

Online sports betting in a federal system - Designing a state-based regulatory framework to regulate online sports wagering in a federal structure

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Introduction and Guiding Themes

The United States Supreme Court decision in *Murphy v National Collegiate Athletic Association* (2018)¹ (**PASPA decision**) has opened the floodgates for US jurisdictions to legalise sports wagering. As States grapple with what this means for them, many are looking to understand how to design regulatory approaches that enable effective oversight of online sports wagering.

Many US States are shifting their approach to gambling from outright prohibition to regulation to capture the economic benefits that come from sports wagering, including jobs and tax revenue. Regulation also allows governments to address the harms that sports wagering causes, notwithstanding that many of these harms will exist with or without legalisation.

While building regulatory frameworks for land-based sports wagering has its challenges, the task becomes more complex when regulators seek to design a regulatory framework for online sports wagering, especially where constitutional powers for the regulatory levers are shared between federal and state authorities.²

Federations around the world have dealt with this issue already, with some still finding their way, including Canada, Argentina, Germany, and the broader EU. This paper, however, looks through the prism of Australia and the US to examine how a more mature market operates in a federal system, and what can be learned from how these jurisdictions have developed their regulatory frameworks.

States must learn to build on their existing understanding of gambling regulation, developed by overseeing casinos, lotteries and racetrack betting to build models that allow them to deal with the inter-state and international nature of online sports wagering.³ To do so, state gambling regulators must develop models based on coordination and cooperation between different levels of government – a common purpose driving an online sports wagering industry operated for the benefit of industry, the broader community and government.

Common purpose

One of the criticisms levelled at state-based regulation in a federal structure is that it creates inconsistent approaches that ultimately hinder effective regulation, something exacerbated by the online nature of the activity.⁴

This paper does not seek to propose the adoption of a federal regulatory scheme for gambling, noting this could create undue delay and would largely replicate working models already in place in local jurisdictions.⁵

¹ *Murphy, Governor of New Jersey, et al v National Collegiate Athletic Association, et al*, 584 U.S. ____ (2018) ('PASPA decision').

² State is used as a catchall term for organised political communities sitting under a national government that would otherwise be treated as sovereign, such as provinces, local governments and municipalities.

³ Gonzalo Masot and Tomas Garcia Botta, 'Online gaming: Argentina's main jurisdictions are moving forward to its regulation' (2019) 23(6) *Gaming Law Review* 405.

⁴ John Andrie, 'A winning hand: a proposal for an international regulatory schema with respect to the growing online gambling dilemma in the United States' (2006) 10(1) *UNLV Gaming Research & Review Journal* 59, 74.

Rather, what is required, is better coordination and collaboration between jurisdictions to achieve greater consistency of purpose and approach.

Underpinning this is the pursuit of a common purpose – a driving force that will encourage regulators to not treat the development of their local industry as a competitor to another state,⁶ but rather see the opportunities to develop a stronger industry based on mutually agreed standards and approaches informed by the latest research, experiences from other jurisdictions and evidence-based interventions as the industry matures over the coming years.

Who is this paper for?

Generating economic activity is a key justification for the introduction of online wagering in your jurisdiction. This economic activity creates jobs and provides a source of taxation revenue for government. While economic activity is important, regulatory schemes should be developed not only to drive industry development, but to contain the harms that come from that activity.

This paper considers that harm mitigation strategies employed as part of any gambling regulatory framework should be given the same level of attention as the economic and other benefits that come from gambling. This is even more important when considering how to design a regulatory framework in a federal system – a system where the economic benefits may be realised outside of individual jurisdictions notwithstanding that the harms are felt locally.

In designing a regulatory framework, regulators should consider harm minimisation and economic development as two sides of the same coin – an effectively regulated market will provide the best economic and social outcomes.

While Australia’s online wagering market is relatively well-developed, Australian regulators continue to look for opportunities to improve these two key tenets of the Australian regulatory system. As Australian regulators update their frameworks, they are guided by the impacts of federalism, and the benefits of cooperation.

There have been clear examples where the Australian model has not worked as intended, where economic benefit has not been realised or gambling harm not contained. However, the Australian model does provide a significant body of evidence on how developing lines of communication and forums for cooperation have led to a shared common purpose that provides consistency across jurisdictions, benefiting industry and community alike.

It is hoped that these experiences can be used to develop a framework for establishing online wagering in a federal system – something that many US State regulators are currently contemplating. As this paper considers the regulatory levers that can be pulled to oversee online wagering, including licensing, taxation, advertising and harm minimisation obligations, it details how these regulatory tools can be effectively operated in a federal structure.

⁵ Becky Harris, ‘Regulated Sports Betting: A Nevada Perspective’ (2020) 10(1) *UNLV Gaming Law Journal* 75, 87.

⁶ See, e.g., comments by the Governor of New Hampshire in Matt Stout, ‘With a jab at Massachusetts, N.H. ushers in online sports betting’, *Boston Globe* (online at 30 December 2019) <<https://www.bostonglobe.com/metro/2019/12/30/with-jab-massachusetts-ushers-online-sports-betting/sjv4YKLbX5Rluz52mtnKxO/story.html>>.

While many US States are well progressed in developing their online wagering industry, there remain opportunities to improve, just as the Australian system continues to subject itself to review and improvement. It is hoped that this paper provides useful guidance to not only those States looking to explore online wagering but to those who are seeking to enhance public benefit from online wagering operations in their jurisdiction.

What is online sports wagering?

Online gambling is now accessible 24/7 anywhere in the world, with its pervasiveness and availability coupled with challenges in effectively regulating it.⁷

The overall wagering market makes up around 14% of global gambling revenue,⁸ with online sports wagering increasing its share of the market over land-based wagering due to its constant availability and ease of access, ability to bet continuously in private, and the interactive and immersive nature of the online environment.⁹

When referring to online sports wagering, this paper does not differentiate between app and website based sport wagering from a regulatory perspective, although it is clear that there are some clear differences that need to be taken into account when designing specific measures, such as managing the use of push notifications and location tracking.

However, daily fantasy sports are carved out due to the different legal status it enjoys in the US (although not in Australia).

Underlying themes of online sports betting

Gambling is an individual choice that can be both legitimate and rational

In the same way that people can choose to spend their money on new clothes or to go out for a meal, people can make a conscious, rational decision to spend their money on gambling as a form of entertainment, a way to socialise with others, and for some as a successful income generator. Where people are able to participate voluntarily, gambling can provide intrinsic benefits in the same way other forms of entertainment can.¹⁰

Gambling also creates jobs and economic activity

Gambling creates jobs in casinos, hotels and registered clubs (in Australia), betting service providers and lottery operators. These jobs and businesses are then critical to other business that support gambling operators including manufacturers, restaurants, live performers, hotels and other entertainment providers. One just needs to look at places like Nevada to see the kinds of economic activity that can be generated directly and indirectly from gambling.

⁷ Julia Hornle, et al, European Commission, *Evaluation of Regulatory Tools for Enforcing Online Gambling Rules and Channelling Demand towards Controlled Offers* (November 2018), 13.

⁸ Global Betting & Gambling Consultants, *Global Gambling Revenues by product* (Web Page) <<https://www.gbqc.com/2018/05/16/global-gambling-revenues-by-product/>>.

⁹ Sally Gainsbury, 'Interactive Gambling' (2014) *Australian Gambling Research Centre Discussion Paper No. 3*, 6.

¹⁰ Patrick Basham and John Luik, 'The social benefits of gambling' (2011) 31(1) *Economic Affairs* 9.

Gambling is a significant source of revenue for governments

This economic activity is critical for individuals and businesses but is often an important source of revenue for Governments. For example:

- In 2018/19, New York State generated \$13,015,977 USD (\$19.9 million AUD) through its Pari-Mutuel tax, with a further \$9,399,617 USD (\$14.4 million AUD) coming from off-track betting;
- the New Hampshire Lottery has generated \$2 billion USD (\$3.06 billion AUD) for the State education system;
- Nevada generates over \$700 million USD (\$1.07 billion AUD) in tax revenue from gambling;
- New South Wales collected over \$2.35 billion AUD (\$1.54 billion USD) in gambling and betting taxes in 2018/19; and
- Gambling will contribute almost \$2 billion AUD (\$1.31 billion USD) to the 2019/20 Victorian budget.

Gambling can cause harms to individuals and communities

While there are clear benefits that come from gambling, there are also significant harms that can flow from gambling activity if gambling providers, governments and individuals do not take steps to address them. The Victorian Responsible Gambling Foundation has sought to raise awareness of these harms:

Harm from gambling isn't just about losing money. Gambling can affect self-esteem, relationships, physical and mental health, work performance and social life. It can harm not only the person who gambles but also family, friends, workplaces and communities.¹¹

Gambling is also an attractive venture for organised crime, both as a provider of gambling services and to control the outcomes of gambling offered by others.

Who are sports bettors and why do they wager?

Online sports betting can often increase excitement and enjoyment of a sporting activity.¹² Sports betting can encourage individuals to become more invested in sports and engage with others over a common interest.

However, in Australia, around 41% of regular sports bettors (those who bet at least once a month) experience gambling related harms.¹³ Online gamblers are twice as likely as non-

¹¹ Victorian Responsible Gambling Foundation, *Gambling Harm Awareness Week* (Web Page, 2019) <<https://responsiblegambling.vic.gov.au/reducing-harm/gambling-harm-awareness-week/>>.

¹² Daniel Wann, et al, 'An Examination of Sports' Fans Perceptions of the Impact of Legalization of Sports Wagering on Their Fan Experience' (2015) 19(2) *UNLV Gaming Research & Review Journal* 21, 35.

¹³ Andrew Armstrong and Megan Carrol, Australian Gambling Research Centre, *Sports betting in Australia*. Melbourne: Australian Gambling Research Centre (7 January 2019).

online gamblers to be problem gamblers and three times more likely to be moderate-risk gamblers.¹⁴

This is often due to the increased perception of skill (and therefore of control) amongst sports bettors compared with other bettors, which is often reinforced by near misses.¹⁵

Sports bettors tend to be more involved than other kinds of gamblers – spending more time and money than others, including often operating multiple accounts with different operators.¹⁶

Sports bettors tend to be younger, male, interested in gambling on other types of gambling, and are more likely to be impulsive (including making impulsive bets).¹⁷

Why should Governments regulate?

The benefits and costs of gambling will be present regardless of whether it is legal or not (due to the pervasiveness of illegal gambling) – the question becomes to what degree the benefits and harms will be experienced in the community under different regulatory approaches.

A prohibitionist model allows a government to enforce the law equally against all participants by making it clear that any gambling will be punished. This model usually relies on general law enforcement to ensure gambling operations are identified and addressed. Under a prohibitionist model, gambling operations are necessarily run by ‘criminals’.

While the benefit of a prohibitionist model is that it strives for zero gambling related harms through zero gambling, it seeks to do so with only one approach – addressing supply. A prohibitionist model is unable to generate revenue to pay for measures that address demand other than the costly process of prosecuting operators and seeking to recover proceeds of crime. To address demand, governments must allocate funds from other sources to address the harms caused by operators.

“Are the successes of law enforcement tantamount to cutting off a lizard’s tail only to see it grow again, and if so, is the battle even worth fighting? Is the better way — with gambling increasingly woven into the fabric of American sports — to simply legalize it so it can be regulated?”ⁱ

A regulatory approach addresses this issue by creating mechanisms that allow governments to suppress (or encourage) supply while also doing so with demand. While there are different approaches to developing regulatory models, governments can adapt their approach depending on the relative demand or supply and manage the impacts of the activity on the community by shifting regulatory inventions as required. Governments allow the activity to be offered legally but

¹⁴ Matthew Browne, Matthew Rockloff, Nerilee Hing, Alex Russell, Cailen Murray Boyle and Vijay Rawat, ‘NSW Gambling Survey 2019’ (18 September 2019) *NSW Responsible Gambling Fund*, 95-96.

¹⁵ See, e.g., Michael Cantinotti, Robert Ladouceur and Christian Jacques, ‘Sports Betting: Can Gamblers Beat Randomness?’ (2004) 18(2) *Psychology of Addictive Behaviors* 143.

¹⁶ Alex Russell, Nerilee Hing and Matthew Browne, ‘Risk Factors for Gambling Problems Specifically Associated with Sports Betting’ (2019) 35 *Journal of Gambling Studies* 1211, 1212.

¹⁷ Alex Russell, Nerilee Hing, En Li and Peter Vitartas, ‘Gambling risk groups are not all the same: Risk factors amongst sports bettors’ (2019) 35(1) *Journal of Gambling Studies* 225.

choose who can participate and on what terms – stifling unlawful operations.¹⁸

A regulatory approach allows the government to require participants to contribute to the cost of regulation and to the cost of the negative consequences of the industry. It recognises that there are benefits to allowing the industry to occur (including taxation, local jobs and broader economic activity), and that the activity is likely to occur in a less harmful manner due to government oversight of the direction the industry takes.

Those operating within the regulatory framework are legitimised but only where they are held accountable for following the rules set by government – it captures those consumers and operators previously in the illegal market.¹⁹ It also allows those suffering from gambling related harms to be treated not as people complicit in illegal activity but those suffering from a direct result of market activity – an effort that will hopefully remove the stigma of those seeking help.

This paper supports a regulatory approach as it recognises that online wagering will occur with or without government endorsement due to the ease of accessing services provided by operators around the world, but that industry must be held accountable for their actions through comprehensive frameworks that ensure that benefits are shared with the broader community and the impacts of industry activity are addressed by industry.²⁰ Bringing sports wagering into the open is the best way to ensure it is conducted in a responsible manner.²¹

“Public policy regarding Internet gambling is complicated by the difficulty in controlling access and availability of Internet gambling sites, the relative anonymity of users and operators, lack of physical boundaries between jurisdictions, and disparity in physical locations of players and providers.”ⁱⁱ

Ensuring an effective balance between developing a vibrant industry with industry obligations to share the benefits of this vibrancy and address the harms caused is not an easy balancing exercise.²² It requires trial and error on the part of regulators to ensure that they have the right regulatory policy design and enforcement to achieve that balance.

Underpinning this, however, is that governments must be able to point to harms that are sufficiently large enough to justify government intervention, and that they have the tools to address those harms.²³ This paper supports making sure that there is not over regulation (such as federal and states regulating the same activity) as it will lead to increased

¹⁸ M.P. Kailus, ‘Note: Do not bet on unilateral prohibition of Internet gambling to eliminate cyber-casinos’ (1999) 1999(3) *University of Illinois Law Review* 1045, 1045.

¹⁹ Rey Mashayekhi, ‘Inside the Battle for the Future of Sports Betting’ (10 April 2019, *Fortune*) <https://fortune.com/longform/sports-betting-battle/>

²⁰ Australian Productivity Commission, *Gambling* (Report No. 50, 26 February 2010), 3.3.

²¹ Adam Silver, ‘Legalize and Regulate Sports Betting’, *New York Times* (online at 13 November 2014) <<https://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html>>.

²² Melissa Rorie, ‘Regulation of the Gaming Industry Across Time and Place’ (2017) September *Center for Crime and Justice Policy*, 2.

²³ Australian Productivity Commission, above n 20, 3.2

regulatory costs, which creates an edge for unlicensed operators (who are not subject to regulatory costs as they operate outside of the law) over licensed operators.²⁴

However, regulators should not shy away from imposing justified regulatory obligations on industry participants, as the benefits of operating in a lawful market will outweigh the risks of operating unlawfully.

Gambling in Australia

Gambling has been considered (for better or worse) part of Australian culture since British arrival. Convicts played two up,²⁵ the first horse race in the colony was held in 1810 and gaming machines have operated lawfully in New South Wales since 1956. Australia now has a mature gambling market made up of casinos, hotels and clubs (operating gaming machines, wagering and Keno), lotteries and totalizator operations. And while studies indicate that people are concerned with the proliferation of gambling in Australia, most do not support banning it.²⁶

When the Australian colonies federated into a single nation, the *Constitution of the Commonwealth of Australia* allocated specific enumerated powers to the Federal Government. These powers were to be the exclusive powers of the Commonwealth – where the Federal Government and a State government have an inconsistent law on one of these issues, the federal law prevails. For example, the Commonwealth has exclusive powers over “aliens” which would prevent a State from passing an inconsistent law on immigration.

All other powers (i.e. those not specifically listed in the Constitution) remain the responsibility of the States. This has allowed the continued operation of the States in a federal system, with State governments still retaining significant legislative and service delivery responsibilities. For example, States are still responsible with determining education, health, transport and law and order policy. Sitting in this bucket of responsibilities is gambling.

When gambling was able to be contained within a single jurisdiction (in casinos, registered clubs and race track betting), this was relatively straightforward – the State government was responsible for determining the laws, the compliance approach and the taxation (noting gambling winnings are not required to be declared as income in Australia unless conducted as a professional business). It also helped that there were limited options for gambling, even in wagering which tended to be limited to racing. While there were always the impacts of organised crime to consider, oversight of gambling was predominantly the responsibility of State governments.

Telephone and online wagering complicated this. No longer was the gambling product offered and delivered in a single jurisdiction. Now a customer was able to access services at the gambling venue down the road but also over the phone and then online. While many operators continued to capture those customers in their own State, increasingly customers sought out those based in other jurisdictions due to value, variety and ease of access.

²⁴ Becky Harris, ‘Expert Commentary on Sports Betting Post-PASPA’ (2019) 9(29) *UNLV Gaming Law Journal* 31.

²⁵ A game that involves flipping two coins and betting on the combination of those coins.

²⁶ See, e.g., Ian McAllister, ‘Public opinion towards gambling and gambling regulation in Australia’ (2014) 14(1) *International Gambling Studies* 146, 152.

Australians make up around 5% of the global interactive and online gambling market.²⁷ Between 2004 and 2014, the number of active online betting accounts increased 400% to 800,000,²⁸ with the Australian market growing seven-fold between 2009 and 2019.²⁹ Australians have the highest per capita expenditure in the world, around double the average of other Western nations.³⁰

Some State governments started to look at ways to curb interstate gambling, including attempts to stymie the expansion of online operations from other States by prohibiting those not licensed in their jurisdiction from offering wagering services. This included amendments to the *Betting Control Act 1954* (WA) to prohibit interstate betting exchange operators offering services in Western Australia. This legislation was challenged by Betfair (a Tasmanian licence holder), which argued that this was a protectionist policy prohibited by the *Australian Constitution*. In *Betfair Pty Limited v Western Australia*, the High Court noted:

The emergence of Internet-based betting exchange wagering platforms raises several highly challenging issues for the future viability of the Australian racing industry, consumer protection of punters and for government revenue flows from wagering.

Australia's situation is unique among the World's first level racing countries. This stems jointly from its status as a Federation and the co-existence in all jurisdictions of bookmakers and totalizators (TAB). Eight individual racing jurisdictions, together with eight State and Territory Governments with a range of often disparate racing and wagering legislation, heightens the challenge of developing and implementing a coordinated national response to the emergence of betting exchanges.³¹

The Court found that, despite the regulatory complexity considered above, there is a constitutional limit on States discriminating against businesses in other States.

The effect of this was to create a limit on the power of the States to regulate conduct in their own jurisdiction by requiring regulators to have regard to the constitutional guarantee of freedom of trade amongst the States. As a result of this finding, there was a rapid expansion of the sector as operators were able to offer services to a wider cohort of consumers.³²

²⁷ Sally Gainsbury, Robert Wood, Alex Russell, Nerilee Hing, and Alex Blaszczyński, 'A digital revolution: Comparison of demographic profiles, attitudes and gambling behaviour of Internet and non-Internet gamblers' (2012) 28 *Computers in Human Behaviour* 1388, 1398.

²⁸ Barry O'Farrell, *Review of Illegal Offshore Wagering* (18 December 2015) <https://www.dss.gov.au/sites/default/files/documents/04_2016/review_of_illegal_offshore_wagering_18_december_2015.pdf> (O'Farrell Review).

²⁹ Jennifer Podesta and Anna Thomas, Australian Gambling Research Centre, Australian Institute of Family Studies, 'Betting restrictions and online wagering in Australia' (November 2017) <https://www.dss.gov.au/sites/default/files/documents/11_2017/final_report_-_betting_restrictions_report.pdf>, 7.

³⁰ Andrew Armstrong and Megan Carroll, *Gambling activity in Australia: Findings from wave 15 of the Household, Income and Labour Dynamics in Australia (HILDA) Survey* (November 2017) <https://aifs.gov.au/agrc/sites/default/files/publication-documents/rr-gambling_activity_in_australia_0.pdf>, 5.

³¹ *Betfair Pty Limited v Western Australia* (2008) 234 CLR 418, [7] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

³² Nerilee Hing, Kerry Sproston, Kate Brook and Richard Brading, 'The Structural Features of Sports and Race Betting Inducements: Issues for Harm Minimisation and Consumer Protection' (2017) 33 *Journal of Gambling Studies* 685, 687.

This constitutional impediment to discrimination amongst gambling operators is complemented by the federal legislative powers that allows the Federal Government to regulate interstate trade,³³ and online activities. The Australian Federal Government is vested with legislative power over “postal, telegraphic, telephonic, and other like services”.³⁴ This includes primary responsibility for online activities.³⁵

The *Interactive Gambling Act 2001* (Commonwealth) was passed under this legislative authority, which allowed the Commonwealth to prohibit certain kinds of gambling activities being offered in Australia, including online casinos and online wagering offered by offshore providers. The Act does not seek to limit States’ ability to regulate other kinds of gambling, or fetter the States (and Territories) ability to allow online wagering operators to be licensed in their jurisdiction and offer services to people in other States.

This federal system has led to the development of a sophisticated online wagering market, with betting service providers based in different States and Territories able to compete with one another to offer services, markets, and products in each other’s traditional markets. For example, a licensed betting service provider in the Northern Territory is able to offer bets to a person based in New South Wales on a contingency even where that betting service provider is not licensed in New South Wales and where New South Wales has not approved their own betting service providers offering that contingency.

This system created incentives for betting service providers to set up in jurisdictions with the most favourable regulatory environment for their business. This could involve a more straightforward licensing approach, lower tax rates or more discretion to offer certain kinds of products. This environment also caused States to compete against one another – both to ensure that business was attracted to their jurisdiction and that harms caused by that business were effectively mitigated.

While States should continue to seek to attract businesses to base themselves in their jurisdiction, the ongoing competition between States, the role of the Commonwealth over the regulation of the online environment (and television and online advertising) and the increasing prevalence of offshore providers spurred States to develop collaborative forums to ensure consistent approaches to gambling regulation, including the National Consumer Protection Framework for Online Wagering, Australian Casino and Gaming Regulators CEO Forum and Gambling Research Australia.

Gambling in United States

In the same way that gambling is treated as part of Australia’s culture (again, for better or worse), gambling has a long history in the United States. Gambling was a feature of the American colonies, including betting on horseracing in Virginia and lotteries to fund the expansion of colonies (and also to fund the Independence movement).

