers and provincial regulators resulted in the drafting and passing of the 2008 Amendment Act, the purpose of which, was supposed to allow the measured introduction of interactive gambling, however, Minister (Rob Davies) of Trade and Industry delayed the promulgation as he was seeking to reconcile a growing concern that the gambling sector was growing too quickly with a negative social impact.[474]

This delay in the promulgation of the NGAA raises a further concern on whether this could be a change of direction by the Minister to keep the position of interactive gambling as is, prohibited, or whether there is a realistic prospect that interactive gambling will become a legalised industry in South Africa in the near future. According to the GRC, interactive gambling would be legalised, Bodasing noted that it was stated in the 2012 March Portfolio committee reported that the Act could be promulgated in the next 12 to 18 months from then. The criteria in which interactive gambling will be regulated cannot be the same as that which is used for land-based gambling. An interesting issue to note mentioned by Dr Louw is the possibility of resistance by the Provincial regulators on the proposed form of licensing. It was proposed by the GRC that only a fixed number of licenses should be granted in order to evaluate this form of gambling. The rationale behind this theory, as stated by Dr Louw, is that ‗interactive gambling does not involve the same level of fixed infrastructure investment as land-based gambling, and the same criteria cannot be applied; the same sort of social investment will have to be attached to the license conditions' however, the provincial regulators are more likely to resist this process in order to grant more licenses so as to increase their revenues. The Provincial regulators may also resist another proposal by the GRC, that is, that licenses be granted at a national level rather than a provincial level as in land-based gambling because of the nature of interactive gambling. The GRC based this recommendation on the fact that the internet or electronic media generally has a national/global audience and is not ‗located' at a fixed point like a casino or LPM, and further

[473] Bodasing.
[474] Louw.

that Schedule 4 of the constitution[475] gives National and Provincial legislatures concurrent jurisdiction, however, according the constitution, national legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by the province…[476] Bodasing mentioned that there is a lack of harmonisation and uniformity in the way that licensing should be done, and Dr Louw stated that the Provincial regulators want to be able to grant licenses in order to increase their revenue stream (and therefore they are generally unconcerned with the social impact of gambling).

An industry as complex as interactive gambling begs the question of the National Gambling Boards technological capacity to regulate it at a national level, not to mention the global level, with the possibility of a high influx of illegal foreign operators waiting for the go-ahead. The GRC agreed that the NGB does not at this time have the expertise, they suggested that the NGB and the National Lotteries Board (NBL) be merged (for this and other reasons), mainly because the NBL has the most sophisticated electronic monitoring capacity of any branch of government, and this would be very useful in developing the capacity needed to regulate interactive gambling. This recommendation was met with much defiance as the NBL guards their territory very jealously and the provincial regulators who enjoy the fact that the NGB has almost no powers or capacity and is therefore easy to undermine. Bodasing noted that the NGB will have to create the capacity for themselves in terms of policing functions, investigation, power play and competition to regulate from a very small capacity. Another issue raised was the possibility of prohibition of South African residents from gambling on foreign internet gambling sites. The GRC slammed this and made reference to the USA and Australia, both of which have competent governments and considerable state regulatory capacity but have failed dismally. Dr Louw suggested that increased surveillance of electronic banking transactions would be the best way to try to prohibit, however it would be subject to limitations. Bodasing, on the other hand, added that the law of jurisdiction could be the best way to prohibit, where there is no physical presence in the country, then there is no jurisdiction for foreign operators; she agrees with Dr Louw on the use of the reserve bank because there is the requires technology in place, however, she agrees that policing this form of prohibition is not possible. The GRC took the view that, rather than increasing the level of prohibitions and restrictions on internet based financial transactions, it would be better to

[475] 1996 Constitution, schedule 4.
[476] 1996 constitution, section 146.

offer incentives to interactive operators to move into the legal/public domain; thus by legalising a select number of operators, and allowing them to advertise, and certify the integrity of their operations, etc., the punters will have the confidence to choose operators that have conducted themselves properly.

One of the aims of the NGAA is to protect the citizens of this country, hence the integrity of the games need to be ensured. According to Bodasing, since this form of gambling is done online it would be easier to trace the paper trail left by the operators, however, they both agree that this issue on its own requires an in depth study as it involves complex tax/e-commerce questions in addition to the integrity certification typically required of interactive gambling operators. Furthermore, the public interest is an integral part of protecting the country‘s citizens, therefore there needs to be measures adopted in order to promote the public interest. Accordingly, the GRC noted that in terms of the social impact of gambling, the public needs to be protected; it was added that there will be a need to monitor the impact of interactive gambling on the public very carefully, to determine the negative impacts, if any, and to take action against this timeously. The limited number of licenses recommended as a start is a way in which the GRC can assess the social and economic impact before widening the interactive gambling field, furthermore, according to Bodasing, with the policy in place is that gambling is legal, interactive gambling is the future, this is an aptitude versus attitude approach, the aptitude creates an illegal industry where regulators cannot help the wronged and it encourages criminal activity, hence interactive gambling cannot be effectively prohibited, it is in everyone‘s interest to permit and be able to tax. Moreover, the issue of minors is a major concern for everyone, and the GRC is of the view that the same policies used by the banking and other security-centered sites will be used, that is, a combination of passwords, credit card details and the ID numbers, as well as the parents notifying the operators will suffice, and although this is not full proof, it will probably be more difficult to beat than for example a 17year old dressing up and pretending to be over 18 years at a casino.

The taxation of interactive gambling is rather complex and therefore the GRC found that it would be best debated and discussed by competent authorities. They noted that the profit margins on interactive gambling are typically much tighter than those on fixed point operations. Notwithstanding this position, a 6% rate was suggested by the Interactive Gambling Tax Bill, and the GRC did not dispute, however, they did mention the importance

of not having a high tax rate so as not to push operators out, such as the United Kingdom. Additionally, the co-existence of the interactive gambling industry and the land-based gambling industry is a crucial factor and therefore, it would be compelling to find middle ground for their existence. The issue therefore, is how will this be done, will there be information sharing, especially with regards to things such as the database of problem gamblers. The GRC stated that it is already a requirement that there be information sharing between all gambling operators in terms of people that are excluded from gambling; typically this happens in a very half-hearted manner and needs to be improved. Moreover, the GRC is of the view crime and money laundering issues that require specialised input and they need to be dealt with by banking experts, however, the more controls put in place, the more confident the punters will feel and also, because it is in online it will be easier to track. Finally, the legalising of interactive gambling will create a certain impact in the way in which the land-based operations work, this raises the issue of this will be evaluated and handled. The GRC stated that, internationally, interactive gambling has made a very big impact on land-based revenue streams, this need to be monitored carefully, but in all likelihood, land based operators will be given a chance to apply for online licenses.

3.8 CONCLUSION

The legislative models discussed above are important for the regulators to not only see the position that South Africa is in at present and how this system has been working out for South Africa since the evolution of interactive gambling; but also to compare with other models, the way in which they are functioning and to decipher a way that betters the already created legislation. Furthermore, after careful consideration of the most crucial issues pertaining to the regulation of interactive gambling it is well within reason to note that a great deal has been achieved by merely taking the first step to set out a way in which this industry can be controlled. The National Gambling Amendment Act legalises interactive gambling in amendment of the National Gambling Act of 2007. This Amendment Act makes it legal to provide interactive games within South Africa. As a result of this Act, the Minister of Trade and Industry established the Gambling Review Commission to assist with the regulations of interactive gambling. These regulations make provisions for compliance, enforcement, licensing, protection of minors, the list is endless; the regulations are a set of guidelines for the enforcement of the National Gambling Act. Moreover, the cases discussed above give a

clear position of interactive gambling currently and they also show the difficulty of managing such a complex issue without a set of regulations in place. These cases are not only from South Africa, which is important because it is good for this industry to compare with other jurisdictions so as to make decisions that are more effective if need be. Also, as big and complicated as taxation is, this chapter makes a brief but relevant criticism on the way in which other jurisdictions have gone about it and although it doesn‘t go into much depth, the view taken by the Interactive Gambling Tax Bill makes the intention of the legislature much clearer. Finally, the interviews conducted with the Gambling Review Commission shed a lot of light into the process of regulation of this industry and the difficulties that the National Gambling Board is faced with in terms of trying to regulate this industry.

CHAPTER 4
AUSTRALIA

4.1 INTRODUCTION

Australia, unlike Britain and the United States, has always had a more liberal approach to gambling since white settlement.[477] Gambling has been identified as ~~a~~an essential feature of the popular culture in Australia; it is also a thriving profitable industry, which makes significant contributions to state government revenues."[478] This chapter looks at the history of gambling as a whole in Australia, from its birth in the 19th century to the point of the regulation of interactive gambling in 2001. This chapter focuses mainly on the regulation of gambling and taps into the policies of interactive gambling. The problems that the regulation of interactive gambling has been associated with since its introduction are also discussed, as well as the advantages of Australia having a legalised interactive gambling sector. Furthermore, this chapter discusses the legislation pertaining to interactive gambling in Australia, specifically, the Interactive Gambling Act of 2001; and the cases that have since been brought before the Australian courts since interactive gambling was legalised. This chapter also looks at the issue of problem gambling since the legalisation of interactive gambling as well as the precautions taken to ensure responsible gambling.

4.2 BACKGROUND

Australians did not gamble until the arrival of the European settlers with and after the First Fleet before the 1800s.[479] During the 1800s gambling was permitted by the racing clubs with gambling by the elite and the army officers tolerated.[480] Racing became the most popular

[477] Australian Institute for Gambling research *'Australian Gambling Comparative History and Analysis'* Project Report October 1999 242, 1.
[478] Australian Institute for Gambling research *'Australian Gambling Comparative History and Analysis'* Project Report October 1999 242, 1.
[479] The Department of Justice and attorney-general 'Gambling in Australia- a history' available at *http://www.olgr.qld.gov.au/responsibleGambling/educationInfo/schoolStuff/gambol/moreinfo.pdf,* accessed on 15 November 2012.
[480] The Department of Justice and attorney-general 'Gambling in Australia- a history' available at *http://www.olgr.qld.gov.au/responsibleGambling/educationInfo/schoolStuff/gambol/moreinfo.pdf*, accessed on 15 November 2012.

form of gambling for entertainment amongst males at this period.[481] In the 1910s and 20s lotteries owned by the state and the Golden Art Union thrived and became a new form of funding for the First World War.[482] During the 1930s other forms of gambling such as bingo, raffles and unions became popular and were accepted as being respectable activities.[483] In the 1940s gambling was becoming a problem for the government with many forms of illegal gambling developing; as such the government introduced the Totalisator Agency Boards (TAB) in order to ensure legality so as to get revenues.[484] Over the years gambling developed rapidly and government took control of most if not all forms of gambling by regulating it. Despite all the restrictions by legislation on gambling and opposition by different social groups, ‗the Australian passion for gambling has survived'.[485] In the 1990s gambling became huge, suddenly everyone saw an opportunity in this new industry, the government was looking to receive taxes and the private sectors wanted a share in this flourishing market.[486] Technological developments came with the virtual world, legal casinos were introduced, and the lottery developed new games; the chances of winning became slimmer with the growth, this industry was raising concern, not only for the government, but also society was becoming more aware of the increasing social harms of gambling.[487] In 1998/9 the Productivity Commission engaged in a review of this industry, and released the report in 1999 of which regulation has been highly reliant on ever since.[488] In 2009 the commission conducted a further enquiry report which was released in June of the following year,[489] in order to review the developments of gambling since the previous commission report and the enactment of the Interactive Gambling Act.

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[481] Australian Gaming Council ‗A Database on Australia's Gambling Industry 2011/12' Australia's Gambling Environment Chapter 14, 1.
[482] Australian Gaming Council ‗A Database on Australia's Gambling Industry 2011/12' Australia's Gambling Environment Chapter 14, 1.
[483] The Department of Justice and attorney-general ‗Gambling in Australia- a history' available at *http://www.olgr.qld.gov.au/responsibleGambling/educationInfo/schoolStuff/gambol/moreinfo.pdf*, accessed on 15 November 2012.
[484] The Department of Justice and attorney-general ‗Gambling in Australia- a history' available at *http://www.olgr.qld.gov.au/responsibleGambling/educationInfo/schoolStuff/gambol/moreinfo.pdf*, accessed on 15 November 2012.
[485] S Pinto & P Wilson ‗Gambling in Australia' (1990) 24 *Australian Institute of Criminology trends & issues in crime and Criminal Justice* 1, 1.
[486] The Department of Justice and attorney-general ‗Gambling in Australia- a history' available at *http://www.olgr.qld.gov.au/responsibleGambling/educationInfo/schoolStuff/gambol/moreinfo.pdf,* accessed on 15 November 2012.
[487] Gambling Review Commission (2010) ‗International Study of Gambling Jurisdiction', 8.
[488] Australian Gaming Council ‗A Database on Australia's Gambling Industry 2011/12' Australia's Gambling Environment Chapter 14, 1.
[489] Australian Gaming Council ‗A Database on Australia's Gambling Industry 2011/12' Australia's Gambling Environment Chapter 14, 1.

