

**THE REGULATION OF PROMOTIONAL COMPETITIONS IN SOUTH AFRICA**

by

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## **SUMMARY**

Promotional competitions are competitions in which prizes are awarded by lot or chance in order to promote goods or services. Due to the chance element, these competitions are often categorised as lotteries or gambling. Initially, South African legislation did not make provision for the running of promotional competitions, but this situation changed when the Lotteries Act, 1997 came into force. Currently, promotional competitions are regulated by the Consumer Protection Act, 2008 (CPA).

This thesis examines the regulation of promotional competitions in South Africa. It commences with a background discussion, which touches on the relevant terminology and some sociological aspects. It then considers the consequences of gambling and the need for and nature of regulation, and deals with the marketing and consumer protection contexts. This is followed by a brief overview of the global and South African history of gambling, lotteries and promotional competitions, which includes a discussion of South African case law.

Foreign law relating to promotional competitions in New Zealand and Great Britain is explored in order to compare this to the South African position. This is followed by an examination of the current regulation of promotional competitions in South Africa, including a discussion regarding the interplay between the CPA and the Lotteries Act and a detailed analysis of the CPA's provisions. The self-regulation of promotional competitions is discussed as well. The concluding chapter of this thesis contains recommended solutions for the problems identified in the analysis of the relevant legislation.

## **KEY TERMS**

Promotional competitions; consumer protection; gambling; lotteries; sales promotion schemes; prize promotions; prize competitions; sweepstakes; advertising; self-regulation.

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## PREFACE

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Promotional competitions are everywhere. In the morning when you drive to work, the radio presenter might announce with great excitement that the first listener that calls in will win a hamper. While standing in the supermarket queue during lunch, a cardboard cut-out might stare at you, daring you to enter a competition in which you might win a shiny red car if your entry is drawn. Back at the office, you might receive a text message proclaiming that you have won a prize in a sweepstakes that you might not even have heard of. In the evening, while eating cookies in a wrapper that promotes an airtime competition, you might hear that your aunt has won a washing machine after submitting hundreds of entries in an online competition. When you are in bed, you might see a promotional newsletter on your phone and then fall asleep, dreaming that you have won that trip to France.

Businesses use these kinds of competitions to promote their products and services, and to increase sales. In many instances, the outcome of the competitions is determined by chance. Activities that involve the awarding of prizes by way of chance are typically regarded as lotteries, and lotteries form part of the broader field of gambling. The latter is a controversial pastime and industry, and people often hold strong views about gambling – whether they are in favour of or against it. The debate about gambling will probably not die down soon, if it all. Even while this thesis was written, there was great controversy in this author’s home city regarding the establishment of a new casino complex.<sup>1</sup>

Controversial topics are often the subject matter of legislation and regulation. Gambling is no exception and laws relating to gambling date back to ancient times. These laws focus on activities where people stake money or offer consideration in the hope that fortune will favour them and reward them with a prize. The key elements of gambling appear in legislation worldwide and are the subject matter of a myriad of

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<sup>1</sup> See Mudzuli K “R8bn Menlyn casino faces challenges” 17 October 2014 *IOL News*, <http://www.iol.co.za/business/companies/r8bn-menlyn-casino-faces-challenges-1.1766514>, accessed on 24 July 2015; Mudzuli K “Menlyn casino gets go ahead” 12 December 2014 *IOL News*, <http://www.iol.co.za/news/crime-courts/menlyn-casino-gets-go-ahead-1.1795044>, accessed on 24 July 2015).

court cases. These laws keep on changing and community attitudes shift. Sociologists express their views and lawyers attempt to keep track with the developments while they have to advise their clients on an area of the law that is often complex and sometimes obscure.

This study seeks to deal with these issues. It touches on gambling and lotteries, lot and chance as well as skill. It explores some of the relevant history, and considers the sociological context of gambling. It ventures into advertising, marketing and promotions – the tools traders use to drive sales. It turns to consumer protection law and the need to shield people against powerful traders and examines some of the legal intricacies and anomalies. However, this remains a limited study of vast subject areas with many branches and it points to the need for continued research.

## CHAPTER 1

### INTRODUCTION

- 1.1 Research statement
- 1.2 Research aims and enquiries
- 1.3 Hypotheses
- 1.4 Value of the research
- 1.5 Approach and method
- 1.6 Delineation
- 1.7 Outline of chapters
- 1.8 Referencing techniques

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#### 1.1 Research statement

The law relating to gambling and lotteries might be regarded as complex or obscure.<sup>1</sup> It is not an area of the law that receives much attention in undergraduate legal studies or practical legal training in South Africa.<sup>2</sup> In this country it is difficult to find academic works dedicated to the law relating to promotional competitions in particular. Elsewhere, law firms have practices that focus mainly on gambling law or marketing and promotions law,<sup>3</sup> and entire conferences focus on these topics.<sup>4</sup> Even so, South

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<sup>1</sup> On Prof I. Nelson Rose's website this subject area is described as follows:

"The law of gambling can be simple, or enormously complex. For example, all gambling requires three elements: prize, chance and consideration. But creating a successful game that has only two of those elements can be extremely difficult. Similarly, some forms of online gaming are legal, but only a legal professional can tell you whether your plans meet the requirements of the law."

(Rose IN "Gambling and the Law®", <http://www.gamblingandthelaw.com/>, accessed on 24 July 2015.)

<sup>2</sup> The author checked the undergraduate law curricula of a couple of South African universities and could not find a course dedicated to gambling law or marketing or promotions law specifically. Having said this, these areas of the law might be dealt with in wider legal subject areas, such as statutory crimes or consumer protection law or marketing studies.

<sup>3</sup> Here are examples of American law firms with teams that specialise in advertising, marketing, sweepstakes and promotions law: Cohen Silverman Rowan (New York City and Boulder), Davis & Gilbert (New York City), Frankfurt Kurnit Klein & Selz (New York City), Greenberg Traurig (Chicago, Denver, Las Vega, New York), Loeb & Loeb (Chicago, Los Angeles and New York City), Manatt, Phelps & Phillips (New York City), Reed Smith (Washington DC and Chicago), and Winston and Strawn (Chicago).

<sup>4</sup> For example, the Brand Activation Association's annual Marketing Law Conference. See Brand Activation Association "BAA's 37<sup>th</sup> Marketing Law Conference – Walking the Line: Between Innovation

Africa has a vibrant advertising industry and promotional competitions are ubiquitous.<sup>5</sup> In view of this, it is submitted that there is a need for an extensive examination of the regulation of promotional competitions in South Africa. This research is aimed at fulfilling that need. Thus, this thesis will analyse how and to what extent promotional competitions are regulated in South Africa. This analysis will show that promotional competitions are regulated on a comprehensive basis and that the regulation is adequate and appropriate, if not slightly excessive. It will further be shown that there are inconsistencies between the statutes that regulate promotional competitions and that there is room for improvement of the relevant provisions.

## 1.2 Research aims and enquiries

In the course of this study, various issues and questions that arise in respect of the regulation of promotional competitions will be examined. At the outset, the meaning of various terms will be explored because this study field is replete with terminology. For example, section 36 of the Consumer Protection Act<sup>6</sup> (“CPA”) refers to “promotional competitions”.<sup>7</sup> This terminology was also used in the Lotteries Act,<sup>8</sup> which regulated promotional competitions before the relevant provisions were repealed and replaced by the CPA’s provisions.<sup>9</sup> However, other terms are used for this kind of competition and similar schemes as well.<sup>10</sup> These include “sweepstakes”,<sup>11</sup> “prize competitions”,<sup>12</sup> “sales promotion schemes”<sup>13</sup> and “trade promotion lotteries”.<sup>14</sup> These terms are found in the context of “gambling” and “gaming” as well. Definitions for these terms will be

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and Regulation”, <https://www.baalink.org/conference/show/id/BAALAW-NOV15>, accessed on 24 July 2015.

<sup>5</sup> One need only visit a supermarket, page through a newspaper or explore social media to find numerous examples of promotional competitions in South Africa.

<sup>6</sup> 58 of 2008.

<sup>7</sup> S36(1)(d) of the CPA. See the full definition at page 213 below.

<sup>8</sup> 57 of 1997 (the “Lotteries Act”).

<sup>9</sup> Lotteries Act, s1: “‘promotional competition’ means a lottery conducted for the purpose of promoting the sale or use of any goods or services.” To be read with the definition of “lottery” in the same section: “ ‘lottery’ includes any game, scheme, arrangement, system, plan, promotional competition or device for distributing prizes by lot or chance and any game, scheme, arrangement, system, plan, competition or device, which the Minister may by notice in the Gazette declare to be a lottery”.

<sup>10</sup> See also the various gambling related terms defined in Wiehahn NE (chairman) *Main Report on Gambling in the Republic of South Africa* (RP 85/1995) (“LGB Main Report”) 145-154.

<sup>11</sup> A term often used in the United States of America. See, for example, the Deceptive Mail Prevention and Enforcement Act.

<sup>12</sup> A term used in s339 of the United Kingdom’s Gambling Act 2005.

<sup>13</sup> See New Zealand’s Gambling Act 2003.

<sup>14</sup> This term is used in Australia. See LeGuay P “Australia” in *International Promotion Marketing Law Book* (2<sup>nd</sup> ed) (“LeGuay”) 14-16.

sought in legislation and other sources. They will be analysed and it will be determined whether an understanding of these terms will assist in examining the regulation of gambling and related activities.

Next, this thesis will turn towards the field of sociology in order to enquire into the nature of gambling activities.<sup>15</sup> It will be investigated whether a play element underlies gambling, lotteries, competitions and similar pursuits.<sup>16</sup> The general sociological discussion around play will be narrowed down when this thesis will look into the policy issues in respect of gambling. In considering the regulation of this activity, one should examine people's reasons for participating in gambling more closely. Attention should be given to gambling's negative effects – which often serve as justification for the prohibition or regulation of gambling and might point towards the reason for regulating promotional competitions.<sup>17</sup> However, although gambling activities might have detrimental effects, one must enquire into their ability to generate revenue and have a positive impact on economies as well.<sup>18</sup>

The nature of and need for regulation will be explored and it will be considered why some laws are created. The author will examine why an activity is sometimes regarded

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<sup>15</sup> The American Sociological Association describes sociology as follows:

“Sociology is:

- the study of society
- a social science involving the study of the social lives of people, groups, and societies
- the study of our behavior as social beings, covering everything from the analysis of short contacts between anonymous individuals on the street to the study of global social processes
- the scientific study of social aggregations, the entities through which humans move throughout their lives'
- an overarching unification of all studies of humankind, including history, psychology, and economics.”

(American Sociological Association “What is Sociology?” <http://www.asanet.org/about/sociology.cfm>, accessed on 25 July 2015.)

<sup>16</sup> Herman RD *Gamblers and Gaming: Motives, Institutions and Controls* 1-9; Downes DM, Davies, BP, David ME and Stone P *Gambling, work and leisure: a study across three areas* 11-14; Smith JF & Abt V “Gambling as Play” in Frey JH & Eadington WR (eds) *Gambling: Views from the Social Sciences. The Annals of the American Academy of Political and Social Sciences* 122 122-132; Reith G *HOMO ALEATOR: A Sociological Study of Gambling in Western Society* 199-253; Reith G “The Experience of Play” in Cosgrave JF (ed) *The Sociology of Risk and Gambling Reader* 255-287; Ottaway J *The UK National Lottery and Charitable Gambling* 91-127.

<sup>17</sup> In the past, people have held strong views against gambling on the basis that it could harm society. Eadington WR “Understanding Gambling” in Eadington WR & Cornelius (eds) *Gambling: Public Policies and the Social Sciences* 3 4.

<sup>18</sup> See, for example, Munting R *An economic and social history of gambling in Britain and the USA* 55; LGB Main Report 60-61; Clotfelter CT & Cook PJ *Selling Hope: State Lotteries in America* 219-221.

as a vice and a crime.<sup>19</sup> The question arises whether gambling is regarded as a vice and a crime, and why people are in favour of or against gambling. It needs to be considered whether society's views about gambling are changing, leading to a shift from prohibition to regulation or liberalisation.<sup>20</sup> At the same time, the regulation of promotional competitions might be moving from gambling legislation to the field of consumer protection law.<sup>21</sup> This raises the question whether promotional competitions still carry a gambling stigma.

In view of the apparent shift to consumer law, one should consider the nature of and need for consumer protection,<sup>22</sup> and enquire into the development of consumer protection law in South Africa.<sup>23</sup> Further, one should investigate the meaning and role of advertising,<sup>24</sup> marketing<sup>25</sup> and sales promotion,<sup>26</sup> consider the tools used by businesses to attract sales and identify the place of promotional competitions in this context.

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<sup>19</sup> See, for example, Dixon D *From prohibition to regulation: bookmaking, anti-gambling, and the law* ("Dixon") 17; Leitzel J *Regulating Vice: Misguided Prohibitions and Realistic Controls* 4; Dombrink J "Gambling and the Legalisation of Vice: Social movements, public health and public policy in the United States" in McMillen J (ed) *Gambling Cultures: Studies in history and interpretation* 43; Green SP "Vice Crimes and Preventive Justice" 10 October 2013 *Criminal Law and Philosophy* (published online at <http://link.springer.com/article/10.1007/s11572-013-9260-7>, accessed on 5 March 2015) 1-2.

<sup>20</sup> Dixon 6-7, 9.

<sup>21</sup> In South Africa, promotional competitions used to be regulated by the Lotteries Act. However, when the CPA came into force it repealed the Lotteries Act's provisions relating to promotional competitions and the CPA now regulates same. See section 36 of the CPA.

<sup>22</sup> See, for example, Woker T "Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act" 2010 *Obiter* 217-231 ("Woker 2010").

<sup>23</sup> See De Stadler E *Consumer Law Unlocked* ("De Stadler 2013") 1; Ramsay I *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3<sup>rd</sup> ed) ("Ramsay 2012") 1 for definitions of consumer law. For the process in terms of which the CPA was developed, see for example the memorandum accompanying the Consumer Protection Bill, 2008 as well as Du Preez ML "The Consumer Protection Bill: A few preliminary comments" 2009 *South African Law Journal* 58 59-60, Barnard J *The Influence of the Consumer Protection Act 68 of 2008 on the Common Law of Sale* 23-24, Van Eeden E *Consumer Protection Law in South Africa* 23, Stoop PN *The Concept 'Fairness' in the Regulation of Contracts under the Consumer Protection Act 68 of 2008* ("Stoop 2012") 68-71 and Eiselen S & Naudé T "Introduction and Overview of the Consumer Protection Act" in Eiselen S & Naudé T (eds) *Commentary on the Consumer Protection Act* 18-20.

<sup>24</sup> For the definition of "advertisement", see for example, s1 of the CPA and clause 4 of the Advertising Standards Authority of South Africa's Code of Advertising Practice.

<sup>25</sup> For a definition of "marketing", see for example American Association of Marketing "Definition of Marketing" <https://www.ama.org/AboutAMA/Pages/Definition-of-Marketing.aspx> (accessed on 20 April 2014).

<sup>26</sup> For the definition of "sales promotion", see for example Shimp TA *Integrated marketing communication in advertising and promotion* (international ed) 446.



Having examined the background and context of the promotional competitions, the focus will turn to a survey of the history of promotional competitions.<sup>27</sup> The historical roots of promotional competitions will be traced in order to establish how the regulation of these activities has developed. In addition to an international perspective, this study will explore the South African legal history in order to determine whether knowledge about the development of the law in this field can assist one in interpreting the current legal position.<sup>28</sup>

One of the main purposes behind this research is to examine whether the current regulation of promotional competitions in South Africa needs to be amended or improved. Accordingly, before the local legal position is evaluated, the regulation of promotional competitions in other countries will be explored in order to establish whether lessons can be learned from the relevant legislation in those jurisdictions. The applicable laws of New Zealand<sup>29</sup> and Great Britain<sup>30</sup> will be considered in particular, and it will be seen whether the legislation and case law of those countries can assist one to interpret the relevant South African law and recommend changes to it.

Thereafter, the common law relating to lotteries and promotional competitions will be considered.<sup>31</sup> The key elements of a lottery will be established and analysed, and it will be considered whether case law can be useful for interpreting the current legislation. The application of the Lotteries Act<sup>32</sup> will then be investigated, and the interplay between the Lotteries Act and the CPA with regard to promotional competitions will be examined. Other authors' views on this interplay will be

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<sup>27</sup> See, for example, C l'Estrange Ewen *Lotteries and sweepstakes*; Curtin L & Bernardo K *The History of Sweepstakes*; Ashton J *A History of English Lotteries*; Ezell JS *Fortune's Merry Wheel: The Lottery in America*; Kopp SW & Taylor CR "Games, Contests, Sweepstakes, and Lotteries: Prize Promotion and Public Policy" in Sheth JN (series ed) & Fullerton RA (ed) *Research in Marketing: Explorations in the History of Marketing* 151; Jones JP *Gambling Yesterday and Today*; LGB Main Report 37-44; Schwartz DG *Roll the Bones: The History of Gambling*; Brenner R with Brenner GA *Gambling and Speculation: A Theory, a History, and a Future of Some Human Decisions* 1-18.

<sup>28</sup> See, for example, Carnelley M "Offences relating to gambling and lotteries" in Milton JRL, Cowling MG and Hoorst SV *South African Criminal Law and Procedure Vol III: Statutory Offences* 2<sup>nd</sup> ed, service number 21, 2011 1-7;

<sup>29</sup> See s4 of New Zealand's Gambling Act 2003.

<sup>30</sup> See s339 and Schedule 2 of the United Kingdom's Gambling Act 2005.

<sup>31</sup> Regarding the common law position, see for example Bell, Dewar & Hall *Kelsey Stuart's The Newspaperman's Guide to the Law* (5<sup>th</sup> ed) 204; Dendy M "Lotteries and the Law" 1989 *Witwatersrand University Student Law Review* 1 43 49-50; Dendy M "Pitfalls of Advertising – II. Lotteries." 1988 *Businessman's Law* 17 77-78; Carnelley 2011 59.

<sup>32</sup> 57 of 1997.

questioned,<sup>33</sup> and it will be determined whether it will be possible for promoters to navigate through this interplay in order to run lawful promotional competitions. The discussion will then turn to those provisions of the Lotteries Act that used to govern promotional competitions in the past.<sup>34</sup> Some of the problems experienced with those provisions will be dealt with, and it will be examined whether repealed provisions are similar to the current legislation. It will be uncovered how the CPA has changed the regulation of promotional competitions and it will be determined whether the position has been improved. The focus will be on section 36 of the CPA and the related regulations that govern promotional competitions in South Africa at present.<sup>35</sup>

When one considers the provisions of section 36 and the related regulations, a number of questions arise. For example, are the traditional elements of a lottery (consideration, chance and prize) present within the regulation under the CPA as well?<sup>36</sup> Does section 36 only apply to competitions in which chance determines the outcome, or does the section's reach extend to those competitions in which participants have to display their skill? The CPA's provisions relating to consideration might create some uncertainty and, in particular, it will be investigated whether promoters are allowed to require consumers to purchase their goods or procure their services in order to enter a promotional competition. Further, one needs to consider the wording which implies that a promotional competition must be conducted in the ordinary course of business in order to be governed by the CPA and whether competitions may be conducted for

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<sup>33</sup> See for example Louw J, quoted in Koenderman T "Don't bet on it" *Finweek* 4 March 2010 50-51; Louw J "Consumer Protection Act 2008 and Promotional Competitions. Promotional Competitions – The End of the Line: Lawful No Longer". (Internet article accessed on 23 February 2014, but no longer available online. Article on file with author hereof.)

<sup>34</sup> S54 of the Lotteries Act and the Promotional Competition Regulations, 2002.

<sup>35</sup> Van Heerden C "Section 36" in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (Original Service 2014) ("Van Heerden 'Section 36'") paras 1-22; De Stadler 2013 66-78; Van 2013 169-174; Du Preez 77; Jacobs W, Stoop PN & Van Niekerk R "Fundamental Consumer Rights under the Consumer Protection Act 68 of 2008: A Critical Overview and Analysis" 2010 13:3 *Potchefstroom Electronic Law Journal* 302 342-344; Strachan D "Promotional competitions under the CPA" 2010 (December) *Without Prejudice* 34-35; Taylor N "Promotional competitions – let the promoter beware" 2011 (April) *Without Prejudice* 17-20 ("N Taylor"); Monty S "The money or the box – getting competition rules straight" 2012 (May) *Without Prejudice* ("Monty") 57-58; Mncwango S "The complex rules for promotional competitions" 2013 (April) *Without Prejudice* ("Mncwango") 82; Honey E & Mare A "Promotional competitions in terms of the CPA" (10 August 2011) <http://www.bowman.co.za/News-Blog/Blog/promotional-competitions-in-terms-of-CPA> ("Honey & Mare"), accessed on 30 May 2015.

<sup>36</sup> Regarding the elements of a lottery, see for example Williams FE *Lotteries, Law and Morals* ("FE Williams 1958") 69; *R v Cranston* 1914 AD 238; *R v Lew Hoi* 1937 AD 215 220; *Minister of Mineral and Energy Affairs v Lucky Horseshoe (Pty) Ltd* 1994 (2) SA 46 (A) 52.

other purposes. The author will also examine the situation that will arise if a promotional competition does not fall within the CPA's scope.

It needs to be explored how the CPA protects consumers against misleading marketing of competitions. One needs to enquire whether these provisions are adequate or whether there is room for possible improvement. In particular it will be determined whether the CPA sets minimum standards for competition offers and rules. Further, it will be examined whether a legal relationship is created between a promoter and consumers who accept the promoter's offer to participate in a competition, and the rights that may arise as a result thereof will be identified. In addition, the study will focus on some other consumer rights in the CPA, including the rights to privacy<sup>37</sup> and responsible marketing.<sup>38</sup> This research will also focus on challenges that might be experienced by promoters in interpreting and complying with the CPA's provisions. For example, the CPA's requirements regarding record-keeping and oversight of competitions will be questioned. Some drafting errors will be identified as well.

In order to be effective, regulation must be coupled with proper sanctions in order to serve as a deterrent. While this research will not deal with the enforcement of the CPA and other relevant legislation, the applicable sanctions will be identified and considered.

The thesis will investigate the role of self-regulation in the running of promotional competitions. It will enquire into the nature and value of self-regulation,<sup>39</sup> and examine some rulings of self-regulatory bodies in order to determine whether promoters can learn from such rulings and apply the principles in order to structure compliant promotional competitions.

Last, it will be determined whether the current legislation relating to promotional competitions can be improved. Typographical errors and drafting issues will be

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<sup>37</sup> See s14 of the Constitution of the Republic of South Africa, 1996; s11 of the CPA; s45 of the Electronic Communications and Transactions Act, 2002; Van Zyl E & De Stadler E "Section 11" in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (Original Service 2014); and the Protection of Personal Information Act 4 of 2013.

<sup>38</sup> See, for example, Van Heerden C "The Regulation of Marketing under the CPA" in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (Original Service 2014).

<sup>39</sup> Regarding industry codes under the CPA, see for example Woker 2010 221-223; Melville N & Yeates J "Section 82" in Eiselen S & Naudé T (eds) *Commentary on the Consumer Protection Act*; De Stadler 2013 93-94, 182; Regarding self-regulation, see also Boddewyn JJ "Advertising Self-Regulation: True Purpose and Limits" 1989 *Journal of Advertising* 18:2 19; Gunningham N & Rees J "Industry Self-Regulation: An Institutional Perspective" 1997 *Law & Policy* 19:4 363.

identified and uncertainties will be pointed out. Recommendations will then be made as to how these issues can be resolved. This will include proposals relating to amendments to the legislation.

### **1.3 Hypotheses**

It is assumed that this research will show that background knowledge of disciplines outside the legal field will assist one to understand the potential need for legislation that regulates gambling and related activities. It is submitted that sociological literature, in particular, might be useful to understand the role of gambling activities in society and people's need for gambling, and especially people's opinions in favour of or against gambling, thus informing the policy that underlies or should underlie gambling legislation.

It is submitted that one must explore the terminology that is used in respect of gambling and associated activities in order to interpret the relevant legislation and categorise promotional competitions in particular. Further, because promotional competitions lie at an intersection of gambling and marketing, it will be useful to understand the advertising, marketing and promotional context within which promotional competitions are situated in order to identify the nature and purpose of these competitions.

This research will demonstrate that the historical context of promotional competitions is valuable for understanding the regulation of promotional competitions and the relevant policy considerations. The history of the pertinent legislation and the surrounding case law should serve as an important basis for evaluating and interpreting the current legal position.

When it comes to the current regulation of promotional competitions in South Africa, it is expected that some uncertainties regarding the interplay between the Lotteries Act and the CPA will be encountered, but it is assumed that it will be possible to resolve these. Further, it is foreseen that some of the CPA's relevant provisions will prove to be unclear, deficient or challenging to interpret. A number of recommendations will be made to deal with these issues. It is submitted that a study of the relevant legislation in New Zealand and the United Kingdom may assist in this regard.

A discussion of the applicable self-regulatory industry codes will round off this analysis of the regulation of promotional competitions in South Africa, while a discussion of

some self-regulatory rulings will give a practical perspective on the running of promotional competitions.

Overall, it is expected that this thesis will provide a comprehensive evaluation of the state of the regulation of promotional competitions in South Africa. It is anticipated that it will come to the conclusion that this regulation is appropriate and extensive, but it will also uncover some problems with the relevant legislation and provisions. It is submitted that these issues can be remedied by way of amendments to the pertinent provisions.

#### **1.4 Significance of the research**

It is submitted that this study will be a valuable contribution to the academic literature pertaining to the law relating to promotional competitions, particularly from a South African perspective. It is hoped that its exploration of the sociological and policy issues, the historical background as well as the consumer protection and marketing considerations will provide context to a study of these competitions. It is submitted that the analysis of the current legislation will assist both lawyers and competition promoters in interpreting the law. It is hoped that the recommendations relating to improvements and amendments to the legislation may be taken into account if the relevant legislation is reviewed at some point in the future. Ultimately, it is anticipated that this thesis will provide an all-encompassing appraisal of the regulation of promotional competitions in South Africa and an evaluation of the relevant law.

#### **1.5 Approach and method**

To a large extent, this research will involve use of the doctrinal method in order to examine South Africa's regulation of promotional competitions. This will involve a literature study to synthesise the relevant legislation, case law and other materials and to conduct an extensive critical analysis thereof.

Interdisciplinary research will be undertaken as well. In particular, the author will draw from sociological literature in order to provide background and context to the topic. This will be complemented with a cursory exploration of the field of advertising, marketing and sales promotion.

Historical research will play an important role in the writing of the thesis. It will be useful to consult materials such as draft legislation, explanatory memoranda, commission reports, submissions by the public, news articles, previous legislation and older case law in order to understand the history and context of the subject matter and how it has influenced the current legislation. Repealed legislation and older case law may assist in the interpretation process.

The comparative method will be employed too. The relevant laws of New Zealand and Great Britain will be examined. The regulation of promotional competitions in those countries will be compared with the position in South Africa. It may be informative to do so and to determine whether the other countries' legislation may assist one in interpreting South Africa's legislation or in order to suggest improvements to same.

## **1.6 Choice of comparative jurisdictions**

For a number of reasons, Great Britain was chosen as a comparative jurisdiction. Great Britain and South Africa have close historical ties and both countries employ common law systems. This similarity assists one in comparing the two jurisdictions and determining if provisions from the British legislation could be used in South Africa. Due to the use of the common law system, case law plays an important role in Great Britain. There is an abundance of British decisions relating to lotteries and prize promotions in particular. The reasoning found in these cases can be useful in interpreting South African provisions, especially because of the similarity between English and South African law when it comes to the essential elements of a lottery. South African courts have recognised this similarity and various British lottery cases have been cited by our courts.<sup>40</sup> In addition, the volume of British case law relating to lotteries and prize promotions provide an abundance of practical examples of lotteries and competitions and the factors that one needs to take into account when determining whether or not a scheme is lawful.

It must be borne in mind that there is a particular similarity between certain provisions of South Africa's Lotteries Act and the United Kingdom's former Lotteries and

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<sup>40</sup> See, for example, *R v Lew Hoi* 1937 AD 215; *R v Gondo* 1951 (3) SA 509 (A); *S v Midas Novelties (Pty) Ltd* 1966 (1) SA 492 (A); *FirstRand Bank v National Lotteries Board* [2008] 3 All SA 121 (SCA).

Amusements Act.<sup>41</sup> In view of this, case law on the British provisions can cast a light on the relevant South African legislation. Furthermore, it needs to be noted that comprehensive self-regulatory industry codes complement Britain's legislation relating to promotional competitions. Those codes are far more wide-ranging than the ones found in South Africa. As such, they serve as practical comparative sources.

New Zealand was chosen partly due to its influence on the current British legislation regarding prize promotions. In particular, it has been pointed out that the British provisions relating to the costs that may be charged in respect of competition entries have been modelled on the "New Zealand model".<sup>42</sup> New Zealand is a smaller and younger country than Great Britain, but it employs a common law system too. Although it has a lengthy gambling statute, it appears that the country's legislature attempted to use clear and understandable language. The legislation merely authorises promotional competitions, known as sales promotion schemes in that country, and they are not regulated by way of extremely comprehensive or complex provisions. It is therefore interesting to compare those provisions with the extensive ones found in South Africa.

## 1.7 Delineation

The scope of this thesis will cover the sociological, marketing and consumer contexts of promotional competitions by way of background. However, the discussion of these contexts is based on a literature study only and is not exhaustive. Empirical research and surveys will not be conducted. For research on the social and economic impact of gambling, readers are referred to the reports issued by the National Gambling Board.<sup>43</sup> It is submitted that a study of the prevalence, impact and efficacy of promotional competitions in South Africa might be a useful topic for future research, although such research might lie within the field of marketing studies.

The thesis will deal with the history of gambling and lotteries, and promotional competitions in particular. This overview is based on existing literature. While a

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<sup>41</sup> 1976. See the similarity between s56 of the Lotteries Act and s14 of the Lotteries and Amusements Act.

<sup>42</sup> Dresden B "United Kingdom" in *International Promotion Marketing Law Book* (2<sup>nd</sup> ed) ("Dresden 2010") 276.

<sup>43</sup> See National Gambling Board "Research" <http://www.ngb.org.za/organisational-areas/research.aspx>, accessed on 27 July 2015.

moderate quantity of international material was accessible for this purpose, much less information was available regarding the South African history of this topic. This might be a subject for future research.

The self-regulation of promotional competitions in South Africa will be explored, with particular focus on the Advertising Standards Authority's Code of Advertising Practice ("ASA Code"). Only the relevant provisions of the ASA Code will be dealt with and the entire ASA Code will not be discussed in detail. While selected Advertising Standards Authority rulings will be discussed as well, the thesis does not contain a full survey of all applicable rulings.

Although the thesis touches on the privacy aspects of promotional competitions as well as the general marketing provisions of the CPA, those aspects and provisions will not be explored in detail. The enforcement of the CPA's provisions, particularly those relating to promotional competitions, will not be investigated, although the relevant sanctions will be considered.

## **1.8 Outline of chapters**

This thesis commences with the introduction contained in this Chapter 1. Thereafter, in Chapter 2, the terminology relating to gambling, lotteries and promotional competitions will be examined. The play element of gambling will be discussed, in addition to people's reasons for gambling, the consequences of gambling, opinions relating thereto as well as policy considerations. The chapter will contain a discussion of the advertising, marketing and promotional context of promotional competitions as well as the consumer protection perspective.

Chapter 3 contains a brief history of the subject from a global perspective. In addition, it will describe the development of the relevant legislation in South Africa and related case law will be discussed.

The law relating to promotional competitions in New Zealand and Great Britain will feature in Chapter 4. This will include a discussion of some case law as well as rulings by self-regulatory authorities.



Chapter 5 contains a detailed analysis of the CPA's provisions that relate to promotional competitions. The relevant provisions of the Lotteries Act will be discussed, and the interplay between the Lotteries Act and the CPA will be examined.

Self-regulation is the focus of Chapter 6. It will include a brief discussion of international industry codes as well as a more detailed study of self-regulation of promotional competitions in South Africa. In particular, the relevant provisions of the ASA Code as well as the Code of Conduct of the Wireless Application Service Providers' Association will be covered.

This thesis concludes with Chapter 7, in which conclusions will be drawn and recommended improvements of or amendments to the relevant legislation will be proposed.

## **1.9 Reference techniques**

In this work, the author may refer to some statutes, organisations and the like on repeated occasions. Where a frequently used term is referred to for the first time, the reference will be in full. It will be accompanied by an abbreviation that will appear between inverted commas and brackets, for example: National Consumer Commission ("NCC").

Where a source is referred to, the full reference will be reflected in the relevant footnote. If a source is referred to more than once, the first full reference will be accompanied by an abbreviated citation or "mode of citation", which will appear between inverted commas inside brackets. For sake of brevity, further citations will display the abbreviated citation instead of the full reference. Where an abbreviated citation is displayed the reader can also find the full reference by consulting the bibliography at the end of this thesis. The bibliography is displayed in table format. In the table, each full reference of a source is accompanied by its "mode of citation" in a separate column alongside the full reference.

## CHAPTER 2

### BACKGROUND

- 2.1 Introduction
- 2.2 Terminology
- 2.3 The play element
- 2.4 Policy and regulation
- 2.5 The consumer protection perspective
- 2.6 The marketing context
- 2.7 Conclusion

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#### 2.1 Introduction

At first glance, promotional competitions might appear to be simple marketing gimmicks. Yet, upon closer examination, one discovers a network of disciplines that converge in these activities. These disciplines range from law and criminology to sociology and marketing studies. In order to evaluate the regulation of promotional competitions properly, these study fields need to be taken into consideration. Accordingly, this chapter will explore the background and context of promotional competitions.

The chapter commences with an explanation of the relevant terminology and the key elements of the relevant concepts. Thereafter, promotional competitions will be considered from a sociological perspective. In essence, promotional competitions are play activities and it is useful to understand the role of play in people's lives and in society as it may impact on regulatory policy. Since this thesis is about the regulation of promotional competitions, there will also be a discussion surrounding the nature of vice, crime and regulation. It will be explained that promotional competitions are in fact gambling activities. Gambling is a particularly controversial topic and there are various arguments for and against the prohibition, legalisation and regulation of this activity. These arguments will be discussed and it will be considered whether gambling, and promotional competitions in particular, should be prohibited or regulated. Since consumer protection law also regulates promotional competitions, this perspective will

also be afforded attention. True promotional competitions are conducted for marketing purposes. As such, the marketing perspective will be considered as well.

## 2.2 Terminology

### 2.2.1 Opening remarks

This thesis examines the regulation of promotional competitions in South Africa, a topic which lies in a subject field that is awash with terminology. In order to consider this, one needs to be aware of the context within which these competitions are found and to understand the meaning of all relevant concepts. It is therefore necessary to explore the various relevant terms and their meanings in order to have a clear reference frame when considering the matters discussed in this thesis.

The term “promotional competition” is one of the key terms used in this thesis. It features in South Africa’s Consumer Protection Act, 2008 (“CPA”) to denote a chance based competition that has the purpose of promoting goods or services.<sup>1</sup> The term was also employed in the Lotteries Act,<sup>2</sup> which regulated promotional competitions before the relevant provisions were repealed and replaced by the CPA’s provisions.<sup>3</sup> However, other terms are also used for this kind of competition and similar schemes.<sup>4</sup> These terms are found in the legislation that regulates promotional competitions in other countries, and include “sweepstakes”,<sup>5</sup> “prize competitions”,<sup>6</sup> “sales promotion schemes”<sup>7</sup> and “trade promotion lotteries”.<sup>8</sup> These terms and a couple of other related terms will be referred to again later in this thesis and will be defined in further detail.

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<sup>1</sup> CPA, s36(1)(d). See the full definition and analysis in Chapter 5.

<sup>2</sup> 57 of 1997 (“Lotteries Act, 1997”)

<sup>3</sup> Lotteries Act, 1997 s1: “‘promotional competition’ means a lottery conducted for the purpose of promoting the sale or use of any goods or services.” To be read with the definition of “lottery” in the same section: “‘lottery’ includes any game, scheme, arrangement, system, plan, promotional competition or device for distributing prizes by lot or chance and any game, scheme, arrangement, system, plan, competition or device, which the Minister may by notice in the Gazette declare to be a lottery”.

<sup>4</sup> See also the various gambling related terms defined in the LGB Main Report 145-154.

<sup>5</sup> A term often used in the United States of America. See for example the Deceptive Mail Prevention and Enforcement Act, which defines a “sweepstakes” as “a game of chance for which no consideration is required to enter”.

<sup>6</sup> A term used in, for example, s339 of the UK Gambling Act 2005.

<sup>7</sup> See s4 and s18 of the NZ Gambling Act 2003.

<sup>8</sup> A term used in, for example, Australia. See LeGuay P “Australia” in *International Promotion Marketing Law Book* (2<sup>nd</sup> ed) (“LeGuay”) 14-16.

Essentially, a promotional competition consists of a competition that a person enters in order to stand a chance to win a prize.<sup>9</sup> One of the key elements of a promotional competition lies in the fact that the outcome of the competition is determined by lot or chance. Due to the chance element, this type of competition constitutes a form of gambling (even if in the wider sense of that word). This is because such a game can display most, if not all, of the key elements of gambling or a lottery, which is a species of gambling. In actual fact, promotional competitions would in the past have fallen within the purview of South Africa's Gambling Act, 1965, and in many countries they are still governed by gambling legislation.<sup>10</sup> After the repeal of South Africa's Gambling Act, 1965, the regulation of promotional competitions moved to the Lotteries Act, 1997. However, as Carnelley and Schrage point out, South Africa applies dual regulation of gambling in the form of national and provincial gambling titled legislation on the one hand, and the Lotteries Act, 1997 on the other.<sup>11</sup> As such, all of those statutes together still constitute gambling legislation. Even though promotional competitions might now be regulated by the CPA, they are still referred to in the Lotteries Act, 1997, and consequently retain their connection to gambling.

The focus of this thesis is on promotional competitions and the regulation thereof, but it needs to be kept in mind that those competitions are in fact forms of gambling. To an extent, this thesis is therefore also (at least peripherally) about gambling and its regulation. In order to consider the regulation of promotional competitions, one must therefore consider the regulation of gambling as well.

### 2.2.2 Gambling

Gambling can be defined in different ways and in a broad and narrow sense.<sup>12</sup> Generally, gambling is explained as an activity in which money or something of value

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<sup>9</sup> The CPA's definition of "promotional competition" will be fully analysed in Chapter 5 below.

<sup>10</sup> For example Australia, New Zealand and the United Kingdom.

<sup>11</sup> Carnelley M & Schrage E "Gambling Regulation: A comparison between the Roman and South African gambling laws" in Hoctor SV & Schwikkard PJ (eds) *The Exemplary Scholar: Essays in Honour of John Milton* ("Carnelley & Schrage") 264.

<sup>12</sup> McMillen notes that, although the concept appears to be generally understood, "gambling has no intrinsic meaning". In his view, gambling can have different meanings according to the "socio-historical context in which it occurs". [McMillen J "Understanding Gambling: History, concepts and theories" in McMillen J (ed) *Gambling Cultures: Studies in history and interpretation* ("McMillen") 6] Munting finds that it is not easy to give a meaning to gambling, although people understand the concept "intuitively" and that "almost any area of risk or chance" could form part of this. As he notes, expressions such as "life is all a gamble" are quite common. [Munting R *An economic and social history of gambling in Britain*

is staked on an uncertain future event in the hope of winning a prize.<sup>13</sup> In other words, the following three key elements usually feature in definitions of gambling:

- (a) participants contribute money or something of value in order to participate;
- (b) the outcome of the activity is unknown and will be determined by an event that will happen in the future; and
- (c) one or more persons will win a prize or receive some kind of reward.

To a greater or lesser extent, these elements also feature in promotional competitions.

### 2.2.2.1 Gambling definitions in foreign sources

A comprehensive definition for gambling is found in Devereux's sociological work on the topic. He defines gambling as "an activity in which two or more persons engage, under certain rules and conditions specified in advance, to make a transfer of any specified amount of property contingent upon the outcome of a future and uncertain event".<sup>14</sup> The money or thing of value is called the "stake" and the agreement between the participating parties can be described as a "wager" or a "bet".<sup>15</sup>

In the United Kingdom, the Gambling Commission, under chairmanship of Lord Rothschild (the "Royal Commission"), analysed the definition of "gambling" thoroughly.<sup>16</sup> Before crafting a more comprehensive definition, the Royal Commission provided the following, simpler definition of gambling:

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*and the USA* ("Munting") 1; Reith G "The Culture of Gambling in Great Britain: Legislative and Social Change" in Spapens T, Littler A and Fijnaut C (eds) *Crime, addiction, and the regulation of gambling* 165 ("Reith 2008") 167 fn 2] Becker notes that there is a distinction between the economic and legal definitions of gambling, the principal difference being that the degree of randomness and the amount of money involved does not play a role in the economic definition. [Becker T "The German Market for Gambling and Betting" in Spapens T, Littler A and Fijnaut C (eds) *Crime, addiction, and the regulation of gambling* 141 ("Becker") 142]

<sup>13</sup> See Collins P *Gambling and the public interest* ("P Collins") 15; McMillen 6-7; Rose I N "The International Law of Remote Wagering" 2007 *John Marshall Law Review* Vol 40 ("Rose 2007") 1161; Rose I N *Gambling and the Law* ("Rose 1986") 75.

<sup>14</sup> Devereux EC *Gambling and the Social Structure: A sociological study of lotteries and horse racing in contemporary America* (Vol. 1) ("Devereux") 28.

<sup>15</sup> Devereux 28-29.

<sup>16</sup> Royal Commission on Gambling Final Report, July 1978 ("1978 Commission Report") 1 and 449-450.

Almost everyone knows intuitively what gambling is – buying the chance of making money; taking a calculated risk because of the potential reward; engaging in an action or a series of actions resulting in a favourable, unfavourable or neutral outcome; and so on.<sup>17</sup>

In Appendix A to its report, the Royal Commission then formulated this definition:

Gambling consists of an agreement between parties with respect to an unascertained outcome that, depending on the outcome, there will be a redistribution of advantage (usually but not always monetary) among those parties. This redistribution may be achieved directly (as in a game of poker) or through an agent (as in the case of football pools and lotteries).<sup>18</sup>

The Royal Commission's definition seems to give prominence to the contractual nature of gambling, to such an extent that one could perhaps say that the Commission describes gambling as a type of agreement.<sup>19</sup> The definition focuses on the redistribution aspect of gambling as well. One must bear in mind that the Commission had to devise a definition for gambling for purposes of the Commission's evaluation of gambling and its regulation in the United Kingdom. Not all gambling activities would

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<sup>17</sup> 1978 Commission Report 1.

<sup>18</sup> 1978 Commission Report 449.

<sup>19</sup> In practice, gambling can give rise to an actual agreement (contract) between gambler and gambler, or between gambler and casino, and agreements often lead to disputes. As such, the enforceability of gambling agreements has been an issue through the ages, with such agreements being unenforceable or enforceable during different time periods and in different countries. See, for example, Carnelley & Schrage 252-263 regarding gambling in ancient Roman times and Roman laws relating to gambling debts and gambling claims. Gambling debts are unenforceable under the common law, although gambling in itself is not prohibited by such law. Christie 393; Carnelley M "Post-Constitutional Legal Developments in the South African Gambling Law through Judicial Precedent" 2001 *Stellenbosch Law Review* 1 131-154 ("Carnelley *Stell LR*") 131. In a modern South African context, see s65 of the Lotteries Act, 1997 and s16 of the National Gambling Act, 2004 pursuant to which gambling debts are enforceable (although there are some exceptions). Regarding the enforcement of gambling debts and related agreements in South Africa and some related court judgements, see, for example, Carnelley M "Inter-party enforcement of legal gambling debts. Sea Point Racing CC v Wilkinson [1999] 2 All SA 626 D" 1999(1) *Obiter* 218-223; Carnelley M "Enforcement of lawfully incurred gambling debts" 2001(5) *De Rebus* 57; Carnelley M "Tata 'ma millions? The enforceability of a gambling debt between the lottery operator and the ticket-holder; and the enforceability of a partnership agreement to share lottery winnings already paid to one of the partners" 2006 (1) *Obiter* 358-368. The enforceability of foreign judgements relating to gambling debts is also discussed in Carnelley M "The role of public policy in the non-enforcement of foreign judgments arising from gambling debts in South African courts: A comparative overview" 2007 *Journal for Juridical Science* 32:2 1-17. In respect of public policy and wagering contracts, see for example Hawthorne L "Public policy: the origin of a general clause in the South African law of contract" 2013 *Fundamina* 19:2 300-320 ("Hawthorne") 315-319. See also Christie 392-39 regarding gambling contracts in the context of illegality and unenforceability. The *locus classicus* in South African case law is *Dodd v Hadley* 1905 TS 439, in which the court held that wagers were not enforceable. (Hawthorne 318) In circumstances where gambling debts cannot be enforced under the Lotteries Act, 1997 or the National Gambling Act, 2004 they will be governed by the common law and will be unenforceable on public policy grounds. (Hawthorne 318, citing *Gibson v Van der Walt* 1952 (1) SA 262 (A) at 270.)

have fallen in the Commission's terms of reference and its definition has a limited scope.<sup>20</sup>

### 2.2.2.2 Gambling definitions in South African sources

One can find definitions of gambling in a South African context as well. Although its predecessor, the Howard Commission,<sup>21</sup> did not discuss the meaning of gambling, the Lotteries and Gambling Board provided a detailed glossary of gambling related terminology in its Main Report of the Lotteries and Gambling Board ("LGB Main Report").<sup>22</sup> The LGB Main Report's definition of gambling is virtually identical to the simpler definition contained in the 1978 Commission Report,<sup>23</sup> but it adds that "[i]n the most general sense of all, gambling refers to any activity engaged in for the sake of a return of which the outcome is uncertain".<sup>24</sup> Wiehahn recounts how the Lotteries and Gambling Board conducted wide research into the meaning of the term "gambling" and that the Board resolved to use it as a "generic term" encompassing lotteries, gaming and wagering.<sup>25</sup>

South Africa's National Gambling Act, 2004 does not define "gambling" as a concept on its own.<sup>26</sup> Perhaps, the legislature did this to avoid devising a comprehensive

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<sup>20</sup> 1978 Commission Report 449. The Commission stated that, in a broad interpretation, "gambling" could include "any activity engaged in for the sake of a return which is uncertain".

<sup>21</sup> The Commission of Inquiry into Lotteries, Sports Pools, Fund-Raising Activities and certain Matters relating to Gambling (RP 80/1993) ("Howard Report"). For more on that Commission, see page 117-118 below.

<sup>22</sup> The Main Report on Gambling in South Africa (RP 85/1995) ("LGB Main Report"). See the more detailed discussion at pages 118-120 below.

<sup>23</sup> See page 18 above.

<sup>24</sup> LGB Main Report 149.

<sup>25</sup> Wiehahn NE *Gambling in South Africa – A New Challenge* ("NE Wiehahn 1995") 3-4. In respect of the word "gambling", Carnelley notes that "the term includes lotteries, wagering on horse races as well as casino gaming". Carnelley M "Guarding the Guardians: Non-Judicial and Judicial Control over Unlawful Decisions by the South African Gaming Boards" 2001 *Obiter* 74-101 ("Carnelley *Obiter* 2001") 74 fn 1. Christie and Bradfield note that the courts use "gambling, gaming, wagering and bettering [...] as more or less interchangeable terms". Christie RH & Bradfield GB *Christie's The Law of Contract in South Africa* (6<sup>th</sup> ed) ("Christie") 393. Wiehahn draws a distinction between lotteries, gaming and wagering. He argues that a lottery is a "slow-response activity" (perhaps because there is a time lapse between the moment when the lottery ticket is purchased and the moment winners are made known during the actual lottery draw). On the other hand, he describes gaming as a "quick-response activity", while wagering consists of "betting on human and animal sport". (NE Wiehahn 1995, 3-4)

<sup>26</sup> Although the National Gambling Act, 2004 does not contain a definition for "gambling", some of the provincial gambling statutes do contain such a definition. The North West Gambling Act, 2001, defines "gamble" ("gambling" having a corresponding meaning) as follows:

"the wagering of a stake of money or anything of value on the unknown result of a future event at the risk of losing all or a portion thereof for the sake of a return, irrespective of whether any measure

definition that might lead to divergent interpretations, debates and litigation.<sup>27</sup> Or, the legislature did not want to codify a concept that already has so many different meanings. Whatever the reason may be, the legislature decided on defining and regulating specific “gambling activities”, without reference to “gambling” in general. According to section 3, the following activities classify as gambling activities:

- (a) placing or accepting a bet or wager in terms of section 4(1);
- (b) placing or accepting a totalisator bet, in terms of section 4(2); or
- (c) making available for play, or playing -
  - (i) bingo or another gambling game in terms of section 5;
  - (ii) an amusement game, to the extent that applicable provincial laws require such games to be licensed, or
  - (iii) an interactive game.

The scope of this work does not allow for a detailed analysis of all of these activities. However, some comments will suffice.

As one would expect, the placing of bets or wagers is regarded as a gambling activity.<sup>28</sup> According to section 4(1), someone will be regarded as placing a bet or wager if that person:

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of skill is involved or not and encompasses all forms of gambling but, excludes the operation of an amusement machine”.

The KwaZulu-Natal Gaming and Betting Act, 2010 contains the following definition for “gambling”:

“engaging in any activity whereby money or any other thing of value is staked on the unknown result of a future event at the risk of losing all or a portion of the money or valuable thing so staked for the sake of a return and is the generic term encompassing all forms of ‘gaming’ and ‘betting’ as defined in this section, but excludes –

- (a) any lawful lottery; and
- (b) any recognised investment activity undertaken with a recognised financial institution”.

See Carnelley *Obiter* 2001 74 fn 1.

<sup>27</sup> On the other hand, this could lead to a situation where an activity might be gambling in the traditional sense but, due to the lack of a general definition of “gambling”, does not fall within the scope of the provisions of the National Gambling Act, 2004. In such a situation, the activity will not be regulated by that Act, but it might still be covered by the common law. The common law did not prohibit gambling. However, gambling agreements were not enforceable under the common law – mostly likely to dissuade people from participating in gambling. (Carnelley M “Gambling, Gaming and Lotteries” in Joubert WA (founding editor) *The Law of South Africa* 2<sup>nd</sup> ed 10:2 164; Carnelley *Stell LR* 129; Christie 393)

<sup>28</sup> The National Gambling Act, 2004 does not define the terms “bet” and “wager”. As such, from the context of the wording of section 4(1), one must deduce that a “bet” or “wager” refers to money (or something of value) staked on a contingency. However, some of the provincial gambling statutes do contain definitions for “betting” and “wagering”. See, for example, the KwaZulu Natal Gaming and Betting Act, 2010 and the North West Gambling Act, 2001.



- (a) being a player, stakes money or anything of value on a fixed-odds bet, or an open bet, with a bookmaker on any contingency; or
- (b) being a bookmaker -
  - (i) accepts a stake of money or anything of value on a fixed-odds bet, or an open bet, from a player on any contingency; or
  - (ii) stakes money or anything of value on a fixed-odds bet, or an open bet, with another bookmaker on any contingency;
- (c) stakes or accepts a stake of money or anything of value with one or more other persons on any contingency; or
- (d) expressly or implicitly undertakes, promises or agrees to do anything contemplated in paragraph (a), (b) or (c).

As can be seen from section 4(1), bets and wagers involve the staking of money or something of value on a contingency. The National Gambling Act, 2004 does not define the terms “bet” or “wager”, although it does contain definitions for specific kinds of bets. It does define “contingency” as “an event or occurrence of which the outcome is uncertain or unknown to any person until it happens”.<sup>29</sup> As such, the activity of betting or wagering contains some of the traditional characteristics of gambling, but, interestingly, there is no mention of a prize.<sup>30</sup> When it comes to bets and wagers, it seems that the bookmaker plays a key role, because the Act states that betting or wagering takes place if money is staked with a bookmaker<sup>31</sup> or takes place if a bookmaker accepts or makes the stakes.<sup>32</sup>

Returning to gambling activities as classified in section 3 of the National Gambling Act, 2004, we see that betting and wagering are not the only activities that qualify as gambling activities. Bingo, amusement games and interactive games are classified as gambling activities too.

### **2.2.2.3 General remarks regarding gambling as a concept**

Despite the various definitions that exist, there is no ultimate, general definition for gambling. As Collins points out, some activities fall within the scope of gambling even

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<sup>29</sup> National Gambling Act, 2004, s1.

<sup>30</sup> As mentioned above (page 17), the prize or reward is one of the three traditional key elements of gambling. Accordingly, the absence of the prize element is striking. In fact, the term “prize” is not even defined in the National Gambling Act, 2004.

<sup>31</sup> S4(1)(a)

<sup>32</sup> S4(1)(b)

though people might not ordinarily regard those activities as gambling.<sup>33</sup> In this regard, he mentions examples such as lotteries, prize draws and newspaper competitions.<sup>34</sup> McMillen notes that gambling generally has a restricted definition in academic writing, which excludes activities such as private gambling (where the money does the rounds within a closed group of players) or even insurance.<sup>35</sup> He points out that the meaning of the concept depends on the culture, society and era in which it takes place.<sup>36</sup> He notes that the meaning of the term normally centres on the financial element – the staking of money or something of value.<sup>37</sup> However, he informs the reader that it can play a social or even a religious role in some cultures or societies.<sup>38</sup>

One aspect of gambling that is certain<sup>39</sup> is that it is based on an event that is uncertain.<sup>40</sup> This uncertainty is central to the definition of gambling. Devereux explains that an event is uncertain if “the outcome cannot be adequately controlled or predicted by the parties engaged on the basis of knowledge and techniques legitimately

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<sup>33</sup> P Collins 15.

<sup>34</sup> P Collins 15. Many authors point to the fact that stock broking could be considered gambling. See, for example, the 1978 Commission Report 449 and McMillen 6. Munting notes that when Barings Bank collapsed in the 1990s due to derivative market losses, many people linked the speculation on such markets to gambling. (Munting 2-3) Before that, during the 1960s, a council of churches classified the British government’s Premium Bonds as gambling products. (Munting 4)

<sup>35</sup> McMillen 6-7. Van Niekerk examines the relationship and distinction between insurance and gambling in detail, specifically in the context of the insurance law’s development in the Netherlands. Van Niekerk JP *The Development of the Principles of Insurance Law in the Netherlands from 1500 to 1800* (“Van Niekerk”) 89-174. See also Rose IN “How Insurance Became (Mostly) Not Gambling” 2014 *Gaming Law Review and Economics* 18:9 (“Rose 2014”) 864-872 for a discussion of insurance and gambling and the history of the relationship between those two. Rose remarks that “[i]nsurance is, of course, gambling”, and points out that “unlike traditional gambling, the buyer usually hopes the future event will not happen”. (Rose 2014 864)

<sup>36</sup> McMillen 6.

<sup>37</sup> McMillen 6. Herman also raises the point that money adds thrill, excitement and purpose to gambling. He states: “Things done casually, without effort, including playing games, tend to be regarded as frivolous. Thus, a small bet helps a game come alive, and a large bet generates more interest [...] Putting one’s money where one’s mouth is produces a challenge which is difficult to take lightly.” Herman RD *Gamblers and Gaming: Motives, Institutions and Controls* (“Herman 1976”)

<sup>38</sup> McMillen 6-7. In this regard, McMillen refers to “pre-capitalist societies, such as Bali, China, Africa and Australian Aboriginal communities” in which gambling did not have much of a profit making purpose.

<sup>39</sup> The interplay between certainty and uncertainty has led to many paradoxes and popular quotes. For example: “[...] one unchangeable certainty is that nothing is certain or unchangeable.” (John F. Kennedy, State of the Union Address, January 11, 1962)

<sup>40</sup> 1978 Commission Report (Vol 2) 450; LGB Main Report 149. In the context of legal history, Van Niekerk explains that jurists distinguished between different types of uncertainty in chance based transactions, particularly absolute (objective) uncertainty and relative (subjective) certainty. Van Niekerk 96.

available”.<sup>41</sup> No matter to what degree, the outcome of gambling always depends on external factors that cannot be controlled.<sup>42</sup>

Even though chance plays a key role in gambling, some gamblers regard particular types of gambling as games of skill.<sup>43</sup> Herman warns that one cannot make an absolute, clear-cut distinction between gambling games, because the player’s perspective must be taken into account.<sup>44</sup> When playing roulette, one person might have the view that he is taking part in a game of skill, while another might regard the activity merely as a game of chance.<sup>45</sup> Nevertheless, as Reith points out, chance is found in all types of gambling to one degree or another.<sup>46</sup>

Roger Caillois divided the human activity of play into four categories.<sup>47</sup> Authors often divide gambling games into two of Caillois’s four categories: agonistic games and aleatory games.<sup>48</sup> Agonistic games involve skill, while the outcome of aleatory games is determined by chance.<sup>49</sup> Subject to his warning about making clear-cut distinctions, Herman is of the view that gambling games can actually be divided into all four of Caillois’s categories.<sup>50</sup> For example, he classifies backgammon, poker and handicapping (sports betting, horse playing and even stock market playing) as agonistic games. Under aleatory games, he includes dice games, blackjack, roulette,

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<sup>41</sup> Devereux 28.