³³ *Australian Constitution* s 51 (i).

³⁴ *Ibid*, s 51 (v).

³⁵ In *R v Brislan* (1935) 54 CLR 262 the High Court accepted a broad interpretation of the phrase “other like services” enabling the Commonwealth to regulate radio, television and internet services.

Gambling has been prohibited and legalised at different times in different States, with American's views on gambling considered to swing back and forth,³⁶ with some States (Hawaii and Utah) maintaining their prohibitions:

- 1930s, 21 States opened horseracing tracks;
- 1931 - Assembly Bill 98 – an Act concerning slot machines, gambling games and devices - legalised most forms of gambling in Nevada;
- 1964 – New Hampshire establishes the first legal state lottery; and
- 1977 – New Jersey legalises gambling in Atlantic City.³⁷

All of these moves to legalise gambling were state based, with the Tenth Amendment providing that powers not provided to the Congress are reserved for the States. In the same way that the Australian enumeration of powers operates (noting the *United States Constitution's* influence over the framers of the *Australian Constitution*), those powers not specifically given to the federal government in the federal Constitution are left to the States.

However, while intrastate trade, such as gambling, can be regulated by the States, once the gambling activity crosses state lines, federal legislative power is enlivened under the Commerce Clause. In *U.S. v Darby*, Justice Stone found 'Congress is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals, or welfare, even though the state has not sought to regulate their use.'³⁸

The *Wire Act 1961* (18 U.S.C. § 1084) was introduced to address concerns by the Kennedy administration about interstate betting aiding organised crime. The Wire Act prohibits certain betting businesses that facilitate interstate betting. While the Act was seen as prohibiting online gambling generally, a 2011 Department of Justice Office of Legal Counsel Memorandum found that the restrictions on interstate betting, including the transmission of information across state lines to facilitate gambling, were limited to sports betting. This finding allowed the expansion of online lotteries and in some cases poker.

The Department of Justice issued a new opinion in 2018 that reversed the position that the Wire Act only applied to sports wagering, seemingly prohibiting online lotteries where servers were based in other jurisdictions. New Hampshire initiated proceedings against the Department of Justice to set aside the opinion, with the US District Court of New Hampshire determining that the Wire Act did only apply to sports wagering, effectively prohibiting interstate sports betting (but preserving daily fantasy betting).³⁹ While the decision is under appeal, and does not prohibit federal agencies prosecuting other States allowing interstate gambling, it is expected that the Federal Government will respect the court's decision until a final appeal is resolved.⁴⁰

³⁶ PASPA decision, above n 1, 2.

³⁷ David Schwartz, *Cutting the Wire* (University of Nevada Press, 2005).

³⁸ *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941), 114.

³⁹ *New Hampshire Lottery Commission, et al. v. William Barr, in his official capacity as Attorney General of the United States of America, et al.* 386 F. Supp. 3d 132 (D.N.H. 2019)

⁴⁰ Ann Kim, Gregory Lisa, Hilary Tompkins, Robert Toll and Michael Hacker, *Implications from New Hampshire Lottery Commission v. Barr* (Web Page, June 2019) <<https://ehoganlovells.com/cv/bf7f799cb7b39883ba438d01057812906e3c1d0a>>.

While the power to regulate inter-state gambling provided the Congress with broad powers, prior to the introduction of the *Professional and Amateur Sports Protection Act 1992* ('PASPA')⁴¹, federal laws (such as the Wire Act) could arguably be seen as supporting state efforts to either prohibit gambling or regulate by preventing non-local operators.⁴² These laws were designed to ensure that gambling operations were only able to occur on an intra-state basis.

For example, Congress has enacted laws that have allowed inter-state gambling to occur where the bet is placed from a State that allows horserace betting to a State that allows horserace betting.⁴³ The *Interstate Horse Racing Act 1978*, which saw revenue shared with race tracks and owners, was a shift in the Federal Government's approach to gambling – shifting from enabling/protecting State based regulations to a revenue based approach independent of state approaches (notwithstanding that States still needed to allow bets to be placed).⁴⁴

Since the introduction of PASPA, sports wagering, especially online sports wagering, in the US has increased exponentially. In 2017, \$4.8 billion USD (\$6.89 billion AUD) was wagered through Nevada's sportsbooks.⁴⁵ This legal industry is overshadowed by the illegal betting industry, with Americans illegally wagering more than \$150 billion on sports every year.⁴⁶

The rapid growth of online gambling, and its trans-border nature, led to Congress approving a last-minute amendment to the *Safe Ports Act 2006* that introduced the *Unlawful Internet Gambling Enforcement Act (UIGEA)*. UIGEA:

prohibits any person engaged in the business of betting, as defined, from knowingly accepting credit, electronic fund transfers, checks, or any other payment involving a financial institution to settle unlawful internet gambling debts.⁴⁷

The effect of the UIGEA was twofold; it made it clear that it was unlawful to operate online gambling in the United States without a licence and that banks are not able to process deposits for unlawful online gambling (i.e. gambling without a licence).

The Act included carve outs, including state lotteries, horse racing bets and fantasy sports, and Congress was clear that the new Act was not intended to limit the powers of the States with respect to the regulation of gambling:

⁴¹ A law that allowed civil actions to be brought to enjoin violations of the prohibition on sports wagering in jurisdictions that did not allow sports wagering at the time of the commencement of the Act (rather than making it a criminal offence).

⁴² Keith Miller and Anthony Cabot, 'Regulatory models for sports wagering: the debate between state and federal oversight' (2018) 8 *UNLV Gaming Law Journal* 153, 154.

⁴³ I Nelson Rose, 'Gambling and the Law: An introduction to the Law of Internet Gambling' (2006) 10(1) *UNLV Gaming Research & Review Journal*, 3.

⁴⁴ Miller, above n 42, 155.

⁴⁵ David Purdum, *Nevada sportsbooks took in record bets and winnings* (Web Page, 1 February 2018) <https://www.espn.com/chalk/story/_/id/22273982/record-amounts-money-bet-lost-nevada-2017>.

⁴⁶ Mashayekhi, above n 19.

⁴⁷ Federal Trade Commission, *Unlawful Internet Gambling Enforcement Act* (Web Page) <<https://www.ftc.gov/enforcement/statutes/unlawful-internet-gambling-enforcement-act>>.

No provision of this subchapter shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States.⁴⁸

the bet or wager and the method by which the bet or wager is initiated and received or otherwise made is expressly authorized by and placed in accordance with the laws of such State, and the State law or regulations.⁴⁹

While UIGEA allowed for States to issue licences for online gambling, States have been limited in their ability to introduce sports betting by PASPA, which purportedly limited their power to legalise sports betting, even when supported by residents.

This changed in the PASPA decision, with the Supreme Court finding that the *United States Constitution* does not allow Congress to issue orders to the governments of the States on what they can legalise where Congress has abdicated the opportunity to prohibit the activity:

The legalization of sports gambling requires an important policy choice, but the choice is not ours to make. Congress can regulate sports gambling directly, but if it elects not to do so, each state is free to act on its own. Our job is to interpret the law Congress has enacted and decide whether it is consistent with the Constitution. PASPA is not.⁵⁰

The Court found that the *United States Constitution* does not prohibit Congress passing laws on wagering but does prevent them hindering the legislative capacity of the States to pass a law authorising wagering. The effect of this decision is to allow States to determine their own approach to gambling: ongoing prohibition or legalisation.

The decision also highlighted the influence of national sporting bodies on the issue. Major sporting codes (NFL, NBA, MLB, NHL and NCAA) joined the federal government in its action to protect PASPA, arguing that the law help to ensure the integrity of sports.

The NCAA argued “Sports wagering has the potential to undermine the integrity of sports contests and jeopardizes the well-being of student-athletes and the intercollegiate athletics community.”⁵¹

While the NCAA continues to oppose the introduction of sports betting, other sporting codes have adapted their approach to the issue to respond to the reality of the situation – jurisdictions will introduce sports betting. This might be in part because the NCAA faces the added pressure of addressing threats to integrity from gambling amongst unpaid/unpaid players that may be susceptible to offers in a way that other sporting codes do not.

The NFL indicated that they would work to find a way to respond to the law in a way that maintained the integrity of their sports.⁵² Interestingly, the NFL not only called on States to

⁴⁸ *Unlawful Internet Gambling Enforcement Act* 31 U.S.C. §§ 5361- 5367, § 5361(b) (UIGEA)

⁴⁹ *Ibid*, § 5262(10)(B)(ii).

⁵⁰ PASPA decision, above n 1, 30-31 (Alito J)

⁵¹ National Collegiate Athletic Association, *Sports Wagering* (Web Page) <<http://www.ncaa.org/enforcement/sports-wagering>>.

⁵² AP, ‘Supreme Court makes sports betting a possibility across US’, *SMH* (Online at 15 May 2018) <<https://www.smh.com.au/sport/supreme-court-makes-sports-betting-a-possibility-across-us-20180515-p4zfah.html>>.

enact laws that responded to the risks of sports betting to the integrity of sports, but also called on Congress to enact a core regulatory framework for sports betting.⁵³

In a situation where States cannot be prevented from introducing intrastate online sports betting, and where the “Dormant Commerce Clause” prohibits States from discriminating against interstate commerce except in limited circumstances,⁵⁴ the next few years will challenge the existing congressional rationale to maintain prohibitions of interstate online sports wagering, making regulatory design in a federal system increasingly important.

Offshore betting

To build state based regulatory frameworks in a federal system to allow online sports betting, regulators must understand the nature of the unlawful, and often offshore, online sports betting market.

There is variable quality of offshore providers, with many licensed in other jurisdictions but without consistent standards regarding licensing, compliance and overall operational obligations. While most operators seek to encourage foreign residents to use their services, some will seek to prevent overseas residents accessing their services (either as a local licensing obligation or to prevent drawing the ire of a foreign regulator/law enforcement agency).⁵⁵

Unlawful and offshore betting service providers divert people from the lawful market, creating risks to the consumer, revenue loss for government and increased online and organised crime risks.

Many jurisdictions have adopted a legal model not only because of the desire to leverage some of the benefits of a local gambling industry, but also on the difficulty of outright prohibitions on gambling due to the relative ease of access to offshore providers. A domestic industry is designed to provide a lawful and safer option for individuals looking to gamble online.

For example, it is estimated that around 95% of bettors in the United Kingdom gamble with licensed operators,⁵⁶ contrasted with estimates by the American Gaming Association that around 97% of bets on the 2017 Superbowl were placed illegally.⁵⁷

Regulators are interested in shutting down offshore betting as it causes loss of control over the market (adequate consumer protections/ gambling harm minimisation obligations, fraud, money-laundering and sporting integrity).⁵⁸ Offshore betting represents revenue leakage (tax

⁵³ National Football League, *Supreme Court strikes down law against sports gambling* (Web Page, 14 May 2018) <<https://www.nfl.com/news/supreme-court-strikes-down-law-against-sports-gambling-0ap3000000932647>>.

⁵⁴ See, e.g., *Wyoming v. Oklahoma*, 502 U.S. 437 (1992); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977).

⁵⁵ Sally Gainsbury, Brett Abarbanel and Alex Blaszczynski, 'Factors influencing Internet gamblers' use of offshore online gambling sites: Policy implications' (2018) 11(2) *Policy & Internet* 235, 237.

⁵⁶ Sally Gainsbury, Alex Russell, Nerilee Hing and Alex Blaszczynski, 'Consumer engagement with and perceptions of offshore gambling sites' (2018) 20(8) *new media & society* 2990, 2992.

⁵⁷ American Gaming Association, *Americans to bet \$4.7 billion on Super Bowl 51* (Web Page, 31 January 2017) >.<<https://www.americangaming.org/new/americans-to-bet-4-7-billion-on-super-bowl-51/>>.

⁵⁸ Podesta, above n 29, 7

and licence values), create risks for individual players (such as fraud, identity theft and lost funds)⁵⁹ and can cause significant integrity risks for betting activity locally (e.g. difficult to track the bets that are being placed that could be used to prove match fixing).

Offshore providers are not required to abide by the same regulatory requirements as onshore providers and are not subject to domestic regulatory and legal controls, which often leave people who do play with these providers without recourse when the operator misappropriates money, or fails to pay out winnings, or creates incentives for a player to gamble beyond their means. From a regulatory design perspective, allowing unlawful operators to access local markets will continue to drain customers from licensed operators who are unable to compete on many products or price points.⁶⁰

It is difficult to accurately estimate the size and value of the offshore betting market in Australia and the United States,⁶¹ but in Australia there is evidence that the expansion of domestic lawful providers, and a strict enforcement approach, has reduced the size of the offshore market domestically.⁶² Notwithstanding the expansion of sports betting in the United States, many will still choose to bet with offshore providers, for example, it was estimated (prior to COVID) that 5.2 million people would place bets with offshore providers for the NCAA March Madness.⁶³

There is an argument that the success of countries like Australia and the UK in reversing the trend towards offshore has been supported by licensing frameworks that facilitate legitimate foreign providers setting up operations domestically – a result of the benefits of operating lawfully to access domestic markets outweighing regulatory costs. It is hoped this trend could also be realised in the US.

From a policy perspective, it is important to not only understand the size of the market and how they infiltrate domestic markets, but also who is using offshore sites and why. Understanding why people gamble in certain ways allows governments to design more comprehensive regulatory frameworks, including use of behavioural insights and human centred design.

Offshore gamblers tend to be younger, more highly educated, and are more likely to work full time than those who only use domestic sites.⁶⁴ They also tend to have higher rates of problem gamblers.⁶⁵

When given a choice, most players will prefer to use a domestic lawful site as opposed to an unlawful site, but will continue to make decisions on which site to use based on “ease of site use, ability to wager in [local currency], ease of placing bets, ease of account creation, promotional offers, operator reputation, and available products.”⁶⁶

⁵⁹ Gainsbury, above n 56, 2992.

⁶⁰ Harris, above n 5, 82.

⁶¹ See, e.g., O’Farrell Review, above n 28, 19.

⁶² Gainsbury, above n 56, 2992.

⁶³ Before COVID-19 - <https://www.cbsnews.com/news/march-madness-betting-americans-expected-to-wager-8-5-billion-on-march-madness-prediction-brackets-in-2019/>

⁶⁴ Gainsbury, above n 56,3001.

⁶⁵ Ibid, 2990.

⁶⁶ Ibid, 3000.

Legality of gambling with a provider is often not a determinative factor for bettors not because of a desire to engage in unlawful activities but to a general lack of knowledge of local laws.⁶⁷ Although research does indicate that even if known, legality is not seen as a priority, with as little as 10% of Australian bettors seeing compliance with local licensing of importance when selecting a betting service provider.⁶⁸

Many players who gamble with offshore providers do not consider that the fewer consumer protection requirements, such as pre-commitment and deposit limits, are necessarily a bad thing.⁶⁹ It is likely this is a result of the kinds of people that prefer betting with unlawful operators are those less interested in accessing responsible gambling offerings.⁷⁰

The impact of COVID

Before considering how regulators can use different policy levers to effectively regulate online sports wagering, it is appropriate to consider that this paper sits within an economic and social environment still dealing with the impacts of COVID-19.

The effect of COVID-19 on economies around the world has been stark, with many industries struggling to cope with the enforced shutdowns and reduced economic activity caused by quarantining, physical distancing, and other necessary public health measures.

The gambling industry has been dramatically impacted by the pandemic. In Las Vegas, the shutdown of casinos has caused unprecedented downturn as gambling operators lose billions of dollars a month and state unemployment topped 28% in April 2020.⁷¹ Sportsbooks around the world have been forced to close, some for the first time since they opened.⁷²

The closure of land-based operators has led to a shift of people gambling online, but the transfer has not been completely seamless.

Most sporting competitions were postponed for several weeks, which led to a fall in online sports betting around the world. Between February and April 2020, there was a 41% drop in searches for sports betting websites in the UK.⁷³ The Australian online sports betting industry struggled to keep customer interest as the core elements of the services that attract

⁶⁷ Ibid, 2993.

⁶⁸ Sally Gainsbury, et al., 'A digital revolution: Comparison of demographic profiles, attitudes and gambling behavior of Internet and non-Internet gamblers' (2012) 28(4) *Computers in Human Behavior* 1388.

⁶⁹ Podesta, above n 29, 11.

⁷⁰ Gainsbury, above n 56, 3006.

⁷¹ Ken Ritter, Associated Press, *Vegas, baby! Casinos reopen after long coronavirus closure* (Web Page, 5 June 2020) <<https://abcnews.go.com/Health/wireStory/las-vegas-reopening-coronavirus-casino-closure-71060678>>.

⁷² Greg Bishop, 'The World of Sports Betting in a World Without Sports', *Sports Illustrated* (Online at 7 May 2020), <<https://www.si.com/gambling/2020/05/07/how-covid-pandemic-changed-sports-gambling-present-future>>.

⁷³ Affiliate Insider, *How has COVID-19 affected the UK iGaming industry?* (Web Page, 5 June 2020) <<https://affiliateinsider.com/featured/how-has-covid-19-affected-the-uk-igaming-industry/>>.

customers were no longer available.⁷⁴ Some estimates put the loss of revenue for online gambling at more than 15% pre-pandemic forecasts.⁷⁵

Notwithstanding a shrinking in the availability of betting options, online sports bettors have been able to find new markets to gamble on, such as “offshore table tennis tournaments and obscure European second tier soccer leagues still kicking the ball around.”⁷⁶ People have even started to bet on virtual simulations of games.⁷⁷

Online sports betting operators are also better placed than land-based operators to rebound, as their service relies on professional sports recommencing, rather than relying on physical distancing restrictions being lifted. These operators are well placed to capture new customers, especially those who previously gambled with land-based operators. This is likely to increase the size of the online gambling industry, which is forecasted to increase its share of the total global gambling market by 27% (16.5% up from 13% pre-COVID-19).⁷⁸

It is also likely that government stimulus measures aimed at driving consumer demand for local businesses to re-boot the economy will be used on gambling. In Australia, there has already been significant increases in spending on gambling, with a 64% increase in spending compared to an ordinary week,⁷⁹ and early access to superannuation (retirement savings) being funnelled into gambling.⁸⁰

⁷⁴ Jamie Nettleton and Samuel Gauci, Addisons, *Online Gambling and COVID-19: The Australian Perspective* (Web Page, 14 May 2020) <<https://addisons.com/knowledge/insights/online-gambling-and-covid-19-the-australian-perspective/>>.

⁷⁵ Affiliate Insider, above n 73.

⁷⁶ Tim Boreham, *The Gambling Stocks To Punt On Post The Coronavirus Crunch* (Web Page, 3 June 2020) <<https://www.sharecafe.com.au/2020/06/03/the-gambling-stocks-to-punt-on-post-the-coronavirus-crunch/>>.

⁷⁷ Bishop, above n 72.

⁷⁸ Affiliate Insider, above n 73.

⁷⁹ AlphaBeta Australia, *COVID19 Economic Impact: Real Time Tracking* (Web Page, 15 June 2020) <<https://www.alphabeta.com/illiontracking>>.

⁸⁰ Matt Wade, ‘Super bender: retirement nest-egg withdrawals used to boost spending on non-essentials’, *SMH* (Online at 1 June 2020) <<https://www.smh.com.au/business/the-economy/super-bender-retirement-nest-egg-withdrawals-used-to-boost-spending-on-non-essentials-20200531-p54y5q.html>>.

Licensing

Where a jurisdiction determines that it will allow online wagering to occur it can adopt one of three models:

- Approve an exclusive rights holder (private or Government run) operating a betting service, with all other providers treated as providing unlawful services (often considered to be an effective way to reduce gambling related harms);⁸¹
- Allowing any betting service provider to offer wagering services where they have acquired a licence; and
- Allowing any betting service provider to offer wagering services without a licence.

A licensing system allows the regulator to determine who can offer online wagering services and under what terms. It creates a safer environment for residents by seeking to eliminate illegal offerings and focus on improving standards in a lawful wagering market.⁸²

Licences can be used as an enforcement tool for conduct and revenue collection – ensuring that operators abide by directions of the regulator to allow them to continue to lawfully offer their services. Licences are particularly important where the government has legalised a good or service that has addictive potential to ensure that appropriate harm minimisation strategies are considered part of the licensee's operating model.⁸³

Some jurisdictions have approved exclusive providers, usually through competitive tenders. These exclusivity arrangements often provide an initial windfall for the government, as well as ongoing returns through licence fees or taxes. For example, in 2013 Tabcorp paid the NSW Government \$75 million to extend its exclusivity agreement for retail (land based) wagering services for 20 years.⁸⁴ Establishing exclusive operating rights is an effective way to establish a land-based wagering system.

However, in an online environment, exclusivity arrangements for online sports betting are going to become increasingly difficult to guarantee. The online environment has low barriers to entry, offshore providers seeking to compete, and customers are calling out for variety and responsive products. While exclusivity arrangements secure guaranteed revenue, make sense for land based operators and are more straightforward to regulate, this kind of set up will be more difficult in an online environment, especially where the regulator operates in a federal structure with a division of powers between state and federal governments.

The US also has the added complexity of not only having many commercial operators running lawful gambling business that are seeking to set up sports wagering (and ultimately online sports wagering) but a large number of tribal casinos operating over sovereign lands. Any licensing system that seeks to allow wagering operations online that requires a licence

⁸¹ Tomi Roukka and Anne Salonen, 'The Winners and the Losers: Tax Incidence of Gambling in Finland' (2019) *Journal of Gambling Studies*, 2.

⁸² Nettleton, above n 74.

⁸³ Sally Gainsbury, Matthijs Blankers, Claire Wilkinson, Karen Schelleman-Offermans, and Janna Cousijns, 'Recommendations for international gambling harm-minimisation guidelines: Comparison with effective public health policy' (2014) 30 *Journal of Gambling Studies* 771, 775

⁸⁴ Tabcorp, *Retail exclusivity extension finalised for Tabcorp's NSW wagering licence* (Web Page, 20 June 2013) <<https://www.tabcorp.com.au/news-media/media-releases/retail-exclusivity-extension-finalised-for-tabcorp>>.

will require regulators to negotiate with tribal leaders on how this sovereignty interacts with a state-controlled licensing system.⁸⁵

Licences for existing operators or allow new entrants

In designing a licensing scheme, governments will need to consider whether sports wagering should only be offered by existing operators (e.g. casinos and lotteries) or whether licences will be open to new operators. While Australia has not sought to restrict new entrants to the market (which has allowed international operators to set up Australian operations with Australian licences), many US States have imposed restrictions on who can seek a licence based on existing gambling operations.

In New Jersey, for example, national operators FanDuel and DraftKings were only able to set up sports wagering operations by collaborating with bricks and mortar licence holders, which then allowed them to offer online services.