Australia can be recognised as the port of gambling, it has been a general leader in the development of the industry.[490] It also has the most advanced technology and has a longer history of legal gaming than most other countries.[491] In the last 10 to 15 years there has been expeditious transformation which has lead to legalisation (or liberalisation) of new forms of gambling and vast technological developments.[492] The whole concept of internet gambling came about around 1995, when the very first online casinos started to appear online.[493] Australia is one of the first countries to legalise internet gambling in one of its states.[494]

4.3 REGULATION OF ALL FORMS OF GAMBLING IN AUSTRALIA

Gambling in Australia is one of the most heavily regulated industries in the country, with the most relevant Acts, Regulations, Codified practices, and Ministerial Directions addressing gambling issues.[495] Gambling in Australia is properly regulated by the state and functions through the revenue of such activities.[496] The State government is basically accountable for the control of legal and illegal gambling and the responsibility of the federal government control is limited to the investigation of organised crime and the international investments.[497] The state and federal government together are involved in various gambling aspects including funding, tax, police and organising help services for gamblers experiencing problems, regulators and so forth.[498] In spite of their combined contribution, each level of government has different responsibilities related to gambling.[499] The federal government deals with issues pertaining to national laws with regard to internet gambling; state and territory governments oversee most aspects of gambling; and local governments on the other hand have responsibilities over planning.[500] However, due to the rapid development of gambling, the

[490] Australia's *Gambling Industries: Productivity commission Final Report* 10 (26 November 1999) 7.
[491] Australia's *Gambling Industries* (note 490 above) 7.
[492] Australia's *Gambling Industries* (note 490 above) 7.
[493] Pokies Online, available at *http://www.onlinepokies.com/internetpokies.htm,* accessed on 28 October 2012.
[494] Australia's *Gambling Industries* (note 490 above) 7.
[495] Australian Gaming Council _A Database on Australia's Gambling Industry 2011/12' Australia's Gambling Environment Chapter 14, 1.
[496] Gambling Review Commission (2010) _International Study of Gambling Jurisdiction', 10.
[497] Gambling Review Commission (2010) _International Study of Gambling Jurisdiction', 10.
[498] Gambling Review Commission (2010) _International Study of Gambling Jurisdiction', 8.
[499] Gambling Review Commission (2010) _International Study of Gambling Jurisdiction', 8.
[500] Gambling Review Commission (2010) _International Study of Gambling Jurisdiction', 8.

Commonwealth has taken an active role in this area.[501] Gambling in Australia was unravelling public debates on every level, this became a national concern and the Commonwealth instituted an inquiry by the Productivity Commission to examine the position of gambling and the future prospects.[502]

The enactment of new technologies into gambling forms has led the Commonwealth to take an interest in the industry as this is one of its constitutional responsibilities.[503] For the reasons that ―prohibiting or regulating internet gambling is confronted by the ‗same challenges of jurisdiction and law enforcement as internet activities at large', efforts to address risks associated with internet gambling have faced distinctively different challenges to policy and legislative measures aimed at curbing problem gambling in a traditional sense."[504] In August of 1998 the Commonwealth instructed the Productivity Commission to conduct a report on the performance of gambling industry as well as the social and economic impact it has across Australia.[505] Because of the importance of the regulatory mechanisms, the collection of revenues and the welfare of the community of online gambling, federal parliament placed a prohibition on the provision of internet gambling to Australian residents.[506] The Prime Minister of Australia at the time, expressed concern on the fast growing internet gambling in a press statement which was released on the 16th of December 1999, he mentioned the possibility of an investigation of the feasibility of banning internet gambling.[507] In May of the year 2000, Ministers came together and announced the examination of legislation that was going to impose a 1 year long moratorium of the introduction of new interactive gambling

[501] Kim Jackson ‗Gambling Policy and Regulation' available at *http://www.aph.gov.au/About_Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/gamblingbrief*, accessed on 20 October 2012.
[502] Kim Jackson ‗Gambling Policy and Regulation' available at *http://www.aph.gov.au/About_Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/gamblingbrief*, accessed on 20 October 2012.
[503] Kim Jackson ‗Gambling Policy and Regulation' available at *http://www.aph.gov.au/About_Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/gamblingbrief*, accessed on 20 October 2012.
[504] J Jolly ‗The Safest Bet: Revisiting the Regulation of Internet Gambling In Australia' (2011) 15 Gaming Law Review and Economics 441, 441.
[505] Kim Jackson ‗Gambling Policy and Regulation' available at *http://www.aph.gov.au/About_Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/gamblingbrief*, accessed on 20 October 2012.
[506] Kim Jackson ‗Gambling Policy and Regulation' available at *http://www.aph.gov.au/About_Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/gamblingbrief*, accessed on 20 October 2012.
[507] Kim Jackson ‗Gambling Policy and Regulation' available at *http://www.aph.gov.au/About_Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/gamblingbrief*, accessed on 20 October 2012, Prime Minister John Howard, ‗National Approach to Problem Gambling'.

services.[508] Later the same year the Government introduced the Interactive Gambling (Moratorium) Bill to prohibit those interactive gambling services that were not being provided before 19 May 2000.[509] In 2001, the Australian Parliament passed the Interactive Gambling Act (IGA), concerned that the fast growing internet industry had the ‗potential to greatly increase the accessibility of gambling and exacerbate problem gambling among Australians'.[510]

4.4 A NEW ERA OF INTERACTIVE GAMING IN AUSTRALIA

The first inquest by the Productivity Commission reported that ―internet gambling offered the potential for consumer benefits, as well as new risks for problem gambling."[511] The Commission advised that ―managed liberalisation including licensing of sites, consumer protection measures and taxation would meet the majority concerns provided that the federal, state and territory governments were actively involved."[512] ―This recommendation put the issue of online gambling policy reform firmly on the agenda; and as a result, the federal government commissioned the Department of Broadband Communications and the Digital Economy (DBCDE) to conduct a review of the Interactive Gambling Act."[513] In 2001, the Interactive Gambling Act was introduced, banning the provision of internet gambling to Australian residents.[514] The Interactive Gambling Act of 2001 permits online sports and race books, poker rooms, and skill games to be legally operated in Australia and to be played by Australian residents, the exception is on Australian online casinos whereby the residents are not permitted to gamble.[515] The Act also ―prohibits Australian-based interactive gambling services from being provided to customers in designated countries; and prohibits the

[508] Kim Jackson ‗Gambling Policy and Regulation' available at *http://www.aph.gov.au/About_Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/gamblingbrief*, accessed on 20 October 2012.
[509] Kim Jackson ‗Gambling Policy and Regulation' available at *http://www.aph.gov.au/About_Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/gamblingbrief*, accessed on 20 October 2012.
[510] Revised Explanatory Memorandum, Interactive Gambling Bill 2001 1.
[511] S Monaghan ‗Critical Review of the Impact of Internet Gambling' 27 January 2009, Reported to the Australian Gaming Council 1, 4.
[512] Monaghan (note 511 above) 4.
[513] Clubs Australia Submissions (note 458 above) 2.
[514] Monaghan (note 511 above) 4.
[515] Wood & Williams (note 127 above) 496.

advertising of interactive gambling," amongst other things.[516] The Act, however, does not affect the operation of online sports betting services as these are considered to involve an element of skill rather than a game of chance.[517] In 2004, a review of the Interactive Gambling Act concluded that it had _curtailed the development of the Australian interactive gambling industry and was associated with the minimal use of internet gaming services by Australians'.[518] The present position as of 2010 is that –online gambling service providers may operate in Australia, but may not provide their services to Australian consumers; however, Australian consumers wishing to engage in online gambling may do so using the services of offshore operations."[519] The Productivity Commission in 2009, advocated for a lifting of the ban on the prohibition of the Interactive Gambling Act subject to a strict consumer regime; with the eGaming Review reporting in June 2010, that the Australian government had turned the recommendation.[520] The eGaming Review quoted the Minister of Communications, Mr Stephen Conroy as saying: –We are not convinced that liberalising online gambling would have benefits for the Australian community which would outweigh the risks of an increased incidence of problem gambling, particularly with the rapid changes in technology."[521] The Review further reported that in the year 2008, Australians spent well over AS$ 790 million on offshore sites.[522]

The study by the Productivity Commission stated that in 1998-1999 at least 90 000 Australians gambled on the internet.[523] According to Australian gambling analysts, –there were more than 250 companies or authorities operating around 850 internet gambling sites in 1999, with revenues of about $US 1.67 billion."[524] This was expected to be an 80% increase

[516] Kim Jackson _Gambling Policy and Regulation' available at *http://www.aph.gov.au/About_Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/gamblingbrief*, accessed on 20 October 2012.
[517] Gambling Review Commission (2010) _International Study of Gambling Jurisdiction', 23.
[518] Australian Government Department of Broadband, Communications and the Digital Economy, The Interactive Gambling Act 2001 (2004).
[519] Gambling Review Commission (2010) _International Study of Gambling Jurisdiction', 23.
[520] Gambling Review Commission (2010) _International Study of Gambling Jurisdiction', 24.
[521] Gambling Review Commission (2010) _International Study of Gambling Jurisdiction', 24.
[522] Gambling Review Commission (2010) _International Study of Gambling Jurisdiction', 24.
[523] Monaghan (note 511 above) 5.
[524] Bills Digest No. 50 of 2000-01 _Interactive Gambling (Moratorium) Bill 2000' 17 August 2000 available at *http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd0001/01bd050*, accessed on 20 October 2012.

from the year 1998.[525] In over 15 years of legalising, interactive gambling has exploded faster than ever with gambling revenues in 2010 topping $800 billion and still rising.[526] The Interactive Gambling Act, like the Unlawful Internet Gambling Enforcement Act (UIEGA) focuses on –providers of internet gambling services rather than the people placing bets;[527] this Act makes it an offence to provide interactive gambling services to someone not physically present" in Australia.[528] The way in which the internet is growing so rapidly and the pace at which technology is developing requires that the policies of online behaviour be reviewed more extensively.[529] Analysts have contended that what the policymakers should really be asking themselves is not whether online gambling can be controlled, but the extent to which it can be controlled.[530] Research has shown that the current legislative framework in Australia is ineffective when it comes to preventing Australians from gambling online; hence it defeats the initial purpose of the Interactive Gambling Act.[531] Not only is this prohibition dysfunctional, but it has also resulted in Australians using foreign sites to gamble; increasing the risk of Australian consumers and the loss of Australian revenues to foreign gambling service providers.[532] It has thus been argued that a more constructive approach would be to "strictly regulate and monitor the provision of Internet gambling services by the private sector in Australia, or implementing state-owned Internet gambling services."[533]

Federal and state governments as well as oppositions together with community groups have expressed a number of legitimate concerns regarding the legalising of online gambling.[534] According to Jolly[535] –the primary risks associated with interactive gambling are similar to those associated with gambling in a traditional sense."[536] Basically, that gambling encompasses a number of important societal risks such as the experiences of gamblers not

[525] Bills Digest No. 50 of 2000-01 _Interactive Gambling (Moratorium) Bill 2000' 17 August 2000 available at *http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd0001/01bd050*, accessed on 20 October 2012.
[526] Gambling Review Commission (2010) _International Study of Gambling Jurisdiction', 5.
[527] Cynthia Orme et al _Internet Gambling- A discussion paper on the Internet and Other forms of Remote Gambling' *Gambling and Public Health Alliance International newsletter* (July 2010) at 4.
[528] Orme et al (note 527 above) 4.
[529] Jolly (note 504 above) 442.
[530] A Essa _The Prohibition of Online-Casinos in Australia: Is it Working?' (2004) 4(1) *QUT Law and Justice J* 88, 88.
[531] Jolly (note 504 above) 442.
[532] Jolly (note 504 above) 442.
[533] Jolly (note 504 above) 442.
[534] Clubs Australia Submissions (note 458 above) 2.
[535] Jarrod Jolly is an LLB/BA candidate at the University of Queensland, Brisbane, Australia and the University of British Columbia, Vancouver, Canada.
[536] Jolly (note 504 above) 442.

being able to control their impulse to gamble.[537] This risk results in ‗diminished job performance; increased family stress; fraud or theft in order to pay the acquired gambling debts; in short financial ruin'.[538] The means of which Internet gambling is paid for, that is credit cards, has the highest potential of increasing the financial harm.[539] Furthermore, as indicated above the internet is conveniently accessible 24 hours a day, and research shows that this could increase the number of problem gamblers and the intensity of their addiction.[540] Unlike gambling in the traditional sense ―where gambling occurs in a social context and under some kind of supervision with cameras and trained staff rotating, online gambling often takes place in social isolation without any supervision".[541] ―There is a genuine concern that the ‗anywhere/anytime' nature of online and mobile gambling increases the risk of consumers developing a gambling problem;"[542] in particular, a few measures can be taken to ascertain that people do not gamble under the influence of drugs and alcohol or that they are not minors.[543] Advertising of responsible gambling campaigns have been suggested, however, it is noteworthy that these campaigns are harder to communicate to internet gamblers than it is with traditional gambling.[544]