<sup>42</sup> The Royal Commission notes that, although gambling might involve one uncertain event or a series of such events, “the outcome is in all cases uncertain tot the parties”. 1978 Commission Report 450.

<sup>43</sup> From a legal perspective, it is often crucial to determine whether or not an activity involves chance or skill. For example, in order to decide whether or not an activity can be classified as a “promotional competition” under the CPA, one must analyse whether the outcome of the competition is determined by lot (chance) or by skill. If a mixture of the two is present, the scheme will still be regarded as a promotional competition. However, Becker points out that it is difficult to determine whether a game is one of skill or chance, and that it is often a relative, subjective analysis. He mentions, for example, that poker could be deemed to be a game of skill when a newcomer plays against a season player, but it could be seen as a game of chance when both players are professionals. (Becker 142-143)

<sup>44</sup> Herman 1976 7.

<sup>45</sup> Herman 1976 7.

<sup>46</sup> Reith G *The Age of Chance: Gambling in Western Culture* (“Reith 1999”) 94.

<sup>47</sup> See the more detailed discussion at pages 32-33 below. The four categories are: agonistic games, aleatory games, mimicry and vertigo.

<sup>48</sup> In evaluating gambling activity, authors often make the distinction between games of skill (agonistic games) and aleatory games (chance based games). See, for example, Stevens M & Young M “Who Plays What? Participation Profiles in Chance Versus Skill-based Gambling” 2010 *Journal of Gambling Studies* Vol 26 89-103 (“Stevens & Young”) 90-92.

<sup>49</sup> Caillois R *Man, Play, and Games* (“Caillois”) 14-19; Stevens & Young 90-92.

<sup>50</sup> Herman 1976 7.

lotteries and hedging.<sup>51</sup> He regards games that involve cheating and misleading as mimicry, and marathons and plunging as vertigo games.<sup>52</sup>

In view of the broad scope within which gambling can be defined, it is not difficult to categorise promotional competitions as a sub-species of this activity. Further, since it is often argued that gambling should be regulated due to the central part played by chance, one should realise that this argument in favour of regulation will also have a bearing on promotional competitions and the potential need to regulate those activities.

### 2.2.3 Gaming and other euphemisms

A term that is often used in conjunction with gambling or even as a synonym of gambling is the term “gaming”. Some authors make a clear distinction between “gambling” and “gaming”, while others are of the view that “gaming” is a euphemistic alternative for the term “gambling”. In the LGB Main Report, “gaming” is given a meaning which is separate and distinct from the definition of “gambling”. The authors define “gaming” as “[t]he playing of a game of chance (or of chance and skill combined) for winnings in money or money’s worth”.<sup>53</sup> In contrast, they define “gambling” as follows: “Buying the chance of making money; taking a calculated risk because of the potential reward, engaging in an action or a series of actions, resulting in favourable, neutral or unfavourable outcome.”<sup>54</sup>

According to Rose, the whole subject area involving gambling, lotteries and the like should accurately be classified as “gambling”.<sup>55</sup> He describes gaming as “betting on games of chance”.<sup>56</sup> However, he points out that individuals often prefer to use the

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<sup>51</sup> Herman 1976 7. In these games, luck plays the dominant role. (Herman 1976 21) Although some purchasers of lottery tickets might differ, luck is so pervasive in a lottery that it would be very difficult to display any element of skill in such an activity.

<sup>52</sup> Herman 1976 8. He mentions “gaffs”, “Three Card Monte” and “bluffing” as mimicry based gambling games. He also explains how both mimicry and vertigo can be a part of poker playing. (Herman 1976 15-17)

<sup>53</sup> LGB Main Report 149.

<sup>54</sup> LGB Main Report 149. The authors add: “In the most general sense of all, gambling refers to any activity engaged in for the sake of a return of which the outcome is uncertain.” As such, the authors assign an extremely wide meaning to gambling. If one considers their definition, life itself could be regarded as gambling.

<sup>55</sup> Rose 1986 75. This is in line with NE Wiehahn’s comments regarding the view taken by the Lotteries and Gambling Board, after they examined a variety of definitions. See page 19 above.

<sup>56</sup> Rose 2007 1163. The Lotteries and Gambling Board labelled gaming as a “quick response activity”. NE Wiehahn 1995 3.

term “gaming” instead of “gambling”.<sup>57</sup> By way of example, he mentions that attorneys who specialise in gambling law would rather refer to “gaming law” than “gambling law”.<sup>58</sup> Although he does not explicitly state this, one can infer from his discussion that persons prefer to use the term “gaming” instead of “gambling” because the term “gambling” might have negative connotations associated with it.

It seems that not all sources agree on the meaning of the term “gaming”. Although some authors point out that “gaming” has a distinct meaning, others regard it as a synonym for “gambling”.<sup>59</sup> For example, in Haugen’s glossary of gambling terminology, he states that “gaming” and “gambling” are identical terms.<sup>60</sup> He explains that people use the term “gaming” instead of “gambling” in order to avoid the negative undertone associated with the term “gambling”.<sup>61</sup> Thompson describes “gaming” as a euphemism for “gambling”, and indicates that “gambling”, “gaming” and “wagering” are used as interchangeable terms.<sup>62</sup>

Although it seems to be the trend for industry associations and role-players to refer to the “gaming” industry, Collins criticizes this practice and states that it could create the implication that the industry has “something to hide”.<sup>63</sup> He suggests that the industry should be frank about the field of activity in which it operates.<sup>64</sup> It should not hold back

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<sup>57</sup> Rose 1986 75. Perhaps this is because “gambling” might sound like a vice to some people, while they might regard “gaming” as a leisure activity.

<sup>58</sup> Rose 1986 75. Prof Rose’s website describes him as “one of the world’s leading authorities on gambling law”. (“Gambling and the Law”, [www.gamblingandthelaw](http://www.gamblingandthelaw), accessed on 28 February 2015.) However, in one of his articles, he refers to the need to involve specialist “gaming” lawyers in matters. Rose NI “Why Gaming Lawyers Are Important” 2011 *Gaming Law Review and Economics* 15:7/8 419-421.

<sup>59</sup> Carnelley, for example, mentions that there is no clear difference between “gambling” and “wagering” and that “in South Africa the terms are used loosely and interchangeable”. However, in her view, the key element of “gaming” lies in the fact that “the person placing the stake, participates in a game that determines whether and to whom the winnings are paid – irrespective of whether the outcome of the game is determined by skill and/or luck”. (Carnelley *Obiter* 2001 74 fn 1)

<sup>60</sup> Haugen DM *Legalized Gambling* (“Haugen”) 141.

<sup>61</sup> Haugen 141.

<sup>62</sup> Thompson WN *Legalized gambling: a reference handbook* 276.

<sup>63</sup> P Collins 20. The use of the word “gaming” is becoming commonplace, to such an extent that the public might reach a point where “gambling” and “gaming” are regarded as synonyms. Legislation reflects this too. For example, KwaZulu-Natal’s legislation on this topic is called the “KwaZulu-Natal Gaming and Betting Act, 2010”, although it deals with both “gaming” and “gambling”. The Act defines “gaming” as “playing any casino game, bingo or any gaming machine or limited payout machine”. See fn 26 above for its definition of “gambling”. In the context of that Act, it seems that “gaming” has a more limited definition, if compared to “gambling”.

<sup>64</sup> P Collins 20.

from asserting that gambling affords entertainment to many people, while pointing out that in a few cases gamblers do battle with problem gambling.<sup>65</sup>

It seems therefore that, in the narrow sense, “gaming” refers to an activity where persons bet on the outcome of a game. However, in a broader context, the term “gaming” is also used as a “softer” alternative for the term “gambling”.<sup>66</sup>

In a similar manner, terms like “promotional competition”, “sweepstakes”, “prize competition” and “sales promotion scheme” could perhaps be regarded as euphemisms for “soft” gambling as well. These terms might serve to set the relevant activities apart from regular gambling and shield them against an inquiry into the regulation of gambling. Some persons may regard gambling as a vice, but still participate in promotional competitions. (It would be interesting to see whether their participation would continue if those competitions bore the gambling label.) Perhaps these euphemisms also highlight a difference in nuance: gambling could be regarded as a hard core activity, while promotional competitions are the soft core version. This distinction might call for different levels of regulation, similar to the different forms of regulation of hard core and soft core pornography.

#### 2.2.4 Lotteries

Lotteries and gambling are activities that seem to go hand-in-hand. As such, one needs to investigate whether these activities differ, if at all. The LGB Main Report describes a lottery as “the distribution of prizes by chance where the persons taking part, or a substantial number of them, make a payment or consideration in return for obtaining their chance of a prize”.<sup>67</sup> Clotfelter and Cook explain that “[t]he essence of a lottery is the purchase of a chance to win a prize, based on a random drawing”.<sup>68</sup> According to them, lotteries can be found in a myriad of varieties, but one can identify four general types of lotteries: “passive drawings, instant scratch-off games, numbers,

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<sup>65</sup> P Collins 20.

<sup>66</sup> “Gaming” might be described as a “vanilla” term or euphemism.

<sup>67</sup> LGB Main Report 151. In the Lotteries and Gambling Board’s Interim Report, the authors noted that there seems to be a distinction between lotteries and gambling, but remarked that the “distinction appears to be more academic than real”. (“Lotteries and Gambling Board Interim Report”, reproduced in *The Complete Wiehahn Report on Gambling in South Africa* 6). NE Wiehahn also mentioned that the Board labelled lotteries as “slow-response activities”. (NE Wiehahn 1995 3)

<sup>68</sup> Clotfelter CT & Cook PJ *Selling Hope: State Lotteries in America* (Clotfelter & Cook”) 51.

and lotto”.<sup>69</sup> Despite all the varieties, most sources identify three common elements in a lottery: consideration, chance and prize.<sup>70</sup> To an extent, these elements are also contained in the definition provided by the Lotteries Act, 1997:

“lottery” includes any game, scheme, arrangement, system, plan, promotional competition or device for distributing prizes by lot or chance and any game, scheme, arrangement, system, plan, competition or device, which the Minister may by notice in the Gazette declare to be a lottery.<sup>71</sup>

It is interesting to note that the Lotteries Act, 1997 does not provide a closed definition of the term “lottery”. Instead, in the definition, it states that the term “includes” the various items mentioned in the definition. This means that there might be other games, schemes and the like that could be considered to be lotteries, even though they might not be expressly mentioned in the definition contained in the Lotteries Act, 1997. However, it is not clear what those games would be and how one would identify them. This could create problems in practice for persons that would like to conduct games of chance, since it is not entirely clear when a particular game would qualify as a lottery. Even though some games might not fall within the scope of the description provided in the Lotteries Act, 1997, they might be regarded as lotteries if one considers definitions provided by the legislation of other countries or in dictionaries.

Furthermore, it is noteworthy that the definition in the Lotteries Act, 1997 does not refer to consideration. In other countries (for example the United Kingdom<sup>72</sup> and the United States<sup>73</sup>) consideration is one of the key elements of a lottery. A lottery functions on the basis that all the participants contribute to the pool of prizes by purchasing their entries into the lottery. The consideration element is important from a regulatory

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<sup>69</sup> Clotfelter & Cook 51.

<sup>70</sup> See, for example, Williams FE *Lotteries, Law and Morals* (“FE Williams 1958”) 69; *R v Cranston* 1914 AD 238; *R v Lew Hoi* 1937 AD 215 220; *Minister of Mineral and Energy Affairs v Lucky Horseshoe (Pty) Ltd* 1994 (2) SA 46 (A) 52.

<sup>71</sup> Lotteries Act, 1997 s1.

<sup>72</sup> S14(1) of the United Kingdom’s Gambling Act 2005 states that an arrangement will be a “lottery” if it meets the criteria of a “simple lottery” (defined in s14(2)) or a “complex lottery” (defined in s14(3)). In both cases, one finds the following criterion: “persons are required to pay in order to participate in the arrangement”.

<sup>73</sup> See, for example, the definitions of the term “lottery” in the Texas State Lottery Act and Georgia’s lottery legislation. [Lord TH & Miller LC “Playing the Game by the Rules: A Practical Guide to Sweepstakes and Contest Promotions” *Franchise Law Journal* 3-9 (“Lord & Miller”) 3 and fn 1] The Federal Communications Commission defines a “lottery” as “any game, contest or promotion that combines the elements of prize, chance and consideration”. (Federal Communications Commission “Broadcasting Contest, Lotteries, and Solicitation of Funds” <http://www.fcc.gov/guides/broadcasting-contests-lotteries-and-solicitation-funds>, accessed on 28 February 2015.)

perspective, too because entrants contribute money to participate in lotteries and checks should be put in place to ensure that this element is controlled in order to curb potential abuse. In many countries, organisers of promotional competitions and similar schemes avoid their schemes from falling within the scope of lotteries or gambling legislation by removing the consideration element.<sup>74</sup> Due to the wide definition in the Lotteries Act, 1997, it might seem that an activity could qualify as a lottery, even if entrants do not have to pay to participate. However, section 63 of the Lotteries Act, 1997 states that it will not apply “in relation to any lottery, sports pool or competition in respect of which there is no subscription”.<sup>75</sup>

Although lotteries have distinct terminology attached to them, they seem to display the characteristics of gambling. Just like gambling, participants normally have to pay to purchase their entries into a lottery. The outcome of a lottery is also determined by an uncertain future event and participants take part in the activity in the hope of winning a prize.

It is submitted that a promotional competition can be regarded as a sub-species of the lottery. Typical promotional competitions involve games in which the outcome is determined by an uncertain event – chance. Entrants participate in these games in order to win prizes. If a promotional competition can be regarded as a lottery, such a competition could also be regarded as a gambling activity in the broader sense. One could therefore say that a lottery is merely a particular form of gambling.

Since lotteries can be regarded as gambling, the policy issues that need to be considered in relation to gambling should be relevant in the case of lotteries as well.<sup>76</sup> It then follows that if typical promotional competitions could be classified as lotteries

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<sup>74</sup> See, for example, Lord & Miller, where the authors suggest that a promoter can avoid breaching United States lottery laws by structuring a competition in such a way that one of the traditional elements of a lottery (chance, consideration or prize) is left out. (Lord & Miller 3) See also Cabot AN, Light GJ & Rutledge KF “Economic Value, Equal Dignity and the Future of Sweepstakes” 2010 *UNLV Gaming Law Journal* 1:1 1-38 (“Cabot *ea*”), in which the authors discuss the elements of gambling in the context of sweepstakes, and how one of those can be removed in order to make a competition lawful. They focus on the consideration element in particular. This approach can also be followed in the United Kingdom in order to avoid a competition from being classified as a lottery under the Gambling Act 2005. (Dresden B “United Kingdom” in *International Promotion Marketing Law Book* 2<sup>nd</sup> ed 275-276)

<sup>75</sup> The term “subscription” is defined as “the payment, or delivery of any money, goods, article, matter or thing, including any ticket, coupon or entry form, for the right to compete in a lottery”. (Lotteries Act, 1997, s1) As such, if no consideration is payable, a competition will not be subject to the Lotteries Act, 1997. See the more comprehensive discussion below at pages 192-196.

<sup>76</sup> See section 2.3 below.



or gambling, the public policy considerations become relevant for such competitions as well. Those considerations therefore require closer scrutiny. But, before they can be examined, it is useful to understand the play element which underlies gambling, since it provides some background to the public policy considerations.

### 2.3 The Play Element

People might have various reasons for taking part in gambling, lotteries, promotional competitions and activities of a similar nature. They may wish to win a prize, make some money or put their luck to the test. But, on a macro level, what action takes place when people participate in these activities? Before one analyses these activities to examine issues such as the need to regulate gambling, people's reasons for being involved in these activities or the legal definitions that apply, it is useful to understand the context from a social sciences perspective.

In general, gambling, lotteries and promotional competitions display a common element of play.<sup>77</sup> When people participate in gambling and lotteries, at a very basic level, they participate in play and games. Herman's view is that "gambling is best understood as game playing, and game playing is both normal and thoroughly integrated with the rest of the culture in which it occurs".<sup>78</sup>

In 1938, Johan Huizinga published *Homo Ludens*,<sup>79</sup> in which he identified the role of play in society and how it shapes culture.<sup>80</sup> Although he warned that it would be "a little cheap, to call all human activity 'play'", Huizinga recorded his conviction that "civilization arises and unfolds in and as play".<sup>81</sup> His view is that "culture arises in the

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<sup>77</sup> Herman 1976 1-9; Downes DM, Davies, BP, David ME and Stone P *Gambling, work and leisure: a study across three areas*. ("Downes ea") 11-14; Smith JF & Abt V "Gambling as Play" in Frey JH & Eadington WR (eds) *Gambling: Views from the Social Sciences. The Annals of the American Academy of Political and Social Sciences* 122 ("Smith & Abt") 122-132; Reith G *HOMO ALEATOR: A Sociological Study of Gambling in Western Society* ("Reith 1996") 199-253; Reith G "The Experience of Play" in Cosgrave JF (ed) *The Sociology of Risk and Gambling Reader* 255-287 ("Reith 2006"); Ottaway J *The UK National Lottery and Charitable Gambling* ("Ottaway") 91-127.

<sup>78</sup> Herman 1976 1.

<sup>79</sup> Huizinga J *Homo Ludens: A study of the play-element in culture*. The work was first published in German in Switzerland in 1944, then translated by RFC Hull and published in England in 1949. "Homo Ludens" can be translated as "Man the Player", and describes a characteristic of man alongside others such as "Homo Sapiens" and "Homo Faber" ("Man the Maker"). (Foreword to *Homo Ludens*, page unnumbered.) Reith continues with the terminology used to describe man and casts the light on "Homo Aleator" ("Man the Gambler"). (Reith 1996 1)

<sup>80</sup> See Herman 1976 1-3, Downes ea 11-14, Smith & Abt, 122-132.

<sup>81</sup> Forward to *Homo Ludens*, page unnumbered.

form of play, that it is played from the very beginning”.<sup>82</sup> Further, he identifies a very important element of play, namely “fun”.<sup>83</sup> In his work, Huizinga distinguished various characteristics of play: it is voluntary and free, it is independent from “ordinary life”, play is limited and comes to an end, and it has rules and creates order.<sup>84</sup> The function of play can be found in two basic aspects: play is “a contest *for* something” and “a representation *of* something”.<sup>85</sup> Ultimately, the “civilizing function” of play and contests is one of the key concepts in Huizinga’s work.<sup>86</sup>

Although Huizinga refers to gambling in his work,<sup>87</sup> it seems that he does not have a high regard for games of pure chance and their value in society.<sup>88</sup> When it comes to games of chance, he reasons that “for the development of culture as such we must call them unproductive” and that these games are “sterile, adding nothing to life or the mind”.<sup>89</sup> He points out that tension and uncertainty are general characteristics of play and that games have value because of the tension they create in people that watch them being played.<sup>90</sup> Based on this, he seems to argue that games of chance do not have value, because “the tension felt by the player is only feebly communicated to the onlooker”.<sup>91</sup> In his view, games of skill have more value for the improvement of civilization. Accordingly, Downes and his colleagues state that in Huizinga’s work

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<sup>82</sup> Huizinga 46. Ottaway points out that Huizinga builds on Plato’s views regarding the link between play and culture. (Ottaway 91 and fn 1 on that page.) Reith also refers to Plato’s influence on Huizinga, particularly with regard to “sacred play”. (Reith 1996 4)

<sup>83</sup> Huizinga 3.

<sup>84</sup> Huizinga 7-13. See Ottaway’s discussion of these characteristics. (Ottaway 94-97.)

<sup>85</sup> Huizinga 13. Huizinga identified how play could be “pointless” on the one hand, but “significant” on the other. (Smith & Abt 123, citing Huizinga 15)

<sup>86</sup> Huizinga 46-75. He also shows how play has a role in various disciplines, such as art, philosophy, poetry and even law and war. One could reinterpret Huizinga’s view on the role of play as follows: Although play could be regarded as merely “fun and games”, it fulfils key roles in human life, culture and society. (Dictionary.com defines “fun and games” as “frivolously diverting activity”. <http://dictionary.reference.com/browse/fun%20and%20games>, accessed on 12 January 2015).

<sup>87</sup> See Huizinga 11, where he discussed the “tension of play” and how that tension is at its height in athletics and gambling.

<sup>88</sup> Reith observes that Huizinga is “dismissive of games of chance”, and she finds this remarkable because Huizinga seems to place so much value on play’s key function in society. (Reith 1996 4)

<sup>89</sup> Huizinga 48.

<sup>90</sup> Huizinga 47-48.

<sup>91</sup> Huizinga 48. Perhaps that might have been Huizinga’s view in the middle of the 1900s, but in present times there are websites dedicated to live broadcasting of poker tournaments. See, for example, PokerStars ([www.pokerstars.tv](http://www.pokerstars.tv), accessed on 28 February 2015). As such, gambling must have spectator value to some people.

“gambling is given short shrift as a parasitic, materialistic and entirely negative activity: the dark side of play”.<sup>92</sup>

Although Huizinga argues that play in itself has no real purpose, he reasons that the outcome of play does have significance.<sup>93</sup> A match or a game might be played momentarily and come to an end, but the players gain satisfaction and the delight increases if someone watches the outcome of the game.<sup>94</sup> In this regard, Huizinga stresses the importance of “winning” and the “prize” in play and games.<sup>95</sup> He states:

Pure avarice neither trades nor plays; it does not gamble. To dare, to take risks, to bear uncertainty, to endure tension – these are the essence of the play spirit. Tension adds to the importance of the game and, as it increases, enables the player to forget that he is only playing.<sup>96</sup>

It is in this vein that Huizinga does see some significance in games of chance, despite the fact that he argues that games of chance have no real value for the improvement of civilization. As mentioned above, he points out that value lies in the outcome of play. Thus, he argues that winning in itself has significance and therefore it does not matter whether chance or skill led to the winning. He states: “Luck may have a sacred significance; the fall of the dice may signify and determine the divine workings; by it we may move the gods as efficiently as by any other form of contest.”<sup>97</sup>

It is insightful to examine the player’s state of mind when playing a game. Reality and the game might become blurred. Huizinga shows how there is a fine line between play and seriousness. He points out that “playing” and “gambling” are terms used in relation to stock exchanges and that while a “gambler at the roulette table will readily

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<sup>92</sup> Downes *ea* 11. Yet, the authors regard Huizinga’s work as “the most consummate attempt yet to give play its due in the creation of culture”.

<sup>93</sup> Huizinga 49. According to Herman, Huizinga identifies how players want to get something out of the activity. They take up a challenge, with the hope of gaining a reward. (Herman 1976 2)

<sup>94</sup> Huizinga 49-50. Herman summarises this by saying: “The ‘magic’ of the play experience is retained after the game is over.” (Herman 1976 2)

<sup>95</sup> Huizinga 50-51.

<sup>96</sup> Huizinga 51. Herman remarks how Huizinga identifies players’ drive to both seek tension, but to relive it as well. (Herman 1976 2)

<sup>97</sup> Huizinga 56. Here, Huizinga also refers to the sacred. Ottaway observes how play has a sacred, transcendental nature for Huizinga. (Ottaway 91, 93) See also Herman 1976 1.

concede that he is playing; the stockjobber will not”.<sup>98</sup> In his view, both the gambler and the stockbroker have the same purpose: “the hope of gain”.<sup>99</sup>

Despite its contribution to literature, there is some criticism of Huizinga’s *Homo Ludens*. Herman’s view is that “there remain problems and ambiguities in his work” and that it was “an important beginning but perhaps too abstract”.<sup>100</sup> He mentions that people experience play in different ways and that “play itself is variable and differs in general characteristics from one occasion to another.”<sup>101</sup> Yet, Herman states that Huizinga’s contribution is important because it focuses on the attractiveness of play and people’s motivation for engaging in play.<sup>102</sup> Herman mentions that Huizinga’s work points out that the distinctions between work and play “are exaggerated and misleading”.<sup>103</sup>

Another prominent figure in the study of play is Roger Caillois. He conducted a ground breaking analysis of play, published under the title *Man, Play, and Games*. In his work, Caillois sought to classify the various forms of play and divide it into four categories: *agôn*, *alea*, mimicry and *ilinx*.<sup>104</sup> *Agôn* (agonistic play) involves competition between people.<sup>105</sup> In agonistic play, the intention is to level the playing field in order for competitors to be evaluated on an equal footing.<sup>106</sup> This form of play can test various qualities, such as skill, strength and speed, and can manifest in broad spectrum of activities which can range from football, tennis and boxing to chess, checkers and

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<sup>98</sup> Huizinga 52.

<sup>99</sup> Huizinga 52. Comparing the mindset of the stockbroker with that of the gambler, Huizinga finds that “the difference of mentality is exceedingly small”.

<sup>100</sup> Herman 1976 2-3. Ottaway has some criticism of Huizinga’s theories as well, particularly in respect of the way in which Huizinga treats play as a “transcendental signifier” and because he then does not maintain this concept throughout his work. (Ottaway 92, 104-106) Ottaway notes that Caillois also criticised some of Huizinga’s theories as. (Ottaway 94, 100-101)

<sup>101</sup> Herman 1976 2-3.

<sup>102</sup> Ottaway also finds Huizinga’s theory useful to interpret the opposition between play as an everyday phenomenon and play as an elevating social tool. (Ottaway 92)

<sup>103</sup> Herman 1976 3.

<sup>104</sup> Caillois 12. In his work, Caillois also deals with the concepts of *paidia* (“improvisation and joy”) and *ludus* (“gratuitous difficulty”). Caillois 27. According to Reith, Caillois saw some shortcomings in Huizinga’s work and sought to improve this with his four categories of play. (Reith 1996 4)

<sup>105</sup> Caillois 14-17. See Ottaway 101. Herman translates this form of play as “competitive struggle”. (Herman 1976 4)

<sup>106</sup> Caillois 14. Caillois points to *alea*’s potential of summarily changing a person’s life even though they might not have earned it and, in this regard, Ottaway refers to a slogan used by the United Kingdom’s National Lottery: “Forget it all in an Instant!” (Ottaway 102 and fn 1 on that page.)

billiards.<sup>107</sup> *Alea* (aleatory play), on the other hand, involves play where the outcome is determined independently from the participant.<sup>108</sup> Fate, destiny, luck or chance is the determining factor in this form of play.<sup>109</sup> Caillois mentions dice, lotteries, “heads or tails” and roulette as some examples of aleatory play.<sup>110</sup>

While *agôn* and *alea* involve play in circumstances where participants are given equal opportunities by playing according to rules, *mimicry* involves the escape from reality.<sup>111</sup> A person participates in mimicry if they imagine themselves to be something or someone else.<sup>112</sup>

*Ilinx*, Caillois’s last form of play, is distinguished by activities that involve vertigo. He describes this form of play as involving “an attempt to momentarily destroy the stability of perception and inflict a kind of voluptuous panic upon an otherwise lucid mind”.<sup>113</sup> Examples of *ilinx* can be found in children’s spinning games, acrobatic movement, dancing and amusement park rides.<sup>114</sup>

Whereas Huizinga does not think much of gambling as a form of play, Roger Caillois recognises it at least and examines its function in society.<sup>115</sup> He mentions that governments use lotteries to generate funds and how the chance of winning a big prize in a lottery gives hope to people of lesser financial means.<sup>116</sup> Further, he points out how sport (games of skill) has to be subsidised by governments, while games of

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<sup>107</sup> Caillois 14. Caillois also questions whether, as they become more developed, societies shift from play based on simulation and vertigo to agonistic and aleatory play. (Caillois 97; See Reith 5 and Downes *ea* 13)

<sup>108</sup> Caillois 17. Ottaway 101-102.

<sup>109</sup> Caillois 17. Smith and Abt picks up on this and point out that, in Caillois’s definition of play, uncertainty constitutes a key element – both during the play and in respect of its result. (Smith & Abt 123)

<sup>110</sup> Caillois 17. Caillois points out that “alea” is the Latin term used for the game of dice. Contrary to Huizinga, Caillois therefore recognises the role of gambling games in play.

<sup>111</sup> Caillois 19. Ottaway observes that escape takes place by way of “alternation of identity”. (Ottaway 102)

<sup>112</sup> Caillois 19. Children display mimicry when they pretend to be nurses or pilots, and mimicry is also manifested in theatre, drama and masquerades. (Caillois 21)

<sup>113</sup> Caillois 23.

<sup>114</sup> Caillois 23-26. Herman observes that “children’s play behaviour” inspired Caillois’s play categories of mimicry and vertigo. (Herman 4)

<sup>115</sup> Reith 1999 3. Smith and Abt also point to the fact that gambling activities can be categorised into the forms of play identified by Caillois. However, they point out that play can become commercialised, that this can have an influence on play and that it also displays its surrounding culture. (Smith & Abt 123)

<sup>116</sup> Caillois 115.

chance are often, conversely, used to fund governments.<sup>117</sup> At the same time, however, he implicitly criticizes gambling, by stating: “To gamble is to renounce work, patience, and thrift in favour of a sudden lucky stroke of fortune which will bring one what a life of exhausting labor and privation has not [...]”<sup>118</sup> Still, he does not refrain from stating that games of chance do have cultural significance.<sup>119</sup>

In discussions of the play element, the work of Erving Goffman features as well, although Goffman’s focus was more on action in particular.<sup>120</sup> In his essay titled “Where the Action Is”,<sup>121</sup> Goffman points out that human action and chance-taking go hand-in-hand.<sup>122</sup> He specifically analyses human action with reference to betting and gambling.<sup>123</sup> Downes and his co-authors are of the view that Goffman elevates gambling from the lowly position imposed upon it by morality.<sup>124</sup>

It is important to be cognisant of the play element in gambling, lotteries, promotional competitions and the like because it constitutes one of the factors that motivate people to participate in those activities. When one considers the regulation of gambling, one must keep in mind that it does have meaning to participants, and that it should not merely be regarded as frivolous and devoid of value. Promotional competitions and other games of chance and gambling activities, being forms of play, fulfil a function in

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<sup>117</sup> Caillois 156. In other words, state lotteries are often created in order to raise funds for charitable, public or other causes, but governments are obliged to provide funding for sport development. See, for example, Ottaway 144-161 regarding lotteries and charity, and Clotfelter and Cook regarding the lottery as a form of “voluntary tax”. (Clotfelter & Cook 215-234).

<sup>118</sup> Caillois 115.

<sup>119</sup> Caillois 156. However, Downes and his co-authors are of the view that Caillois could have examined the role of gambling in different societal classes more critically, particularly since he refers to gambling’s value to fund some parts of society, yet it is extremely popular amongst the upper classes that are already wealthy. (Downes *ea* 14)

<sup>120</sup> See, for example, Downes *ea* 14-19 Smith & Abt 126-127; Ottaway 106-112; Reith 1996 6; McMillen 15.

<sup>121</sup> The essay is contained in Goffman E *Interaction Ritual: Essays on Face-to-Face Behavior* 149-270 (“Goffman 1976”).

<sup>122</sup> Goffman 1976 149.

<sup>123</sup> Goffman 1976 149 and further on. Goffman starts his analysis with an example of two boys that pick up a coin and decide to do a coin toss. He states: “They agree, then, to engage in a *play* or, as probabilists call it, a *gamble* - in this case one go at the *game* of cointossing.”

<sup>124</sup> Downes *ea* 17. (McMillen 15) Goffman’s work is useful in its discussion of aspects such as human interaction, challenging and “squaring off”. (Smith & Abt 126-127). See also the evaluation of Goffman’s contribution to risk-taking discourse in Cosgrave JF “Goffman Revisited: Action and Character in the Era of Legalized Gambling” 2008 *International Journal of Criminology and Sociological Theory* 1:1 80-96. Although Reith recognises Goffman’s contribution, she remarks that “the modesty of his observation is masked by the gratuitous complexity of the language in which it is expressed”. (Reith 1996 6)

many people's lives.<sup>125</sup> Even so, one needs to consider if and how these activities should be regulated, even though they might display such a distinct element of play.

## **2.4 Policy and Regulation**

### **2.4.1 Introduction**

The focus of this study is on the regulation of promotional competitions. As such, a consideration of the regulatory side of the topic is essential. From a policy perspective it needs to be considered why some things need to be regulated, or even prohibited, and how regulation takes place or should take place.

As has been explained above, promotional competitions can, in certain circumstances, be regarded as gambling and/or lotteries in the broader sense of the word.<sup>126</sup> Although Herman might argue that "gambling is not separate or unique" and that it is intertwined with the rest of the social world, it still remains a controversial topic from a policy perspective.<sup>127</sup> Therefore, one needs to pause to examine some views and perspectives on gambling, its regulation and legalisation. Furthermore, since the regulation of promotional competitions in South Africa has shifted from lottery legislation to the sphere of consumer protection law, it is necessary to consider the regulation from a consumer protection perspective as well. These views inform and set the context for the regulation of promotional competitions in particular.

In order to find answers to this question, one should first consider the nature of gambling, why people gamble and the effects of gambling on people. That will then lead one to some of the views in respect of gambling as well as the actual regulation thereof.

### **2.4.2 People's reasons for gambling**

In order to regulate a particular behaviour, it is important to understand why someone engages in that behaviour in the first place. It is submitted that if one understands what motivates a person to do something, it will be easier to control the factors that lead to such behaviour and the circumstances in which the behaviour is manifested, if such

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<sup>125</sup> According to Taylor and Kopp, many people participate in competitions because they regard them as "fun and exciting". [Taylor CR & Kopp SW "Games, Contests, and Sweepstakes Run Afoul: A State of Legal Disorder" 1991 *Journal of Public Policy & Marketing* 10:1 199-213 ("Taylor & Kopp 1991") 201]

<sup>126</sup> See page 16 above.

<sup>127</sup> Herman 1976 1.

control is necessary. One can also control the manner in which others enable the person's behaviour.

In section 2.2 above, the play element of gambling and promotional competitions was examined. The discussion touched on people's need for play and play's function in society. The focus, though, was more on the nature of gambling as a form of play and the various types of play. In this section the scope will be narrowed to people's reasons for engaging in gambling and promotional competitions.

When it comes to gambling, one can consider various factors that motivate a person to participate. The opportunity for financial gain might be the most obvious reason.<sup>128</sup> Clotfelter and Cook suggest that some people are drawn to lotteries by the mere chance of winning money, even if just a little, since it can better their lives.<sup>129</sup> However, they also argue that some participants might be misled into playing lotteries because they do not properly understand the small odds of winning.<sup>130</sup> In this regard, they point out that, despite the odds, some people still take part in lotteries because they feel that they are lucky, that they can devise a system to win or even because they are purely superstitious.<sup>131</sup> Rosecrance adds that some people might gamble to show that they are wealthy, even though they might know that they will not make money out of it.<sup>132</sup> Brenner and Brenner suggest that competition between peers motivate people to

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<sup>128</sup> Brenner R with Brenner GA *Gambling and Speculation: A Theory, a History, and a Future of Some Human Decisions* ("Brenner & Brenner") 19. The authors argue that it may be easy to reason that some people gamble because it gives them a chance to make money which they would not otherwise be able to generate. However, they warn that the issue is more complex, particularly if one considers that there would not be opposition to gambling if it was purely a means of making money. According to Binde, the opportunity to win is the primary driver behind gambling, but he also identifies other factors such as "the dream of hitting the jackpot" (a moment that will change one's life), "social rewards" and "intellectual challenge". (Binde P "Why people gamble: a model with five motivational dimensions" 2013 *International Gambling Studies* 13:1 81-97)

<sup>129</sup> Clotfelter & Cook 71. Rule S & Sibanyoni C *The Social Impact of Gambling in South Africa* ("Rule & Sibanyoni") 30-33.

<sup>130</sup> Clotfelter & Cook 71; Taylor & Kopp 1991 201. As such, a lack of information and disclosure could lead to financial abuse of gambling participants. This could be the reason why odds of winning in a promotional competition need to be disclosed in the United States of America. See, for example, Sprott, DE, Hardesty DM & Miyazaki AD "Disclosure of Odds Information: An experimental Investigation of Odds Format and Numeric Complexity" 1998 *Journal of Public Policy and Marketing* 17:1 11-12. Some authors suggest that odds information should be displayed in an understandable manner on lottery tickets. For instance, Ariyabuddhiphongs suggest that such information could, for example, be conveyed in the following manner: "[I]f you bought a ticket every day from birth and lived to be 100 it would take you 383 life times to win a lotto." [Ariyabuddhiphongs V "Lottery Gambling: A Review" 2011 *Journal of Gambling Studies* 27 15-33 ("Ariyabuddhiphongs") 27-28]

<sup>131</sup> Clotfelter & Cook 71.

<sup>132</sup> Rosecrance J *Gambling without Guilt: the Legitimation of an American Pastime* ("Rosecrance") 63.



take risks and gamble. If someone's friend becomes wealthy, that person might start gambling in order to try and catch up with their friend.<sup>133</sup>

However, as the saying goes, money is not everything. As Walker points out, the motivation behind gambling behaviour is not simple and economic reasons on their own are not sufficient to explain why people gamble.<sup>134</sup> Although persons might gamble in order to make money and improve their circumstances, research shows that gambling is not a profitable activity.<sup>135</sup> It has the promise of big wins, but gamblers' losses exceed their winnings. Most people waste their money on gambling and lotteries.<sup>136</sup> Walker states that if gambling was a financial investment, a gambler would quickly change his bankers due to the negative results yielded.<sup>137</sup> Yet, people are still attracted to gambling and lotteries. In Walker's view, only a few people would gamble if economic reasons were the only drivers behind gambling – perhaps only those with “economically masochistic urges”.<sup>138</sup> As such, he suggests that psychological rather than economic reasons stimulate people to gamble.<sup>139</sup> In this vein, Kusyszyn remarks: “During gambling, money loses its economic value. The gambler is seen to be playing with money rather than for it.”<sup>140</sup>

If pure economic gain is not the real or only reason for gambling, why do people participate in it? Various other factors have been identified. Walker mentions that people like challenges, such as mountain climbing, running, gardening and other hobbies.<sup>141</sup> In his view, gambling is for many people a challenge with the promise of a

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<sup>133</sup> Brenner & Brenner 21-22. The authors also note that once someone has obtained that wealth, they would take fewer risks in order to preserve their money.

<sup>134</sup> Walker, MW “A Sociocognitive Theory of Gambling Involvement” in Eadington WR & Cornelius JA (eds) *Gambling and Commercial Gaming: Essays in Business, Economics, Philosophy and Science* (“Walker 1992”) 371.

<sup>135</sup> Walker 1992 372. See also Rosecrance 63-64. Rosecrance is of the view that there must be other factors that motivate people to gamble, because they would not gamble if they knew that they were going to lose their money.

<sup>136</sup> Clotfelter & Cook 119-120.

<sup>137</sup> Walker 1992 372.

<sup>138</sup> Walker 1992 372. Rosecrance suggests other factors that motivate people to gamble, such as some people's need to show off their societal class. (Rosecrance 63)

<sup>139</sup> Walker 1992 372. See also Rosecrance 53-58. He gives a broad overview of the history of psychiatric perspectives on gambling, and points out that even Sigmund Freud analysed gambling behaviour. Rosecrance mentions that people's failure to realise their slim chances of winning as well as the things that they can do with their winnings might also move them to gamble. (Rosecrance 63)

<sup>140</sup> Kusyszyn I “The Psychology of Gambling” in Frey JH & Eadington WR (eds) *Gambling: Views from the Social Sciences. The Annals of the American Academy of Political and Social Sciences* 133 (“Kusyszyn”) 134.

<sup>141</sup> Walker 1992 373.

big prize.<sup>142</sup> It can be a problem solving activity too.<sup>143</sup> A true gambler commits to the challenge to beat the system and the odds in the hope of being the exception and accumulating great wealth.<sup>144</sup>

An important feature of gambling is that it offers entertainment to people.<sup>145</sup> It acts as a diversion from life and gives people the opportunity to have some fun.<sup>146</sup> According to Collins, pleasure plays a big role in the gambling experience and particularly in the offering provided by casinos.<sup>147</sup> In this regard, he distinguishes between various forms of pleasure, such as the “pleasure of playing games”, the “pleasure of fantasizing about being rich”, the “pleasure of being intoxicated” (in his view, gambling can function as a drug) and the “pleasures of escape”.<sup>148</sup>

Apart from finding pleasure in the challenge of gambling, people also seem to participate in gambling because they enjoy playing with chance and risk.<sup>149</sup> Moody suggests that people gamble because risk and chance are part of their daily lives.<sup>150</sup>

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<sup>142</sup> Walker 1992 373. However, Walker mentions that some people are merely occasional gamblers that do not participate in gambling for the challenge. He suggests that those people gamble for entertainment or cultural reasons. (Walker 1992 374)

<sup>143</sup> Frey JH “Gambling: A Sociological Review” in Frey JH & Eadington WR (eds) *Gambling: Views from the Social Sciences. The Annals of the American Academy of Political and Social Sciences* 107 (“Frey”) 110.

<sup>144</sup> Walker 1992 374-375.

<sup>145</sup> See, for example, LGB Main Report 53. The authors of the report remark: “Gambling has become a great national pastime and entertainment.” Basham and Luik argue that gambling has particular recreational and entertainment value, that it makes people happy and that gamblers should have “the right to do what they want with their own money” without regulatory interference. Basham P & Luik J “The Social Benefits of Gambling” March 2011 *Economic Affairs* 13:1 (“Basham & Luik”) 9-13.

<sup>146</sup> Clotfelter & Cook 118-119; Rule & Sibanyoni 30-31.

<sup>147</sup> P Collins 21. Gambling operators and casinos capitalise on gamblers and the public’s need for entertainment by constructing entertainment complexes and go to great lengths to make their venues attractive and to ensure that visitors have a pleasurable experience. See, for example, Mayer K, Johnson L, Hu C and Chen S “Gaming customer satisfaction: An exploratory study” 1998 *Journal of Travel Research* 37 178-183; Mayer KJ & Johnson L “A Customer-based Assessment of Casino Atmospherics” *UNLV Gaming Research & Review Journal* 7:1 21-31; Lam LW, Chan KW, Fong D & Lo F “Does the look matter? The impact of casino servicescape on gaming customer satisfaction, intention to revisit, and desire to stay” 2011 *International Journal of Hospitality Management* 30 558-567.

<sup>148</sup> P Collins 22.

<sup>149</sup> On fate and risk, see Giddens A “Fate, Risk and Security” in Cosgrave JF (ed) *The Sociology of Risk and Gambling Reader* (“Giddens”) 29. While some people have to take risks in life (such as driving) others actively seek out risks in life, such as fast driving or smoking (despite its health risks). (Giddens 42-44)

<sup>150</sup> Moodie GE “Perspective on Gambling” in Eadington WR & Cornelius JA (eds) *Gambling and Commercial Gaming: Essays in Business, Economics, Philosophy and Science* (“Moodie 1992”) 441. Moody GE “The Roots, Significance, Value and legislation of Gambling” 1995 *Journal of Gambling Studies* 11:1 35-59 (“Moody 1995”). A family visit to an amusement arcade prompted Moody’s analysis of chance and risk taking within a gambling context. He recounts how excited his children were to watch roulette playing and remarks that it was the activity that caught their attention rather than the winnings. Moody 1995 37-39.

His view is that people gain excitement from gambling because it allows them to take risks and chances they would not take in real life.<sup>151</sup> As such, he proposes that life experiences often inspire gambling activity.<sup>152</sup>

Moody's view accords with that of Erving Goffman, who is of the view that modern life has become controlled and measured and that people engage in gambling because it can serve as a "surrogate for risk taking".<sup>153</sup> In a similar vein, Frey notes that gambling can be a form of "protest", because it allows people who have ordinary, controlled, routine jobs to break out of the norm and enjoy an activity that is filled with risk and uncertainty.<sup>154</sup> However, in what may seem to be a contradiction, he mentions that some persons enjoy gambling because it gives them the opportunity to regain control and autonomy and to escape frustrating jobs that make them feel "powerless".<sup>155</sup>

Gambling might fulfil other needs too. James Smith remarks that it presents people with the opportunity to achieve "a clearly defined conclusion" – winning or losing – while life is often indeterminate and uncertain.<sup>156</sup> Further, he points out how gambling plays a particular role amongst members of certain classes of society, particularly the middle class. Since anyone can play the lottery and be a winner, he remarks that "[i]n lotto games where no player has a particular advantage, Americans may have found an ultimate democracy".<sup>157</sup>

Ultimately, Moody argues, gamblers are attracted to gambling because it stimulates them.<sup>158</sup> In his view, it is the "chance/risk", "win/lose" thrill of gambling that compels gamblers.<sup>159</sup> They are driven by the adrenaline of the game, just like a low flying pilot that might hit the ground or a sailor that is sailing so close to the wind that his yacht

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<sup>151</sup> Moody 1992 443. In Moody's view, gambling's value lies in "the experience of controlled stimulation it provides". He further argues that, in order to help people who struggle with problem gambling, one needs realise that problem gamblers find value and satisfaction in gambling. (Moody 1995 50)

<sup>152</sup> Moody 1992 443. He states: "If I had it right, the roots of gambling do lie deep in our general human experience." (Moody 1995 50)

<sup>153</sup> Rosecrance 61.

<sup>154</sup> Frey 110.

<sup>155</sup> Frey 111.

<sup>156</sup> Smith JF "When it's Bad it's Better: Conflicting images of gambling in American culture" in McMillen J (ed) *Gambling Cultures: Studies in history and interpretation* 101 ("JF Smith") 105.

<sup>157</sup> JF Smith 110.

<sup>158</sup> Moody 1992 443-447.

<sup>159</sup> Moodie 1992 445.

may capsize.<sup>160</sup> Collins describes this as the “intoxicating pleasure of gambling”, an adrenaline rush that has a psychophysical effect on participants.<sup>161</sup> Kusyszyn holds a similar view.<sup>162</sup> He argues that gambling fulfils an existential need – in the thrill of gambling people confirm to themselves that they are alive.<sup>163</sup>

Chance and luck are elements that are beyond human control. As such, when people gamble, some might be stimulated by a situation where the outcome of the activity is determined by fate.<sup>164</sup> In this regard, Newmark points out that gambling might fulfil a religious function in some gamblers’ lives.<sup>165</sup> He argues that some gamblers might find satisfaction in gambling because it connects them to a “higher power”.<sup>166</sup> In his view, it is possible that some people enjoy gambling because it gives them the opportunity to rise above their ordinary lives.<sup>167</sup> Winning gives them self-confidence and improves their image; the ability to predict the outcome of the game makes them feel special.<sup>168</sup>

People’s circumstances and external factors can also motivate them to gamble. Some argue that boredom might lead people to gamble and this has been confirmed in research surveys.<sup>169</sup> Yet, some experts are not convinced that boredom leads to gambling.<sup>170</sup> In Newton’s view, “boredom” is a vague term and a situation that could

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<sup>160</sup> Moodie 1992 445-446. Moodie queries whether people’s reliance on thrill seeking could become destructive and whether there might even be a risk of addiction. He asks: “Can there be a substance involved in all this? Can there be, even, an addiction to adrenalin?” (Moodie 1995 50)

<sup>161</sup> P Collins 22.

<sup>162</sup> Kusyszyn 136-137.

<sup>163</sup> Kusyszyn 137. Kusyszyn argues that “[t]he gambler replaces Descartes’s dictum, ‘I think, therefore I am,’ with ‘I feel, therefore I am.’”

<sup>164</sup> Giddens denies that fate and destiny have a role in modern life. Instead, he argues, chance and risk are by-products of the lives we lead. Giddens 29.

<sup>165</sup> Newmark DL “Covert Religious Aspects of Gambling” in Eadington WR & Cornelius JA (eds) *Gambling and Commercial Gaming: Essays in Business, Economics, Philosophy and Science* (“Newmark”) 449. On the role of “ontological beliefs”, witches, spirits and the like in certain South African people’s reasons for playing the lottery, see Van Wyk I “Bad luck, slippery money and the South African lottery” in Cassidy R, Pisac A & Loussouarn C *Qualitative Research in Gambling*.

<sup>166</sup> Newmark 450. Moody also refers to the context of “higher powers” and people’s questions about whether there is meaning in life and a “creator”. In his view, all of this uncertainty can in fact lead to gambling. (Moody 1995 39)

<sup>167</sup> Newmark 453. In a study that focussed on the narratives of a few problem gamblers in Hong Kong, the researchers found that gambling makes some people feel “extraordinary” and that they gamble in order to gain recognition and because they yearn for “connection”. Wong Y-L R, Leung YKT & Lau CWD “Behind the allure of gambling: A qualitative exploration of the existential yearning of Chinese men with problem gambling in Hong Kong” 2009 *International Gambling Studies* 9:3 189 199-201.

<sup>168</sup> Newmark 453.

<sup>169</sup> Rule & Sibanyoni 29-30. Reith acknowledges the role of boredom in gambling. She highlights the thrill of gambling, but also points to its fleeting nature and the disappointment that sets in once the activity is over. (Reith 1996 214-216)

<sup>170</sup> Newman O *Gambling: Hazard and Reward* (“Newman”) 14-15.

lead to various activities, not necessarily gambling.<sup>171</sup> Some people might perhaps be influenced by others. In one study, participants remarked that peer pressure or family members made them gamble.<sup>172</sup> Despite this, Martinez remarks that most people gamble out of their own free will.<sup>173</sup>

The television and media seem to play a role in encouraging gambling.<sup>174</sup> Casinos and lotteries use advertising and publicity as effective tools to promote gambling and lottery participation. Organisations sometimes go to great lengths to lure people in.<sup>175</sup> Some authors argue that those activities and gambling publicity in general motivate people to gamble or even cause problem gambling.<sup>176</sup>

In the course of committing to the gambling challenge, gamblers rely on various assumptions and beliefs. As Walker points out, these beliefs and assumptions are often mistaken.<sup>177</sup> Eventually, gamblers become trapped in their behaviour.<sup>178</sup> This entrapment leads to the negative consequences of gambling behaviour, such as financial distress, emotional turmoil as well as family and marital problems.<sup>179</sup>

The factors that motivate people to gamble can be applied in the context of promotional competitions as well. In some instances, people participate in such competitions because they would like to win a prize, which often consists of money. Therefore, economic reasons might motivate participation. However, there might also be others who participate to relieve boredom or because they seek a challenge. A different group of people may enjoy entering promotional competitions because of the thrill element or because they can associate with the chance or fate element involved. They

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<sup>171</sup> Newman 14-15.

<sup>172</sup> Rule & Sibanyoni 30, 32-33.

<sup>173</sup> Martinez TM *The Gambling Scene: Why People Gamble* ("Martinez") 108.

<sup>174</sup> Martinez 93-107.

<sup>175</sup> Moodie 447. Popkin J "Tricks of the Trade" in Riconda A (ed) *Gambling* 71. Popkin describes the research casinos undertake to develop techniques that will help them to make visitors gamble longer. These techniques include ensuring gamblers' comfort, manipulating time perception and even the use of scents.

<sup>176</sup> Moodie 447. Collins AF "The Pathological Gambler and the Government of Gambling" in Cosgrave J *The Sociology of Risk and Gambling Reader* ("AF Collins") 355. Collins quotes in article in *The Times* (15 June 1995) that proclaimed "the identification of 'lotto-mania', a 'delusional illness triggered by publicity' surrounding the UK's national lottery".

<sup>177</sup> Walker 1992 377-387. In his research, Walker found that gamblers often displayed irrational thinking and behaviour, such as speaking to and bargaining with gambling machines, carrying lucky charms and thinking that they are luckier than other people. Walker MB "Irrational Thinking Among Slot Machines Players" 1992 *Journal of Gambling Studies* 8:3 245 ("Walker *Irrational Thinking*") 251-252, 258-259.

<sup>178</sup> Walker 1992 387-390. If a gambler encounters a big win, they pursue another. On the other hand, if they lose, they feel that they should try again.

<sup>179</sup> Walker 1992 391-394.

might wish to contain the uncertainty that permeates their lives by attempting to win the prize. Since promotional competitions are conducted with the purpose of promoting sales, the marketing for such competitions is ubiquitous, and present in all forms of media, including on television and radio as well as in the press and in social media. This will drive some people to participate in promotional competitions as well.

People's reasons and motivations for participating in promotional competitions give context to the regulation of those competitions. This might point to participants' vulnerability and susceptibility to potentially harmful schemes or abuse. As such, protection of the public could be a basis for regulating such competitions. The economic motivation might also indicate a need for regulating the prizes that are awarded. Furthermore, the reasons and motivations can highlight ancillary matters that need to be considered, such as the advertising of promotional competitions and the related marketing material. Perhaps, the psychological motivation for participating in promotional competitions might even point to a possible risk: some participants could be led into compulsive or destructive behaviour.

### **2.4.3 Gambling's negative effects**

It can be argued that promotional competitions need to be regulated because they are forms of gambling. However, in order to understand this argument, one then needs to know why gambling should be regulated. Perhaps the reason lies in that fact that gambling is not merely a form of entertainment without consequence. It has an impact or influence on individuals, society and the economy.<sup>180</sup> This is often perceived as negative or harmful and, as such, many countries prohibit or regulate gambling. Accordingly, in considering the regulation or prohibition of gambling (and, by extension, promotional competitions), one should be aware of and evaluate gambling's effect on people and society at large.

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<sup>180</sup> In its review of gambling, the Lotteries and Gambling Board pointed out that gambling's social and economic effects receive the most attention. (LGB Main Report 53) In the past, societies held strong views against gambling on the basis that "permitted gambling posed a threat of social disruption". Eadington WR "Understanding Gambling" in Eadington WR & Cornelius (eds) *Gambling: Public Policies and the Social Sciences* 3 4.

Gambling's impact on people and society can be identified in various dimensions.<sup>181</sup> Since gambling gives people the opportunity to make money in exchange for little effort, some argue that gambling could potentially be detrimental to people's work ethic.<sup>182</sup> Some opponents of gambling contend that gambling causes crime and other ills too.<sup>183</sup> In general, gambling may have an effect on society because it could polarise people. For example, it can create tension between proponents of gambling and religious communities that may have strong views against it.<sup>184</sup>

In considering the impact of gambling on society and individuals, a lot of attention is given to problem gambling.<sup>185</sup> This relates to the situation where a gambler becomes so entrenched in the activity that they lose control over their gambling behaviour.<sup>186</sup> According to Collins, gambling becomes problem gambling when it harms the participants and those around them.<sup>187</sup> This behaviour is also known as or mentioned in the context of addictive gambling or gambling addiction, compulsive gambling, pathological gambling, excessive gambling, immoderate gambling or disordered gambling or gambling disorder.<sup>188</sup>

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<sup>181</sup> Anti-gambling views are divergent and numerous. Only some of the arguments against gambling are mentioned here, but there are various others. For example, Brenner & Brenner point out that some people hold the view that legalisation of gambling might divert money away from the stock market or investment, although they argue that the amount of money spent on gambling is not sufficient to have any remarkable effect on stockbroking and investment. (Brenner & Brenner 134)

<sup>182</sup> LGB Main Report 55-55. Brenner & Brenner offer a contrary view. According to them, it is arguable that gambling gives some people an opportunity to rise in society and that they will then work harder. They also argue that some might work harder in order for them to have funds that can be spent on gambling. (Brenner & Brenner 134)

<sup>183</sup> However, some researchers like McGowan questions this. He argues that there is limited evidence that gambling is a substantial cause of crime. McGowan R "Casinos or No Casinos: What Are the Relevant Considerations?" 2012 *Gaming Law Review and Economics* 16:1&2 27-42 ("McGowan") 36-38.

<sup>184</sup> LGB Main Report 54-55. See also the Howard Report 17-23. Within Christianity, for example, there are divergent views surrounding gambling. Some denominations argue that it is a sin, while the Catholic Church maintains that it is not a sin as long as it does not prohibit the person from fulfilling religious duties. (Cabot ea 4-5)

<sup>185</sup> LGB Main Report 55-58.

<sup>186</sup> Blaszczynski & Nower explain problem gambling as follows:

"the defining feature of a problem gambler is not only the emergence of negative consequences but also the presence of a subjective sense of impaired control, construed as a disordered or diseased state that deviates from normal, healthy behaviour. Impaired behavioural control, defined by repeated, unsuccessful attempts to resist the urge in the context of a genuine desire to cease, is the central, diagnostic and foundational feature of pathological gambling."