Maintaining relationships with existing operators makes regulation more straight forward. Existing licence holders have gone through probity processes, have shown their ability to comply with licence requirements, and have generated significant economic activity in the local economy. To support existing licence holders, jurisdictions can offer protections to existing licensees by designing systems that effectively ring-fence the market to only allow existing operators to offer services. This includes licensing schemes that favour incumbents or those able to operate across multiple forms gambling.

While this rewards those who the regulator is used to working with, it is likely to stifle innovation and revenue potential by limiting competition.⁸⁶ National online sports wagering operators will continue to strike the relationships that get them into new, lucrative markets. However, in doing so, governments must consider whether the benefits of such a system are sufficient to offset the potential loss of competition that drives innovation in products and consumer protection offerings, as well as creating a potential advantage to offshore providers not required to share profits with existing providers.

Probity

A licensing system allows the regulator to ensure that only those who meet certain ethical standards – a fit and proper person – can operate an online wagering service. Most jurisdictions are familiar with probity processes for land-based operations, including casino operators and their employees. A similar process can apply with online operators with regulators able to determine the level of approvals required (i.e. what level of management needs to be approved by the regulator).

While Australian and American jurisdictions have different techniques for determining probity, the outcome sought by each regulator is the same – ensuring that the person operating a licence is a fit and proper person free from criminal influence and a person who is likely to run the betting service in a way that meets community standards.

⁸⁵ See, e.g., Steve Ruddock, 'An interview with Michigan Representative Brandt Iden who has spearheaded the State's recent efforts to legalize online gaming and sports betting' (2019) 9 *Gaming Law Review* 661.

⁸⁶ Miller, above n 42, 165.

In approaching probity processes for online sports wagering providers operating in a federal system, one of the key limitations in a licensing scheme run by a regulator independent of other neighbouring states, or without interaction with the federal government, is that the probity process may be duplicative, burdensome for the applicant and may miss opportunities to create a more efficient approach.

To ensure unfit people are kept out of the industry, while encouraging regulatory efficiencies, regulators in a federal system should look for opportunities to leverage work done in other jurisdictions where possible. Opportunities include:

- requiring national criminal and financial checks;
- creating model probity processes across licensing systems to create consistency in what materials applicants need to prepare (noting jurisdictions can still require further processes to be undertaken);
- proactively sharing data and intelligence between regulators and law enforcement agencies (for example where a person fails to pass probity in one jurisdiction this is shared with other regulators); and
- explore the use of technology to enhance and streamline probity assessments, such as blockchain.⁸⁷

Dealing with existing unlawful operators

One of the more difficult propositions that regulators will need to determine is how they treat operators who have been offering markets in their jurisdiction without a licence (i.e. those operating unlawfully before legalisation or the opening up of a multi-operator model).

There is an argument that the operator has shown that they are not a fit and proper person as they have deliberately sought to circumvent the regulatory framework – creating regulatory risks for the regulator as well as potentially detracting revenue from the lawful market (and by extension the tax revenue payable to the Government). For example, in Nevada, online gaming licences are not issued to those who have not been found to operate online gaming services in breach of state or federal laws.

Conversely, regulators should make every effort to capture as many operators in the lawful market. Those who are licensed are held to a certain standard of conduct, pay taxes (which pays for the regulator) and are able to be punished for transgressions through standard administrative processes, rather than having to rely on costly criminal prosecutions.

These competing tensions will need to be carefully considered by regulators, especially when considering how to build consistent licensing approaches across multiple jurisdictions.

Mutual recognition across state lines

A simple way to achieve this is through mutual recognition. Mutual recognition refers to the process that allows an operator who has gone through a licensing process in one jurisdiction to have that process recognised in another jurisdiction. This can be either through allowing them to conduct their business under that initial licence or allow that initial licence to be used to meet pre-requisites in the new jurisdiction.

⁸⁷ Explored further below. See, e.g., Andre Wilsenach, Jennifer Roberts and Breyen Canfield, 'The Role of Blockchain Technology in Modernizing Gaming Regulation', *Nevada Gaming Lawyer* (Online at September 2017) <https://www.unlv.edu/sites/default/files/page_files/27/Blockchain.pdf>.

Australia has adopted a process of mutual recognition, supported by the *Mutual Recognition Act 1992* (Commonwealth) and State legislation, which allows a betting service provider issued a licence in one State or Territory to offer services to residents of other States.

There are clear benefits to mutual recognition, including reduced regulatory costs for regulators and industry participants (as there are fewer probity and licensing processes to abide by), removing costs of entry into new markets and greater choice for customers by allowing them to seek out the best prices and products.

Mutual recognition relies on jurisdictions working collaboratively, and not treating each other as competitors.

In Australia, the majority of betting service providers are registered and licensed in the Northern Territory, in some cases due to traditionally lower taxation rates and more discretion to operators in what kinds of services could be offered. Despite having a population of just over 200,000, as at May 2020, the Northern Territory has 20 sports bookmakers and betting exchange operators, running 24 wagering websites.

Despite the Northern Territory taking the lion's share of online wagering taxation (until the introduction of point of consumption taxes), other jurisdictions have been willing to work with the Northern Territory, and have allowed those 20 betting service providers to offer services to their residents (noting that the point of consumption taxes detailed below could be considered a new barrier to entry to licence applicants in the Northern Territory).

While it would be difficult to ignore the impact of the *Betfair* decision on this relationship, since then regulators have been proactive in engaging with each other to ensure consistency in how they engage with their licensees. This engagement has created better outcomes for residents and reduced the need to have a standalone licensing process for all market participants in each jurisdiction.

The key elements to a successful mutual recognition scheme are:

- consistent licensing requirements across jurisdictions (including probity and ongoing licensing obligations);
- recognition not only of the licence but the licence conditions (e.g. what contingencies can be offered);
- information sharing arrangements between jurisdictions; and
- enforcement powers against licensees regardless of where they are licensed, including a willingness of regulators to act on evidence provided by other jurisdictions.

This approach is being explored in Argentina, with two provincial governments establishing a Cooperation Commission to oversee the licensing and regulatory process for online wagering, conceding that the issue will be difficult to contain without cooperation across traditional jurisdictional boundaries.⁸⁸ Amongst other areas of responsibility, the Commission is charged with ensuring consistent licensing approaches (including what services can be offered) and geo-location minimum standards to retain state control of local wagering.

⁸⁸ Masot, above n 3.

There are drawbacks from a mutual recognition system. The clearest limitation is that it creates a risk to government revenue – fewer licences based in your jurisdiction means fewer licence fees and lower taxation – offsetting one of the main reasons for legalising gambling in the jurisdiction.⁸⁹ While these issues can be overcome, the ongoing viability of mutual recognition relies on interjurisdictional cooperation.

A mutual recognition process hands (at least some) responsibility for the licensing process to another regulator. This regulator will make assessments on probity, what conditions will be placed on the licence (and determine when those conditions have been breached) and determine what services the operator can offer.

While there will always be situations of jurisdictions trying to attract operators to domicile locally, this should not come at the expense of watering down obligations that are critical to ensuring the ongoing viability of the industry, including public confidence. Jurisdictions should not seek to enter mutual recognition relationships with other jurisdictions unless there is a level of confidence that the operators will be held to the same standard of conduct in either jurisdiction. At a minimum, there needs to be confidence that the decisions of another regulator will not adversely impact the local jurisdiction's industry and community.

While the US continues to rely on state based regulatory frameworks due to the prohibition on inter-state gambling operations for sports betting, some operators are already turning their minds to a national model by establishing relationships with existing licence holders in jurisdictions across the country, such as DraftKings which has a deal with Caesars to allow it to acquire licences in all the states that Caesars operates.⁹⁰

A move to mutual recognition (i.e. allowing operators to take wagers from any state where sports betting is legal) would build on the *Interstate Horseracing Act* model by giving federal recognition to interstate gambling but retaining state regulators as the decision makers around the appropriateness of the activity occurring. This would enhance the liquidity in markets, allowing operators to offer better products to customers.⁹¹

This approach makes sense in an online environment where borders are increasingly irrelevant. However, for the US this will require buy-in from States that allow online sports wagering, and the Federal Government to relax prohibitions on interstate online sports wagering to recognise that a mature state-based regulatory framework is best placed to regulate online sports wagering.

An initial first step that US States could take in the interim is to allow regulators to license any operator who meets the obligations of a licensee, irrespective of whether they have a physical presence in the state. This replicates the approach of some States with respect to daily fantasy sports.⁹² Licensees would still need to abide by local licensing requirements but would be able to take advantage of reduced regulatory costs by consolidating operations into a single physical location. However, while the Wire Act continues to operate, servers would still need to be based locally – something that will hopefully be eased over time.

⁸⁹ Saied Toossi and Pengju Zhang, 'Video Gambling Adoption and Tax Revenues: Evidence from Illinois' (2018) 39(1) *Public Budgeting & Finance* 67, 68.

⁹⁰ Mashayekhi, above n 19.

⁹¹ Miller, above n 42, 170.

⁹² *Ibid*, 167.

Compliance Approach

Gambling regulators around the world are becoming increasingly well practised in risk-based, evidence led compliance of the gambling industry.

In developing a risk-based approach, regulators must ensure that the tools that are used to ensure compliance for online sports wagering are custom built to respond to the nature of the gambling activity, including the particular harms that can be aggravated by online sports wagering, rather than simply adopting the same compliance approach that has been used for less harmful forms of gambling.⁹³

Compliance model

In developing a regulatory framework for online sports wagering, regulators should seek to ensure that they have a transparent compliance approach, making clear what kinds of conduct will trigger what kinds of regulatory intervention. This ensures that industry is aware of the consequences of breaches, and the public has confidence that the regulator will take action to prevent harms from online sports wagering.

While the most significant intervention a regulator can take is criminal prosecution of the company and its directors, there are a number of alternative compliance options that sit below this kind of action that are able to create incentives for compliance and punishes breaches as they occur. These include:

- licence removal;
- fines;
- licence conditions and internal controls;
- warnings; and
- education and training requirements.

Where a licence holder is based in the jurisdiction, enforcement is relatively straightforward as the regulator can control all the activity of the licensee. For example, in 2018 the Nevada Gaming Commission imposed a \$2 million fine (\$250,000 to the Nevada Council on Problem Gambling), and mandated the creation of a Corporate Social Responsibility officer position, against CG Technology, which operated the sports book in a number of Las Vegas properties, for serious wagering offences.⁹⁴

The CG Technology case became more complex, however, in that the alleged offences included inter-state gambling, which was not only a breach of its Nevada licence conditions, but also enlivened federal laws prohibiting interstate gambling. As a result, CG Technology agreed to pay an additional \$22.5 million to the US Government for amongst other things facilitating interstate gambling.⁹⁵

⁹³ Fred Steinmetz and Ingo Fiedler 'A state-operated blockchain-based system for the transparent processing of online gambling payments in Germany' (2019) 10 *Gaming Law Review* 715.

⁹⁴ Dan Katz, *CG Technology Fined \$2 Million by Nevada Gaming Commission for Sports Betting Improprieties* (Web Page, 22 November 2018) <<https://www.pokernewsdaily.com/cg-technology-fined-2-million-by-nevada-gaming-commission-for-sports-betting-improprieties-32456/>>.

⁹⁵ Dan Purdum, *CG Technology fined \$22.5M by U.S. for role in illegal scheme* (Web Page, 4 October 2016) <https://www.espn.com.au/chalk/story/_/id/17707481/las-vegas-sportsbook-cg-technology-was-fined-225m-illegal-gambling-money-laundering-scheme>.

The CG Technology case provides a useful example of how breaches of sports wagering laws in a state become increasingly difficult to police and enforce due to the cross-border nature of online gambling, which necessarily limits the reach of regulators.

While a regulator is able to issue summons on a licensee, compel them to hand over documents or answer questions, and can readily access their property to conduct a search, this is more difficult for online sports wagering as it relies on business being conducted from a single premises, or at least in a place where those powers are enforceable. Where licences are required, regulators are more readily able to access the information they need as the threat of licence removal will invariably keep licensees in line.

However, where a regulator is dealing with a lawful or unlawful operator from another state or offshore, the regulator must look to cooperate with other jurisdictions, including federal agencies, to effectively regulator its own market.⁹⁶

Leveraging federal governments to support action against offshore operators

Dealing with the impacts of offshore providers is an opportunity for ongoing collaboration between regulators as part of the pursuit of a common benefit – protecting the control of the market by the regulator. How jurisdictions go about this will be dependent on their constitutional framework, and ongoing relationship with other jurisdictions (whether federal or state) but could include:

- consistent prohibitions on the offering of, and participation in, offshore betting (to create a consistent trigger for regulatory/law enforcement action);
- giving regulators strong enforcement powers to crack down on unlawful behaviour, including website blocking powers through internet service providers; and
- where enforcement is reliant on another jurisdiction (another state or federal government), the creation of automatic cooperation provisions to support enforcement of that law.

When seeking to sanction offshore providers, state regulators should take advantage of federal law enforcement capabilities, not only to seek assistance when jurisdictional borders limit enforcement powers but also to proactively partner on investigations and operations. In this way states can separate out their role as a regulator, with the federal government carving out a more general law enforcement responsibility.

Federal Governments have made clear their support of state gambling regulators, such as the *Unlawful Internet Gambling Enforcement Act* (US) which prohibits people engaging in online gambling (either as an operator or player) that is not authorised by a state regulator. And in the US, federal prosecutors have been incredibly successful in shutting down unlawful online gambling, including the online poker “Black Friday” raids,⁹⁷ that allowed federal agencies to

“Strong support from federal-level enforcement agencies, with their unique police powers, would also facilitate the dismantling of illegal gambling operators.”ⁱⁱⁱ

⁹⁶ European Commission, *Communication Towards a Comprehensive European Framework for Online Gambling*, COM (2012) 596 final, 23 October 2012, 5.

⁹⁷ AAP, *Supergrass Tzvetkoff hopes to win freedom* (Web Page, 4 June 2014) <<https://www.sbs.com.au/news/supergrass-tzvetkoff-hopes-to-win-freedom>>.

leverage federal laws to secure positive gambling regulatory outcomes.

Federal governments also have the advantage of extensive criminal and regulatory powers that apply more generally and can be used effectively to secure gambling regulatory outcomes, through state, federal and international cooperation.

Anti-money laundering

Money laundering refers to the process of disguising illegally obtained assets to appear legitimate.⁹⁸

One of the risks around the proliferation of online gambling is that it provides a new avenue for unlawful transactions to occur, including money laundering by organised crime and terrorist organisations. Online sports wagering, and gambling more generally, is particularly susceptible to money laundering due to:

- the diverse money flows that may disguise unlawful activity;
- the increasing use of cryptocurrencies;
- winnings are often not required to be declared for tax purposes (allowing individuals to launder more money without sacrificing it to tax as would occur with other businesses); and
- no physical product being developed, removing the ability to compare reported vs. actual transactions.⁹⁹

While often leaving gambling regulation to the states, addressing risks of money laundering has traditionally been a responsibility of the federal government,¹⁰⁰ asserting regulatory authority over gambling activity irrespective of state regulatory approaches.¹⁰¹ This paper does not seek to provide a detailed analysis of effective anti-money laundering approaches other than to identify the value in continuing to vest responsibility in federal law enforcement agencies, with state regulators cooperating to support this.

Gambling regulators can achieve this by ensuring that they leverage their licensing obligations (such as those that require gambling operators to take steps to address the risk of crime infiltrating their operations) to ensure that licences and ongoing operations are contingent on comprehensive compliance with AML obligations.

One of the vulnerabilities of online sports wagering is the potential anonymity that can be achieved through identity masking.¹⁰² This reinforces the need not only for age verification (a harm minimisation tool dealt with further below) but also stringent identity verification more generally to ensure that the source of the funds put through gambling accounts are able to be readily traced back to an individual. States could look to cooperate on uniform identity

⁹⁸ Simon Planzer, 'Anti-money laundering and online gambling: Guidance on How to Implement Broad and Indistinct AML Notions in Regulatory Practice' <<https://ssrn.com/abstract=3048303>>.

⁹⁹ Steinmetz, above n 93.

¹⁰⁰ See, e.g., 18 U.S.C § 1956 and 1957. These provisions give extensive powers to prosecute extraterritorially. Section 1956(d) makes clear that states may also have anti money laundering offences, which has been set up in some States (e.g. *New York Penal Code Law*, article 470)

¹⁰¹ Miller, above n 42, 156.

¹⁰² Kane Pepi, 'An Exploratory Study Into The Money Laundering Threats, Vulnerabilities, And Controls Within The UK Bookmaker Sector, With A Specific Focus On Fixed-Odds Betting Terminals' (2018) 22(1) *UNLV Gaming Research & Review Journal*, 3.

verification standards (including exploring the use of biometrics) to support efforts to reduce money laundering risks.

This is critical to offset the risks arising from the increasing use of cryptocurrencies and digital wallets. Regulators must identify new ways of engaging with operators to prevent the misuse of cryptocurrencies without unduly limiting innovation. The use of adaptive licensing conditions that can be changed quickly as required, rather than set and forget legislative powers, will provide regulators with an effective way of working with the operator and federal enforcement agencies to promote proactive management of the money laundering risks caused by cryptocurrencies.

Maintaining consistent approaches between states, and with federal agencies, will secure better outcomes for regulators seeking to address money laundering risks, as well as make compliance more straightforward for industry.

Geolocation

Given the implications of the Wire Act on sports betting, there are legitimate concerns from operators around the risk of engaging in unlawful inter-state gambling.¹⁰³

The use of targeted geo-location (allowing the user's location to be determined based on the location of the device they are using to access the gambling service) allows operators to create a geo-fence around where a person is able to lawfully make a bet.

Geolocation allows regulators to quickly identify where a bet has been placed, as well as allowing operators to proactively develop strategies to prevent unlawful inter-state gambling or advertising. This was successfully used in New Jersey against operator Amaya for accepting bets from out-of-state players,¹⁰⁴ and is increasingly used by Australian jurisdictions to support prohibitions on certain kinds of gambling advertising (where States have adopted different rules).

This process is not only important from the perspective of the *Wire Act* but also ensures that governments are able to accurately audit the revenue from operators that is subject to state taxes, something Australian jurisdictions are able to use to support collection of point of consumption taxes.

Sanctions

While regulators have often taken a light touch to sanctions for breaches of advertising, harm minimisation and consumer protection requirements (noting that integrity and anti-money laundering obligations are invariably enforced more strongly), regulators around the world are increasingly seeking to meet community expectations and crack down on all breaches of gambling frameworks, ensuring that penalties are commensurate with harms and are not just seen as a cost of doing business.¹⁰⁵

In Europe, the average fines imposed on gambling operators increased from less than €10,000 to over €560,000 in the Czech Republic (between 2015 and 2017), €495,000 to

¹⁰³ Harris, above n 5, 87.

¹⁰⁴ Mark Griffiths, 'Online Gambling and Geolocation Technology: Implications for regulation and potential threat to player protection' (2019) 5 *Gaming Law Review* 344.

¹⁰⁵ New South Wales, *Parliamentary Debates*, Legislative Council, 7 August 2019, 41 (The Hon. Scott Farlow).

over €1,000,000 in Spain (between 2015 and 2016) and from €5,500 to €335,000 in the UK (between 2015 and 2017).¹⁰⁶

In the 2018, the Great Britain Gambling Commission imposed a penalty package of £6.2m on William Hill for not only breaches of anti-money laundering obligations but “social responsibility” obligations.¹⁰⁷

In Australia, some jurisdictions have also upped the ante for advertising offences, with New South Wales increasing penalties from \$5,500AUD to \$110,000AUD.¹⁰⁸

In a federal system, there is a risk that large penalties and proactive regulators will create a disincentive for operators to establish operations in new markets, due to the inherent risks of operating online sports wagering, including the competitive nature of the industry. Regulators should seek to create consistency across jurisdictions not only on the nature of obligations for licence holders, but also the consequences for breaches.

Regulators, however, need to ensure that the penalties are commensurate with the harm caused, and the potential profits that can be generated. In the same way that market operators look to innovate, so should regulators. Government’s should not shy away from setting a high-water mark for obligations on operators, which invariably leads to stronger compliance and a more level playing field.

A similar point was made by US regulators after the *Murphy* decision, which provided that coordination across jurisdictions to create this level playing field was the best way to eradicate illegal activities by creating consistency between states and leveraging federal support where required.¹⁰⁹

¹⁰⁶ Hornle, above n 7, 122.

¹⁰⁷ Gambling Commission, *William Hill to pay £6.2m penalty package for systemic social responsibility and money laundering failures* (Web Page, 20 February 2018) <<https://www.gamblingcommission.gov.uk/news-action-and-statistics/News/william-hill-to-pay-62m-penalty-package-for-systemic-social-responsibility-and-money-laundering-failures>>.

¹⁰⁸ See, Gambling Legislation Amendment (Online and Other Betting) Bill 2019 (NSW).

¹⁰⁹ André Wilsenach, *State Gambling Regulators Equipped and Ready to Take Charge on Legal Sports Betting Industry* (Web Page, 22 May 2018) <<https://www.linkedin.com/pulse/state-gambling-regulators-equipped-ready-take-charge-legal-wilsenach/>>.

Consumer protection - Harm minimisation measures

How are gambling harms defined?

Focusing on “harm”

Gambling harms are the negative consequences that are felt by the individual and the broader community due to gambling activity.¹¹⁰

Focusing on harms rather than the prevalence of problem gamblers ensures that a regulatory framework is targeted at addressing the impacts on all residents, rather than the small subset of those experiencing high levels of acute harms.

“Stable problem gambling rates are not necessarily indicative of successful policy or indeed absence of increased harm.”^{iv}

Responses still need to be developed for those falling within the cohort of problem gamblers, as these people will experience acute harms.¹¹¹ However, regulators should seek to address the harms, not just the correlative impacts, as the majority of harms are felt by non-problem gamblers.¹¹²

Focusing on the spectrum of gambling harms allows for regulator to understand the true impact of gambling.¹¹³

What are “harms”

Policymakers, community advocates and industry all talk about “gambling harms” but rarely do they mean the same thing. Gambling harm is one of the amorphous terms that has different meanings to different groups. Because it is difficult to define uniformly, it is also difficult to measure in a consistent way:

the absence of a detailed and explicit definition, with an accompanying conceptual model, makes it difficult to operationalize the concept and thereby measure the impacts or severity of harm experienced, and this deficit separates gambling from other public health issues to its detriment.¹¹⁴

From a policy making standpoint, quantifying and responding to the harms of gambling is as important as understanding the benefits that flow from gambling to ensure that regulators are considering the net impacts of gambling at the economy-wide, community and individual levels.

If you are unable to identify and measure the harm, there is a risk that the regulatory response will not be appropriately targeted at addressing the harm – it may deal with the harm ineffectively and/or burden non-harmful behaviours.