4.5 REGULATED INTERACTIVE GAMBLING AFTER THE 2001 ACT

Interactive gambling has a few positives that have made Australia legalise it regardless of the feedback by much research conducted that advocated for its prohibition. Firstly gambling on the internet is convenient and it has its benefits, such as that a credit card can be used in order to pay for the game rather than cash itself; a gambler can play at any time of the day all day and at the same time be anonymous online.[545] With this being said, the most obvious advantage of this industry has to be the large commercial potential that the market of internet gambling comes with.[546] According to the Productivity Commission report, despite the fact

[537] McMillen & Grabosky (note 198 above) 2.
[538] McMillen & Grabosky (note 198 above) 1.
[539] Australian Government Productivity Commission, *Gambling: Productivity commission inquiry Report* 15.7 (2010).
[540] Parke & Griffiths (note 66 above) 295.
[541] Clubs Australia Submissions (note 458 above) 2.
[542] Clubs Australia Submissions (note 458 above) 2.
[543] Jolly (note 504 above) 443.
[544] Jolly (note 504 above) 443.
[545] M Vivaldi ‗Changing the game: the regulation of online gambling in Australia' (2010) 12(9) *Internet L. Bull* 1.
[546] McMillen & Grabosky (note 198 above) 2.

that interactive gambling and wagering were a relatively small market in the industry, this form of gambling has exhibited strong growth over the last decade.[547] This growth is expected to continue over the years to come especially considering that a lot more people will be acquainted with the developing technology and will be more familiar with the internet.[548] Furthermore, a very important issue will be the revenues that will be received with the growth of the industry which will assist in curbing problem gambling.[549]

The productivity Commission Report in 2010 also mentioned a couple of advantages that can be associated with interactive gambling that could potentially minimise the traditional harms associated with gambling, these involve the following;[550]

1. gambling at home makes it easier for other family members to intervene when they realise that it is becoming a problem;
2. the fact that a credit card is used provides a monthly reminder of the full financial costs of gambling to both the gamblers and their families;
3. internet gambling has a lower cost structure than land-based gambling, therefore lower bets or better odds can be offered, theoretically lowering the cost of gambling;
4. internet gambling permits the player to play at his own pace without any pressure.
5. most internet gamblers are more likely to from higher socio-economic groups with above average education levels and income, and working in professional or managerial jobs;
6. Internet gambling companies must attract business in an uncertain and risky environment, and thus their trustworthiness through security, privacy, and reliability is key to their success; safe gambling practices are arguably encouraged through these market forces.

The regulated interactive gambling industry has not been all smooth sailing, in fact, interactive gambling gives rise to issues such as problem gambling and the way in which the regulating country addresses the issue of responsible gambling for gamblers. These two

[547] Australian Government Productivity Commission, *Gambling: Productivity commission inquiry Report* 15.1 (2010).
[548] Jolly (note 504 above) 443.
[549] Jolly (note 504 above) 443.
[550] Jolly (note 504 above) 444.

issues are significant in any regulating jurisdiction because of their rapid increase as the industry grows.

4.5.1 Problem Gambling

The first Productivity Commission report did not have one definite definition of problem gambling, but chose to give a few that had common features.[551] Problem gambling could then be defined as a lack of control by the gambler of his gambling behaviour, and adverse personal, economic and social impacts resulting from the gambler's behaviour, particularly financial loss.[552] More research has been conducted over the years since the 1999 Productivity Commission report, and problem gambling remains with a variety of definitions, all of which have a different basis but outline the important effect of this issue.

During the years 1997 and 1998 the Productivity Commission estimated that 2.1 Australians had a problem with their gambling.[553] In 2009 the Commission conducted a further review, however, this time a meta-analysis was performed of the previous decade using existing state/territory results.[554] These results included at least 0.5% -1.0% of Australian adults with severe gambling problems and 1.4% -2.1% with a moderate problem that could result into severe problem gambling.[555] While the majority of online gamblers appear to play in a responsible manner, research is increasingly demonstrating that the incidence of problem gambling is higher amongst samples of internet gamblers than land-based gamblers.[556] The Tasmanian Gambling Impact Study found that ~~"~~1~~-~~2% of internet gamblers were problem gamblers," in addition to that, ~~"~~amongst an online sample of 1 920 internet gamblers a substantial proportion was classified as moderate (22.6%) or severe (20.1%) problem gamblers."[557]

It has been contended by further research that in as much as an there is an apparent relationship between internet gambling and problem gambling, a causal connection has not

[551] Australia's *Gambling Industries* (note 490 above) 6.3.
[552] Australia's *Gambling Industries* (note 490 above) 6.3.
[553] Australian Gaming Council _A Database on Australia's Gambling Industry 2011/12' Australia's Gambling Environment Chapter 8, 13.
[554] Australian Gaming Council _A Database on Australia's Gambling Industry 2011/12' Australia's Gambling Environment Chapter 8, 13.
[555] Australian Gaming Council _A Database on Australia's Gambling Industry 2011/12' Australia's Gambling Environment Chapter 8, 13.
[556] Monaghan (note 511 above) 7.
[557] Monaghan (note 511 above) 7.

been established.[558] It is plausible that internet gambling attracts individuals who would not otherwise gamble on the traditional forms of gambling or where there are no other gambling opportunities available, this could then result in an increased prevalence of problem gambling.[559] Some internet gamblers report a preference for online gambling and aversion to land-based venues, indicating that internet gambling may be creating a new market of gamblers.[560]

4.5.2 Responsible Gambling

Responsible gambling refers to ~~a~~ broad concept which underpins a number of strategies, the aims of which are to reduce the incidence of problem gambling and minimise potential social costs and harm associated with problem gambling."[561] Like problem gambling, responsible gambling has no single agreed definition.[562]

There is a large discrepancy between sites in the extent of responsible gambling features used, a number of jurisdictions that regulate internet gambling, such as the United Kingdom, mandate the inclusion of responsible gambling features.[563]

The United Kingdom, sites are required to prominently display clocks and timers (indicating the current time and time in play) and the amount of money being wagered, won and lost.[564] The Netherlands has some of ~~th~~e most proactive responsible gambling measures of any jurisdiction; in addition to the bans and spending limits, Holland Digitaal has a maximum play limit of €100 per week" for individuals between the ages of 18- 23, this also allows players to impose limitations on visit frequency and intervenes when players show sudden dramatic increases in gambling expenditure on frequency.[565] In addition to monetary limits, Svenska Spel, Sweden's online gambling site, has launched a tool called _playscan' that detects players at risk of developing gambling problems and offers tools to modify behaviour

[558] Monaghan (note 511 above) 8.
[559] Monaghan (note 511 above) 8.
[560] Monaghan (note 511 above) 8.
[561] Australian Gaming Council _A Database on Australia's Gambling Industry 2011/12' Australia's Gambling Environment Chapter 9, 3.
[562] Australian Gaming Council _A Database on Australia's Gambling Industry 2011/12' Australia's Gambling Environment Chapter 9, 3.
[563] Monaghan (note 511 above) 9.
[564] Monaghan (note 511 above) 10.
[565] Monaghan (note 511 above) 10.

including personal gaming budgets, self-diagnostic test of gaming habits and the chance to self-exclude from the site.[566] While this tool is voluntary, it is strongly recommended.[567]

Due to the absence of regulation in many jurisdictions, some sites have adopted a self-regulatory approach.[568] An independent organisation based in the United Kingdom, eCOGRA conducts audits –to certify that internet gambling sites provide fair, honest, and responsible" gambling.[569] As of January 2009, there were 134 tier one companies that had successfully achieved individual safe and fair accreditations from eCOGRA with other licensees currently undergoing testing and monitoring services.[570] The self-regulation imposed by private gambling companies indicates that there is a market for a safe online gambling environment.

4.6 THE FIRST DECADE OF THE NATIONAL GAMBLING ACT OF 2001 IN AUSTRALIA

The Interactive Gambling Act was passed by the Commonwealth Parliament on 28 June 2001and was given Royal assent by the Governor-General on 11 July 2001.[571] The stated objective of the Australian government introducing the Interactive gambling Act is summarised as follows:

> –The Government is concerned that the interactive gambling industry has the potential to expand rapidly in Australia, and that any further expansion of interactive gambling could exacerbate problem gambling in Australia. The Government is also mindful of the need not to place undue burdens on Australia's communications industries. It hence seeks a strategy for restricting Australian's access to interactive gambling while balancing he interests of the information economy."[572]

[566] Monaghan (note 511 above) 10.
[567] Monaghan (note 511 above) 10.
[568] Monaghan (note 511 above) 10.
[569] Monaghan (note 511 above) 10.
[570] Monaghan (note 511 above) 10.
[571] Chuck Humphrey ‗Australian Online Gambling, Summary: Interactive Gambling Act 2001' available at *http://www.gambling-law-us.com/Articles-Notes/online-gambling-australia.htm* accessed on 23 October 2012.
[572] Revised Explanatory Memorandum, Interactive Gambling Bill 2001 7.

The Interactive Gambling Act is more concerned with the interactive gambling service providers rather than the potential or actual customers.[573] It is an offence under the Act for Australian and foreign interactive gambling service providers to provide such services to residents physically present in Australia.[574]

- ―The offence applies to all interactive gambling service providers, whether based in Australia or offshore, whether Australian or foreign owned."[575]
- ―The offence carries a maximum of $220, 000 per day for individuals and $1.1 million per day for bodies corporate."[576]

Interactive gaming is briefly defined as ―any gambling activity conducted via the internet; it is governed by the Interactive Gambling Act of 2001 which is Commonwealth, rather than state/territory legislation."[577] This phenomenon of ―interactive gambling is fairly broad and can include various forms of remote gambling such as digital television or mobile gambling platforms."[578] The Interactive Gambling Act also prohibits any Australian-based interactive gambling service providers from providing services to customers in certain ‗designated countries'.[579] This ―offence will not apply if the interactive gambling service provider did not know and could not, with reasonable diligence, have ascertained that the service had Australian customers."[580] Accordingly, ―interactive gambling service providers that can show that they exercised reasonable diligence in ensuring that Australian customers are prevented from using their services will have a defence against the offence provision."[581] In order for this defence to apply, the following are required to prove reasonable diligence was applied:[582]

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[573] Chuck Humphrey ‗Australian Online Gambling, Summary: Interactive Gambling Act 2001' available at *http://www.gambling-law-us.com/Articles-Notes/online-gambling-australia.htm* accessed on 23 October 2012.
[574] The Interactive Gambling Act, section 15.
[575] The Interactive Gambling Act, section 15(5).
[576] Chuck Humphrey ‗Australian Online Gambling, Summary: Interactive Gambling Act 2001' available at *http://www.gambling-law-us.com/Articles-Notes/online-gambling-australia.htm* accessed on 23 October 2012.
[577] Australian Gaming Council ‗A Database on Australia's Gambling Industry 2011/12' Australia's Gambling Environment Chapter 2, 10.
[578] Australian Gaming Council ‗A Database on Australia's Gambling Industry 2011/12' Australia's Gambling Environment Chapter 2, 10.
[579] Interactive Gambling Act, section 15A
[580] The Interactive Gambling Act, section 15A (3).
[581] The Interactive Gambling Act, available at *http://www.dbcde.gov.au/broadband/online_gambling/interactive_gambling_act_2001* accessed on 23 October 2012.
[582] The Interactive Gambling Act, section 15A (4) (a-d).

- whether prospective customers were informed that Australian law prohibits the provision of the service to customers who are physically present in Australia;
- whether customers were required to enter into contracts that were subject to an express condition that the customer was not to use the service if the customer was physically present in Australia;
- whether the person required customers to provide personal details and, if so, whether those details suggested that the person was not physically present in Australia; and
- whether the person has network data that indicates that customers were physically present outside Australia when the relevant customer account was opened throughout the period when the service was provided to the customer."

Where a prohibited internet gambling service is hosted outside Australia, the Interactive Gambling Act seeks to impose both regulatory and mandatory obligations upon Australian Internet Service Providers (ISPs) to take steps to restrict access by Australians to such services.[583] Nevertheless, with such prohibitions, the Interactive Gambling Act considers that, to the extent that an activity is not prohibited, it is permitted.[584] Accordingly, licenses to provide interactive gambling services can still be issued, and services provided under the relevant licence, in accordance with the licensing regimes of various Australian state and territory jurisdictions.[585]

The Interactive Gambling Act also makes it "an offence to publish or broadcast in Australia an advertisement for an interactive gambling service."[586] Further, it is "an offence to advertise online gambling services via the internet, broadcasting, print media, billboards and hoardings."[587] However, these "prohibitions are subject to certain exceptions," such as;

[583] A Cabot et al 'Internet Gambling Report XI: An Evolving Conflict Between Technology and Law' in J Nettleton (ed) *Australia* (2008) 597, 599.
[584] Cabot (note 583 above) 599.
[585] Cabot (note 583 above) 600.
[586] The Interactive Gambling Act, available at *http://www.dbcde.gov.au/broadband/online_gambling/interactive_gambling_act_2001* accessed on 23 October 2012.
[587] The Interactive Gambling Act, section 61 Division 5.