(Blaszczynski A & Nower L "A pathways model of problem and pathological gambling" *Addiction* 97 487-499 at 488)

<sup>187</sup> P Collins 137.

<sup>188</sup> See P Collins 135-147. Clotfelter & Cook 125. "UNLV Gaming Law Journal: Gambling Disorder and the Law Symposium Issue" [http://law.unlv.edu/sites/default/files/glj\\_call\\_for\\_abstracts.pdf](http://law.unlv.edu/sites/default/files/glj_call_for_abstracts.pdf) (accessed

Problematic gambling behaviour is formally classified as a disorder by the American Psychiatric Association. The fifth edition of the Association's *Diagnostic and Statistical Manual of Mental Disorders* contains a separate category for behavioural disorders and gambling disorder is classified under this category.<sup>189</sup> The previous version of the manual referred to "pathological gambling" instead of "gambling disorder".<sup>190</sup> Reilly and Smith suggest that the change in terminology might remove the stigma association with "pathological gambling".<sup>191</sup> This could also make it easier for individuals to seek treatment for this disorder.<sup>192</sup>

Persons that display problem gambling behaviour should be distinguished from professional gamblers.<sup>193</sup> Research shows that pathological gamblers' impulsivity seems to be the main distinguishing factor between them and professional gamblers.<sup>194</sup> According to Martinez, persons that display problem gambling behaviour become emotionally involved in the activity, take risks, make irresponsible decisions when playing, get involved in disagreements with other gamblers and lose frequently.<sup>195</sup> Professional gamblers,<sup>196</sup> on the other hand, see gambling as a

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on 21 May 2014). There seems to be no single, generally accepted definition of "problem gambling". Carnelley remarks that due to "the vagueness of the definition, the exact incidence of problem gambling is unknown". Carnelley M "The Proliferation of Gambling, Problem Gambling and Public Policy" 2000 *Obiter* 192-199 ("Carnelley 2000") 194. See also the various definitions quoted by the Gambling Review Commission. In essence, problem gambling presents itself when a person cannot control their desire to gamble and the situation leads to harm. [Gambling Review Commission *Review of the South African Gambling Industry and its Regulation* September 2010 ("2010 Gambling Review") 379]

<sup>189</sup> American Psychiatric Association "DSM 5 Fact Sheet. Substance-Related and Addictive Disorders" [http://www.psychiatry.org/dsm5\\_1](http://www.psychiatry.org/dsm5_1) ("APA Fact Sheet") (accessed on 24 May 2014).

<sup>190</sup> Pathological gambling first featured in the third edition of the *Diagnostic and Statistical Manual of Mental Disorders*. In that edition, it was classified as an impulse control disorder. See Reilly C & Smith N, National Centre for Responsible Gambling "The Evolving Definition of Pathological Gambling" [http://www.ncrg.org/sites/default/files/uploads/docs/white\\_papers/ncrg\\_wpdsm5\\_may2013.pdf](http://www.ncrg.org/sites/default/files/uploads/docs/white_papers/ncrg_wpdsm5_may2013.pdf) (accessed on 24 May 2014). Reilly & Smith explain that pathological gambling has also been reclassified as an addiction instead of an impulse control disorder. (Reilly & Smith 3.) Walker, in a contribution that predates the formal reclassification of pathological gambling as an addiction, argues against classifying gambling as addictive. In his view, gambling can be seen as a game of skill or a leisure activity in which losses could be a side-effect. He questions why persons would be praised for persisting in other activities, such as sport and hobbies, but criticised for heavy gambling. (Walker 1996 232-239.)

<sup>191</sup> Reilly & Smith 4.

<sup>192</sup> APA Fact Sheet 1.

<sup>193</sup> Martinez 46.

<sup>194</sup> Weinstock J, Massura CE & Petry NM "Professional and Pathological Gamblers: Similarities and Differences" 2013 *Journal of Gambling Studies* 29 205-216 ("Weinstock *ea*") 213.

<sup>195</sup> Martinez 47-49. Weinstock *ea* have observed that pathological gamblers have lower self-esteem and "elevated levels of psychiatric distress", and that they also gamble as a result of stress or to "regulated mood". (Weinstock *ea* 212)

<sup>196</sup> Martinez refers to professional gamblers as "hard rocks".



“business venture”.<sup>197</sup> They do not take unnecessary risks and focus on the game, instead of getting involved in conflict with other players.<sup>198</sup>

It seems that not all forms of gambling may necessarily lead to problem gambling. The amount of money required to participate in gambling might dictate whether or not someone can be led into problem gambling.<sup>199</sup> Walker points out that pathological gamblers are normally involved in casino and racing gambling, because those forms of gambling involve substantial amounts of money.<sup>200</sup> In his view, people who play lotteries or bingo are unlikely to become problem gamblers because much money cannot be spent on those gambling activities.<sup>201</sup>

Views regarding problem gambling are divergent. Although a lot of research has been done regarding this subject, it seems that there is still a lack of consensus and clarity regarding problem gambling and its extent.<sup>202</sup> This might be because the formal studying of pathological gambling is a rather young science. Alan Collins proposes that the shift from gambling prohibition to gambling regulation might have caused the birth of this science.<sup>203</sup> When governments started regulating gambling, they had to start examining the consequences of allowing the activity and how to deal with those that become addicted to it.

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<sup>197</sup> Martinez 47. It appears that professional gamblers mainly participate in gambling to generate profit. (Weinstock *ea* 213.) In the long run, professional gamblers also seem to win often. (Martinez 49)

<sup>198</sup> Martinez 47. Professional gamblers seem to be able to control their behaviour and are able to put mechanisms in place to prevent them from gambling irresponsibly. (Weinstock *ea* 213)

<sup>199</sup> Walker 1992 394. The various forms of gambling require varying levels of skill and involve differing levels of continuity. As such, the different forms of gambling do not involve the same types of human behaviour. The differences between various forms of gambling also have an influence on the occurrence of problem gambling. Dickerson M “Internal and External Determinants of Persistent Gambling: Problems in Generalising From One Form of Gambling to Another” 1993 *Journal of Gambling Studies* 9:3 225-245 (“Dickerson”) 226, 241-243.

<sup>200</sup> Walker 1992 394.

<sup>201</sup> Walker 1992 394. However, research shows that lotteries can still be addictive, even if to a smaller extent. Ariyabuddhiphongs 22-23. Welte JW, Barnes, GM, Wieczorek WF, Tidwell MO & Parker JC “Risk factors for pathological gambling” 2004 *Addictive Behaviors* 29 323-335 (“Welte *ea*”) 323-333.

<sup>202</sup> P Collins 131-132. In addition, there is also a need for broader research and studies in countries outside the Western world and in different cultures. Raylu N & Oei TPS “Pathological gambling: A comprehensive review” 2002 *Clinical Psychology Review* 22 1009-1061 (“Raylu & Oei”) 1047. The Gambling Review Commission noted that one cannot accurately measure the prevalence of problem gambling. (2010 Gambling Review). However, its report reflects that some South Africans do struggle with problem gambling and that its levels exceed those seen in Europe. (2010 Gambling Review 87-88)

<sup>203</sup> AF Collins 380. See also Raylu & Oei 1011 and the sources cited by them.

Some authors do not readily accept that there is a disorder such as compulsive gambling.<sup>204</sup> Vatz and Weinberg, for example, challenge some of the grounds on which compulsive gambling is classified as a disorder.<sup>205</sup> They argue that some gamblers might use the disorder as an excuse for their behaviour while they can in fact control themselves and their gambling activities.<sup>206</sup> Yet, it seems that most authors recognise the existence of problem gambling. Some authors also note that as gambling becomes increasingly deregulated, the number of people that struggle with problem gambling will increase as well.<sup>207</sup> The LGB Main Report briefly deals with the different views, but quite quickly comes to the conclusion that compulsive or addictive gambling exists and that it is a problem that needs to be dealt with.<sup>208</sup>

Problem gambling needs to be dealt with due to its negative impact on the gambler and those around him. The consequences of problem gambling behaviour are wide-ranging. One of the most obvious effects relate to the gambler's financial situation.<sup>209</sup> If a gambler cannot control his spending on gambling, it is bound to deplete his finances. In order to maintain their habit, gamblers often incur great amounts of debt – which might ultimately lead to financial ruin and bankruptcy.<sup>210</sup>

Apart from the actual money spent on gambling, gamblers may incur other costs too. Lesieur observes that problem gambling can sometimes lead to medical conditions and gamblers need to pay for the treatment of those conditions.<sup>211</sup> In order to keep on gambling, some gamblers cancel their insurance or fall behind on debt instalments, the consequences of which can be ruinous.<sup>212</sup> The costs of problem gambling are not restricted to monetary costs. Problem gambling exacts its toll emotionally and psychologically as well. It can make the person depressed and despondent and lower

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<sup>204</sup> LGB Main Report 56. Other authors aver that problem gambling is not very prevalent, because “most people bet with their heads, not over them, and realize that gambling and speculation are good servants and bad masters”. (Brenner & Brenner 139)

<sup>205</sup> Vatz RE & Weinberg LS “Refuting the Myths of Compulsive Gambling” in Riconda A (ed) *Gambling* (“Vatz & Weinberg”) 167-174.

<sup>206</sup> Vatz & Weinberg 173-174.

<sup>207</sup> P Collins 136; Clotfelter & Cook 127. Lesieur HR and Custer RL “Pathological Gambling: Roots, Phases & Treatment” in Frey JH & Eadington WR (eds) *Gambling: Views from the Social Sciences. The Annals of the American Academy of Political and Social Sciences* 146 (“Lesieur & Custer”) 148-149.

<sup>208</sup> LGB Main Report 56-57.

<sup>209</sup> Martinez 64-65. Lesieur H “Compulsive Gambling” in Riconda A (ed) *Gambling* (“Lesieur”) 155-157.

<sup>210</sup> Lesieur 155-157.

<sup>211</sup> Lesieur 157.

<sup>212</sup> Lesieur 157. Rule & Sibanyoni 35-39.

their self-esteem.<sup>213</sup> However, gamblers develop coping mechanisms to deal with the negative effects of gambling.<sup>214</sup> Nevertheless, Martinez notes that problem gamblers ultimately hit “rock bottom”.<sup>215</sup> Alan Collins mentions how gamblers are urged to question themselves about their gambling behaviour in order to determine whether their behaviour has become problematic, but also that they may realise the threat to their psychological health if their gambling behaviour is out of control.

Gambling’s effect is not limited to gamblers themselves. If a person’s gambling spirals out of control it impacts upon the persons around the gambler as well.<sup>216</sup> Problem gambling has a negative impact on the gambler’s relationships and can destroy families.<sup>217</sup> This concern in respect of gambling is not new – Carnelley and Schrage point out that Justinian already identified this problem in ancient Roman times.<sup>218</sup> Problem gamblers display behaviour that can interfere with interpersonal relationships, such as withdrawal, lying, irritation and anger.<sup>219</sup> Walker notes how gambling can keep gamblers away from their families, creating so-called “gambling widows”.<sup>220</sup> Problem gambling can affect persons that are not close to the gambler as well. The gambling need might force some people to commit crimes in order to sustain their habit.<sup>221</sup> Gambling might have a negative impact on the individual’s health and work performance.<sup>222</sup> In serious cases it could even lead to suicide.<sup>223</sup>

In order to protect gamblers and society in general, problem gambling needs to be addressed. The LGB Main Report notes the risks associated with problem gambling and recognises pathological gambling as a “psychological abnormality” that requires

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<sup>213</sup> Martinez 67-68.

<sup>214</sup> Rosecrance 123-128.

<sup>215</sup> Martinez 68-70.

<sup>216</sup> Carnelley 2000 195.

<sup>217</sup> LGB Main Report 57. Rule & Sibanyoni 22, 39-42. Carnelley & Schrage 269-270.

<sup>218</sup> Carnelley & Schrage 270.

<sup>219</sup> Walker 1992 392.

<sup>220</sup> Walker 1992 393.

<sup>221</sup> Lesieur 161-163. LGB Main Report 57.

<sup>222</sup> Rule & Sibanyoni 21-23, 42-44. However, gambling does not necessarily have a negative effect on a person in all cases. There might be evidence of some health benefits brought about by recreational gambling. (Humphreys B, Nyman J & Ruseski J *The Effect of Gambling on Health: Evidence from Canada* Working Paper No. 2011-18, available online at <http://uofa.ualberta.ca/-/media/arts/departments-institutes-and-centres/economics/wps/WP2011-18-Humphreys-Ruseski.pdf>)

<sup>223</sup> LGB Main Report 57. Martinez recounts the tale of a gambler that committed suicide by jumping of the Golden Gate Bridge. His suicide note referred to “the cards, always the cards”. Martinez 69.

specialist treatment.<sup>224</sup> The Board even recommended the setting up of facilities where pathological gamblers can be treated and rehabilitated.<sup>225</sup> Such institutions are not currently functioning under the National Gambling Act, 2004. However, the South African Responsible Gambling Foundation NPC is operating a National Responsible Gambling Programme.<sup>226</sup> The aim of the Programme is to limit problem gambling, provide counselling, raise awareness and do research regarding the subject.

Problem gambling is often treated in a manner similar to that in which alcohol addiction is treated. This is often done through “step based” programmes hosted by dedicated organisations in support group format. These programmes involve steps such as confession and surrender. Professional counselling is also available for treatment of the disorder.<sup>227</sup> The goal of the treatment is usually to achieve abstinence.<sup>228</sup>

However, it seems that the goal of treating problem gambling does not need to be abstinence in all cases. Instead, authors argue that some problem gamblers can still participate in controlled gambling.<sup>229</sup> Rosecrance, for example, suggests that some gamblers struggle with problem gambling because they follow “ineffective gambling strategies”.<sup>230</sup> As such, he proposes that their problem gambling might be solved if one assists them to improve their gambling strategies.<sup>231</sup> Peter Collins emphasises the importance of education to combat problem gambling too. In his view, gambler’s failure to grasp gambling odds often leads to problem gambling and he suggests that teaching people about money management strategies could reduce gambling problems.<sup>232</sup> Solonsch deals with this aspect as well and stresses the importance of

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<sup>224</sup> LGB Main Report 56.

<sup>225</sup> LGB Main Report 58.

<sup>226</sup> National Responsible Gambling Programme “History, Structure and Function of the NGRP” <http://www.responsiblegambling.co.za/content/?37> (accessed on 25 May 2014). See also Collins P *ea* “Addressing Problem Gambling: South Africa’s National Responsible Gambling Programme” *South African Medical Journal* 101:10 722-723.

<sup>227</sup> Lesieur & Custer 153-156.

<sup>228</sup> Martinez 74-92. McGurrin MC “Treatment of Pathological Gambling” in Riconda A (ed) *Gambling* 174.

<sup>229</sup> Rosecrance 118-119.

<sup>230</sup> Rosecrance 118.

<sup>231</sup> Rosecrance 118-119. See also Walker M “The Medicalisation of Gambling as an ‘Addiction’” in McMillen J (ed) *Gambling Cultures: Studies in history and interpretation* 223 (“Walker 1996”) 238.

<sup>232</sup> P Collins 148-149.

educating gamblers in order to improve their gambling behaviour.<sup>233</sup> This will assist them to control their losses and motivate them to gamble skilfully.<sup>234</sup>

The negative effects of gambling need to be borne in mind when one considers the regulation of promotional competitions. In themselves, promotional competitions might seem innocuous. However, those competitions could be regarded as entry level gambling activities and introduce people to lotteries. As such, it is submitted that legislatures might have viewed this a reason for regulating promotional competitions in order to protect the public, particularly since participation in those competitions might stimulate vulnerable persons to get involved in more serious forms of gambling which might, in certain instances, lead to problem gambling.

#### **2.4.4 Economic impact of gambling**

It has to be kept in mind that gambling has a constructive side to it because it can have a positive economic impact. Many countries run state lotteries with the aim to generate revenue.<sup>235</sup> The income from such lotteries can be spent on projects that benefit society.<sup>236</sup> Indirectly, gambling contributes to community and upliftment projects due to the social responsibility programmes operated by casinos.<sup>237</sup> Moreover, authors argue that gambling can stimulate the economic growth of a country in general.<sup>238</sup> In a South African context there seems to be substantiation for the positive effects of gambling on the economy as well.<sup>239</sup> In this regard, the Gambling Review Commission

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<sup>233</sup> Solonsch M “An Analysis of Skill in Gambling” in Eadington WR & Cornelius JA (eds) *Gambling and Commercial Gaming: Essays in Business, Economics, Philosophy and Science* 477 (“Solonsch”) 484.

<sup>234</sup> Solonsch 484.

<sup>235</sup> Rule & Sibanyoni quote the then Minister of Finance who, in relation to gambling, “quipped that the government had ‘introduced a new form of tax’ that was mainly for people ‘who do not understand mathematics’”. (Rule & Sibanyoni 8). Various countries attempt to gain profit from lotteries. For example, Brenner *ea* note that the revenue generating potential of lotteries is attractive to African countries that struggle financially. See Brenner AB, Lipeb M & Servet J-M “Gambling in Cameroon and Senegal” in McMillen J (ed) *Gambling Cultures: Studies in history and interpretation* 167. In this context, lotteries can sometimes be seen as “consumer goods” and be regulated as such. (Scott 19; Clotfelter & Cook 219-221.) Munting remarks that governments have been running lotteries to generate revenues during various periods in history. For example, during the 1700s, lotteries were close on annual events. (Munting 55)

<sup>236</sup> LGB Main Report 61.

<sup>237</sup> Ligthelm, AA, Mango T & Jonkheid E *Socio-Economic Impact of Legalised Gambling in South Africa* (“Ligthelm *ea*”) 106.

<sup>238</sup> LGB Main Report 60-61.

<sup>239</sup> 2010 Gambling Review” 39-72; Carnelley & Schrage 266; Tyawa B “Regulating Gaming in the New South Africa” 2012 *UNLV Gaming Research & Review Journal* 16:1 93-96 (“Tyawa”) 94-95.

recommended that South Africa's National Lottery should continue with its "revenue maximisation mandate".<sup>240</sup>

Gambling may benefit the tourism industry too.<sup>241</sup> Casinos often form part of resort complexes, which attract visitors because of the entertainment and recreational activities they offer. Sun City and Montecasino are examples of such venues in South Africa. In a foreign context, the casinos in Nevada, Monte Carlo and Macau demonstrate how gambling can have a positive impact on the economy and growth of cities.<sup>242</sup>

Gambling can benefit individuals as well by generating employment and other forms of income.<sup>243</sup> Many people are directly employed by the gambling industry and work in the management and operations of casinos and lottery operators. Other persons are employed by suppliers to the gambling sector or generate an income by providing their services to this industry. The Gambling Review Commission confirmed gambling's job creation potential in finding that "the gambling industry is a significant employer in the economy".<sup>244</sup>

Quite a bit of research has been conducted regarding the positive economic effect of gambling.<sup>245</sup> However, some scholars caution that one should not merely assume that legalised gambling will always have a positive economic effect.<sup>246</sup> Kaplan argues that

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<sup>240</sup> 2010 Gambling Review 134, 138. The Commission found that the National Lottery plays an important role in the generation of funds for various causes, and that the "revenue maximisation" approach seemed to have been successful. Yet, it indicated that some changes had to be made in order to deal with challenges that had been experienced. (2010 Gambling Review 68)

<sup>241</sup> It seems that gambling venues near a country's borders particularly attract tourists if gambling is illegal in the neighbouring country. Leiper N "Tourism and Gambling" 1989 *GeoJournal* 19:3 269-275 ("Leiper") 274. The Lotteries and Gambling Board considered gambling's effect on tourism as well, but concluded that it is not a direct contributor to tourism growth although it might have a positive influence on same. (LGB Main Report 61.)

<sup>242</sup> Leiper 271-272. Many casino cities rely on tourists, particularly those from countries that prohibit gambling. However, it seems that the growth of internet gambling may have an effect on those industries because some people might choose to gamble on the internet instead of visiting gambling venues. Au N & Perry Hobson JS "Gambling on the Internet: A Threat to Tourism?" 1997 *Journal of Travel Research* 35:4 ("Au & Perry Hobson") 77-81.

<sup>243</sup> LGB Main Report 59-60; P Collins 3.

<sup>244</sup> The Commission's research showed that the gambling industry was responsible for the formal employment of 2.64% people in South Africa (if indirect employment is taken into the equation as well). 2010 Gambling Review 133.

<sup>245</sup> See, for example, Ligthelm ea 101-106 and Ligthelm AA & Mabaso LT *Economic Impact of Legalised Gambling in South Africa* 63-76.

<sup>246</sup> For example, Rose cautions that lottery revenues are often overrated when considered in the context of governments' need for funds. (IN "The Danger of Not Caring About Gambling" 2011 *Gaming Law Review and Economics* 15:10)

gambling is not such an effective tool to generate revenue for a country.<sup>247</sup> He points out that a significant portion of the revenue created by lotteries flows to other parties, such as service providers and winners.<sup>248</sup> As such, the net income that can be distributed to beneficiaries is much less than the revenue that initially flows in from lottery proceeds.<sup>249</sup> He criticises governments' reliance on lotteries for revenue generation, suggesting that more "dependable" sources should be used.<sup>250</sup> Kaplan argues that gambling creates a "moral paradox" for governments, because they encourage people to gamble so that revenue can be generated, while they allow them at the same time to participate in an activity that could lead to financial hardship and even addiction.<sup>251</sup>

Peter Collins suggests that legalised gambling can create revenue flow into a country from foreign gamblers visiting the country.<sup>252</sup> At the same time, he points out that illegal gambling creates various policing and enforcement expenses arising from combating illegal gambling and its related activities.<sup>253</sup> However, he argues that legalised gambling does away with many of those problems, resulting in cost savings.<sup>254</sup>

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<sup>247</sup> Kaplan HR "The Social and Economic Impact of State Lotteries" in Frey JH & Eadington WR (eds) *Gambling: Views from the Social Sciences. The Annals of the American Academy of Political and Social Sciences* 91 ("Kaplan") 94-99.

<sup>248</sup> Kaplan 98. Abbott also point to significant "legal, economic, social and health" costs associated with gambling. In his view, gambling is "more like tobacco or alcohol than soft drink or cosmetics". Abbott M "The Impact of Gaming on the Community" in Scott M (ed) *Lotteries, gaming and public policy* ("Abbott") 78.

<sup>249</sup> Kaplan 98.

<sup>250</sup> Kaplan 100. Some other authors also question lotteries' potential to generate funds for governments. In a United States context, some researchers have concluded that lotteries generate relatively small revenues that are undependable and are coupled with proportionally high administration costs. Mikesell JL & Zorn CK "State Lotteries as Fiscal Savior or Fiscal Fraud: A Look at the Evidence" 1986 *Public Administration Review* 46:4 311-320 ("Mikesell & Zorn") 318-319.

<sup>251</sup> Kaplan 103. Some critics argue that lotteries are regressive sources of revenue because, proportionally, poorer people tend to spend more on lottery tickets than wealthier persons. (Mikesell & Zorn 319) Altshuler and Gómez-Ibáñez explain these sources of revenue as follows: "A progressive revenue source requires poor households to pay a smaller share of their income than rich households, while a regressive revenue source asks the poor to pay a larger portion of their income than the rich." (Alshuler AA & Gómez-Ibáñez JA *Regulation for Revenue: The Political Economy of Land Use Exactions* 107)

<sup>252</sup> P Collins 121. See also, for example, Leiper 274 and Au & Perry Hobson.

<sup>253</sup> P Collins 121. Illegal gambling operators might also evade tax and could reduce countries' tax revenues or divert business from legal operators, leading to a reduction in tax revenue. (See the comments of the Casino Association of South Africa in SAPA "Illegal gambling costs SA millions" *Business Report* 20 February 2015 (<http://www.iol.co.za/business/news/illegal-gambling-costs-sa-millions-1.1821553#.VPd-e3kcRMs>, accessed on 4 March 2015)

<sup>254</sup> P Collins 121.

The economic impact of gambling is also relevant in the context of promotional competitions in particular. Since gambling and lotteries are sources of revenue for gambling and lottery operators as well as governments, many legislatures have decided to regulate gambling in order to ensure that gambling and lotteries are operated in a controlled environment and in an attempt to deal with the criminal activities that might be stimulated by the money involved in gambling and lotteries. Promotional competitions could also be a source of revenue for the promoters that conduct them and many legislatures have therefore chosen to regulate the economic aspects of promotional competitions. It can be argued that promotional competitions are often exempted from the more onerous requirements of gambling legislation because they should only promote goods and services and generate revenue through sales and transactions instead of competition entry fees. This may be the reason why the relevant legislation often prohibits the organisers of promotional competitions from charging entry fees or requiring consideration for participation in promotional competitions.<sup>255</sup> The prohibition might also be in place to protect the lotteries operated by licensed lottery operators against competition and a reduction in revenue caused by promotional competitions.

#### **2.4.5 Opinions in respect of gambling**

This thesis evaluates the regulation of promotional competitions. The regulation of these activities forms part of the broader regulation of gambling. Accordingly, in examining the regulation of promotional competitions, one should take into account the considerations that are relevant in appraising the regulation of gambling. In this appraisal process, the question is whether gambling should be legal or illegal; whether it should be prohibited, regulated or legalised and unregulated. When reflecting on this question, authors usually refer to the various views in favour of or against gambling. As such, some of these views will be considered below.

One of the most significant arguments against legalised gambling centres on the argument that gambling instils in people the belief that they can get “something for nothing”.<sup>256</sup> In other words, it encourages people to participate in an activity in which

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<sup>255</sup> See, for example, the provisions of sections 36(3)(a) and 36(4) of the CPA.

<sup>256</sup> See, for example, Kaplan 104. Studies have shown that the “something for nothing factor” motivates some persons to gamble. (Nyman JA, Welte JW & Dowd BE “Something for nothing: A model of



they can achieve a gain without putting in effort. Caillois points out how governments often wish to regulate games of chance because it mocks the principles that encourage people to work for a living.<sup>257</sup> Along the same line of argument, Kaplan argues that gambling “promote[s] a no-work ethic”.<sup>258</sup> He takes the argument to the extreme by pointing out that some lottery winners resign their employment and are thereby removed from the workforce.<sup>259</sup> According to Brenner and Brenner, there is no evidence to support this argument.<sup>260</sup>

In a similar vein, some contend that gambling promotes false hope. Kaplan argues that gambling could even function as a form of “social control”, because governments use it as an “escape mechanism” to divert people’s attention from their circumstances and challenges.<sup>261</sup> (In this context, Frey notes that gambling could be in line with Marxist theories.<sup>262</sup>) Instead, Kaplan reasons, governments have a responsibility to look after their citizens and to guard against the ills that can be created by activities such as gambling.<sup>263</sup> In his view, gambling should not be used as an easy, temporary tool to generate revenue.<sup>264</sup> Rather, governments should face the challenge and take on the problems in society, deal with difficult questions and come up with sustainable solutions for improving their countries’ economies.<sup>265</sup> Kaplan concludes that lotteries are not effective tools to generate revenue for governments.<sup>266</sup> Instead, they “are

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gambling behaviour” 2008 *The Journal of Socio-Economics* 37 2492-2504). Many opponents of gambling argue that people should earn their wealth through labour and in no way else. Aasved argues that this is a moralist view shaped by “Western European Protestant capitalistic societies”. Aasved M *The Sociology of Gambling* (“Aasved”) 6-7. The phrase “something for nothing” often features in debates about the merits of gambling. It seems that it might have its origin in the following quotation from George Bernard Shaw: “Gambling promises for the poor what property does for the rich: Something for nothing”. (Quoted in Eadington WR “Understanding Gambling” in Eadington WR “Understanding Gambling” in Eadington WR and Cornelius JA (eds) *Gambling: Public Policies and the Social Sciences* 6) Wilson Mizner played with the “something for nothing” words when he said the following about gambling: “The sure way of getting nothing for something”. (Quoted in Abbot 77)

<sup>257</sup> Caillois 157.

<sup>258</sup> Kaplan 104.

<sup>259</sup> Kaplan 104.

<sup>260</sup> Brenner & Brenner 50.

<sup>261</sup> Kaplan 104.

<sup>262</sup> Frey 112. Frey notes that, from a Marxist perspective, sport and gambling can be used to alleviate the tension and alienation caused by ordinary life.

<sup>263</sup> Kaplan 105. There are various views about the extent to which governments should be involved in gambling and its regulation. Scott asserts that public policy must be clear about government’s role in this regard. Scott C “Lotteries and Gaming: Some Public Policy Issues” in Scott M (ed) *Lotteries, gaming and public policy* (“Scott”) 26. See the further discussion at pages 61-67 below.

<sup>264</sup> Kaplan 105.

<sup>265</sup> Kaplan 105.

<sup>266</sup> Kaplan 105. It seems that there are differing views about whether gambling is an effective source of revenue for governments. Some researchers accept that gambling does have revenue generating

stopgap measures that lull the populace into a state of complacency while social and fiscal problems intensify”.<sup>267</sup>

Gambling can be criticised because it is often most popular and prevalent amongst those members of society who are less privileged and belong to lower classes.<sup>268</sup> One could argue that those are in fact the persons that should not gamble, because they cannot afford it and often waste more money than they gain. They should be the ones that benefit from the proceeds of lotteries, instead of being victims who are drawn deeper into negative circumstances by the hope of making easy money.

Various other reasons exist for the prohibition or regulation of gambling. Critics often point to gambling’s potentially negative impact on persons, such as gambling disorder, financial hardship and family problems. Peter Collins calls this the “human costs argument”.<sup>269</sup> In order to curb these negative consequences, governments have to put measures in place in order to control gambling and gambling operators and deal with problem gambling. Further costs are incurred in order to enforce gambling laws and to police crimes that relate to gambling.<sup>270</sup> These measures create additional costs and provide the basis for the “social costs argument” against gambling.<sup>271</sup>

Having said this, one should also bear in mind that some authors are in favour of the deregulation or liberalisation of gambling.<sup>272</sup> Some of them are of the view that the likelihood of harm caused by gambling is overemphasised.<sup>273</sup> In particular, they reason that that the liberalisation of gambling will not necessarily lead to addiction or problem gambling.<sup>274</sup> Instead, they suggest that liberalisation might have positive social or

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potential and focus more on the manner in and model by which this should be regulated. Scott 19-23; Clotfelter and Cook 215-252.

<sup>267</sup> Kaplan 105.

<sup>268</sup> Frey JH “Gambling: A Sociological Review” in Frey JH & Eadington WR (eds) *Gambling: Views from the Social Sciences. The Annals of the American Academy of Political and Social Sciences* 107 (“Frey”) 111. See also Lighthelm *ea* 99-100, where the authors note that lottery participation is proportionally higher in less affluent segments of society.

<sup>269</sup> P Collins 34-36.

<sup>270</sup> P Collins 37.

<sup>271</sup> P Collins 36-39.

<sup>272</sup> In an article that stresses the social benefits of gambling, Basham and Luik concludes that “gambling adds significantly to the sum of human happiness; maybe that is reason enough for policy-makers to leave it alone”. (Basham & Luik 12) See also Littlewood M “Gambling and Regulation: Why there is Nothing to Fear from Liberalisation” March 2011 *Economic Affairs* 34-37 (“Littlewood”).

<sup>273</sup> Littlewood 34; Basham & Luik 12.

<sup>274</sup> Littlewood 36-37.

economic effects.<sup>275</sup> Especially in the context of gaming and gambling activities that involve no consideration requirement, it appears that traditional arguments in favour of prohibition or regulation are losing strength.<sup>276</sup> This is significant in the context of this thesis, because promotional competitions usually do not involve the payment of money. (In fact, laws usually prohibit promoters from requiring consideration.) It would therefore seem that there is a move to liberalise promotional competitions as well, although they may still need to be regulated in order to avoid abuse.

#### **2.4.6 Law, vice and regulation**

This work focuses on the regulation of promotional competitions. In order to consider the regulation of these activities, it will be beneficial to pause and consider the nature of crime and regulation in general. The study of the regulation and prohibition of crimes lies within the context of what Dixon describes as “the study of lawmaking in criminology and the sociology of law”.<sup>277</sup> But, as Dixon remarks, “crime is not a fixed category of behaviour but rather a socially created designation”.<sup>278</sup> He explains this by quoting Edwin Sutherland. The quotation elucidates the point well and is worth reproducing here:

An understanding of the nature of law is necessary in order to secure an understanding of the nature of crime. A complete explanation of the origin and enforcement of laws would be, also, an explanation of the violation of laws [...] Crime is a violation of law. If there were no laws, there would be no crimes. Whenever a law is passed and enforced, acts that were not crimes previously are made crimes. [...] In that sense, crime is the creation of the law.<sup>279</sup>

In other words, legislatures create laws in order to curb and prohibit crimes. One might say that something would not be a crime unless a law prohibited it.

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<sup>275</sup> Littlewood 37; Basham & Luik 9-12.

<sup>276</sup> Owens MD “If it isn’t Gambling, How Far Should Gaming Regulation Go?: Quasi-gambling, ‘Freemium,’ and State Control” 2013 *Gaming Law Review and Economics* 17:7 506-510 (“Owens 2013”) 509. Owens points out that, traditionally, gambling was criticised as being unproductive and that it had no “social utility”. However, he questions the validity of this argument and reasons that some of the relevant activities actually have social value because they offer the opportunity for “controlled simulation”. (Owens 2013 509)

<sup>277</sup> Dixon D *From prohibition to regulation: bookmaking, anti-gambling, and the law* (“Dixon”) 17.

<sup>278</sup> Dixon 17.

<sup>279</sup> Sutherland EH *Criminology* 11, 18.

What then determines whether something should be a crime? Criminal laws are often created in response to vice and are often used as tools to control, curb or prohibit it.<sup>280</sup> Laws have been passed and used to control vices such as prostitution, abortion, homosexuality, drug use, smoking, drinking, pornography, loitering, polygamy and gambling.<sup>281</sup> A basic dictionary definition of “vice” might explain it as “a moral fault or weakness in someone’s character” or “illegal and immoral activities, especially involving illegal sex, drugs, etc”.<sup>282</sup> Despite these relatively simple definitions, vice is a subjective concept with shifting meanings.<sup>283</sup> Yet, vices display common elements. Leitzer identifies three main characteristics of vice: the activity is carried out in excess, it is habitual (as opposed to occasional) and it mostly affects the person that engages in the activity personally.<sup>284</sup>

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<sup>280</sup> Dombrink J “Gambling and the Legalisation of Vice: Social movements, public health and public policy in the United States” in McMillen J (ed) *Gambling Cultures: Studies in history and interpretation* 43 (“Dombrink”); Green SP “Vice Crimes and Preventive Justice” 10 October 2013 *Criminal Law and Philosophy* (published online at <http://link.springer.com/article/10.1007/s11572-013-9260-7>, accessed on 5 March 2015) (“Green”) 1-2. The resultant laws, sometimes called “vice laws”, are criticised by some on the basis that they are “moralistic” (in other words, these laws only criminalise something because it is “wrong” or “sinful”) or “paternalistic”. (Green 1-2.) Skolnick notes that there is a difference between crime and vice, because vice “results from more ambivalence” and it “is continually subject to reevaluation”. Skolnick JH “The Social Transformation of Vice” 1988 *Law and Contemporary Problems* 51:1 9-29 (“Skolnick”) 9. [Leitzel J *Regulating Vice: Misguided Prohibitions and Realistic Controls* (“Leitzel”) 4 fn 3]

<sup>281</sup> Dombrink 43; P Collins 21; Green 1. Whitebread remarks that “prohibitory legislation most often occurs when a social majority objects to the specific conduct, value system, or culture of others and imposes regulation upon them. [Whitebread CH “‘Us’ and ‘Them’ and the Nature of Moral Regulation” *Southern California Law Review* 74 361-370 (“Whitebread”) 362, citing Hunt A *Governing Morals: A Social History of Moral Regulation* 1]

<sup>282</sup> Cambridge Dictionaries Online “Vice” (<http://dictionary.cambridge.org/dictionary/british/vice>, last accessed on 7 March 2015).

<sup>283</sup> Burnham JC *Bad Habits: Drinking, Smoking, Taking Drugs, Gambling, Sexual Misbehavior, and Swearing in American History* (“Burnham”) 2; Leitzel 2-3. Leitzel remarks that society’s views regarding vices shift over time, even though it might seem as if people are agreed on which activities constitute vices. (Leitzel 3)

<sup>284</sup> Leitzel 4. He notes that vice usually involves “pleasure and wickedness”, citing Skolnick JH “The Social Transformation of Vice” 1988 *Law and Contemporary Problems* 51:1 9-29 (“Skolnick”) 10. Skolnick refers to “pleasure and popularity, as well as wickedness”. Burnham remarks that vices “traditionally have been attractive, indeed, have been recreational and gratifying activities”, and he mentions that they also have “ritualistic aspects”. Accordingly, he labels them “bad habits”. (Burnham 1-2) Burnham also points to the connection between vice and deviance. People tend to decide what is acceptable to them, and categorise as deviant those people who do things that fall outside their classification of what is acceptable. (Burnham 14-15) Leggett observes that some vice activities (such as drug trafficking, prostitution and backroom gambling) often display a need to make money and that the policing of such activities require specific tactics. Leggett T *Rainbow Vice: The Drugs and Sex Industries in the New South Africa* 1.

It is often stated that the impact of vice is primarily on the person involved in the relevant conduct and that the behaviour could be regarded as “victimless”.<sup>285</sup> However, it cannot be denied that third parties might be affected by the relevant person’s behaviour as well. When someone is involved in the relevant behaviour, there may very well be indirect victims such as relatives or friends.<sup>286</sup> The law is therefore often used to protect perpetrators against harming themselves, those around them and the public in general.<sup>287</sup> As such, and due to the criticism of the moralistic basis of so-called “vice crimes”, the basis of these crimes has in many cases shifted from morals to harm prevention.<sup>288</sup>

The law is often informed by public opinion or morality.<sup>289</sup> However, challenges are created by the divergence in the public’s views.<sup>290</sup> Morals are also not universal and what one person might regard as moral another might condemn as immoral.<sup>291</sup> Even

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<sup>285</sup> Leitzel 4-6; Geis G *Not the Law’s Business: An examination of homosexuality, abortion, prostitution, narcotics, and gambling in the United States* (“Geis”) 2. These crimes are often known as “victimless crimes”. Green remarks that, lately, these crimes fit the description of “preventive justice offenses”. He describes “preventive justice offenses” as follows: “Offenses that are said to be preventive (or anticipatory or prophylactic) are those for which the preventive (rather than retributive) rationale is the primary justification”. (Green 1) According to Ashworth and Zedner, the source of the term “preventive justice” is not clear, but can be traced back to William Blackstone in the 1700s. (Ashworth A & Zedner L *Preventive Justice* 28-29)

<sup>286</sup> Geis 2-4.

<sup>287</sup> Geis 4. However, the issue with some of the relevant laws lies in the difficulty to determine on an empirical basis the consequences of and harm caused by specific behaviour. (Geis 11)

<sup>288</sup> Green 10. In Green’s view, it is difficult to argue that crimes were at a stage purely based on moral views, and that even extreme moralists would still have criminalised certain acts not purely on a moral basis but, even if only in part, also on account of the potential harm that can arise from those acts. Leitzel questions where the intention should be to reduce the occurrence of vice, or rather the harm that arises from vice. (Leitzel 13) The theory that government should intervene in a person’s activity if it could cause harm to others is known as the “harm principle”. Leitzel attributes the origin of this principle to John Stuart Mill. (Leitzel 19). Mill reasoned as follows:

“[...] the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.”

(Mill JS *On Liberty* 22)

<sup>289</sup> Various authors support this view. See, for example, Hart HLA *Law, Liberty, and Morality* 1-6; Fuller RC “Morals and Criminal Law” 1942 *Journal of Criminal Law and Criminology* 32:6 624-630 624. Law and morals (and their relationship or separation) is a vast legal philosophical subject, which encompasses debates about natural law, legal positivism and related topics.

<sup>290</sup> Geis 6-7; P Collins 3; Leitzel 3-5, 9; Skolnick 15-17. Whitehead captures the essence of morality’s relativity: “What is morality in any given time or place? It is what the majority then and there happen to like, and immorality is what they dislike.” (Whitehead AN *The Dialogues of Alfred North Whitehead*, quoted in Whitebread 1) On morality and its foundations in general see, for example, Burns RP “On the Foundations and Nature of Morality” 2008 *Harvard Journal of Law & Public Policy* 31:1 7-21.

<sup>291</sup> Some laws are also created as result of negative trends, shocking incidents or due to “moral panic” (for example anti-terror legislation). These laws often have negative consequences, because they tend to generalise and target certain sections of society. (Green 13-14) (The concept “moral panic” has its origins in the 1960s and the New Deviancy Theory, and is attributed to Jock Young and Stanley Cohen.

in communities that share the same beliefs and morals one would find that the members of those communities do not necessarily share the exact same measure and interpretation of morality. There is often a discord between morality and the law, and even if one argues that moral laws protect society, one may find some societies that have fallen apart despite laws that were meant to enforce morality.<sup>292</sup>

When regulating vice, the law also needs to strike a balance between protecting society and limiting individual freedom.<sup>293</sup> When developing laws, lawmakers need to consider to what extent a law may enforce subjective morality on individuals that participate in certain behaviour out of their own free will. Even if it is argued that the purpose of the law is to protect the relevant individuals against themselves, one must bear in mind that harm can be interpreted in different ways. What one person might consider harmful, another might regard as pleasurable. As such, Geis suggests that the law should allow individual freedoms within reasonable bounds so that individuals can exercise their own choices, but without harming society in general.<sup>294</sup>

These considerations are relevant for purposes of this study too. Promotional competitions are forms of gambling. Some people consider gambling to be a vice and argue that it should therefore be prohibited or regulated. Their arguments are often based on morality or subjective views and it is difficult to consider whether gambling needs to be prohibited or regulated on objective grounds. When it comes to promotional competitions, arguments in favour of prohibition are even more tenuous. Is participation in a promotional competition really a vice? Perhaps some people's participation in these competitions becomes excessive and habitual. Yet, even if this is true in exceptional cases, it is submitted that this should not be a reason for prohibiting the public from participating in promotional competitions

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Young J "Moral Panic: Its Origins in Resistance, Ressentiment and the Translation of Fantasy into Reality" 2009 *British Journal of Criminology* 49 4-16. Krinsky C "Introduction: The Moral Panic Concept" in Krinsky C (ed) *The Ashgate Research Companion to Moral Panics* 1-5)

<sup>292</sup> Geis 7.

<sup>293</sup> RA *The Gambling Debate* 26-31. In an American context, McGowan remarks: "This conflict between the societal good and the rights of individuals remains the basis for debating the ethical merits of public policy issues ranging from gun control to environmental protection." He notes that the tension is "between the common good and the individual's right to choose freely". (McGowan 26) Graglia's view is that "[g]overnment should prohibit conduct only to produce beneficial consequences sufficient to overcome the resulting loss of liberty". [Graglia LA "Government Promotion of Moral Issues: Gambling, Smoking, and Advertising" 2008 *Harvard Journal of Law and Policy* 31:1 69 ("Graglia") 70]

<sup>294</sup> Geis 14.

in general. However, the potential for abuse might be cause for effective regulation instead.

#### 2.4.7 Replacing prohibition with regulation

Gambling has been prohibited during various periods in history and in a variety of countries.<sup>295</sup> However, governments often found that the prohibition of gambling merely led to underground gambling, mob activities and related crimes.<sup>296</sup> They therefore started to consider legalising gambling in order to control it and curb the illegal activities spawned by underground gambling. Accordingly, many countries have shifted from prohibiting gambling to regulating it instead,<sup>297</sup> and legalised gambling is spreading.<sup>298</sup> Promotional competitions, as subspecies of gambling, have been part of this process all along. While promotional competitions were initially prohibited by virtue of the ban on gambling, the legalisation of gambling has also led to the emancipation of promotional competitions.

South Africa is part of the gambling legalisation wave. Gambling was prohibited in South Africa since the arrival of European settlers at the Cape, but was legalised at the end of the twentieth century. (This legalisation has also led to provisions that allow the lawful conducting of promotional competitions.) The approach to gambling has changed as well. Monnye puts it as follows: “Gambling has undergone a metamorphosis from being immoral, to becoming amoral, and from being a leisure

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<sup>295</sup> Dixon 6-7, 9. Governments often grapple with gambling since it is a controversial topic and opponents and proponents can often become emotional about the debate, often due to biased views or a lack of proper research and statistics.

<sup>296</sup> P Collins 2. Cabot and Csoka mentioned that prohibition can only be effective if very onerous penalties are put in place to deter people from flouting the relevant law, if there is proper enforcement and if the public supports the prohibition. [Cabot AN & Csoka LV “The Games People Play: Is it Time for a New Legal Approach to Prize Games?” 2004 *Nevada Law Journal* 4:2 197-261 (“Cabot & Csoka”) 249]

<sup>297</sup> Dixon gives a thorough examination of this shift in the United Kingdom. The title of his work aptly captures this shift: *From prohibition to regulation*. See Dixon D *From prohibition to regulation: bookmaking, anti-gambling, and the law*. See also Eadington WR “Ethical and Policy Considerations in the Spread of Commercial Gambling” in McMillen J (ed) *Gambling Cultures: Studies in history and interpretation* 243 (“Eadington 1996”) 243.

<sup>298</sup> Rose attributes this spread to factors such as the disappearance of moral arguments against gambling, government sanctioning of gambling, gradual change in gambling operations, the economic attraction of gambling, gamblers need for newer continuous improvement of gambling activities and aggressive development by gambling operators. (Rose IN “Gambling and the Law®: The Third Wave of Legal Gambling” 2010 *Villanova Sports & Entertainment Law Journal* 17:2 361 388-385; Rose IN “The Rise and Fall of the Third Wave: Gambling Will be Outlawed in Forty Years” in Eadington WR (ed) *Gambling and Public Policy: International Perspectives*)

activity, to becoming an income-generating recreational activity”.<sup>299</sup> He points out that morality no longer dictates whether gambling should be regulated; instead, the generating of income and the promotion of tourism and recreation now drive the regulation of gambling.<sup>300</sup>

Globally, gambling is losing its vice categorisation. Dombrink remarks that gambling might not be regarded as a vice anymore (although some could still see it as a “special interest vice”) and that problem gamblers might not be as threatening as prostitutes and people addicted to drugs.<sup>301</sup> He notes that gambling may be controlled by way of so-called “sin taxes” and that it can therefore contribute to countries’ economies as well.<sup>302</sup> He identifies a shift in gambling studies – where critics of gambling used to focus on morality and gambling as a vice, they now evaluate gambling on its “actual societal contributions”.<sup>303</sup> In a similar vein, Leitzer is of the view that “the increased satisfaction of consumers” is one of the most important benefits of gambling.<sup>304</sup>

The shift in views regarding gambling can also be related to changes in the communities that used to have strong views about gambling. At a stage, the church (or some parts of it) opposed gambling strongly. However, Eadington remarks that the church’s influence in society is decreasing and its views about gambling are changing.<sup>305</sup> He points out that some churches in fact use gambling (such as bingo

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<sup>299</sup> Monnye S L “Gambling in South Africa: is online gambling not a component of gambling?” UNLV Gaming Law Journal Vol 3 (Fall 2012) (“Monnye”) 221. A study commissioned by the National Gambling Board echoed Monnye’s view and found that “gambling has become ‘normalised behaviour’ in South Africa”, although it did note that some members of the public were concerned about easy access to gambling venues and pointed out that attitudes might change as mobile and internet gambling develops. (National Gambling Board *The Social Impact of Gambling in South Africa: Qualitative Perspective 2013* 20-22, available online at <http://www.ngb.org.za/SiteResources/documents/Social%20impact%20of%20gambling%20qualitative%20perspective%202013.pdf>, accessed on 19 March 2015)

<sup>300</sup> Monnye 221. Gambling and its regulation do not exist in a vacuum, but is also influenced by and may have an influence on politics, empowerment, the services industry and employment. [Sallaz J *The labor of luck: casino capitalism in the United States and South Africa* (“Sallaz”) 18-19]

<sup>301</sup> Dombrink 49. In respect of lotteries specifically, research shows that some people do not even regard lotteries as a form of gambling anymore. Instead, they view it as a pastime or recreational activity. (Ariyabuddhiphongs 17)

<sup>302</sup> Dombrink 58-59.

<sup>303</sup> Dombrink 58. Rose also observes how gambling used to be regarded as a sin, but turned into a vice as society’s views changed. Eventually, gambling started to be viewed as entertainment and lately (problem) gambling can be regarded as a psychological condition. Rose IN “Compulsive Gambling and the Law: From Sin to Vice to Disease” 1988 *Journal of Gambling Behaviour* 4:4 240 240-242.

<sup>304</sup> Leitzel 222. He remarks that people often miss this beneficial characteristic when they evaluate arguments in favour of or against gambling.

<sup>305</sup> Eadington 1996 245.



and lotteries) to generate funds for charitable purposes.<sup>306</sup> The public's view of gambling has changed too. James Smith remarks that where gambling may have been considered a sin and vice in the past, nowadays some people might even consider it "patriotic" to support a state run lottery.<sup>307</sup>

These developments have implications for promotional competitions as well. If gambling is losing its vice categorisation, then it is becoming even less likely that participation in promotional competitions will be regarded as a vice. Instead, as is the case with gambling, there might be a shift in focus to the constructive attributes of the activity, such as the marketing benefits for promoters and the entertainment value for participants.

#### 2.4.8 Regulating gambling

Governments can follow various approaches and guidelines in regulating gambling and promotional competitions.<sup>308</sup> They can prohibit those activities, allow them but

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<sup>306</sup> Eadington 1996 245. See also Rosecrance 6-7, who refers to the views of different churches and religious figures. The Howard Commission noted that some churches opposed gambling, while others acknowledged that they use raffles to generate funds. (Howard Report 18-23.) Carnelley and Schrage also point out, in a South African perspective, that negative attitudes about gambling are becoming less prevalent, perhaps because the church has a decreasing influence. (Carnelley & Schrage 269)

<sup>307</sup> JF Smith 102. Despite this, public views about gambling seem to keep on changing. In Australia, for example, people generally seem to be critical of gambling and feel that the legalisation of gambling has reached its limits. (McAllister I "Public opinion towards gambling and gambling regulation in Australia" 2014 *International Gambling Studies* 14:1 146-160) People's views might also differ depending on the socio-demographic groups they form part of. (Rousseau GG & Venter DJL "Measuring Consumer Attitudes Towards Gambling" 2002 *SA Journal of Industrial Psychology* 28:2 87-92 92) One must also bear in mind that gambling – and casino gambling in particular - is still prohibited in a number of countries, such as Brazil, Israel and India. See Thompson WN "Why They Say 'No' (Casi-'No'): Countries that Reject Legalized Casino Gambling" 2012 *UNLV Gaming Law Journal* 16:3 195-230. Some researchers are also warning about the possible dangers of uncontrolled spreading of gambling and are calling for a debate about this. (See Orford J *An Unsafe Bet? The Dangerous Rise of Gambling and the Debate We Should Be Having* 222-235)

<sup>308</sup> Various models of prohibition and regulation can be considered. In the context of online gambling, Snail discusses liberal, restrictive, prohibitive and protectionist models (and some permutations of those). Snail S "Online Gambling in South Africa" 2007 *Juta's Business Law* 15:3 114-121 ("Snail") 116-117. Kingma identifies three models, with reference to changing attitudes towards gambling over the course of time. The prohibition model is based on the premise that gambling is a sin and should be banned because it is "dysfunctional for social order". The alibi model involves perception of gambling as a vice, recognises its social value, and aims for legalisation. In terms of the risk model, gambling is viewed as entertainment and gambling laws are structured according to the economic importance of gambling. Kingma SF "The liberalization and (re)regulation of Dutch gambling markets: National consequences of the changing European context" 2008 *Regulation and Governance* 2 445-458 ("Kingma") 448. Kingma also notes that gambling models and policies are not necessarily implemented on their own, but often alongside each other. (Kingma 455) See also Kingma's discussion of gambling policy in the context of the risk society (with acknowledgment to Ulrich Beck). Kingma S "Gambling and the Risk Society: The Liberalisation and Legitimation Crisis of Gambling in the Netherlands" 2004 *International Gambling Studies* 4:1 47-67. Cabot and Csoka identify three models of regulation: the

regulate them at the same time, or they can allow people to engage in those activities freely and without any regulation.<sup>309</sup> In the context of gambling and promotional competitions there is, as discussed above, a trend to move from the prohibition of gambling to the regulation thereof.<sup>310</sup> The concept of regulation and its application in relation to gambling and promotional competitions therefore requires consideration.

Regulation is a broad concept and various definitions can be given to the term. Dudley and Brito define the term within the narrow concept of “regulations”, being “specific standards or instructions concerning what individuals, businesses, and other organizations can or cannot do”.<sup>311</sup> According to Orbach, the term can be explained as “government intervention in the private domain or a legal rule that implements such intervention”.<sup>312</sup> In a “decentred” approach, Black proposes the following definition for regulation:

regulation is the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behaviour-modification.<sup>313</sup>

Generally, one can also distinguish between “social regulations” and “economic regulations”.<sup>314</sup>

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player protection model (which protects the player), the government neutral model (in terms of which a government imposes very little regulation) and the government protection model (which “protects the economic interests of the state”). Cabot & Csoka 251-255, citing Cabot AN (ed) *Casino Gaming – Policy, Economics and Regulation* in general. In the context of casinos in particular, some states follow the so-called “Nevada model” which aims to regulate and stimulate a dynamic gambling industry by recognising gamblers’ need to gamble and giving casino operators space and freedom to run their operations. (Sallaz 235) In legalising gambling, South Africa sought to follow the Nevada model, but Sallaz points out that factors such as politics, employment regulation and management practices caused the model to be implemented in a manner which is different from the one followed in the state of Nevada. (Sallaz 19-23)

<sup>309</sup> Cabot & Csoka 251-255.

<sup>310</sup> See section 2.3.7 above. Reith observes that the international trend is one of “proliferation and deregulation” and gambling has been expanding under governments’ watchful eyes. However, she argues that this has also led to a rise in problem gambling. (Reith 2008 167).

<sup>311</sup> Dudley SE & Brito J *Regulation: A Primer* (“Dudley & Brito”) 1.

<sup>312</sup> Orbach B “What is Regulation?” 2012 *Yale Journal on Regulation Online* 30:1, available online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2143385](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2143385) (“Orbach”) 6. Orbach points out that people often associate regulation with restriction, but regulation also involves facilitation and supply, such as the provision of roads, as well as health and education services. (Orbach 4)

<sup>313</sup> Black J “Critical Reflections on Regulation” 2002 *Australian Journal of Legal Philosophy* 27:1 1-35 (“Black 2002”) 26.

<sup>314</sup> Dudley & Brito 8. Gambling regulation would mostly constitute social regulation, although gambling authorities might also have an economic function. (See section 2.3.7.)

Why then would governments use their power to interfere in the lives of their citizens by regulating gambling and promotional competitions?<sup>315</sup> Often, they do so based on ideology or prevailing religious or moral views.<sup>316</sup> However, the regulation of gambling is also driven by attempts to curb problem gambling, crime and other negative consequences of gambling.<sup>317</sup> In regulating gambling, governments strive to achieve a balance. They need to create an opportunity for the public to channel their desire to participate in gambling,<sup>318</sup> while they have to curb related crimes, excess and abuse at the same time.<sup>319</sup> Gambling involves money in various forms too.<sup>320</sup> Due to the risks of cheating, money laundering and the range of other crimes associated with money, gambling needs to be regulated.<sup>321</sup> Linked to this, governments also regulate gambling in order to control the allocation of gambling proceeds.<sup>322</sup> In addition, gambling is regulated to protect children and vulnerable people and even to avoid “public nuisances”.<sup>323</sup> It seems, therefore, that there is some need to regulate gambling. Since promotional competitions are regarded as gambling activities, this regulation affects

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<sup>315</sup> Gambling laws may be quite commonplace and gambling regulation might be accepted as a given, but Rose bemoans the fact that gambling is not better regulated and often neglected and ignored by legislatures. (Rose 589-590) As mentioned above (page 54), one must also bear in mind that some authors are in favour of deregulation or no regulation of gambling. They regard gambling as merely another form of human entertainment and activity, which does not need to be regulated. In fact, Basham and Luik argue that governments take away individuals’ opportunity to act responsibly by regulating gambling for them. (Basham & Luik 12)

<sup>316</sup> Geis 5-14; Spapens T “Regulating Illegal Gambling Markets: The Case of Illegal Casinos in the Netherlands” in Spapens T, Littler A and Fijnaut C (eds) *Crime, addiction, and the regulation of gambling* 93 (“Spapens”) 93. Religion plays an ambivalent role in gambling. In some religions, gambling forms part of religious activities (for example, divination and the casting of lots), while in other religions gambling is frowned upon or banned (such as in Islam). However, even within some religions there are divergent views in respect of gambling. In Christianity, for example, Roman Catholicism does not prohibit moderate gambling, while Puritan Christianity preaches against gambling. [Ferentzy P & Turner NE “The History of Gambling and Its Intersection with Technology, Religion, Medical Science, and Metaphors” in *The History of Problem Gambling: Temperance, Substance Abuse, Medicine, and Metaphors* (“Ferentzy & Turner”) 13-16; Binde P “Gambling and religion: Histories of concord and conflict” 2007 *Journal of Gambling Issues* 20 145-165]

<sup>317</sup> Spapens 93. Schalken TM *Casino en illegaliteit* (“Schalken”) 1.