¹¹⁰ Alex Blaszczyński et al (2014) ‘Operator-Based Approaches to Harm Minimisation in Gambling Summary, Review and Future Directions’ *Responsible Gambling Trust*, 15.

¹¹¹ Armstrong, above n 12.

¹¹² Paul Delfabbro and Daniel King, ‘Challenges in the conceptualisation and measurement of gambling-related harm’ (2019) 35(3) *Journal of Gambling Studies* 743.

¹¹³ Matthew Browne, et al, ‘Assessing gambling-related harm in Victoria: a public health perspective’, *Victorian Responsible Gambling Foundation* (April 2016).

¹¹⁴ Erika Langham, et al, ‘Understanding gambling related harm: a proposed definition, conceptual framework, and taxonomy of harms’ (2016) 16 (80) *BMC Public Health*, 2

Measuring harm

The terms ‘non-problem’, ‘low-risk’, ‘moderate-risk’ and ‘problem’ gamblers derive from the Problem Gambling Severity Index (PGSI), a widely used scale that measures the severity of gambling problems across the population.¹¹⁵ While there are arguments about its accuracy,¹¹⁶ the PGSI is generally accepted as a reliable population-wide tool for assessing the likely prevalence of gambling behaviours that lead to gambling related harms.

While readily admitting that “harm occurs across the spectrum of gambling behaviour and severity”,¹¹⁷ jurisdictions have started to use the indicative factors of the PGSI and other analytical tools, and have combined them with more specific approaches to develop an understanding of the prevalence and impacts of problematic gambling behaviour and gambling harm in their community. For example, the New South Wales *2019 Gambling Survey* is used to inform regulatory design by developing an understanding of how people gamble and how they experience harms.

When measuring harm, it is critical to try to understand not only the harm itself but also who bears the cost of that harm. This will inform whether intervention is required, and, if so, in what form. To support this, researchers are increasingly focusing on trying to understand how gambling related harms are occurring, and being experienced by, online gamblers.

One of the limitations of this research (and research into gambling harm more generally) is that it relies on people self-identifying the harm. In measuring harm, it is difficult to understand the actual impacts as opposed to the perceived impacts (noting you are relying on people’s perception of something rather than being able to objectively measure).¹¹⁸

How to regulate against harms

Should governments be involved in regulating against harms?

For governments seeking to address gambling through regulation, one of the key questions that needs to be answered is whether there is an appetite for regulating against harms, and if so which kinds of harms.

In Australia there is a ready acceptance that gambling related harm represent market failure – industry operations that create costs to the market and community that are not addressed through operators alone. The Australian community supports action against gambling related harms that impact the individual, as well as broader societal harms such as organised crime.

US regulators will need to unpack these foundational questions as they will influence whether regulators want to curb harms that only impact predominantly (at least initially) consenting adults, or whether regulators only focus on the broader community impacts of gambling.

¹¹⁵ Shawn Currie et al, ‘Validity of the Problem Gambling Severity Index Interpretive Categories’ (2013) 29 *Journal of Gambling Studies* 311.

¹¹⁶ See, e.g. Samuelsson, et al ‘Gamblers’ (mis-)interpretations of Problem Gambling Severity Index items: Ambiguities in qualitative accounts from the Swedish Longitudinal Gambling Study’ (2019) 36(2) *Nordic Studies on Alcohol and Drugs* 140.

¹¹⁷ Langham, above n 114, 2-3.

¹¹⁸ Heather Wardle, Gerda Reith, David Best, David McDaid and Stephen Platt, ‘Measuring gambling-related harms: a framework for action’ (2018) *UK Gambling Commission*, 13.

Making sure that regulation and regulatory obligation imposed on industry reflect community sentiment will be critical to gaining buy in from the community to roll out online sports wagering. However, governments need to ensure that they invest time and effort in understanding how community acceptance of certain gambling related harms are likely to shift where harms spread and/or become more acute. When governments wait until this point, it may be too late to intervene. A public health based prevention approach is often the more effective way to address this risk.

How can they regulate?

Research is increasingly identifying the complex inter-relationships between different types of harms, and their impacts on the individual – including the prevalence of co-morbidities that cause or exacerbate different harms and/or susceptibility to those harms, including mental health issues and substance abuse.¹¹⁹ These inter-relationships often make it difficult to design policy responses that target the underlying behaviours that cause the harm.

However, the regulator is tasked with addressing those harms, regardless of who they affect.

The policy response adopted by regulators will be determined by the relative weight placed on the harms associated with gambling as against the relative benefits: jobs, tax, entertainment etc. One cannot unduly discount these benefits as they speak to people's interest in maintaining a vibrant gambling industry. More importantly, however, they speak to the ability of the regulator to gain traction in the public debate on why certain parts of the industry need to be regulated in certain ways (critical to ensure the broader community's appetite for certain kinds of behaviour being more tightly regulated).

Being able to clearly define and measure harms arms the regulator with the necessary information to take an evidence-based approach to gambling regulation – a careful balancing act that regulates the sector only to the extent required.

This is consistent with how government should look to regulate any sector, but given the importance of gambling to support jobs (both in the gambling sector and outside – e.g. performers in venues), taxation revenue and people's general ability to determine what they do with their money it is even more critical that regulators strike the right balance when it comes to regulating gambling related harms.

Rather than simply prohibiting conduct, adopting a harm minimisation approach for online sports betting allows regulators and industry participants to recognise that there will be harms that occur from gambling, but that these harms should be minimised through regulatory approaches rather than prohibiting the activity itself. Harm minimisation seeks to strike a balance between abstinence from gambling activities on the one hand and ongoing harmful participation in gambling.¹²⁰

Online operators are able to observe and limit harmful behaviours, including through the use of data to inform interventions.¹²¹ Online operators are at the forefront of innovation, and have the capacity to match product innovation with innovation in harm reduction (albeit with

¹¹⁹ Gainsbury, above n 83, 772.

¹²⁰ Blaszczyński, above n 110, 15.

¹²¹ Joerg Haefeli, Suzanne Lischer and Juerg Schwarz, 'Early detection items and responsible gambling features for online gambling' (2011) 11(3) *International Gambling Studies* 273, 275.

widespread take up of this intervention proving elusive). This must be coupled with cooperation with the regulator to ensure that harm minimisation occurs not only while the person is gambling or seeking to gamble but also in the broader societal, community and inter-personal environment.¹²²

Regulation follows trends in community expectations – where the community is of the view that gambling is harmful, or that self-regulation is ineffective, there may be calls for stronger regulatory intervention by government.¹²³ A multi-faceted approach, underpinned by cooperation between government and industry, will ensure proactively manage community expectations, allowing a strong, profitable industry that is effectively addressing harms.

What is responsible gambling?

Industry and regulators regularly use the term “responsible gambling” to refer to practices that encourage people to spend within their means. Responsible gambling is aimed at helping gamblers avoid addiction and enjoying gambling in a sustainable way.¹²⁴ Ultimately responsible gambling is designed to help develop strategies for gamblers that will allow them to avoid developing gambling problems or experience gambling harms.¹²⁵ Responsible gambling is to be distinguished from treatment, which goes to addressing the harms that have eventuated in individual circumstances.¹²⁶

The value is in preventing individuals from escalating into problematic gambling behaviours. At this point, the cost on the individual, as well as the intervention itself, is significantly less than waiting until the person self-identifies that they have a problem.¹²⁷ Developing responsible gambling as a normal part of gambling encourages individuals to think about their spending habits as a matter of course, and makes it easier for individual players to comply with those responsible gambling approaches more regularly. For example, framing pre-commitment as a budgeting tool rather than as problem gambling intervention.¹²⁸

While there is industry acceptance of the term, some researchers and community advocates are concerned that the term individualises and pathologises problematic gambling behaviours rather than supporting a public health focused prevention approach.¹²⁹ The promotion of “responsible gambling” is often seen as ineffective,¹³⁰ and appears to create a simplistic dichotomy between recreational gambling on the one hand and

¹²² Wardle, above n 118, 9.

¹²³ McAllister, above n 26, 158.

¹²⁴ Jaeseok Lee, Chih-Chien Chen, Hak-Jun Song, Choong-Ki Lee, ‘The Role of Responsible Gambling Strategy and Gambling Passion in the Online Gamblers’ Decision-Making Process: Revising the Theory of Planned Behavior’ (2014) 30 *Journal of Gambling Studies* 403, 407.

¹²⁵ Douglas M. Walker and Elizabeth Mandell, ‘Ideas in behavioural economics related to gambling research’ (Paper presented at the 12th European Conference on Gambling Studies and Policy Issues, 11-14 September 2018), 7.

¹²⁶ Haefeli, above n 121, 274.

¹²⁷ Ibid, 276.

¹²⁸ Blaszczynski, above n 110, 10.

¹²⁹ Charles Livingstone, et al, ‘Identifying effective policy interventions to prevent gambling-related harm’ (June 2019) *Victorian Responsible Gambling Foundation*, 9.

¹³⁰ Kerry Sproston, Clare Hanley, Kate Brook, Nerilee Hing and Sally Gainsbury, ‘Marketing of Sports Betting and Racing’ (2015) *Gambling Research Australia*, 20.

harmful/problematic gambling on the other.¹³¹ This dichotomy is inconsistent with accepted understanding of harms occurring on a spectrum.

Jurisdictions are starting to reconsider the use of responsible gambling, instead looking to adopt more targeted terms such as gambling harm minimisation or prevention. These terms are more closely aligned with the public health approach that must underpin any regulatory design and intervention on online sports betting and have been adopted by this paper instead of 'responsible gambling'.

How do you design a model that cuts across jurisdictions - What worked in Australia?

As part of the response to the 2015 O'Farrell national review into offshore gambling,¹³² Australian State and Territory Governments agreed to develop a National Consumer Protection Framework for Online Wagering (NCPF) with the Commonwealth Government.

The NCPF sets out ten consumer protection measures designed to give consumers more control over their gambling by modernising consumer protection tools for online wagering, ensuring that licensing and legislative requirements around harm minimisation reflect best practice and to address regulatory fragmentation across jurisdictions that had resulted in poorer regulatory outcomes.¹³³ The measures are:

1. prohibition of lines of credit;
2. prohibition of betting service providers advertising payday loans;
3. updated identity verification requirements;
4. limits on offers of inducements;
5. streamlined account closure requirements;
6. voluntary opt-out pre-commitment scheme;
7. provision of activity statements;
8. consistent gambling harm messaging across jurisdictions;
9. staff training for online betting service providers; and
10. national self-exclusion register across all online wagering providers.

One of the key benefits of the NCPF is that it enabled a uniform approach to a number of foundational harm minimisation strategies. It means that a customer in any part of Australia will have the benefit of consumer protection tools that enable them to make better decisions about their gambling.

Most importantly, the NCPF sets minimum standards across jurisdictions but still allows States to adopt high standards of harm minimisation. By allowing States to continue to set higher standards, it encourages innovation by not tying States to a single model that requires uniform agreement but allows jurisdictions to trial new approaches, build evidence on its effectiveness, and hopefully bring other jurisdictions with them to set a new, higher uniform minimum standard.

¹³¹ Livingstone, above n 129, 49.

¹³² O'Farrell Review, above n 28.

¹³³ Rebecca Jenkinson, Tayyab Khokhar, Rukhsana Tajin, Uma Jatkar and Julie Deblaquiere, 'National Consumer Protection Framework for Online Wagering: Baseline Study' (June 2019) *Australian Gambling Research Centre, Australian Institute of Family Studies*, 6.

The NCPF has only been operation for a short period of time, and is subject to ongoing review,¹³⁴ but regulators in the US can draw out a few key lessons from its development.

In developing the NCPF, governments considered the findings of the national review into the impacts of offshore gambling and the increasing body of evidence of the impacts of online sports wagering on the industry, including gambling related harms. Governments then worked together with industry and leading experts in harm minimisation to develop a set of minimum standards.

Adopting minimum standards allowed industry to consistently implement certain harm minimisation strategies, rather than having to start from scratch in each jurisdiction. In a federal system, it also allowed operators to continue to operate across boundaries without regulators fearing that the harms caused by sports wagering would be experienced locally without any recourse to address the harms.

Governments created forums to allow proposals to be developed collaboratively, to discuss implementation, compliance and enforcement, and understand the regulatory costs and benefits of introducing the new measures. Adopting a national approach for implementation is also complemented by a national approach for evaluation of the model.¹³⁵ It is hoped that the evaluation will inform future initiatives that lift minimum harm minimisation standards across Australian jurisdictions.

Pre-commitment

Pre-commitment is a harm minimisation tool that allows an individual player to set limits on the amount of time and money that they will spend gambling. Pre-commitment can either be voluntary (a person sets a limit but can exceed that limit), mandatory (a person must set a limit and cannot exceed it) or a mix (may be required to set a limit before gambling can commence but can exceed it).

Reducing stigma

In an ideal world, individuals would be able to always self-regulate and to stay within their preferred limits of time and money spent on gambling. However, “individuals frequently fail to resist the urge to gamble more than intended during sessions of play...[making] impulsive decisions that override their pre-session intentions to allocate a set amount of time and money with which to gamble.”¹³⁶

There are any number of reasons why this occurs, and not all are considered problematic (including enjoyment of activity), but what it makes clear is that providing individuals with tools to set limits on the time and money they spend gambling is likely to enhance their control over those issues.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Blaszczyński, above n 110, 32.

While some research suggests recreational and low risk gamblers set monetary limits before they start gambling, those experiencing problematic behaviours are frequently exceeding any limits that may be set.¹³⁷

The key determinant between a person complying with their limit and exceeding it is having a plan. While there must always be a sense of personal responsibility, creating an environment that empowers an individual to make informed decisions is critical. This includes encouraging individuals to set limits before play, and supporting them to stick to those limits:

The advantage of pre-commitment is that, once a limit is set, factors related to emotional states, incurred losses, personality traits (impulsivity and risk-taking), and shifting motivations are less likely to exert their influence on decisions made; that is, the outcome is that there will be a greater likelihood for an individual to adhere to initial intentions and decisions.¹³⁸

Those that stick to their limits are less likely to experience gambling related harms, or will experience less severe harms.¹³⁹ This relies, however, on the individual setting limits that are appropriate, rather than setting limits that are too high that are likely to lead to harms irrespective of whether they are stuck to or not.

Before considering how to develop an effective scheme, regulators and operators should be mindful that any system design must seek to address the stigma that pre-commitment is only for those who have hit rock bottom. Studies into pre-commitment have shown common perceptions of this tool include that it is for “players experiencing difficulties controlling their expenditure”.¹⁴⁰ For those who do not feel that they fall into this cohort, pre-commitment is not seen as necessary.

Any rollout of pre-commitment (voluntary or universal) should seek to increase awareness of the product and address this stigma by making clear that pre-commitment is a tool that allows a person to control their spending by placing limits, tracking their expenditure and make decisions about how much time and money they will spend gambling before they start gambling.

What collaboration with other jurisdictions could be effective?

While research is quite clear that pre-commitment can be an effective mechanism to encourage people to make better decisions about their gambling habits, one of the limitations of the tool, especially in an online environment, is the ease in which people are able to move between operators.

A person who sets a limit and then exceeds it may cease their gambling or may just shift to another provider where they have excess limits or have not set one. This is a risk in an environment where people will often have accounts with multiple operators.

¹³⁷ Simone Rodda, et al, ““It was terrible. I didn’t set a limit”: Proximal and Distal Prevention Strategies for Reducing the Risk of a Bust in Gambling Venues” (2019) 35 *Journal of Gambling Studies* 1407, 1408.

¹³⁸ Blaszczynski, above n 110, 32-33.

¹³⁹ Shawn Currie, et al, ‘Use of Self-control Strategies for Managing Gambling Habits Leads to Less Harm in Regular Gamblers’ (2019) *Journal of Gambling Studies*, 10.

¹⁴⁰ Blaszczynski, above n 110, 11.

Ultimately, allowing individuals to set limits with multiple providers creates an additional obstacle to them sticking to that limit as it allows individuals to get around their pre-determined limits without having to do anything but switch websites or apps.

Australian jurisdictions have already started to take steps to make it easier for people to self-exclude from all platforms in a single process. This is designed to make it easier for people to control their spending by removing themselves from online wagering in a single process. Pre-commitment operates in a different way to self-exclusion in that it is not only designed to help people who are experience problems with their gambling but also to empower people to make better budgeting decisions. It is a consumer empowering tool that can be effective at preventing and/or limiting gambling harms.

As Australia rolls out its self-exclusion register, regulators could look to see what other national schemes could be adopted to support consumer protection, including working towards creating a whole of sector pre-commitment system. Any system would not be mandatory (i.e. a person is not able to exceed their limits) but would allow the person to have a real time understanding of the time and money spent on online wagering.

There are significant limitations to this approach that would need to be resolved before any progress is made on it. A sector-wide platform would require all operators to share their data with each other or a third party. It would require individual operators reporting in real time how their customers are spending, and when they pay out bets (which would assumedly reset the limit with the winnings).

This kind of approach may also create further incentives for operators to offer attractive products to their customers to encourage them to spend the allocated limit with them rather than another operator. While this already happens, a sector-wide approach may exacerbate this issue, including potentially creating an environment where players are spending to their limit where they may not have previously done so.

While cost sharing would factor into debate about whether to progress this kind of initiative, industry has previously indicated a willingness to support these platforms where there are responsible gambling benefits.

In a federal system, with multiple providers operating across jurisdictions, adopting nationally consistent systems is an effective way to ensure competitive neutrality and maximise harm minimisation outcomes. The system allows the sharing of the regulatory burden across jurisdictions while addressing gambling related harms that are felt locally.

An alternative approach could be to consider the use of digital wallet providers as a partner in empowering players to stick to their limits. Digital wallets allow players to move between operators with ease by only requiring card details to be shared with a single provider. Giving players the option of setting limits of spending (notwithstanding time limits would not be captured) may assist players to set limits across all forms of gambling, not just with individual providers.

Deposit limits and cooling off periods

Deposit limits are a form of pre-commitment that allow individuals to set limits on the amount of money that be deposited over a set period. By setting deposit limits ahead of gambling,

players can increase their control over the gambling behaviours by “breaking the nexus between decisions made and actual behaviours”¹⁴¹

The NCPF introduced minimum deposit limit standards by requiring all operators to introduce opt-out deposit limits with set cooling off periods. All new customers must be prompted to set a deposit limit, with the process of using the tool explained in plain English. The use of cooling off allows players to space out their deposits, offsetting the risk that players will chase losses.¹⁴²

Player Statements

Player activity statements provide the player with increased information and controls around their spending that is not targeted at reducing gambling of and by itself, but rather to address and prevent gambling related harms.¹⁴³ Player statements allow people to track their spending and often serve as a critical limit setting tool.¹⁴⁴

The NCPF introduced a requirement for operators to provide players with meaningful player activity statements, including information on wins, losses, and time spent gambling. It is hoped that this will encourage players to implement pre-commitment, including deposit limits, that are likely to enhance their spending control (in contrast to setting limits that are excessively high and unlikely to improve control).¹⁴⁵

Regulators will work with operators to trial activity statement templates to understand what form of statement is most likely to encourage players to implement strategies to proactively manage spending.¹⁴⁶

Self-exclusion

Self-exclusion is a tool that allows people with a gambling problem, or who are at risk of a gambling problem, to voluntarily ban themselves from gambling with a provider. The participant agrees to stay away from the provider’s platform, and the operator agrees to help the participant stay away.

There are varying views on the effectiveness of self-exclusion. The available research indicates that, for many problem and at-risk gamblers, self-exclusion reduces the total value of spending, improves perceived gambling control, and can help repair personal and family relationships, mental health and work performance that have been damaged by gambling.

However, self-exclusion is sometimes treated as the ambulance at the bottom of the cliff as it relies on a person hitting rock bottom before they seek help. This, however, is not a fair assessment of self-exclusion as a tool, merely the perception of it.

Many of the limitations that are present in land based exclusion schemes that inhibit their effectiveness, such as inconvenience, embarrassment in asking staff for help and ease of

¹⁴¹ Ibid, 42.

¹⁴² Ibid.

¹⁴³ Ibid, 21.

¹⁴⁴ Currie, above n 139, 5.

¹⁴⁵ Blaszczyński, above n 110, 42.

¹⁴⁶ Australian Department of Social Services, *National Consumer Protection*

Framework for Online Wagering (Web Page, 28 November 2018)

<https://www.dss.gov.au/sites/default/files/documents/11_2018/ncpfow-fact-sheet28-nov-2018-2.pdf>.

still accessing venue, are removed, with the online interaction making it easier for people to sign up and easier for operators to ensure compliance.

To build an effective self-exclusion program there must be strong program awareness, ease of access to a wide range of venue/operator harm minimisation programs, staff empowered to take appropriate action when behaviours are identified (either before the person excludes or where a person seeks to breach an exclusion), and the provision of correct information.¹⁴⁷

In an online sports wagering market, an effective self-exclusion scheme is platform and operator neutral, allowing an individual to access the same standard of exclusion with whichever operator they engage. This would allow a person to access the same straightforward sign up process, standard of enforcement and ongoing support no matter which operator they initially sign up with. Fundamentally, a successful scheme allows a person seeking to self-exclude to exclude themselves from multiple operators and platforms at the same time.¹⁴⁸

Australia is finalising its National Self-Exclusion Register for online wagering providers, which will allow a player to exclude from all providers through a single process. The Register will be established by the Federal Government (but funded by operators) and allow individuals to exclude themselves from online wagering temporarily (minimum 3 months) or permanently through a single process.¹⁴⁹

The Register is part of the NCPF and is designed to support national consistency across Australian States and Territories. The scheme will be supported by prohibitions on advertising to excluded persons and inducements to individuals to not exclude (delivered through Federal and State based regulation).

While the scheme will not also exclude players from other kinds of lawful online gambling (e.g. lotteries) or from land based operators (e.g. casinos and gaming machine venues), it does recognise that an effective scheme relies on cooperation between operators, as well as making sure that the process is as simple and quick for the player seeking to exclude. This is critical to ensuring that unnecessary obstacles are not put up for the player.

There are risks with operating a multi-operator exclusion model, including technical integration, data privacy and cost. These issues need to be proactively managed to ensure the scheme is seamless for customers and operators and decrease the risk that players will simply shift to offshore operators because the requirements are too onerous.

While Australia is (along with the UK) leading the world on the rollout of this kind of scheme, there are still opportunities for improvement, including developing ways to standardise the exclusion process across all gambling operators (online and land based) to ensure that those seeking help with their gambling are not able to circumvent exclusion orders by using other types of gambling.

¹⁴⁷ Livingstone, above n 129, 34.

¹⁴⁸ J. Caillon, et al, 'Effectiveness of At-Risk Gamblers' Temporary Self-Exclusion from Internet Gambling Sites' (2019) 35 *Journal of Gambling Studies* 601, 612.