- ―Political communications, incidental or accidental advertising, products or services having the same name as an interactive gambling service or anti-gambling advertisement."[588]
- The advertising ban does not include services that are excluded from the definition of _interactive gambling services' such as wagering and excluded lottery services.[589]
- This offence also ―does not include advertisements published in any overseas media such as magazines published overseas or websites that are aimed at non-Australian audiences".[590]

As the law stands, interactive gambling services are prohibited for Australian residents. However, the Minister has the ability under the Interactive Gambling Act to extend the offense to prohibit the provision of such services to people in designated countries.[591] But ―a country cannot become a _designated country' unless;[592]

- ―the government of that country has requested a designation under the Act from the Minister; and
- there is legislation in force in that country that corresponds to the main offense provision of the Act."

Nevertheless, there is no foreign country that has been designated under this provision at the time of writing. In addition to this, ―the Act established a complaints mechanism to enable Australians to refer gambling services available on the internet to the Australian communications and Media Authority (ACMA),"[593] and the Department of Broadband, Communication and Digital Economy (DBCDE).[594]

[588] The Interactive Gambling Act, sections (61BB, BG and DB).
[589] The Interactive Gambling Act, section 8A.
[590] The Interactive Gambling Act, section 61CB.
[591] Chuck Humphrey _Australian Online Gambling, Summary: Interactive Gambling Act 2001' available at *http://www.gambling-law-us.com/Articles-Notes/online-gambling-australia.htm* accessed on 23 October 2012.
[592] The Interactive Gambling Act, section 9A (3) (a) & (b).
[593] Interactive Gambling Act Parts 3-7.
[594] The Interactive Gambling Act, available at *http://www.dbcde.gov.au/broadband/online_gambling/interactive_gambling_act_2001* accessed on 23 October 2012.

In terms of section 69A of the Interactive Gambling Act, ―the Minister is provided with the capacity to develop regulations relating to agreements involving illegal interactive gambling services."[595] The regulations may provide as follows:

- ―that an agreement has no effect to the extent to which it provides for the payment of money for the supply of an illegal interactive gambling service;[596] and
- that civil proceedings do not lie against a person to recover money alleged to have been won from, or paid in connection with, an illegal gambling service."[597]

According to this Act, the Minister was obliged to use all reasonable efforts to introduce regulations under section 69A within 6 months of the commencement of the act, that is, 11 January 2002.[598] A review conducted by the Department of Communications Information Technology and Arts (which is now the DBCDE), came to the view that no regulations should be introduced.[599] ―The Government has not to date made such regulations; however, it has continued to consult with financial institutions and States and Territories on how their intent would best be given effect."[600]

In January of 2003, the Minister announced that the Department of Communications, Information Technology and Arts would conduct a review of the Interactive Gambling Act, to ―examine the effectiveness of the Act on the growth of the industry, the social and commercial impacts of the industry and technological developments relevant to the operation of the Act."[601] The report was completed in July 2004 and it concluded that, ―the Interactive Gambling Act had curtailed the development of the Australian interactive gambling industry and was associated with the minimal use of the internet gaming services by Australians."[602] The Review found that, the ―Interactive Gambling Act had proven to be largely successful in meeting its policy objectives and minimising the potential expansion of interactive gambling

[595] The Interactive Gambling Act, available at *http://www.dbcde.gov.au/broadband/online_gambling/interactive_gambling_act_2001* accessed on 23 October 2012.
[596] The Interactive Gambling Act, section 69A(1)(a).
[597] The Interactive Gambling Act, section 69A(1)(b).
[598] Cabot (note 583 above) 603.
[599] Cabot (note 583 above) 603.
[600] Chuck Humphrey ‗Australian Online Gambling, Summary: Interactive Gambling Act 2001' available at *http://www.gambling-law-us.com/Articles-Notes/online-gambling-australia.htm* accessed on 23 October 2012.
[601] Jolly (note 504 above) 446.
[602] The Interactive Gambling Act, available at *http://www.dbcde.gov.au/broadband/online_gambling/interactive_gambling_act_2001* accessed on 23 October 2012.

that may exacerbate problem gambling in Australia."[603] The Review also found that, "global interactive gambling had continued to grow since 2004, driven by strong consumer demand for both interactive gaming and sports betting services".[604] It further found that the restrictions in the Interactive Gambling Act had been effective in achieving negative growth in the use of prohibited interactive gambling services (e.g. online casinos). As a result, it was recommended that the current legislative framework be maintained.[605] "It was also conceded that although filtering technology had developed since 2001, they had still not advanced to a point where they might be suitable for mandatory blocking of prohibited Internet gambling content at an ISP-level."[606]

A further Review by the DBCDE conducted in 2011 on the operation of the Interactive Gambling Act found, "the effectiveness of the Interactive Gambling Act in reducing the risk of harm could be increased by enabling and encouraging prohibited online gambling service providers, particularly those that are popular amongst Australians, to become licensed in Australia, on condition that they:"[607]

- "cease offering higher risk online gambling (for example, online slot machines) to Australians and only offer online gambling services that are of relatively lower risk (for example online tournament poker); and
- agree to comply with a set of strong harm minimisation and consumer protection measures."[608]

The DBCDE recommended that the Interactive Gambling Act "provide for the development of a national standard, applicable to all Australian licensed interactive gambling providers, that establishes a framework for a minimum set of harm minimisation and consumer protection measures for all types of interactive gambling permitted by the Interactive

[603] Australian Government Department of Communications, Information Technology and the Arts, *Review of the Operation of the Interactive Gambling Act 2001 iv* (2004), available at *http://www.archive.dcita.gov.au/2007/11/review_of_the_iga* accessed on 25 October 2012.
[604] Australian Government Department of Communications, Information Technology and the Arts, *Review of the Operation of the Interactive Gambling Act 2001 iv* (2004), available at *http://www.archive.dcita.gov.au/2007/11/review_of_the_iga* accessed on 25 October 2012.
[605] Cabot (note 583 above) 605.
[606] Jolly (note 505 above) 447.
[607] Australian Government Department of Broadband, Communications and the Digital Economy, *Interim Report, Review of the Interactive Gambling Act 2001* 7 (2011).
[608] Australian Government Department of Broadband, Communications and the Digital Economy, *Interim Report, Review of the Interactive Gambling Act 2001* 7 (2011).

Gambling Act."[609] This report also found that the prohibition on online gaming for Australian residents is ineffective in ameliorating the risks of harm; instead it allows Australians to access illegal offshore sites most of which have poor or no harm minimisation measures.[610] The Review reported evidence that Australians were already spending in the vicinity of $1 billion per year on illegal gambling in 2011.[611] And based on the trends, Australians are set to spend in excess of $17.9 billion on illegal gaming over the next decade.[612] The DBCDE recommended therefore, that the prohibition be lifted on online tournament poker for a trial period of 5 years, subject to the operations becoming licensed in Australia and complying with the national harm minimisation standard.[613] "In addition to the trialling of online poker the report also recommends some minor strengthening of enforcement against unlicensed providers and an education and awareness program to inform Australians about the dangers of gambling on unlicensed sites."[614]

However, more research on the matter suggests that these minor improvements will result in substantive changes to the number of Australians gambling on illegal casinos or the quantum they bet, it is henceforth submitted that, "the Government should consider a regulatory regime that ensures that Australians have access to safe and regulated gambling opportunities and that also to channel the economic benefits derived from online gambling back into the local community."[615]

The 2010 Productivity Commission also contended that regulated access would have potential benefits over prohibition.[616] Specifically it was found that regulated access could "divert consumers from unsafe sites to ones that meet stringent Australian probity and consumer safety standards"; as such, Australian businesses would be provided with "greater commercial opportunities".[617]

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[609] Australian Government Department of Broadband, Communications and the Digital Economy, *Interim Report, Review of the Interactive Gambling Act 2001* 9 (2011).
[610] Clubs Australia Submissions (note 458 above) 3.
[611] Clubs Australia Submissions (note 458 above) 3.
[612] Clubs Australia Submissions (note 458 above) 2.
[613] Australian Government Department of Broadband, Communications and the Digital Economy, *Interim Report, Review of the Interactive Gambling Act 2001* 15 (2011).
[614] Australian Government Department of Broadband, Communications and the Digital Economy, *Interim Report, Review of the Interactive Gambling Act 2001* 16 (2011).
[615] Clubs Australia Submissions (note 458 above) 4.
[616] Jolly (note 504 above) 447.
[617] Jolly (note 504 above) 447.

4.7 CASE LAW

On 7 March 2008, the High Court of Australia in *Betfair PTY Limited v Western Australia*[618] ruled unanimously in favour of allowing Western Australia residents to legally place bets with licensed online betting exchanges. The landmark case was brought by Betfair, who challenged the validity of Western Australian legislation introduced in 2007 prohibiting local residents from placing bets with telephone and internet betting exchanges. The High Court ruled that the legislation imposed ‗discriminatory and protectionist burdens' on interstate trade, thereby contravening section 92 of the Australian constitution, which protects freedom of trade between states. Justice John Heydon ruled that the Western Australia state Government's argument of the legislation being in place to ensure that persons wagering at races contributed to the persons conducting the races was unacceptable. The Court stated that Betfair was ready to undertake obligations to ensure that the organisers of races obtain a reward from Betfair as well as from other wagering operators in the state.

Talks on this decision stated that it would allow more exchanges into the market, which has the potential to undermine the economic viability of an industry.[619] Further the Tasmanian Minister of racing, Michael Aird, commented that the decision paves a way for residents from all States and Territories to wager with Betfair and for Betfair to advertise across the country.[620]

On 10 December 2002, the High Court of Australia handed down its decision in *Dow Jones & Company Inc v Gutnick*[621] which allowed legal proceedings to be brought in Australia in respect of defamatory material in publications placed onto the internet in overseas jurisdictions and decided that internet documents were subject to the laws of where they were downloaded and read, rather than where they were posted.[622] While this case was concerned with a jurisdictional issue, this decision could have ramifications on the internet gambling industry as it may encourage Australian regulators and prosecutors to prosecute the plethora

[618] *Betfair PTY Limited v Western Australia* (2008) 234 CLR 418.
[619] S Monaghan, *Internet and Wireless Gambling- A current Profile*, The Australian Gaming Council (May 2008) 7.
[620] Monaghan (note above 619) 7.
[621] *Dow Jones & Company Inc. v Gutnick* (2002) HCA 56.
[622] Cabot (note 583 above) 606.

of Internet casinos and interactive gambling operators advertising to Australians.[623] However, the reality maybe that Australian prosecutors and gambling authorities are unlikely to bring proceedings for breaches of the Interactive Gambling Act related to internet gambling unless they can obtain an effective judgement.[624]

4.8 TECHNOLOGICAL PERSPECTIVES

Technological development has influenced gambling by aiding the use of gambling products and by acting as an alternative leisure form.[625] These technological developments have over the past 200 years, profoundly affected the extent and form of gambling; one major influence in particular, has been the internet and telecommunications.[626] The innovative telecommunications technology has allowed the development of internet gambling which crosses state and national borders; information technology makes internet gambling a truly global activity, linking home gambling with international operators.[627] Technology has made a significant contribution to the nature of gambling products and the growth of the gambling market. Australian gambling innovations have led the world and facilitated public participation and the development of new gambling products.[628] In the last two decades the use of satellite telecommunications and SKY channel has brought racing from every state and overseas, to people's homes.[629] The development of computer technology and online retail outlets enabled lottery operators and TABs to improve their services and offer more products with quicker results.[630]

The new forms of technology has created a large market of internet gambling, moreover, the advances in information technology have allow gambling operators to collect valuable

[623] Cabot (note 583 above) 606.
[624] Cabot (note 583 above) 606.
[625] Australian Institute for Gambling research „*Australian Gambling Comparative History and Analysis*' Project Report October 1999 242, 21.
[626] Australian Institute for Gambling research „*Australian Gambling Comparative History and Analysis*' Project Report October 1999 242, 22.
[627] Australian Institute for Gambling research „*Australian Gambling Comparative History and Analysis*' Project Report October 1999 242, 22.
[628] Australian Institute for Gambling research „*Australian Gambling Comparative History and Analysis*' Project Report October 1999 242, 206.
[629] Australian Institute for Gambling research „*Australian Gambling Comparative History and Analysis*' Project Report October 1999 242, 206.
[630] Australian Institute for Gambling research „*Australian Gambling Comparative History and Analysis*' Project Report October 1999 242, 206.

commercial data on their customers.[631] Technology in the field of gambling is constantly evolving, with new types of games and wagering methods being offered by providers to gain a competitive advantage.[632] It is important therefore, for government to be aware of the changes in technology of the transformation and ‗step change' impact on the market; particularly, those that will strongly improve the enabling technology supporting internet gambling such as broadband access; and providing new platforms through which individuals can participate, such as mobile technology and digital television.[633]

4.9 CRIMINAL ACTIVITY

The new online gambling market place is a cyber-bazaar for techno-fraudsters who well know that most police and gaming regulators are not exhaustively trained in computer crime or even barely computer literate and more particularly in in criminal activity associated with gambling related crimes.[634] Cyber criminals are aware of the limited level of knowledge that law enforcers possess of the operation of this new industry and thus when the police fail to apply the law because of this limitation, there is an increase in criminal activity.[635] In Australia more and more legislation is being put in place, however there have been no means/actions taken to assist in training the law enforcement agents in this fast growing industry.[636] It is evident that the regulation of interactive gambling has come with a rapid increase in criminal activity that is facing law enforcement and the need for much training is called for by the researchers and regulators of this industry.