<sup>318</sup> Schalken uses the Dutch term “menselijke speelzucht”. Schalken 1.

<sup>319</sup> Schalken 1. Spapens observes that governments often allow regulated legal gambling in an attempt to reduce illegal gambling by providing persons who participate in illegal gambling with another, regulated option. He reasons that people’s desire for gambling will not be quenched if gambling is prohibited. As such, legislatures allow gambling, but have to regulate it in order to deal with its negative consequences. Spapens 93-94.

<sup>320</sup> Players stake money and often winnings are paid out in money.

<sup>321</sup> Rose IN “The Dangers of Under-Regulating Gambling” 2015 *Gaming Law Review and Economics* 19:1 4-5. Rose warns against the risks of under-regulating gambling and discusses how under-regulation can lead to crime and corruption.

<sup>322</sup> Schalken 5. This is particularly relevant in the case of lottery proceeds and the allocation of funds to lottery grant recipients.

<sup>323</sup> Leitzel 222.

the running of such competitions as well. However, it is submitted that promotional competitions do not involve all of the evils associated with regular gambling and that promotional competitions should therefore be regulated less strictly.

In South Africa, the legislature has acknowledged the requirement to protect society and the country's economy against the negative effects of gambling.<sup>324</sup> In particular, the National Gambling Act, 2004 confirms the need to ensure that "gambling activities are effectively regulated, licenced, controlled and policed" and that "society and the economy are protected against over-stimulation of the latent demand for gambling".<sup>325</sup> When it comes to gambling regulation, countries can follow a revenue, consumer or sumptuary model.<sup>326</sup> In South Africa's case, the regulation follows the sumptuary model in respect of gambling, but the revenue model in the case of the National Lottery.<sup>327</sup> These models allow lawful gambling and actually encourage it, in the case of the revenue model. Thus, it appears that gambling and lotteries are no longer regarded as evil and immoral in South Africa.

The role of government in dealing with gambling creates challenges when one considers the regulation of gambling.<sup>328</sup> It is submitted that government has an ambiguous role in this regard. On the one hand, government is involved in the regulation and control of gambling. The purpose of this is to protect gamblers and the public. However, on the other hand, government has a duty to look after the finances

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<sup>324</sup> Preamble to the National Gambling Act, 2004.

<sup>325</sup> Preamble to the National Gambling Act, 2004. S87(1)(f) also empowers the Minister of Trade and Industry to make regulations which set standards for gambling operations in order to avoid over-stimulation of gambling demand and to protect minors. The National Gambling Act, 1996 (the current Act's predecessor) recorded the guiding principles in the main part of the statute (s13), instead of the preamble. Carnelley notes that the Lotteries and Gambling Board also suggested that gambling policy should guard against the negative effects of excessive gambling and protect people's "work-ethic", but those principles were not incorporated in the National Gambling Act, 1996. (Carnelley *Obiter* 2000 198)

<sup>326</sup> The revenue model entails maximisation of income, the consumer model aims to protect consumers (inter alia through the provision of information) and the sumptuary model seeks to satisfy gambling demand while discouraging excessive gambling. Clotfelter & Cook 242-248. (Scott 20-21; 2010 Gambling Review 30-31)

<sup>327</sup> 2010 Gambling Review 9. The approach was suggested by the Lotteries and Gambling Board prior to the legalisation of gambling in South Africa and the Gambling Commission recommended that this approach be maintained. (2010 Gambling Review 17; LGB Main Report 63)

<sup>328</sup> Where government also acts as a gambling or lottery operator one must evaluate government's role in actual gambling services as well. In New Zealand, for example, the National Lottery is operated by the New Zealand Lotteries Commission. (See Subpart 2 of New Zealand's Gambling Act 2003.) In South Africa the National Lottery is owned by government but operated by a private entity, while all other gambling is undertaken by the private sector. (2010 Gambling Review 68) The Lotteries and Gambling Board suggested this approach based on its research regarding the systems followed in other countries. (LGB Main Report 70, 77-80)

of the country as well. The issue is compounded if government has a direct interest in gambling, for example in countries where governments operate state lotteries.<sup>329</sup> This places government in a precarious and arguably biased position. Government needs to monitor gambling and lotteries and to assess its impact on members of the public. However, in doing so, government would be aware of the revenue that is potentially created by the relevant activities. Government therefore needs to strike a balance between protecting the public and generating income for the state.<sup>330</sup>

When it comes to the actual regulation of gambling, one finds that it is focused on various aspects of gambling activity. The regulation covers matters such as gambling venues, the gamblers themselves, the gamblers' minimum age, the licensing of gambling operators, gambling advertising and problem gambling.<sup>331</sup> As such, there is a wide spectrum of activities that can fall within the scope of gambling legislation. However, when considering the regulation of gambling, as with other activities, it is submitted that governments should be careful of "over-criminalization".<sup>332</sup> One should also be mindful of the fact that close regulation, particularly when considered together with other forms of regulation, could at times have negative economic consequences.<sup>333</sup> In this regard, Collins mentions how the ban on public smoking in South Africa can affect casinos profits.<sup>334</sup> In the end, the legislation that is put in place should be effective and achieve its purposes.<sup>335</sup> It is submitted that this should be kept

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<sup>329</sup> Scott discusses the role of government as a provider of lottery products. She remarks that the trend seems to be for governments to shift from being monopoly service providers and that this shift should perhaps also be reflected in the gambling industry. Scott 19, 24-26.

<sup>330</sup> See Selby W "Social Evil or Social Good? Lotteries and state regulation in Australia and the United States" in McMillen J (ed) *Gambling Cultures: Studies in history and interpretation* 65 ("Selby") 82-83. McGowan discusses this balancing act in the context of the gambling industry as well as the tobacco industry. In particular, he notes that the matter can be seen as a weighing-up of "the ethics of sacrifice" against the "ethics of tolerance". McGowan 26-31.

<sup>331</sup> Eadington WR "Understanding Gambling" in Eadington WR *Gambling: Public Policies and the Social Sciences* 8. P Collins 1. Miers D *Regulating Commercial Gambling: Past, Present, and Future* ("Miers") 350-351.

<sup>332</sup> Dixon 20-2, citing Geis and Rich RM *The Sociology of Criminal Law* 235-261). Furthermore, if gambling is allowed, gambling operators will want to stimulate demand in order to grow their businesses. However, as Scott warns, excessive advertising and promotion of gambling "could be severe in terms of a possible erosion to work incentives, to saving and investment behaviour, and to economic growth and productivity". Scott 19.

<sup>333</sup> Cohen raises the point that people often overlook the economic role of gaming regulators, and that regulators should be mindful of the economic impact of their actions. Cohen P "Beyond the Obvious – The Economic Role of the Gambling Regulator" 2014 *Gaming Law Review and Economics* 18:2 173-182.

<sup>334</sup> P Collins 83, fn 6.

<sup>335</sup> Dixon 21, citing Miers D & Page A *Legislation* vii; Tomasic R "The Sociology of Legislation" in Tomasic R (ed) *Legislation and Society in Australia* 19-26.

in mind in relation to the regulation of promotional competitions as well. Close regulation of those activities will not necessarily prevent such competitions from being conducted. Promotional competitions can serve a legitimate purpose in the marketing activities of businesses as well, and they should not be deprived of these marketing tools merely because they display some gambling characteristics.

Gambling legislation should also keep up with developments in technology, such as online and interactive gambling, although it often tends to trail behind such developments.<sup>336</sup> Legislators will face challenges to keep up with new, hybrid forms of gambling that evolve as a result of new media, especially social networks.<sup>337</sup> Due to the international nature of the internet, a country's legislation should be aligned with those of other countries and international best practice.<sup>338</sup> This applies in the case of promotional competitions as well, particularly in view of the trend to conduct such competitions on social media platforms.

Further, one should bear in mind that legislation needs to be administered and enforced in order to serve its purpose.<sup>339</sup> With gambling legislation comes the requirement for establishing regulators and authorities that can promote compliance with the legislation, oversee its effectiveness and enforce its provisions against those who breach the law.<sup>340</sup> These authorities would also take steps if a promotional

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<sup>336</sup> Miller KC "How Should the Past Inform the Future? Reviewing Regulating Internet Gaming: Challenges and Opportunities" 2014 *UNLV Gaming Law Journal* 5:1 49-79 79. The regulation of interactive gambling is a developing topic in South Africa. Currently, unauthorised interactive gaming is unlawful in South Africa. (S11 of the National Gambling Act, 2004). However, when the National Gambling Amendment Act, 2008 enters into force it will regulate interactive gambling and provide for the issuing of interactive gambling licenses. For discussions of interactive gambling and the law in South Africa, see for example Carnelley M "Interactive Gambling: A South African Comparative Perspective Part I – Universal Legal Challenges" 2001 *Obiter* 273-299; Carnelley M "Interactive Gambling: A South African Comparative Perspective Part II – Regulatory Frameworks in Selected Jurisdictions" 2002 *Obiter* 23:2 1-26; Carnelley M "South African Interactive (Internet) Gambling Regulation – The 2006 Developments" 2007 *Speculum Juris* 2 258-265; Snail 114-121; Rodrigues C "The gaming spider spins its web: gaming law" 2008 *Without Prejudice* 8:9 24-25; Monnye 221-242. See also the overview, analysis and recommendations of the Gambling Review Commission (2010 Gambling Review 174-184).

<sup>337</sup> Owens MD "If you can't tweet 'em, join 'em: The New Media, Hybrid Games, and Gambling Law" 2010 *Gaming Law Review and Economics* 14:9 669-672.

<sup>338</sup> Gainsbury S & Wood R "Internet gambling policy in critical comparative perspective: the effectiveness of existing regulatory frameworks" 2011 *International Gambling Studies* 11:3 309-323 320. For an overview of online gambling regulation in a number of countries, see Hutto J "What is Everybody Doing About it? A Foreign Jurisdictional Analysis of Internet Gaming Regulation" 2005 *Gaming Law Review* 9:1 26-34.

<sup>339</sup> Miers 351.

<sup>340</sup> In turn, gambling regulators and authorities also require oversight and review, for example when they issue gambling licences. See Carnelley *Obiter* 2011 74-78.

competition contravenes the relevant legislation and enters the realm of unlawful gambling. The compliance and enforcement activities of gambling regulators and authorities should be complemented by self-regulation of businesses that make gambling and lottery activities available to the public.<sup>341</sup> It is submitted that it would be more appropriate for self-regulatory authorities in the marketing and advertising industry to fulfil this role in the case of promotional competitions.

Ultimately, it is this author's view that legislatures should aim for balance. They should not lose sight of the fact that gambling can cause maladies in society. Yet, by prohibiting gambling, legislatures may not be able to eradicate gambling or problem gambling. It might actually force it to go "underground". As such, the situation may be addressed by legal, but properly regulated, gambling.

#### **2.4.9 Promotional competitions and regulation**

Promotional competitions are popular sales promotion tools.<sup>342</sup> However, they are forms of gambling and lotteries as well.<sup>343</sup> Therefore, they share some of the negative characteristics of gambling. These competitions may be potential tools of harm and abuse, not only due to their gambling roots, but also because of unscrupulous marketers' misuse of these promotional tools. The risk factors associated with promotional competitions, considered below, may constitute cause for the regulation of promotional competitions.

As is the case with gambling, promotional competitions can, in certain instances, lead to financial exploitation.<sup>344</sup> If competition organisers were allowed to charge consideration for entries, participants could end up spending significant sums of

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<sup>341</sup> Miers 351.

<sup>342</sup> Refer to the more detailed discussions of promotional competitions as promotional tools in section 2.5 below. Unfortunately, it seems that statistics relating to the prevalence of promotional competitions in South Africa are not available. This differs from the position in other countries, for example Germany, where such information is recorded and accessible. (Becker 145-150)

<sup>343</sup> Refer to the discussion above at page 16.

<sup>344</sup> In an American context, Cabot and his colleagues point to the policy that financial harm should be the only grounds on which activities should be prohibited. They state that "public policy should not be concerned with the prospect that persons will become financially destitute buying hamburgers and soda simply to enter a game when they otherwise can receive free entries". (Cabot *ea* 37) It is submitted that this is too narrow a view. Even if entry to a competition is free, there could be various other harmful or abusive practices which may require regulation or prohibition.

money in an attempt to win attractive prizes.<sup>345</sup> In such a situation, the competitions would constitute outright gambling or lottery activities. However, the laws of many countries prohibit organisers of promotional competitions from requiring consideration from entrants.<sup>346</sup> Despite this, there is still the possibility that entrants could part with excessive amounts of money if they are required to purchase competition promoters' goods even though they might not need such goods.<sup>347</sup> In order to prevent this from happening some countries prohibit promoters from requiring participants to purchase goods in order to enter competitions.<sup>348</sup> However, the relevant laws often exclude the costs of submitting or transmitting entries from the aforesaid prohibition.<sup>349</sup> Even so, there is still the risk that entrants might incur significant costs as a result of sending multiple entries.<sup>350</sup>

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<sup>345</sup> During 2008, Vodacom ran a competition in which the public could win BMW motor vehicles. In order to enter, participants had to send text messages that were charged at R10 each. The National Lotteries Board sent a cease and desist letter to Vodacom and the latter decided to bring the competition to an end. (Unknown "Vodacom switches from 'play' to 'pay'" 25 February 2008 IOL News <http://www.iol.co.za/news/south-africa/vodacom-switches-from-play-to-pay-1.390727#.VRHi3HkcRMs>, accessed on 25 March 2015) Griffiths discusses a similar situation in a British context, focussing specifically on television programmes that require participants to enter by phoning premium rated phone numbers. [Griffiths M "Interactive television quizzes as gambling: A cause for concern?" 2007 *Journal of Gambling Issues* Issue 20 ("Griffiths 2008") 269-276]

<sup>346</sup> See, for example, s36(3)(a) of South Africa's CPA. The position is also similar in countries such as the United States (see *Cabot ea* 1-3). See also the discussion of New Zealand and Great Britain's laws in Chapter 4 below.

<sup>347</sup> James JS "Regulating the Sweepstakes Industry: Are Consumers Close to Winning?" 2000 *Santa Clara Law Review* 41:2 581-618 ("James 582"); Unknown *Bank Night and Similar Devices as Illegal Lotteries* 1941 *Yale Law Journal* 50:5 941 946 (See *Cabot ea* 4-5 and fn 29); Griffiths M "Instant-win products and prize draws: Are these forms of gambling?" 2003 *Journal of Gambling Issues* 9 ("Griffiths 2003") (<http://jgi.camh.net/doi/full/10.4309/jgi.2003.9.5>, accessed on 21 March 2015). Cabot and his colleagues mention that there is no evidence of financial abuse which could be used to inform public policy in this regard. They state: "No reports exist to show that persons face financial devastation because they purchased truckloads of Dr. Pepper or other retail products simply to gain entry into promotional sweepstakes." (*Cabot ea* 30)

<sup>348</sup> For example, Germany (Becker 144) and France (Béjot M & Bouvier C "France" in *International Promotion Marketing Law Book* (2<sup>nd</sup> ed) 99). In order to get around this prohibition, many promoters offer entrants an alternative, free method of entry, such as sending in a post card. This is sometimes described as "equal dignity sweepstakes" or flexible participation lotteries. See Cabot 18-23; FE Williams 1938 119-120; FE Williams 1958 132. Griffiths questions whether people actually use the alternative methods and mentions that he has not been able to obtain feedback from competition organisers in this regard. (Griffiths 2003 unpagged)

<sup>349</sup> See, for example, s36(3)(a) of the CPA. The exception is also provided for in Germany. (Becker 144)

<sup>350</sup> Becker 144. He mentions the example of a person who repeatedly phones a competition line. Actual examples of such scenarios can be found. Although in the context of a competition where participants had to vote for their favourite presenters and artists, *IOL News* reported of a person who won a car but spent R28 000 in sending text messages in doing so. (Khalianyane L "Woman spends big to win car" 30 October 2013 *IOL News* <http://www.iol.co.za/news/south-africa/eastern-cape/woman-spends-big-to-win-car-1.1599723>, accessed on 21 March 2015)



As another risk factor, some authors mention that promotional competitions can be regarded as “precursors” of gambling.<sup>351</sup> In other words, such competitions might introduce persons to gambling or serve as an entry-level form thereof.<sup>352</sup> Griffiths argues that prize draws “play on people’s something-for-nothing mentality, which contributes to the developing ‘instant-win’ culture”.<sup>353</sup> As such, legislatures need to retain a measure of control over these competitions in order to limit the gambling element and avoid such competitions from becoming tools that lure people into more extensive gambling activities.

Some promotional competitions might be associated with deception and misleading of consumers. In general, this could be due to misleading wording used to market a promotional competition.<sup>354</sup> However, the issue is also manifested in specific misleading practices. Certain competition organisers deceive consumers by notifying them that they have won prizes, while that is in fact not the case, or there might be additional requirements that they have to meet in order to become eligible for a prize.<sup>355</sup> Organisers sometimes use deliberately vague marketing materials that hide onerous requirements in order to mislead persons to enter competitions.<sup>356</sup> Consumers can be misled as to the true value of prizes as well.<sup>357</sup> Furthermore, they could be lured into entering competitions while they fail to understand their chances of winning, and for this reason some foreign laws require that promoters must disclose

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<sup>351</sup> Griffiths 2003 (unpaged).

<sup>352</sup> This theory is similar to the “gateway hypothesis” or “stepping stone theory” in studies of drug abuse, in terms of which it is argued that drug users start with “softer” drugs and then progress to “harder drugs”. (Vanyukov *ea* “Common liability to addiction and ‘gateway hypothesis’: Theoretical, empirical and evolutionary perspective” 2012 *Drug and alcohol dependence* 123 Supplement 1, S3-17, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3600369/>, accessed on 21 March 2015; Kandel D “Stages in Adolescent Involvement in Drug Use” 1975 *Science* 190:4217 912-914) In this context, some authors refer to “gateway drugs”. (Kandel DB “Examining the Gateway Hypothesis: Stages and Pathways of Drug Involvement” in Kandel DB (ed) *Stages and Pathways of Drug Involvement: Examining the Gateway Hypothesis* 3) Perhaps there is a possibility that promotional competitions could be regarded by some to be “gateway gambling games”.

<sup>353</sup> Griffiths 2003 (unpaged).

<sup>354</sup> James 596. Some American states prohibit the use of certain words in sweepstakes marketing.

<sup>355</sup> James 582-588; Cushing C & Tierney J “Regulating the Sweepstakes Industry. Multistate Litigation” undated (“Cushing & Tierney”) (<http://web.law.columbia.edu/sites/default/files/microsites/career-services/Regulating%20the%20Sweepstakes%20Industry.pdf>, accessed on 27 March 2015) 1-2. S36(2) of the CPA appears to have been drafted in order to curb such deceptive or misleading practices.

<sup>356</sup> Griffiths 2003 (unpaged).

<sup>357</sup> For this reason, some states in the United States of America requires the average retail value of prizes to be disclosed. (James 595)

the odds of winning.<sup>358</sup> Generally, consumers can be misled by complicated, confusing, deficient or inaccessible rules or terms and conditions.<sup>359</sup>

Various other abusive or questionable practices can be identified in the running of promotional competitions, such as failure to retract a competition's marketing material after the competition has closed,<sup>360</sup> shifting of competition closing dates<sup>361</sup> and failure to award prizes. It could also happen that a promoter organises a competition even though it might not be in the position to award the prizes advertised in relation to the competition.<sup>362</sup> In general, some consumers could be subjected to inconvenience, confusion and abuse in competitions that are not organised properly or that run awry due to glitches in the competition process.<sup>363</sup>

As is the case with gambling in general, regulators need to take vulnerable persons into account and ensure that they are adequately protected. In particular, legislation should protect children<sup>364</sup> and the elderly<sup>365</sup> from competition promoters' abusive

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<sup>358</sup> For example the relevant statutes of Florida, Georgia and New York in the United States. (James 595-596)

<sup>359</sup> Due to this, some laws require promoters to prepare rules before launching their competitions. See, for example, s36(3)(c) of the CPA. In some countries or states, such as New York, promoters are required to file their competition rules with the authorities. (Lord & Miller 5)

<sup>360</sup> See, for example, the New Zealand case *Commerce Commission v Progressive Enterprises Ltd* [2010] NZCA 374 in which cereal boxes that contained marketing material for a competition were still displayed in stores after the competition had closed. (In that case, the Commerce Commission ultimately lost the battle against the competition organiser for failure to prove *mens rea*.)

<sup>361</sup> See the Australian case *Trade Practices Commission v Calderton Corp Pty Ltd* (1994) ATPR 41-306, in which the promoter shifted the closing date and added fake entries to the competition. (Miller *RV Miller's Australian Competition and Consumer Law Annotated* (35<sup>th</sup> ed) 1603.)

<sup>362</sup> To deal with this, some American states (such as Florida and New York) require competition promoters to provide security by way of a bond or guarantee or by establishing a trust account. (Lord & Miller 5)

<sup>363</sup> Seligman TJ "Marketing through Online Promotions" April 2004 *The Computer and Internet Lawyer* 21:4 22-26 ("Seligman") 25. Seligman mentions the example of a competition run by the Kellogg Company where thousands of entrants were erroneously informed that they had won the grand prize.

<sup>364</sup> Paxman K, Pelton T & Pelton FL "Should corporations be permitted to use promotional contests to manipulate the buying habits of children and youth?" in Pelton T, Reis G & Stewart S (eds) *Connections 2006* 65-76 ("Paxman ea"). The authors focus specifically on the potential danger of drawing children into gambling by exposing them to promotional contests. They also discuss health risks and obesity issues that could be caused by promotional competitions run by fast food restaurants – arguing that the lure of such competitions could affect children's eating habits. Griffiths also identifies how instant win and prize draw competitions may have an impact on children and could create so-called "chasing" behaviour. (Griffiths 2003, unpagged) See also Leitzel's discussion regarding vice and the protection of children in general. (Leitzel 21-26)

<sup>365</sup> Cushing & Tierney 6-7; James 588-592. James examines elderly people's propensity for participating in sweepstakes and lists various reasons for this, including financial insecurity, reduced mental capabilities and boredom.

practices. Other classes of vulnerable persons, such as those who are unemployed or in financial distress, might be at risk as well.<sup>366</sup>

The internet and new media has caused a proliferation of competitions and contests.<sup>367</sup> This technology has created privacy issues in the context of competitions – some promoters gather consumers' behavioural information, data, personal information or contact details in the course of conducting competitions.<sup>368</sup> The information could be used to conduct direct marketing or could even be sold or provided to third parties. Consumer protection, privacy and data protection legislation may contain general provisions that are aimed at preventing this kind of abuse, but dedicated provisions could be more effective.<sup>369</sup>

Despite the risks and issues discussed above, promotional competitions can be run in such a way that the risk of potential harm and abuse is reduced or removed. As such, instead of prohibiting such competitions, it is submitted that they should be allowed, subject to proper and efficient regulation. Such regulation needs to be sufficient and must properly address the risks associated with promotional competitions.<sup>370</sup> In Cabot and Csoka's view, this regulation should at least provide for sufficient disclosure to participants,<sup>371</sup> must ensure that advertising material is truthful and that the activities are conducted honestly, must prohibit conflicts of interest,<sup>372</sup> provide for effective dispute resolution, and regulate and protect participants' privacy and protect minors.<sup>373</sup> One can also add that organisers should be required to implement internal procedures

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<sup>366</sup> Griffiths 2008 272. Griffiths also argues that some late night television competition shows prey on viewer's vulnerability because they are tired, less suspecting or perhaps intoxicated by that time.

<sup>367</sup> Seligman 25; Cushing & Tierney 2; Cabot & Csoka 260-261.

<sup>368</sup> Seligman 24-26.

<sup>369</sup> For general provisions dealing with unsolicited communications and direct marketing in South African law, see the provisions of s45 of the Electronic Communications and Transactions Act, 2002, s11 of the CPA and s69 of the Protection of Personal Information Act, 2013.

<sup>370</sup> Taylor and Kopp suggest that the regulation of prize contests should focus on preventing misleading and deception, and controlling the "gambling urge". In their view, participants are capable of evaluating their odds of winning and deciding whether they should enter, provided that the promoter of the competition does not mislead the public in order to lure them into entering the competition. (Taylor & Kopp 1991 202)

<sup>371</sup> Cabot & Csoka explain that disclosure must give the public the opportunity to make an informed decision as to whether they should participate in a specific prize game, but must also provide participants with contact details in order for people to get in touch with organisers. (Cabot & Csoka 256)

<sup>372</sup> For example, organisers' employees and family members should not be allowed to participate. (Cabot & Csoka 257)

<sup>373</sup> Cabot & Csoka 256-257.

in order to prevent competitions from going awry.<sup>374</sup> Minimum requirements should be set regarding the content and disclosure of competition rules as well.<sup>375</sup> Perhaps promoters should also be required to provide proof that prizes were actually awarded, if requested to do so.

## 2.5 The Consumer Protection Perspective

Until the CPA came into effect, promotional competitions were regulated by gambling (lotteries) legislation.<sup>376</sup> However, the promulgation of the CPA brought about a major shift in this regard. When the CPA entered into force, it repealed section 54 of the Lotteries Act, 1997. The latter still regulates lotteries in general and is the overarching legislation in this regard, but the particular regulation of promotional competitions in South Africa is now found in the CPA.

The shift in regulation from gambling legislation to consumer protection legislation is significant. As mentioned above, the Lotteries Act, 1997 remains the ultimate legislation which one must refer to in the first instance, in order to determine whether or not a lottery is lawful in South Africa. Section 56 of the Lotteries Act, 1997, in essence, provides that a lottery or competition will be unlawful unless it is authorised by the Lotteries Act, 1997 or other legislation. However, the Lotteries Act, 1997 no longer regulates promotional competitions in detail and the particular regulation is now found in the CPA.<sup>377</sup> As such, there is a synergy between the Lotteries Act, 1997 and the CPA. But, it seems that the legislature now regards a promotional competition as a consumer protection issue and not as much a gambling or lotteries issue. It appears that the intention remains to protect the public against the possible evils created by promotional competitions (which are still types of lotteries), but the impression is

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<sup>374</sup> Taylor & Kopp 1991 209.

<sup>375</sup> Taylor & Kopp 1991 209. Taylor and Kopp also provide additional recommendations, specifically in the context of United States regulation. These include that organisers should be required to register their competitions with authorities, lists of winners should be sent to the authorities and promoters should be required to obtain a bond or establish trust accounts to cover the value of prizes offered in the competition. They also suggest that promoters should display disclaimers prominently, and limit the number of entries to one per person. (Taylor & Kopp 1991 209-210)

<sup>376</sup> S54 of the Lotteries Act, 1997, provided for the conducting of promotional competitions, subject to detailed requirements.

<sup>377</sup> The Memorandum on the Objectives of the Consumer Protection Bill, 2008 does not contain any explanation for moving the regulation of promotional competitions from lotteries legislation to consumer protection legislation. The Draft Green Paper on the Consumer Policy Framework 09/04 ("Consumer Policy Green Paper") mentions promotional competitions merely in the context of false or misleading selling or advertising. (Consumer Policy Green Paper 26)

created that the consumer, in particular, is the vulnerable party who needs to be protected. Perhaps the reason for this lies in the fact that promotional competitions are tools used by suppliers to promote goods and services. Because the CPA governs the marketing and promotion of goods and services to consumers in South Africa, one can deduce that the legislature deemed it more appropriate to regulate promotional competitions through the CPA instead of the Lotteries Act, 1997 or other gambling legislation. Since the CPA now governs promotional competitions in South Africa, the nature of and need for consumer protection legislation warrants brief consideration.

Consumer protection law is an evolving and unique field of the law. De Stadler defines consumer law as “the area of law that regulates the private relationship between businesses and their customers”.<sup>378</sup> However, as she cautions, this is an “oversimplification” of the term.<sup>379</sup> Ramsay’s definition of “consumer law” is wider and he states that the term “could be understood as all laws and regulations affecting consumption and the structuring of consumer markets”.<sup>380</sup>

The concept “consumer law” can be defined from various angles. De Stadler touches on this relativity and the fact that the meaning depends on the definition of “consumer” in the relevant jurisdiction.<sup>381</sup> In South Africa, the CPA’s definition of “consumer” includes “a person to whom [...] goods or services are marketed in the ordinary course of the supplier’s business”, “a person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business”, a user of goods, a recipient of services and also franchisees.<sup>382</sup> However, section 5 exempts the application of the

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<sup>378</sup> De Stadler E *Consumer Law Unlocked* (“De Stadler 2013”) 1.

<sup>379</sup> De Stadler 2013 1.

<sup>380</sup> Ramsay I *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3<sup>rd</sup> ed) (“Ramsay 2012”) 1.

<sup>381</sup> De Stadler, E “What is the Consumer Law Review” in Juta’s *Consumer Law Review* newsletter (February 2012) <http://jutalaw.co.za/newsletter/newsletter/consumer-law-review-january-2012-1/> (accessed on 11 January 2015) (“De Stadler 2012”).

<sup>382</sup> The full definition, in s1 of the CPA, is as follows:

“consumer”, in respect of any particular goods or services, means-

- (a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business;
- (b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of this Act by section 5(2) or in terms of section 5(3);
- (c) if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services; and

CPA to certain transactions, for example where a juristic person is a party to a consumer transaction and the juristic person's annual asset value or turnover in the previous financial year exceeds the threshold that is published from time to time.<sup>383</sup> The CPA also does not apply to transactions where goods are sold or services are provided to the State.<sup>384</sup> As such, the consumer protection law contained in the CPA does not necessarily apply to the relationship between businesses and customers in all instances.

Although the introduction of the CPA into South African law was a legal milestone in this country, consumer protection legislation was already in place in various countries at that stage.<sup>385</sup> Consumer protection law is not new and, as Barnard remarks, "the CPA did not introduce the concept of consumer protection".<sup>386</sup> In the same vein, Du Preez gives examples of consumer protection principles in Roman law and the *Magna Carta*.<sup>387</sup> Furthermore, although the CPA is the first wide-ranging and comprehensive consumer protection statute in South Africa, consumer protection provisions can be found in various South African statutes that predate the CPA, although their provisions are piecemeal, limited and specific to particular subject matter.<sup>388</sup>

Consumer protection legislation has evolved in response to various factors, including imbalances and shortcomings in the law. Van Eeden points to developments during the nineteenth and twentieth centuries that drove the evolution of consumer protection

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(d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e)".

<sup>383</sup> CPA, s5(2)(b).

<sup>384</sup> CPA, 25(2)(a).

<sup>385</sup> For example Argentina, Brazil, Canada, India, Uganda and the United Kingdom. Du Preez ML "The Consumer Protection Bill: A few preliminary comments" 2009 *South African Law Journal* 58 (Du Preez) 58 62.

<sup>386</sup> Barnard J *The Influence of the Consumer Protection Act 68 of 2008 on the Common Law of Sale* ("Barnard") 23.

<sup>387</sup> Du Preez 58.

<sup>388</sup> See Woker T "Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act" 2010 *Obiter* 217-231 ("Woker 2010") 218-229, where Woker discusses the state of the law relating to consumer protection and credit prior to the introduction of the CPA. Refer to Du Preez 58, fn 7 for a list of statutes that contained consumer protection related provisions prior to the CPA coming into effect. See also the Memorandum to the Consumer Protection Bill [B19D-2008] ("CPB 2008") and the brief overview of consumer protection in South Africa prior to the CPA in Barnard 19-23, as well as Eiselen S & Naudé T "Introduction and Overview of the Consumer Protection Act" in Eiselen S & Naudé T (eds) *Commentary on the Consumer Protection Act* ("Eiselen & Naudé") 1. See also Louw E *The Plain Language Movement and Legal Reform in the South African Law of Contract* 131-135 for a discussion of the development of consumer protection law in South Africa, with specific reference to plain language.

law.<sup>389</sup> In the second half of the twentieth century, jurists started to recognise that laws tend to favour businesses over consumers, even though those laws may seem just.<sup>390</sup> Persons started to identify an imbalanced relationship between business and consumers. Van Eeden compares this to the relationship between employers and employees in which employers tend to have the upper hand.<sup>391</sup> In the consumer context, the balance of power most often lies with the supplier. For this reason, Du Preez remarks that “[t]he more vulnerable the consumer is, the more protection is required”.<sup>392</sup> However, she stresses that consumer protection law should not follow a “one size fits all” approach, but must be adapted to specific local needs and contexts.<sup>393</sup>

The CPA is the product of a lengthy process during which the consumer market in South Africa was investigated and the need for comprehensive consumer protection legislation was identified.<sup>394</sup> The memorandum accompanying the final draft of the Consumer Protection Bill, in a succinct manner, lists the following factors which led to the development of the legislation: “discriminatory and unfair market practices; proliferation of low-quality and unsafe products; lack of awareness of rights; limited redress; inadequate protection for consumers; weak enforcement capacity”.<sup>395</sup>

The CPA’s aim is to address the issues highlighted in the paragraphs above. Section 3 sets out the CPA’s purposes with particular reference to the vulnerable consumer and unique consumer contexts.<sup>396</sup> The preamble of the CPA contains the mission for the CPA. The legislation’s purposes include:

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<sup>389</sup> Van Eeden E *Consumer Protection Law in South Africa* (“Van Eeden 2013”) 1.

<sup>390</sup> Van Eeden 2013 21-22. See also Ramsay 2012 1-40 and Eiselen & Naudé 6-13.

<sup>391</sup> Van Eeden 2013 1.

<sup>392</sup> Du Preez 63.

<sup>393</sup> Du Preez 63.

<sup>394</sup> For the history of this process, see for example the memorandum accompanying the CPB 2008 as well as Du Preez 59-60, Barnard 23-24, Van Eeden 2013 23, Stoop PN *The Concept ‘Fairness’ in the Regulation of Contracts under the Consumer Protection Act 68 of 2008* (“Stoop 2012”) 68-71 and Eiselen & Naudé 18-20.

<sup>395</sup> CPB 2008. See Woker 2010 230-231, where she submits that regulation is necessary in order to protect consumers, particularly due to the proliferation of unfair practices, the uneven playing field which favours suppliers, the complicated nature of goods and challenges faced by consumers in seeking redress against suppliers.

<sup>396</sup> Jacobs W, Stoop PN & Van Niekerk R “Fundamental Consumer Rights under the Consumer Protection Act 68 of 2008: A Critical Overview and Analysis” (2010) 13:3 *Potchefstroom Electronic Law Journal* 302 (“Jacobs *ea*”) 304.

[t]o promote a fair, accessible and sustainable marketplace for consumer products and services and for that purpose to establish national norms and standards relating to consumer protection, to provide for improved standards of consumer information, to prohibit certain unfair marketing and business practices, to promote responsible consumer behaviour, to promote a consistent legislative and enforcement framework relating to consumer transactions and agreements.<sup>397</sup>

The intention of the legislation seems to be clear, but it remains to be seen over the years to come whether the legislation will bring about the desired results.<sup>398</sup> Having said this, it must be noted that the CPA has nevertheless filled a void and provides consumers with wide-ranging protection. In shifting the regulation of promotional competitions from the realm of gambling law to consumer protection law, the legislature has also increased the extent of the regulation. The CPA regulates promotional competitions in more detail than ever before. Accordingly, it is submitted that the regulation of promotional competitions from a consumer law perspective favours the consumer considerably. Of course, this increases the compliance burden on promoters at the same time.

## 2.6 The Marketing Context

### 2.6.1 Introduction

The focus of this thesis is on the regulation of promotional competitions specifically. One of the key characteristics of a promotional competition is that it serves to promote businesses, products and/or services. Indeed, for promotional competitions to be lawful in South Africa, they must in fact be conducted for promotional purposes.<sup>399</sup> In the course of considering the regulation of promotional competitions, one should explore some marketing theory and seek to understand why businesses organise

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<sup>397</sup> Extract from preamble to the CPA.

<sup>398</sup> Before the CPA came into force, Woker asked a similar question, hoping that it will mirror the arguable success of the National Credit Act, 2005. (Woker 2010 231) Despite the good intentions behind the CPA, the statute is not without its faults. See, for example, Govinden's comments on the CPA's product liability provisions. (Govinden K "One step forward, two steps back" December 2014 *Without Prejudice* 14:11 35-36) Eiselen and Naudé note that the CPA's first years have been marred by "teething problems". (Eiselen & Naudé 20-21)

<sup>399</sup> See, for example, the definition of "promotional competition" in s36(1)(d) of the CPA. It requires that the competition must be conducted "for the purpose of promoting a producer, distributor, supplier, or association of any such persons, or the sale of any goods or services". The definition in the Lotteries Act, 1997 was more limited. It referred to "a lottery conducted for the purpose of promoting the sale or use of any goods or services". See also the definition of "sales promotion scheme" in New Zealand's Gambling Act, 2003. It refers to "gambling [...] used by a creator, distributor, or vendor of goods or services to promote the sale of those goods or services".



promotional competitions. Background knowledge regarding the running of prize promotions and some of the practices followed by promoters will assist one in considering whether and how promotional competitions should be regulated. In particular, this will cast some light on possible benefits of and the business case for running promotional competitions. Legal practitioners and other persons who draft terms and conditions for promotional competitions and review such promotions also need to be aware of the marketing context and the possible pitfalls of running promotional competitions. This will help them to ensure that they provide proper and informed services to their clients. Furthermore, an understanding of the client's perspective will create a better rapport with them.

### 2.6.2 Marketing and marketing tools

Any organisation needs to focus on activities that attract customers and clients and that maintain those relationships. The conducting of promotional competitions forms part of those activities. All of the activities fall within the broader category of marketing. The *Cambridge Business English Dictionary* describes “marketing” as “the business activity that involves finding out what customers want, using that information to design products and services, and selling them effectively”.<sup>400</sup> *Merriam-Webster* explains the concept as “the activities that are involved in making people aware of a company's products, making sure that the products are available to be bought, etc”.<sup>401</sup> The American Association of Marketing (“AMA”)<sup>402</sup> defines “marketing” as “the activity, set of institutions, and processes for creating, communicating, delivering, and exchanging offerings that have value for customers, clients, partners, and society at large”.<sup>403</sup> As

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<sup>400</sup> <http://dictionary.cambridge.org/dictionary/business-english/marketing?q=marketing> (accessed on 20 April 2014).

<sup>401</sup> <http://www.merriam-webster.com/dictionary/marketing> (accessed on 20 April 2014).

<sup>402</sup> AMA “Definition of Marketing” <https://www.ama.org/AboutAMA/Pages/Definition-of-Marketing.aspx> (accessed on 20 April 2014). The AMA has adopted various formal definitions for “marketing” over the years. One could say that the changes to those definitions reflect changes in marketing practice and society. For discussions surrounding the AMA's 2004 definition, see Gundlach, GT “The American Marketing Association's 2004 definition of marketing: Perspectives on its implications for scholarship and the role and responsibility of marketing in society” *Journal of Public Policy & Marketing* 26:2 243-250. Regarding the 2007 revision, see Gundlach, GT & Wilkie, WL “The American Marketing Association's new definition of marketing: Perspective and commentary on the 2007 revision” *Journal of Public Policy & Marketing* 28:2, 259-264.

<sup>403</sup> See Belch GE & Belch MA *Advertising and Promotion: An integrated marketing communications perspective* 7-8 (Belch & Belch). The authors of that work point out that “exchange” is a key element of “marketing” as a concept. The marketer and the customer each have something to “exchange” with the other – the marketer has products to sell and the customer can offer money in return. However, the meaning of “marketing” has become broader. The concept is no longer confined to merchants and their

such, the term “marketing” does not include only attracting customers’ attention, but studying their needs and fulfilling those needs as well.

In order to drive its marketing, a business can make use of a broad set of marketing tools. When referring to this set of tools, marketers often talk about the “marketing mix”.<sup>404</sup> Some authors have refined the marketing mix in order to identify four main components. These are known as “the 4Ps”: product, place, price and promotion.<sup>405</sup> Marketers focus on these key components in choosing and using the correct tools to market their products and services.

A marketer needs to get its message across to the public. This is done in the form of marketing communication.<sup>406</sup> In the context of the 4Ps, Koekemoer points out that the fourth “P” (promotion) represents this communication element.<sup>407</sup> There are various marketing communication tools that can be used in order to promote a business and its goods and services. These tools include, amongst others, advertising, direct marketing, personal selling, public relations, sponsorship and sales promotions.<sup>408</sup>

Advertising is probably one of the most obvious of the marketing communication tools. There are various ways in which one can define the term “advertising”. Since this thesis is based within the context of South African consumer law, one could start with the extensive definition of “advertisement” found in the Consumer Protection Act,

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goods. Non-profit organisations can market themselves, even if members of the public cannot necessarily buy something from them. This is why the words “society at large” are found in the AMA’s definition of “marketing”.

<sup>404</sup> It seems that the term “marketing mix” was coined by Neil Borden, who was inspired by a bulletin written by James Culliton. See Borden NH “The concept of the marketing mix” 1964 *Journal of Advertising Research* Vol 4 (June) 4-7.

<sup>405</sup> The concept of the “4Ps” was developed by Edmund J McCarthy. See Silverman SN “An historical review and modern assessment of the marketing mix” in Rassuli KM *ea* (eds) “Proceedings of the 7<sup>th</sup> conference on historical research in marketing and marketing thought” 25-35. Various changes and updates to the 4Ps have been suggested. See for example the overview and suggestions in Fitzgerald J, Cavanaugh N & Bhiro R “CPR for the 4Ps: Breathing new life into the marketing mix” <http://alumni.keiseruniversity.edu/wp-content/uploads/2014/04/CPR-for-the-4Ps-IABE.pdf> (accessed on 23 April 2014). Cummins & Mullin suggest using “6Cs” instead of “4Ps” (Cummins & Mullin 12-13, 15-16.)

<sup>406</sup> See Koekemoer L *Advertising and sales promotion* (Koekemoer) 1. He explains that the “process of communicating with consumer and customers is called marketing communication.”

<sup>407</sup> Koekemoer 4.

<sup>408</sup> Koekemoer 4-11; Du Plessis F “Introduction to integrated marketing communication” in Du Plessis *ea* *Integrated marketing communication: A contemporary approach* (“Du Plessis”) 3-7; Semenik *ea* *Advertising and promotion: An integrated brand approach* (6<sup>th</sup> international ed) (Semenik *ea*) 13-14, 22-23; Shimp TA *Integrated marketing communication in advertising and promotion* (international ed) (“Shimp”) 7-8.

2008.<sup>409</sup> One could also consider the definition contained in the Code of Advertising Practice of South Africa's Advertising Standards Authority.<sup>410</sup> However, since this particular discussion focuses on the marketing context of promotional competitions, it may be a good idea to find guidance from a source in the marketing discipline. Semenik and his co-authors describe advertising purely as "a paid, mass-mediated attempt to persuade".<sup>411</sup> A marketer therefore pays to spread its messages through various forms of media in order to convince the public to buy its product or use its services.<sup>412</sup>

Promotional competitions are forms of marketing and are usually supported by advertising. As such, it is important to understanding marketing and advertising as concepts from an industry perspective as well as in a legal framework. Marketing and advertising is regulated by self-regulatory codes and legislation, and one therefore needs an understanding of these concepts in order to interpret the applicable legislation.

### 2.6.3 Sales promotion in general

Another key marketing communication tool is sales promotion.<sup>413</sup> Various definitions exist for this concept.<sup>414</sup> Shimp describes it as follows:

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<sup>409</sup> S1 of the CPA defines "advertisement" as follows:

"any direct or indirect visual or oral communication transmitted by any medium, or any representation or reference written, inscribed, recorded, encoded upon or embedded within any medium, by means of which a person seeks to-

- (a) bring to the attention of all or part of the public-
  - (i) the existence or identity of a supplier; or
  - (ii) the existence, nature, availability, properties, advantages or uses of any goods or services that are available for supply, or the conditions on, or prices at, which any goods or services are available for supply;
- (b) promote the supply of any goods or services; or
- (c) promote any cause."

<sup>410</sup> Clause 4 of the Code of Advertising Practice contains the following definition:

"4.1 'advertisement' means any visual or aural communication, representation, reference or notification of any kind –

- 4.1.1 which is intended to promote the sale, leasing or use of any goods or services; or
- 4.1.2 which appeals for or promotes the support of any cause."

<sup>411</sup> Semenik *ea* 11-13.

<sup>412</sup> Semenik *ea* make the point that advertising always involves payment. If the marketer did not pay for the advertisement, it can be classified as publicity, public relations or some other form of marketing, but not as advertising. Semenik *ea* 11.

<sup>413</sup> Koekemoer uses the term "sales inducements". (Koekemoer 10.)

<sup>414</sup> See for example Brown C *The Sales Promotion Handbook* ("Brown") 13-14; Yeshin T *Sales Promotion* (Yeshin) 7-10; Semenik 536; Belch & Belch 516; Cook G "Sales Promotion" in Du Plessis *ea Integrated marketing communication: A contemporary approach* ("G Cook") 176. Yeshin evaluates

By definition, sales promotion (or simply promotion) refers to any incentive manufacturers, retailers, and even not-for-profit organizations use that serve to change a brand's perceived price or value temporarily.<sup>415</sup>

When conducting sales promotions, marketers can employ various sales promotion activities and tools. These include promotional offers, discounts, rebates, vouchers (coupons), giveaways, sampling, loyalty schemes, contests and promotional competitions.<sup>416</sup>

At its most basic level, sales promotion is a tool used by marketers to stimulate sales. However, Koekemoer points out that sales promotion does not include all activities that encourage sales.<sup>417</sup> He explains that “[s]ales promotions is any activity that offers incentives, such as a trial or continued purchase, for a limited time period to induce a desired response from a targeted population”.<sup>418</sup> Therefore, it seems that sales promotions are temporary in nature.

One must also distinguish sales promotion from advertising. According to Kotler, the difference is that “where advertising offers a reason to buy, sales promotion offers an incentive to buy”.<sup>419</sup> While sales promotion might be related to a limited time period, advertising can be an ongoing effort to build brand recognition and loyalty.

Sales promotions can be aimed at the marketer's own sales force, wholesalers, retailers and the consumer directly.<sup>420</sup> According to Koekemoer, sales promotions can be based on the relevant product (for example “buy one get one free”), the price of the product (for example a discount) or value peripheral to the actual product (for example a competition).<sup>421</sup> Yeshin points out that a sales promotion draws customers' attention, incentivises them and makes sales happen quicker.<sup>422</sup> Sales promotion influences

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various definitions and points out some deficiencies in them. For example, he criticizes the focus on the short-term nature of sales promotions and argues that sales promotions can build long term value for brands.

<sup>415</sup> Shimp 446 (emphasis contained in source).

<sup>416</sup> See Belch & Belch 518; G Cook 192-208; Jethwaney J & Jain S *Advertising management* (2<sup>nd</sup> ed) (Jethwaney & Jain) ch 12; Semenik 537-538; Yeshin 12.

<sup>417</sup> Koekemoer 6.

<sup>418</sup> Koekemoer 6.

<sup>419</sup> Kotler P *Marketing management* (10<sup>th</sup> ed) 597. See G Cook 176.

<sup>420</sup> Belch & Belch 517; G Cook *ea* 176; Koekemoer 6; Yeshin 11.

<sup>421</sup> Koekemoer 10. See also Yeshin 11.

<sup>422</sup> Yeshin 10.

consumers, whether through economic benefits, the conveying of information about the marketer's offering or even the creation of an emotional experience for the consumer.<sup>423</sup>

Marketers' focus on sales promotions is increasing.<sup>424</sup> Shimp attributes this growth to various causes, including marketers' attempt to win back customers' loyalty and catching consumers' attention in an environment where products are often very similar.<sup>425</sup> Sales promotions have very specific benefits for marketers, such as driving sales, creating consumer faithfulness and stimulating consumer interest in products.<sup>426</sup> However, marketers must plan sales promotions carefully and avoid the potential issues associated with them.<sup>427</sup> Semenik and his colleagues warn that sales promotions can make customers too keen on the benefits offered by promotions – which might eventually devalue a brand due to the focus on aspects such as low pricing.<sup>428</sup> If a sales promotion scheme is run on a regular basis, customers might become used to it and will become upset if changes are made to the scheme.<sup>429</sup> Sales promotions require significant time, resources and effort.<sup>430</sup> Marketers need to ensure that they manage them properly and ever increasing compliance and legal requirements impose a substantial burden on the persons involved.<sup>431</sup> As such, they should approach promotions strategically and conduct them at appropriate times and in a manner that benefits the brand.

Marketers should analyse and measure the impact and success of their promotions.<sup>432</sup> They might benefit from the existing research regarding the effectiveness of sales promotions. Marketing literature contains useful guidelines for running promotions too. For example, Raghubir and colleagues provide a handy list of “Do's and Don'ts of

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<sup>423</sup> Raghubir P, Inman JJ & Grande H “The three faces of consumer promotions” *California Management Review* (2004) 46:23-42.

<sup>424</sup> G Cook 183-185; Shimp 448-452; Yeshin 3-7.

<sup>425</sup> Shimp 450-451.

<sup>426</sup> Cummins J & Mullin R *Sales Promotion: How to create, implement and integrate campaigns that really work* (3<sup>rd</sup> ed) (Cummins & Mullin) 33-44. G Cook 179-180.

<sup>427</sup> G Cook 180-182; Semenik 554-555.

<sup>428</sup> Semenik *ea* 554.

<sup>429</sup> Semenik *ea* 555.

<sup>430</sup> Semenik *ea* 555; Jethwaney & Jain 516.

<sup>431</sup> The CPA regulates various sales promotion tools, such as trade coupons and similar promotions (s34), loyalty programmes (s35), promotional competitions (s36) and referral selling (s38). The requirements of those sections can be somewhat exacting.

<sup>432</sup> See, for example, the advice provided by Brown 283-301; Cummins & Mullin 109-119; G Cook 210; Koekemoer 238-239; Yeshin 234-250.

Promotion Design”.<sup>433</sup> Ultimately, marketers should evaluate the various sales promotion tools and decide on the most effective ones for their specific organisations.

#### 2.6.4 Prize promotions

A promotion in which consumers can win prizes is known as a prize promotion. This forms a category of sales promotion on its own. Prize promotions can appear in various forms. Broadly, one can distinguish between two different types of arrangements.<sup>434</sup> In some prize promotions, entrants need to display some form of skill, and winners are then judged based on the quality of their entries. These competitions are often called “skill contests”. Other competitions are structured in such a manner that the outcome is determined by chance. These are the “promotional competitions” that are regulated by section 36 of the CPA. In such competitions consumers normally have to enter a draw and the winner is then identified by the first entry drawn. In another form of promotional competitions, winners are identified instantly, for example by scratching a card or discovering a winning code or device inside product packaging. Marketers can consider the various forms of competitions and contests in order to decide which format will be most suitable for a specific campaign or project.

Prize promotions are unique sales promotions tools. Cummins and Mullin point out that a prize promotion is the only type of sales promotion in which the consumer is not assured that they will obtain a benefit - in a prize promotion everyone cannot be a winner (while in other sales promotions all consumers might be entitled to discounts or free gifts).<sup>435</sup> The marketer can accurately calculate the cost of the promotion too, because the number of prizes and their value can be fixed, but with other sales

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<sup>433</sup> Raghbir *ea* 40-41.

<sup>434</sup> Some authors distinguish between more types of prize promotions. Cummins and Mullin, for example, lists skill competitions, free draws, instant wins, games and lotteries. (Cummins & Mullin 204.) Some promoters also integrate advertising into interactive competitions, which is sometimes described as “advergaming”. (Cabot *ea* 16) Peattie and Peattie also point out that promoters can aim their competitions at their salesforce (“push competitions”), while other competitions can be aimed at attracting customers (“pull competitions”). [Peattie K & Peattie S “Sales Promotion – Playing to Win?” 1993 *Journal of Marketing Management* 9 255 (“Peattie & Peattie 1993a”) 255.] For purposes of this study, the author will categorise prize promotions based on the elements of skill or chance. This is because those elements play such a crucial role in determining whether or not a prize promotion is regulated by gambling, lotteries and/or consumer protection legislation.

<sup>435</sup> Cummins & Mullin 203.

promotions the costs are often dependant on the extent of consumer participation.<sup>436</sup> The marketer can give relatively big benefits (prizes) to a limited number of winners, because the marketer does not have to incur expenses in respect of all consumers that participate in the promotion.<sup>437</sup> Prize promotions are also unique because they are regulated much more than other types of sales promotions.<sup>438</sup>

Prize promotions can be of great value to marketers.<sup>439</sup> They create excitement amongst consumers, particularly because of the types of prizes that can be offered and the joy involved in discovering whether or not a participant is a winner.<sup>440</sup> These promotions can lead to increased sales and draw attention to the specific products involved in the competition.<sup>441</sup> They can assist to stimulate demand in off-peak sales seasons.<sup>442</sup> Prize promotions can potentially let a brand stand out amongst the noise created by advertising in general, particularly since these promotions challenge consumers to do something in order to win a prize.<sup>443</sup> Some marketers can also launch prize promotions to counteract promotions that are conducted by their competitors.<sup>444</sup> Prize promotions afford marketers an opportunity to gain insight about consumers and

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<sup>436</sup> Cummins & Mullin 203. Also, as opposed to other types of sales promotions (such as temporary discounts), the promoter does not have to reduce the price of the relevant goods or services. (Peattie & Peattie 1993a 259)

<sup>437</sup> Cummins & Mullin 203.

<sup>438</sup> Cummins & Mullin 203;

<sup>439</sup> Peattie K & Peattie S "Sales Promotion Competitions – A Survey" 1993 *Journal of Marketing Management* 9:3 271-286 ("Peattie & Peattie 1993b") 283-285.

<sup>440</sup> Tillman R & Kirkpatrick CA *Promotion: Persuasive Communication in Marketing* 335. In their work which dates from the 1960s, Tillman & Kirkpatrick mentions exciting prizes such as "swimming pools ... or exotic items such as oil wells, islands, and race horses".<sup>440</sup> Times might have changed since then. See also Yovovich BG "Sweeps and games take out new claims" *Advertising Age* 3 May 1982 ("Yovovich") M-7, M-30.

<sup>441</sup> G Cook 199; Tillman & Kirkpatrick 335; Peattie & Peattie 1993b 281. Ordinarily, one would expect prize promotions to be used by manufacturers, service providers, retailers and other profit driven businesses to promote their goods and services. However, Peattie points out that prize promotions can also be used to market non-profit organisations effectively. In this context, prize promotions still offer value to the public, while creating brand awareness for the non-profit promoter. These promotional tools also present an opportunity for non-profit marketers to collaborate with business that operate for profit. [Peattie S "Applying sales promotion competitions to nonprofit contexts" 2003 *International Journal of Nonprofit and Voluntary Sector Marketing* 8:4 349-362 ("Peattie 2003") 355-360] S36 of the CPA does not cover the running of promotional competitions by non-profit organisations in particular. The section seems to be aimed at competitions conducted to promote producers, distributors or suppliers, or goods or services. If a non-profit marketer wishes to conduct a chance based promotional competition, it would have to attempt to bring the competition within the ambit of s36 (perhaps by structuring the competition as a promotion of its goods or services), failing which it would have to comply with the more onerous requirements of the Lotteries Act, 1997.

<sup>442</sup> Peattie & Peattie 1993a 264; Peattie & Peattie 1993b 281.

<sup>443</sup> Yovovich M-30.

<sup>444</sup> Peattie & Peattie 1993b 281-281.

even build up databases of client information as well.<sup>445</sup> By requiring entrants to answer questions regarding a product or brand, prize promotions can assist marketers to educate consumers about their products.<sup>446</sup> They can also provide a platform for marketers to collaborate with and benefit from the reputation of other brands if products manufactured by prominent brands are offered as prizes.<sup>447</sup> As such, if prize promotions are used properly they can be effective promotional tools for marketers.<sup>448</sup>

However, prize promotions do have some drawbacks. Overall, Brown is rather averse to prize promotions.<sup>449</sup> He identifies a number of challenges, such as mistakes that happen with the implementation of prize promotions and unscrupulous marketers that give competitions a bad reputation.<sup>450</sup> Cummins and Mullin describe prize promotions as “a minefield, but one that is worth getting through – just watch your step”.<sup>451</sup> Prize promotions also have a high barrier to entry because they often require consumers to purchase products in order to participate or to put in some kind of effort (such as sending in an entry or displaying skill or creativity) in order to enter. As such, they do not always attract consumers in great numbers.<sup>452</sup> Prize promotions are usually once-off activities that do not ensure consumer loyalty.<sup>453</sup> There is often also a significant time period between entry and announcement of the winners, which makes these promotions less appealing for consumers.<sup>454</sup> Some authors warn that prize promotions can detract from the brands and products being promoted, particularly if the consumer’s focus is more on the promotion than on the actual brand or if something goes wrong during the running of the promotion.<sup>455</sup> In view of the drawbacks,

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<sup>445</sup> Tillman & Kirkpatrick 335.