¹⁴⁹ Senator the Hon Anne Ruston and The Hon Paul Fletcher MP, *National Self-Exclusion Register to help reduce harm from online wagering* (Web Page, 24 November 2019) <<https://ministers.dss.gov.au/media-releases/5306>>.

Additionally, by building an easy to use platform for people to exclude themselves through, players could also look to set standardised pre-commitment and deposit limits across all operators (rather than having to set manually for each operator), as well as book and access counselling and other support services through the same platform that they set up their self-exclusion through.

Penalties

One of the trickier issues that regulators must deal with for self-exclusion is the consequences for a player breaching their order and for an operator allowing a breach to occur.

Penalising the excluded person for breaching an exclusion order is unlikely to be effective at encouraging behaviour change. Rather it is likely to discourage signing up to the exclusion in the first place, which risks losing the benefits of people stopping their gambling even for short periods of time (with the hope that next time they will be able to see the exclusion through).

Rather, operators should be punished where they do not take reasonable steps to ensure compliance. This approach does not impose a strict liability on operators (i.e. as soon as a person breaches their exclusion the operator is liable) but recognises that operators owe their customers a duty to support their decision to stop gambling.

Where this approach is adopted, an operator will not be liable where the individual does everything they can to breach the exclusion (such as using a virtual private network (VPN) or using someone else's account) but sets expectations that operators will put in systems to prevent exclusions being breached (e.g. ensuring certain credit cards are not used or logging IP addresses).

Use of predictive analytics

Regulators and land based operators continue to invest in training to allow staff and customers to proactively identify when a person is exhibiting signs of problematic gambling behaviours.¹⁵⁰ This training allows the staff member to observe physical signs that a person may be struggling with their gambling, and to design an intervention based on those signs – aware of the importance of the style of intervention, the tone used and the location when it occurs. While there are limitations to the expertise of the individual staff member in being able to identify certain behaviours as problem gambling behaviours,¹⁵¹ it is even more difficult in an online wagering environment when a person's physical signs cannot be observed by the operator.

However, online operators have an edge on their land-based competitors as they are able to use data to create a personalised understanding of an individual's gambling. This data is used by operators to design their products to ensure that they are offering the right kinds of products and services to match their customers' expectations. Designing products that respond to consumer demands is critical to retaining those customers on the provider's

¹⁵⁰ See, e.g., ACT Government, The Gambling Harm Venue Support Kit (Web Page) <https://www.gamblingandracing.act.gov.au/__data/assets/pdf_file/0008/1174337/The-Gambling-Harm-Venue-Support-Kit.pdf>.

¹⁵¹ Blaszczynski, above n 110, 9.

platform.¹⁵² Data also allows the operator to work with authorities to proactively identify fraudulent behaviours, including money laundering and cheating at gambling.

Lessons learned from anti-money laundering detection (i.e. suspicious transactions) should be used by operators to inform better harm minimisation interventions.¹⁵³ It is hoped that the threat of criminal prosecution should not be the only reason that operators seek to intervene when unusual activity occurs.

Data allows operators to develop predictive analytics, which can be used to identify problematic gambling behaviour more accurately in real time and create interventions that are targeted at the particular behaviour. This can include more closely observing the kinds of markets a person is gambling on, the length of their sessions, and the size of their bets.

These interventions do not necessarily require a person to be cut off from their service but are intended to detect harm and use messaging to encourage that person to think more about their spending behaviours. The earlier these interventions occur, the more effective they will be.¹⁵⁴

Operators should also be encouraged to apply predictive analytics to communications between the players and the operator. Engagement between the operator and the player, usually through instant messaging features or email, can allow the operator to predict accurately the likelihood of a person experiencing gambling related harms due to their online gambling.¹⁵⁵ For example, where a person seeks to remedy an issue with their account, a recreational gambler is less likely to be concerned with a delay in this issue being remedied, while a problem gambler will want the issue resolved immediately to allow them to continue gambling.

Regulators should work with operators to understand how to engage with customers in a way that does not seek to attach stigma to interventions but is about supporting customers to make better decisions regarding their gambling behaviour.

Regulators should look to set consistent rules across jurisdictions around the use of data, noting potential privacy concerns, but recognise that this information provides new opportunities to design customisable interventions regarding money laundering, criminal activities (such as cheating at gambling) and harm minimisation rather than only relying on population wide strategies.

Interactive messaging

Land based operators have started to explore the use of interactive messaging on gaming machines as part of best practice harm minimisation. Interactive messaging allows operators to provide real time personalised information about the player's playing behaviour that can inform future play. For example, messages can be designed to provide information of how

¹⁵² Sally Gainsbury, Alex Russell, Alex Blaszczyński, Nerilee Hing, 'Greater involvement and diversity of Internet gambling as a risk factor for problem gambling' (2015) 25(4) *European Journal of Public Health* 723, 727.

¹⁵³ Planzer, above n 98, 26.

¹⁵⁴ Livingstone, above n 129, 6.

¹⁵⁵ Haefeli, above n 121.

long the player has been gambling or how much money has been spent over a period of time.

Interactive messages create a break in play that encourages the player to consider their gambling at a specific point in time, which can lead to better decision making. By making the messaging personalised to the individual, interactive messages during sessions can often be more effective than generalised harm minimisation messages.¹⁵⁶

Online sports wagering platforms are uniquely placed to rollout comprehensive pop-up messaging capabilities as they have access to incredible amounts of personalised data that can be used to not only offer more personalised gambling products but to enhance the customer experience by promoting better decision making by players.¹⁵⁷

Well-designed messaging can be used to stimulate self-evaluation of personal behaviour by allowing the player to contrast the information that they are being provided with their own conceptions, for example their rate of expenditure. Presenting the information in this way “increases the probability that the information will not be automatically dismissed as not being personally relevant.”¹⁵⁸

Age restrictions

Limiting access of minors to gambling is a key responsibility for governments around the world. Notwithstanding the benefits that gambling can provide to an individual, it is wholly inappropriate to allow a minor to access gambling services.

Early age gambling can cause immediate harms to the minor, and increases the risk of early onset of problematic gambling behaviours.¹⁵⁹ Minors do not have fully formed neural capacities to make informed decisions, and this can lead to high prevalence of risk-taking behaviours.¹⁶⁰ And minors will seek to circumvent age restrictions, with research finding that the lower identity verification requirements is one of the drivers for people using offshore providers, indicating risks around minor gambling and money laundering.¹⁶¹

To stop minors accessing online sports wagering platforms, operators are required to impose age verification procedures. This can be required in legislation or licensing conditions, but the expectation is the same – that minors will not be able to gamble. For example, Nevada requires accounts to be verified in person before they can be accessed online, an effective check against minors using other people’s identity information to set up accounts.¹⁶²

In an online environment, age verification (and identity verification more generally) can be incredibly difficult as operators are reliant on the customer to provide information. There are limited opportunities to verify the authenticity of the player’s connection with the identity

¹⁵⁶ Ibid, 274.

¹⁵⁷ Livingstone, above n 129, 5.

¹⁵⁸ Blaszczynski, above n 110, 24.

¹⁵⁹ Ardeshir S Rahman, et al, ‘The Relationship Between Age of Gambling Onset and Adolescent Problematic Gambling Severity’ (2012) 46(5) *Journal of Psychiatric Research* 675, 677; Patricia Gómez, et al, ‘Minors and Online Gambling: Prevalence and Related Variables’ (2019) *Journal of Gambling Studies*, 2.

¹⁶⁰ Gómez, above n 159, 5; Blaszczynski, above n 110, 10.

¹⁶¹ Gainsbury, above n 56, 3005.

¹⁶² Harris, above n 5, 99.

documentation provided – operators rely on government identification and bank identification verification to protect against minors. Barring the use of biometric tools to verify identity, regulators rely on operators to abide by age verification requirements, and to use mystery shopper and complaints to ensure compliance.

In a federal system, there are opportunities to coordinate enforcement efforts as there are likely to be mutually advantageous benefits (e.g. identity security remains an issue across both state and federal governments). Regulators should require certain minimum standards of age/identity verification for licensed operators, which have goals of not only addressing money laundering issues but also protecting vulnerable minors.¹⁶³

Further, jurisdictions should look to develop common minimum standards, especially where there are differences in legal gambling ages. Consistent minimum age verification standards will improve operators' capacity to adhere to age restrictions at the point of supply, overcoming the risk that competing operators from other jurisdictions will only do the bare minimum rather than what is necessary to prevent vulnerable minors from gambling online.

In play betting

In-play betting allows players to place bets after an event has begun.¹⁶⁴ While most of the above strategies are considered “operator-based” harm minimisation,¹⁶⁵ regulation of in-play betting (and inducements) are “product-based” strategies that go to the core features of the product itself to limit the harms caused by gambling.

In play betting allows multiple contingencies to be offered for the one event, allowing bettors to gamble more frequently, and often with less time to assess the risks associated with the bet.¹⁶⁶ In play betting, along with other kinds of sports betting, often includes a perception of skill over the result, and allowing multiple bets to be placed on a single event can encourage loss chasing.¹⁶⁷ As a result, in play bettors are more likely to experience problematic gambling behaviours than other sports bettors.¹⁶⁸

Australia prohibits in-play sports betting (except in restricted circumstances) due to the impacts on integrity of sports and the risk of gambling harm. This position contrasts with the UK, which does not currently consider that in play betting poses such significant risks to the licensing objectives that it would justify prohibiting it.¹⁶⁹

The UK Gambling Commission's view is that the cheating and crime risks associated with in play betting are not so dissimilar from other forms of betting, which are able to be addressed

¹⁶³ Gainsbury, above n 83, 775.

¹⁶⁴ Gainsbury, above n 9, 5.

¹⁶⁵ Blaszczynski, above n 110, 17.

¹⁶⁶ Elizabeth A. Killick and Mark D. Griffiths, 'In-Play Sports Betting: a Scoping Study' (2018) 17 *International Journal of Mental Health Addiction* 1456.

¹⁶⁷ Jonathan Parke and Mark Griffiths, 'The role of structural characteristics in gambling' in G. Smith, D. Hodgins and R. Williams (Eds.), *Research and measurement issues in gambling studies* (Elsevier, 2007).

¹⁶⁸ Killick, above n 166, 1468.

¹⁶⁹ UK Gambling Commission, *In-play (in-running) betting: position paper* (Web Page, September 2016) <<https://www.gamblingcommission.gov.uk/PDF/In-running-betting-position-paper.pdf>>.

However note that this position may change following the comprehensive review into gambling conducted by the House of Lords (published July 2020) – see, Select Committee on the Social and Economic Impact of the Gambling Industry, *Gambling Harm – Time for Action* (House of Lords Paper 79 Session 2019-21).

through regulation rather than prohibition. While conceding that there are gambling related harm risks associated with this type of betting, the UK Gambling Commission considers it appropriate to address these risks through licensing conditions more generally, including obligations to engage with players exhibiting problematic gambling behaviour.¹⁷⁰

This paper recognises the risks associated with in-play gambling, both in the near continuous form of gambling it encourages and the risks to the integrity of sport (discussed further below) that justify regulators approaching authorisation for this kind of betting with care. Consideration of conditions on the offering of this kind of bet type is encouraged to ensure regulators are able to address the risks associated with this bet type. However regulators must be wary to approach this issue carefully to ensure that activity does not simply shift to offshore providers.

Easy to understand terms and conditions

One of the key features of the gambling industry is information asymmetry – operators understand the probabilities associated with their products better than customers (and regulators). This is an inherent feature of gambling, and something most customers willingly accept.

However, there are risks associated with the disjunct between the operator's and customer's understanding of the product. It allows operators to market products in ways that encourage people to think that they can control the odds of winning, or that the offers are too good to turn down. It also allows some operators to portray harm minimisation tools, such as pre-commitment and self-exclusion, in a way that discourages take up, such as by making the process overly complicated or presenting the tools as only for problem gamblers.

Australian operators have not sought to engage in such behaviour, but noting that there remains a risk that the terms and conditions of online sports betting service providers may still be overly complicated, regulators are working with operators to make their terms and conditions, especially for harm reduction tools, easier to understand.

Moving towards plain English terms and conditions can assist in supporting customers to make informed decisions by understanding how the product works. It allows customers to compare providers and different products and service – empowering them to make decisions that correspond with their desired outcome.

In addition, operators should be encouraged (or required where appropriate) to make terms and conditions easy to find on their homepage and throughout the gambling platform to ensure that customers are given ample opportunity to understand the terms of the gambling product before entering into a transaction.

¹⁷⁰ Ibid.

Taxation

Taxation of online gambling allows the market to undertake its activities within the framework established by government but recognises that redistributive tools are needed to ensure society benefits from the conduct and that the consequences of market activity are at least somewhat offset.

Government use taxes for different reasons: revenue generation, to disincentivise behaviour, offset externalities, or to seek to increase economic welfare more generally.

A gambling tax could be designed to address the particular externalities that come from production, such as problem gambling, to raise revenue that goes to funding non-gambling related initiatives, or create favourable conditions for certain industry participants over others, such as giving a smaller operator preferential rates to incentivise competition.

“Gambling is often legalised not for the possible benefits to consumers but for the economic rents that specific interests, especially governments can capture...Economic rents through taxes on online gambling might be difficult for policymakers to achieve.”^v

Incentive based taxes are used by governments across a range of industries, particularly those industries that are considered “vices” (tobacco, alcohol and increasingly in the United States cannabis). Where the tax falls into this category, it is used to discourage a person from participating in that activity by imposing an additional financial cost. While these products are addictive, the success of using price controls to discourage consumption indicates that for some consumers, price controls can influence behaviours, even where an addiction is present.¹⁷¹

These taxes normally operate as a cost of production that is directly passed onto the consumer, which works to encourage the consumer to use their purchasing power to reward those who keep costs down (i.e. those that are able to reduce the prevalence of the activity that incurs the tax or reduce overall costs) thereby shifting the market equilibrium to address the externalities.¹⁷²

Gambling taxes, however, operate in a way more akin to general income or company taxes – your tax bill is determined by your profits rather than as an excise of transactions. In this way, gambling taxes respond to the demand inelasticity of online gambling, which provides that the consumption of the good is not impacted by the tax rates as the costs are not seen as impacting on the product that is purchased.

This is clearly not the case, with online wagering companies factoring in profit margins into every market to ensure that not only is their risk profile effectively managed but that they are able to absorb the impacts of a flat or progressive taxation regime into their profits. For example, following the introduction of a point of consumption tax in Queensland (impacting operators licensed in other jurisdictions), some operators removed certain promotions and

¹⁷¹ Walker, above n 125, 4.

¹⁷² Erin Scharff, ‘Taxes as regulatory tools: An argument for expanding New York City’s taxing authority’ (2011) 86(5) *New York University Law Review* 1556.
<http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-86-5-Scharff.pdf>

inducements, likely leading to a fall in betting due to increased percentages in markets (and therefore a decline in value for bettors).¹⁷³

The use of a tax as a re-distributive tool in regulating industry is a recognition that a necessary by-product of allowing gambling to occur, is that there will be those for whom problem gambling is an issue.

Rather than only relying on industry to address this issue, the use of a tax on gambling revenue helps to offset some of these issues by channelling funding into demand reduction strategies for those gambling beyond their capacity.

A counterpoint to this approach is that the externalities felt by consumers (i.e. gambling related harms) are able to be factored into the transaction, and are reflected in the price customers are willing to pay.¹⁷⁴ Tax therefore is an additional charge on a consumer who has already factored in the harms into their decision to gamble.

This approach does not capture those externalities felt by people other than the consumer (those gambling harms felt by friends and family, the costs of regulating the sector, crime etc), and assume that the participant is making a rational decision (i.e. that they have perfect information and freedom to make the choice). This assumption is unlikely to hold up with regard to many gambling decisions.

Notwithstanding this, there are risks with only adopting an externalities-based approach to taxation. Governments that seeks to set tax rates on gambling activities based on the externalities associated with those activities will fast realise that they are unable to accurately quantify these externalities. Estimating externalities is also particularly difficult with online wagering, with the benefits realised, and harms felt, across state lines.

This approach may also require resetting taxation rates for other gambling products. Where a government seeks to impose a externalities-based tax on online wagering, it will likely need to reset its approach for other gambling products, such as lotteries which have relatively low gambling related harms but are taxed at high rates against gaming machines that have high gambling related harms but are often taxed at only modest levels. This will likely hit government revenue, with only a marginal chance that harms will be more effectively responded to.

Governments should instead adopt taxes based on revenue generation that is able to be directed towards addressing gambling related harms, as well as general community welfare and offsetting regulator costs.

Noting the relative inelasticity of demand for gambling products impacted by price controls (as opposed to general economic conditions), governments should seek to generate sufficient revenue to increase general economic wellbeing of citizens, and allow for the funding of services targeted at addressing gambling related harms, including counselling, advertising and education programs and innovation.

¹⁷³ Nathan Exelby, 'Point of Consumption Tax is already taking a toll on punters', *The Courier Mail* (Online at 29 April 2019).

¹⁷⁴ Kahlil S. Philander, 'A normative analysis of gambling tax policy' (2013) 17(2) *UNLV Gaming Research & Review Journal* 17, 21.

Regardless of the taxation motivation, governments need to ensure that the tax rates are appropriately set to allow operators to remain competitive while also ensuring that the underlying purpose of the tax (be it revenue generation or offsetting of harms) is realised.¹⁷⁵

How do taxes operate where operators can offer services from other jurisdictions?

Conceiving taxes in these terms is relatively straightforward when you are able to treat a jurisdiction as an independent eco-system (where the market's consumers and participants are solely based in one jurisdiction). However, when industry participants are able to develop and deliver products through an online environment controlling your tax base becomes more challenging.

Where governments do not factor in inter-jurisdictional competition when setting taxation rates, regulators put local operators at a disadvantage, as the local operators are required to absorb more costs than their competitors in low-taxing jurisdictions. For example, until the introduction of the point of consumption tax in Australia, operators in the Northern Territory were able to take advantage of lower tax rates than their competitors in New South Wales and Victoria, and were able to offer a greater variety of products as their costs were lower (and able to be invested in expanding their risk profile).

Regulators must look not only to design a tax that ensures that citizens are able to benefit from gambling activity (or have the harms offset) but is also a tax that corporations will pay. This requires setting taxation rates that are commensurate with the market, meet the regulators needs and stack up against community expectations.

Used in this way, tax allows the regulator to respond to the evolving nature of the online wagering industry without having to revisit the regulatory framework every few years - allowing innovation but continuing to factor in the consequences of the market in determining how to regulate.

Will you tax at the point of supply or the point of consumption?

A point of supply tax imposes a duty on the revenue/activity of an operator based in your jurisdiction irrespective of whether the consumer is also based in your jurisdiction.¹⁷⁶ Point of supply allows you to benefit from the economic activity generated by an operator based in your jurisdiction irrespective of whether the end user of the product (and by extension many of the harms) are also based in your jurisdiction.

This model of taxation is attractive for jurisdictions which attract betting service providers to base their operations locally and offer services to people in other jurisdictions.

In contrast, a point of consumption tax imposes a duty on all bets placed in that jurisdiction, irrespective of where the betting service provider is based. This in effect provides that the transaction occurs locally, and therefore the tax must be paid to the jurisdiction itself (even

¹⁷⁵ Harris, above n 5, 88.

¹⁷⁶ Assumes interstate gambling is lawful.

when the betting service provider is based elsewhere) – “a tax regime that does not favour or penalise operators based on their location.”¹⁷⁷

A point of consumption tax allows jurisdictions that have high wagering activity, but few betting service providers based locally, to generate revenue. A point of consumption tax relies on online wagering being lawful in both the originating and receiving jurisdictions, and the jurisdiction having sufficient regulatory controls to compel the betting service provider to pay that tax.

Adopting a point of consumption taxation model is particularly important where the jurisdiction is seeking to use revenue generated from the tax to offset some of the harms caused by the activity.

In a federal system that allows betting service providers to operate across state lines, a point of consumption taxation model makes sense – it ensures the revenue basis of the jurisdiction without over-reliance on particular operators (those based in the jurisdiction itself), such as South Australia as against the Northern Territory. When other jurisdictions do not have operators, and you are able to offer an exclusive service that attracts interest from other jurisdictions, a point of supply tax model is likely to create a stronger revenue model, such as New Hampshire as against Massachusetts.

A point of consumption tax addresses the particular concerns around adopting a mutual recognition (Interstate Horseracing Act) model in the US by guaranteeing jurisdictions their share of taxation revenue even where the betting is placed with an interstate operator on an event in another State, addressing concerns about the impacts of operators only basing themselves in jurisdictions with the lowest taxation rates.¹⁷⁸ For example, New York would not be required to create a licensing framework for operators, or police them, if they were licensed in a nearby jurisdiction, but could still tax their activity.

There is a risk, however, that where different jurisdictions take different approaches that many operators will be double taxed, making operations unprofitable. This risk will need to be managed as regulators design schemes that address the particular needs of their jurisdiction. For example, the *Revenue Act 1951* (US) initially imposed a 10% tax on wagering activity, in addition to state and other federal taxes. This made wagering unprofitable. However, when the federal gaming tax was dropped to 0.25%, it was not prohibitive on business activity notwithstanding the state taxes that were also imposed.

Flat or progressive?

The use of lump sum taxation (akin to a licence fee) is likely to be the most efficient for industry, as they can predetermine the impact of the tax on their balance books.

A flat tax rate on net wagering revenue imposes a set amount on all net wagering revenue, irrespective of the quantum. For example, DraftKings Sportsbook, the exclusive provider of sports wagering in New Hampshire, returns 50% of its net revenue to the State.

¹⁷⁷ New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 October 2018, 56 (Dominic Perrottet).

¹⁷⁸ Miller, above n 42, 170.

A progressive taxation model is similar to what many casino operators are currently subject to – the more profit generated, the higher the marginal tax rate.

A progressive tax system aids smaller operators, by giving them a competitive edge to the larger operators by reducing their costs until they can expand. This provides better competition in the market – potentially benefitting the customer. There is a risk that this approach will create disincentives to larger operators if the rates become too high.

Regardless of which model is adopted, governments should seek to adopt a consistent approach across jurisdictions to ensure consistency without imposing prohibitively high tax rates, which will make it easier for lawful operators to compete against illegal operators.

Even where rates are set appropriately, some industry participants may remain concerned that rates that are too high will give a competitive edge to offshore providers that are not required to pay taxes. This is a realistic concern, but the effective enforcement by federal governments around money being sent offshore to be used on unlawful wagering sites in the US and Australia reduces the risk that there will be a significant impact on domestic vs. offshore providers if taxation rates are seen as “too high”.¹⁷⁹

Jurisdictions should not seek to price match with lower taxing jurisdictions only to provide competitive neutrality from a tax perspective for licensed operators. Jurisdictions should not undervalue the benefit operators receive from being clothed in legality. They are able to offer services free from fear of being shut down and are able to draw in customers comfortable with gambling with a lawful operation. Notwithstanding this, consistency in taxation approaches will improve take up of licences, improve competition and margins for operators, and create an edge for lawful operators against offshore providers.