In the same place, Godson maintained the notion that, whilst regulatory law enforcement is necessary, it is not sufficient; for instance, ‗the continued existence of drug trafficking and money-laundering in the US dramatically illustrates that even the most regulated, aggressive

[631] Australian Institute for Gambling research ‗*Australian Gambling Comparative History and Analysis*' Project Report October 1999 242, 206.
[632] Allen Consulting Group ‗Review of current and future Trends in Interactive gambling activity and regulation' Commissioned by the Australian Government Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), July 2007 60, VIII.
[633] Allen Consulting Group ‗Review of current and future Trends in Interactive gambling activity and regulation' Commissioned by the Australian Government Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), July 2007 60, VIII.
[634] B Clarke ‗Techno Gambling: Stepping Outside the Cyber-Gambling Square' Paper presented at the conference, Gambling, Technology and Society: Regulatory Challenges for the 21st Century, 7-8 May 1998 12, 2.
[635] Clarke (note 634 above) 2.
[636] Clarke (note 634 above) 2.

and effective law enforcement systems are unable to combat organised crimes adequately'.[637] Gambling as a whole, is very attractive to organised crime from its initial birth, therefore the new form of gambling needed to be met with adequate resources to control the growth of crime along with the growth of the interactive gambling industry.[638] Finally, just as new technologies will lead the government into rethinking a range of issues, including law enforcement, it was also predicted that opportunistic and sophisticated criminals will be viewing these technologies with interest.[639] The Australian Crime Commission identified online gambling as a money-laundering risk and a risk for revenue and taxation fraud.

4.10 CONCLUSION

The primary objective of the Australian government in introducing the Interactive Gambling Act 2001 was to prevent the exacerbation of problem gambling by restricting Australians from access to interactive gambling, while balancing the interests of the information economy.[640] According to the information provided above, much research has shown that the Interactive Gambling Act has failed. The main reason that has been provided for this failure is the fact that the internet is a very broad and hence it is not possible to regulate it without the cooperation of the world.[641] It is very difficult to control what happens over the internet, in this regard controlling foreign interactive service providers, therefore prohibiting Australians from gambling on Australians sites has led them straight to those sites and managed to increase the prevalence of problem gambling. Research, Reports and Reviews all have suggested that this prohibition has resulted in the loss of a potentially lucrative industry, valuable tax revenue and the opportunity to have a meaningful impact on problem gambling in Australia.[642]

Basically it looks like the Government is unlikely to substantially shift its current stance on the issue in the short term. It is thereby contended that Australia should consider the benefits

[637] Clarke (note 634 above) 4.
[638] Clarke (note 634 above) 5.
[639] Clarke (note 634 above) 6.
[640] Revised Explanatory Memorandum, Interactive Gambling Bill 2001 7.
[641] Jolly (note 504 above) 449.
[642] Australian Government Productivity Commission, *Gambling: Productivity commission inquiry Report* 15.1 (2010).

of implementing a system that is regulated or one that is state-owned.[643] Or even more likely, Australia should adopt the recommendation of the 2010 Productivity Commission Report and implement the ‗managed liberalisation' of Internet gambling.[644]

Nonetheless, after much consideration of the Australian system, it is obvious that Australia is still on the lead when it comes to interactive gambling. The fact is, Australia took the initiative to provide legislation for how they want the interactive gambling to operate in Australia, this has put them a stem ahead from any other jurisdiction. Australia is now fixing problems that they are aware of, issues that they have had at least a decade of experience with, therefore the Australian government has only to fix where there are loopholes.

[643] Jolly (note 504 above) 452.
[644] Jolly (note 504 above) 452.

CHAPTER 5
NEW ZEALAND

"Whatever our view of gaming, it is an integral aspect of our society."

----John Marklands

5.1 INTRODUCTION

Gambling has never been a part of the history of New Zealand. It only surfaced on the arrival of the European settlers with their passion for betting on horses and cards.[645] Different types of gambling developed with time and eventually government had to find a way to regulate it and receive taxes at the same time.[646] The most dominant form of gambling was Race betting, particularly for men; making at least 75% of the $200 million spent on the three major gambling forms.[647] On the other hand, women played what is now called bingo, which made up $40 million and families participated in a form of raffle called 'Golden kiwi', which amounted to $10 million of the total amount spent.[648] On the whole, the indigenous people of New Zealand were unprepared for this way of life, and therefore government subjected gambling to high regulations and confined it to specific time frames and places.[649] This chapter will discuss the basic history of gambling in New Zealand as well as the regulation of gambling as a whole. It further goes on to evaluate the form in which interactive gambling is regulated; because of nature of its regulation, interactive gambling legalisation will be different from the way in which it is discussed in the Australian perspective above. The case law that is discussed under this jurisdiction is limited because of its relevance to the purpose of this study. This chapter will then discuss the technological developments of gambling into interactive gambling and finally the problems of this industry will be discussed in depth rather than the criminal activity.

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[645] P Adams 'The history of gambling in New Zealand' (2004) 12 *Journal of Gambling Issues* 1, 4.
[646] Adams (note 645 above) 4.
[647] A Secker et al 'The New Zealand Gambling Act 2003: Striking a balance between permitted gambling, problem gambling and community expectations' National Association for Gambling studies- 2004 Annual Conference Gold Coast, Australia 266, 267.
[648] Secker et al (note 647 above) 267.
[649] Adams (note 645 above) 4.

5.2 BACKGROUND AND REGULATION OF ALL FORMS OF GAMBLING IN NEW ZEALAND

During the mid-eighties there was a need for change of the regulatory system in order for growth of the economy.[650] This required that the strict regulations be changed in order to accommodate gambling.[651] This sudden reform encouraged the reduction of government department costs and size as well as personal and corporate tax liability.[652] All this change required there to be another way in which to regain revenues in the country, and gambling was the more viable source for the taxation base.[653] The revolution of the gambling industry in New Zealand resulted in the population spending increasing rapidly over the period of 1979 (NZ$0.1 billion) and 2003 (NZ$1.9 billion).[654] By the year 2004, gambling expenditure had exceeded NZ$2 billion, with Electronic Gaming Machines (EGMs) in locations with liquor licenses, accounting for just over half of this amount.[655] Following closely behind is the New Zealand Lotteries Commission (NZLC) selling their tickets in over 600 retail outlets, thereafter race and sports betting follow suit, with race betting having dropped from 75% to 12% since the regulation of gambling. Bingo at this point became particularly irrelevant.

It was at this point that the New Zealand government saw fit to establish a Gaming Review, when the gambling industry increased rapidly and different forms of gambling were being introduced faster than before.[656] The industry had created a shortcut for the New Zealand government in terms of increased revenue and was suddenly becoming a problem; it was increasing at an abnormally high speed of which it went unnoticed.[657] More and more people were gambling and more machines were made at different technological levels, consuming much more of people's time and money in a space of a decade.[658]

[650] Adams (note 645 above) 4.
[651] Adams (note 645 above) 4.
[652] Adams (note 645 above) 4.
[653] Adams (note 645 above) 4.
[654] Adams (note 645 above) 4.
[655] Secker et al (note 647 above) 267.
[656] Secker et al (note 647 above) 268.
[657] Secker et al (note 647 above) 268.
[658] Adams (note 645 above) 4.

5.3 REGULATION OF INTERACTIVE GAMBLING IN NEW ZEALAND

The gambling Act 2003 introduced the term ‗remote interactive gambling' and defines it in section 4 to include ―gambling by a person at a distance by interaction through a communication device".[659] In the same section, ―communication device includes such things as computers, telephones, radios and similar devices which are used to communicate at a distance and using technology (including telecommunication, radiocommunication and/or broadcasting technology)."[660] The provision to permit remote interactive gambling by the New Zealand Lotteries Commission is a new one under the Act, while the New Zealand Totalisator Agency Board (TAB) has been offering gambling over the internet since 1998.[661]

In terms of Section 9(2)(b) of the Gambling Act of 2003 ―bookmaking and interactive gambling are prohibited and illegal, they are not authorised and should not be authorised under this Act."[662] To fall into the definition of gambling, ―the player must pay something to participate (directly or indirectly) and there must be an element of chance in order to win money or a prize." The prohibition would include, ―selling lottery tickets on the internet and would also include a New Zealand casino website".[663] The Department of Internal Affairs fact sheet[664] indicates that there are several exemptions to this general rule:

- ―Sales promotions in the form of a lottery and conducted in New Zealand are excluded from the ban on remote interactive gambling.

[659] The Gambling Act 51 of 2003 Section 4.
[660] The Gambling Act 51 of 2003 Section 4.
[661] Cabot et al (note 583 above) 625.
[662] Department of Internal Affairs ‗Remote Interactive Gambling and the Gambling Act 2003' available at *http://www.dia.gov.nz/diawebsite.NSF/wpg_URL/Resources-material-Gambling-Act-2003-Summary-of-the-Act?OpenDocument,* accessed on 25 October 2012.
[663] Department of Internal Affairs ‗Remote Interactive Gambling and the Gambling Act 2003' available at *http://www.dia.gov.nz/diawebsite.NSF/wpg_URL/Resources-material-Gambling-Act-2003-Summary-of-the-Act?OpenDocument,* accessed on 25 October 2012.
[664] Department of Internal Affairs ‗Gambling Fact Sheet 27' available at *http://www.dia.gov.nz/diawebsite.nsf/files/GamblingFactSheets/$file/FactSheet27-May2011-pdf,* accessed on 25 October 2012.

- The New Zealand Lotteries Commission and the New Zealand Racing Board can conduct approved forms of remote interactive gambling."[665]

"New Zealand law cannot be enforced in other countries and it is not illegal for a New Zealander to gamble on an overseas website or to take part in other gambling outside of New Zealand."[666] For instance, it is not illegal for a person in New Zealand to gamble online on a website that is in a different country. The problem starts when any of that gambling is conducted in New Zealand, then it would be illegal under the Act.[667] It is also "illegal for anyone other than the TAB and NZLC to manage or supervise overseas remote interactive gambling from New Zealand."[668] The fact that New Zealand law does not apply in other jurisdictions leaves New Zealanders unprotected from all problems that occur when they decide to gamble on overseas websites, and the consumer and enforcement agencies have no jurisdiction in other countries.[669] It was suggested by Linkleter[670] that the only way to ensure that the overseas site a person is using is legitimate, they would have to look for certain things, for example; "banking options, where the company is licensed, where the customer support is based, whether the company is independently audited by a respected organisation, how long the company has been in business for, what is their payment processing like and finally to do some research online and see if there have been other players on that site and whether they recommend it".

Advertising of overseas gambling is prohibited under section 16 of the Gambling Act in New Zealand.[671] According to section 16, an overseas gambling advertisement is any

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[665] Department of Internal Affairs 'Gambling Fact Sheet 27' available at *http://www.dia.gov.nz/diawebsite.nsf/files/GamblingFactSheets/$file/FactSheet27-May2011-pdf*, accessed on 25 October 2012.
[666] Simpson Grierson 'Online Gambling- Can You or Can You Not?' *FindLaw* April 2001, available at *http://www.findlaw.com/12international/countries/nz/articles/440.html,* accessed on 23 October 2012.
[667] Department of Internal Affairs 'Gambling Fact Sheet 27' available at *http://www.dia.gov.nz/diawebsite.nsf/files/GamblingFactSheets/$file/FactSheet27-May2011-pdf*, accessed on 25 October 2012.
[668] Vincent Cholewa 'Online Gambling' available at *http://www.netsafe.org.nz/keeping_safe.php?pageID=185&sectionID=adults&menuID=110*, accessed on 23 October 2012.
[669] Vincent Cholewa 'Online Gambling' available at *http://www.netsafe.org.nz/keeping_safe.php?pageID=185&sectionID=adults&menuID=110*, accessed on 23 October 2012.
[670] Fraser J Linkleter 'Legality of Online Gambling in New Zealand' available at *http://ezinearticles.com/?legality-og-Online-Gambling-in-New-Zealand&id=6581562*, accessed on 25 October 2012. Fraser James Linkleter is an expert specialising in the Australian and New Zealand Market.
[671] Cabot et al (note 583 above) 625.

communication that publicises or promotes gambling, or a gambling operator, when that gambling or operator is outside of New Zealand. It also includes any communication that is reasonably likely to induce people to gamble outside New Zealand.[672] As with many laws there is always an exception, and with this rule there are three main exceptions:

- When the promotion of the gambling or gambling operator is merely incidental to the purpose of the communication, for example, a tourism advertisement that mentions a casino in a city;[673]
- Advertisements intended for the promotion of gambling equipment intended only for buyers of gambling equipment;[674] and
- Advertisements or messages intended to prevent, minimise or treat harm including health messages concerning gambling."[675]

According to Smith[676] the Department of Internal affairs contends that most of the advertisements in New Zealand are as a result of websites operated within the country by operators who are unaware that they are breaking the law.