<sup>446</sup> Yovovich M-30.

<sup>447</sup> Yeshin 168-170. See also G Cook 199.

<sup>448</sup> In order to be effective, prize promotions need to be managed properly in order to avoid, for example, that customers start buying products only for the sake of participating in a promotion, with the result that some customer loyalty might be lost if the promotion comes to an end or is changed. (Peattie & Peattie 1993b 284-285; Peattie K, Peattie S & Emafo EB “Promotional Competitions as a Strategic Marketing Weapon” 1997 13:8 *Journal of Marketing Management* 13 777 787-788)

<sup>449</sup> Brown 101-102. See also the challenges identified in Semenik *ea* 546-547 and Belch & Belch 542-543.

<sup>450</sup> Brown 101. Due to the potential liability that could arise if a competition goes awry, some insurers offer sales promotion insurance. (Peattie & Peattie 1993a 266)

<sup>451</sup> Cummins & Mullin 204.

<sup>452</sup> Brown 102. The fact that many customers’ entries might not be successful, could also put the public off competitions because they associate them with losing. (Peattie & Peattie 1993a 266)

<sup>453</sup> Brown 102.

<sup>454</sup> Brown 102; Peattie & Peattie 1993a 266.

<sup>455</sup> See, for example, Belch & Belch 543; Semenik *ea* 546.



organisations should employ prize promotions strategically in their marketing activities and not merely run them because their marketing agencies suggest them or because everyone else is running such promotions.<sup>456</sup>

Legal and regulatory requirements are some of the most significant challenges faced by organisers of prize promotions and promotional competitions in particular. However, these are obstacles that cannot be ignored. In some countries or states, promoters must register their promotional competitions, obtain approvals or file details regarding the competitions with local authorities.<sup>457</sup> There might also be laws requiring organisers to post bonds or maintain funds in trust accounts as security for the awarding of prizes.<sup>458</sup> From a United States perspective, Thomas divides the regulatory requirements for running prize promotions into three separate categories: “Fairness and disclosure requirements, restrictions on retail chance promotions and antigambling or lottery laws.”<sup>459</sup> These legal requirements can be found, even if in different forms, in South Africa’s regulation of promotional competitions as well.<sup>460</sup> As in many other countries, promoters running competitions in South Africa need to ensure that they familiarise themselves with the relevant legal provisions in order to avoid their competitions falling foul of the law.<sup>461</sup> This can often be a time consuming and costly exercise, but one that promoters need to undertake in order to avoid adverse consequences. As Frank Dierson remarks: “[...] it isn’t criminal intent, but rather inadvertencies that most often trip up companies running sweepstakes.”<sup>462</sup>

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<sup>456</sup> Peterson F & Kesselman-Turkel J “Through the looking glass” *Advertising Age* 3 May 1982 M-10. (Taylor & Kopp 1991 210)

<sup>457</sup> For example, China, Russia and some states in the United States of America. Lehman E “China” in *International Promotion Marketing Law Book* (2<sup>nd</sup> ed) 57; Anyukhina I “Russia” in *International Promotion Marketing Law Book* (2<sup>nd</sup> ed) 228; Lord & Miller 5.

<sup>458</sup> New York and Florida are examples of states that have such requirements. Lord & Miller 5.

<sup>459</sup> Thomas R “The quirks of the law” *Advertising Age* 3 May 1982 M-11 – M-12 (“Thomas”). (Taylor & Kopp 1991 2015)

<sup>460</sup> Currently, s36 of the Consumer Protection Act, 2008 (“CPA”) regulates promotional competitions. Previously, promotional competitions were governed by s54 of the Lotteries Act, 1997, together with the accompanying regulations. See the discussion in Chapter 5 below.

<sup>461</sup> Cook touches on legal issues in his discussion of competitions, contests and sweepstakes in a South African marketing communication context. (G Cook 199.) He states that “competitions or contests require some skill of participants, and not mere chance, in order for them to take part legally”. He mentions that games of chance require licences because they are lotteries. These statements are incorrect. Even though Cook’s comments were published in 2010 and might have been written before the CPA came into force, games of chance were already lawful at that stage, provided that they complied with the provisions of the Lotteries Act, 1997 and the relevant regulations.

<sup>462</sup> Frank Dierson quoted in Thomas at M-12.

Having identified various drawbacks, Brown states that a prize promotion can be successful if it creates sufficient excitement, entry is easy, the prize is significant or consumers feel that there is a good possibility of winning the prize.<sup>463</sup> Although mentioning that participation levels in prize promotions are low, Shimp states that contests give consumers the opportunity to interact with a brand at a different level.<sup>464</sup> In particular, he points out that prize promotions on the internet are becoming more important. Cummins and Mullin also view prize promotions as “powerful promotional techniques” with the potential to be very successful, but warn that their effect can wane quite quickly.<sup>465</sup> In Tillman and Kirkpatrick’s view, these contests draw consumer attention because they give them the opportunity “to play, to compete, to win, to get something for nothing”.<sup>466</sup>

Since prizes play a crucial role in effective prize promotions, Brown suggests that promoters should opt for one substantial prize (or a limited number of big ones), instead of various insignificant prizes.<sup>467</sup> Cummins and Mullin recommend one big first prize and many prizes for the rest of the winners.<sup>468</sup> A prize should be relevant to the consumers that will enter.<sup>469</sup> In Brown’s view, cash prizes are always best, followed by houses, cars and holidays.<sup>470</sup>

## 2.7 Conclusion

The purpose of this chapter was to examine the background and context of promotional competitions. At the outset, the key characteristics of gambling and lotteries were identified, chance being the most important of these. It was explained that promotional competitions are in fact forms of gambling, because they involve the allocation of prizes by way of lot or chance. In view of this, gambling was considered in further detail.

To start off with, gambling’s play element was identified. It was recognised that gambling has a purpose for its participants. Promotional competitions, as forms of

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<sup>463</sup> Brown 102. See also Jethwaney & Jain 515-516.

<sup>464</sup> Shimp 522.

<sup>465</sup> Cummins & Mullin 223.

<sup>466</sup> Tillman & Kirkpatrick 336.

<sup>467</sup> Brown 101.

<sup>468</sup> Cummins & Mullin 208.

<sup>469</sup> Brown 103.

<sup>470</sup> Brown 103. See also Cummins & Mullin 204.

gambling, are therefore not without value. However, cognisance has to be taken of the gambling element and various views surrounding gambling were examined. It appears that people's views about gambling are considerably influenced by morality and that many people oppose gambling because it allows winners to gain something without working for it.

Even if the moral arguments are set aside, one cannot ignore the fact that gambling has some negative consequences, particularly in the shape of problem gambling. Due to the effects of this upon the gambler and those around him or her, it appears that some kind of regulation was necessary in order to protect participants against the ills that are sometimes associated with gambling. In view of the link to gambling, promotional competitions cannot escape regulation. If such an escape were to be allowed, persons would abuse promotional competitions as loopholes for conducting unlawful gambling.

When examining the legalities regarding promotional competitions, one should also keep in mind that they are principally sales promotion tools. Accordingly, the marketing context of promotional competitions was considered. It was explained that prize promotions are often designed and conducted mainly for purposes of attracting customers and generating sales, and not to serve as lotteries or disguised gambling activities. However, this does not mean that these competitions should not be regulated. For example, the marketing material surrounding promotional competitions could be misleading or deceptive, and competitions processes often go awry. This is where consumer protection law comes into play. Whilst gambling law regulates lawful gambling and prohibits unlawful gambling, consumer protection law regulates the actual running of promotional competitions in order to deal with the issues that might arise in the running of such competitions and the potential abuse of consumers that might be involved.

In conclusion, it is argued that society has moved past the point where activities such as promotional competitions can be regarded as a vice. Instead, they have merit in promoting sales and provide entertainment and diversion to consumers. Even though they share the same elements as regular gambling, it is suggested that far less harm

is associated with them. Accordingly, it is submitted that promotional competitions should be lawful and that the current regulatory approach in South Africa is appropriate.

## CHAPTER 3

### AN OVERVIEW OF THE HISTORY OF GAMBLING, LOTTERIES AND PROMOTIONAL COMPETITIONS

- 3.1 Introduction
- 3.2 A brief history from a global perspective
- 3.3 The South African historical context
- 3.4 Conclusion

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#### 3.1 Introduction

Societies and legislatures have been grappling with the regulation of gambling activities over the ages. As far back as the times of the ancient Romans, it was deemed necessary to promulgate laws relating to gambling. Even in the present day, legislatures continue to conduct gambling reviews and update the relevant laws. Gambling remains a controversial topic and it is expected that the debate around it will not be settled soon.

This chapter will provide an overview of the history of gambling, lotteries and promotional competitions in order to provide a historical background for this study. It will start with a discussion of gambling in ancient times and conclude with developments in the twenty first century. It will be shown how societies' attitudes towards these activities are ever-changing and how legislatures' approaches to these activities have developed over time. This background information is necessary to inform current considerations regarding the regulation of promotional competitions. The evolution of the marketing function of promotional competitions will be explained as well in order to show that these competitions are not merely gambling activities, but that they have been serving legitimate business purposes across generations. Various court decisions will also be discussed, in order to show the courts' reasoning regarding the essential elements of gambling, particularly lot or chance. Since the elements of lotteries and gambling have remained the same over centuries, it is submitted that these decisions can be used even in the present day to interpret legislation relating to lotteries and promotional competitions.

## 3.2 A brief history from a global perspective

### 3.2.1 Ancient times

Lotteries and gambling are not new. Historians and other authors tell us that the roots of those schemes and activities can be traced back to ancient civilisations.<sup>1</sup> However, there seems to be no certainty regarding the exact point in the history of humanity at which gambling was invented. In fact, some suggest that gambling might even predate humanity. Schwartz refers to studies and research that have shown that even animals seem to have an appetite for risk and gambling, and intimates that primates and other animals that predate humans might have discovered gambling before us.<sup>2</sup>

Lotteries, gambling and promotional competitions might not have existed in ancient times in the same form as today, but the concept of conducting an activity in which an outcome is determined by chance was present even in those societies.<sup>3</sup> As remarked by the Lotteries and Gambling Board, gambling was not invented in the previous century, but has been with humanity for ages.<sup>4</sup> In that report, the authors point out that the history of gambling is closely related to the history of “a basic characteristic of the human being: To play; to take a chance; to hazard; to risk; to game; to chance his luck”.<sup>5</sup>

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<sup>1</sup> See, for example, Williams FE *Lotteries, Laws and Morals* (“Williams FE 1958”) 22-23; C l’Estrange Ewen *Lotteries and sweepstakes* 19-22; Curtin L & Bernardo K *The History of Sweepstakes* (“Curtin & Bernardo”) 11-22; Ashton J *A History of English Lotteries* (“Ashton”) 2-3; Ezell JS *Fortune’s Merry Wheel: The Lottery in America* (“Ezell”) 2; Kopp SW & Taylor CR “Games, Contests, Sweepstakes, and Lotteries: Prize Promotion and Public Policy” in Sheth JN (series ed) & Fullerton RA (ed) *Research in Marketing: Explorations in the History of Marketing* 151 (“Kopp & Taylor”) 152; Ottaway J *The UK National Lottery and Charitable Gambling* (“Ottaway”) 27-30; Murray HJR *A History of Board-Games other than Chess* 7-9 (“Murray”); Jones JP *Gambling Yesterday and Today* 13-21 (“Jones”); Wiehahn NE (chairman) *Main Report on Gambling in the Republic of South Africa* (RP 85/1995) (“LGB Main Report”) 258; Schwartz DG *Roll the Bones: The History of Gambling* (“Schwartz”) 6; Brenner R with Brenner GA *Gambling and Speculation: A Theory, a History, and a Future of Some Human Decisions* (“Brenner & Brenner”) 1-18.

<sup>2</sup> Schwartz 5. He refers to a study conducted by Duke University in which researchers found that macaque monkeys choose riskier opportunities over more predictable ones. In order to get more juice from a target, the monkeys would go for a riskier object, even though they knew that some of the other targets always gave them juice even though the amount of juice was less.

<sup>3</sup> Ottaway 26-27.

<sup>4</sup> LGB Main Report 25. The Board remarked: “The oldest ‘profession’ known to civilised society may very well be prostitution, but probably just as old as a leisure-time activity or as a more serious endeavour is the phenomenon of gambling.” (LGB Main Report 25)

<sup>5</sup> LGB Main Report 25.

The role of lot and chance in life has been recognised by people since the dawn of civilisation. Yet, in those times, people did not only acknowledge its role, but lot was often actively used in practice to take decisions and for divination purposes. The ancient Hebrews threw lots to determine matters.<sup>6</sup> The Old Testament of the Bible contains numerous accounts of instances where lots were used to determine divine will or the outcome of a situation. Lots were used, for example, to select scapegoats, to allocate land, to identify culprits and, in Jonah's case, to select the person that had to be thrown into the sea.<sup>7</sup> In the New Testament, the soldiers used lots to divide up Jesus's clothes after his crucifixion and the disciples used lots to determine a new disciple after the death of Judas Iscariot.<sup>8</sup>

Lots were used in other societies and religions too, including those of ancient Egyptian, Indian and East Asian peoples.<sup>9</sup> Egyptian mythology contains tales of the gods playing gambling games, but the walls of Egyptian tombs and ruins also depict gambling activities of ordinary people who lived in ancient times.<sup>10</sup> Early Indian writings contain numerous accounts of divination and gambling and ancient hymns even contain songs about wives lost and lives ruined by gambling.<sup>11</sup> The Chinese used diviners too and some oracles gained recognition as great scholars, the *I Ching* perhaps being one of the most well-known examples of Chinese texts that relate to divination.<sup>12</sup>

As has been the case throughout history, people in early times also struggled with the unpredictable nature of life and tried to find guidance in tools of divination.<sup>13</sup> Objects such as bones, nuts, pebbles, shaped sticks, shells, beans and slips of paper were used for divination and even to determine the outcome of legal trials.<sup>14</sup>

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<sup>6</sup> Jones 16.

<sup>7</sup> Ewen 19-20; Ottaway 27-28; Williams FE 1958 22-23.

<sup>8</sup> Matthew 27:35; Acts 1:26; Ottaway 27.

<sup>9</sup> Ewen 20.

<sup>10</sup> Jones 14; Schwartz 10-11;

<sup>11</sup> Schwartz 12-15. Schwartz quotes the thirty-fourth hymn in the tenth mandala of the *Rig Veda* completed between 1500 and 1200 BC), which ends with the following stanza: "My mother-in-law hates me; my wife pushes me away. In his defeat the gambler finds none to pity him. No one has use for a gambler, like an aged horse put up for sale". (Schwartz 14-15)

<sup>12</sup> Schwartz 15-17; Curtin & Bernardo 13-14.

<sup>13</sup> LGB Main Report 26.

<sup>14</sup> Ewen 20; Ezell 2; Murray 7-8; LGB Main Report 26.

Divination activities probably started off as “odds and evens” games, an activity that persists even in the present day.<sup>15</sup> However, the tools used to predict the future evolved as time progressed. Divination practitioners started using hucklebones (*astragali*) to predict what the future might hold in store.<sup>16</sup> In due course, the hucklebones were shaped into dice. At some stage, dice had more than the six sides that are found in common dice these days. The oldest six-sided dice was found in the north of Iraq (the location of historic Mesopotamia), while some credit the ancient Lydians for inventing the cubic dice.<sup>17</sup>

Although modern day lottery instruments are scientifically checked for accuracy and independent auditors supervise lottery draws, it might not have been the case in ancient times. Some people preferred using objects that did not produce absolutely random results. When using those objects, the diviner had to interpret the pattern in which objects such as bones or shells fell on the ground or even by inspecting excrement or the organs of animals.<sup>18</sup> On the one hand, those practices allowed a margin for interpretation in order to give some flexibility and colour to the outcome.<sup>19</sup> On the other, it allowed the diviner to steer the prediction to a sometimes more pleasing result or to appease the client.<sup>20</sup> This also led to another aspect of gambling that is encountered even today: cheating.<sup>21</sup>

Apart from the divinatory uses, lot and chance also fulfilled less serious functions in ancient times. Lot and chance have been incorporated in games and pastimes since early times and archaeologists have discovered evidence of rudimentary chance based games in societies as old as the San people.<sup>22</sup> As such, tools that were initially used for divination and forecasting the future became instruments of pastime and play.<sup>23</sup>

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<sup>15</sup> Schwartz 6. The Bible also refers to the use of the Urim and the Thummim which were used in Old Testament times to determine the will of God. (See, for example, Exodus 28:30 and Ezra 2:63)

<sup>16</sup> Schwartz 6; Murray 8.

<sup>17</sup> Schwartz 8; Murray 8.

<sup>18</sup> Schwartz 6. Some diviners used more pleasant smelling tools, such as rose petals or tea leaves. (Schwartz 6)

<sup>19</sup> Schwartz 6.

<sup>20</sup> LGB Main Report 26

<sup>21</sup> Loaded dice were discovered in ancient Egyptian tombs (LGB Main Report 26) and early Indian records mention “clogged” dice (Jones 14).

<sup>22</sup> Jones 13.

<sup>23</sup> LGB Main Report 26.



The objects used to cast lots also gave meaning to the word “lot”. It seems that the word “lot” developed from the Teutonic word “hleut”, which was used to describe objects used for divinatory purposes, for example pebbles or beans.<sup>24</sup> In due course, the terms *lotteria* (Italian) and *loterie* (French) were developed to indicate games of chance.<sup>25</sup> In later times, the word “lot” obtained a wider meaning too, referring also to a person’s fate and destiny in languages such as Dutch and English.<sup>26</sup>

### 3.2.2 The ancient Greeks

Gambling was a part of the lives of the ancient Greeks, but to some authors it seems that the Greeks were less addicted to it than other ancient societies.<sup>27</sup> Jones argues that this was perhaps the result of strict laws and harsh sanctions and he refers to Aristotle’s critical views about gambling.<sup>28</sup> Yet, gambling featured prominently in various facets of ancient Greek society, whether sacred or secular. Greek mythology even ascribed the origin of the universe to a gambling game between the gods Hades, Poseidon and Zeus, while another god, Hermes, was the god of divination as well as gambling and luck.<sup>29</sup> The *Iliad* also contains an account relating to the casting of lots to determine who will fight in a particular battle and describes how the god Zeus used a divination device to determine who would win a battle and which hero would die.<sup>30</sup>

Gambling formed a part of everyday life in ancient Greek times as well. Ancient Greek art depicts various forms of gambling and dice games, dice being used in both games as well as divination.<sup>31</sup> It appears that they enjoyed chance based games like “odds and evens” and “heads or tails” as well, and cheating happened in some ancient Greek games as evidenced by altered dice discovered by archaeologists.<sup>32</sup> The drawing of lots featured in their lives as well, and it appears that they often used a boy who had

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<sup>24</sup> Ezell 2.

<sup>25</sup> Ezell 2; LGB Main Report 26.

<sup>26</sup> LGB Main Report 26; Ottaway 27-28; Ewen 24-25.

<sup>27</sup> Jones 16. Jones remarks that the Romans and Teutons, or the Oriental people, may have been much more involved in gambling.

<sup>28</sup> Jones 16. Jones notes that Aristotle placed gamblers in the same category as robbers and thieves.

<sup>29</sup> Schwartz 22; LGB Main Report 26.

<sup>30</sup> Curtin & Bernardo 14; Ewen 21; LGB Main Report 26.

<sup>31</sup> Schwartz 24.

<sup>32</sup> Schwartz 23, 25. Some dice with missing or duplicated numbers have been unearthed.

two living parents to draw a lot (a boy whose parent or parents have died being regarded as unlucky).<sup>33</sup> Lots were sometimes used to appoint public officials too.<sup>34</sup>

However, gambling games were not the only popular games in those times. Games and contests of skill also featured prominently in ancient Greek society, being the origin of the present-day Olympic Games. These games were accompanied by gambling, with the public betting on matters such as the achievements of the athletes and the outcome of horse and chariot races.<sup>35</sup>

### 3.2.3 The ancient Romans

The early Romans' lives were filled with superstition and playing with chance and fortune. They were greatly influenced by fortune and fate, and sought the advice of astrologers, fortune-tellers and other practitioners of divination.<sup>36</sup> The goddess Fortuna was a prominent figure in their belief system and the ancient Romans associated her with fate as well as prosperity.<sup>37</sup>

With the rise of the Roman Empire gambling games flourished.<sup>38</sup> The ancient Romans became specialists at casting hucklebones (known as *tali*) and playing dice (known as *tesserae*).<sup>39</sup> Even children participated in various forms of chance based games.<sup>40</sup> The Romans were fond of games like "odds and evens" and activities in which a person had to guess in which closed hand an object was hidden, while they participated in formal gambling played at dedicated tables.<sup>41</sup> At Pompeii, archaeologists also discovered manipulated dices used for cheating.<sup>42</sup> The Romans are well-known for

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<sup>33</sup> Curtin & Bernardo 14; Ewen 22.

<sup>34</sup> Curtin & Bernardo 17.

<sup>35</sup> Schwartz 25. Schwartz notes that games were not held only at Olympus, but also at Delphi, Corinth and Nemea.

<sup>36</sup> Schwartz 25.

<sup>37</sup> Curtin & Bernardo 15. Schwartz quotes Pliny the Elder, an ancient Roman philosopher who stated: "We are so much at the mercy of chance that Chance is our God." (Schwartz 25)

<sup>38</sup> Jones 19; Schwartz 25.

<sup>39</sup> Schwartz 26.

<sup>40</sup> Jones 19.

<sup>41</sup> Jones 20. Evidence of gambling can also be seen in the ruins of Pompeii (the ancient city that was preserved when the nearby volcano erupted), for example writing on one wall welcoming gamblers, and gambling related graffiti and inscriptions about gambling winnings contained on other walls. [Schwartz 29; Jones 20; Drzazga J *Wheels of Fortune* ("Drzazga") 166] At Pompeii, archaeologists also discovered manipulated dices used for cheating. (Drzazga 166) Archaeologists have discovered evidence of gambling on numerous ancient flat surfaces in Rome, located in places such as the Forum and the Coliseum. [Lanciani R "Gambling and Cheating in Ancient Rome" 1892 *The North American Review* 155:428 97 ("Lanciani") 97-98]

<sup>42</sup> Drzazga 166.

their gladiators and the public displays put on in arenas and amphitheatres. A lot of betting took place during these ancient shows and gamblers placed wagers on various aspects of these public spectacles.<sup>43</sup>

The ancient Romans incorporated lots in various facets of their lives, but it seems that their lotteries constituted a form of entertainment or amusement, instead of the present day activity in which people purchase tickets with the hope of winning sizeable cash prizes.<sup>44</sup> Yet, the Romans are credited with developing the lottery in a basic form.<sup>45</sup> In their form of lottery they used rods or plates, called *sortes*, which contained inscriptions on them.<sup>46</sup> These lots were often used for divination and to predict the future, although the philosopher Cicero was highly critical of this and decried the practice as fraudulent.<sup>47</sup> Romans sometimes also used lots to allocate gifts to their guests when entertaining.<sup>48</sup> Lots played a part in the justice system as well and were used to select judges and, at times, to indicate who should be executed.<sup>49</sup> Some Roman officials were selected by way of lot too.<sup>50</sup>

The Roman emperors seemed to be very fond of gambling.<sup>51</sup> Augustus Caesar enjoyed gambling as a pastime and entertainment, although winning was not necessarily his objective.<sup>52</sup> He also sponsored lottery prizes and organised a lottery to generate revenue for projects in the city of Rome.<sup>53</sup> Caligula, on the other hand, was a ruthless gambler and wanted to win, whatever it took.<sup>54</sup> Another emperor, Claudius, was a keen gambler as well, and even wrote a book about dice throwing.<sup>55</sup> Nero, who succeeded him, spent vast sums of money on gambling.<sup>56</sup> He also held lotteries in which slaves or gold could be won.<sup>57</sup> Gambling was a part of Julius Caesar's life too.

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<sup>43</sup> Schwartz 29.

<sup>44</sup> Ezell 2; Ashton 3.

<sup>45</sup> Ewen 20.

<sup>46</sup> Ewen 20; Curtin & Bernardo 14.

<sup>47</sup> Ewen 20-21; Curtin & Bernard 14-15. In Cicero's view, the practice of divination encouraged superstition and error. (Ewen 21, quoting Cicero's *De Divinatione*)

<sup>48</sup> Ewen 21; Ashton 3.

<sup>49</sup> Curtin & Bernardo 17.

<sup>50</sup> Schwartz 26.

<sup>51</sup> Some ancient Romans regarded the Caesars' palaces to be "gambling dens". (Lanciani 103-104)

<sup>52</sup> Schwartz 27.

<sup>53</sup> Curtin & Bernardo 16.

<sup>54</sup> Schwartz 27-28.

<sup>55</sup> Schwartz 28.

<sup>56</sup> Schwartz 28.

<sup>57</sup> Ezell 2; Kopp & Taylor 152; Curtin & Bernardo 16.

Being inspired by a vision, he famously decided to cross the river Rubicon and conquer Rome with his army. Once he had resolved to do so, he declared: “*Alea iacta est.*” This can be translated as “the die is cast” or “the gambling is on” and shows that Julius Caesar relied on chance and fate in his destiny too.<sup>58</sup>

Although it is quite clear that ancient Romans of all classes participated in gambling, commentators highlight a hypocrisy or dichotomy in this regard.<sup>59</sup> While gambling was prevalent, and even enjoyed by the emperors, gambling and games of chance were officially illegal under Roman laws (apart for some exceptions, such as betting on a few specific activities and gambling during the Saturnalia feast time).<sup>60</sup> Publicly, gambling was disapproved of and “gambler” was even a slightly disparaging term.<sup>61</sup> Yet, the gambling carried on and laws were flouted. Some philosophers pointed out that the laws were ineffective, while many of those philosophers were also very critical of gambling and regarded it as a vice.<sup>62</sup>

It seems that Roman laws against gambling were passed in order to protect society from the ills caused by gambling.<sup>63</sup> Initially, those laws might not have been very successful, perhaps because of the lack of proper enforcement.<sup>64</sup> However, the laws became stricter and offenders stood trial and faced more substantial penalties.<sup>65</sup> The laws developed further when Emperor Hadrian issued the Perpetual Edict.<sup>66</sup> Another important milestone in the development of Roman gambling law was reached when the *Corpus Iuris Civilis* was completed in the reign of Justinian.<sup>67</sup> His role as head of

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<sup>58</sup> Schwartz 26. Carnelley M & Schrage E “Gambling Regulation: A comparison between the Roman and South African gambling laws” in Hoctor SV & Schwikkard PJ (eds) *The Exemplary Scholar: Essays in Honour of John Milton* (“Carnelley & Schrage”) 253 and fn 9. Schwartz, at 26, refers to a similar event in modern day history when, upon giving instructions to proceed with D Day and invade Normandy, General Eisenhower used another gambling related reference: “We’ve gone all in.”

<sup>59</sup> Carnelley & Schrage 254-255; Jones 20; Schwartz 28-29; Faris SB “Changing Public Policy and the Evolution of Roman Civil and Criminal Law on Gambling 2012 *UNLV Gaming Law Journal* 3:2 199 (“Faris”) 200.

<sup>60</sup> Carnelley & Schrage 254; Schwartz 28; Jones 20; Ewen 21. Some forms of gambling, like betting on sports, were however allowed. (Faris 199)

<sup>61</sup> Carnelley & Schrage 254; Schwartz 28; Faris 200.

<sup>62</sup> Carnelley & Schrage 254-255. Some philosophers regarded gamblers as criminals, greedy and regarded them the same as adulterers.

<sup>63</sup> Carnelley & Schrage 254.

<sup>64</sup> Carnelley & Schrage 255; Jones 20. Faris notes that gambling was regarded as a vice, but the Roman laws against gambling were not enforced consistently and across the board. (Faris 199)

<sup>65</sup> Carnelley & Schrage 256.

<sup>66</sup> Carnelley & Schrage 256.

<sup>67</sup> Faris notes that Justinian’s laws brought about a sea change in Roman gambling law, when dedicated edicts were passed in order to outlaw specific forms of gambling. (Faris 212)

the Roman Catholic Church might have shaped his attitude regarding gambling law.<sup>68</sup> While Justinian was emperor, the prohibitions against gambling became much stricter and he added civil remedies in an attempt to curb the evils he blamed on gambling.<sup>69</sup>

While gambling might already have been very popular during the peak of Roman civilisation, it seems that it became even more widespread and prevalent during the decline of the Roman Empire. People became addicted to the activity and would be engrossed in gambling for days on end. Eventually, gambling became so rife that some authors identify it as one of the contributors to the ultimate fall of the Roman Empire.<sup>70</sup>

### 3.2.4 The development of lotteries

The lottery, in its modern form, appears to have its roots in the early Renaissance. Some authors are of the view that the modern lottery originated in Italy during the 1500s.<sup>71</sup> However, according to Ashton, the earliest account of a lottery he could find related to a lottery held in 1446 by the widow of Jan van Eyck, the Dutch painter who lived in Bruges.<sup>72</sup> There are also records of various lotteries held in cities in the Low Countries, including Ghent, Utrecht and l'Écluse at around the same time.<sup>73</sup>

It appears that early modern lotteries could have originated from schemes that might have been some of the earliest, rudimentary promotional competitions. Both Ashton and Ewen refer to lotteries held by Italian merchants (particularly in Genoa and Venice) in order to dispose of merchandise that did not sell well.<sup>74</sup> Ewen refers to another author, Johann Beckmann, who wrote about merchants who kept "urns of fortune".<sup>75</sup> Apparently, the merchants wrote the names of items on lots that were kept in those

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<sup>68</sup> Carnelley & Schrage 259. Faris remarks that Justinian's gambling related laws were driven by a desire to restore order to the Roman Empire and deal with the economic and social crises faced by it. (Faris 213)

<sup>69</sup> Carnelley & Schrage 260.

<sup>70</sup> Jones 20; Schwartz 29-30. Faris notes that Marcellinus, the Roman historian from the fourth century AD, wrote with disgust about the Romans' preoccupation with gambling and the activity's negative consequences on the Roman society. (Faris 203)

<sup>71</sup> Ezell 2; Ashton 4. According to Brenner and Brenner, Western Europe's first private lottery was conducted in Florence in 1530. (Brenner & Brenner 9)

<sup>72</sup> Ashton 4;

<sup>73</sup> Ewen 25-28.

<sup>74</sup> Ewen 23-24; Ashton 3-4. See also Van Niekerk JP *The Development of the Principles of Insurance Law in the Netherlands from 1500 to 1800* 104.

<sup>75</sup> Ewen refers to Beckmann J *History of Ancient Institutions*. Ewen 24. See also Curtin & Bernardo 47.





The next milestone in English lottery history can be found in the early 1600s, when a series of prominent English lotteries were organised in order to generate funds for the building of the colony of Virginia in the New World (America).<sup>98</sup> These lotteries, known as the “Virginia Standing Lotteries”, were private lotteries and were initially quite successful, although they were eventually closed because of abuse and fraud.<sup>99</sup> The running of state and private lotteries in England continued during the next two centuries, although there were various attempts to regulate or ban them. However, in 1826, the English state lotteries were halted, even though some private lotteries were allowed to continue.<sup>100</sup> But, by 1845, anti-lottery legislation became very strict and even the promotion of lotteries in the press became illegal.<sup>101</sup> Despite the success of some lotteries and their revenue potential, fraud, mismanagement and abuse of the public led to their demise in England.

The brief overview set out above relates mostly to lotteries in England. However, lotteries developed and flourished in various other countries at the same time. In North America, lotteries were operated from the early days of colonisation.<sup>102</sup> They were in many instances held to raise funds for building and improvements, and contributed, for example, to building work at Yale and Harvard.<sup>103</sup> Lotteries also provided funding for the American Revolutionary War.<sup>104</sup> However, as was the case in England, lotteries developed a reputation for taking poor people’s money, abusing and misleading the public and general mismanagement.<sup>105</sup> Based on changes in the American’s society’s moral views, lotteries started to offend certain parts of society too.<sup>106</sup> This eventually led to the abolition of most lotteries in North America during the nineteenth century, the Louisiana Lottery being the last lottery to be banned in 1892.<sup>107</sup>

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<sup>98</sup> Curtin & Bernardo 47-48; Ashton 28-29.

<sup>99</sup> Curtin & Bernardo 51; Ezell 4-8.

<sup>100</sup> Curtin & Bernardo 61; Bender 104-105; Ashton 265-278; Raven J “The Abolition of the English State Lotteries” 1991 *The Historical Journal* 371-389.

<sup>101</sup> Curtin & Bernardo 62; Ezell 9-11.

<sup>102</sup> See Ezell 12-284 for an account of the lottery’s history in America.

<sup>103</sup> Ewen 31. Unknown “Lotteries” 1933 *Bulletin of the Business Historical Society* 7:4 1 (“Unknown 1933”) 1.

<sup>104</sup> Unknown 1933 1-3.

<sup>105</sup> Bender 126; Taylor CR & Kopp SW “Games, Contests, and Sweepstakes Run Afoul: A State of Legal Disorder” 1991 *Journal of Public Policy & Marketing* 10:1 199-213 (“Taylor & Kopp 1991”) 203; Blanche EE “Lotteries Yesterday, Today, and Tomorrow” 1950 *Annals of the American Academy of Political and Social Science* Vol 269 71 (“Blanche”) 73.

<sup>106</sup> Taylor & Kopp 1991 203.

<sup>107</sup> Bender 127; Jones 140; Unknown 1933 5.



Alongside lotteries, other forms of gambling continued to be popular around the world during and after the Renaissance. In America, gambling was participated in even before the arrival of the European settlers.<sup>108</sup> When the Europeans arrived in the New World, they brought their gambling activities with them as well.<sup>109</sup> One finds the history of gambling intertwined with major events such as North America's War of Independence and there are even accounts of some of the American presidents' fondness for gambling.<sup>110</sup> The notorious Wild West also played an important part in America's gambling history.<sup>111</sup>

In Britain, race betting and card games became increasingly popular.<sup>112</sup> Gambling remained ever-present, even though some anti-gambling laws were passed, for instance during the 1740s.<sup>113</sup> Nevertheless, people continued to gamble, although the activity might have stayed out of public until regulated gambling was again legalised in 1961.<sup>114</sup> Yet, horse race betting continued to be a popular, legal activity in Britain. The gambling scene remained present in other parts of the world as well, particularly in European colonies and the main continent, where gambling at spas, for instance, was quite popular.<sup>115</sup> Well-known gambling hotspots such as Hong Kong and Macau were born during colonial days as well.<sup>116</sup>

### **3.2.5 The rise of contests, sweepstakes, games and similar schemes**

In Britain and the United States of America, lotteries were banned during the nineteenth century. However, this inspired people to conduct lotteries in new forms, while trying to avoid anti-lottery legislation. A fondness for gambling, but also merchants' desire to promote sales, led to the development of competitions, games and sweepstakes that were often lotteries in disguise.<sup>117</sup>

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<sup>108</sup> Schwartz 135-138.

<sup>109</sup> Schwartz 138-139.

<sup>110</sup> Schwartz 138-157; Jones 23-24.

<sup>111</sup> Schwartz 214-268.

<sup>112</sup> Schwartz 158-180.

<sup>113</sup> Jones 23; Schwartz 159.

<sup>114</sup> Jones 23, 26.

<sup>115</sup> Schwartz 182-241.

<sup>116</sup> Schwartz 217-222.

<sup>117</sup> Kopp & Taylor 156.

When following the history of these schemes, one must bear the elements of a lottery in mind, as well as the distinction between lotteries and contests.<sup>118</sup> In a lottery, entrants pay consideration for the opportunity to win a prize, which is awarded by way of lot or chance. In a contest, success is determined by skill and not by lot, luck or chance. Whenever promotional schemes came before courts or authorities, these elements (or the lack thereof) were closely scrutinized in order to determine whether the schemes amounted to lotteries (in which case they were often declared to be illegal).<sup>119</sup> However, these elements could be difficult to interpret. Due to the uncertainty of the outcome of court cases about lotteries, Ewen remarks that those cases, in themselves, became lotteries.<sup>120</sup>

The gift enterprise is one of the first forms of the modern prize promotion and perhaps one of the parents of the promotional competition as we know it today. Gift enterprises date back to the eighteenth century and became particularly popular halfway through the nineteenth century.<sup>121</sup> These enterprises entailed schemes by which businesses tried to attract custom and encourage sales by giving customers the opportunity to win a prize by way of chance.<sup>122</sup> In these schemes, customers were often given state lottery tickets or tickets to lotteries organised by the shopkeepers themselves.<sup>123</sup> Ashton, whose work dates back to 1893, warned his readers against these enterprises, calling them “losing games”.<sup>124</sup> In the United States, the laws were changed in 1867 in order to ban them.<sup>125</sup>

At this time, legislatures exempted art unions (organisations founded to promote the sale of art) from lottery legislation. These unions held lotteries in which works of art were distributed by way of lotteries.<sup>126</sup> The exemption from the legislation led to the growth of those unions as well as some abuse of the exemption.<sup>127</sup>

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<sup>118</sup> Curtin & Bernardo 94; Kopp & Taylor 156-157.

<sup>119</sup> See, for example, the American cases discussed by Curtin & Bernardo. (Curtin & Bernardo 92-93, 97-98, 100, 103-106, 113, 115-116, 118-199)

<sup>120</sup> Ewen 312.

<sup>121</sup> Curtin & Bernardo 93.

<sup>122</sup> Curtin & Bernardo 92; FE Williams *Flexible-Participation Lotteries* (“FE Williams 1938”).

<sup>123</sup> Curtin & Bernardo 93; Ewen 305-206; Ashton 293-296; FE Williams 1938 3.

<sup>124</sup> Ashton 292.

<sup>125</sup> Curtin & Bernardo 93.

<sup>126</sup> Ashton 331.

<sup>127</sup> Ewen 299-304.

During the second half of the nineteenth century, particularly in England, newspapers started various schemes to promote sales and generate revenue.<sup>128</sup> Ewen classifies these schemes as disguised lotteries (he calls them “newspaper lotteries”) and regards them as attempts to flout anti-lottery legislation.<sup>129</sup> These newspaper lotteries took on many forms. Missing word competitions were popular.<sup>130</sup> In these competitions, newspapers would omit a word from a sentence. A reader, on paying an entry fee, stood a chance to win a prize if they correctly guessed the missing word. The newspapers did not keep the entry fees for themselves, but distributed the fees amongst the winners. The missing word competitions eventually ended up in court and were declared to be unlawful lotteries.<sup>131</sup>

Limerick competitions were similar to the missing word competitions, except that entrants had to come up with the last line for a limerick.<sup>132</sup> Initially it appeared that skill determined success in these competitions and that they were therefore not lotteries.<sup>133</sup> However, it became apparent that the entries were not actually judged, that all entries were not even read and that sub-standard entries sometimes won in those competitions.<sup>134</sup> The authorities concluded that luck in fact determined who would be the winner and accordingly banned the competitions on account of being lotteries.<sup>135</sup>

In the United States, merchants and businessmen recognised competitions’ potential to promote business and sales as well. However, prize promotions only become truly popular and prevalent in that country during the twentieth century.<sup>136</sup> Curtin and Bernardo suggest that legal lotteries were still satisfying the public’s appetite for games of chance during the nineteenth century.<sup>137</sup> However, one of the most

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<sup>128</sup> Miers D *Regulating Commercial Gambling* (“Miers 2004”) 176-184.

<sup>129</sup> Ewen 307.

<sup>130</sup> Ashton 339-346; Bender 142-145; Ewen 307-308.

<sup>131</sup> Bender 144-145; Ewen 308. For example, in the English case of *Barclay v Pearson* [1893] 2 Ch 154 the court decided that a missing word competition was a lottery, because the outcome depended on whether the winner’s entry matched the organiser’s entry, and not on the skill displayed by the participant. (Miers 2004 178)

<sup>132</sup> Bender 146; Ewen 309-311.

<sup>133</sup> Bender 145.

<sup>134</sup> Bender 145; Ewen 310.

<sup>135</sup> Bender 145; Ewen 310. Miers notes that the British government initially did not regard the limerick competitions as illegal, but the Joint Select Committee on Lotteries and Indecent Advertisements was of the view that missing word competitions and limerick contests were “surrounded by similar evils”. (Miers 2004 178-179)

<sup>136</sup> Curtin & Bernardo 107-123; Kopp & Taylor 158-164.

<sup>137</sup> Curtin & Bernardo 91-92

prominent prize promotions organised in America during the 1800s was in fact not a lottery, but a skill contest.<sup>138</sup> PT Barnum (a concert promoter) decided to bring Jenny Lind (a famous opera singer) to the United States.<sup>139</sup> In order to promote the concerts and ticket sales, he organised a contest in which members of the public could write lyrics for a song.<sup>140</sup> Entries were to be judged and the winning entry to be sung by Lind during the concerts.<sup>141</sup> The competition generated enormous attention and ticket sales were boosted because people wanted to hear the famous singer performing the winning song, thus demonstrating the marketing power of a competition.<sup>142</sup>

At the end of the nineteenth century and into the first half of the twentieth century, Americans started to exploit prize promotions in earnest.<sup>143</sup> Promoters devised various schemes to promote sales, in some instances to make money from entry fees as well. Often, these schemes had to be tested in the courts. The question was usually whether a competition required consideration from entrants in order for them to participate. A couple of court cases centred on this, but in some of those the courts found that the competitions were not unlawful. *Yellowstone Kit v State*<sup>144</sup> was one of those cases.<sup>145</sup> In that matter, Yellowstone Kit was a travelling medicine man who sold various medicines and lotions. He held shows in the evening in order to promote his goods. He gave the public free lottery tickets and held a draw on the final night of his stay in town. In order to stand a chance to win, ticket holders had to be present at the draw. Yellowstone Kit charged entry fees for the final night's show, but made it clear that ticket holders could attend the draw for free. The court acquitted the salesman on the basis that entrants did not have to pay anything in order to participate in the prize draw. Some further judgements followed in which the courts held that the relevant

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<sup>138</sup> Curtin & Bernardo 90-91.

<sup>139</sup> Lind's visit to the United States is also regarded as a watermark in the development of live music in America and mass culture in general. [Waksman S "Selling the Nightingale: P.T. Barnum, Jenny Lind, and the management of the American crowd" 2011 *Arts Marketing: An International Journal* 1:2 108 ("Waksman") 108-109]

<sup>140</sup> Waksman 112.

<sup>141</sup> The winning entry was "Greeting to America", with lyrics by Bayard Taylor and music by Jules Benedict. (Waksman 117)

<sup>142</sup> Curtin & Bernardo 91; Waksman 112.

<sup>143</sup> Various forms of contests became quite popular, including contests that required entrants to formulate lists of things that products could be used for as well as letter writing contests. (Kopp & Taylor 158-19)

<sup>144</sup> 88 Ala. 196, 7 So. 338 (1890).

<sup>145</sup> Curtin & Bernardo 95-98; FE Williams 1958 95-104; Kopp & Taylor 157.

competitions were not unlawful lotteries, because consideration was not a requirement for entry into those competitions.<sup>146</sup>

However, the American courts became stricter in due course. In one case, for example, the court concluded that a newspaper conducted an illegal lottery because winners had to go to the newspaper's offices to claim their prizes, even though no entry fees were involved.<sup>147</sup> The courts and authorities reasoned that if a promoter required any kind of effort or exertion from an entrant, that requirement would amount to consideration and would render the competition an illegal lottery.<sup>148</sup> The laws also required post offices to confiscate illegal lottery materials.<sup>149</sup> The post offices applied a stringent policy in this regard and organisers steered away from chance based competitions, opting for skill based contests instead.<sup>150</sup> As such, contests became very popular during the first half of the twentieth century and involved challenges such as word guessing, jingle writing or letter writing contests in which entrants had to explain why they liked their favourite products.<sup>151</sup>

During the 1930s, the Irish Hospitals Sweepstakes was launched, setting the scene for promotional sweepstakes that would become extremely popular in the United States later in that century.<sup>152</sup> The Irish Hospitals Sweepstakes was a lottery run by a private trust for the benefit of Irish hospitals.<sup>153</sup> Lotteries were not generally lawful in Ireland at that time, but the Irish Hospitals Sweepstakes received a special dispensation.<sup>154</sup> The Irish Hospitals Sweepstakes generated substantial revenue, and attracted more entries from the United States than from Ireland itself, even during the

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<sup>146</sup> Curtin & Bernardo 98-99; Kopp & Taylor

<sup>147</sup> *Edward F. Sweet v Washington Hesing* (case no. 23241, US Circuit Court for the Northern District of Illinois); FE Williams 1958 106-109; Curtin & Bernardo 100-101; Kopp & Taylor 157.

<sup>148</sup> Curtin & Bernardo 101; FE Williams 1958 108-109.

<sup>149</sup> FE Williams 1958 105; Curtin & Bernardo 100.

<sup>150</sup> FE Williams 1958 105-106; Curtin & Bernardo 101-102; Kopp & Taylor 157-158. During this period, post offices used the book *Lotteries, Frauds and Obscenity in the Mails* (JL Thomas) to guide them. Thomas was Assistant Attorney-General for the Post Office Department and later a judge of the Supreme Court of Missouri.

<sup>151</sup> Curtin & Bernardo 102-105; Kopp & Taylor 158-162.

<sup>152</sup> Curtin & Bernardo 120-123; Bender 158-166.

<sup>153</sup> Encyclopaedia Britannica "Irish Sweepstakes"

<http://www.britannica.com/EBchecked/topic/294177/Irish-Sweepstakes> (accessed on 24 January 2015) ("Britannica, Irish Sweepstakes").

<sup>154</sup> Dowrick, FE "The Irish Sweep and Irish Law" 1953 *The American Journal of Comparative Law* 2:4 505 ("Dowrick") 505-506.

period that lotteries were illegal in America.<sup>155</sup> Under Irish law, this created some questions relating to conflict of laws, particularly since many entrants were from countries outside Ireland and disputes could arise about transactions relating to the sweepstakes.<sup>156</sup> The Irish Hospitals Sweepstakes also attracted considerable participation from the United Kingdom, from which the Republic of Ireland had recently become independent.<sup>157</sup> This increased the existing strain between the two countries, particularly since lotteries were initially still unlawful in the United Kingdom.<sup>158</sup> The Irish Hospitals Sweepstakes operated for 57 years until it was replaced by a state lottery.<sup>159</sup> Despite the success and popularity of the sweepstakes, investigations revealed that abuse and greed was rife, with only a fraction of the lottery's income actually going to hospitals.<sup>160</sup>

The term "sweepstakes" was not used for the first time in the 1930s though. The word dates back to at least Elizabethan times, the term appearing in Shakespeare's *Hamlet* (although spelt "swoopstake").<sup>161</sup> In those times, "sweepstakes" referred to a game in which the victor was entitled to all the stakes.<sup>162</sup> In the 1700s and beyond, the term was used in relation to horse racing and later on in respect of pool betting.<sup>163</sup> In the twentieth century, it featured prominently in the name of the Irish Hospitals Sweepstakes, as discussed above. From the 1950s, sweepstakes became very popular in the United States.<sup>164</sup> However, the term was now used for a prize promotion which did not require entry fees or consideration from participants.<sup>165</sup> Winners were determined by chance, and by the 1960s promoters preferred to run these competitions instead of skill based competitions.<sup>166</sup> The laws started to change too,

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<sup>155</sup> Britannica, Irish Sweepstakes.

<sup>156</sup> Dowrick 505-506.

<sup>157</sup> Ewen 352. Coleman M "A Terrible Danger to the Morals of the Country: The Irish Hospitals' Sweepstake in Great Britain 1930-87" 2005 *Proceedings of the Royal Irish Academy. Section C: Archaeology, Celtic Studies, History, Linguistics, Literature* 105c:5 197 ("Coleman") 198-205.

<sup>158</sup> Coleman 213-214.

<sup>159</sup> Britannica, Irish Sweepstakes.

<sup>160</sup> Dodd S "Irish Sweepstake scandal remains a lesson to us all" *Independent.ie* (7 December 2003) <http://www.independent.ie/opinion/analysis/irish-sweepstake-scandal-remains-a-lesson-to-us-all-26237690.html> (accessed on 24 January 2015).

<sup>161</sup> Shakespeare W *Hamlet* (Act IV, Scene V, Line 143). Curtin & Bernardo 4; Bender 159.

<sup>162</sup> Curtin & Bernardo 4.

<sup>163</sup> Curtin & Bernardo 5; Bender 159-160.

<sup>164</sup> Curtin & Bernardo 7.

<sup>165</sup> Curtin & Bernardo 7.

<sup>166</sup> Kopp & Taylor 163; Taylor & Kopp 1991 204.

with state lotteries being established in some American states.<sup>167</sup> The courts also relaxed strict interpretations and rejected arguments that some competitions were unlawful.<sup>168</sup> In subsequent years, the Federal Trade Commission increased regulation of these competitions in the United States, although prize competitions continued to remain popular promotional tools for marketers.<sup>169</sup>

### 3.3 The South African historical context

#### 3.3.1 Early history

South African gambling legislation dates back to 1658 – merely six years after arrival of the Dutch at the Cape.<sup>170</sup> The legislation prohibited gambling and games.<sup>171</sup> It appears that the gambling habits and losses of visiting sailors and soldiers gave rise to the creation of this law.<sup>172</sup> A couple of subsequent laws, called “plakaten”, were issued in the Cape during the rest of the 1600s and in the subsequent century, banning lotteries and prohibiting the playing of cards and dice in homes.<sup>173</sup> In those times, gambling was a problem amongst slaves, but was rife in canteens too and even a Dutch clergyman was dismissed on account of his gambling habit.<sup>174</sup>

The 1800s saw the promulgation of separate, dedicated gambling legislation for each of the former South African colonies.<sup>175</sup> In the Orange Free State, all gambling and

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<sup>167</sup> Taylor & Kopp 1991 204.

<sup>168</sup> See for example *Federal Communications Commission v. American Broadcasting Co., Inc* (1954) 347 U.S. 284, in which the court found that neither the promotional value of the competition nor the requirement that entrants had to listen to the radio constituted consideration. Taylor & Kopp 1991 204.

<sup>169</sup> Kopp & Taylor 163-164.

<sup>170</sup> Carnelley M “Offences relating to gambling and lotteries” in Milton JRL, Cowling MG and Hoorc SV *South African Criminal Law and Procedure Vol III: Statutory Offences 2<sup>nd</sup> ed*, service number 21, (“Carnelley 2011”) 2.

<sup>171</sup> 1 *Kaapse Plakaatboek* 46; Carnelley 2011 2 and 3, fn 1.

<sup>172</sup> Lötter 191, citing Speight WL “Gambling in South Africa” 1958 *Commercial Law Reporter* 229 (“Speight”). In the LGB Main Report, the authors assumed that “the indigenous people of South Africa” must also have played gambling games before the arrival of European settlers. (LGB Main Report 30.)

<sup>173</sup> Carnelley 2011 2; Lötter 192; Van Wyk I “‘Tata Ma Chance’: On Contingency and the Lottery in Post-Apartheid South Africa” 2012 *Africa* 82:1 41 (“Van Wyk”) 42.

<sup>174</sup> Ruwardus Cloppenburg used to be in the service of the Dutch East India Company, but was “[o]ne of the most notorious gamblers of the early eighteenth century”. (Speight 230-231)

<sup>175</sup> Carnelley 2011 2-3; Lötter 192.

games of chance were forbidden.<sup>176</sup> Natal and the Transvaal followed suit and passed their own legislation against betting, gambling and games of chance.<sup>177</sup>

In the Cape of Good Hope, the Act for the Prohibition of Lotteries entered into force on 30 September 1889.<sup>178</sup> It repealed previous legislation of the same kind, apart from any art union legislation. As was the case in England and other countries, art unions were exempted from lotteries legislation and, as such, these organisations could hold lotteries in which works of art could be won.<sup>179</sup> The Cape Act prohibited matters such as the operation of lotteries, their advertisement in newspapers and the distribution of materials that contained information relating to any lotteries.

The Orange Free State passed anti-lottery legislation which was similar to the Cape Act.<sup>180</sup> The *Wet over Loterijen en Sweepstakes*<sup>181</sup> (Act on Lotteries and Sweepstakes) declared illegal all lotteries in the Orange Free State. It dealt with typical lottery concepts such as prizes, subscription and consideration. Although it did not define the term “sweepstakes”, it referred to that term as an example of a lottery.<sup>182</sup> Similar anti-lottery legislation was also in place in Natal and the Transvaal.<sup>183</sup>

A Commission of Enquiry was appointed in 1909 to investigate matters relating to race meetings, betting and the like in the Transvaal.<sup>184</sup> The Commission’s report is relevant because it contains specific recommendations relating to “competitions which, though they contain an element of skill (and are therefore not illegal under the present law), are really lotteries”.<sup>185</sup> The report mentions examples such as limerick and guessing competitions.<sup>186</sup> The Commission recommended a change in the law in order for the

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<sup>176</sup> Carnelley 2011 2.

<sup>177</sup> For example the Transvaal’s *Wet Tegen Hazardspelen*, 6 of 1889 (Act against Games of Chance). Carnelley 2011 2; LGB Main Report 31.

<sup>178</sup> Act 9 of 1889 (the “Cape Act”).

<sup>179</sup> The art unions were exempted in order to stimulate the development of the fine arts and the raising of funds for that purpose. (LGB Main Report 30.)

<sup>180</sup> Carnelley 2011 2.

<sup>181</sup> Chapter CXLIII of the Orange Free State’s “*Wetboek*” (Law Book).

<sup>182</sup> S2(1) of the OFS Act.

<sup>183</sup> Law 25 of 1878 in Natal and, in the Transvaal, the Law against Holding of Lotteries 7 of 1890. Carnelley 2011 3.

<sup>184</sup> Jordan HH (chairman) *Report of the Race Meetings, Betting, etc., Commission* (“Jordan Report”).

<sup>185</sup> Jordan Report 5.

<sup>186</sup> Jordan Report 5.



definition of “lottery” to cover “[...] all kinds of competitions [...] in which the element of chance predominates over the element of skill”.<sup>187</sup>

In 1910, the Union of South Africa was created. The separate gambling and lottery laws of the former colonies remained in force in the Cape, Orange, Free State, Natal and Transvaal.<sup>188</sup> The next major event in South African gambling legislation would only occur in the 1960s with the promulgation of the Gambling Act, 1965. In the interim, ancillary legislation was adopted to deal with specific gambling matters such as gambling clubs and sports pools.<sup>189</sup> Two Gambling Amendment Acts were also promulgated to strengthen the current legislation and to deal with lotteries played by means of pin-table machines.<sup>190</sup> An attempt to curb the distribution of materials to lottery organisers can be found in section 35 of the Post Office Act, 1958 as well.

### **3.3.2 Prize promotion judgements in the first half of the twentieth century**

During the first half of the 1900s, the courts were called upon in a number of cases to determine whether competitions and other schemes constituted lotteries. The various provincial laws were still in place, and lotteries were unlawful. In many of those cases, arguments centred on the presence of the consideration element. In some cases, the courts also had to decide whether the outcome of those competitions or schemes was determined by skill or by chance. Some of the judgements are discussed below.

In *R v Lew Hoi*,<sup>191</sup> a case that involved a Chinese numbers game, the court carefully analysed the definition of “lottery”. The court discussed the subscription element and pointed out that in ordinary sweepstakes the contributions (subscriptions) of the entrants made up the prize and the scheme remained a lottery even if part of the subscription funds was paid out to someone.<sup>192</sup> It confirmed that the scheme was a lottery even if the prize was not predetermined and it did not matter that the scheme involved some variations that were not necessarily common to other lotteries.<sup>193</sup> The

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<sup>187</sup> Jordan Report 5.

<sup>188</sup> Carnelley 2011 3; Lötter 192; Carnelley M “Gambling, Gaming and Lotteries” *The Law of South Africa* 10:2 (“Carnelley 2005”), par 216 and fn 3.

<sup>189</sup> Carnelley 3; LGB Main Report 32.

<sup>190</sup> LGB Main Report 32.

<sup>191</sup> 1937 AD 215.

<sup>192</sup> 220-221.