Will you tax to pay for a certain activity or for general revenue?

Taxation is a regulatory lever that governments can pull on to ensure that the community benefits from the economic activity that happens in their community. Taxation also allows Governments to offset the impacts that economic activity causes – in this case gambling related harms.

Understanding what your taxation revenue will go towards helps to clarify how to design your taxation scheme, how to contrast yourself with other jurisdictions, and how to engage with industry.

In circumstances where industry is taxed and that tax goes into consolidated revenue, governments are able to spend that money in whatever way corresponds with the priority of the day – whether it be education, health or to pay off public debt. In this case, there is risk that gambling operators will argue in the same way that any enterprise will – taxes are too high and are hindering growth.

Some governments in federal systems have adopted dedicated levies that are directed towards harm minimisation. For example, New South Wales directs not less than \$5 million per year from its point of consumption tax on online wagering to measures targeting gambling harms through its Responsible Gambling Fund.

¹⁷⁹ Philander, above n 174, 22.

Putting aside the value that this budget allocation brings generally, which is significant, adopting a dedicated levy to respond to harms is a targeted way of addressing the shortcomings of betting service providers operating in a federal model.

The levy ensures that local regulators can impose obligations on industry participants to address the gambling related harms caused by their conduct, regardless of where the operator is based. This creates regulatory neutrality between local and out of state providers, as well as improves the regulator's overall capacity to manage harms.

One of the risks associated with allocating money directly to certain functions automatically (such as through a statutory requirement) is that it can lead to inefficient allocations of revenue.¹⁸⁰ This can be seen in some automatic tax deductions available to gambling companies for the delivery of responsible gambling measures without a need to be accountable for the harm reduction benefits of those measures.

While there are good intentions behind the allocation of funding from gambling taxation revenue to gambling harm minimisation activities, this needs to be treated carefully by government to ensure that the allocation is outcomes driven.

Some jurisdictions have been able to adopt this approach, by allocating funding into a specific agency or body, which then allocates that money to specific projects. This approach is effective where the body itself is held to set standards, including clear accountabilities and target outcomes. The NSW Responsible Gambling Fund is an example of this, with the Fund developing a Strategic Plan,¹⁸¹ with regularly reporting against strategic goals.¹⁸²

Are there agreements between operators and other bodies around revenue sharing that will limit tax receipts?

Governments must also be alive to the calls from sporting bodies to receive a share of bet receipts. Sporting bodies will seek support from government to recover a share of revenue generated from sports wagering to build the sport and cover the costs associated with integrity (discussed further below).

When determining tax rates, governments must take into account the amount that will be paid to sporting codes and the federal government in determining the appropriate tax rate. This will ensure that the tax rate does not make it unprofitable to run an online sports book.

What concessions, if any will be offered to industry

Where governments employ taxes as a regulatory tool to address negative externalities, industry is given an incentive to address those externalities in an effort to reduce tax liability. For example, liabilities under a tax on carbon emissions will be reduced as the firm reduces its carbon emissions, even if its production increases.

¹⁸⁰ Roukka, above n 81, 2.

¹⁸¹ Responsible Gambling Fund, *Office of Responsible Gambling's Strategic Plan for 2018 – 2021* (Web Page, 2018) <<https://www.responsiblegambling.nsw.gov.au/about-us/strategic-plan>>.

¹⁸² Responsible Gambling Fund, *Progress Report 2018/19* (Web Page, 2019) <https://www.responsiblegambling.nsw.gov.au/_data/assets/pdf_file/0008/283940/ORG_Progress_Report_2018-19.pdf>.

This approach could be applied to gambling companies as well. Where gambling firms are able to reduce gambling, related harms associated with their conduct, they could be provided tax incentives to ensure that they benefit from addressing negative externalities. This would create greater corporate social responsibility by allowing firms to improve profits where they reduce harms.

In theory this approach makes sense and is consistent with how many other industries are currently treated. However, there is insufficient information available to assess the current level of gambling related harms precisely, the contributions made by a particular firm to those harms, and to measure whether actions by that operator result in reduced gambling related harms.

Many gambling industry participants invest heavily in responsible gambling measures, such as pre-commitment, counselling, training for staff and advertising campaigns on the risks associated with gambling. However, there are rarely evaluations of the impact of these campaigns – empirical data linking the actions of the company to a reduction in gambling related harms.

While this is a high bar to clear, as the benefits may be limited to certain cohorts, may take time to be recognised, or are limited to slowing increases in gambling related harms rather than decreasing them, it is critical that, where governments offer incentives to online wagering companies to reduce their tax bill, this is tied to outcomes rather than outputs.

Where industry is unable to provide evidence on the benefits of their initiatives, governments should retain the revenue generated from industry activity and redirect it into those programs and initiatives that are effective.

Underlying assumptions that need to be factored into how jurisdictions go about answering these questions

The above questions provide a useful starting point to consider how to maximise returns from wagering in a federal system. There are, however, a number of assumptions that need to be addressed.

Firstly, the above model assumes that all participants are licensed. A licensing system allows the regulator to identify and track all market participants, including through requiring certain reporting obligations to be satisfied. It assumes that licensing controls, and other regulatory sanctions, are sufficient to ensure compliance with taxation obligations.

In this licensing-based model, it also assumes that jurisdictions cooperate to minimise duplication of taxation. While it is widely accepted that operators will often be required to pay tax to both a state and federal government (e.g. local excise tax to state and general income to federal), jurisdictions should work together to minimise double taxation over the same kind of conduct.

Australian jurisdictions cooperated in this way in the development of the point of consumption tax by:

- using existing interjurisdictional forums to share information on wagering activity, revenue and impacts;

- circulating draft approaches to other jurisdictions for comment to ensure final proposals reflected all views; and
- coordinating efforts to engage with industry in a structured way to ensure deliberations were transparent.

Secondly, the discussion of taxation in a federal system assumes that the federal government is taking steps to reduce the activity of offshore providers, which allows residents to place bets with overseas providers, and represents revenue leakage. Revenue generated by offshore providers, who are not licensed domestically, and are operating unlawfully, cannot be taxed (at least not easily).

These operations not only represent revenue loss for local governments, but also create a competitive advantage for offshore providers over domestic providers who are required to pay taxes on their local operations.

Regulators should coordinate efforts across jurisdictions to ensure that even where they are encouraging competition between betting service providers licensed in their jurisdiction that they collaborate to target offshore providers. This can include by empowering a federal regulator to protect against foreign providers harvesting domestic markets, even where the federal government does not have a further role to play in gambling regulation.

Integrity

One of the main concerns raised by sporting codes to the legalisation of sports wagering is the risk to the integrity of sport.

Sports betting creates value in sporting outcomes outside of the sport itself. This creates opportunities for individuals other than sporting codes and players to make money from sports win or loss. This of and by itself is not an issue, as sports inevitably have winners and losers. The risk of sports betting is that it creates incentives to have the outcomes of games determined by something other than the players on the field.

Match fixing is a risk for all sports in all countries. It does not discriminate between professional and amateur, men and women, team or individual. There are countless examples of where athletes, coaches and managers have been caught out engaging in match fixing with others and independently in order to enhance value in sports betting markets. The names of the most famous are well known, such as the 1919 Black Sox World Series Scandal, Tim Donaghy and the NBA and the 2010 Pakistan cricket spot fixing.

The concern for the regulator is the ones that go unchecked. Match fixing that is not identified before it occurs not only harms confidence in sports betting markets but threatens community confidence in how sports are being run. Failure to pick up these criminal acts may lead to a loss of confidence in sports betting, sports and the regulator.

With the expansion of online sports wagering, especially offerings by offshore providers, there are now increased risks that existing mechanisms targeting integrity in sport may not be sufficient.¹⁸³ This is especially so when state regulators seek to work with national competitions.¹⁸⁴

State regulators are particularly effective at ensuring integrity of gambling in land-based operations. However as gambling shifts online, state regulators must work with other actors, including sports organisations, other state gambling regulators and federal authorities, to provide whole of sector oversight of sports integrity.

Building a regulatory framework based on cooperation and coordination between jurisdictions allows jurisdictions to establish a common purpose and a want to collaborate, even where the regulatory costs are borne by a different jurisdiction to the one realising the regulatory benefit.

Protecting the integrity of sport is one of the main arguments put forward by proponents of a federal regulatory model for online sports betting. Federal regulators are able to take a whole of country approach to sports integrity, establish a single arrangement with codes and wagering providers, and leverage off the existing laws available to federal enforcement agencies.¹⁸⁵

Federal regulators are also better placed to engage with regulators and law enforcement agencies from other countries to collaborate on protecting the integrity of sporting contests –

¹⁸³ James Wood, *The Review of Australia's Sports Integrity Arrangements* Wood (2018), 7 ('Wood Review').

¹⁸⁴ Miller, above n 42, 166.

¹⁸⁵ Ibid, 172.

something particularly important based on the take up of betting on sporting contests happening in other countries.

What kind of mechanisms could be used?

In designing a framework to address sports integrity, regulators must be mindful of the size/value differential between lawful markets and offshore markets. The risks associated with integrity breaches are higher in offshore markets as they are unregulated or with regulators having limited visibility of betting activity. They do not have relationships with regulators, nor are they required to abide by regulatory obligations. This makes it harder to identify cheating at gambling offences.

“[Asia has] created a low-risk, high-profit environment for the manipulation of sports competitions (match-fixing) at all levels [in Australia], but particularly at subelite levels where there is less monitoring and visibility, and also an attractive avenue for organised crime to engage in money laundering.”^{vi}

Regulators must understand this value differential in order to design the right kinds of regulatory tools that will pick up breaches. Regulators cannot rely too heavily on licensing alone to incentivise markets to address cheating offences. Rather, regulators must take advantage of the other compliance levers available to them to cooperate with other jurisdictions and sporting codes to crack down on integrity risks, especially as sports wagering takes on an increasingly large portion of the world gambling market.

Jurisdictions exploring opening up sports wagering must ensure that they build relationships with sporting codes.

Sporting codes have an intimate understanding of how sports should be played and are often best placed to identify when under-handed tactics are used. Sports have a vested interest in promoting integrity, as failure to do so will impact on the value of the sporting code for broadcasters, ticketed fans and merchandise. People will not support a sporting code that allows cheating.

Many sporting codes are alive to the risks of cheating for gambling purposes, and have already started to put in place internal protections to ensure players, coaches and teams understand the importance of not becoming involved in cheating at gambling, while also ensuring that you are proactively creating an environment where incentives to fix matches are removed.

A federal integrity body?

To support sporting codes, Australia has established the Sport Australia, National Integrity of Sport Unit (NISU), and the Australian Sports Anti-Doping Authority (ASADA), which have developed national strategies that deter, detect and respond to corrupt behaviour, including match fixing. Following a national review of sports integrity risks, ASADA, NISU and the integrity elements of Sports Australia have now been consolidated into Sports Integrity Australia – a federal agency operating as a national sports integrity commission, with a National Sports Tribunal proposed following a two year trial.¹⁸⁶ The new agency will gather

¹⁸⁶ Wood Review, above n 183.

and act on intelligence about match-fixing and corruption across Australia,¹⁸⁷ and is proposed to oversee any national match-fixing offences.¹⁸⁸

The US has not established overarching regulatory authorities that sporting codes are accountable to, and instead relies on codes self-regulating against these issues.¹⁸⁹ Sporting codes are required to create and maintain their own integrity strategies, with specific rules addressing particular risks around the expansion of sports betting.

For example the NCAA Football Rules (also adopted by the NFL) prevents teams going for an extra point or 2 point conversion at the end of a game where it will not impact the outcome of the game (as the touchdown puts the team ahead).¹⁹⁰ This rule makes sense from a time and people management perspective, but also helps protect against teams going for extra points where there may be financial benefit (e.g. point spread bets).¹⁹¹

Notwithstanding the work of state regulators and sporting codes in the US, there continues to be calls for a national sports integrity framework.¹⁹²

The drawbacks of this approach include the potential loss of the expertise in gambling regulation developed by States if the federal scheme is not well designed; expertise that is particularly honed in how local betting activities occur. While many US jurisdictions are grappling with how to design a sports wagering industry in their State, Australian States and some US States have significant experience in overseeing the gambling industry.

There are benefits to federal oversight of integrity, and sports wagering more generally, but these benefits can be just as readily achieved through developing better cooperation between states, such as the Australian CEOs Forum, U.S. State Gaming Regulators Forum and the newly established U.S. State Sports Betting Forum through the University of Nevada, Las Vegas.

An alternative model would be to invest regulatory responsibilities for sports integrity with a federal agency while retaining wagering integrity (and general oversight of the industry) with state regulators.¹⁹³

This would allow the coordinating benefit of a federal regulator with national sporting bodies, while preserving decisions around local sports betting regulation to local governments. The federal regulator would be able to pool intelligence from across the country, as well as engage with foreign regulators on investigations.

¹⁸⁷ Paul Sakkal, Powerful new regime to tackle match-fixing, cheating in Australian sport, *SMH* (Online at 21 January 2019) <<https://www.smh.com.au/politics/federal/powerful-new-regime-to-tackle-match-fixing-cheating-in-australian-sport-20190130-p50umv.html>>.

¹⁸⁸ Jamie Nettleton, Joseph Abi-Hanna and Despina Bouletos, *Australia – Sports Integrity – The Government Response to the Wood Review* (Web Page, 3 April 2019). <<https://addisons.com/knowledge/insights/australia-sports-integrity-the-government-response-to-the-wood-review/>>.

¹⁸⁹ Harris, above n 5, 81.

¹⁹⁰ *2020 NCAA Football Rules and Interpretations*, rule 8, section 3, article 2(a) NCAA rules.

¹⁹¹ Thomas Lasalle, 'Why the NCAA should amend its stance on sports betting' (2019) 10 *Gaming Law Review* 752, 757.

¹⁹² Miller, above n 42, 172.

¹⁹³ Wood Review, above n 183; Miller, above n 42, 175

However, there is a risk that duplications of effort, additional regulatory costs to government and the diverse set up of state wagering frameworks would hinder addressing integrity more generally unless the coordinating mechanisms identified above are developed as part of any division of responsibilities.

Integrity agreements and mutual obligations

Maintaining integrity in sports is also important for the bottom line of sports betting operators, as it ensures that they are setting their markets according to honest competition and are not misled in setting odds or paying out wins. This creates a mutual obligation between sporting codes and betting service providers “to detect, prevent, and eliminate match fixing.”¹⁹⁴

Australian sport wagering regulatory frameworks are alive to this mutual obligation and have sought to formalise the relationship through the use of mandated integrity agreements between sports betting service providers and “sports controlling bodies”.¹⁹⁵ The requirements of these agreements are largely consistent across jurisdictions, and the key elements are:

- measures that will be used to prevent, investigate and assist in prosecution of match fixing and other cheating at gambling activities, including sharing of data and cooperation in enforcement;
- funding that will be provided by the sports betting service providers to the controlling body to support these measures;
- how information will be shared between the betting service provider and the controlling body; and
- where the betting service provider is proposing to offer a new contingency on a sport, agreement on how the controlling body will be consulted before an application is made to the relevant regulator.¹⁹⁶

For US regulators, one of the key issues around the adoption of integrity agreements is whether they must also be mandated by government to be successful. Getting buy in of the leagues is critical to ensuring the ongoing viability of sports wagering in the United States.¹⁹⁷

Many sporting bodies are already engaging in agreements with different betting service providers to extract commercial benefit from betting occurring of their sport.¹⁹⁸ Major codes have already reached agreements with betting operators (NBA, MLB, NHL, and Major League Soccer have each struck official partnerships with MGM Resorts, while the NFL announced its own deal with Caesars Entertainment).¹⁹⁹

But these sporting bodies are also jealously protecting their data generation and intellectual property because of the risk of sharing this with third parties to derive value without ensuring that value also flows to the sport itself. While sports will continue to push for protections of their images and control of the use of information generated by the leagues (data), it may be

¹⁹⁴ Wilsenach, above n 109.

¹⁹⁵ The organisation that is responsible for regulating that sport (e.g. National Rugby League or Cricket Australia).

¹⁹⁶ See, e.g., *Betting and Racing Act 1998* (NSW), s 18A.

¹⁹⁷ Miller, above n 42, 176-183.

¹⁹⁸ Harris, above n 5, 91.

¹⁹⁹ Mashayekhi, above n 19.

difficult in some cases due to the First Amendment and case law that appears to water down the enforceability of payment for schedules, results etc.²⁰⁰

To resolve these concerns, US sporting leagues are seeking either a share of revenue generated from betting on their competitions (an approach adopted in Australia), or a more generic integrity fee, which would be used to cover the cost of protecting against match fixing and other cheating. Some jurisdictions are starting to listen to these concerns.²⁰¹

But still, there is a push to develop standardised integrity agreements to ensure that the costs imposed on leagues to prevent cheating are at least partially offset from the bodies that benefit from fair and transparent gambling.

Current proposals are looking at an integrity fee of between 0.25% - 1% of wagers, paid directly to the league regardless of the sports betting service provider's revenue.²⁰²

It is appropriate that sporting codes and betting service operators collaborate to promote integrity, but the current proposals for integrity fees of around 1% (noting it has dropped down to 0.25%)²⁰³ would impose significant financial burdens on wagering operators, without a clear indication of how that figure was arrived at, i.e. for close to \$2 billion a year across all codes, will sporting codes spend that quantum of money every year on protecting integrity and if so, is this necessary and should gambling operators be solely responsible for covering this cost.²⁰⁴

“Will the sports leagues get their “integrity fee”? Teams have the rights to their games; but, they do not have any rights to the statistics generated by their games. You cannot copyright facts. So, the leagues have no real bargaining power, because they have nothing to sell. Still, it would be a good idea to have teams as active partners for issues like standardizing the timing of the announcement of results and, yes, increased integrity.”^{vii}

Regulators need to determine whether they consider the risks significant enough to impose an additional cost on sports betting operators, especially in circumstances where the benefits will be realised mainly by the sporting codes (getting the benefit without having to pay for it) while local betting service providers will cover the cost for what may be out of state sporting competitions (e.g. Iowa does not have any teams in the main codes).²⁰⁵

The Australian model shows the benefits of mandating that agreements be struck while allowing the codes and operators to develop the details. However, as US sporting codes are mature and savvy operators, allowing individual agreements to be struck without government involvement may still achieve the desired outcome, noting concerns around the costs to industry from an additional integrity fee.

²⁰⁰ See, e.g., *National Football League v. Governor of Delaware*, 435 F. Supp. 1372 (D. Del. 1977) on scores and schedules; *National Basketball Association v. Motorola*, 105 F.3d 841 (2d Cir. 1997) on copyright protections over basketball games.

²⁰¹ Wayne Parry, 'US sports leagues split on how to monetize sports betting', *AP News* (Online at 5 February 2019) <<https://apnews.com/86888142961d45a191cf00d1f026f302>>.

²⁰² Lasalle, above n 191, 755.

²⁰³ Mashayekhi, above n 19.

²⁰⁴ Miller, above n 42, 180.

²⁰⁵ Wayne Parry, 'US sports leagues split on how to monetize sports betting', *AP News* (Online at 5 February 2019) <<https://apnews.com/86888142961d45a191cf00d1f026f302>>.

A proposed approach

An alternative model, which could address both parties concerns around the costs of the model, would be to explore using existing taxation arrangements. Operators, sporting codes and State Governments could look to develop a model that uses the existing 0.25% tax rate under the federal *Revenue Act 1951* to cover the cost of integrity.

Under this model, federal funds would be distributed to sporting codes based on the relative share of the legal sports wagering market. This would encourage sporting codes to work with wagering operators and regulators to push customers into the legal market as it would increase the revenue take under the federal scheme; increasing the share distributed to sporting codes.

This approach would also remove the risk of inconsistent approaches between jurisdictions and codes and would not represent an additional financial cost to operators who are already subject to this charge. It does not seek to subvert the authority of States to oversee gambling regulation, but rather builds on the existing framework. Convincing Congress to forgo this revenue appears to be the key sticking point.

Using the existing federal tax, would allow a standardised approach across all jurisdictions creating regulatory consistency that will create a level playing field for all sporting codes and jurisdictions. It would remove a headache for regulators and could allow additional funding to be made available for gambling harm minimisation initiatives or support amateur sports as a check against integrity issues arising in those competitions.

Regulate certain high-risk contingencies

As online sports wagering operators look to capture market share, operators look at opportunities to differentiate their offerings from their competitors. One of the ways that they seek to achieve this is through offering new kinds of contingencies. As operators are able to offer more and more contingencies on a certain event, it becomes harder for regulators and sporting codes to manage the risk of cheating as the number of variables that need to be tracked grows exponentially.

One of the levers that regulators can pull on is to limit what kinds of betting contingencies betting service providers are able to offer, either through legislation, licence conditions and by mandating that markets are determined in consultation with sporting codes (an approach taken in Australia, Italy and France). This approach is intended to manage the risks associated with match fixing, as well as normalisation of gambling.²⁰⁶

Australian jurisdictions have taken different approaches with this issue, but underpinning approaches is a consistent obligation on sports betting providers to engage with the sporting code before offering a market.

²⁰⁶ Ben Van Rompuy, 'The Odds of Match Fixing: Facts & Figures on the Integrity Risk of Certain Sports Bets' (January 2015) *International Sports Law Centre* <<https://www.asser.nl/media/2422/the-odds-of-matchfixing-report2015.pdf>>.

Some organisations, such as the NFL, are seeking to put the “kibosh” on certain betting contingencies out of concern for the impact it will have on the susceptibility of the league to match fixing.²⁰⁷ These include limiting the use of spot betting.

Spot betting refers to “gamblers staking their money on the minutiae of sporting encounters.”²⁰⁸ This can cover anything from the number of penalties awarded, the length of extra time or what colour Gatorade will be poured on the coach at the end of the game. One of the risks of spot betting from an integrity perspective is that it will often involve betting on something that has limited to no impact on the outcome of the game. This makes it harder for sporting codes to regulate as they are focused on ensuring the integrity of match outcomes and often do not have the capacity to delve down into the minutiae.

Spot betting is susceptible to cheating as it allows players, coaches or support staff to alter a small element of the game for significant financial benefit. The risks are higher in the lower levels of the sports where prize money is lower and there are more opportunities to engage in cheating, especially in individual engagements (such as missing the next putt or double faulting on the next serve).²⁰⁹

Prohibiting spot betting is the easiest way to address this issue. It removes the risk by removing the incentive. The risk, however, of not allowing sport betting to be offered by licensed operators in the jurisdiction is that they will seek out operators licensed in other jurisdictions, or unlawful operators.