A practical example of advertising remote interactive gambling is the case of the *Department of Internal Affairs v TV Works Ltd,*[677] in this case the Department of Internal Affairs charged TV Works with breaching the Gambling Act of 2003 by publishing an advertisement promoting a gambling operator outside New Zealand and that the defendant published an advertisement that was reasonably likely to induce people to gamble outside of New Zealand. These advertisements related to the Asian Pacific Poker Tournament. These advertisements were characterised as 'Sports Players Advertisements'. In these advertisements, sports players are used to 'endorse' pokerstars.net. Evidence brought before the court indicated that the overall emphasis of the advertisements was that pokerstars.net enabled the viewer to both qualify and practice, with the possibility of winning millions of dollars. More evidence

[672] Department of Internal Affairs 'Gambling Fact Sheet 27' available at *http://www.dia.gov.nz/diawebsite.nsf/files/GamblingFactSheets/$file/FactSheet27-May2011-pdf*, accessed on 25 October 2012.
[673] Gambling Act 51 of 2003, Section 16(2)(e).
[674] Gambling Act 51 of 2003, Section 16(2)(d).
[675] Gambling Act 51 of 2003, Section 16(2)(b & c).
[676] Cabot et al (note 583 above) 625.
[677] *Department of Internal Affairs v TV Works Ltd* DC Auckland CR 08004505568-620, 23 June 2010.

indicated that the advertisement was not for gambling but for free play, it was for practise poker.

A feature of the case was the difference between the _.net' and the _.com' Pokerstars websites. The _.net' site is for practise poker games using _play money'. The .com site has online poker with gambling for real money. The Department of Internal affairs contended that the use of the generic word _Pokerstars' in both the .net and .com domain names were two ways of saying the same thing. According to a number of expert witnesses for the defence, the play sites have been successful in helping players improve or develop their skills in order to do better in the real poker games, and using the adverts appeals not only to poker players, but others who may interested in the game. According to Prof Todd, an expert witness, the focus of the advertisement would be to encourage people to go onto the sites and potentially become like the celebrities that appear on the advertisements.

When analysing the evidence before him, Judge Harvey[678] noted that the nature of the material in the advertisements made it clear that what was being advertised was free websites that do not involve gambling. Further that the .com website is not mentioned at any time. Also, the navigational realities of the internet mean that there is a very significant difference between web addresses of any nature, even though they may be associated with the same domain name. On that basis he said the advertisements were not overseas gambling advertisements and dismissed the charges.

As far as the Asia Pacific Poker Tournaments are concerned, the thrust of the advertising is to encourage people to participate in the tournament. Experts in this area contend that this tournament involves gambling because it involves paying an entry fee on the outcome of the tournament seeking to win the prize pot and the winnings depend on the games of poker. Further that the advertisement for the tournament could not be seen as incidental to the advertisement for pokerstar.net and would not amount to an exception in pursuant to s16(2)(e) of the Gambling Act of 2003. The defence argued that this advertisement was not a promotion of gambling outside of New Zealand and in fact it was a competition and it did not

[678] Judge David Harvey was appointed to the bench in 1988; he serves in the District Court, holding warrants for general, jury and Youth Court jurisdictions. He is a former chair of the Copyright Tribunal, he lectures part-time in law and information technology at the University of Auckland, and he has been involved in the introduction of information technology for the Judiciary since 1990, and is the author of internetlaw.nz-selected issues.

fit the definition of gambling in the Act. The Judge in this case held that the Asia Pacific Poker Tournament was not gambling because it operated as a competition with the player for a prize. He further found that the way Asia Pacific Poker Tournament was structured was not gambling and dismissed the charges. He stated that ~~"~~It does not involve the payment of consideration based upon the outcome of the game. It involves the splitting of a sum of money derived from the payment of entry fees between the winning players".

Accordingly the prosecution conceded that the New Zealand Parliament cannot regulate matters that happen overseas; hence remote interactive gambling is prohibited within New Zealand, however, New Zealanders are permitted to gamble on overseas websites.

This case can be seen to illustrate a part of the New Zealand Law in terms of gambling law that could be flawed in the sense that many gambling websites can be disguised as competitions and trial rounds that could assist in encouraging people to gamble, even if they did not want to. The advertisements include showing ways in which people can participate in poker tournaments. Even though the pokerstars.net advert does not indicate the .com website, a person who has learnt how to gamble on the .net site can want to put his new skills to practise and find another website, even if it is not pokerstars.com, this could be detrimental to the New Zealand's economy. Overseas gambling means the loss of contribution to the social cost of New Zealand and deprives the country of their taxation.

In the Gaming Review one of the categories discussed was cross-border gambling. The internet allows people to access gambling products across national borders.[679] This means that the various types of gaming available within New Zealand face competition for the gambling dollar from overseas operators.[680] Such an advance in technology makes it challenging to decide whether to permit foreign websites to operate in a country or to prohibit completely. It was noted in the Internet Gambling Report XI[681] that the very nature of the Internet makes it difficult, if not impossible for a government to effectively and efficiently control access to, or supply of, cross-border gambling from overseas venues. The major concern for the Review was trying to find a way in which interactive gambling could be

[679] Cabot et al (note 583 above) 627.
[680] Cabot et al (note 583 above) 627.
[681] Cabot et al (note 583 above) 627.

regulated in order to avoid revenues being benefited by foreign jurisdictions and at the same time trying to protect New Zealand citizens by not exposing them to the industry within the country.[682] One way that was discussed by other organisations such as the Commonwealth Scientific and Industry Research Organisation (CSIRO) was blocking access to internet content; this idea was kicked to the curb after it was found to be ineffective.[683] It was reported that this idea could be technically feasible; however there were no guarantees that it would be successful, and even if it could succeed the costs could be prove to be very high.[684]

Interactive gambling is "undertaken through online sites where many of the traditional forms of gambling available in land-based venues have been reproduced in electronic format. There are two main forms of online gambling in New Zealand.[685] They are –online wagering which is comprised of betting on racing (thorough bred, harness and dog), sports betting and betting on the outcome of events such as reality TV shows or elections; and online gaming, which comprises of casino games such as blackjack, poker and Roulette."[686] All these different forms of gambling are played differently online then they are traditionally, online gambling requires high frequency wagers as compared to land-based gambling. Orme and others[687] interpreted this to mean that the variations in the risk profile when it comes to _problem gambling associated with the different types of gambling are more compressed when played online, compared to traditional gambling'.

5.4 LEGISLATION REGULATING THE NEW ZEALAND GAMBLING INDUSTRY

There are three main statutes that cover gambling in New Zealand; the Racing Act of 1971, the Gaming and lotteries Act of 1977 and the Casino Control Act of 1990.[688] The fundamental objective of the Racing Act and the Gaming and Lotteries Act was to create a

[682] Cabot et al (note 583 above) 628.
[683] Cabot et al (note 583 above) 628.
[684] Cabot et al (note 583 above) 628.
[685] Orme et al (note 527 above) 1.
[686] Orme et al (note 527 above) 1.
[687] Orme et al (note 527 above) 1.
[688] J Markland _Gaming in New Zealand' Department of Internal Affairs Policy Unit (1996) 1.

source of income that would be used to give back to the community.[689] The Casino Controls Act on the other hand introduced commercialised gambling and it emphasised on tourism, employment and economic development.[690] Since these statutes the gaming industry has grown expeditiously and has become more difficult to regulate, requiring a more coherent policy framework.[691]

In 1995 the Government saw a need for the Gaming review of all forms of gaming and their social and economic impact.[692] This Review was established in order to assess gambling reform and develop policy and regulatory frameworks for economic growth as well as to curb problem gambling and high taxation.[693] The Gaming Review ultimately resulted in the establishment of the Gambling Act 2003.[694] This law was enacted in July 2004 after the Review considered the difficult issues of who could operate gambling and for what purpose; how to prevent and minimise the harm caused by gambling; and how local communities could be involved in the decision making on the availability of risky forms of gambling.[695] The Gambling Act of 2003 was the first law in New Zealand to regulate remote interactive gambling.[696] One of the key issues of this Act, amongst others, was to prohibit remote interactive gambling in New Zealand (with the exception of the New Zealand Lotteries Commission and the Racing Board which were permitted to conduct approved interactive forms).[697] The reason for the prohibition was because the industry's potential for harm, especially for young people.

5.5 THE INSERTION OF REMOTE INTERACTIVE GAMBLING INTO THE GAMBLING ACT OF 2003

The New Zealand legislature decided on a system of closed regulation for this jurisdiction; this involves the licensing of interactive gambling providers, but limiting these licenses to

[689] A Cabot et al _Internet Gambling Report XI: An Evolving Conflict Between Technology and Law' in R Smith (ed) *New Zealand* (2008) 623, 634.
[690] Markland (note 688 above) 1.
[691] Markland (note 688 above) 1.
[692] Markland (note 688 above) 1.
[693] Markland (note 688 above) 1.
[694] Secker et al (note 647 above) 269.
[695] Secker et al (note 647 above) 269.
[696] Cabot et al (note 689 above) 623.
[697] Secker et al (note 647 above) 270.

domestic providers.[698] The Gambling Act of 2003 prohibits the operation of remote interactive gambling.[699] Under this Gambling Act of 2003, ~~–t~~he prohibition is on remote interactive gambling in New Zealand and therefore does not prohibit remote interactive gambling conducted overseas."[700] It is not illegal for a New Zealand resident to play on a website that is based in another jurisdiction. The 2003 Gambling Act provides for penalties for any person that takes part in unauthorised gambling.[701] Therefore the practise of interactive gambling in New Zealand is limited to the games provided by licensed foreign interactive gambling operators rather than the local operators.

5.6 TECHNOLOGICAL DEVELOPMENTS

Part of the reasons why the Government established the Gaming Review was because of the technological impact of gambling. In particular, the way in which gambling was delivered and the ability of laws to cope with the new ability or gambling to be transmitted across national borders. The Review had to consider a number of issues pertaining to technology, a few of which were listed by Andrew Secker[702] as follows:

- Technology had become so influential that it crossed borders between different forms of gambling;
- Research undertaken in 2000 (Amey 2001) revealed that not many New Zealanders gambled on the Internet (1% respondents) but many of the reasons given for this low number was that the majority of the population at the time had not been acquainted with the new form of communication, the internet, or they had been insecure about the safety of using their credit cards just anywhere.
- Remote interactive gambling was a new development and therefore had not been addressed by any of the already existing gambling statutes;

[698] Allen Consulting Group ‗Review of current and future Trends in Interactive gambling activity and regulation' Commissioned by the Australian Government Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), July 2007 60, 2.
[699] The Gambling Act of 2003, section 9(2)(b).
[700] Allen Consulting Group ‗Review of current and future Trends in Interactive gambling activity and regulation- Literature Review' Commissioned by the Australian Government Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), June 2009 60, 38.
[701] Allen Consulting Group ‗Review of current and future Trends in Interactive gambling activity and regulation- Literature Review' Commissioned by the Australian Government Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), June 2009 60, 38.
[702] Secker et al (note 647above) 269.

- A particular form of taxation that would cater for a large number of New Zealanders who decided to gamble on foreign gambling products and how the government would still create community benefits from gambling;
- How other jurisdictions had dealt with this new industry within the confines of either complete prohibition or licensing. With regards to this issue, it was noted that no technologically advanced country had enacted measures to actually block access to internet content; and
- However, according to the Independent Australian research (NOIE) blocking access to internet content would be impracticable. Since other methods were available to implement a ban, although none of them would be 100% effective, and all could potentially affect Internet performance.

5.7 PROBLEMS WITH INTERACTIVE GAMBLING

Like every other industry, interactive gambling comes with its own baggage. Firstly the fact that the games can be operated anywhere in the world and played on the other side of the world clearly creates the biggest problem for this industry especially when it comes to regulation. The New Zealand government prohibits interactive gambling within New Zealand; however citizens are permitted to gamble on sites that are outside of the country.[703] This law could have the effect of creating a market for foreign operators within New Zealand to operate on a tax free economy; this could be detrimental to the countries growth. Secondly, this law makes it all the more challenging for land-based operations to compete with an unregulated market of gamblers that is operated from all around the world. Thirdly, the fact that citizens can gamble on any site makes it easy for New Zealanders to gamble uncontrollably on foreign sites that are unregulated, therefore allowing them the chance to be problem gamblers. The Act does not assert extraterritorial jurisdiction thereby making it difficult to protect its citizens from problems that occur on the sites they gamble on.[704] Even if they have some kind of recourse, –New Zealand law does not apply overseas and therefore their enforcement and consumer protection agencies have no jurisdiction in other

[703] Simpson Grierson _Online Gambling- Can You or Can You Not?' *FindLaw* April 2001, available at *http://www.findlaw.com/12international/countries/nz/articles/440.html,* accessed on 23 October 2012.
[704] Simpson Grierson _Online Gambling- Can You or Can You Not?' *FindLaw* April 2001, available at *http://www.findlaw.com/12international/countries/nz/articles/440.html,* accessed on 23 October 2012.

countries."[705] Other problems that can occur are those that every other jurisdiction is fighting, they include; money laundering, hackers taking people's money and closing down the sites or simply refusing to pay out the winnings, fraudsters getting access to credit card information and personal information including bank details as well as selling private information to other organisations for other purposes.[706]

Another major challenge is minors gambling online. For many sites the requirement is that players must be 18 years and older. The lack of regulation of this particular area leaves minors exposed to gambling on the internet using their parents details and leaving the parents with no recourse for this. Problem gamblers are also a major consideration because it is easy for them to access overseas sites with no legal implications for their gambling condition.[707] This law could also create problem gamblers as a result of the privacy of this form of gambling and the fact that it is easily accessible and it creates instant gratification.[708] A study in 2007 reported that ~~–i~~nternet gamblers, relative to others, are much more likely to be problem or pathological gamblers."[709]

5.8 CONCLUSION

Looking at the system chosen by New Zealand and the studies conducted thereafter it is clear that the New Zealand government may need to re-evaluate their decision on allowing their citizen to gamble freely on foreign websites as this is creating more problems than actual regulation of the industry. Or more difficult to do, they could prohibit interactive gambling completely or block access to foreign websites, although it could be more costly, it could prove to be cheaper than an influx of problem gamblers that will result from gambling from a tax free industry.