<sup>193</sup> 220-221.

court stressed the importance of giving effect to the legislature's intention to prohibit gambling and concluded as follows:

[...] the Court should be slow to hold that a scheme is not a lottery which contains the gambling element of an adventure of a stake by a number of competitors in the hope of winning a prize on some issue determined by chance, even if it contains other features which do not affect these essential characteristics.<sup>194</sup>

A prize promotion was the subject of the matter in *R v Cotterill*.<sup>195</sup> In that case, Ackermans Limited ran the "Jumble Word Competition" in *The Cape Argus*. Entrants had to unscramble words and send their answers to the promoter, with no entry fees charged.<sup>196</sup> Mr Ackermann acknowledged that the competition was run in order to promote his store's sales. On account of this, the court found that at least some of the entrants must have made a contribution by purchasing items from the store. In the court's view this fulfilled the subscription element.<sup>197</sup> Further, the court found that winners were selected by way of chance even though they had to display skill in unscrambling the words.<sup>198</sup> This was because there were numerous entries and only a fraction of them were actually verified to check whether the answers in them were correct.<sup>199</sup> The organisers merely awarded the prizes to the first 78 entries that were opened. Since the winners received prizes, the third element of a lottery was present as well. As a result, the court declared the competition to be an unlawful lottery.<sup>200</sup>

The consideration element in a prize promotion came under the spotlight again in *R v Ellis Brown Limited*.<sup>201</sup> In that case, the defendant sold coffee and tea.<sup>202</sup> The defendant concealed prize vouchers in some of the product tins. If a person bought one of those tins, they became entitled to a cash prize.<sup>203</sup> The court had to examine whether participants had to pay something in order to stand a chance to win a prize. The court referred to this payment requirement as the so-called "gambling element".<sup>204</sup>

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<sup>194</sup> 222.

<sup>195</sup> 1927 CPD 48.

<sup>196</sup> 49.

<sup>197</sup> 53.

<sup>198</sup> 53-54.

<sup>199</sup> 53.

<sup>200</sup> 78. The court decided that "[c]hance was the determining factor".

<sup>201</sup> 1938 AD 98.

<sup>202</sup> 100.

<sup>203</sup> 100.

<sup>204</sup> 100.

It decided that participants did in fact pay to participate in the competition, because they could not get hold of the winning vouchers without purchasing the tins of coffee or tea.<sup>205</sup> In the court's view, entrants paid to participate when they paid for the products they purchased.<sup>206</sup> In conclusion, the court stated that it had to apply the law and that it could not venture into a debate regarding whether the relevant legislation was in fact intended to prohibit something which was essentially a promotional tool to market a promoter's business.<sup>207</sup>

The definition of "lottery" in the Transvaal's Law against the Holding of Lotteries was also considered in *R v Morrison*.<sup>208</sup> The appellant in that matter was a businessman who wished to increase his sales by giving customers the opportunity to receive a coupon if they purchased goods to a value of five shillings.<sup>209</sup> The coupons would be entered into a draw and the winner would receive a house and land. The court noted that subscription is a crucial element of a lottery.<sup>210</sup> It held that customers were "induced to risk money in order to have a chance of gaining a valuable prize".<sup>211</sup> The court decided that the price paid by entrants for the goods purchased from the appellant included the subscription for entry into the prize draw.<sup>212</sup> Consequently, the court found that the scheme was a lottery.

In some judgements, the courts found that the relevant schemes did not constitute lotteries. In *R v Livingstone*,<sup>213</sup> for example, entrants had to predict which horses would win in a race.<sup>214</sup> The court found that the competition was not a lottery because success in the competition depended on skill instead of chance.<sup>215</sup> The court's reasoning was that it took some skill to select the horses and that chance was not the determining factor in the competition.<sup>216</sup>

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<sup>205</sup> 101.

<sup>206</sup> 101.

<sup>207</sup> 101. As such, the court recognised the function of a promotional competition. However, not being the legislature, it was not in a position to make provision for the lawful running of such competitions.

<sup>208</sup> 1914 TPD 329.

<sup>209</sup> Carnelley classifies this competition as a "gift scheme". Carnelley 2011 66 and fn 14.

<sup>210</sup> 332-333.

<sup>211</sup> 334-335.

<sup>212</sup> 332.

<sup>213</sup> 1924 TPD 45.

<sup>214</sup> 48.

<sup>215</sup> 48-49.

<sup>216</sup> 48.

In *Silberman v Hodkinson*,<sup>217</sup> the court had to consider another prize promotion that involved prediction. In this case, a cigarette manufacturer invited entrants to vote for popular girls' names by sorting twelve specific girls' names in order of popularity, amongst other entry requirements.<sup>218</sup> The organisers would then, using the lists of names received from entrants as votes, determine the order of the twelve names based on the popularity displayed in the entries.<sup>219</sup> The winner would be the person who had the most names in the correct order. The court found that this was not a lottery, because the outcome depended on skill.<sup>220</sup> The court referred to the reasoning in *R v Livingstone*, where the one judge was of the view that the outcome of a lottery had to depend entirely on chance in order for the competition to be a lottery, while the other judge stated that chance had to be the "determining factor" instead of the "only element" or "only factor".<sup>221</sup> While in the *Silberman* case the judge agreed with the test that chance had to be the only factor, he was satisfied in the case under consideration that chance was not "the determining factor".<sup>222</sup>

Skill was also the determining factor in *R v Bertram Davis*.<sup>223</sup> In that matter, the South African Toilet Requisite Co. placed advertisements in the *Sunday Times*.<sup>224</sup> The advertisements contained pictures and entrants had to create captions for those.<sup>225</sup> Entry fees were payable and the winner would be the person whose caption is chosen by one of the newspaper's employees.<sup>226</sup> The court found that this was not a lottery, because participants had to use their skill to create a caption that would be selected by the newspaper employee.<sup>227</sup>

The above cases are merely examples of the numerous cases that turned on whether or not a competition or other scheme involved a lottery.<sup>228</sup> The cases from those times remain instructive because they can be used to give guidance when one must interpret

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<sup>217</sup> 1927 TPD 562.

<sup>218</sup> 563.

<sup>219</sup> 563.

<sup>220</sup> 568.

<sup>221</sup> 568.

<sup>222</sup> 568.

<sup>223</sup> 1915 TPD 155.

<sup>224</sup> 157.

<sup>225</sup> 157.

<sup>226</sup> 157.

<sup>227</sup> 164-165.

<sup>228</sup> See, for example, the various lotteries listed by Carnelley (Carnelley 2011 66) and the applicable footnotes.

the provisions of the current Lotteries Act, 1997.<sup>229</sup> As such, some of these cases will be referred to below in the discussions around section 54 of the Lotteries Act, 1997 and section 36 of the CPA.<sup>230</sup>

### 3.3.3 The times of the Gambling Act, 1965

During the 1960s, the government decided to combine the various provincial gambling laws into one statute on the basis that the current position was confusing and that clarity had to be achieved.<sup>231</sup> The government chose to maintain the prohibition on gambling (except for betting on horseracing).<sup>232</sup> The Minister of Justice was in fact strongly opposed to gambling and saw the need to “stamp out lotteries” and “eradicate this evil root and branch”.<sup>233</sup> Lötter points out how the government also provided sweeping powers to the Minister, giving him the authority to expand the definition of “lotteries and games of chance” to include activities that were not already mentioned in the statute.<sup>234</sup>

Despite arguments from the opposition, the Gambling Act, 1965 entered into effect on 1 July 1969 without any changes.<sup>235</sup> Numerous court cases found their basis in the 1965 Act, commencing with a number of battles regarding the Minister of Justice’s attempts to prohibit “any pin-table, machine, or contrivance”.<sup>236</sup> Some of the cases came about as a result of uncertainty regarding the Act’s wording. Carnelley remarks that it was “an enactment distinguished, as was its pre-Union predecessors, by extraordinary inept draftsmanship”.<sup>237</sup>

The provincial laws did not make provisions for the running of promotional competitions. The situation did not change under the Gambling Act, 1965 either. However, promoters still tried to run them. As such, these competitions ended up in our courts on occasion and led to judgements such as *Minister of Mineral and Energy Affairs v Lucky Horseshoe (Pty) Ltd.*<sup>238</sup> In that case, the respondent issued lottery

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<sup>229</sup> For example, some of the cases were referred to in *FirstRand Bank v National Lotteries Board* [2008] 3 All SA 121 (SCA).

<sup>230</sup> See Chapter 5 below.

<sup>231</sup> Lötter 192; Carnelley 2011 3; Carnelley 2005 164; LGB Main Report 33.

<sup>232</sup> Carnelley 2005 164 fn 4.

<sup>233</sup> Lötter 192, where that author refers to the texts of the various Assembly Debates.

<sup>234</sup> Lötter 193

<sup>235</sup> Lötter 193; LGB Main Report 33.

<sup>236</sup> Lötter 193.

<sup>237</sup> Carnelley 2011 and fn 21.

<sup>238</sup> 1994 (2) SA 46 (A).

tickets to various retailers, including filling stations. The retailers bought the tickets from the respondent, but they were made available to members of the public at no cost. Initially, the respondent required the retailers to provide a member of the public with a ticket only if they purchased something from the retailer. However, the respondent changed its instructions and informed retailers that tickets had to be given to everyone, even if they did not purchase something. Despite this, the court found that the scheme was a lottery because most members of the public would only have received tickets if they bought something from a retailer.<sup>239</sup> In the court's judgement, this meant that those members of the public paid consideration in order to enter the competition and that the subscription element was therefore present.<sup>240</sup>

In yet another case surrounding the subscription element, the court in *S v Pepsi-Cola (Pty) Ltd*<sup>241</sup> had to examine a promotion in which every tenth bottle of Pepsi contained a liner which entitled the purchaser of that bottle to another free Pepsi. The court found that the scheme was not a lottery since members of the public did not pay an increased amount for the relevant bottles of Pepsi and that there was therefore no subscription.<sup>242</sup> In the court's view, members of the public were not paying for the right to win another Pepsi.<sup>243</sup> The court regarded the scheme as a promotional tool, instead of a lottery, and was of the view that the legislature did not intend for such schemes to be covered by the prohibitions of the Gambling Act, 1965.<sup>244</sup> The court also expressed its surprise that a policeman's time was wasted to investigate the matter which led to the case, particularly while so many serious crimes were being committed.<sup>245</sup> Dendy queries the argument of the court in the *Pepsi-Cola* case.<sup>246</sup> For instance, he criticises the court's decision that the scheme was not a lottery since participants would not enter the competition for a future right to stand a chance to win a prize.<sup>247</sup> He indicates that the court overlooked the legislation's definition of "prize" in concluding that the

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<sup>239</sup> 55.

<sup>240</sup> 59.

<sup>241</sup> 1985 (3) SA 141 (C).

<sup>242</sup> 144.

<sup>243</sup> 144.

<sup>244</sup> 144.

<sup>245</sup> 142.

<sup>246</sup> Dendy III 104.

<sup>247</sup> Dendy III 104.

free cool drinks did not qualify as prizes, pointing out that any movable or immovable property could constitute a prize.<sup>248</sup>

In *Boardman v Minister van Finansies*<sup>249</sup> the court was called upon to decide whether the Government's defence bond scheme amounted to an illegal lottery. The public could buy defence bonds and stood a chance to win prizes in a monthly draw.<sup>250</sup> The court argued that participants in the scheme were not at risk to lose anything and found that the scheme was not a lottery, because there was no subscription involved.<sup>251</sup> Furthermore, the court held that the Government was in any event not bound by the provisions of the Gambling Act, 1965.<sup>252</sup> As such, even if the scheme was a lottery, the outcome would have remained the same.<sup>253</sup> The *Boardman* decision has been criticised for deviating from earlier decisions and creating the implication that an entrant must risk losing something in order for the subscription element of a lottery to be present.<sup>254</sup> Dendy also argues that the court misinterpreted the definition of "lottery" by finding that a scheme had to be a lottery in the general sense in order to be an illegal lottery.<sup>255</sup>

Apart from the Gambling Act, 1965, competition organisers also had to take note of other legislation that could have an impact on their competitions. The Trade Practices Act, 1976, which contained provisions relating to trade coupons, was one of these statutes.<sup>256</sup> This Act regulated the situation where trade coupons were provided to someone, *inter alia* for them to be able to participate in a competition,

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<sup>248</sup> Dendy II 78 and fn 9 on that page.

<sup>249</sup> 1984 (1) SA 259 (T).

<sup>250</sup> 261-262.

<sup>251</sup> 266-267.

<sup>252</sup> 267.

<sup>253</sup> 267.

<sup>254</sup> Dendy M "Pitfalls of Advertising – II. Lotteries." 1988 *Businessman's Law* 17 77 ("Dendy II") 77 fn 4; Dendy M "Pitfalls of Advertising – III. More about lotteries." 1988 *Businessman's Law* 17 101 ("Dendy III") 104; Dendy M "Pitfalls of Advertising – IV. Competitions." 1988 *Businessman's Law* 17 157 ("Dendy IV") 160; Lane W, Hoffe D, Dison D & Tatham C *Kelsey Stuart's The Newspaperman's Guide to the Law* (4<sup>th</sup> ed) ("Lane *et al.*") 187.

<sup>255</sup> Dendy I fn 4, where Dendy also points out that the court in *S v Mbonani* 1986(3) SA 839 (N) clearly rejected the argument of the court in the *Boardman* case. However, in *S v Pepsi-Cola* 1985 (3) SA 141 (C), the court seems to have followed the argument in the *Boardman* case. (Dendy III 104.) Bell, Dewar & Hall *Kelsey Stuart's The Newspaperman's Guide to the Law* (5<sup>th</sup> ed) ("Bell Dewar") 207.

<sup>256</sup> Stuart KM *The Newspaperman's Guide to the Law* (3<sup>rd</sup> ed) ("Stuart") 231-235. The Trade Practices Act, 1976 replaced the Trade Coupons Act, 1935, which also contained strict prohibitions relating to trade coupons.

and prohibited certain practices in relation to such trade coupons.<sup>257</sup> Those provisions were relaxed by way of amendments that came into effect in 1984.<sup>258</sup> Apart from the legislation relating to coupons, competition organisers further had to ensure that they did not fall foul of the Newspaper Press Union of South Africa's general by-laws, which prohibited the publication of skill competitions that had no purpose other than money making and not the promotion of business, unless certain exceptions applied.<sup>259</sup>

Although gambling was prohibited in South Africa under the Gambling Act, 1965, this was not the case in the so-called "homelands" (Transkei, Bophuthatswana, Venda and Ciskei) that were established during the 1970s.<sup>260</sup> Those states passed legislation which provided for the issuing of gambling licenses and several casinos operated in those states.<sup>261</sup>

Despite the prohibitions of the Gambling Act, 1965, and initial cases such as *Boardman*, *Pepsi-Cola* and *Lucky Horseshoe*, it seems that the authorities often ignored minor lotteries, such as fundraising lotteries conducted by churches and schools.<sup>262</sup> In due course, larger and more prominent fundraising lotteries started to appear, for example ITHUBA, Operation Hunger, the Community Chest and Natal Lotto.<sup>263</sup> It is not clear why action was not taken against those lotteries, particularly since they blatantly contravened the Gambling Act, 1965.<sup>264</sup> Carnelley suggests that the operators might have argued that those schemes were based on skill instead of chance, while the Report of the Commission of Inquiry into Lotteries, Sports Pools, Fundraising Activities and Certain Matters relating to Gambling ("Howard Report") notes that chance was still the dominant element of these lotteries.<sup>265</sup> Perhaps as a result of promoters' attempts to hide their lotteries behind feigned skill requirements,

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<sup>257</sup> Section 10.

<sup>258</sup> Lane *ea* 191-192.

<sup>259</sup> Lane *ea* 227.

<sup>260</sup> Carnelley 2005 164; Carnelley 2011 3; Lötter 194; LGB Main Report 34; Van Wyk 42.

<sup>261</sup> Carnelley 2005 3. Wiehahn P "To be or not to be: the legality of gambling in South Africa" *Codicillus* XXXVII 2 39 ("P Wiehahn") 39.

<sup>262</sup> Lötter 194.

<sup>263</sup> Lötter 194; LGB Main Report 33; Carnelley 2011 3; P Wiehahn 40; Commission of Inquiry into Lotteries, Sports Pools, Fundraising Activities and Certain Matters relating to Gambling (RP 80/1993) (the "Howard Report") 15. In the Howard Report, the authors remarked how operation of the ITHUBA scratch cards actually generated revenue for the operator of that scheme, to the detriment of the charities that were supposed to benefit from it. (Howard Report 56-57.)

<sup>264</sup> Howard Report 42-43.

<sup>265</sup> Carnelley 2011 3; Howard Report 15; Lötter 194.



the Gambling Act, 1965 was amended to prohibit skill based gambling games as well.<sup>266</sup>

### 3.3.4 Gambling reform at the end of the twentieth century

Even though the Gambling Act, 1965 was amended to ban skill based gambling, the South African government must have realised that the public had a need for gambling and, perhaps, that times were changing. The Howard Commission was therefore created, with Mr Justice JA Howard as chairman. As is clear from the Howard Commission's name, its purpose was to investigate whether lotteries and various forms of gambling were desirable and, if so, how they should be regulated and who should profit from them.<sup>267</sup>

The Howard Commission's inquiry found that gambling was a well-liked and lucrative activity in South Africa.<sup>268</sup> In view of this, it concluded that the public's desire for gambling should be recognised and that gambling should therefore be legalised.<sup>269</sup> However, the Howard Commission recommended tight regulation in order to guard against the ills that can often be caused by gambling.<sup>270</sup> In respect of lotteries specifically, the Howard Commission concluded that they are less damaging than other forms of gambling, perhaps since lotteries are conducted over longer periods and because there is less instant gratification due to the draws only taking place at the end of the lottery periods.<sup>271</sup> As such, a single National Lottery was suggested for South Africa.<sup>272</sup> The Howard Report also deals with small lotteries (such as those operated by schools and churches) as well as private lotteries (office and club lotteries).<sup>273</sup> The Howard Commission concluded that these lotteries are less

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<sup>266</sup> Carnelley 2011 3; Lötter 194-195; LGB Main Report 33.

<sup>267</sup> Carnelley 2011 3-4; Howard Report 1-4. The Howard Commission's terms of reference were initially limited to lotteries, sports pools and scratch-card games, but in due course extended to gambling games. (Howard Report 1.)

<sup>268</sup> Howard Report 16.

<sup>269</sup> Howard Report 22-23. In the Commission's view, gambling prohibition would not eliminate all gambling activity. Instead, it remarked: "Laws which are designed to lead men away from vice and sin, particularly those vices and sins that injure only the sinner, are notoriously difficult to enforce".

<sup>270</sup> Howard Report 23.

<sup>271</sup> Howard Report 33-34.

<sup>272</sup> Howard Report 35-40. The Commission was of the view that one could not object "to the State promoting or even conducting a national lottery which is popular, socially harmless and designed to raise money for welfare, health, education and other social purposes". (Howard Report 35)

<sup>273</sup> Howard Report 45-49.

problematic and that they should be allowed, subject to limitations and restrictions.<sup>274</sup> However, the Howard Commission did not deal with promotional competitions conducted by merchants and businesses at all, and was of the view that no other lotteries should be allowed.<sup>275</sup>

As a result of the Howard Commission's work, the Lotteries and Gambling Board Act, 1993 was promulgated. This happened in times of historic change in South Africa, including Nelson Mandela's release from imprisonment and the country's first democratic elections. In Carnelley's view, these events "overtook" the Howard Report, but the process was in fact taken forward again with the establishment of the Lotteries and Gambling Board.<sup>276</sup> The Board conducted its own enquiry into lotteries and gambling, under chairmanship of Prof NE Wiehahn, and delivered an Interim Report during October 1994.<sup>277</sup> It submitted its *Main Report on Gambling in the Republic of South Africa* in March 1995.<sup>278</sup>

Despite challenges such as time pressure, a lack of reference sources and a complicated practical and legislative landscape in the country, the Lotteries and Gambling Board completed its work in quite a short period of time.<sup>279</sup> The LGB Main Report covers wide territory, ranging from the history of gambling in South Africa and other countries to the socio-economic impact of gambling, the economic effects of gambling and problem gambling.<sup>280</sup> The Board recognised that gambling had become a leisure activity in South Africa and that the time had arrived to introduce legal, regulated gambling in South Africa, despite that fact that some people were still

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<sup>274</sup> Howard Report 45-49.

<sup>275</sup> Howard Report 49-50.

<sup>276</sup> Carnelley M "Betting on Dog Racing. The Next Legalised Gambling Opportunity in South Africa? A Cautionary Note from the Regulation of Greyhound Racing in Britain" 2010 *UNLV Gaming Law Journal* 1:1 73 at 78 and fn 41 on that page.

<sup>277</sup> LGB Main Report 1. Sallaz notes that Wiehahn was appointed in post-apartheid South Africa and was seen as a good choice because he was regarded as a "*veligte* (enlightened) Afrikaner" (sic), having previously recommended the legalisation of trade unions. Sallaz JJ *The Labor of Luck: Casino Capitalism in the United States and South Africa* ("Sallaz") 189.

<sup>278</sup> The Board's Report was met with mixed reaction and with quite a measure of opposition from urban casinos and some large corporate entities. (Sallaz 194-195)

<sup>279</sup> NE Wiehahn 1995 2-3. The Board relied on submission from various role-players, many of whom were in favour of legalised, regulated gambling. Civic organisations also provided submissions and only one political party was in favour of banning gambling. (Sallaz 189-190)

<sup>280</sup> NE Wiehahn 1995 5-8.

opposed to the activity.<sup>281</sup> The Board was not convinced that gambling would have an adverse effect on people's work ethic and was of the view that it would not have a significant on society, although it recommended that the government should conduct ongoing research relating to the socio-economic impact of gambling.<sup>282</sup> Problem gambling was also covered by the Board and it took note of the fact that some people in South Africa did struggle with this.<sup>283</sup>

In its Report, the Board formulated twelve principles for "the design, structure and operation of South Africa's gambling system".<sup>284</sup> These principles included control and regulation, interaction between national and local government and the protection of gamblers and society.<sup>285</sup> The Board proposed that legalised gambling "should be strictly controlled, well-regulated and effectively policed".<sup>286</sup> In order to protect society, it was in favour of an approach in terms of which gambling would be allowed but not stimulated, and suggested that government's policies should balance the operation of a legal gambling industry against the protection of society.<sup>287</sup> Particular emphasis was placed on "transparency, honesty and integrity" in the gambling industry.<sup>288</sup> The Board produced recommendations on the operation of a National Lottery and the regulation of private, society and small lotteries as well as the licensing of casinos and the regulation of sport betting.<sup>289</sup> However, the LGB Main Report does not deal with promotional competitions.

Ultimately, the LGB Main Report laid the foundations for legalised gambling in South Africa and led to the enactment of the National Gambling Act, 1996.<sup>290</sup> The new legislation allowed for the licensing of casinos and the regulation of gambling and wagering and dealt with matters such as the creation of the National Gambling

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<sup>281</sup> LGB Main Report 53-54. In the Board's view, "gambling is a reality in that it is natural for man to take a chance or a risk". (LGB Main Report 54)

<sup>282</sup> LGB Main Report 54-55.

<sup>283</sup> LGB Main Report 55-58. The Board also proposed that the gambling industry should contribute towards the establishment of problem gambling treatment centres.

<sup>284</sup> NE Wiehahn 1995 9.

<sup>285</sup> NE Wiehahn 9-12; LGB Main Report 63-73.

<sup>286</sup> LGB Main Report 63. The Board also suggested that the relevant gambling legislation should be comprehensive, properly drafted and unambiguous.

<sup>287</sup> LGB Main Report 65.

<sup>288</sup> LGB Main Report 69. The Board was concerned about the fact that the gambling industry was often associated with crime and negative elements and was of the view that transparency would prevent such perceptions from being formed.

<sup>289</sup> LGB Main Report 75-139.

<sup>290</sup> Carnelley 2011 4.

Board.<sup>291</sup> As a result, South Africa evolved into “[o]ne of the newest legal gambling ‘havens’ in the world”.<sup>292</sup>

The National Gambling Act, 1996 was eventually replaced by the National Gambling Act, 2004.<sup>293</sup> The 2004 Act contains principles that are similar to its predecessor and deals with the same matters in general.<sup>294</sup> However, according to Carnelley, “the structure of regulation of the industry on a national level has been revisited, broadened and clarified”.<sup>295</sup> The National Gambling Act, 2004 is the statute that currently regulates gambling in South Africa on a national level, while each of the nine provinces has its own provincial gambling legislation as well.<sup>296</sup>

### 3.3.5 The Lotteries Act, 1997 and promotional competitions

While the National Gambling Act, 1996 legalised regulated gambling in South Africa, the Lotteries Act, 1997 led to the establishment of South Africa’s first National Lottery. The Lotteries Act, 1997 commenced on 1 March 2000 and is still in force, although it has been amended on occasion and certain sections have been repealed.<sup>297</sup> It provides for the operation of the National Lotteries Commission and National Lottery<sup>298</sup> and deals with the allocation of lottery proceeds.<sup>299</sup> The Act also regulates sports pools<sup>300</sup> and various other forms of lotteries, such as society lotteries,<sup>301</sup> private lotteries<sup>302</sup> and lotteries that are incidental to exempt entertainment.<sup>303</sup>

The Lotteries Act, 1997 introduced the first provisions for the lawful conducting of promotional competitions in South Africa. Section 54 of the Lotteries Act, 1997 was dedicated to this form of competition.<sup>304</sup> The section was not in the draft versions of

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<sup>291</sup> Carnelley 2011 4.

<sup>292</sup> Carnelley M “A Précis of the South African Gambling Industry” 2001 *Gaming Law Review* 5:1 3.

<sup>293</sup> Carnelley 2011 4.

<sup>294</sup> Carnelley 2011 6.

<sup>295</sup> Carnelley M “Gambling Law Developments in South Africa: The Summer of 2004/2005” 2005 *Gaming Law Review* 9:4 318.

<sup>296</sup> Carnelley 2005 164.

<sup>297</sup> The Lotteries Act, 1997 has been amended by the Lotteries Amendment Act 10 of 2000, Lotteries Amendment Act 46 of 2001, Prevention and Combating of Corrupt Activities Act 12 of 2004, Public Service Amendment Act 30 of 2007, the CPA and the Lotteries Amendment Act 32 of 2013.

<sup>298</sup> Ss 2 to 20.

<sup>299</sup> Ss 21 to 35.

<sup>300</sup> S55.

<sup>301</sup> S38.

<sup>302</sup> S37.

<sup>303</sup> S36.

<sup>304</sup> S 54 has been repealed and promotional competitions are now regulated by s36 of the CPA.





The consideration or subscription element in promotional competitions formed the basis of two noteworthy judgments of the Supreme Court of Appeal: *FirstRand Bank v National Lotteries Board*<sup>321</sup> and *National Lotteries Board v Bruss NO*.<sup>322</sup> In the *FirstRand Bank* case, the bank ran a competition in which entrants stood the chance to win randomly drawn cash prizes if they deposited money for a 32 day period in a “Million-a-Month” call account. The bank relied on section 63 of the Lotteries Act, 1997, and argued that the Act did not apply to the competition because entrants were not required to tender any form of subscription. The court disagreed and declared the competition to be unlawful. It found that entrants staked something on a chance of winning when they were deprived of the possession of their money for a fixed period (even if the entrants could withdraw all of their money after the deposit period).

The *Bruss* matter involved the *Winikhaya* competition conducted by a charitable trust. Entrants stood the chance to win various prizes by sending entries by way of premium rated text messages or post cards to the organisers. The prizes were awarded by way of random draws. The court held that the competition was an illegal lottery and not a promotional competition, because it involved subscription and the trust operated the competition in order to raise funds for charities instead of promoting goods or services.

### **3.3.6 The shift from lotteries legislation to consumer protection**

The beginning of the twenty first century saw the arrival of South Africa’s first comprehensive and dedicated consumer protection legislation.<sup>323</sup> The Consumer Protection Act (“CPA”) was signed into law on 24 April 2009. Certain of its provisions took effect a year after that, with almost all other provisions entering into force on 31 March 2011.<sup>324</sup>

The CPA repealed section 54 of the Lotteries Act, 1997, and now regulates promotional competitions in detail by way of section 36 and the related provisions found in the Consumer Protection Act Regulations. The focus may have shifted from

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<sup>321</sup> [2008] 3 All SA 121 (SCA). See Carnelley M “Gambling law” (Recent Cases) 2010 3 *South African Journal of Criminal Justice* 439-453 (“Carnelley 2010”) 450-451 and the criticism in Louw J “Distortion of the law: A comment on the SCA judgment in *FirstRand Bank Ltd v National Lotteries Board* 2008 (4) SA 548 (SCA)” 2012 (August) *De Rebus* 59-60.

<sup>322</sup> [2009] 2 All SA 164 (SCA). See Carnelley 2010 451-452.

<sup>323</sup> See page 75 above.

<sup>324</sup> Some provisions are still in abeyance as at the date hereof, for example those relating to the registration of business names and the pre-emptive blocking of direct marketing.

lotteries regulation to consumer protection legislation, but promotional competitions are still strictly regulated. And promotional competitions remain as popular as ever, if not more prevalent due to the social media wave. As such, even though the courts have not yet had the opportunity to interpret the provisions of section 36, it is probably just a matter of time before that will happen.

### 3.4 Conclusion

Gambling, in all of its forms (including lotteries, sweepstakes and prize draws), is part of society and has been present in people's lives from time immemorial. People have made fortunes out of it, but lives have also been ruined. As one can see from the very brief overview above, legislatures have been grappling with gambling for a very long time.<sup>325</sup> Even the ancient Roman lawyers struggled to hold a consistent view about gambling. They passed laws that banned it while, at the same time, they continued with the activity in private. At times, gambling was used to generate revenue for governments and noble causes. Yet, throughout history, governments have also endeavoured to ban gambling or regulate it in a strict manner. It seems that history moves in circles and that gambling may be legal during one era, while it will be banned in the next.<sup>326</sup> However, the arguments for and against gambling and legislative approaches towards it remain useful to inform current debates around the topic. It is also important to bear the historical background in mind when considering the way in which gambling and promotional competitions should be regulated in the present day.

Around the globe, courts have played a key role in the development of the law relating to promotional competitions. Their decisions are especially useful to understand the elements of prize promotions, especially the presence or absence of the chance element. This is the case in respect of South Africa as well. In the discussions above, it was shown that this country's courts released some particularly instructive judgements during the beginning of the twentieth century. At the end of that century,

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<sup>325</sup> Lötter refers to gambling as a "selective vice" and highlights this dichotomy, pointing out how some forms of gambling can be completely legal, while others are, at the same time, strongly regulated or forbidden. Lötter S "The odds against gambling" 1994 *South African Journal of Criminal Justice* (7) 189 ("Lötter") 189.

<sup>326</sup> Rose writes about the "gambling waves" and "recurring cycles" of gambling regulation that come and go. (Rose IN *Gambling and the Law* ("Rose 1986") 13.) Blanche points out how "European countries have alternatively abolished the lotteries, re-established them, re-abolished them, and so on". (Blanche 72) See also Wiehahn NE *Gambling in South Africa – A New Challenge* 5.



the Supreme Court of Appeal also added some very important judgements to the existing body of case law.

At present, gambling is legal in many countries, although it is often regulated comprehensively. Sweepstakes, prize promotions, contests and the like are popular promotional tools too (while they constitute gambling at the same time). Legislation is currently quite permissive in relation to these forms of gambling, although they are regulated in order to protect the public. Yet, as is the case with gambling in general, history shows that promotional schemes often lead to abuse. In the end, it remains to be seen whether the current trend of legalisation of promotional competitions will continue, or whether the tide will turn against them again at some point in the future.

## CHAPTER 4

### THE REGULATION OF PROMOTIONAL COMPETITIONS IN NEW ZEALAND AND GREAT BRITAIN

- 4.1 Introduction
- 4.2 New Zealand
- 4.3 Great Britain
- 4.4 Conclusion

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#### 4.1 Introduction

South Africa's regulation of promotional competitions is not unique and did not develop independently. Some provisions of the applicable legislation have their roots in English law or have been copied from English statutes, and South African courts have quoted English cases in their judgements on lotteries and promotional competitions. Overall, English law has had an important influence on the development of South African law. Consequently, one cannot consider the current regulation of promotional competitions in South Africa without examining the past and present legal position in Great Britain. Such an examination will provide reasons for some provisions in South African legislation and related English judgements can be used to interpret the legislative provisions in this country. Furthermore, it will be instructive to compare South Africa's current regulation of promotional competitions with the situation in Great Britain in order to determine whether any lessons can be learnt from its legislation.

In addition, the relevant laws of New Zealand will be considered. This will be done because Great Britain's current legislation relating to prize competitions followed the New Zealand model in part. New Zealand's legislation is also quite modern and it will be useful to benchmark South Africa's legislation against the position in that country. Accordingly, this chapter will focus on the regulation of promotional competitions (also known as prize competitions or sales promotion schemes) in Great Britain and New Zealand, while some comparative comments will be provided from a South African perspective.

## 4.2 New Zealand

### 4.2.1 Background

New Zealand is a country located in the South Pacific Ocean, with an estimated population of just over 4.4 million people.<sup>1</sup> The Polynesian Maori originally settled there before the first European discovered it in 1642, and the British started to colonise it from 1769 when Captain Cook arrived in New Zealand.<sup>2</sup> The country became an independent dominion in 1907, but it remains part of the British Commonwealth and Queen Elizabeth II is still the official head of state.<sup>3</sup>

Before the arrival of the Europeans, the Maori did not gamble.<sup>4</sup> However, they practised forms of divination and used lots, for example to determine someone's guilt.<sup>5</sup> Gambling only started to spread in New Zealand after Europeans settled in the country and introduced raffles as well as betting on cards and horses.<sup>6</sup> Although Queen Victoria gave instructions that there should be no lotteries in New Zealand and recreational lotteries were thus prohibited, people in colonial times still participated in other forms of lotteries, such as lotteries in which people disposed of unwanted goods.<sup>7</sup> Small lotteries were also held by churches, schools and the like.<sup>8</sup> Eventually, the 1881 Gaming and Lotteries Act banned lotteries, subject to some exceptions.<sup>9</sup> However, soon art union lotteries were allowed and the New Zealand government founded its own Art Union.<sup>10</sup> In 1907, amendments to the laws banned "street betting"

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<sup>1</sup> Central Intelligence Agency *The World* "New Zealand" 20 June 2014 (<https://www.cia.gov/library/publications/the-world-factbook/geos/nz.html>) ("CIA Factbook NZ") (accessed on 31 January 2015). New Zealand has a relatively small population, when compared to South Africa's estimated population of approximately 54 million people. (Statistics South Africa "Mid-year population estimates: 2014" <http://beta2.statssa.gov.za/publications/P0302/P03022014.pdf>.)

<sup>2</sup> Wilson J "History" *Te Ara - the Encyclopedia of New Zealand* (30 April 2014) <http://www.teara.govt.nz/en/history> (accessed on 31 January 2015).

<sup>3</sup> CIA Factbook NZ. New Zealand and South Africa have somewhat similar colonial histories and both countries are still members of the British Commonwealth at present.

<sup>4</sup> Adams P "The history of gambling in New Zealand" 2004 *Journal of Gambling Studies* Issue 12 (available online at <http://jgi.camh.net/doi/full/10.4309/jgi.2004.12.2>) ("Adams").

<sup>5</sup> Grant D *On a Roll: A History of Gambling and Lotteries in New Zealand* ("Grant") 151-152.

<sup>6</sup> Adams.

<sup>7</sup> Grant 155.

<sup>8</sup> Grant 156.

<sup>9</sup> Grant 160. Some specific raffles, for example, were still allowed.

<sup>10</sup> Australasian Gambling Council "Chapter 16: A Brief History of Gambling in New Zealand" 1 (available online at [https://www.austgamingcouncil.org.au/system/files/AGCPublications/AGC\\_DB\\_2013-14\\_CHP\\_16.pdf](https://www.austgamingcouncil.org.au/system/files/AGCPublications/AGC_DB_2013-14_CHP_16.pdf)) ("AGC Ch 16") (accessed 31 January 2015); Grant 158-159.

and basically restricted legal gambling to the racecourse.<sup>11</sup> During the First World War, funds were raised by way of lotteries and raffles, even though some were legal and others were not.<sup>12</sup> In 1949, raffles and some other forms of gambling were legalised under the Gaming Amendment Act 1949 (which amended the Gaming Act, 1908).<sup>13</sup>

During the 1970s, the New Zealand society's views on gambling changed and restrictions eased.<sup>14</sup> As a result, a new gambling statute, the Gaming and Lotteries Act 1977, came into force on 1 April 1978. It regulated various matters relating to lotteries and gambling and specifically contained an exemption for competitions that qualified as "sales promotions".<sup>15</sup> If a scheme qualified as such, it would not be prohibited or regulated by the Act's provisions relating to prize competitions and it could therefore be conducted lawfully. The concept "sales promotion" was defined as follows:

any prize competition -

- (a) promoted by the manufacturer or a retailer of any goods or services for the purpose (which shall be a question of fact) of promoting the sale of those goods or services; and
- (b) in respect of which the right to enter is dependent on the purchase, at a price not exceeding the usual retail price, of any such goods or services, or any specified quantity or value of such goods or services, within a specified period; and
- (c) in respect of which no other direct or indirect consideration is paid to participate.<sup>16</sup>

The 1977 Act therefore allowed promoters to conduct competitions in order to promote sales of their goods or services, as long as the relevant price remained the usual one and no other consideration was payable.

During the 1980s, two lotteries ("Lotto" and "Instant Kiwi") were launched and gaming machines were introduced.<sup>17</sup> After that, the Casino Control Act 1990 paved the way

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<sup>11</sup> Report of the Royal Commission to Inquire into and Report upon Gaming and Racing Matters in New Zealand (H-23) 1948.

<sup>12</sup> Grant 174-175.

<sup>13</sup> AGC Ch 16 1; Grant 213. In general, gambling was still prohibited and raffles had to comply with the legislation's requirements in order to be lawful.

<sup>14</sup> Grant 287.

<sup>15</sup> S18.

<sup>16</sup> S2.

<sup>17</sup> AGC Ch 16 1. These lotteries are conducted in New Zealand to this day.



matters, although it focuses on the regulation of horseracing, greyhound racing and sports betting in particular. The purposes of the NZ Gambling Act include controlling of the growth in gambling, legalising some forms of gambling (while prohibiting others), promoting responsible gambling, guarding against the risks associated with gambling and crimes related to gambling and ensuring that proceeds from gambling are distributed appropriately.<sup>27</sup>

There are three main authorities that oversee or play a part in the regulation of gambling in New Zealand. The Department of Internal Affairs is tasked with the controlling of gambling and also issues licenses for gambling that takes place outside casinos.<sup>28</sup> The Gambling Commission's main function is the licensing of casinos.<sup>29</sup> The New Zealand Lotteries Commission operates lotteries in New Zealand, including Lotto and Instant Kiwi.<sup>30</sup> Until recently, the position in New Zealand in this regard differed from the one in South Africa, where the National Lottery was conducted by a licensed operator under supervision of the National Lotteries Board. However, the Lotteries Amendment Act, 2013 came into force in South Africa on 14 April 2015 and changed the National Lotteries Board's name to the National Lotteries Commission. The powers of South Africa's National Lotteries Commission were extended too and the National Lottery can now be conducted by a licensed operator or an organ of state. (Previously, organs of state could not be licensed to operate the National Lottery.)<sup>31</sup> The third main authority on New Zealand's gambling scene is the Ministry of Health, which plays a role in gambling regulation, particularly in the area of problem gambling services.<sup>32</sup> In South Africa, it seems that problem gambling is mostly the responsibility of the National Responsible Gambling Programme and the South African Responsible Gambling Foundation – and not South Africa's Department of Health.<sup>33</sup>

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<sup>27</sup> S3.

<sup>28</sup> Department of Internal Affairs "Gambling Fact Sheet #1: Gambling Regulation in New Zealand" ("Fact Sheet 1") 2. The unit is known as "Gambling Compliance". It also fulfils other functions, such as providing Government with policy input, educating the public and setting certain gambling related rules and standards.

<sup>29</sup> Fact Sheet 1 2. The Gambling Commission also hears appeals against decisions of the Department of Internal Affairs and can function as a commission of enquiry.

<sup>30</sup> Fact Sheet 1 2.

<sup>31</sup> See, inter alia, sections 1(a), 3, 4 and 13 of the Lotteries Amendment Act, 2013 and the Memorandum on the Objects of the Lotteries Amendment Bill, 2013.

<sup>32</sup> Fact Sheet 1 2.

<sup>33</sup> National Responsible Gambling Programme "History, Structure and Function of the NGRP" <http://www.responsiblegambling.co.za/content/?37> (accessed on 21 February 2015); Collins P ea

As a general departure point, gambling is prohibited in New Zealand unless it is authorised by the NZ Gambling Act, the Racing Act 2003 or constitutes private gambling.<sup>34</sup> “Private Gambling” is defined as “gambling by persons at a private residence”, but it must comply with a number of requirements in order to be lawful.<sup>35</sup> The requirements include, *inter alia*, that all stakes placed must be distributed as rewards, the gambling must mainly be a form of social event or entertainment, the person conducting the gambling must not make money out of it and there must be no admission fees.<sup>36</sup> The NZ Gambling Act expressly prohibits bookmaking and remote interactive gambling,<sup>37</sup> and does not allow the authorisation of any of those activities.<sup>38</sup>

The NZ Gambling Act provides for six different classes of authorised gambling.<sup>39</sup> No licence is required for the first two classes.<sup>40</sup> Gambling must meet a variety of criteria in order to be categorised as class 1 or 2 gambling. These criteria relate to, *inter alia*, the purposes for which the gambling proceeds will be applied, the total value of prizes, the potential turnover of the gambling and the frequency of the gambling.<sup>41</sup> In order to conduct gambling that falls within classes 3 and 4 an operator must obtain a licence.<sup>42</sup>

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“Addressing Problem Gambling: South Africa’s National Responsible Gambling Programme” 2011 *South African Medical Journal* 101:10 722-723.

<sup>34</sup> NZ Gambling Act, s9(1). Fact Sheet 1 1.

<sup>35</sup> S4.

<sup>36</sup> See the definition of “private gambling” in s4.

<sup>37</sup> According to s4(1):

**“remote interactive gambling—**

(a) includes—

- (i) gambling by a person at a distance by interaction through a communication device; or
- (ii) the conduct of gambling described in subparagraph (i) by a person; but

(b) does not include—

- (i) gambling conducted by the Lotteries Commission; or
- (ii) gambling authorised under the Racing Act 2003; or
- (iii) gambling by a person in New Zealand conducted by a gambling operator located outside New Zealand; or
- (iv) a sales promotion scheme that is in the form of a lottery and is conducted in New Zealand.”

<sup>38</sup> S9(2)(b).

<sup>39</sup> S20(1).

<sup>40</sup> S23 and 26.

<sup>41</sup> See s22 for the criteria that apply to class 1 gambling and s24 for those that relate to class 2 gambling. S25 also contains a list of requirements that apply to class 2 gambling specifically. Those requirements have to be met in relation to gambling that meets the criteria in s24 and relate to matters such as the publication of point of sale information, the announcement of results, a prohibition on the incurring of costs relating to the claiming of prizes as well as requirements that relate to unclaimed prizes.

<sup>42</sup> S28(1) and 31. See s27 for the criteria that relate to class 3 gambling and s30 for the criteria that apply in respect of class 4 gambling.

The remaining two classes encompass casino gambling and lotteries conducted by the Lotteries Commission.

Apart from dealing with the various classes of authorised gambling, the NZ Gambling Act also deals with matters such as application for and renewal and suspension of gambling licences.<sup>43</sup> Part 3 of the NZ Gambling Act provides for the establishment of the Gambling Commission and matters related to the operation of the Commission.<sup>44</sup> A large portion of the statute is dedicated to the New Zealand Lotteries Commission and the operation of lotteries.<sup>45</sup> The distribution of lottery proceeds is regulated as well and the NZ Gambling Act provides for the establishment of the New Zealand Lottery Grants Board in this regard.<sup>46</sup>

In order to deal with the issue of problem gambling, the NZ Gambling Act contains various provisions that deal with “harm prevention and minimisation”.<sup>47</sup> Subpart 1 imposes age restrictions on specific types of gambling. In terms of section 301, it is an offence for a person under the age of 18 years to purchase a ticket for an instant game and certain other lotteries. Persons under that age are prohibited from participating in class 4 gambling and casino gambling too.<sup>48</sup> Subpart 2 regulates admission to gambling venues and makes provision for the issuing of exclusion orders in order to prevent problem gamblers from entering gambling venues. The NZ Gambling Act also provides for the development and implementation of an “integrated problem gambling strategy” in order to curb problem gambling.<sup>49</sup> In order to fund the problem gambling strategy, a levy can be imposed on gambling operators.<sup>50</sup>

The NZ Gambling Act deals with various miscellaneous matters as well, such as the enforceability of gambling contracts,<sup>51</sup> and prohibits the provision of credit for gambling

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<sup>43</sup> See, for example, subpart 3 (licensing of class 3 gambling), subpart 4 (licensing of class 4 gambling) and subpart 5 (casino gambling) in Part 2 of the NZ Gambling Act.

<sup>44</sup> See s220 to 235.

<sup>45</sup> See subpart 2 of part 3 of the NZ Gambling Act.

<sup>46</sup> See subpart 3 of the NZ Gambling Act.

<sup>47</sup> See part 4 of the NZ Gambling Act. The provisions are aimed at protecting consumers and the public in general.

<sup>48</sup> See s302 and 303.

<sup>49</sup> S317 and 318.

<sup>50</sup> S319 to 323.

<sup>51</sup> In terms of s14(1), a contract will be illegal if it relates to illegal gambling, but will be enforceable under s14(2) if it is authorised by or under the NZ Gambling Act.



purposes.<sup>52</sup> It is also an offence to advertise overseas gambling in New Zealand.<sup>53</sup> In this regard, the NZ Gambling Act creates an anomalous position when it comes to the internet and gambling. It is illegal for a person in New Zealand to participate in remote interactive gambling<sup>54</sup> (online gambling) and to advertise overseas online gambling in New Zealand. However, a person in New Zealand may participate in online gambling which is conducted by an operator based outside New Zealand.<sup>55</sup>

Online gambling was the subject matter of *Department of Internal Affairs v TV Works Ltd*,<sup>56</sup> in which the accused were charged with advertising overseas gambling in New Zealand.<sup>57</sup> The District Court confirmed the anomalous position, noting that New Zealand courts do not have jurisdiction over matters outside New Zealand and mentioning that the NZ Gambling Act did not prohibit someone in New Zealand from participating in online gambling offered by an operator outside that country.<sup>58</sup> The court dismissed the charges on the basis that the relevant activity did not constitute gambling. However, the decision on that basis was overturned on appeal to the High Court,<sup>59</sup> and on further appeal the High Court's decision was confirmed by the Court of Appeal.<sup>60</sup> It appears that under New Zealand's previous gambling statute, the Gaming and Lotteries Act 1977, the position was similar in that the Department of Internal Affairs acknowledged that persons in New Zealand could participate in online gambling conducted by operators outside New Zealand, although such activity may

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<sup>52</sup> S15. However, the holder of a casino operator's licence may offer or provide credit with the approval of the Casino Control Authority or the Gambling Commission. (S15(3))

<sup>53</sup> S16(1). See CCH 28-29.

<sup>54</sup> See the definition in fn 37 above and the prohibition on remote interactive gambling in s9(1)(2)(b).

<sup>55</sup> The District Court judgement also drew attention due to its recognition of the digital era. The judgement was in digital form and contained embedded videos. See for example Shera R "Judge Harvey Goes Web 2.0" (<http://www.lojo.co.nz/updates-article/Judge-Harvey-Goes-Web-20>, accessed on 23 February 2015).

<sup>56</sup> CR 08004505568-620 (District Court, Auckland, 23 June 2010).

<sup>57</sup> Paras 25-33 of the judgement.

<sup>58</sup> Paras 109-110 of the judgement.

<sup>59</sup> *Department of Internal Affairs v TV Works Ltd* CRI 2010-404-256 [2010] NZHC 2024 (17 November 2010).

<sup>60</sup> *TV Works Ltd v Department of Internal Affairs* [2012] NZCA 160; NZAR 534 (26 April 2012). *The New Zealand Herald* "Judge calls bluff on online gambling site" 10 July 2010 ([http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10657874](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10657874), accessed on 23 February 2015); *The New Zealand Herald* "Court settles wrangle over definition of gambling" 26 April 2012 ([http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10801678](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10801678), accessed on 23 February 2015); Nightingale S ea "Internet gambling – But not as you know it" (<http://www.buddlefindlay.com/legal-update-on-ICT-aug-2011>, accessed on 23 February 2015).



Gambling Act, it becomes clear that such a competition could fall within the ambit of the Act, potentially rendering such a competition illegal.<sup>68</sup> In some circumstances, a promotional competition could be classified as “gambling” if participants submit entries (which might be regarded as consideration<sup>69</sup> if one follows a broad interpretation of the term) with the hope of winning money in a competition where the outcome is determine wholly or partly by chance (such as in the event of a random draw). A promotional competition could also be categorised as a “lottery” if one considers that some promotional competitions involve indirect payment by participants who stand a chance to win money prizes in a draw that takes place at the conclusion of the competition.

In view of the abovementioned issues, organisers of promotional competitions in New Zealand run the risk of falling foul of the NZ Gambling Act’s provisions and should therefore take care to prevent their competitions from being illegal. However, the New Zealand legislature must have recognised the need to allow lawful operation of such competitions, because provision has been made for the conducting of such competitions in the NZ Gambling Act. Sales promotion schemes are regulated by way of section 18 of the NZ Gambling Act. As such, the regulation of these competitions form part of gambling legislation, in contrast with the position in South Africa where promotional competitions are now regulated as part of consumer protection legislation – specifically section 36 of the Consumer Protection Act, 2008. It is interesting to note that some organisations in New Zealand advocate for the regulation of sales promotion schemes to be shifted to consumer protection legislation (i.e. the Fair Trading Act), while a similar shift has already happened in South African legislation.<sup>70</sup>

The NZ Gambling Act deals in a very succinct manner with promotional competitions (referred to as “sales promotion schemes” in New Zealand).<sup>71</sup> Section 18 explicitly

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<sup>68</sup> Bachman E, Knox L and Peacock R “New Zealand” in *International Promotion Marketing Law Book* (“Bachman”) 192.

<sup>69</sup> The NZ Gambling Act does not define the term “consideration”.

<sup>70</sup> (See the submission by the Marketing Association of New Zealand in respect of the Ministry of Consumer Affairs’ Consumer Law Reform Discussion Paper, [http://www.consumeraffairs.govt.nz/pdf-library/consumer-law-reform-submissions-pdfs/nz-marketing-association.pdf/at\\_download/file](http://www.consumeraffairs.govt.nz/pdf-library/consumer-law-reform-submissions-pdfs/nz-marketing-association.pdf/at_download/file), accessed on 28 March 2015).

<sup>71</sup> In this chapter, the terms “sales promotion scheme” and “prize competition” are used in most cases in order to refer to promotional competitions, because those terms are the ones that appear in the relevant New Zealand and British legislation.



provisions are tailored for competitions that have purchase requirements, it is submitted that the NZ Gambling Act will not be relevant in such circumstances only. In competitions with no purchase requirement, participants might still be required to tender consideration – in which event the competition could still be classified as gambling. Alternatively, in order to remove the competition from the NZ Gambling Act's scope, the organiser would have to structure the competition in such a way that it does not contain all of the elements of “gambling” or a “lottery”.<sup>77</sup> This could be done by eliminating one of the traditional elements of gambling or a lottery, such as making the competition purely skill based (thereby removing the chance element).<sup>78</sup> The organiser could also attempt to remove the consideration element by making entry into the competition absolutely free.<sup>79</sup>

Turning to the four criteria contained in the definition of “sales promotion scheme”, one sees that two of those relate to the consideration element. Subsection (a) presupposes that an organiser of a sales promotion scheme would require participants to purchase goods or services in order to enter the competition, and states that such consideration may not exceed the usual retail price of the goods. The NZ Gambling Act does not explain how one would determine if a price is the “usual retail price”. Presumably, this is the price normally charged. In other words, the price that would be payable if no competition was running. It would thus be lawful for an organiser to require entrants to purchase goods or services.<sup>80</sup> However, if an organiser wishes for its scheme to comply with the requirements for a sales promotion scheme, the organiser would have to require participants to purchase goods or services in order to enter the competition.<sup>81</sup> Of course, if participants are not required to purchase goods or services, and there is no other form of consideration payable, the NZ Gambling Act would not

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<sup>77</sup> CCH *Sales and Marketing Law in New Zealand* (“CCH”) 23-24. The authors suggest that organisers should first check whether the competition contains an element of gambling. If it does not, the competition will not be affected by the NZ Gambling Act. However, if a gambling element is present, the competition needs to comply with all of the requirements contained in the definition of “sales promotion scheme” in order to be legal.

<sup>78</sup> CCH 25. The authors provide the example of “a giveaway where the first 10 people get a prize”. However, it is questionable whether there will be no element of chance in such a competition, since it might be argued that chance will determine who the first ten people will be.

<sup>79</sup> CCH 25.

<sup>80</sup> In some countries, such as France, it is not lawful for organisers to require entrants to purchase goods or services in order to enter a competition. (Béjot M “France” in *International Promotion Marketing Law Book* 99) In South Africa, the position regarding this issue is unclear. See the discussion at pages 226-228 below.

<sup>81</sup> This is due to the provisions in s4(a).



sales promotion scheme “must be run within a specified period of time” and that the relevant information should be included in material that promotes the competition.

The last requirement in the definition centres on the chance element. It is clear from that requirement that a competition would be classified as a sales promotion scheme if it involves chance in one way or another. This requirement is cast in broad terms and would affect any competition which contains an element of chance. However, whereas a competition organiser would usually scrutinize the chance related portions of definitions such as these in order to attempt to avoid their competition from falling within the scope of same, the situation is the other way around when it comes to the NZ Gambling Act. When that Act is considered, organisers of competitions (in which there is a purchase requirement) will endeavour to ensure that they can structure their competitions in such a way that they will actually fall within the ambit of the definition of “sales promotion scheme”.

Apart from the four requirements contained in the “sales promotion scheme” definition, organisers of such schemes must also ensure that the prizes awarded in such a scheme are not prohibited prizes in terms of the provisions of section 17.<sup>89</sup> That section empowers the making of regulations that specify prohibited prizes and confirms that gambling will be regarded as illegal if prohibited property is offered or used as prizes.<sup>90</sup> The Gambling (Prohibited Property) Regulations 2005 have been issued in this regard and prohibits items such as liquor, firearms and tobacco products from being awarded as prizes. A promoter may also not offer vouchers or entitlements to any prohibited property. The nature of a prize is required to be disclosed comprehensively too.<sup>91</sup>

The Gambling Amendment Act<sup>92</sup> introduced a new section 17A which relates to the retail value of prizes. It requires that someone who conducts gambling must inform entrants of the “retail value and characteristics of any non-cash prize offered or used as a prize for the gambling”.<sup>93</sup> Although the NZ Gambling Act does not state this clearly, it is arguable that organisers of sales promotion schemes will have to comply

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<sup>89</sup> The introductory text of the “sales promotion scheme” definition makes it clear that such a scheme may not involve a prohibited prize.

<sup>90</sup> S17(2).

<sup>91</sup> Fact Sheet 9 2.

<sup>92</sup> 2015 (No 3).

<sup>93</sup> S17A(1).

with this new requirement, since those schemes constitute gambling under the Act. It is submitted that this requirement was introduced in order to assist the public to make informed decisions before they enter competitions or participate in gambling.

The NZ Gambling Act's prohibition on remote interactive gambling creates challenges for promoters who wish to run promotional competitions online.<sup>94</sup> As mentioned before, remote interactive gambling takes place when a person gambles at a distance by interacting through a communication device.<sup>95</sup> As such, if a promotional competition involves a scheme in which entrants interact with the promoter via a communication device (such as a cell phone or computer), the competition may constitute remote interactive gambling. This would be the case if the relevant competition contains the typical elements of gambling, such as the staking of consideration on an uncertain event in the hope of winning a prize. However, there is an exception for remote interactive competitions that are run as sales promotion schemes specifically. The definition of "remote interactive gambling" provides that such gambling does not include "a sales promotion scheme that is in the form of a lottery and is conducted in New Zealand".<sup>96</sup> It seems, therefore, that a gambling type promotional competition conducted via the internet, a cell phone or similar means will be lawful only if the competition is structured as a lottery.