Instead, regulators should leverage their inter-jurisdictional forums with state and federal enforcement agencies to proactively identify those engaged in this kind of behaviour. Where spot betting is allowed there must also be engagement with the sporting organisations to share information about suspicious betting activity to ensure that wagering operators, regulators and sporting organisations are proactively addressing integrity risks. This could include proactively providing information on surges on betting on certain contingencies to inform greater oversight by sporting codes. Integrity agreements are a useful way of achieving this.

Regulators should also consider whether there should be limits on the kinds of sports that can be bet on. Limiting sporting events can be driven from an integrity perspective but also due to concerns of normalising gambling behaviour, a particular risk for minors. While the risk of normalisation of gambling more generally is discussed below, if efforts are not taken to limit the normalisation of gambling to minors competing in sports, there is a risk that they will be more susceptible to offers of cheating in exchange for financial benefit. This issue has been explored in Australia through the prism of esports.

Case study – esports

Esports is the organised form of competitive computer gaming, which allows individuals and teams to play computer games against one another in live and online tournaments.

²⁰⁷ Mike Florio, *NFL wants official data used for gambling, restrictions on certain types of bets*, (Web Page, 26 September 2018) <<https://profootballtalk.nbcsports.com/2018/09/26/nfl-wants-official-data-used-for-gambling-restrictions-on-certain-types-of-bets/>>.

²⁰⁸ BBC, *Spot betting: How does it work?* (Web Page, 31 August 2010) <<https://www.bbc.com/news/uk-11137067>>.

²⁰⁹ Mashayekhi, above n 19.

While the term “esports” is an easy reference point for regulators, esports actually represents all sports played through electronic platforms. In this way it is important to understand that treating all “esports” the same would be similar to treating all ball sports the same.

Normalisation of gambling to minors

Viewership of esports is becoming increasingly mainstream with an estimated 214 million viewers globally in 2016, 303 million in 2018,²¹⁰ and potentially as high as 550 million by 2021.²¹¹ Esports has been able to leverage this viewer interest into participation rates that eclipse most traditional sports. Just over 40% of esports viewers are also playing at least once per month.²¹²

This wide viewership, especially amongst minors, has led to concerns amongst some Australian jurisdictions around the normalisation of gambling to minors where esports betting is allowed. This concern stemmed from high rates of participation and viewership amongst minors. Allowing betting service providers to offer markets on esports may in turn lead to the increased gambling advertising on esports, as well as minors conflating esports betting (such as odds, contingencies etc.) with esports.

This is exacerbated when the online nature of the sport is factored in, which allows for more interactive content to be communicated more readily to minors who are often accessing the material without parental supervision. This issue is a live one, with a report by Nielsen finding around 17% of eSports fans were aged between 14 and 17.²¹³

However, regulators must be careful to adopt a consistent approach with all sports around the normalisation of gambling. To take a differentiated approach between esports and more traditional sports around issues such as advertising, contingencies and the like due to a concern around the normalisation of gambling to minors, regulators must have a firm evidence base to detail why the risks are elevated in one sport in contrast to another. This approach would be in addition to any rules around advertising detailed further below.

Threats to the integrity of esports

Following the October 2015 arrest of 12 people in South Korea for match fixing related to betting on esports events, a risk analysis of the threats to the integrity of esports was commissioned by a group of concerned industry stakeholders (which later formed the Esport Integrity Coalition Limited (ESIC)). The risk analysis found that the four most significant threats to the integrity of esports are:

- cheating to win using software cheats;
- online attacks to unlawfully slow or disable an opponent;

²¹⁰BITKRAFT eSports Ventures, ‘eSports 101 A Deep Dive into the World of Competitive Video Games’ (Web Page, 2017) <http://esportsobserver.com/wp-content/uploads/2017/01/Esports_101-whitepaper-BITKRAFT.pdf>.

²¹¹ Newzoo, *Free 2018 Global eSports Market Report* (Online, 2018) <https://resources.newzoo.com/hubfs/Reports/Newzoo_2018_Global_Esports_Market_Report_Excerpt.pdf?>.

²¹² Battlefy, *Why do people watch eSports?* (Blog, 28 July 2016) <<https://blog.battlefy.com/why-do-people-watch-esports-6ad7e8ec58b9>>.

²¹³ Nielsen, *Exploring esports fans in Australia* (Web Page, 13 March 2018) <<https://www.nielsen.com/au/en/insights/report/2018/exploring-esports-fans-in-australia/#>>, 7.

- match fixing; and
- doping.²¹⁴

While these threats and challenges have been identified, and various bodies have been established to promote rules, codes of conduct and ethics, the esports industry as a whole has been unable to react in a cohesive manner.

Lack of single governing body creates regulatory risks

Maintaining public confidence in the integrity of esports as an entertainment and betting event relies upon the industry recognising the inherent integrity risks and proactively seeking to mitigate them by applying best practice from other sports.

Unlike traditional sports, there are currently no national or international bodies which are widely recognised as “the” controlling body for esports. This is because every eSport game operates differently, with different structures and approaches to controlling the game. The game developers and publishers, tournament providers and even broadcasters have in many cases acted as pseudo-controlling bodies for esports tournaments, while formal esports controlling bodies have been slow to develop.

By not having a single governing body, the industry currently lacks a formal governance and leadership structure that has the authority to develop, implement and regulate a minimum standard of integrity safeguards.

Several bodies have emerged in Australia in an effort to fill this role, including the Australian Esports Association, a member of the International e-Sports Federation (IeSF), and Australian operations of the ESIC, which is seeking to be seen as the governing body that takes responsibility for the disruption, prevention, investigation and prosecution of all forms of cheating, including match fixing and doping.

The ESIC has information sharing Memoranda of Understanding with the Nevada Gaming Control Board, UK Gambling Commission, Isle of Man Gambling Supervision Commission and Malta Gaming Authority. ESIC also has partnerships with online bookmakers, pinnaclesports.com and Unikrn.

Despite having no governing body, enforcement of intellectual property rights has been an effective integrity safeguard

One of the key risks for esports is its online presence. However, this has also been one of its strengths in responding to integrity risks. With esports only making up a small portion of game publishers’ overall market, there is a vested interest in ensuring integrity protections are in place to prevent cheating, for example by hacking or software cheat.

Publishers are proactive in taking steps to protect their image, including by:

- imposing lengthy bans on players found cheating to prevent them from participating in the game in any form;
- investing in new technologies to identify and respond to new hacking techniques before they impact on the game; and

²¹⁴ I Smith, Esport Integrity Coalition, *Threats to the Integrity of Esports – A Risk Analysis* (Web Page, February 2016) <http://www.esportsintegrity.com/wp-content/uploads/2016/04/ESIC_Threat-Assessment_Apr-2016.pdf>.

- building predictive data analytics that build an evidence base of how every player plays the game (for example by measuring click speeds or how they normally play a certain map) to allow the publisher to quickly respond to match fixing risks.

What the issue of esports has shown, from an integrity perspective, is that relationships between sporting codes (whatever form they take) and betting service providers can be critical, but that often the sporting codes have vested interests in protecting the value of their reputation. This reputation has a value that far exceeds the value of any gambling revenue that could be generated.

For regulators, understanding esports will be critical to understand how younger players gamble, as it is a rapidly growing market that promises to be one of the largest markets for sports betting. There has already been a significant increase in market share as a result of the hiatus of other sporting competitions due to COVID-19,²¹⁵ with many bettors engaging with offshore providers where regulators and sporting codes are unable to map out and address integrity risks.

²¹⁵ Nettleton, above n 74, 2.

Advertising restrictions

Advertising is often seen as a critical first step after legalisation to securing cultural legitimacy, i.e. acceptance by the community of the legitimacy and/or value of gambling.²¹⁶ The ability to advertise is also seen as one of the key benefits of being licensed – an opportunity to advertise in a way that unlicensed competitors cannot. For online wagering, the expansion of the market has resulted in a rapid proliferation of advertising supporting its participants.²¹⁷

Advertising allows operators to distinguish themselves from their competitors to secure market share in an increasingly competitive environment. In considering the impacts of information asymmetry between industry and consumer, advertising often has a positive impact in allowing consumers to increase awareness of what the market can offer, including products, price and delivery.

Advertising to domestic markets allows an operator to distinguish their offerings (e.g. markets, offers, products) from their licensed and unlicensed competitors to secure brand recognition and market share, as well as encourage consumers to gamble in the first place.²¹⁸

Where a product has been made legal, there is a reasonable argument that a provider of that product should be able to advertise that product to the market to attract customers.

However, while this makes sense in a perfect market, where there is market failure, such as information asymmetry between provider and consumer, or negative externalities are not addressed by industry alone, it is reasonable that the regulator seeks to carve out a role for itself. In many cases, whether or not online sports wagering can be advertised will come down to whether the underlying activity itself is properly regulated.²¹⁹

While industry participants should be encouraged to provide the best deals for customers, this should not come at the expense of addressing the harms that flow from the market's operation. Critics of gambling advertising have argued:

“there is evidence that the principal use of advertising for products ... is, apart from recruiting new consumers, to ‘normalise’ the product and associate it with enjoyable and desirable activities, such as sport.”²²⁰

For those who have existing problematic gambling behaviours or are likely to have tendencies towards problematic gambling behaviour, gambling advertising may exacerbate the likelihood of their experiencing gambling related harms. This could include being induced to gambling more frequently or in greater amounts, or gambling on contingencies that they would not otherwise have.

²¹⁶ Blaszczynski, above n 110, 68.

²¹⁷ Hing, above n 32, 686.

²¹⁸ Nerilee Hing, Alex Russell, Anna Thomas and Rebecca Jenkinson, ‘Wagering Advertisements and Inducements: Exposure and Perceived Influence on Betting Behaviour’ (2019) 35 *Journal of Gambling Studies* 793, 794.

²¹⁹ Alan Budd, et al, *Gambling Review Report* (July 2001) (the “Budd Report”).

²²⁰ Livingstone, above n 129, 7.

More concerning for a Government that is seeking to legalise online wagering, or to continue to support its ability to advertise, are the risks associated with the normalisation of gambling to minors.

How to design a model

This is an issue that regulators around the world are dealing with to explore ways to respond to the proliferation of gambling advertising.²²¹ There are a number of approaches available to governments looking to legalise sports betting:

- limited to no restrictions (e.g. Ireland);
- prohibit certain kinds of advertising, (e.g. Australia and Poland);
- prohibit certain kinds of advertising through requiring pre-approval (e.g. France); and
- outright prohibitions of any advertising (e.g. Italy).

In a federal system, there will usually be a division of responsibilities with respect to advertising between state and federal governments. Where a federal government seeks to cover the field (i.e. provide a definitive model of regulation), states will be limited in their ability to influence regulation. However, where co-regulatory models are adopted, states and federal governments can adopt independent or cooperative models to regulate advertising.

In Australia, for example, the Australian Communications and Media Authority and Ad Standards operate under federal authority, which imposes rules on how gambling advertising is able to be published, including limitation around ads during children's programs and live sporting broadcasts. States are left to determine the lawfulness of the content of that advertising, including prohibitions on misleading and socially irresponsible gambling advertising.

In developing rules around what kind of advertising is allowed, regulators are able to draw on an extensive research that explains the impacts of gambling advertising on individuals, which range from finding clear causative links between gambling related harms and advertising, and those with more circumspect findings.

For regulators, any decision on whether to restrict gambling advertising must be informed by developing an understanding of the likely harms caused by the advertising to inform how restrictions are designed.

Normalisation and impact on minors

A growing body of evidence draws a troubling link between gambling advertising and the normalisation of gambling to minors, often due to the increasing saturation of gambling advertising, particularly sports betting advertising.

In the United Kingdom between 2005 and 2012, gambling advertising on television increased from 0.5% of overall content to 4.1% (over 800% increase that increased total ads from around 152,000 to over 1.39 million adverts).²²²

²²¹ See, e.g. Jennifer Felsher, Jeffrey Derevensky, and Rina Gupta 'Lottery playing amongst youth: Implications for prevention and social policy' (2004) 20(2) *Journal of Gambling Studies* 127.

²²² Ofcom, *Trends in Advertising Activity – Gambling* (Web Page, November 2013)

<https://www.ofcom.org.uk/_data/assets/pdf_file/0026/53387/trends_in_ad_activity_gambling.pdf>.

Canadian research has indicated high recognition rates of seeing gambling advertising amongst 10-18 year olds, with over 90% remembering seeing gambling advertising and almost 40% indicating it was likely to encourage them to gamble.²²³

In Australia's main media markets (Adelaide, Brisbane, Melbourne, Sydney and Perth) in 2016 there were around 137,000 gambling advertisements over 5,000 unique programs on free-to-air alone.²²⁴ The majority were during daytime hours (6am – 8:29pm). In the 12 months to April 2014, one operator produced 870 unique advertising products.²²⁵

Regulators around the world are struggling with how to contain the impact of gambling advertising on minors while allowing gambling operators to advertise lawful products. The risks are significant, with a minor change having significant impact.

For example, in Australia changes to the *Commercial Television Industry Code of Practice* in 2015 that re-classified certain time spots, and allowed increase time periods for gambling advertising by 30 minutes resulted in a 55% increase in gambling advertising on TV.²²⁶ This despite a clause that prohibits gambling advertising “during any Program that is broadcast between 5.00 am and 8.30 pm and principally directed to Children.”²²⁷

The most alarming elements of this advertising is how well it works to normalise and legitimise sport betting behaviours to minors, who are increasingly able to quote odds, name brands, explain how markets operate, and seek to use that information to secure their share of perceived guaranteed wins.²²⁸ This is seen especially so with the increasing convergence of sports and gambling.

Advertising and sport

For some time there has been a close relationship between sports and gambling. In Australia, this started through the operation of electronic gaming machines in registered clubs, with funds then directed by these not-for-profit entities into community and professional sports. While some clubs are seeking to divest their relationship with electronic gaming machines,²²⁹ many are now developing lucrative relationships with betting service providers.²³⁰

Betting service providers will often seek to develop a commercial relationship between a team or code, including through uniform sponsors, “official betting partners” and by providing a share of profits on matches back to the code.

²²³ See, e.g. Felsler, above n 221.

²²⁴ Kerry O'Brien and Muhammad Iqbal, 'Extent of, and children and young people's exposure to, gambling advertising in sport and non-sport TV' (September 2019) *Victorian Responsible Gambling Foundation*, 12

²²⁵ Sproston, above n 130, 18.

²²⁶ O'Brien, above n 224, 20.

²²⁷ *Commercial Television Industry Code of Practice*, cl 6.5.1(b)

²²⁸ O'Brien, above n 224, 5.

²²⁹ See, e.g., some Australian Football League clubs moving away from gaming machines: Ben Waterworth, 'It's a 'truly historic and landmark day' for the Dogs. Now all eyes are on seven rival clubs', *Fox Sports* (Online at 20 November 2019) <<https://www.foxsports.com.au/afl/afl-2020-western-bulldogs-exit-gaming-industry-afl-clubs-with-pokies/news-story/f7ae40bf2ccb2b06b12ad05e6ea58059>>.

²³⁰ Hannah Pitt, et al, "It's just everywhere!" Children and parents discuss the marketing of sports wagering in Australia' (2016) 40(5) *Australian and New Zealand Journal of Public Health* 480.

This creates an almost symbiotic relationship between sporting code and betting service providers – the betting service providers needs markets to offer their products and the sporting codes rely on the income generated from those bets to put on matches. For some codes this is seen as a critical component of a code’s financial viability

Betting service providers will also enter into advertising arrangements with venues and broadcasters in an effort to maintain a connection (at least in the mind of customers) between the sport and the betting service provider. For those who have an interest in sport, this connection necessarily exposes them to more gambling advertising, irrespective of interest or likely susceptibility of experiencing gambling related harms.²³¹

This can include advertising during breaks in play, sponsoring analysis sections by commentators, or even ensuring that their markets are announced by the commentators during the game:

“Embedded promotions can range from simple product placements comprising visual or aural references to a product or brand (for example, logos on jerseys, stadium or racetrack signage), to substantial product integrations into the event which may include entire conversations about the product or brand (for example, discussions of betting companies and products during sports and racing commentary).”²³²

Many in the community see the market as nearing saturation:

An audit of annual reports of ASX-listed bookmakers by The Australian Financial Review found they had spent \$503.7 million collectively on marketing since the ban was introduced to try to protect children from betting ads.²³³

This was more than 3 times the amount spent in the preceding three years.

But what are the regulatory concerns that could arise from this kind of relationship? While gambling is hardly the only industry to seek to take advantage of the popularity of sports, it is clear that this close relationship is having a significant impact on normalisation of gambling to minors, others gambling related harms, and concerns around the integrity of gambling.

Studies have shown that the sports wagering advertising saturation can lead to children being able to recognise brands, cite the relationship with certain sporting teams, and even understand odds and product offerings.²³⁴ Concerningly, the relationship between sport and gambling “may be positively ‘shaping’ or ‘normalising’ children’s gambling attitudes and consumption intentions.”²³⁵

When sporting heroes and experts are enlisted to promote sports betting, it normalises the conduct as makes it seem that there two things, sports and betting, are inherently the same thing, with significant engagement with sports justifying significant engagement with gambling. This includes the risk that sports betting is seen as less harmful than other forms

²³¹ Sproston, above n 130, 22.

²³² Ibid, 36.

²³³ Lucas Baird, ‘Bookmakers ad spending has soared to more than \$500m since TV ban’, *AFR* (Online at 18 November 2019) <<https://www.afr.com/companies/games-and-wagering/bookmakers-ad-spending-has-soared-to-more-than-500m-since-tv-ban-20191112-p539oh>>.

²³⁴ O’Brien, above n 224, 5.

²³⁵ Pitt, above n 230.

of gambling because it is an otherwise healthy activity that can bring people together.²³⁶ Where this kind of behaviour is normalised, it encourages minors to gamble, or increases risks of problematic gambling behaviour developing later in life.

While some industry players rest responsibility for controlling the impacts of gambling advertising at sports on minors with the broader community, including parents,²³⁷ it is clear that industry and the regulator must drive reform to ensure that sports wagering is not seen as a necessary part of sport.²³⁸

Regulators in Australia have grappled with this issue and have chosen to, as much as possible, adopt national approaches to this issue, due to the national nature of sports.

For example, there is a prohibition of all sports wagering advertising from 5 minutes before the scheduled start of play for a live sports broadcast to 5 minutes after the conclusion of the match or 8:30pm (when it assumed fewer children will be able to see the advertising) online and on free-to-air stations. Some jurisdictions have also prohibited the advertising of betting markets and promotions on an event during the event itself, an effort designed to reduce impulsive decision making.²³⁹

As regulators in the US examine the potential for sports wagering in their jurisdictions, they should be mindful to understand the potential harms that could arise from allowing unchecked gambling advertising during, or in connection with, sports. Regulation must follow community trends, and where self-regulation is ineffective at addressing harms, the regulatory must be ready to step in and address community concerns.²⁴⁰

Minimum harm minimisation/responsible gambling messaging in all advertising

Australian jurisdictions require gambling advertising to be accompanied by prescribed responsible gambling messaging to alert audiences to the risks associated with gambling and provide information on the availability of help for those experiencing problems with gambling.

It is unclear what the benefits of this kind of messaging is, with most operators putting the responsible gambling messaging in peripheral parts of advertising, often hidden in small print and not recognised by audiences.²⁴¹ When combined with particularly effective advertising, including inducements, responsible gambling messaging is often missed or ignored.²⁴²

However, the NCPF commits jurisdictions to adopting consistent messaging to be included in all gambling advertising for online wagering services to improve the effectiveness of the harm minimisation messaging. Consistent messaging not only allows operators to design more effective harm reduction messaging (if they act on their corporate social responsibility commitments) but also increases the likelihood that regulators will be able to combine efforts to find messaging that cuts through to audiences. Australian jurisdictions are currently

²³⁶ Sproston, above n 130, 24.

²³⁷ Pitt, above n 230, 485.

²³⁸ Ibid, 485.

²³⁹ See, e.g. *Betting and Racing Act 1998* (NSW), section 331.

²⁴⁰ McAllister, above n 26, 158.

²⁴¹ Blaszczyński, above n 110, 71.

²⁴² Hing, above n 32, 700.

working out what the consistent message will be. It is hoped that something simple but clear, such as “Gambling can cause harms to you and others” is adopted.

Notwithstanding concerns around the cut through of this kind of messaging to encourage behavioural change, one of the key benefits of responsible gambling messaging is to alert audiences to the availability of gambling help services. In Australia, jurisdictions cooperate to provide a single online and telephone portal that allows people to access a single service regardless of where they are based. In an online wagering environment, where people are able to place bets anywhere at any time, having a 24/7 gambling help service is critical.

Ensuring take up of that service supports regulators efforts to address gambling related harms. Any responsible gambling messaging should seek to support take up of these services, and any research on responsible gambling messaging that provides behavioural insights (i.e. why people do things in certain ways) should be shared amongst jurisdictions.

Direct marketing

Direct marketing is communication from a betting service provider to an individual customer that is designed to create a personal interaction between an operator and the customer, allowing the operator to design an offer that meets the wants of the customer. For example, an email offer that is targeted at the specific sport or bet type that the customer prefers to bet on.

In the competitive environment of online wagering, where operators offer similar products, direct marketing, often combined with personalised offers and customisable products, is a key way in which operators attract and retain customers.²⁴³ For example, the expansion of cash-outs and customers proposing their own markets. The take up of these offers allows the operator, with the benefit of predictive analytics, to develop marketing offers that go directly to the customer and are targeted at enticing them with offers that are personalised for their betting interests.

There are clearly benefits for the customer looking to bet, but there is also significant risk that providing direct, personalised messages will encourage a person to gamble in ways that they would not otherwise. Research indicates that direct marketing is one of the most effective ways of influencing an individual to gamble.²⁴⁴

Without rules governing the use of direct marketing, there are heightened risks that operators will engage in practices that incentivise players to gamble more frequently, in larger amounts and on contingencies that they may not understand the risks on.

In a federal system, where competition drives innovation and economic activity, adopting measures that may limit the ability of operators to differentiate from their competition is likely to be unappealing to industry. Direct marketing works, and operators are unlikely to abstain from using this kind of advertising unless they are required to by regulators. Cooperation between jurisdictions is critical to ensure that all operators are held to the same standard.

²⁴³ Hibai Lopez-Gonzalez, Susana Jimenez-Murcia and Mark D. Griffiths, ‘Customization and personalization of sports betting products: implications for responsible gambling’ (2019) 8 *Gaming Law Review* 572.

²⁴⁴ Hing, above n 218, 801.