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[705] Vincent Cholewa _Online Gambling' available at *http://www.netsafe.org.nz/keeping_safe.php?pageID=185&sectionID=adults&menuID=110*, accessed on 23 October 2012.
[706] Vincent Cholewa _Online Gambling' available at *http://www.netsafe.org.nz/keeping_safe.php?pageID=185&sectionID=adults&menuID=110*, accessed on 23 October 2012.
[707] Vincent Cholewa _Online Gambling' available at *http://www.netsafe.org.nz/keeping_safe.php?pageID=185&sectionID=adults&menuID=110*, accessed on 23 October 2012.
[708] Vincent Cholewa _Online Gambling' available at *http://www.netsafe.org.nz/keeping_safe.php?pageID=185&sectionID=adults&menuID=110*, accessed on 23 October 2012.
[709] Orme et al (note 527 above) 2.

A few other ways to combat interactive gambling harm have been investigated and suggested by the Gambling and Public Health Alliance International[710] including the following:

- Gambling Legislation: this includes licensing and regulating the operating hours, reporting, codes of practise, technical specification.[711] This is the most efficient way to keep interactive gambling at bay, however it will depend on the method of regulation, whether the country permits all forms of gambling to all their citizens; permit gambling to foreigners and prohibit residents (Australian method); or to permit foreign websites to operate in that country at a certain tax rate.
- –Telecommunications: this area includes permitted use of communications systems, regulation of internet sites, internet service provider (ISPs), services, „net filters', access to network, national security consideration of network access etc."[712] This area could prove to be very costly, however countries that are more technologically advanced can make provision for such a system of regulation.
- –Financial Legislation: this area includes a government's recognition of the legitimacy of a financial transaction, permit actions to recover debts, credit arrangements; financial limits on certain transactions, financial fees and charges."[713] This area requires a more international arrangement more than the others in order to succeed. Therefore countries like the U.S. would have to remove any bans on banks paying out to internet gambling websites.
- –Consumer Law: this includes fair/unfair contracts, marketing, explicit and implicit contracts, informed consent by customers, and legitimacy of contracts and unconscionable behaviour of the gambling provider."[714] This area is a very important issue whether countries choose to regulate or prohibit, it is always very important that all consumers feel confident in conducting businesses in their own countries and are well protected at the same time.

[710] Orme et al (note 527 above) 7; The Gambling and Public Health Alliance International is an organisation aimed at developing and promoting policies, programs and strategies that are effective in reducing gambling harm.
[711] Orme et al (note 527 above) 7.
[712] Orme et al (note 527 above) 7.
[713] Orme et al (note 527 above) 7
[714] Orme et al (note 527 above) 7.

Interactive gambling provides ~~–s~~ubstantial public policy challenges for national governments and the Alliance notes that State or provincial or local governments have very limited capacity to enact legislation or regulations in relation to interactive gambling, given the global nature of this activity."[715] Therefore, it makes sense to say that interactive gambling requires international regulation, even if there are different systems of regulation, there needs to be an agreement by from different levels in the international sphere on how this industry can be regulated in order to protect citizens from harm and at the same time provide revenue that will allow a competitive market for all the operations of interactive gambling.

[715] Orme et al (note 527 above) 7.

CHAPTER 6
POLICY AND RECOMMENDATIONS

6.1 INTRODUCTION

The internet offers a new generation of opportunities, better access to something that many people are already accustomed to but demand on a higher level, gambling. Legislatures worldwide are at their wits‘ end trying to figure out the best possible way to handle interactive gambling; they could either legalise or prohibit it. The fact is, however, that interactive gambling will almost certainly be legalised in the future. In order to make sure that this formidable challenge is vanquished, the right policies need to be in place so as to guide lawmakers to come up with the best possible solution. This chapter seeks to analyse the different policy considerations and make recommendation for South Africa in making the decision to legalise interactive gambling by promulgating the National Gambling Amendment Act of 2008.

The way in which interactive gambling is designed could make its prohibition a bit of a challenge because of how easy it is to evade the internet, making it difficult to enforce the prohibition; and furthermore, with the internet being a borderless international network it would still be very easy for hackers to deviate from the bans created by the different jurisdictions. In the same way place however, with the increasing level of consumer demand for interactive gambling, legalisation seems the more feasible way to go, not only that, but also the fact that the more tax revenues are lost everyday the more legislators are pressured into legalising this industry. This chapter therefore looks at the different policy implications that government can use to ensure that the decision made on the regulation of interactive gambling has the best possible results, not only for the benefit of the economy but also for the protection of the consumers.

6.2 POLICY IMPLICATIONS

It is important to clarify from the first instance how policy making should proceed both as a way of assessing the existing arrangements and as a tool for devising new approaches.[716] As it stands in South Africa, interactive gambling is prohibited and therefore, gambling online is illegal. After having looked at how the regulation process has unfolded since the enactment of the 2008 Amendment Act five years ago, it is likely that a different policy perspective could be considered when making the decision on whether to regulate or prohibit interactive gambling by promulgating the 2008 Amendment Act. According to Australia's Gambling Industries,[717] there are a number of general steps that assist good policy making, such as, specifying the clear objectives, considering alternative measures and using transparent and consultative process; as well as considering a detailed policy.[718] There are 13 steps to good policy, namely;[719]

1. Identifying the problem and rationale, (e.g. what is the problem that needs to be addressed and what is its risk; why is government action needed to correct the problem; what are the objectives of government action; and what are the risks and problems of government action?);
2. The exact objectives ,
3. The risk of government failure too high? (If yes, then no policy action can be taken, however, if no,
4. The government can choose a possible policy option, (e.g. what are the options for policy, i.e. the different types of regulation, including self-regulation; tax measures; financial assistance; and information provision);
5. Then they can make an impact analysis,
6. Then follow up with a consultation, (e.g. who are the main affected parties and what are their views, i.e. industry's views about the compliance costs of new regulations, community views about local changes with significant impacts; and whether there are

[716] Australia's *Gambling Industries* (note 490 above) 16.
[717] Australia's *Gambling Industries* (note 490above) 16.
[718] Australia's *Gambling Industries* (note 490 above) 16.
[719] Australia's *Gambling Industries* (note 490 above) 16 & 17.

appropriate grievance procedures for regulatory arrangements, for example, easily accessible, timely and whether it's a fair system.);

7. After which they can then choose the best option,
8. Then check if the policy is likely to generate a net benefit, or
9. If the policy likely to achieve other desirable goals?
10. If no, then no policy action can be taken,
11. If yes, the policy option can then be made effective, (at this point it is important to ensure whether the option is clear, consistent, comprehensive and accessible to users, for example, granting licenses should be based on pre-agreed criteria and open to scrutiny);
12. In effect, then it can be implemented as the policy to be used, and thereafter, (in this part the government will then assess how the preferred option will be implemented, how the effectiveness of the option will be assessed, including the attempts to measure costs and benefits as well as how frequently this will be done.)
13. The policy can be reviewed. (Finally, whether a built-in provision to review or revoke the policy measure after it has been in place a certain time? For example, a regulation may become anachronistic with technological change, (e.g. the influence of internet gambling on existing gambling modes) or altered community attitudes. Also, whether any assessment of policies will be independent from the policy maker or regulator).

These thirteen steps are merely a guideline to making the best policy in such a complicated industry and if followed properly could result in a policy that best suits everyone involved and can also avoid short term and even long term irregularities in interactive gambling.

Technology ~~–e~~hanges are having a rapid impact on the ways in which gambling services are delivered; new technologies such as the internet, cable and digital television allow the delivery of gambling services into the homes of consumers."[720] All issues that are associated with this technological advancement have been the core of this dissertation in every chapter, and since the increase in demand for a new way of doing things, it has become increasingly difficult for governments to determine the appropriate policy response for a more effective way to regulate interactive gambling. To this effect, the Western Australia Government, for example stated;

[720] Australia's *Gambling Industries* (note 490 above) 305.

> "The emergence of broadband interactive technologies such as the internet and PayTV has a number of far-reaching implications for gambling in Western Australia. These include both new market opportunities for existing industries in the State and new sources of competition; with associated threats and opportunities for tax revenues. However, the potential for interstate and international gambling operators to sell their products directly challenges the State's firm policy and stand prohibiting access (outside of the casino) to electronic gaming."[721]

Central to this regulation/policy issue is "whether the downside risks can be effectively controlled by regulation and/or technology."[722]

In a large-scale, making an assessment of other interactive technologies for gambling beforehand assists in having a predetermined idea of what the results of the chosen policy will be and how effective they will be either for the regulation or prohibition of interactive gambling. Accordingly, one has to examine the benefits and the costs of interactive gambling; in terms of the benefits, they can consider the consumer benefits and export opportunities, in this sense the consumer benefits will result in greater consumer choice which can then be maintained by lower prices and greater convenience.[723] With Costs on the other hand consideration has to be given to the supplier integrity and problem gambling.[724] With problem gambling there is the issue of tax revenue loss and access by minors.[725] With supplier integrity there is the issue of community cost which requires a look at non-regulatory measures, then assessing whether controls on the internet can be warranted, if not then regulation could be a problem; if yes however, then what degree of control is possible?[726] If none, then regulation is not feasible, if some degree of control is possible, then one can continue to weigh up the costs versus the benefits of the differing control, from that the government can then choose to have a complete ban on interactive gambling, not regulating or considering a more appropriate level of regulation.[727]

Choosing a policy that has the correct criteria is in part the most essential element in making regulatory decisions and making the correct assessment of the results of this new industry

[721] Australia's *Gambling Industries* (note 490 above) 305.
[722] Australia's *Gambling Industries* (note 490 above) 305.
[723] Australia's *Gambling Industries* (note 490 above) 306.
[724] Australia's *Gambling Industries* (note 490 above) 306.
[725] Australia's *Gambling Industries* (note 490 above) 306.
[726] Australia's *Gambling Industries* (note 490 above) 306.
[727] Australia's *Gambling Industries* (note 490 above) 306.

will go a long way in choosing the correct policy option and thereafter coming to a more competent form of regulation. The exceptional thing about this industry is that interactive gambling is still in its infancy, and subject to rapid change.[728] Subsequently, it is only possible to speculate about what developments are possible for the delivery of interactive gambling services;[729] but at the same time, if such steps are followed at an early stage the results can shape the turnout of events to be what the government wants for the country.

6.3 RECOMMENDATIONS

After having done extensive research on the regulation of interactive gambling in South Africa and having considered the different ways in which other jurisdictions have approached this new industry; it follows then that a number of recommendations could shed some light in the process of regulation within this country. These recommendations follow from the jurisdictions that have been discussed above as well as from the research conducted and the information collected therewith.

Recommendation 1: More practical suggestions should be given in the effort to protect minors from gambling online.

One of the biggest issues facing this jurisdiction and almost all other jurisdictions is the protection of minors from being exposed to interactive gambling. A lot of the suggestions provided above (as found on the PMG public hearings or reports pertaining to interactive gambling), seem to be leaning on the hope that parents will be more careful in trying to prevent their children from gambling online, or the operator should know when it is not the usual customer using the site. However, a more technologically effective way should be employed to remedy this situation rather than creating discourses around the difficulty or borderless nature of the internet. With an issue so complex it would be anticipated that further input could be sought from other industries such as computer science experts, or programmers, that could find a more practical way to prevent minors from gambling online or even reduce the risk of minors attempting to gamble online.

[728] Australia's *Gambling Industries* (note 490 above) 313.
[729] Australia's *Gambling Industries* (note 490 above) 313.

Recommendation 2: Interactive gambling require the public to be more hands on in the ways in which this industry affects, their continuous involvement/input could make the regulation process a lot less harder to decide.

While this is not a study in media and the effects of newspaper reporting on public opinion of interactive gambling, it could be said that lack of public representation in the media alongside the preponderance of the legislatures views is not particularly productive or better yet, motivating. While legislatures make the law for the people, people are largely excluded from active participation in each deliberation. Moreover, if citizens are to be exposed to such an industry, it cannot be taken for granted that it serves the South African society will appreciate this form of gambling prohibited or regulated on their behalf, arguably, the public needs to see itself reflected in the coverage of interactive gambling regulation.