The use of the term "lottery" in the exception that relates to remotely conducted sales promotion schemes creates some confusion. The NZ Gambling Act's definition of "lottery"<sup>97</sup> contemplates a scheme in which persons pay consideration in order to stand the chance to win a money prize in a draw. If one had to use this definition, it could create a situation where a promoter would have to require participants to pay consideration in order to enter the competition and the promoter would have to award money prizes specifically. If one considers that promoters may in fact not charge consideration in respect of a sales promotion scheme use of the NZ Gambling Act's definition of "lottery" would be nonsensical. It does need to be pointed out that the definition of "lottery" includes a lotto, raffle and sweepstakes. Those terms are,

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<sup>94</sup> Bachman 194; Wilson V "The Legality of Text Competitions under the Gambling Act" 29 September 2004 ("Wilson"), <http://www.internationallawoffice.com/newsletters/detail.aspx?g=b540e029-0910-4d1c-bfca-0ff183aadcc6&redir=1> (accessed on 25 February 2015).

<sup>95</sup> S4(1). See fn 37 above.

<sup>96</sup> Paragraph (b)(iv) of the definition of "remote interactive gambling". See CCH 27-28.

<sup>97</sup> See fn 67 above.



however, not defined. Still, some promotional competitions are conducted in the form of raffles and, as such, one might be able to bring such competitions within the scope of the “lottery” definition. Accordingly, it is submitted that the legislature had random draws in mind when it used the term “lottery” in the exception relating to sales promotion schemes. In order to be able to benefit from the sales promotion scheme exception to remote interactive gambling, a promoter would therefore have to structure its competition in such a manner that a group of participants enter the competition and the outcome needs to be determined by way of a random draw at the end of the competition. Any other form of gambling based promotional competition would fall foul of the prohibition on remote interactive gambling.

An “instant win game” would be an example of a competition which would be regarded as remote interactive gambling if participants have to access the internet in order to play such game.<sup>98</sup> The reason for this would be that a single participant will have an instant, isolated opportunity to determine whether or not they have won a prize and the competition will not involve a type of lottery where all entrants are entered into a single competition with a draw at the end. In order to avoid a competition from being classified as remote interactive gambling, an organiser would have to remove the remote interactive element. In other words, participation would have to take place by means other than the internet, a mobile phone or something similar.<sup>99</sup>

One must also note that the sales promotion exception to remote interactive gambling requires that the sales promotion must be conducted in New Zealand.<sup>100</sup> This would mean that a remote interactive sales promotion scheme would not fall within the scope of the exception if it is operated from outside New Zealand, but is marketed to and open for participation by persons in New Zealand. In order to be lawful, an overseas promoter would have to ensure that its sales promotion scheme is actually organised and run in New Zealand.<sup>101</sup> It is submitted that the legislature inserted these provisions in order to protect consumers against potential abusive schemes that are not regulated by New Zealand’s legislature and cannot be policed by the authorities in that country.

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<sup>98</sup> CCH 28.

<sup>99</sup> Wilson (unpaged). Wilson, quoting the Department of Internal Affairs, also mentions that a text competition would be unlawful if no goods or services are actually promoted

<sup>100</sup> Fact Sheet 9 1; Baldwin.

<sup>101</sup> Baldwin (unpaged).

#### 4.2.4 Prize competitions and spot prizes

In addition to sales promotions schemes, the NZ Gambling Act also regulates other forms of competitions that might be related to promotional competitions. In particular, the Gambling Act (Prize Competition) Game Rules 2004 contain provisions in respect of prize competitions. Chance plays a role in these competitions, but entrants have to exercise a measure of knowledge or skill as well.<sup>102</sup> To qualify under this category, direct or indirect consideration must be paid by entrants and prizes must be in the form of money.<sup>103</sup> The Department of Internal Affairs mention tagged fishing competitions and sporting competitions which involve random draws as examples of prize competitions.<sup>104</sup> In view of the consideration requirement, these competitions are lotteries and not sales promotion schemes, and operators of such competitions must comply with onerous and restrictive requirements.<sup>105</sup>

Specific regulations have been issued under the NZ Gambling Act in order to declare that spot prize competitions will not be regarded as gambling if they meet the criteria in those regulations.<sup>106</sup> In essence, a spot prize competition is a scheme in which prizes are awarded by way of a draw which is held in relation to a specific event (for example a sport tournament). If a spot prize competition complies with the relevant

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<sup>102</sup> The Gambling Act (Prize Competition) Game Rules 2004 define “prize competition” as follows:

“**prize competition** means a scheme or a competition -

- (a) for which direct or indirect consideration is paid to participate; and
- (b) that distributes prizes of money or in which participants seek to win money; and
- (c) for which the result is determined partly by chance and partly by the performance by the participant of an activity of a kind that may be performed more readily by a participant possessing or exercising some knowledge or skill, whether or not it may also be performed successfully by chance.”

<sup>103</sup> See paragraphs (a) and (b) of the definition of “prize competition”.

<sup>104</sup> Department of Internal Affairs “Prize Competition Game Rules” ([http://www.dia.govt.nz/diawebsite.nsf/wpg\\_URL/Services-Casino-and-Non-Casino-Gaming-Prize-Competition-Game-Rules](http://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Services-Casino-and-Non-Casino-Gaming-Prize-Competition-Game-Rules), accessed on 28 March 2015)

<sup>105</sup> Game rules 4 to 10 contain stringent requirements, relating to matters such as competition tickets, prizes, record keeping and auditing.

<sup>106</sup> The Gambling (Non-gambling Activities) Regulations 2013. Regulation 3(1) defines a spot prize competition as follows:

a lottery having the following characteristics:

- (a) it forms part of, or is conducted together with, during, or within 7 days after the completion of, a competition or event;
- (b) it is subsidiary to the competition or event;
- (c) the consideration paid (directly or indirectly) to participate in it is the consideration paid to participate in or attend the competition or event, and no additional consideration (direct or indirect) is required.

requirements, the competition would be lawful and the operator would not require a gambling licence.<sup>107</sup>

#### 4.2.5 Other requirements relating to promotional competitions

When running promotional competitions in New Zealand promoters do not have to be mindful of gambling legislation only. They also need to ensure that their competitions do not fall foul of the provisions contained in related legislation and self-regulatory industry codes.<sup>108</sup>

For promoters, the Fair Trading Act 1986 (“FTA”) is the most important legislation to consider, apart from the NZ Gambling Act. The FTA’s purposes include the prevention of conduct that is harmful to consumers and ensuring that consumers receive truthful information.<sup>109</sup> It is aimed at protecting consumers’ interests and confidence too.<sup>110</sup>

Regarding the FTA’s purpose, Judge Callander remarked as follows:

The trick, it seems, is to sort the genuine from the bogus, the legitimate from the misleading and deceptive. One reason for the Fair Trading Act 1986 was to ban misleading conduct and deceptive practices used by predatory con artists.”<sup>111</sup>

In the case of promotional competitions and sales promotion schemes, the FTA’s provisions would mostly be relevant in relation to the marketing and promoting of those

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<sup>107</sup> Department of Internal Affairs “Gambling Fact Sheet #40: Spot Prize Competitions” (“Fact Sheet 40”) ([http://www.dia.govt.nz/diawebsite.nsf/Files/Gambling-Fact-Sheets/\\$file/Gambling-Fact-Sheet-40-Spot-Prize-Competitions-9-July-2014.pdf](http://www.dia.govt.nz/diawebsite.nsf/Files/Gambling-Fact-Sheets/$file/Gambling-Fact-Sheet-40-Spot-Prize-Competitions-9-July-2014.pdf), accessed on 24 February 2015). Regulation 4 lists the following requirements that have to be met in order for a spot prize competition to be regarded as a non-gambling activity:

- (a) the determination of its outcome does not involve any gaming machine; and
- (b) no prize is property of a class specified by regulations under section 17 of the principal Act as property that must not be offered as a reward for gambling or used to reward a winner of gambling; and
- (c) the main event—
  - (i) is not itself an act, behaviour, or transaction that is gambling; and
  - (ii) benefits the community in which it is held (or some wider community of which it forms part).”

South Africa’s Lotteries Act, 1997 contains a similar exemption relating to lotteries that are conducted in relation to exempt entertainment, although the requirements are more onerous than those of the relevant New Zealand regulations that relate to spot prize competitions. (See s36 of the Lotteries Act, 1997.)

<sup>108</sup> CCH 29-30, 67-68; Bachman 190; Baldwin; Hurley & Smedley.

<sup>109</sup> FTA, s1A. Commerce Commission New Zealand “What is the Fair Trading Act ... and how does it affect me?” (<http://www.comcom.govt.nz/fair-trading/fair-trading-act-fact-sheets/what-is-the-fair-trading-act/>, accessed on 25 February 2015).

<sup>110</sup> S1A(1).

<sup>111</sup> *Commerce Commission v Probitas Ltd and Ewan Malcolm Campbell* District Court, Tauranga, 26 March 2007 page 2, paragraphs 3 and 4).

competitions and schemes.<sup>112</sup> In particular, promoters need to ensure that they do not contravene the provisions of section 17, which deals with the offering of gifts and prizes.

In short, section 17 prohibits a person from offering gifts and prizes if they have no intention to in fact provide those gifts or prizes, or if those prizes or gifts will not be provided in accordance with the offer.<sup>113</sup> In order to ensure that their competition offers comply with the provisions of section 17, promoters need to ensure that their offers are as clear and accurate as possible and that the relevant terms and conditions contain all crucial details.<sup>114</sup> The terms and conditions should, in particular, specify the time period during which the competition will run.<sup>115</sup> Promoters need to make sure that prizes are described without any ambiguity or untruth and that entrants will not be deceived or misinformed when it comes to the prizes or the odds of winning.<sup>116</sup> For example, if a supplier offers the opportunity to win a specified sum of money, the offer would breach section 17's provisions if the winner will in fact receive a gift voucher to purchase the supplier's products, instead of the cash sum.<sup>117</sup> A promoter would also breach those provisions if it offers a prize, but the offer does not disclose that there is a condition attached to the prize.<sup>118</sup>

The provisions of section 17 have formed the basis of a judgement of New Zealand's Court of Appeal. In *Commerce Commission v Progressive Enterprises Ltd*,<sup>119</sup> a large supermarket chain was taken to task by the Commerce Commission in a matter that

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<sup>112</sup> Bachman 190, 193; Baldwin; Hurley & Smedley. When devising marketing and promotional materials and campaigns surrounding promotional competitions, promoters need to take note of the provisions of Part 1 of the FTA in particular.

<sup>113</sup> The full text of s17 reads as follows:

“No person shall,—

(a) in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services; or

(b) in connection with the sale or grant or the possible sale or grant of an interest in land or with the promotion by any means of the sale or grant of an interest in land,—  
offer gifts, prizes, or other free items with the intention of not providing them or of not providing them as offered.”

<sup>114</sup> Commerce Commission New Zealand “Special offers and competitions” August 2010 (“FTA Competitions Fact Sheet”) (<http://www.comcom.govt.nz/dmsdocument/1105>, accessed on 25 February 2015).

<sup>115</sup> FTA Competitions Fact Sheet.

<sup>116</sup> FTA Competitions Fact Sheet.

<sup>117</sup> CCH 29.

<sup>118</sup> CCH 29.

<sup>119</sup> [2010] NZCA 374.

related to a competition's time period. In that case, the supermarket sold cereals which displayed offers to win an overseas trip.<sup>120</sup> However, the competition had already closed and the in-store promotional material did not state the closing date.<sup>121</sup> Consumers complained that the relevant packaging was still found in stores even though the competition had come to an end.<sup>122</sup> In the District Court, it was held that Progressive Enterprises contravened section 17.<sup>123</sup> However, on appeal, both the High Court and the Court of Appeal found that the Commerce Commission had to prove that Progressive Enterprises intended for consumers to be misled (in other words, *mens rea* had to be present), and that the Commerce Commission failed to do so.<sup>124</sup>

In structuring and running competitions in New Zealand, the provisions of self-regulatory industry codes need to be kept in mind as well.<sup>125</sup> There are various codes relating to advertising, which have been issued by the Advertising Standards Authority.<sup>126</sup> The advertising codes of practice relate to matters such as ethics, alcohol advertising, gaming and gambling advertising and advertising aimed at children.<sup>127</sup>

Organisers of sales promotion schemes need to ensure that their promotions and advertising in general comply with the relevant advertising codes. For example, when competitions are aimed at children, the relevant rules must be made clear and the advertiser may not exaggerate prize values and the odds of winning.<sup>128</sup> Where competitions are aimed at children, promoters must take steps to ensure that "excessive repeat purchase" is not promoted.<sup>129</sup> In an alcohol related competition, hazardous prizes may not be awarded if alcohol must be purchased by entrants in order to participate in such a competition.<sup>130</sup> (The Code does not explain the reasoning

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<sup>120</sup> Paras 5-7 of the judgement.

<sup>121</sup> Par 7 of the judgement. The closing date was displayed only inside the cereal packaging and could not be discovered unless the packaging was opened.

<sup>122</sup> Paras 13 and 15 of the judgement.

<sup>123</sup> Par 1 of the judgement. (For the District Court's judgement, see *Commerce Commission v Progressive Enterprises Ltd* DC Manukau CRI-2007-092-6035, 14 April 2008)

<sup>124</sup> Paras 2 and 30-40 of the Court of Appeal judgement.

<sup>125</sup> Hurley & Smedley 2; Bachman 193.

<sup>126</sup> See the Advertising Standards Authority's website: [www.asa.co.nz](http://www.asa.co.nz) (accessed on 28 March 2015).

<sup>127</sup> The Advertising Standards Authority has compiled a booklet which contains the various codes of practice. It is available at this link: [http://www.asa.co.nz/pdfs/ASA%20CoP%202014%20\(Web\).pdf](http://www.asa.co.nz/pdfs/ASA%20CoP%202014%20(Web).pdf) (accessed on 8 August 2015).

<sup>128</sup> Principle 2(f) of the Code for Advertising to Children.

<sup>129</sup> Principle 2(j) of the Code for Advertising to Children.

<sup>130</sup> Principle 1(f) of the Code for Advertising and Promotion of Alcohol.

behind this, but it is submitted that the prohibition is intended to protect consumers against harm that might be caused if hazardous prizes are used while people are under the influence of alcohol.) Further, if the prize is in the form of a large volume of alcohol, the prize may not be made available in one delivery.<sup>131</sup> In gambling and gaming advertisements, advertisers may not exaggerate the odds of winning or the size of prizes.<sup>132</sup> Advertisers must be able to substantiate winning claims as well and, unless skill plays a role in the outcome of a game, they may not create the impression that skill can influence the result of the game.<sup>133</sup> Alcohol advertisers must also ensure that their advertisements and competitions are not open to or aimed at minors.<sup>134</sup> In food advertising, promoters must take steps to make sure that their competitions “do not encourage excessive repeat purchases of foods high in fat, salt and sugar”.<sup>135</sup>

In general, promoters should ensure that their sales promotions and competitions are conducted in accordance with the guidelines and standards of other industry organisations and authorities. These include the Broadcasting Standards Authority and the Interactive Advertising Bureau of New Zealand.

#### 4.2.6 Remarks

In New Zealand, promotional competitions are still regulated by gambling legislation. The NZ Gambling Act specifically authorises promotional competitions, known as “sales promotion schemes” in that country.<sup>136</sup> In South Africa, a shift has been made by moving the regulation of these competitions from gambling legislation to consumer protection legislation.<sup>137</sup> Whereas New Zealand’s legislation has a few relatively

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<sup>131</sup> Principle 2(c) of the Code for Advertising and Promotion of Alcohol. The prize must also be in line with the Alcohol Advisory Council’s standard drink guidelines.

<sup>132</sup> Principle 3(a) of the Code for Advertising Gaming and Gambling.

<sup>133</sup> Principles 3(a) and (b) of the Code for Advertising Gaming and Gambling.

<sup>134</sup> See principles 3(b), (c) and (i).

<sup>135</sup> Principle 2(f) of the Code for Advertising Food.

<sup>136</sup> S18 of the Gambling Act 2003.

<sup>137</sup> While this recognises the sales promotional nature of these competitions, the shift has not been made without resultant complications. For example, a chance based competition would still qualify as a lottery. As such, it would be unlawful by virtue of the provisions of s56 of the Lotteries Act, 1997, unless it is authorised by the Lotteries Act or any other law. Therefore, if a competition complies with s36 of the CPA, it would be authorised. If not, it would have to comply with the requirements of the Lotteries Act, which would be very difficult to meet. Formerly, promotional competitions were regulated and authorised by s54 of the Lotteries Act, but s54 has been repealed. Nevertheless, the Lotteries Act still refers to s54 in a number of places, including s56(b) and (c). Furthermore, whereas the Lotteries Act used to define “promotional competition” with reference to the definition contained in the CPA, the Lotteries Amendment Act, 2013 removed the definition, thereby making it difficult to interpret provisions

simple requirements for the legal conducting of promotional competitions, South African legislation contains detailed and somewhat lengthy provisions that regulate promotional competitions.<sup>138</sup> It is submitted that the reason for the more comprehensive approach in South Africa lies in the fact that those provisions are aimed at protecting consumers and that the legislature therefore meant to regulate promotional competitions more closely in order to protect consumers against abusive practices.

There is some merit in New Zealand's concise and uncomplicated regulation of promotional competitions. It provides promoters with the opportunity to conduct sales promotions in an environment that is not overly restrictive. For example, New Zealand's law does not require that the running of a promotional competition must be overseen by an independent attorney, advocate, auditor or the like.<sup>139</sup> That country's legislation also makes it clear that a sales promotion scheme can involve a requirement that entrants must purchase a promoter's goods or services in order to be able to participate in a competition. In South Africa, this position is not entirely certain and promoters would welcome clarification in this regard.<sup>140</sup> The NZ Gambling Act also allows for entry submission costs to be incurred at standard telecommunication or postage rates.<sup>141</sup> South Africa similarly allows such charges,<sup>142</sup> but the legislature chose to impose a specific monetary amount on the charges that may be incurred when entries are submitted electronically.<sup>143</sup> The monetary amount has not been updated for a number of years.<sup>144</sup> It is submitted that this makes it difficult

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in the Lotteries Act that still refer to "promotional competitions". These issues will be discussed in further detail below. (See Chapter 5.)

<sup>138</sup> See s36 of the CPA.

<sup>139</sup> In South Africa, this is a requirement. See regulation 11(5) of the Consumer Protection Act Regulations.

<sup>140</sup> S36(3)(b) states that entrants may not be required to pay consideration in order to participate in a promotional competition. However, in an apparent attempt to clarify this, s36(4)(b) refers to a requirement that entrants must purchase goods or services, but states that the ordinary price for those goods or services may not be increased. This issue will be discussed in further detail below. (See section 5.4.6 below)

<sup>141</sup> See paragraph c of the definition of "sales promotion scheme" in New Zealand's Gambling Act 2003. The position is also further clarified by s4(2A).

<sup>142</sup> S36(3)(a) of the CPA.

<sup>143</sup> Regulation 11(1) of the Consumer Protection Act Regulations imposes a limit of R1.50 on charges relating to electronic competition entries.

<sup>144</sup> The relevant regulations were published on 1 April 2011.





The Unlawful Games Act 1541 was the first notable statute in this regard.<sup>153</sup> The Lotteries Act 1823 banned lotteries in Britain, although they were conducted intermittently in earlier times.<sup>154</sup> (The aforesaid statute created a principle which underlies British lotteries law up to the present day: lotteries are unlawful in Britain except if legislation allows their operation.<sup>155</sup>) The Betting Houses Act 1853 then outlawed betting houses and gambling remained unlawful for a number of years.<sup>156</sup>

Legalised gambling returned to Britain during the twentieth century.<sup>157</sup> As a precursor, the Select Committee on Betting Duty in 1923 accepted (although only in principle) that gambling could be legal and regulated.<sup>158</sup> Lotteries were reintroduced, in a limited fashion, when lotteries incidental to exempt entertainment as well as some private lotteries were legalised.<sup>159</sup> These lotteries were legalised by the Betting and Lotteries Act 1934, which was promulgated as a result of the findings of the Royal Commission on Lotteries and Betting which held proceedings during 1933 and 1934. A major turning point was reached after the Royal Commission on Betting, Lotteries and Gaming 1949-1951 (the “1951 Commission”) issued its report.<sup>160</sup> The 1951 Commission found that “the object of gambling legislation should be to interfere as little as possible with individual liberty to take part in the various forms of gambling but to impose such restrictions as are desirable and practicable to discourage or prevent excess.”<sup>161</sup> Consequently, the Betting and Gaming Act 1960 repealed the prohibition on gambling and made provision for a number of legalised, regulated forms of gambling.

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<sup>153</sup> Monkcom 4. The said act even banned tennis in certain circumstances. See Monkcom 4-27 for an overview of the development of British gambling legislation

<sup>154</sup> Monkcom 25; Orford 2003 2; Merkin RM “Prize Competitions – The Lottery of the Law” 1981 *Lloyd’s Maritime and Commercial Law Quarterly* 66-82 (“Merkin”) 67. (Van Niekerk JP *The Development of the Principles of Insurance Law in the Netherlands from 1500 to 1800* 104 fn 73) The 1823 Act also prohibited the sale of foreign lottery tickets in Britain.

<sup>155</sup> Monkcom 26. South African lotteries law follows a similar approach. See, for example, s56 of the Lotteries Act, 1997.

<sup>156</sup> Orford 2003 2.

<sup>157</sup> See Dixon D *From Prohibition to Regulation: Bookmaking, Anti-Gambling, and the Law for a discussion of British gambling history and, in particular, the legalisation of gambling in Britain during the twentieth century.*

<sup>158</sup> Orford 2003 3.

<sup>159</sup> Monkcom 26; Orford 2003 3. Similar provisions only entered South African law at the end of the twentieth century by way of the Lotteries Act, 1997.

<sup>160</sup> Orford 2003 3.

<sup>161</sup> Report of the Royal Commission on Betting, Lotteries and Gaming (Cmd. 8190) (“1951 Commission Report”) 55.



deviated from the philosophy that gambling demand should not be stimulated, and suggested that the National Lottery would have to be marketed in order to be successful.<sup>172</sup> However, the broad recommendations of the 1978 Royal Commission were not implemented immediately and the National Lottery was only introduced in 1994. Murphy ascribes this lack of implementation to the restrictive controls of the British Gaming Board.<sup>173</sup>

The 1978 Royal Commission examined promotional competitions in its proceedings as well.<sup>174</sup> It mentioned that many forms of competitions were in fact conducted for purposes of promoting sales.<sup>175</sup> At that stage, chance based promotional competitions were still unlawful, although some promoters nevertheless conducted some competitions.<sup>176</sup> The Commission reached various conclusions, including that it was unworkable to require that competitions had to be based on substantial skill to be lawful.<sup>177</sup> The Commission recommended that competitions without entry charges should be made lawful (even those that did not require skill), but that promoters should not be allowed to charge for entries and, if entrants are required to purchase goods in order to participate, the price of the goods should not be inflated as a result thereof.<sup>178</sup> The Commission noted that implementation of its recommendations would have a significant impact on the running of competitions, but that it supported the need to make the law less complicated, while guarding against abuse.<sup>179</sup> The Commission

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<sup>172</sup> 1978 Commission Report 5, 229-230.

<sup>173</sup> Murphy S "Towards Deregulation ... and Beyond: The Demise of the Gaming Board and the Gambling Bill 2005" 2013 *Gaming Law Review and Economics* 17:6 413 ("Murphy 2013") 413-414.

<sup>174</sup> 1978 Commission Report 240-260. The Commission surveyed a broad spectrum of competitions, ranging from competitions that had entry charges, newspaper competitions, "spot the ball" competitions, competitions run by bookmakers, charitable competitions, free competitions, competitions with product purchase requirements and competitions that required no skill.

<sup>175</sup> 1978 Commission Report 256, 258. The Commission did query competitions where consumers were required to purchase extra products in order to enter, but did not see a need for changing the law in response thereto.

<sup>176</sup> S14 of the Lotteries and Amusements Act 1976 prohibited the conducting of competitions that involved the forecasting of the results of future events as well as other competitions in which success did not depend on substantial skill. The wording of s14 is very similar to the wording of s56 of South Africa's Lotteries Act, 1997, except that the latter statute contains an exception in respect of promotional competitions. (1978 Commission Report 240-258.)

<sup>177</sup> 1978 Commission Report 259. The Commission also remarked that it did not make sense that private lotteries were unregulated, while charitable lotteries had to comply with various requirements. Furthermore, it questioned why prize competitions should be permitted for personal gain. The Commission also mentioned that competition participants should have the opportunity to determine whether or not they had won a prize.

<sup>178</sup> 1978 Commission Report 260.

<sup>179</sup> 1978 Commission Report 260. A submission to the Commission stated that a change to the law would have a negative effect on skills based competitions, because promoters would choose to run



increase sales, the scheme constituted an illegal lottery, because participants bought the packets not only in order to obtain the tea, but also to receive a price.<sup>186</sup>

A similar judgement was delivered in *Willis v Young and Stembridge*.<sup>187</sup> In that matter, a newspaper distributed numbered medals to members of the public.<sup>188</sup> The newspaper selected random numbers and the holders of the relevant medals became prize winners.<sup>189</sup> Even though entrants were not obliged to purchase newspapers or buy the medals, the court found that the competition was an illegal lottery because persons who bought the newspapers increased the newspapers' funds and this constituted the consideration element of a lottery.<sup>190</sup>

The question whether skill or chance determined the winners of a competition was central to the matter of *Witty v World Service, Ltd*,<sup>191</sup> which involved what is often classified as a "newspaper competition".<sup>192</sup> In that instance, a newspaper ran a competition in which participants had to identify geographical places that were represented by pictures that appeared in the newspaper.<sup>193</sup> The court found that this required entrants to exercise substantial skill and, as such, the competition did not constitute a lottery.<sup>194</sup> In *Whitbread & Co Ltd v Bell; Bell v Whitbread & Co Ltd*,<sup>195</sup> a scheme in which a brewer and owner of licensed premises handed out envelopes that contained letters and coupons was also not considered to be a lottery because entrants received the envelopes for free when visiting the brewers' venues.<sup>196</sup> However, the court found that the scheme constituted an illegal competition within the meaning of the relevant legislation at the time.<sup>197</sup> The court thus dismissed the appeal against the conviction in respect of s47 of the Betting, Gaming and Lotteries Act, 1963. However, the decision in the *Whitbread* case was subsequently criticised in *Imperial*

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<sup>186</sup> 211-212.

<sup>187</sup> 1907 1 KB 448.

<sup>188</sup> 449.

<sup>189</sup> 449.

<sup>190</sup> 454-455.

<sup>191</sup> 1935 All ER 243 (CD).

<sup>192</sup> Towards the end of the nineteenth century, newspapers started to change their marketing and editorial policies and sought to increase sales by way of competitions, which often involved limericks, missing words and the like. (Miers 2004 176-184)

<sup>193</sup> 243-244.

<sup>194</sup> 245.

<sup>195</sup> 1970 All ER 64.

<sup>196</sup> 68.

<sup>197</sup> 70-71.

*Tobacco Ltd v Attorney-General*.<sup>198</sup> The competition in the *Whitbread* case was declared to be an unlawful competition even though no skill was involved, but in *Imperial Tobacco Ltd* the House of Lords criticised that finding and stated that a competition should involve at least some skill in order to fall foul of the statutory prohibition.<sup>199</sup>

Section 47(1)(a) of the erstwhile Betting and Lotteries Act 1934 essentially prohibited competitions that were run by newspapers and in which prizes were offered for the forecasting of the results of a future event or a past event, the results of which were not yet known.<sup>200</sup> This prohibition came under the spotlight in *News of the World v Friend*.<sup>201</sup> That matter involved a so-called “spot the ball” competition in which the newspaper published an action picture of a football match, showing the players but not the ball.<sup>202</sup> Readers had to exercise their skill, taking into account various factors in order to decide where the ball was located, and indicate the position on the picture.<sup>203</sup> A panel of experts then evaluated entries and determined which entry best indicated the location of the ball.<sup>204</sup> The newspaper was convicted of contravening section 47(1)(a),<sup>205</sup> on the basis that readers were in fact forecasting the outcome of the experts’ decision. On appeal, the House of Lords disagreed with the court *a quo* and ruled that the appellant was convicted on a contrived construction of the relevant prohibition.<sup>206</sup> It disagreed that readers were actually participating in a forecasting competition in which they had to determine how the experts would decide and, instead, was of the view that readers understood the competition as a challenge in which they had to determine the location of the ball.<sup>207</sup>

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<sup>198</sup> [1980] All ER 866 (HL).

<sup>199</sup> See *Imperial Tobacco Ltd* 875, 879.

<sup>200</sup> South Africa’s current Lotteries Act, 1997 contains similar wording in s56(a).

<sup>201</sup> [1973] 1 All ER 422 (HL).

<sup>202</sup> 426.

<sup>203</sup> 426. They did not have to guess the location of the ball, but were required to exercise their skill to determine where best the ball could be located, based on factors such as the position of the players.

<sup>204</sup> 426.

<sup>205</sup> It should be noted that the newspaper was not charged with a contravention of s47(2), which prohibited competitions in which the outcome did not depend on substantial skill. See page 424 of the judgement.

<sup>206</sup> 429.

<sup>207</sup> 429.

In *Reader's Digest Association Ltd v Williams*<sup>208</sup> the consideration element of lotteries came under the spotlight again. Reader's Digest sent to the public envelopes random numbers, some of which entitled the relevant recipients to prizes.<sup>209</sup> Before sending out the envelopes, Reader's Digest drew a couple of random numbers. Recipients could take up the magazine's sales offer by sending back an envelope marked "Yes, please" and could at the same time send back their random number in order to see if their number matched one of the pre-drawn numbers.<sup>210</sup> If someone did not want to take up the offer, they could send back the "No, thank you" envelope in order to participate in the competition and see whether they had won a prize.<sup>211</sup> A magistrates' court ruled that Reader's Digest contravened the Betting, Gaming and Lotteries Act 1963 by using premises to conduct an illegal lottery.<sup>212</sup> However, on appeal, the Queen's Bench Division found that something would only be a lottery if it involved the distribution of prizes by means of chance, and participants had to make a contribution in order to participate.<sup>213</sup> The court found that one had to take into account the mischief which the legislation intended to prevent and pointed out that lotteries legislation protected poor people from wasting their money on lotteries.<sup>214</sup> As such, the court found that consideration constituted a key element of a lottery and that something would not be a lottery if no consideration was required.<sup>215</sup> Accordingly, the court upheld the appeal on the basis that participants in Reader's Digest's competition were not required to offer consideration or purchase the magazine's products, and that the competition therefore did not constitute a lottery.<sup>216</sup> Subsequent to this judgement, many promoters added a "no purchase necessary" alternative entry route to participants in an attempt to ensure that their competitions could not be classified as lotteries.<sup>217</sup>

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<sup>208</sup> [1976] 2 All ER 737 (QBD).

<sup>209</sup> 738. The envelopes also contained general marketing material regarding the products and magazines distributed by Reader's Digest.

<sup>210</sup> 738.

<sup>211</sup> 738.

<sup>212</sup> 738.

<sup>213</sup> 739.

<sup>214</sup> 739. The court stated that "the evil which the lottery law has sought to prevent was the evil which existed where poor people with only a few pence to feed their children would go and put these few pence into a lottery and lose them, and this sociologically was a bad thing".

<sup>215</sup> 739.

<sup>216</sup> 739 and 742.

<sup>217</sup> Lawson R "Game Over" 4 May 2007 *Solicitor's Journal* 151:17 unpagged ("Lawson 2007a") (<http://www.solicitorsjournal.com/employment/discrimination/game-over>, accessed on 2 May 2015)

Competitions that involve a purchase requirement continued to reappear in English case law. The House of Lords delivered an important judgement in this regard in the matter of *Imperial Tobacco Ltd v Attorney-General*.<sup>218</sup> In that case, a cigarette manufacturer inserted scratch cards inside cigarette boxes.<sup>219</sup> Purchasers of the cigarettes had to scratch the foil off the cards, and if three prizes on the cards matched, they won a prize.<sup>220</sup> The prizes ranged from free cigarettes to big cash prizes.<sup>221</sup> The House of Lords considered various previous judgements on the matter and eventually decided that the competition was a lottery because participants had to purchase cigarettes in order to stand a chance to win prizes, and the price paid for the cigarettes constituted consideration.<sup>222</sup> The House held that it was not necessary to prove that the consideration contributed towards the pool of prize money. The mere fact that participants were required to purchase products constituted the consideration element.<sup>223</sup> The House also mentioned that the Lotteries and Amusements Act 1976 was not necessarily aimed at the same kind of mischief as may have been discussed in older judgements and pointed out that lotteries had become lawful in the meantime.<sup>224</sup>

Some English judgements focussed specifically on so-called “hybrid schemes”.<sup>225</sup> These were competitions that involved two phases. In the first phase, entrants were required to show some kind of skill (such as the answering of a question).<sup>226</sup> Often participants also had to offer consideration (such as paying for the promoter’s product in order to enter the competition). However, since that phase of the competition involved skill, the consideration element did not turn it into a lottery. Because many participants usually sent in the correct answer, the competition moved to a second phase in which the winner was identified in a free, random draw.<sup>227</sup> Promoters argued that the two phases could be split and that both phases were lawful - the first phase

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<sup>218</sup> [1980] 1 All ER 866 (HL).

<sup>219</sup> 869.

<sup>220</sup> 869.

<sup>221</sup> 869.

<sup>222</sup> 868-875.

<sup>223</sup> 872.

<sup>224</sup> 874. However, the House did not venture into declaring what kind of mischief the 1976 Act was aimed at.

<sup>225</sup> FitzGerald S “Bradfute Revisited” 38-41 Autumn 1996 *Newsletter of the Society for the Study of Gambling* No. 28 38-41 (“FitzGerald 1996”) 38.

<sup>226</sup> FitzGerald 38.

<sup>227</sup> FitzGerald 38.





challenged the official policy towards gambling and also strengthened the industry's demand for change.<sup>235</sup> Murphy remarks that the National Lottery also compromised the government's moral position towards gambling.<sup>236</sup> Miers, noting that one can distinguish between social and economic regulation, points out that the National Lottery was a form of economic regulation which was intended to benefit good causes.<sup>237</sup> Reith notes that the introduction of the National Lottery brought about remarkable change in British gambling culture as well.<sup>238</sup> Whereas gambling used to be prevalent amongst mainly male, working class people, the National Lottery caused people from various parts of society to start participating in the activity.<sup>239</sup> Reith points out that the National Lottery removed some of the stigma attached to gambling activities, because the National Lottery was seen to be charitable and was marketed in "ordinary places" such as grocery stores and was televised nationally.<sup>240</sup>

The introduction of the National Lottery also stimulated change in the broader gambling scene.<sup>241</sup> In 2000, the Gambling Review Body was created, under chairmanship of Sir Alan Budd.<sup>242</sup> Its purpose was to review the state of the gambling industry, analyse the social impact, benefits and costs of gambling, and make recommendations for legislative reform.<sup>243</sup> The Gambling Review Body recommended sweeping changes, including the abolishment of the policy that gambling should be allowed but that demand should not be stimulated (the "unstimulated demand" principle).<sup>244</sup> Further, it recommended the establishment of the Gambling Commission (to replace the Gaming Board).<sup>245</sup> The opinion of the Gambling Review Body view was that gambling legislation should be simplified and consolidated, and that the approach

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<sup>235</sup> Miers 2011 98.

<sup>236</sup> Murphy 2013 414.

<sup>237</sup> Miers D "The Gambling Review Report: Redefining the Social and Economic Regulation of Commercial Gambling" 2003 *The Modern Law Review* 66:4 604 ("Miers 2003") 611.

<sup>238</sup> Reith 2008 168.

<sup>239</sup> Reith 2008 168.

<sup>240</sup> Reith 2008 168.

<sup>241</sup> While the National Lottery was allowed to operate freely and market vigorously, the rest of the industry was still under tight restriction. This inconsistency led to demands for change. (Reith 2008 168)

<sup>242</sup> Gambling Review Report (Cm 5206) (the "Budd Report"). (Monkcom 59.)

<sup>243</sup> Budd Report 6. An important task for the Review Body was also to consider how the gambling industry could be strengthened in order to improve the British economy. (Miers 2011 100)

<sup>244</sup> Budd Report 8, 78; Murphy 2013 416.

<sup>245</sup> Budd Report 99; Murphy 2013 416.

should be one of “better regulation”, which should be “*facilitative* rather than restrictive” when it comes to gambling licensing.<sup>246</sup>

In its report, the Gambling Review Body also dealt with promotional competitions (referred to as “prize competitions” in the Budd Report).<sup>247</sup> It considered various forms of prize competitions, such as competitions linked to products or services, competitions conducted by television or radio stations and skills contests.<sup>248</sup> The Gambling Review Body’s view was that prize competitions need not be prohibited,<sup>249</sup> but that legislation had to cater for them and recognise their difference from other lotteries.<sup>250</sup> It was not persuaded that customers who participated in prize competitions regarded those as lotteries and that prize draws were therefore competing with lotteries for the public’s attention.<sup>251</sup> However, the Gambling Review Body was opposed to commercial lotteries (such as competitions that involved premium rated phone calls) and was of the view that those should not be allowed.<sup>252</sup>

Based on its considerations mentioned above, the Gambling Review Body recommended that there should be a statutory definition for lotteries which can be used to distinguish ordinary lotteries from prize competitions and prize draws.<sup>253</sup> However, in order to maintain its views against commercial lotteries, but in order to allow promoters to require people to purchase their goods or services in order to enter their prize competitions, the Gambling Review Body recommended adoption of the so-called “New Zealand model”.<sup>254</sup> In terms of this model, promoters would be allowed to run prize promotions and require participants to purchase their goods and services, as long as the consideration payable did not exceed the ordinary price of the goods or

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<sup>246</sup> Miers 2011 101 (emphasis in Miers’s text); Budd Report 2.

<sup>247</sup> Budd Report 155. The Review Body noted that some lotteries were holding themselves out to be prize competitions, but that their operators were not prosecuted.

<sup>248</sup> Budd Report 161.

<sup>249</sup> At that stage, prize competitions were still banned by virtue of section 14 of the Lotteries and Amusements Act 1976.

<sup>250</sup> Budd Report 155. The Review Body’s opinion was also that gambling regulators should rather focus on other forms of lotteries instead.

<sup>251</sup> Budd Report 155, 161. In the Review Body’s view, most people associated lotteries with charity.

<sup>252</sup> Budd Report 161.

<sup>253</sup> Budd Report 155. Up to that time, there had been no definition for the term “lottery” in British legislation. (Monkcom 25)

<sup>254</sup> Budd Report 162. The Review Body took note of the fact that “promotional lotteries” had become legal in New Zealand. The lotteries are in fact known as “sales promotion scheme” in New Zealand. (See s18 of the NZ Gambling Act and the definition in s4 thereof.)

services.<sup>255</sup> Despite this, the Gambling Review Body did recognise that some minimal costs, such as postage fees, had to be incurred and therefore recommended that such costs be allowed, subject to a maximum limit in order to avoid competitions being turned into commercial lotteries.<sup>256</sup>

The Gambling Review Body considered skill competitions too and was of the view that allowance should be made for prize competitions that involved substantial skill, while incorporating some form of a draw at some stage.<sup>257</sup> The Review Body also recommended the removal of the prohibition on competitions that involved the forecasting of a future event (or a past event, the results of which are unknown).<sup>258</sup> It assumed that the prohibition was contained in earlier legislation in order to distinguish lotteries from betting.<sup>259</sup>

After the Gambling Review Body's report was published, a draft Gambling Bill was prepared and then introduced on 18 October 2004.<sup>260</sup> It was based on the recommendations of the Gambling Review Body.<sup>261</sup> The Bill was met with some resistance, which revealed the fact that many people in Britain still had strong views about and against gambling.<sup>262</sup> After some debates in the media and in parliament,

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<sup>255</sup> Budd Report 162. The Review Body pointed out that promoters in the United Kingdom were at that stage already allowed to run prize promotions, as long as there was no cost involved, and that many promoters offered a "no purchase required" alternative, although few people used the alternative route in reality.

<sup>256</sup> Budd Report 162. The Review Body noted that judgements under the Lotteries and Amusements Act 1976 did not take real issue with the costs of postage in competitions. However, the Review Body's view was that a monetary limit had to be determined and suggested that an amount equal to twice the cost of a first class postage stamp could serve as a guideline in this regard. It also noted that some participants might send or phone in multiple entries, but did not have an issue with this.

<sup>257</sup> Budd Report 162. The Budd Report states that entry fees for skill competitions "need not be minimal, in the same way as other prize competitions, not involving skill". It is submitted that this statement might contain a typographical error, because the Review Body recommended that prize competitions that involve chance should involve minimal entry fees only. As such, it is submitted that the Review Body was in fact referring to "other prize competitions, not involving *chance*". (own emphasis)

<sup>258</sup> This prohibition was found in s14(1)(a) of the Lotteries and Amusements Act 1976. The Review Body did note that such competitions would still be governed by the laws relating to skill competitions.

<sup>259</sup> Budd Report 162. The Review Body pointed out that these types of competitions might be regarded as betting.

<sup>260</sup> Monkcom 61; Murphy 417; Miers 2011 101-102.

<sup>261</sup> Monkcom 60.

<sup>262</sup> Reith 2008 175-176; Murphy 418-422.

some amendments were made to the Bill.<sup>263</sup> The Gambling Act 2005 eventually received royal assent on 7 April 2005 and came into force on 1 September 2007.<sup>264</sup>

The present position in Great Britain is therefore that gambling (including lotteries) is regulated by one piece of legislation, namely the Gambling Act 2005, while the National Lottery still operates by virtue of the National Lottery Act 1993.<sup>265</sup> The Gambling Act 2005 is lengthy, containing 362 sections. It covers a wide spectrum of matters, ranging from the establishment of the Gambling Commission and the creation of various offences to the licensing of lotteries and various gambling activities and the regulation of gambling advertising. It also contains a part which is specifically aimed at the protection of children and young persons.<sup>266</sup>

#### 4.3.4 Prize competitions under the Gambling Act 2005

In order to make provision for the lawful operation of prize competitions by promoters and to bring clarity to the legal position,<sup>267</sup> section 339 of the Gambling Act 2005 states as follows:

##### **Prize competitions**

Participating in a competition or other arrangement under which a person may win a prize is not gambling for the purposes of this Act unless it is—

- (a) gaming within the meaning of section 6,

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<sup>263</sup> Monkcom 60-61; Reith 2008 177.

<sup>264</sup> Intentions were for the Gambling Act 2005 to contribute to the economy, but commentators have queried whether it has in fact achieved this aim, particularly with regard to casino gambling. (Murphy 422; Miers 2011 102-103)

<sup>265</sup> See s15 of the Gambling Act 2005. [Monkcom 44; Coles T “The Regulation of Lotteries in Great Britain Following the Gambling Act 2005” 2006 *Gaming Law Review* 10:5 465 (“Coles”)]

<sup>266</sup> Part 4 of the Gambling Act 2005. Reith points out that the Gambling Act 2005 might make provision for the protection of children and young persons, but the onus is placed on gamblers themselves to act responsibly. She notes that the legislation is based on the assumption that the provision of sufficient information should assist gamblers to make their own decisions. She contrasts this with New Zealand’s “public health model”, which makes provision for training and awareness initiatives, and makes available treatment for persons that struggle with problem gambling. In Britain, on the other hand, charities are relied upon to provide such treatment. (Reith 2008 177-178)

<sup>267</sup> Earlier legislation did not deal with the operation of prize competitions, but they were still covered by lotteries legislation (which did not define the term “lottery”). This situation led to numerous court cases that often revolved around the question of whether something amounted to a lottery. (See section 4.2.2). The various decisions did not always clarify the situation. The British legislature recognised this problem and suggested that a statutory definition for “lottery” would assist in giving clarity in respect of “arrangements whose status under the current law has proved problematic or uncertain”. [Explanatory Notes relating to the Gambling Act 2005 (“GA Explanatory Notes”) par 67] See Crown 2010 235, and also Circus P *Promotional Marketing Law: A Practical Guide* (“Circus”) 38-39; Macleod J *Consumer Sales Law* (“Macleod”) 313 and fn 179. For a discussion of problems experienced in respect of prize promotions under earlier legislation, see Dresden 2005 2-3.

- (b) participating in a lottery within the meaning of section 14, or
- (c) betting within the meaning of sections 9 to 11.

The section is not limited to competitions only but gives authorisation to any arrangement in terms of which someone could win a prize. Accordingly, if a promoter wishes to conduct a prize competition in Great Britain, it must ensure that the arrangement cannot be classified as gaming, betting or participation in a lottery, as set out in the Gambling Act 2005.<sup>268</sup> If the arrangement does not meet the requirements for any of those activities, it will be lawful. If not, the arrangement would constitute gambling and would be illegal unless the promoter has obtained a licence to conduct the activity.<sup>269</sup>

In order to determine whether or not an arrangement will be regarded as a lawful prize competition, it is therefore important to understand what qualifies as “gaming”, “betting” and “participating in a lottery”. Part 1 of the Gambling Act 2005 contains certain “key concepts” and the aforesaid activities are found amongst those. One should also note that the Gambling Act 2005 defines “gambling” as meaning “gaming”, “betting” or “participating in a lottery”.<sup>270</sup> This therefore ties in with section 339, leading to the conclusion that a prize competition will be lawful, unless it constitutes gambling.

#### 4.3.4.1 Betting

The first concept to consider is “betting”. Section 9(1) defines this activity as follows:

In this Act “betting” means making or accepting a bet on—

- (a) the outcome of a race, competition or other event or process,
- (b) the likelihood of anything occurring or not occurring, or
- (c) whether anything is or is not true.<sup>271</sup>

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<sup>268</sup> Crown 2010 234; Dresden B “United Kingdom” in *International Promotion Marketing Law Book* (2<sup>nd</sup> ed) (“Dresden 2010”) 275.

<sup>269</sup> Crown 2010 234.

<sup>270</sup> “Gaming” is defined in s6, “betting” in s9 and “participating in a lottery” in s14, subject to s15.

<sup>271</sup> S9(2) provides further that a transaction may still be betting if it concerns the outcome of a race, competition or other event or process, even if the race, competition, event or process has already occurred or been completed and one party to the transaction knows the outcome. Similarly, s9(3) states that a transaction might be betting if relates to the likelihood of anything occurring or not occurring and one party to the transaction knows the outcome. It is submitted that the intention of these subsections is to ensure that the relevant provisions do not apply to only future events, but that a transaction will also be covered if it involves betting on an unknown outcome which has already been achieved.



participants are required to forecast something and could even require participants to purchase the promoter's goods or services, as long as the price for the goods or services is not inflated in consideration for the competition opportunity and as long as no other consideration or payment is required.<sup>276</sup>

#### 4.3.4.2 Gaming

Section 6(1) defines "gaming" as "playing a game of chance for a prize". Section 6(2) continues and describes a "game of chance" as follows:

- (a) includes—
  - (i) a game that involves both an element of chance and an element of skill,
  - (ii) a game that involves an element of chance that can be eliminated by superlative skill, and
  - (iii) a game that is presented as involving an element of chance, but
- (b) does not include a sport.

Section 6(3) also adds that it does not matter whether or not other people are involved in the game or whether the person plays against a computer. However, in order for gaming to take place, someone must have the opportunity to win a prize, but it does not matter whether or not the person might lose something in the course of playing the game.<sup>277</sup> This is somewhat problematic, because it seems that a competition might therefore constitute gaming, even if there is no consideration involved. Despite this, commentators on the Gambling Act 2005 are of the view that prize competitions and free prize draws will not constitute gaming because those competitions do not involve the active playing of a game.<sup>278</sup> Circus mentions "throwing a dice or spinning a wheel" as examples of active playing, but is of the view that scratching of a scratch card is a passive activity and does not constitute gaming.<sup>279</sup>

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clarification voids the decision in *Minty v Sylvester* (1915) 84 LJKB 1982 in which it was held that there was no lottery because participants did not know that they were entered as a result of paying for their theatre seats. (Lawson 2007a unpagged; Circus 41)

<sup>276</sup> Dresden 2010 277. Par 5 also deals with entries by way of post, telephone or another communication method, and states that the ordinary costs relating thereto will not be regarded as payment. However, par 6 states that a payment required to reveal whether some has won a competition will be regarded as payment to enter. Also, par 7 states that payment for claiming of a prize will constitute payment to enter.

<sup>277</sup> S6(4).

<sup>278</sup> Dresden 2010 277; Circus 244. However, Dresden warns that some online promotional games are at the risk of being classified as gaming. (Dresden 2010 277)

<sup>279</sup> Circus 44.



This author has not been able to locate case law relating to whether a promotional competition can be regarded as gaming in terms of the provisions of the Gambling Act 2005. However, FitzGerald<sup>280</sup> refers to a decision<sup>281</sup> of the United Kingdom's Upper Tribunal (Tax and Chancery Chamber) in which the Tribunal had to consider, in the context of tax legislation, whether "Spot the Ball" constitutes a game and, if so, whether participants were playing a game of chance. In that matter, the Tribunal held the view that a game involves some form of contest, which is played in terms of specific rules.<sup>282</sup> In its view, a game involves changing circumstances and playing the game entails the player reacting to those circumstances.<sup>283</sup> The Tribunal also referred to case law<sup>284</sup> in which it was found that "playing a game of chance involves some active participation" and that it could not take place without "some degree of skill or physical act or by exercising some choice". It mentioned that one must distinguish between a competition and a game, and that a game was accompanied with detail rules relating to the actual playing of the game.<sup>285</sup> In the end, the Tribunal held that there was no game in the matter before it and that "completing and posting a coupon is not 'playing'".<sup>286</sup>

In view of the above, it is submitted that the conclusion may be drawn that ordinary promotional competitions would not constitute gaming, as long as participation in the competition is passive and does not involve active participation where circumstances change in the competition and the participant has to react accordingly and in terms of detailed game rules.

#### 4.3.4.3 Lotteries

As mentioned before,<sup>287</sup> the Gambling Act 2005 contains the first statutory definition for the term "lottery" in British history. Section 14(1) provides that something will be a

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<sup>280</sup> FitzGerald S 12 November 2014 "Case Law Update for the Institute of Licencing" (sic) (<http://www.instituteoflicensing.org/Public/National%20Events/NTE%202014/Presentations/D3%20S1%20-%20Susanna%20FitzGerald%20-%20Case%20Law%20Update.pdf>, accessed on 2 May 2015)

<sup>281</sup> *Commissioners for Her Majesty's Revenue and Customs v IFX Investment Company Ltd and others* [2014] UKUT 0398 (TCC)

<sup>282</sup> Page 12, par 21.

<sup>283</sup> Page 12, par 22. The judge mentioned chess and board games as examples of games that involved more than one player, but also regarded patience (the card game) as a game.

<sup>284</sup> *DPP v Regional Pools Promotions* [1964] 2 QB 244

<sup>285</sup> Page 20, par 37.

<sup>286</sup> Page 23, par 10.

<sup>287</sup> See page 157 above.

lottery if it satisfies the description of a “simple lottery” or a “complex lottery”.<sup>288</sup> The elements of a simple lottery are as follows:

- (a) persons are required to pay in order to participate in the arrangement,
- (b) in the course of the arrangement one or more prizes are allocated to one or more members of a class, and
- (c) the prizes are allocated by a process which relies wholly on chance.<sup>289</sup>

A complex lottery involves prize allocation by way of a series of processes. This is reflected in the definition, which contains a different third element and an additional fourth element:

- (a) persons are required to pay in order to participate in the arrangement,
- (b) in the course of the arrangement one or more prizes are allocated to one or more members of a class,
- (c) the prizes are allocated by a series of processes, and
- (d) the first of those processes relies wholly on chance.<sup>290</sup>

Both of these definitions display the three traditional elements of a lottery: consideration, prizes and chance.<sup>291</sup> If a promoter wishes to lawfully conduct a prize competition, it would have to omit one or more of the lottery elements from the competition.<sup>292</sup> It would be difficult to remove the prize element from the competition, because a competition would not really be a competition if there are no prizes, and it would be difficult to offer something to participants, without it being classified as a

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<sup>288</sup> Coles points out that the definitions follow those contained in decisions of the courts, but the distinction between the two types of lotteries is novel. (Coles 466) Lawson remarks that the concepts of simple and complex lotteries feature only in s14. (Lawson 2007a unpagged) However, it is submitted that the definition of “complex lottery” was inserted in order to regulate so-called “hybrid schemes”. (See page 156 above).

<sup>289</sup> S14(2).

<sup>290</sup> S14(3).

<sup>291</sup> The definitions in section 14 confirm the lottery definition found in *Reader’s Digest Association Ltd v Williams* [1976] 2 All ER 737 (QBD). [Crown 2010; Lawson R “When some prizes are more equal than others” 14 September 2007 *Solicitor’s Journal* 151:34 (“Lawson 2007b”) <http://www.solicitorsjournal.com/commercial/company/when-some-prizes-are-more-equal-others>, accessed on 3 May 2015, electronic version unpagged; FitzGerald S “Government gamble” 22 July 2005 *Solicitor’s Journal* 149:29 (“FitzGerald 2005”) <http://www.solicitorsjournal.com/public/local-government/government-gamble>, accessed on 3 May 2015, electronic version unpagged]

<sup>292</sup> All of the elements of a lottery must be present in order for the arrangement to constitute a lottery. (Macleod 314) True free draws therefore remain outside the scope of the Gambling Act 2005, due to the absence of the consideration element. [Gambling Commission “Prize competitions and free draws: The requirements of the Gambling Act 2005” December 2009 (“GC Guidance”) 8 <http://www.gamblingcommission.gov.uk/pdf/prize%20competitions%20and%20free%20draws%20-%20the%20requirements%20of%20the%20gambling%20act%202005%20-%20december%202009.pdf>, accessed on 3 May 2015]

prize.<sup>293</sup> This is because the Gambling Act 2005 defines “prize” in very broad terms, stating that it includes “any money, articles or services”.<sup>294</sup> Generally, this means that the promoter would have to ensure that the competition does not require payment and/or that the prizes are not allocated by way of chance.<sup>295</sup> If the promoter cannot achieve this, and all the elements of a lottery are present, the arrangement would be illegal unless the promoter has obtained a licence to conduct a lottery<sup>296</sup> or unless the arrangement constitutes an exempt lottery.<sup>297</sup> It is therefore crucial to understand when an arrangement will involve payment or the allocation of prizes by way of chance.

If a promoter explicitly requires a participant to make payment in order to enter a competition (for example, the participant must pay a specified entry fee), the payment element of a lottery would be present.<sup>298</sup> However, in order to cover other payments and payment requirements that might not be that obvious, section 14(6) refers one to Schedule 2 of the Gambling Act 2005.<sup>299</sup> Paragraph 1 of Schedule 2 explains that paying would include “paying money” or “transferring money’s worth”.<sup>300</sup> The Schedule

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<sup>293</sup> Lawson debates whether all things would necessarily be classified as prizes, mentioning that “facilities” and “accommodation” might not fall within the description of “money, articles or services”, but then points out that S14(4) uses the term “includes” and is therefore not a closed list. (Lawson 2007b) FitzGerald also points out that s14(4) does not specifically mention a chance as a prize, but that a chance (such as the opportunity to participate in a television show) could constitute a prize as well. (FitzGerald 2005 unpagged)

<sup>294</sup> S14(4). It also does not matter whether or not the prize is in fact described as a prize. [S14(4)(a)] Circus deals with the use of the term “gift” too, and mentions that the terms “gift” is usually used in a sale promotion context if all customers become entitled to something free. (Circus 40)

<sup>295</sup> Dresden 2010 275.

<sup>296</sup> In terms of s98 of the Gambling Act 2005, licensed lotteries must be conducted by non-commercial societies for good causes or by local authorities for public purposes. A promoter will therefore have difficulties in obtaining a lottery licence, unless it is a non-commercial society or a local authority. [FitzGerald S November 2013 “Lotteries and Competitions” (“FitzGerald 2013”) 3 <http://www.instituteoflicensing.org/Public/National%20Events/NTE%202013/NTE%20DOCS/handouts%20not%20in%20delegate%20pack/d2%20s1%20Lotteries%20and%20Competitions%20Susanna%20F.pdf>, accessed on 3 May 2015]

<sup>297</sup> Crown 2010 234. The Gambling Act 2005 provides exemptions for the running of incidental non-commercial lotteries (Schedule 11, Part 1), private lotteries (Schedule 11, Part 2), customer lotteries (Schedule 11, Part 3) and small society lotteries (Schedule 11, Part 4), and contains specific requirements for operating exempt lotteries. (Crown 2010 234 fn 4) The requirements for a customer lottery include that the promoter must be based and do business at specific premises, prize values must not exceed £50 and profits must not be generated by the lottery. (Circus 42)

<sup>298</sup> Crown 2010 238.