The ideal approach is to use licensing or legislative amendments at the state level to regulate this conduct. However, where federal governments share responsibilities for advertising, cooperation between state and federal governments will be key to ensuring the sector is appropriately regulated.

In Australia, jurisdictions have adopted a consistent approach which only allows direct marketing where a customer has opted in. This allows an interested bettor to still receive direct marketing offers if they choose, but requires a person to consciously make this decision, noting the harms that this kind of advertising can cause. An opt in rather than an opt out arrangement overcomes customer apathy and gives more power to the customer to determine how they engage with gambling products.²⁴⁵

Social media

The saturation of gambling advertising on television, print and radio has led to decreased impact of that advertising. In response to this, betting service providers are increasingly using social media to engage with individuals in a more targeted and often personal way. This approach, designed to enhance the customer experience, also can result in increased gambling related harms.²⁴⁶

Betting service providers are able to leverage off the popularity of sports, celebrities and influencers to reach out to new audiences in new ways, with influencers seen as the “new drivers of gambling advertising.”²⁴⁷ Social media advertising is often treated as more reliable than more traditional forms of advertising and allows an individual to self-select whether they access the advertising, increasing the impact it will have on those who do access the content.²⁴⁸

This poses risks to regulators, as it becomes hard to regulate with many of the advertisements only visible to the individual and the difficulty in enforcing advertising restrictions against large social media platforms.

Where regulators seek to impose advertising restrictions, frameworks should understand the following additional risks posed by social media advertising:

- advertising can be targeted at individuals, and may be used to circumvent content restrictions for gambling advertising (e.g. inducements);
- social media platforms often do not have direct relationships with betting service providers but rely on third party advertising firms to determine content – this makes it harder to enforce restrictions against social media platforms; and
- social media platforms are successful in promoting products not only because of their ability to develop targeted advertising but because it is able to leverage the popularity of “influencers”. Any advertising restrictions must address the potential reach of influencers, especially where they have a commercial relationship with betting service providers.

²⁴⁵ Ibid, 806.

²⁴⁶ M Luo, J Chen, R Ching and C Liu, ‘An examination of the effects of virtual experiential marketing on online customer intentions and loyalty’ (2011) 31(13) *The Service Industries Journal* 2163.

²⁴⁷ Hornle, above n 7, 104.

²⁴⁸ D Chaffey *Internet marketing: Strategy, Implementation and Practice* (Prentice Hall, 4th ed, 2007).

Governments seeking to impose restrictions on the kind of advertising betting service providers can publish should consider the use of a chain of responsibility approach which puts duties of care on all parties that benefit from a transaction to ensure advertising is compliant.

Case Study - Inducements – a challenge for regulators in a federal system

Inducements are “offers or products that are designed to encourage a person to gamble, gamble more frequently or to open a betting account.”²⁴⁹ These offers have “one or more incentives to bet that are additional to what is normally received as part of the core wagering product.”²⁵⁰

Inducements are designed to encourage a change in a person’s future behaviour as opposed to rewarding for past behaviour.²⁵¹ While player rewards schemes allow operators to provide benefits to their regular customers, inducements are designed to entice new customers, or customers who do not gamble as frequently, to gamble with that operator for the first time, more frequently or in larger amounts.²⁵²

Inducements are often advertised as something for nothing or low risk, can be time or value limited, and include:

- sign up bonuses (benefit triggered by opening a new account);
- deposit bonuses (benefit triggered by depositing money into an account);
- free bets (bonus bets that may be required to be ‘played through’ before they can be cashed out);
- refer a friend offers (benefit triggered when another person establishes an account/ bets with operator and links you as cause of that);
- enhanced odds (‘multipliers’, ‘boosts’ or other way to increase odds compared with advertised odds); and
- cash back offers (gives player option to cash out or automatically triggers if a certain event occurs e.g. your team is ahead by 10 at half time and loses).

While there is a body of evidence that points to the potential impacts of inducements, the increasing competitiveness of some markets have resulted in an exponential increase in the use of them in advertising, often resulting in people seeing multiple offers from multiple providers daily.²⁵³

Inducements in Australia are currently regulated across a range of instruments, including:

²⁴⁹ New South Wales, *Parliamentary Debates*, Legislative Council, 7 August 2019, 41 (The Hon. Scott Farlow).

²⁵⁰ Hing, above n 32, 690

²⁵¹ Responsible Gambling Council, *Responsible gambling best practices for player incentives: Land-based venues* (Web Page, 2013) < <https://www.responsiblegambling.org/wp-content/uploads/responsible-gambling-best-practices-for-player-incentives-land-based-venues.pdf>>, 11.

²⁵² Samantha Thomas, Sophie Lewis, Colin McLeod and John Haycock, ‘They are working every angle: A qualitative study of Australian adults’ attitudes towards, and interactions with, gambling industry marketing strategies’ (2011) 12(1) *International Gambling Studies* 111.

²⁵³ Hing, above n 218, 805.

- federal laws (*Interactive Gambling Act 2001* and the *Broadcasting Services Act 1992*);
- state-based Acts (e.g. *Betting and Racing Act 1998* (NSW) and *Gambling Regulation Act 2003* (Victoria)); and
- codes of practice (mandatory - Northern Territory Code of Practice for Responsible Gambling; industry regulated - Australian Association of National Advertisers' Wagering Advertising Code; voluntary - Queensland Responsible Gambling Code of Practice).

The NCPF has introduced uniform prohibitions on betting service providers offering inducements to:

- open an account;
- refer a friend to open an account;
- not close an account;
- sign up for direct marketing; and
- free bets that need to be played through before they can be claimed.

While there is consistency in the offering of inducements, each Australian jurisdiction has differing approaches to the advertising of inducements, including how inducement is defined.

Why inducements are regulated

Gamblers will often cite the use of inducements (bonuses, free credits, enhanced odds) as the reason for gambling with a particular operator, as well as to the frequency in which they gamble.²⁵⁴

Inducements cause gambling related harms by encouraging individual gamblers to gamble more frequently, in larger amounts than they would otherwise gamble, or in different ways (e.g. app-based gambling as opposed to in person). They change the price of the product (with the cost of the inducement incorporated into the odds offered) but in a way that masks the true price.

As a result, customers are more likely to overestimate the value of the product and therefore consume more than they would if they were making rational decisions with all the available information. They are designed to trigger a response by a customer. The level of harm caused by this response will depend on the type of inducement and how it is offered, but inducements act counter to responsible gambling measures by incentivising individuals to adopt more risky gambling behaviours.²⁵⁵

Individuals will not be able to accurately assess the impact that specific advertisements have had on their behaviour.²⁵⁶ However

“it is possible to study the *relative* impact on various groups of people by different forms of advertising. Such research results are valuable for harm prevention and

²⁵⁴ See, e.g., Gainsbury, above n 152.

²⁵⁵ Hing, above n 32, 689

²⁵⁶ Hing, above n 218, 796.

responsible marketing as they differentiate between relatively harmless and relatively risky advertising.”²⁵⁷

As operators use inducements as a way to distinguish themselves, and encourage players to bet with them rather than a competitor, it creates an environment where people are encouraged to open multiple accounts to access the benefits, and to engage in more frequent gambling to take advantage of those offers.²⁵⁸ Once these behaviours take effect, they are encouraged to continue to gamble at this higher intensity, which increases their gambling consumption.²⁵⁹ Where a friend refers a player to gamble, it risks normalising this kind of gambling behaviour as it confirms that a close relationship endorses this way of gambling.²⁶⁰

Inducements are also designed to encourage players to gamble in different ways. While responsible gambling messaging encourages players to understand the odds and to think through placing a bet based on their understanding of the contingency, inducements will often encourage people to make snap decisions to gamble on things that they know little about, including the emergence of novelty bets.²⁶¹

This was a particular problem during COVID-19 when many sports leagues were closed and operators offered products and markets on events they would not otherwise have, encouraging players to bet on things they knew little about.

What worked

All Australian jurisdictions prohibit the advertising of certain inducements, which has created consistency in how online sports betting providers advertise nationally. While there is not a uniform definition of inducement, in the most part jurisdictions are largely consistent on what constitutes an inducement.

Jurisdictions have created a chain of responsibility that provides opportunities to not only enforce prohibitions against betting service providers but also those publishers who have cooperated to publish unlawful advertising – media providers, influencers, industry participants. When advertising is purchased in markets that cross borders (TV and radio markets or online), adopting chain of responsibility liability gives regulators more flexibility to enforce the law against those present in the jurisdiction.

Other jurisdictions have adopted a similar approach. In Finland, for example, the gambling regulator works with broadcasters to explain advertising rules and where there is a lack of compliance they may use the Finnish Communication Regulation Authority to withdraw broadcasting licenses from broadcasters that do not comply with advertising restrictions.²⁶²

²⁵⁷ Per Binde, ‘Gambling advertising: A critical research review’ (2014) *Responsible Gambling Trust*, 1 (emphasis in original).

²⁵⁸ Gainsbury, above n 152.

²⁵⁹ Nerilee Hing, Lorraine Cherney, Alex Blaszczyński, Sally M. Gainsbury & Dan I. Lubman ‘Do advertising and promotions for online gambling increase gambling consumption? An exploratory study’ (2014) 14(3) *International Gambling Studies* 394.

²⁶⁰ Hing, above n 32, 697.

²⁶¹ *Ibid*, 698-699.

²⁶² Hornle, above n 7, 97.

In determining whether to prosecute broadcasters, digital and social media providers, influencers, third parties and affiliates, regulators should seek to distinguish between commercial (where there is a financial or other benefit transferred from the betting service provider to the influencer) and non-commercial (the information is provided without commercial benefit). This is often difficult to discern, so regulators should consider whether the content itself is sufficient to justify a breach (strict liability). This approach gives the regulator more discretion to adopt a risk-based approach – only enforcing those breaches that cause harm or which occurred for financial advantage.

The NCPF changes, and the existing prohibitions on the advertising of inducements, has created an increased sense of responsibility for operators, who must be proactive in vetting their products rather than relying on a third party, or the regulator, to pre-approve advertising.

What has been challenging/where are there gaps

One of the clearest limitations with the current regulatory approach is the lack of uniform definition of what an inducement is – “where they are defined, definitions are broad, vague and provide little specific direction.”²⁶³

In a federal system with mutual recognition, the lack of consistency encourages operators to set up in jurisdictions where the rules are the most liberal.

Many media companies operate nationally, buying advertising space in bulk across jurisdictions and running standard ads across the country. Where there are nuances between jurisdictions it becomes hard for the advertising firms to ensure compliance. Regulators can find ways around this, but it requires custom fitting solutions on a case by case basis rather than addressing the underlying issue – the lack of consistency.

The lack of consistency in definition has also inhibited compliance activity, with some jurisdictions unable or unwilling to take enforcement activities against betting service providers due to general definitions, while others have been able to be proactive in enforcing the law. New South Wales has been the most active in enforcing advertising restrictions against operators, which when coupled with penalties of up to \$110,000 AUD have made operators wary of testing the boundaries of the definition of inducement.

Operators and community advocates have criticised the lack of consistency, which adds significant regulatory burden but often with limited impacts on gambling related harms. For operators offering services nationally, they will need to design bespoke advertising campaigns for each jurisdiction that picks up the nuances of the advertising rules, without a clear understanding of why jurisdictions have adopted differentiated approaches. This includes different definitions, exceptions to rules and interpretations of those rules between regulators. This is a limitation in the Australian model that jurisdictions must look to remedy if they are to support industry to implement advertising campaigns that are consistent with community standards.

²⁶³ Hing, above n 32, 687

How could this be applied in the US?

In an industry that thrives on innovation, betting service providers will seek to leverage ambiguity or division to their advantage. While many operators take their corporate social responsibility seriously, others are willing to test the boundaries of what is allowable.

US regulators must determine whether they are willing to allow online sports betting operators to offer inducements to encourage people to gamble, gamble more frequently and in higher amounts, and if so, what kinds of inducements are they willing to accept.

Governments should ensure that regulators are able to dictate what is appropriate and what is inappropriate – while specificity is important for certainty for industry and regulator alike, some flexibility is required to allow the regulator to respond to the innovation in the marketplace. Failure to do so will quickly create gaps in regulatory frameworks.

Regulators should also be equipped with the power to enforce the restrictions, including significant penalties (i.e. penalties that are not seen as a cost of doing business) and powers to remove offending content.

Critically, US regulators should learn from the limitations of the Australian system. In an environment where advertising can occur on a national basis, creating consistent advertising rules will enable more effective control by the regulator of how their licensees act by encouraging cooperation with other regulators, reduced cost for operators to comply with rules, and better gambling harm minimisation for customers that may otherwise be subject to offers that cause harm.

Research and innovation

Maintaining a state based regulatory structure for online wagering (as opposed to adopting a federal scheme) allows states to be first movers in innovation, rolling out changes quickly without the need to bring multiple jurisdictions along first.²⁶⁴

Regulators should be alive to the risks of stifling innovation that could have deleterious impacts on their local providers by creating costly barriers to entry or enhanced competition.²⁶⁵

To remove these impediments, regulators should seek to collaborate on research and innovation agendas to create economies of scale for regulators and industry.

Research

Developing a comprehensive research agenda is critical to building understanding about betting behaviours. Without understanding how people gamble and what harms they experience, regulators may be unable to effectively determine what regulatory levers to pull.²⁶⁶

Some jurisdictions have developed extensive research capabilities to support regulatory design, including Nevada (e.g. International Center for Gaming Regulation), the United Kingdom (Gambling Commission), New South Wales (Responsible Gambling Fund), Victoria (Responsible Gambling Foundation) and Australia more broadly (Gambling Research Australia).

Regulators should look to support these efforts, as they share in the benefits of investment in gambling research. While there will be differences in jurisdictions' regulatory frameworks, the underlying themes of online sports wagering lend themselves to investment in common research, and sharing of data to support understanding of gambling profiles, susceptibility to harm (to the individual and broader community) and effective design of regulatory interventions.²⁶⁷

In the same way that individual projects should be the subject of evaluation, regulators must also subject themselves to ongoing evaluation to ensure that regulatory outcomes remain appropriate and that regulatory frameworks are effective in achieving those outcomes.

Trials and temporary changes

The competitive environment that online sports wagering providers operate requires providers to look at opportunities to cut costs or expand markets in order to be profitable. One of the drivers of this pursuit of profitability is innovation.

Regulators are often wary of innovation in gambling due to a lack of understanding of how that innovation will impact of regulatory goals, such as minimising gambling harms and criminal influence risks and revenue assurance. Innovation often requires significant

²⁶⁴ Miller, above n 42, 165.

²⁶⁵ Miller, above n 42, 165.

²⁶⁶ Sally Gainsbury and Alex Russell, 'Betting Patterns for Sports and Races: A Longitudinal Analysis of Online Wagering in Australia' (2015) 31 *Journal of Gambling Studies* 17, 18.

²⁶⁷ Blaszczyński, above n 110, 19.

changes to regulatory frameworks that take time and are difficult to secure when the benefits of the innovation are unclear.

Jurisdictions may allow trials to occur before approvals are granted, but this is often difficult to ensure where the product or offering is particularly innovative, or where the risks associated with the product are significant. To address this, some jurisdictions, including New South Wales and Malta, have developed regulatory sandboxes, that allow products to be tested in live environments before licensing decisions are made.

Regulatory sandboxes allow operators to test new products in a live environment to ensure that it complies with regulatory rules, such as anti-money laundering and gambling harm minimisation rules, while subject to rigorous evaluation. This allows regulators to determine what, if any, dispensations will be provided to an operator before a product is formally considered.

For online sports wagering, regulatory sandboxes could be used to consider the use of distributed ledger technology on payment systems,²⁶⁸ cryptocurrencies, or customisable betting options.

To be successful, any trial in a regulatory sandbox must be accompanied by independent evaluation that arms the regulator with the information it needs to make informed decisions on the proposed product. The New South Wales regulatory sandbox model has adopted this approach, requiring independent researchers to be assigned to the trial, with reports provided directly to the regulator.

Regulatory sandboxes could be used not only for innovations in online sports wagering products, but the customer experience more generally, including the adoption of advanced harm reduction interventions to test the value of widescale adoption.

However, regulators must be alive to the risk that once a trial has commenced it will be difficult to remove the product. To address this risk, regulators must work hand in glove with independent evaluators and industry itself to ensure that evaluation frameworks that will be used to assess the viability of the new product give the regulator sufficient information to approve or reject a product, in the same way that they would for a product that has not gone through the sandbox.

Case study - Digital payment and verification technology

With online sports betting operators able to offer services across multiple jurisdictions (pending licensing), many regulators are likely to be pushed to allow the adoption of digital payment technologies, including digital wallets, cryptocurrencies and distributed ledger technology.

Jurisdictions will need to consider their ability to regulate these offerings, with many regulators lacking the capacity to effectively assess and enforce restrictions or limitations on the use of this technology. However, jurisdictions must be alive to these offerings being available, with or without licensing approvals.

²⁶⁸ Juanita Brockdorff , Russell Mifsud , Matthew Scerri and Mark O'Sullivan, *Malta: The Malta Gaming Authority Sandbox Regulatory Framework Innovative Technology Arrangements (ITAs)* (Web Page, 29 January 2020) <<https://www.mondaq.com/gaming/888234/the-malta-gaming-authority-sandbox-regulatory-framework-innovative-technology-arrangements-itas>>.

Digital wallets are apps that store your credit or debit card details that can be used across multiple service providers. It is already widely used outside of gambling, with larger providers including Google, Visa, and Mastercard making it easier to purchase goods and services online.

Online sports betting service providers may look to allow digital wallets rather than storing card details themselves to allow customers to more readily access funds. It is seen as a way of enhancing the customer experience by reducing barriers to customers moving between operators to access the best offers.

There are risks with the expanded use of digital wallets. The use of digital wallets on illegal wagering sites makes it harder to track transactions where payment blocking is otherwise used to prevent offshore gambling as the individual transfers to the digital wallet before using that money to gamble, with that initial transaction harder to identify as a gambling transaction.²⁶⁹

Regulators should seek to impose licensing rules that ensure that the expansion of digital wallets, especially those offered by third party operators, does not facilitate increased access to unlawful operators by overcoming the concern of sharing financial details with an untrusted operator.²⁷⁰

There are also gambling harm risks, with some players not seeing money from the digital wallet as spending real money. Digital wallets may also lead to players exceeding limits, with digital wallets not subject to deposit limits in the same way that operators may be required to offer.²⁷¹ Any use of digital wallets must be accompanied by harm minimisation features to mitigate against the potential gambling harms caused by more ready access to funds.

Cryptocurrencies also allow digital payment technologies for gambling. Cryptocurrencies are digital currencies based on distributed ledgers that allow for a person to be issued with tokens. Countries around the world are still coming to terms with the take up of cryptocurrencies, and the impact they have on tracking transactions. Some have opened up to its use, including some casinos in Las Vegas that host bitcoin ATMS.

There are risks with opening up the use of digital currencies. Cryptocurrencies operate on servers not controlled by governments or traditional financial institutions, which allows transactions to occur anonymously. This is attractive for those seeking to launder money or for minors seeking to circumvent age restrictions (for example the use of skins betting).²⁷²

However, regulators and online sports betting service providers can work together to address these risks. The use of distributed ledger technologies, such as blockchain, allows for the recording of digital transactions on a ledger that is widely distributed, transparent and tamper-proof – extending the reach of regulators to more effectively supervise and control

²⁶⁹ Hornle, above n 7, 68.

²⁷⁰ Sally Gainsbury, above n 56.

²⁷¹ Currie, above n 139, 5.

²⁷² See, e.g., Heather Wardle, 'The Same or Different? Convergence of Skin Gambling and Other Gambling Among Children' (2019) 35 *Journal of Gambling Studies* 1109.

online transactions.²⁷³ By creating an electronic register for digital data that is de-centrally administered, transactions are not able to be hidden but are traceable.²⁷⁴

Adoption of blockchain technology for digital payments would make it easier for regulators to track sources of money by no longer relying exclusively on payment providers to assist. If designed as a whole of system approach, it could differentiate between licensed and non-licensed operators by working with financial institutions to track movements of money to unlicensed operators, while also allowing accurate identification of money laundering – all without impeding the gambling experience for individuals.

The use of this technology could also enhance government driven services, such as the licensing process, by reducing duplication in probity investigations by allowing a single verification of criminal and financial histories through a digital process. This could allow confidential information to be uploaded and encrypted, with access only granted to regulators that require it for licensing or enforcement purposes, or for banks verifying records.²⁷⁵ In a federal system, with betting service providers looking to operate in multiple jurisdictions, blockchain technology could be used to encourage cooperation and reduce costs without forgoing regulatory independence.

²⁷³ Steinmetz, above n 93, 719.

²⁷⁴ Ibid, 718.

²⁷⁵ Wilsenach, above n 87.

Concluding comments

States operating in a federal system have the opportunity to cooperate with other regulators to create more effective online sports wagering regulatory frameworks.

While it is easy to treat other states as competitors for jobs and tax revenue, those jurisdictions that seek out opportunity to set uniform standards across borders will be able to secure strong regulatory outcomes for their residents.

US States can push for reform at the federal level to secure inter-state online sports wagering, to build their own industries and reduce regulatory risks, including gambling harm, money laundering and cheating at gambling. This system should leverage the expertise of State regulators in gambling, as well as the general law enforcement powers of the Federal Government, to create consistent approaches across the country.

Creating consistent approaches not only makes it easier for regulators to enforce those standards, it reduces regulatory costs for operators, encourages innovation, strengthens domestic markets against offshore competitors, and secures better harm minimisation outcomes for the customer.

Australia has shown that, when jurisdictions cooperate, industry and the customer are able to benefit. It is hoped that some of the lessons learned in Australia will inform approaches by the US States as they grapple with how to design a comprehensive regulatory framework for online sports wagering – one that pulls of different policy levers to find the right balance.

Additional References

- i) James Glanz, Agustin Armendariz and Walt Bogdanich, 'The Offshore Game of Online Sports Betting', *NY Times* (Online at 25 October 2015) <<https://www.nytimes.com/2015/10/26/us/pinnacle-sports-online-sports-betting.html>>.
- ii) Gainsbury, above n 83, 773.
- iii) Harris, above n 5, 94.
- iv) Daniel Waugh and Tom Grant, 'Nipped in the Budd? Assessing the wisdom of the Gambling Review Body's recommendations in relation to problem gambling' (2019) 23(1) *UNLV Gaming Research & Review Journal* 19, 21.
- v) W Eadington, 'The future of online gambling in the United States and elsewhere' (2004) 23(2) *Journal of Public Policy and Marketing* 214.
- vi) Wood Review, above n 183, 7.
- vii) I Nelson Rose, *Gambling and the Law: The Supreme Court changes everything* (Web Page, 6 June 2018) <<https://calvinayre.com/2018/06/06/business/gambling-and-the-law-the-supreme-court-changes-everything/>>.