Recommendation 3: A total ban or prohibition seems more feasible in a situation where regulations are still in progress, however this can be avoided.

At the present moment interactive gambling is prohibited in South Africa and the conventional wisdom is that this is not working and will not work in the long run; much like the Prohibition Act in the United States. However, offshore owners and operators of interactive gambling sites are beyond the enforcement of the jurisdiction of the United States; they cannot be shut down by the United States government.[730] Like the United States, South Africa cannot (at an acceptable cost) stop at the border, the information protocol packets that make internet communications possible; however, governments have many more options for regulating internet transactions that the internet regulation literature suggests.[731] The fact that government cannot directly regulate internet gambling site operators and equipment located abroad does not mean that it cannot regulate the transnational communications that those site operators facilitate; such communications take place only in virtue of persons and equipment that are located within the country.[732] Therefore, the government can achieve a great deal of regulatory control over these trans-jurisdictional communications by regulating these local persons or property.[733]

[730] J Goldsmith ‗What internet gambling legislation teaches about internet regulation' (1998) 32(4), *The International Lawyer* 1115, 1118.
[731] J Goldsmith (note 730 above) 1118.
[732] J Goldsmith (note 730 above) 1118.
[733] J Goldsmith (note 730 above) 1118.

Recommendation 4: One major issue is the exceeding number of foreign interactive gambling websites infiltrating the country in an attempt to operate illegally and free of any form of taxation where there are no regulations in place.

According to Goldsmith[734] the most effective form of enforcement of the IGPA is the ability to order local internet service providers to block access to illegal gambling sites.[735] Goldsmith suggests that the same way that internet service providers block access to illegal websites based on content criteria is one way that can be used to filter out and block access of internet gambling sites.[736] Despite this kind of precaution to prevent foreign internet gambling sites from operating in the country, there will be certain foreign operators who will try other avenues to operate illegally in the country such as changing their website address; however, this will make it less attractive for players to use a site that could be interrupted at any point, or even the patience to try and locate that gambling sites' new address.[737] Having such provisions in place would raise the costs of interactive gambling not only for the State that implements them, but also for the players as well as the foreign gambling site operators.[738]

Recommendation 5: Transjurisdictional laws have a better chance of succeeding with this kind of industry as interactive gambling goes beyond the borders of control for individual jurisdictions.

Much consideration can be given to the possibility of general international regulation. The internet, as mentioned numerous times above is borderless, and therefore it would appear that a strictly regulated, liberalised gambling market could be more effective in suppressing the problem gambling than an unrestricted individual jurisdictional market.[739] According to Lycka,[740] ~~a~~ highly regulated, closely controlled online gambling market, relying on strict

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[734] Jack Goldsmith is a Harvard Law School professor who has written extensively in the field of International Law, Civil procedure, Cyber law and National security law. He was a law professor at the University of Chicago when in 2002, he joined the Bush administration as a Legal advisor to the General Counsel of the Department of Defense. In October 2003 he was appointed as a United States Assistant Attorney General, leading the Office of Legal Counsel in the Department of Justice under Attorney General John Ashcroft and Deputy Attorney General James Comey. He resigned in July 2004. He wrote a book about his experience there called *The Terror of the Presidency (2007)*.

[735] J Goldsmith (note 730 above) 1119.

[736] J Goldsmith (note 730 above) 1119.

[737] J Goldsmith (note 730 above) 1119.

[738] J Goldsmith (note 730 above) 1119.

[739] Lycka (note 308 above) 182.

[740] Martin Lycka LLM, is a legal advisor with Betfair since September 2009, focusing on EU and competition Law as well as regulatory issues. Before joining Betfair Mr Lycka worked with Claiant SA, Aliachem, a.s, the Ministry of Foreign Affairs of the Czech Republic and Salans Europe LLP. He graduated from the Charles University in Prague in 2008 and obtained an LLM degree at the College of Europe in 2009. He has authored

responsible gambling standards is a much more effective means of preventing problem gambling than a total ban on online gambling or an unnecessarily restrictive uncompetitive market structure, which could possibly slow down the development of responsible gambling tools."[741] Much like the European countries are governed by the European Union in terms of decision making when making laws, so can South Africa follow the same standards within the African Union and co-join their decision making with other countries within the SADC since gambling and interactive gambling are economic activities for which regulation in each of these countries could benefit from making laws that serve them as a whole instead of individually. The Court of Justice of the European Union (CJEU) found that ~~–~~consumer protection and the prevention of crime and fraud are possible justifications for restrictions imposed by member states on gambling providers and their customers; however, the CJEU has also emphasised that reasons of purely economic nature can rely on the fact that the proceeds of gambling activities are frequently destined to be spent on charitable causes."[742] Furthermore, ~~–~~Member States must not be allowed to rely on one justification they themselves see as the genuine reason for restricting access to their gambling markets – in particular, if the overall practical effect of their gambling regulation decreases consumer protection, for example in the Zenatti case, the CJEU held that restrictions on providing gambling services introduced by a member state must lead to a genuine reduction of gambling opportunities within its jurisdiction (much like the Casino Enterprises case in South Africa)."[743] Additionally, ~~–~~the provision of online gambling as a transnational activity can be hampered if online gambling operators have obligations imposed which force them to establish an offline presence within a jurisdiction."[744]

Recommendation 6: The promulgation of the National Gambling Amendment Act is a progressive step forward in controlling the exponential growth of interactive gambling in South Africa.

The prime goal for legislatures when it comes to interactive gambling regulation is to ascertain that the regulations are practical and effectively meet its objectives—in particular, the protection of citizens against any risk of harm that can be caused by this form of

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more than 45 academic articles on EU and international law (including EU gaming law) and is a co-author of two books.

[741] Lycka (note 308 above) 183.

[742] Lycka (note 308 above) 183.

[743] Lycka (note 308 above) 184.

[744] Lycka (note 308 above) 187.

gambling.[745] The NGAA of 2008 was drafted in an effort to control interactive gambling and provide regulations that seek to ensure that only a handful of licensed operators can provide interactive gambling services to South African consumers. However, the time it has taken to promulgate this Act has provided a gap for punters to operate tax free in this country while the government makes a decision. Waiting another four years to promulgate this piece of legislation will not stop people from gambling online in fact it is creating a network for illegal operators to provide services to the South African market. This is also making it more difficult to determine the pathological online gamblers. The requirement that the legislature make a decision soon is an assumption that interactive gambling will be legalised and regulated, however, complete prohibition is not out of the question as long as this is also regulated so as to ensure that the state has control on the taxation and the protection of minors.

After having looked at the different approaches that can be used to regulate interactive gambling, regulation of interactive gambling in South Africa is more appealing in the sense that the government can control the way in which the industry operates. In this system of regulation the government can follow the concession approach whereby they still retain discretionary power in terms of licensing, as held in the NGAA. This system can provide order and stability and also prevent foreign operators from taking advantage of the uncontrolled prohibitive system. Furthermore, the government could opt for a more restrictive liberal method of regulation whereby the operators which are granted licenses may provide their services to any state that permits interactive gambling with no reciprocity required. On the other hand, South Africa may opt for a more prohibitive liberal approach in order to ensure the protection of law and order as well as public morality; and at the same time allow the government to benefit from the commercial revenues which the gambling industry generates for the country by providing services across borders.

[745] Lycka (note 308 above) 189.

CHAPTER 7
CONCLUSION

7.1 INTRODUCTION

This chapter will indicate how the purpose of the statement and the research objectives were achieved and at the same time highlight the importance of the study as well as the benefit of the study. Further, this chapter will also give possible suggestions for further research and finally make a conclusion on this study. The purpose of this dissertation was to critically analyse the regulation of interactive gambling in South Africa, this analysis was done in chapter 2. This study also investigated the reasons for the elongated period of the promulgation of the National Gambling Amendment Act 10 of 2008 in chapter 3 and whether interactive gambling should be legalised. Chapter 4 and 5 investigated how other industries such as Australia and New Zealand have approached the regulation of interactive gambling within their jurisdictions. Finally chapter 6 highlighted the possible policy implications that could be used to ensure a regulated industry of interactive gambling.

7.2 RESEARCH OBJECTIVES

The following specific objectives guided this study:

- the current legal position of interactive gambling in South Africa. This was discussed in chapter 2;
- to establish what interactive gambling entails and what the reasons for the legislature postponing the promulgation of interactive gambling are. This was discussed in chapter 2 and 3;
- to establish the extent to which the legislature will ensure the confidence in the integrity of interactive gambling. This was discussed in chapter 3;
- to determine the extent to which regulation would be able to enforce responsible gambling and ensure minimal cases of problem gambling. This is discussed in chapter 3;
- to establish the extent to which online casinos would affect land-based casinos and other interactive games. This was discussed in chapter 2;

- to briefly consider the different forms of regulation in different jurisdictions such as the United States, the United Kingdom, other European countries, Australia and New Zealand. This was discussed in chapter 2; and
- to critically analyse two major jurisdictions, that is, Australia and New Zealand, their regulatory approaches, the technological perspectives, legalisation of interactive gambling, problem and responsible gambling as well as the approaches to criminal activity within this industry. This was discussed in chapter 4 and 5.

7.3 SUGGESTIONS FOR FURTHER RESEARCH

Further research on this study could be an extension on the public opinion on interactive gambling to determine the level of knowledge of online gaming and the dangers as well as consequences of interactive gambling. Furthermore, it would be interesting to explore, alongside a content analysis, whether regulating interactive gambling in such a young democracy would be feasible at this point in time.

7.4 CONCLUSION

Interactive gambling in South Africa is a fairly new industry that is now recognised as an economically beneficial industry and at the same time particularly challenging for minors and pathological gamblers. Interactive gambling is currently prohibited in this country, and although the best solution would be to regulate it, the legislature has taken a considerable amount of time in the promulgation process to a point where a final decision has not yet been made in terms of whether interactive gambling actually has a chance of being legalised in South Africa.

It is noteworthy to state that if gambling is not properly regulated it will cause serious social and economic problems, which most of them have been noted throughout this paper. The fact is that prohibition does not seem to be the better solution, it does not work without regulation. Should the state decide to prohibit interactive gambling, it would still require a system of regulation that prevents minors from gambling anyway and foreign operators from going against the prohibition and providing their services anyway. The nature of interactive gambling creates a challenging position for its prohibition or even legislative inactivity (that

is, the non-promulgation of the NGAA 2008), there must be stance taken by the legislature and it must not take any longer.

The prospects of revenue that this industry will bring in for this country are large which means that South Africa has a lot to gain economically. Legalising and then regulating this industry could benefit the country as the state will have control of the taxes as well as who is granted a license and where they can operate, whether only within the country, in and outside of the country or just across borders and not locally. Additionally, the legislature would be able to ensure operator integrity as they would have control of who has the licenses, a proper payment system will be put in place by FICA, SARS, the legislature as well as the national banks; regulation also allows control over the management of players times as well as minors and vulnerable persons.

The main issue of prohibition is not that it will not work at all, but that its enforcement would be more difficult and even cost more than regulated interactive gambling. Prohibition has not seemed to work for countries that are more technologically advanced than South Africa such as the U.S with more funds for control to the extent that they are moving to a more liberal approach. Therefore, taking the chance to prohibit for much longer is not only proving to be impossible, it is allowing foreign operators to operate tax free in this country and that way the country has a money drainage industry that could be controlled.

The National Gambling Board can also control the advertisements along with the SABC and other broadcasting networks in order to ensure that the content in the advert is not misleading or no adverts at all should be permitted in order not to promote gambling online. The licensing procedure would be done at a national level because only 10 licenses will be provided, and since interactive gambling requires stricter control it should not be left to provincial competition, but it should be treated as a matter of national importance. However, this does not mean that the licenses provided cannot be distributed among provinces.

Interactive gambling requires that the enforcement of contracts to be more effective than land-based casinos; the technology required for the operation of online gaming is on a different level to land-based casinos as such the way in which online gaming disputes will be resolved will require more effective means to be established. This technological approach

also requires that responsible gambling be on every website and not merely in fine print, but to be emphasised as very important. This does not only create more work, it creates job opportunities within the country.

Regulating interactive gambling will also provide opportunities for companies different from the well-known land-based casino owners and sports/ animal racing companies. It will open a new industry of gaming that allows fair competition and increasing the growth of the economy through entertainment. At the same time ensure that the interactive gambling service providers that are granted licenses will operate in and honest way and will ascertain that they do not provide games to minors and will not provide services to the vulnerable. Also they will work closely with the National Responsible gambling Board in order to assist pathological gamblers and prevent them from playing online games.

Finally, the South African legislature, the National Gambling Board and the South African government in promulgating the National Gambling Amendment Act 10 of 2008, should work towards implementing general international regulations that will help in breaking the barriers created by the nature of interactive gambling, that is, borderless. Gaming on the internet requires transjurisdictional laws in order to be effective and to protect the citizens of the world and to suppress problem gambling and restrict an increasing unregulated jurisdictional market. This study has focused mainly on the larger picture of the regulation of interactive gambling industry and has shown that the promulgation of this National Gambling Amendment Act will benefit the South African market in a good way and can be controlled if properly regulated.

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