<sup>299</sup> Schedule 2 contains provisions that are virtually identical to those of Schedule 1 (which contains provisions relating to payment requirements in the context of betting).

<sup>300</sup> Some promoters require entrants to provide their contact details or other data, but the Gambling Commission has stated that this would not be regarded as consideration, provided that a reasonable quantity of data is required. (GC Guidance 7)



“normal rate” if it “does not reflect the opportunity to enter a lottery”.<sup>310</sup> (In other words, the rate must not be increased in order to include consideration for the opportunity to enter the competition.) In the Gambling Commission’s view it does not matter if different entrants pay different rates due to differences in service providers’ charges, as long as there is no specific charge in relation to participation in the competition.<sup>311</sup>

In order to give promoters the opportunity to avoid a situation where their competitions might be regarded as lotteries due to the presence of a purchase requirement, the legislature has made provision for competitions that involve a free entry alternative.<sup>312</sup> However, promoters must comply with specific requirements in this regard.<sup>313</sup> In particular, every participant must have the opportunity to either pay for an entry or send in a communication in order to enter.<sup>314</sup> The communication can be sent by normal mail or another method (as long as that method is not “more expensive or less convenient than entering the lottery by paying”).<sup>315</sup> The alternative entry route must also be publicised in such a manner that potential entrants will be aware of it and the competition process must not discriminate between paying entrants and those that make use of the alternative route.<sup>316</sup>

Apart from the payment element, one needs to examine the provisions that relate to allocation of prizes by way of chance as well.<sup>317</sup> If winners are determined by way of chance, a competition would be regarded as a lottery (and thus unlawful) unless one of the other lottery elements (consideration and prizes) is omitted.<sup>318</sup> In relation to the chance element, the Gambling Act 2005 states that a competition will be a lottery if it

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<sup>310</sup> Schedule 2, par 5(2)(a).

<sup>311</sup> GC Guidance 7. It seems that a premium rate would constitute consideration relating to participation in a competition. (Dresden 2010 276; Circus 39) Lawson, however, states that “even premium calls have a normal rate” and that the position is thus unclear. He mentions that the legislature could have specifically stated that premium rates would not be regarded as normal rates. (Lawson 2007a unpagged)

<sup>312</sup> Circus 48-49; Dresden 2010 276; 238-240. It is no longer necessary for all promoters to offer free entry routes to avoid contravening lotteries legislation, but promoters will need to make free entry routes available if their competition involves some form of payment requirement (such as a premium rated phone call). (Dresden 2010 276; 49)

<sup>313</sup> See par 8 of Schedule 2.

<sup>314</sup> Par 8(1)(a) of Schedule 2.

<sup>315</sup> Par 8(1)(b) of Schedule 2. The Gambling Commission has noted that some promoters allow internet entries as free alternatives, but has noted that internet access might not be convenient or available to all participants. (See GC Guidance 7 for the Commission’s principles in this regard.)

<sup>316</sup> Paras 8(1)(c) and (d) of Schedule 2.

<sup>317</sup> Sections 14(2)(c) and 14(3)(d).

<sup>318</sup> Dresden 2010 276.

relies “wholly on chance”. In order to avoid the chance element, many promoters require participants to display some kind of skill.<sup>319</sup> However, in order to deal with a situation where a promoter builds a superficial skill requirement into a competition in an attempt to avoid the application of the Gambling Act 2005, section 14(5) states that an arrangement will still be a lottery if:

- (a) the requirement cannot reasonably be expected to prevent a significant proportion of persons who participate in the arrangement of which the process forms part from receiving a prize, and
- (b) the requirement cannot reasonably be expected to prevent a significant proportion of persons who wish to participate in that arrangement from doing so.<sup>320</sup>

In other words, the competition must involve some kind of requirement which will prevent a significant part of entrants from winning or from participating in the competition in the first place.<sup>321</sup> If the requirement does not serve that purpose, the competition will be regarded as a chance based lottery. The Gambling Commission has mentioned that crossword puzzles as well as “word and number puzzles” are proper skill based competitions.<sup>322</sup> Competitions that involve many answers or relate to a “more obscure or specialist” topic, will likely qualify as skill based competitions.<sup>323</sup> However, the Commission’s view is that a competition will be chance based if entrants must answer a question and the answer can be found on the internet, is general knowledge or can be located in the text that accompanies the competition material.<sup>324</sup>

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<sup>319</sup> Earlier legislation, such as s14(1)(b) of the Lotteries and Amusements Act 1976 prohibited “any other competition in which success does not depend to a substantial degree on the exercise of skill”. In view of this, promoters attempted to structure their competitions in such a way that entrants would be required to display skill, but this led to various cases in which the courts had to determine whether or not substantial skill was involved. (See Miers 2004 206-208 and the cases cited there.)

<sup>320</sup> S14(5)(a) and (b).

<sup>321</sup> Dresden 2010 276; Crown 2010 236-238; Circus 44-45.

<sup>322</sup> GC Guidance 2. Pursuant to the definition of “complex lottery”, the Gambling Commission has also pointed out that a competition will still be lawful, even if a two phase approach is followed, as long as the first phase involves a skill requirement.

<sup>323</sup> GC Guidance 2. See also the other skill indicators mentioned in par 3.17 by the Commission. (GC Guidance 5)

<sup>324</sup> GC Guidance 2.

#### 4.3.5 The impact of European Union law on prize promotions

The United Kingdom is part of the European Union. As such, the United Kingdom has to implement legislation adopted by the European Commission or Council.<sup>325</sup> The European Union's regulations apply automatically in the United Kingdom and do not have to be enacted by way of separate legislation.<sup>326</sup> However, the European Union's directives have to be made law in the United Kingdom by way of national legislation.<sup>327</sup> When it comes to the implementation of directives, the Treaty on the Functioning of the European Union states that member's legislatures have "the choice of form and methods" to implement same.<sup>328</sup> This relative flexibility allows for laws across the European Union to be harmonised to various degrees.<sup>329</sup>

One can distinguish between minimum harmonisation and maximum (full) harmonisation.<sup>330</sup> A directive will provide minimum harmonisation if it sets the minimum standard by which its provisions must be implemented on a national level, while allowing member states to enact stricter legislation based on those provisions.<sup>331</sup> In contrast, a directive will entail maximum harmonisation if member states must implement its rules on the same level and if they may not enact provisions that are

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<sup>325</sup> See Treaty on the Functioning of the European Union, Art 288; European Communities Act 1972, s2(1) and (2). Miller V "Making EU law into UK law" House of Commons Library, Standard Note SN/IA/5419 22 October 2014 3-4 ("Miller 2014") (<http://www.parliament.uk/briefing-papers/SN05419.pdf>, accessed on 4 May 2015).

<sup>326</sup> Treaty on the Functioning of the European Union, Art 288; European Communities Act 1972, s2(1).

<sup>327</sup> Treaty on the Functioning of the European Union, Art 288; European Communities Act 1972, s2(2); Miller 2014 2.

<sup>328</sup> Art 288.

<sup>329</sup> The process by which the laws of European Union member states are harmonised forms part of the wider process of "Europeanisation". Falkner G *ea Complying with Europe: EU Harmonisation and Soft Law in the Member States* 11.

<sup>330</sup> Weatherill S "Harmonisation: How Much, How Little?" 2005 *European Business Law Review* 16:3 533-545; Weatherill S "Maximum versus Minimum Harmonization: Choosing between Unity and Diversity in the Search for the Soul of the Internal Market" in Shuibhne NN and Gormley LW (eds) *From Single Market to Economic Union; Essay in Memory of John A Usher* ("Weatherill 2012") 176; Howells GG "The Rise of European Consumer Law – Whither National Consumer Law?" 2006 *Sydney Law Review* 28 63 ("Howells") 64-65.

<sup>331</sup> Weatherill 2012 176. The implementation of European Union directives that involve minimum harmonisation can lead to so-called "gold plating". This phenomenon is encountered "when implementation goes beyond the minimum necessary to comply with a Directive", and currently the United Kingdom's policy is to prevent this from happening. [Her Majesty's Government "Transposition Guidance: How to implement European Directives effectively" April 2013 8-9, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/229763/bis-13-775-transposition-guidance-how-to-implement-european-directives-effectively-revised.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229763/bis-13-775-transposition-guidance-how-to-implement-european-directives-effectively-revised.pdf), accessed on 11 July 2015; Gerner-Beuerle C "United in Diversity: maximum versus minimum harmonization in EU securities regulation" 2012 *Capital Markets Law Journal* 7:3 317 ("Gerner-Beuerle") 317]

stricter than those contained in the directive.<sup>332</sup> Minimum harmonisation provides greater independence and flexibility for member states, allows the enactment of laws that suit local conditions and encourages legal development because member states can learn from the legislating experience in other states.<sup>333</sup> Maximum harmonisation, on the other hand, centralises the regulatory responsibility, provides legal certainty on a regional level, and promotes cross-border trade due to legal uniformity.<sup>334</sup> While the European Union initially followed a minimum harmonisation approach, its current policy is to foster maximum harmonisation.<sup>335</sup>

Apart from other areas, European Union law has also developed in the area of consumer protection as well as advertising and marketing.<sup>336</sup> In particular, the Unfair Commercial Practices Directive (“UCP Directive”)<sup>337</sup> seeks to protect consumers against misleading practices<sup>338</sup> (including actions or omissions that are untruthful, deceptive or incorrect) as well as aggressive practices (the use of harassment, coercion or undue influence in order to manipulate a consumer’s decisions).<sup>339</sup> In keeping with the European Union’s policy shift in this regard, the UCP Directive provides for maximum harmonisation.<sup>340</sup> The UCP Directive contains provisions that relate to prize promotions specifically.<sup>341</sup> It provides that a commercial practice will

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<sup>332</sup> Weather 2012 176. Weatherill explains that a directive entails maximum harmonisation if it prescribes “both floor and ceiling”, while minimum harmonisation would only prescribe “the floor”.

<sup>333</sup> Loos MBM “Full harmonisation as a regulatory concept and its consequences for the national legal orders. The example of the Consumer rights directive” July 2010 *Centre for the Study of European Contract Law Working Paper Series* No. 2010/03 (“Loos”) 5 [http://www.researchgate.net/publication/228245729\\_Full\\_Harmonisation\\_as\\_a\\_Regulatory\\_Concept\\_and\\_its\\_Consequences\\_for\\_the\\_National\\_Legal\\_Orders\\_The\\_Example\\_of\\_the\\_Consumer\\_Rights\\_Directive](http://www.researchgate.net/publication/228245729_Full_Harmonisation_as_a_Regulatory_Concept_and_its_Consequences_for_the_National_Legal_Orders_The_Example_of_the_Consumer_Rights_Directive), accessed on 11 July 2015; Gerner-Beuerle 318-319; Howells 64; Loos 5; Weatherill 2012 176.

<sup>334</sup> Gerner-Beuerle 319; Howells 64; Weatherill 2012 176.

<sup>335</sup> Howells 64; Weatherill S *EU Consumer Law and Policy* (“Weatherill 2013”) 25.

<sup>336</sup> See Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising. See Weatherill 2013 216-253 in relation to advertising and marketing in a European Union law context.

<sup>337</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (the “UCP Directive”).

<sup>338</sup> UCP Directive, art 6 and 7.

<sup>339</sup> UCP Directive, art 8 and 9.

<sup>340</sup> Loos 6; Weatherill 2012 176.

<sup>341</sup> The provisions are found in Annex I, which contains a list of practices that will in all circumstances be considered unfair. This is known as a “black list”. (See, for example, Howells GG *European fair trading law: the unfair commercial practices directive* 158-163) Regarding the use of grey and black lists in a South African context, see Naudé T “Unfair Contract Terms Legislation: The Implications of Why We Need it for its Formulation and Application” 2006 *Stellenbosch Law Review* 17:3 361 373-374; Naudé T “The Use of Black and Grey Lists in Unfair Contract Terms Legislation in Comparative Perspective” 2007 *South African Law Journal* 124:1 128; Naudé T “The consumer’s ‘right to fair, reasonable and just terms’ under the new Consumer Protection Act in comparative perspective” 2009



always be considered unfair if it involves a competition or prize promotion in which the relevant prizes are not awarded.<sup>342</sup> It also prohibits promoters from creating the false impression that someone has won a prize or will win a prize where there is in fact no prize or where the consumer will have to incur costs or expend money in order to take possession of the prize.<sup>343</sup>

The provisions of the UCP Directive have been incorporated into the United Kingdom's law by way of the Consumer Protection from Unfair Trading Regulations 2008 (the "CPUT Regulations"), which came into effect on 26 May 2008.<sup>344</sup> In view of the UCP Directive's maximum harmonisation approach, the CPUT Regulation's provisions closely resemble those of the UCP Directive. In the context of prize promotions, it mirrors the UCP Directive's prohibitions and provides that it will in all circumstances be unfair to run a competition or prize promotion without awarding prizes,<sup>345</sup> or to create the false impression that someone has won a prize when there is no prize or the consumer has to pay money or incur costs to claim the prize.<sup>346</sup>

The CPUT Regulations' provisions relating to prize promotions have led to a decision by the Court of Justice of the European Union ("ECJ") in *Purely Creative Ltd and others v Office of Fair Trading*.<sup>347</sup> In that matter, promoters informed consumers that they had won prizes, but consumers had to incur costs in order to claim their prizes.<sup>348</sup> The Office of Fair Trading instituted proceedings against the promoters, seeking an order restraining the promoters from carrying on similar promotions.<sup>349</sup> The High Court ruled that the promoters' actions amounted to unfair practices in terms of the provisions of the CPUT Regulations.<sup>350</sup> Both parties appealed against the decision. The appeal was

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*South African Law Journal* 126:3 505; Naudé T "The consumer's 'right to fair, reasonable and just terms' under the new Consumer Protection Act in comparative perspective" 2009 *South African Law Journal* 126:3 505; Stoop PN *The Concept 'Fairness' in the Regulation of Contracts under the Consumer Protection Act 68 of 2008*.

<sup>342</sup> UCP Directive, Annex I (19).

<sup>343</sup> UCP Directive, Annex I (31).

<sup>344</sup> Items 19 and 31 of Schedule 1 to the CPUT Regulations. See *Circus* 49; *Crown* 2010 243; *Dresden* 2010 278; *Kolah* 308.

<sup>345</sup> CPUT Regulations, Sch 1 (19).

<sup>346</sup> CPUT Regulations, Sch 1 (31).

<sup>347</sup> [2012] EUECJ C-428/11. See, for example, the discussion in Köhler H "Congratulations, you have won! New standards apply to announcements of wins: A discussion of *Purely Creative and others*" 2013 *Journal of Intellectual Property Law & Practice* 8:5 399

<sup>348</sup> Paras 13-14 of the judgement.

<sup>349</sup> Par 13 of the ECJ judgement.

<sup>350</sup> Par 18 of the ECJ judgement.

stayed by the Court of Appeal in order to refer questions regarding interpretation of the CPUT Regulations to the ECJ.<sup>351</sup> The ECJ found that the CPUT Regulations prohibited practices where traders gave consumers the impression that they had won prizes if the consumers were obliged to pay money or incur cost in order to receive the prizes.<sup>352</sup> The ECJ stated that it was irrelevant that those costs were minimal or that consumers were afforded alternative routes of entry.<sup>353</sup>

#### **4.3.6 Compliance with industry codes**

##### **4.3.6.1 Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing**

In Britain, competition promoters need to take note of the provisions of self-regulatory codes as well. The United Kingdom Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing (the “CAP Code”) is compiled by the Committee of Advertising Practice (“CAP”) and enforced by the Advertising Standards Authority.<sup>354</sup> The CAP Code contains a section dedicated to sales promotions.<sup>355</sup> In defining a sales promotion, the CAP Code states that it “can provide an incentive for the consumer to buy by using a range of added direct or indirect benefits, usually on a temporary basis, to make the product more attractive”.<sup>356</sup> It mentions “text-to-wins, instant-wins, competitions and prize draws” as examples of sales promotions.<sup>357</sup> The CAP has issued non-binding guidelines in respect of prize promotions as well.<sup>358</sup>

The CAP Code enjoins promoters to display equitable, prompt, efficient, fair and honourable conduct, and must avoid causing consumer disappointment when conducting sales promotions.<sup>359</sup> Its provisions are also aimed at protecting consumers

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<sup>351</sup> Par 23 of the ECJ judgement. The Court of Appeal sought clarification regarding the interpretation of Paragraph 31 of Annex I to the UCP Directive.

<sup>352</sup> Par 57 of the ECJ judgement.

<sup>353</sup> Par 57 of the ECJ judgement.

<sup>354</sup> The website of the Committee of Advertising Practice is located at [www.cap.org.uk](http://www.cap.org.uk) (accessed on 11 July 2015). The CAP Code is available at this link: <http://www.cap.org.uk/Advertising-Codes/~media/Files/CAP/Codes%20CAP%20pdf/The%20CAP%20Code.ashx> (accessed on 4 May 2015). See *Circus* 52-53; *Dresden* 2010 278-279; *Crown* 2010 242-243.

<sup>355</sup> S8.

<sup>356</sup> S8: “Definition”.

<sup>357</sup> S8: “Definition”

<sup>358</sup> CAP “Help note: Promotions with prizes” August 2013 (“CAP Help Note”), <https://www.cap.org.uk/~media/Files/CAP/Help%20notes%20new/PromotionsWithPrizesHelpNote.ashx> (accessed on 11 July 2015).

<sup>359</sup> Rule 8.1.

and their safety and require that promotions must be suitable and not cause offense.<sup>360</sup> In the context of prize promotions, this would mean that promoters must avoid competitions that could cause harm to consumers,<sup>361</sup> must not feature alcoholic drinks in competitions aimed at children,<sup>362</sup> must avoid competitions that promote “excessive consumption or irresponsible use”,<sup>363</sup> must prevent “unsuitable or irresponsible material” from reaching consumers,<sup>364</sup> and must ensure that their competitions do not lead to “serious or widespread offence to consumers”.<sup>365</sup>

Promoters often state that promotional goods are “subject to availability”, but the CAP Code requires that promoters must ensure that they anticipate reasonable demand.<sup>366</sup> It is submitted that promoters would therefore have to ensure that sufficient levels of stock are available if they run competitions that require entrants to purchase goods. In general, promoters are required to ensure that they organise and administer their competitions properly in order to avoid consumer complaints.<sup>367</sup> Prizes must also be awarded within the advertised time period - “normally within thirty days”.<sup>368</sup>

The CAP Code contains detailed provisions relating to the disclosure of information and promoters are required to communicate all key terms and conditions to consumers, particularly in circumstances where consumers might be misled if they are not aware of those terms and conditions.<sup>369</sup> The terms and conditions must not be too complicated and promoters should only in exceptional circumstances amend or supplement them.<sup>370</sup> If space and time does not permit disclosure of the full terms and conditions, promoters must direct consumers to another source where the terms and

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<sup>360</sup> See rules 8.1 to 8.7.

<sup>361</sup> Rule 8.3. It is submitted that a competition which requires entrants to perform dangerous stunts would contravene this rule.

<sup>362</sup> Rule 8.4.

<sup>363</sup> Rule 8.5. It is not clear from the rule what this provision is aimed at, but it is submitted that the intention is to prohibit promoters from conducting promotions that will encourage excessive indulgence in their products.

<sup>364</sup> Rule 8.6. It is submitted that promoters would therefore have to ensure that competition materials are not unsuitable.

<sup>365</sup> Rule 8.7.

<sup>366</sup> Rules 8.9-8.13.

<sup>367</sup> Rule 8.14-8.15.

<sup>368</sup> Rule 8.15.1.

<sup>369</sup> Rule 8.17.

<sup>370</sup> Rule 8.23. Promoters must inform participants where they can obtain the supplemental or changed rules and such rules must not contain anything that would cause someone to refrain from participating.

conditions can be found.<sup>371</sup> In the context of prize promotions, promoters must explain to consumers how they can participate,<sup>372</sup> describe any available alternative entry route<sup>373</sup> and indicate the competition's start date<sup>374</sup> and closing date.<sup>375</sup> Promoters must mention any proof of purchase requirements,<sup>376</sup> entry restrictions (such as age restrictions or consent requirements),<sup>377</sup> and limits on the number of entries that will be accepted.<sup>378</sup> The terms and conditions must disclose the date by which prizes will be handed over if this will happen more than thirty days after the competition has closed.<sup>379</sup> They must also disclose how and when winning entrants will be notified that they have won and winners' names must be published or made available on request.<sup>380</sup> The terms and conditions must contain details of how winners will be used for publicity purposes after the competition (if applicable).<sup>381</sup> The promoters name and correspondence address must be communicated as well.<sup>382</sup>

Prizes are central to competitions and the CAP Code contains detailed provisions in this regard. It requires promoters to disclose the number and nature of prizes.<sup>383</sup> They may not create the impression that prizes can be won if that is not the case.<sup>384</sup> They must not "exaggerate consumers' chances of winning",<sup>385</sup> or create the false impression that the consumer has won a prize or stands a chance to do so if the

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<sup>371</sup> Rule 8.16 and 8.28. It is submitted that promoters could, in such circumstances, display the terms and conditions on their websites. The rule also requires that participants must be able to retain the terms and conditions and refer to them during the course of the competition.

<sup>372</sup> Rule 8.17.1. The promoter must, *inter alia*, disclose significant participation conditions and costs.

<sup>373</sup> Rule 8.17.2.

<sup>374</sup> Rule 8.17.3.

<sup>375</sup> Rule 8.17.4. Promoters must also avoid changing closing dates, unless due to circumstances beyond their control. (Rule 8.17.4.e)

<sup>376</sup> Rule 8.17.5.

<sup>377</sup> Rule 8.17.7.

<sup>378</sup> Rule 8.28.1.

<sup>379</sup> Rule 8.28.3.

<sup>380</sup> Rule 8.28.5. Promoters must observe winners' privacy and comply with relevant legal restrictions in this regard.

<sup>381</sup> Rule 8.28.9.

<sup>382</sup> Rule 8.17.9. It is submitted that promoters must disclose these details in order for consumers to be able to contact them if they have queries regarding the prize promotion.

<sup>383</sup> Rule 8.17.6. If the exact number of prizes is not known, the promoter must disclose a reasonable estimate. Prize descriptions must be clear and the associated costs must be disclosed clearly. (CAP Help Note 4)

<sup>384</sup> Rule 8.19. The rule also requires promoters to distinguish between gifts (that are usually awarded to most consumers) and prizes (that are normally awarded to a few participants only). Promoters must also avoid using the term "awards" in a vague manner. (CAP Help Note 3)

<sup>385</sup> Rule 8.20. Promoters may also not "claim or imply that consumers are luckier than they are". In particular, a consumer may not be described as a "finalist" or as being in the "final stage" unless this is in fact the case. (Rule 8.21)



Similarly, in *Red Bull Company Ltd*<sup>397</sup> the advertiser ran a competition in terms of which the winner could win a trip to watch a grand prix. The winner lodged a complaint on the basis that the trip was not a VIP prize as advertised and due to practical difficulties with the travel arrangements.<sup>398</sup> The ASA upheld the complaint, finding that the VIP description was misleading and that significant exclusions were not publicised.<sup>399</sup>

A holiday prize was also the subject matter of *News Group Newspapers Ltd*.<sup>400</sup> In that matter a newspaper's website advertised a competition in which the winner could win a "family holiday" to Walt Disney World Resort.<sup>401</sup> The winner wanted to take a family member's children along on the trip, but was informed that she could not claim the prize on that basis.<sup>402</sup> In ruling on the subsequent complaint, the ASA decided that the competition's terms and conditions did not make it clear that the winner had to take their own children on the trip and upheld the complaint.<sup>403</sup>

In *HarrisonCole*<sup>404</sup> the advertiser ran some prize draws via *Twitter*. The complainant averred that the winners were connected to the advertiser and that they were not selected by an independent person.<sup>405</sup> The advertiser denied this, but the ASA upheld the complaint when the advertiser could not provide proof that the winners were genuine and independently selected.<sup>406</sup>

The time period within which winners must claim their prize can lead to ASA complaints too. For example, in *Radge Media Ltd*<sup>407</sup> the winner only had a week in order to respond and claim their prize. The ASA ruled that the promoter did not publish a

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<sup>397</sup> 27 February 2013 (Complaint Ref. A12-213426), [https://www.asa.org.uk/Rulings/Adjudications/2013/2/Red-Bull-Company-Ltd/SHP\\_ADJ\\_213426.aspx#.Vav5SHkw9Ms](https://www.asa.org.uk/Rulings/Adjudications/2013/2/Red-Bull-Company-Ltd/SHP_ADJ_213426.aspx#.Vav5SHkw9Ms), accessed on 19 July 2015. Online ruling unpagged.

<sup>398</sup> *Red Bull Company Ltd* unpagged.

<sup>399</sup> *Red Bull Company Ltd* unpagged.

<sup>400</sup> 12 June 2013 (Complaint Ref. A13-224093), [https://www.asa.org.uk/Rulings/Adjudications/2013/6/News-Group-Newspapers-Ltd/SHP\\_ADJ\\_224093.aspx#.Vav5gnkw9Ms](https://www.asa.org.uk/Rulings/Adjudications/2013/6/News-Group-Newspapers-Ltd/SHP_ADJ_224093.aspx#.Vav5gnkw9Ms), accessed on 19 July 2015. Online ruling unpagged.

<sup>401</sup> *News Group Newspapers Ltd* unpagged.

<sup>402</sup> *News Group Newspapers Ltd* unpagged.

<sup>403</sup> *News Group Newspapers Ltd* unpagged.

<sup>404</sup> 22 October 2014 (Complaint Ref. A14-275452), [https://www.asa.org.uk/Rulings/Adjudications/2014/10/HarrisonCole/SHP\\_ADJ\\_275452.aspx#.Vav5xnkw9Ms](https://www.asa.org.uk/Rulings/Adjudications/2014/10/HarrisonCole/SHP_ADJ_275452.aspx#.Vav5xnkw9Ms), accessed on 19 July 2015. Online ruling unpagged.

<sup>405</sup> *HarrisonCole* unpagged.

<sup>406</sup> *HarrisonCole* unpagged.

<sup>407</sup> 23 November 2011 (Complaint Ref. A11-168900), [https://www.asa.org.uk/Rulings/Adjudications/2011/11/Radge-Media-Ltd/SHP\\_ADJ\\_168900.aspx#.Vav6Dnkw9Ms](https://www.asa.org.uk/Rulings/Adjudications/2011/11/Radge-Media-Ltd/SHP_ADJ_168900.aspx#.Vav6Dnkw9Ms), accessed on 19 July 2015. Online ruling unpagged.

deadline within which the prize had to be claimed and, as such, upheld the complaint.<sup>408</sup> The ASA made a similar ruling in *Trinity Mirror plc*<sup>409</sup> where it found that the winner was not given sufficient time to take receipt of the prize.

A promoter's obligation to comply with the rules of a competition was one of the issues in *Sony Computer Entertainment UK Ltd*.<sup>410</sup> A number of consumers lodged a complaint in respect of a competition in which participants could win game consoles.<sup>411</sup> The competition's terms and conditions provided that each person could enter the competition once only, but it turned out that some persons had more than one entry in the competition.<sup>412</sup> The entry mechanism also disadvantaged some entrants. Accordingly, the complaint was upheld.<sup>413</sup>

The importance of clear terms and conditions was emphasised in *PepsiCo International Ltd* as well.<sup>414</sup> One of the consumers in that matter complained that he had won several times, but was afterwards informed that he could only win once.<sup>415</sup> The ASA pointed out a number of deficiencies in the competition process and upheld the consumer's complaint on the basis that the terms and conditions did not state that entrants would only be entitled to one prize each.<sup>416</sup>

Promoters also need to make sure that they describe prizes clearly. In *24.7 Tradesmen (Glasgow) Ltd*<sup>417</sup> the promoter invited consumers to enter a competition in which they could win an iPad.<sup>418</sup> The winner of the competition filed a complaint when

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<sup>408</sup> *Radge Media Ltd* unpagged.

<sup>409</sup> 28 November 2012 (Complaint Ref. A12-203883), [https://www.asa.org.uk/Rulings/Adjudications/2012/11/Trinity-Mirror-Plc/SHP\\_ADJ\\_203883.aspx#.Vav6OXkw9Ms](https://www.asa.org.uk/Rulings/Adjudications/2012/11/Trinity-Mirror-Plc/SHP_ADJ_203883.aspx#.Vav6OXkw9Ms), accessed on 19 July 2015. Online ruling unpagged.

<sup>410</sup> 13 May 2015 (Complaint Ref. A15-290175), [https://www.asa.org.uk/Rulings/Adjudications/2015/5/Sony-Computer-Entertainment-UK-Ltd/SHP\\_ADJ\\_290175.aspx#.VavyuHkw9Ms](https://www.asa.org.uk/Rulings/Adjudications/2015/5/Sony-Computer-Entertainment-UK-Ltd/SHP_ADJ_290175.aspx#.VavyuHkw9Ms), accessed on 29 July 2015. Online ruling unpagged.

<sup>411</sup> *Sony Computer Entertainment UK Ltd* unpagged.

<sup>412</sup> *Sony Computer Entertainment UK Ltd* unpagged.

<sup>413</sup> *Sony Computer Entertainment UK Ltd* unpagged.

<sup>414</sup> 21 November 2012 (Complaint Ref. A12-196585), [https://www.asa.org.uk/Rulings/Adjudications/2012/11/PepsiCo-International-Ltd/SHP\\_ADJ\\_196585.aspx#.Vavyunkw9Ms](https://www.asa.org.uk/Rulings/Adjudications/2012/11/PepsiCo-International-Ltd/SHP_ADJ_196585.aspx#.Vavyunkw9Ms), accessed on 19 July 2015. Online ruling unpagged.

<sup>415</sup> *PepsiCo International Ltd* unpagged.

<sup>416</sup> *PepsiCo International Ltd* unpagged.

<sup>417</sup> 16 July 2014 (Complaint Ref. A14-264899), [https://www.asa.org.uk/Rulings/Adjudications/2014/07/247-Tradesmen-Glasgow-Ltd/SHP\\_ADJ\\_264899.aspx#.VawAPnkw9Ms](https://www.asa.org.uk/Rulings/Adjudications/2014/07/247-Tradesmen-Glasgow-Ltd/SHP_ADJ_264899.aspx#.VawAPnkw9Ms), accessed on 29 July 2015. Online ruling unpagged.

<sup>418</sup> *24.7 Tradesmen (Glasgow) Ltd* unpagged.









outdated very quickly. On the other hand, the study of New Zealand's legislation has shown that South Africa's regulation of promotional competitions is quite comprehensive from a consumer protection perspective. It appears that local legislation does not fall short here. In fact, one may even submit that South Africa's legislation is more protective than New Zealand's law in this regard.

The discussion of the legal position in Great Britain proved that there is a close link between South Africa's current lotteries legislation and Great Britain's former legislation in this regard. It became clear that English case law can provide guidance regarding the principles that should be followed in determining whether an activity is gambling or a lottery. This is confirmed by the fact that South African courts have quoted such judgments on numerous occasions. The self-regulatory position in Great Britain was considered as well. The relevant industry code is clear and comprehensive, and some of its provisions could easily be used if wording is required to clarify or flesh out the provisions in South Africa's legislation and industry codes.

In the following chapters, South Africa's regulation of promotional competitions will be critically analysed and certain recommendations will be made. In some of those discussions, reference will be made to provisions examined in this chapter in order to suggest improvements to South Africa's legislation.

## CHAPTER 5

### PROMOTIONAL COMPETITIONS UNDER THE LOTTERIES ACT AND THE CONSUMER PROTECTION ACT

- 5.1 Introduction
- 5.2 Application of the Lotteries Act
- 5.3 Promotional competition provisions repealed by the CPA
- 5.4 Promotional competitions under the CPA
- 5.5 Conclusion

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#### 5.1 Introduction

This chapter will concentrate on South Africa's current law relating to promotional competitions. The relevant provisions will be critically analysed and commentary will be provided on them. A number of inconsistencies, defects and challenges will be highlighted in the process.

At present, two statutes that have a direct impact on the running of promotional competitions in South Africa: the Lotteries Act<sup>1</sup> and the Consumer Protection Act, 2008 ("CPA"). When someone intends to run a promotional competition, they need to consider the provisions of both statutes in order to determine if and how the promotional competition might be affected by them. The provisions of both these statutes have a bearing on promotional competitions in one way or another. Depending on the circumstances, a promotional competition might be prohibited, authorised or regulated by them.

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<sup>1</sup> 57 of 1997. In this chapter, the Lotteries Act, 1997 will be referred to as the "Lotteries Act".



It is submitted that the reference to “game, scheme, arrangement, system, plan, promotional competition or device” implies that there must be some form of structured, planned or organised activity, as opposed to a purely impulsive event without any prior organisation, thought or planning.<sup>10</sup> The fact that rules apply to the playing of a game, implies that the game was developed in terms of a process that required thought and the actual playing of the game takes place in a structured manner due to the direction given by the rules. The word “scheme” also implies a structured arrangement, being defined as “[a] large-scale systematic plan or arrangement for attaining some particular object or putting a particular idea into effect”.<sup>11</sup> The words “system”, “plan” and “arrangement” evoke similar meanings. The word “device” could refer to some kind of apparatus, but also fits into the meanings associated with the other words mentioned here, when one considers the following definition: “A plan, method, or trick with a particular aim.”<sup>12</sup>

The prize is the second element of the “lottery” definition. The Lotteries Act defines a “prize” merely as “the prize awarded to the winner of a lottery”.<sup>13</sup> It is submitted that a prize can therefore be anything awarded to someone who has won a competition.<sup>14</sup> In *Director of Public Prosecutions v Bradfute & Associates, Ltd.*,<sup>15</sup> Lord Parker was of the view that “a prize need not be a sum of money; it can of course be an article, a commodity, and it is submitted that it can be anything which can be sold, or indeed anything which can be said to be of value”.<sup>16</sup> A reward can be a prize, even if it is insubstantial.<sup>17</sup> In *R v Cranston*<sup>18</sup> the court decided that even the interest payable on

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<sup>10</sup> The word “game”, for example, can be defined as “[a] form of competitive activity or sport played according to rules”. (Oxford Dictionaries. “Game”. Oxford University Press. <http://www.oxforddictionaries.com/definition/english/game>, accessed on May 09, 2015).

<sup>11</sup> Oxford Dictionaries. “Scheme” Oxford University Press. <http://www.oxforddictionaries.com/definition/english/scheme>, accessed on 9 May 2015

<sup>12</sup> Oxford Dictionaries. “Device” Oxford University Press. <http://www.oxforddictionaries.com/definition/english/device>, accessed on 9 May 2015.

<sup>13</sup> Lotteries Act, s1.

<sup>14</sup> See Carnelley 2011 63.

<sup>15</sup> [1967] 1 All ER 112 (QB).

<sup>16</sup> Page 115 of the judgement; Carnelley 2011 63 and 64 fn 3.

<sup>17</sup> *Chief Constable, Durban v Stuart* (1909) 30 NLR 58; Carnelley 2011 63 and 64 fn 4. See also *Salisbury Bottling Co (Pvt) Ltd v Central African Bottling Co (Pvt) Ltd* 1958 (1) SA 750 (FC) where the court decided that numbered bottle corks could be regarded as prizes, because someone could win a bicycle if they managed to collect a sufficient number of corks in the prescribed manner. (Dendy 1989 49-50)

<sup>18</sup> 1914 AD 238.

the bonds could be regarded as prizes.<sup>19</sup> Carnelley submits that a prize does not have to be tangible and that “a claim or legal right will constitute a prize”.<sup>20</sup>

Previously, regulation 6 of the Regulations on Promotional Competitions published in terms of the Lotteries Act<sup>21</sup> (the “PC Regulations”) contained specific provisions that regulated the prizes that could be awarded in promotional competitions. (Those regulations would have been promulgated pursuant to the provisions of section 54(2) and (3), although the regulations merely referred to the Lotteries Act.) However, the PC Regulations are no longer of force because section 54 of the Lotteries Act was repealed by the CPA.<sup>22</sup>

A competition can also be a lottery, even where a prize is offered but no participant receives one.<sup>23</sup> In *R v Lew Hoi*,<sup>24</sup> the court had to evaluate a Chinese game called “Pak-ku-pue”. Chance played a significant role in that game and, due to the mechanics of the game, the sizes of the prizes varied and sometimes no one won anything at all.<sup>25</sup> The court held that the game still displayed the essential characteristics of a lottery, even though someone did not always win.<sup>26</sup> The court reasoned that the purpose of the law was to prohibit an activity that involved a “gambling element” and found that the element was present in the game under discussion.<sup>27</sup> It is submitted, therefore, that a competition could still be a lottery even if, in the end, no participant actually receives a prize. This could happen, for example, where scratch cards are inserted in product packaging and the purchaser of a product fails to scratch a card and claim the prize. It is submitted that this eventuality cannot retrospectively remove the competition’s lottery status. Having said this, some authors state that a scheme cannot be a lottery if there is no prize.<sup>28</sup> However, seeing that they also state that “schemes where no prize is offered, must be very rare, if not non-existent”, it is

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<sup>19</sup> Page 239 of the judgement; Carnelley 2011 63 and fn 5 on 64.

<sup>20</sup> Carnelley 2011 64.

<sup>21</sup> *Government Gazette* (GN R672) of 16 May 2003.

<sup>22</sup> See Schedule 1, C2 of the CPA.

<sup>23</sup> Dendy 1989 43 fn 3.

<sup>24</sup> 1937 AD 215. (Dendy 1989 43 fn 3)

<sup>25</sup> Page 217-218 of the judgement.

<sup>26</sup> Page 221 of the judgement. The court referred to the British cases *Barclay & Pearson* [1893] 2 Ch 154, *Hall & McWilliam* 20 Cox CC 33 and *Santongeli v Neilson* 1900 3 F. 10 in which the courts found that schemes were lotteries even though prizes might not have been awarded.

<sup>27</sup> Page 222 of the judgement.

<sup>28</sup> Bell Dewar 205.







- (b) any competition “in which success does not depend to a substantial degree on skill”,<sup>42</sup> unless it is a promotional competition conducted pursuant to section 54;<sup>43</sup>
- (c) a promotional competition which has been declared unlawful by the Minister of Trade and Industry by virtue of section 54(4) of the Lotteries Act.<sup>44</sup>

However, the prohibitions in section 56 only apply to competitions conducted “through any newspaper, broadcasting service or any other electronic device, or in connection with any trade or business or the sale of any article to the public”. As such, it is submitted that the prohibitions would not apply to other competitions, for example competitions that are not conducted through any of the media mentioned above, or where a competition is not conducted as part of a trade, business or sale, for example a book club.<sup>45</sup> However, such competitions might still be unlawful if they could be classified as lotteries in terms of the definition of “lottery” or if they constitute gambling, in which event they may breach the provisions of the National Gambling Act, 2004. A competition could amount to betting or wagering, as contemplated in section 4(1) of the National Gambling Act, 2004 if participants stake money on a contingency. This would be the case, for example, if participants are required to pay an amount to enter a competition with the opportunity to win a prize, depending on the outcome of an event. A competition might also be classified as a gambling game in terms of the provisions of section 5(1) if participants are required to contribute consideration and they stand a chance to receive a pay-out. According to section 6(1), “a pay-out is any money, merchandise, property, a cheque, credit, electronic credit, a debit, a token, a ticket or anything else of value won by a player – (a) whether as a result of the skill of

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<sup>42</sup> In interpreting the identical wording in s47 of the British Betting, Gaming and Lotteries Act 1963, Lord Parker rejected the argument that this could mean that a competition would escape the prohibition if it involves no skill at all. In his judgement, the prohibition would “cover anything less than a substantial degree of skill including no skill at all”. (*Whitbread & Co Ltd. v Bell* [1970] 2 All ER 64 at 70h) However, Lord Parker’s judgement was subsequently overruled by the judgements in *Imperial Tobacco Ltd v Attorney-General* [1979] 2 All ER 592 (CA) and *Imperial Tobacco Ltd v Attorney-General* [1980] 1 All ER 866 (HL). See page 154 above.

<sup>43</sup> S56(b). The reference to s54 is problematic, because s54 has been repealed by the CPA. Accordingly, it is submitted that s56(c) should be amended in order to provide an exemption for promotional competitions conducted in accordance with s36 of the CPA. See the recommendation below at page 296.

<sup>44</sup> S56(c). In view of the repeal of s54, s56(c) serves no purpose and it is submitted that it should be deleted. See the recommendation at page 296 below.

<sup>45</sup> See Carnelley 2011 72.





Gambling Act, 1965, did not pertinently require that consideration had to be paid in order for a scheme to be a lottery.<sup>56</sup>

Legislation predating the Lotteries Act usually defined lotteries with reference to their generally accepted meaning, followed by specific examples.<sup>57</sup> This is not the case with the Lotteries Act, which contains a specific, closed definition that does not refer to subscription at all.<sup>58</sup> There is also no separate provision in the Lotteries Act that states that subscription must be present in order for a scheme to constitute a lottery. In fact, a search of the Lotteries Act reveals that the word “subscription” is only used twice in the Lotteries Act.<sup>59</sup> Related or synonymous terms, such as “consideration” and “payment”, are also not used in this context.

The term “subscription” is defined as “the payment, or delivery of any money, goods, article, matter or thing, including any ticket, coupon or entry form, for the right to compete in a lottery”.<sup>60</sup> This is a very wide definition, particularly if one considers that most lotteries and competitions require participants to deliver or send in entry forms or similar things to the organisers in order to participate. It is submitted that the exception provided by section 63 therefore serves no meaningful purpose, since it would be extremely difficult for the promoter of a scheme to rely on the exception in section 63.

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*Ltd* 1915 WLD 82 (where payment for newspapers was considered to be consideration in a competition where the public had to purchase newspapers to see if they were winners). In *Boardman v Minister van Finansies* 1984 (1) SA 259 (T) and *S v Pepsi-Cola (Pty) Ltd* 1985 (3) SA 141 (C) the courts determined that subscription was not present, although those decisions have been criticised. See *S v Mbonambi* 1986 (3) SA 836 843; *FirstRand Bank Ltd v National Lotteries Board* 2008 (4) SA 548 (SCA) 128 par 28; Bell Dewar 207; Dendy 1989 64-67; Louw J “When a gamble is not a gamble: the *Pepsi-Cola* case” 1987 (February) *De Rebus* 65-68, 72.

<sup>56</sup> Carnelley 2011 62-63. Carnelley refers to *R v Cotterill* 1927 CPD 48 where the court had to decide whether something was a lottery under the Cape’s Lotteries Prohibition Act 9 of 1889. It is submitted that, from Carnelley’s comments on the *Cotterill* case, one could form the impression that the court required that the subscription element had to be present even though the legislation did not cater for same. It is correct that the Cape’s Act did not explicitly require consideration to be paid, and the court noted this, (Page 50 of the judgement.) But, the court was in fact entitled to refer to the generally accepted meaning of a lottery, since the statute’s definition commenced with the words “every lottery in the common and received acceptance of that term”. Accordingly, the court investigated the general meaning of the term “lottery” and decided that “there must be a contribution by some of the competitors to constitute a lottery”. (Pages 50-51 of the judgement)

<sup>57</sup> The definition of “lottery” in s1(i) of the Gambling Act, 1965 commences as follows: “means any lottery in the generally accepted meaning of the word, and more particularly [...]”.

<sup>58</sup> See the definition of “lottery” at page 185 above.

<sup>59</sup> The term is used in the definition of “subscription” and in s63. See also Carnelley 63 fn 6.

<sup>60</sup> S1.

This is because it would be challenging to create a competition that does not require the submission of entry forms or similar things.

The Lotteries Act states that its provisions will not “apply in relation to any lottery, sports pool or competition in respect of which there is no subscription”.<sup>61</sup> This exception creates the impression that subscription is a requirement, even though no such requirement is to be found.<sup>62</sup> One could therefore be led to conclude that subscription is not a requirement for a scheme to be classified as a lottery under the Lotteries Act, and that a scheme will be classified as such even if it involves only the awarding of prizes by way of lot or chance.<sup>63</sup> This would be extraordinary, particularly in view of the generally accepted meaning of a lottery and the fact that subscription (consideration) gives a lottery its gambling nature.<sup>64</sup> Consequently, it is submitted that consideration remains one of the key components of a lottery. Carnelley is of a similar view. After analysing the position, she concludes that subscription remains an essential element of a lottery, despite the fact that the Lotteries Act does not contain an explicit requirement in this regard.<sup>65</sup>

The view that subscription is in fact an element of a lottery accords with the judgement of the Supreme Court of Appeal in *FirstRand Bank v National Lotteries Board*.<sup>66</sup> In that matter, the bank ran a competition in terms of which participants were required to

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<sup>61</sup> S63.

<sup>62</sup> In *R v Cotterill* 1927 CPD 48 the relevant legislation defined the term “to subscribe”, but the court found that such references to subscription could not lead to the inference that subscription was therefore actually a requirement of the legislation. (Page 50 of the judgement; Carnelley 2011 63 fn 8) In contrast with this approach, Louw seems to assume that subscription is in fact a component of a prohibited lottery under the Lotteries Act, stating that “the requirement of ‘subscription’ arises from s63”. Louw J “Distortion of the law: A comment on the SCA judgment in *FirstRand Bank Ltd v National Lotteries Board* 2008 (4) SA 548 (SCA)” 2012 (August) *De Rebus* 59-60 (“Louw 2012”) 59.

<sup>63</sup> Carnelley 2011 61. Carnelley points out that this could lead to the extraordinary situation where a scheme in terms of which free clothes are handed out to disadvantaged people could constitute a lottery if the clothes are handed out by way of lot or chance. (Carnelley cites *R v Cotterill* 1927 CPD 48 52)

<sup>64</sup> Carnelley 2011 61. The “gambling element” is a crucial characteristic of a lottery, and this is the “mischief” which the legislation seeks to prohibit or regulate. (Carnelley 2011 61 and fn 4; *R v Lew Hoi* 1937 AD 219)

<sup>65</sup> Carnelley 2011 62. In writing about promotional competitions, Abdurahman also proceeds from the basis that subscription is an element of a lottery under the Lotteries Act. [Abdurahman Z “Everybody’s done it” 2006 (December) *Without Prejudice* 37-38 (“Abdurahman”)]

<sup>66</sup> [2008] 3 All SA 121 (SCA). The matter is sometimes referred to as the “MAMA” (Million-a-Month) case, due to the name of the special bank account that was the focus of the litigation. The matter was an appeal against a High Court decision which declared the competition to be unlawful. (*National Lotteries Board v FirstRand Bank Ltd* [2006] ZAGPHC 106) For a discussion of the High Court judgement, see Melamdowitz H “MAMA – they’re making eyes at me” 2007 (August) *Without Prejudice* 16-18. See also Carnelley’s discussion of the appeal judgement. (Carnelley M “Gambling law” (Recent Cases) 2010 *South African Journal of Criminal Justice* 3 439-453 451)

deposit funds in a special account and stood the chance to win randomly allocated prizes.<sup>67</sup> The funds attracted only nominal interest, but no banking fees were incurred in respect of the deposits (except for charges that would be levied if funds were withdrawn prematurely). The court proceeded from the basis that subscription or a stake is an essential element of a lottery.<sup>68</sup> In the end, it rejected the bank's reliance on section 63<sup>69</sup> and held that the bank's scheme was in fact an unlawful lottery, reasoning that participants' temporary loss of possession of their money constituted subscription.<sup>70</sup> Louw criticises the judgement, arguing that all parties overlooked the fact that the competition was an exempt promotional competition (as contemplated by section 54 of the Lotteries Act, which has since been repealed by the CPA).<sup>71</sup> Despite this criticism, he does mention that it was not apparent whether or not the specific competition complied with the requirements of section 54.<sup>72</sup> However, it is submitted that the court did take cognisance of the exemption provided for promotional competitions and the applicable conditions, but noted that "there [was] no suggestion that the Million-a-Month Account [conformed] with those conditions".<sup>73</sup>

The subscription requirement was further entrenched in *National Lotteries Board v Bruss NO*.<sup>74</sup> In that case, persons entered a competition by way of premium rated text messages and stood the chance to win prizes allocated by way of random draws.<sup>75</sup> The court referred to the Lotteries Act's definition of "subscription" and the exemption for lotteries that did not involve consideration (in section 63), and found that it was clear from the provisions that "the right to compete in any lottery is dependent upon

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<sup>67</sup> Pages 122-123 of the judgement.

<sup>68</sup> Pages 124-126 of the judgement.

<sup>69</sup> The bank (unsuccessfully) argued that there was no subscription because participants did not have to pay anything in order to participate in the scheme.

<sup>70</sup> Pages 127-128 of the judgement.

<sup>71</sup> Louw 2012 60.

<sup>72</sup> Louw 59.

<sup>73</sup> Page 129 of the judgement.

<sup>74</sup> [2009] 2 All SA 164 (SCA). The case is informally known as the "Winikhaya" case, due to the name of the competition which was its focus. The matter was an appeal against a decision of the High Court (*National Lotteries Board v Bruss NO* [2007] ZAGPHC 268) For discussions of the appeal judgement, see Carnelley M "Gambling law' (Recent Cases)" 2010 *South African Journal of Criminal Justice* 3 439-453 451-452) and Kingdon E & Jakhoet I "Is it ... or isn't it?" 2009 (February) *Without Prejudice* 9:1 34-35 ("Kingdon & Jakhoet"). Krige also provides a brief summary of the matter, but seems to state that the court decided that the competition was a promotional competition (whereas the court in fact found that the competition was not a promotional one because its main aim was to raise funds). (Krige J "Promotional Competitions 101" 24 December 2013 <http://www.golegal.co.za/legislation/promotional-competitions-101>, accessed on 16 May 2015)

<sup>75</sup> Pages 165-166 of the judgement.





requirement is not only entrenched in lotteries legislation, but also pervades case law on the topic.<sup>82</sup> If competition winners are identified by way of chance, the competition will be a lottery (provided that the other lottery requirements are met as well), but if participants' skill determines the outcome of the competition, it will not be a lottery.<sup>83</sup>

The challenge is encountered when one has to establish whether chance or skill determines the outcome of a competition, particularly in competitions where the result is not determined by pure chance or pure skill on its own, but where there is a combination of the two. This challenge is often caused by the fact that chance is unavoidable in life, and that a measure of chance is even encountered in true skill based competitions.<sup>84</sup> To illustrate this point, Dendy mentions the situation where an unexpected blast of wind (a chance element) might influence the outcome of a golf game (which is normally regarded as a game of skill). He refers to *R v Livingstone*<sup>85</sup> in which the court explained that one should not classify a competition as a lottery merely because there was some element of chance involved, otherwise even proper competitive sports would be categorised as lotteries. However, the converse seems to apply as well, because chance based competitions may very well involve some measure of skill too.<sup>86</sup>

However, our courts have held that one does not need to exclude chance in its entirety from a competition in order to ensure that it is not classified as a lottery.<sup>87</sup> Instead, in determining whether something is a lottery, one should examine the scheme and ascertain whether chance is the "guiding factor",<sup>88</sup> "dominating element"<sup>89</sup> or "determining factor".<sup>90</sup> A scheme will be a lottery where the outcome is determined "substantially by chance, and not by skill".<sup>91</sup> The question is not whether chance or

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<sup>82</sup> For example, in *R v Bertram Davis* 1915 TPD 155 the court stated that "a lottery depends upon a distribution by lot, or in all events by some form of chance". (Page 158 of the judgement) In *R v Cotterill* 1927 CPD 48 the court explained that something "is a lottery if chance is the determining factor". (Page 54 of the judgement)

<sup>83</sup> *R v Bertram Davis* 1915 TPD 155 158.

<sup>84</sup> Dendy 1989 50-51.

<sup>85</sup> 1924 TPD 45 51.

<sup>86</sup> See, *R v James and Tennant* 1919 TPD 47 49, in which the court stated that every game of chance involves some element of skill.

<sup>87</sup> *R v Bertram Davis* 1915 TPD 155 158. (Dendy 1989 51)

<sup>88</sup> *R v Bertram Davis* 1915 TPD 155 158

<sup>89</sup> *R v Childs* 1924 TPD 155 158.

<sup>90</sup> *R v Cotterill* 1927 CPD 48 54; *R v Colborne* 1932 TPD 264 268; *R v Scandrogolio* 1951 (2) SA 297 (SR) 281; *R v Fleetwood* 1924 TPD 96 (Carnelley 2011 65 fn 2; Dendy 1989 57; Bell Dewar 208)

<sup>91</sup> *Royal Baking Powder Co v Crystallisers Ltd* 1928 CPD 448 450. (Carnelley 2011 65 fn 2)





meaningless.<sup>106</sup> According to Louw, this has also resulted in a situation where “all promotional competitions that offend against the provisions of the Lotteries Act will be unlawful and liable to prosecution, whether or not they comply with the Consumer Protection Act”.<sup>107</sup>

Louw bases his argument on “inconsistencies between [the Lotteries Act and the CPA]”, noting that section 36 of the CPA replaced section 54 of the Lotteries Act, but arguing that the CPA does not “[exempt] promotional competitions”.<sup>108</sup> However, Louw does not specifically mention that the Lotteries Act’s prohibitions on unlawful lotteries and competitions, which are found in sections 56 and 57, only apply if a lottery or promotional competition is not authorised by or under the Lotteries Act or any other law.<sup>109</sup> It is submitted that one can argue that promotional competitions have not become unlawful due to the repeal of section 54, because they are “authorised by or under [...] other law”, namely section 36 of the CPA. This argument might be supported by the fact that section 54 (which previously provided for the lawful operation of promotional competitions) was not merely repealed, but replaced by section 36, which makes provision for the continued regulation and operation of lawful promotional competitions. Section 36 contains requirements relating to promotional competitions, but does not specifically authorise the conducting of such competitions. In this regard, Louw’s argument that the CPA does not exempt promotional competitions may have merit. Yet, the legislature does not make meaningless laws. The mere fact that section 36 regulates and does not outlaw promotional competitions shows the legislature’s intention to permit promotional competitions. Thus, it is submitted that one could argue that it was the legislature’s intention to provide for the continued exemption of promotional competitions by way of section 36.

In the past, the argument in favour of the continued authorisation of promotional competitions could have been strengthened by the fact that the legislature replaced

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<sup>106</sup> S56(c) serves no purpose either, since it refers to promotional competitions that are prohibited by way of a declaration made in terms of s54(4) – a section which no longer exists.

<sup>107</sup> Louw J, quoted in Koenderman T “Don’t bet on it” *Finweek* 4 March 2010 50-51 (“Koenderman 2010”). See also Louw J “Consumer Protection Act 2008 and Promotional Competitions. Promotional Competitions – The End of the Line: Lawful No Longer”. (“Louw *End of the Line*”) (Internet article accessed on 23 February 2014, but no longer available online. Article on file with author hereof.)

<sup>108</sup> Koenderman 2010 50.

<sup>109</sup> However, the fact that he refers to the CPA not exempting competitions could indicate that he might have borne this in mind.

the definition of the term “promotional competition” in the Lotteries Act with a new definition that specifically referred to the meaning given to that term in section 36 of the CPA.<sup>110</sup> However, the position was clouded again by the Lotteries Amendment Act, 2013 which came into force on 14 April 2015. The Amendment Act removed the definition of the term “promotional competition” from the Lotteries Act, despite the fact that the term still appears in the Lotteries Act.<sup>111</sup> It is submitted that the legislature was under the impression that the regulation of promotional competitions had shifted from the Lotteries Act to the CPA, and that the intention was thus to “clean up” the Lotteries Act by removing the definition. However, it is submitted that this aggravated the situation and that an opportunity was wasted to clarify an unclear position, particularly since the Amendment Act was aimed at resolving other uncertainties.<sup>112</sup>

In summary, it seems that a promotional competition (which is a lottery) may be lawful if it complies with the requirements of the CPA.<sup>113</sup> It is not entirely clear whether the CPA explicitly authorises the operation of such competitions, yet the legislature would not have created the CPA’s extensive regulation of promotional competitions if it did not intend to authorise them. However, even if it is authorised by the CPA, one must bear in mind that a competition might still be unlawful if it does not comply with the

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<sup>110</sup> The definition was replaced simultaneously with the repeal of s54. See Schedule 1C of the CPA.

<sup>111</sup> Despite the deletion of its definition, the term “promotional competition” still appears in the definitions of “lottery” and “participant” in s1, in the heading of Chapter 1 as well as in ss56, 57(1), 57(2) and 58(1)(a).

<sup>112</sup> The question whether the National Lotteries Board had *locus standi* to institute proceedings against operators of unlawful lotteries and competitions came up in *FirstRand Bank Ltd v National Lotteries Board* and *Bruss NO v National Lotteries Board*. One of the intentions behind the Lotteries Amendment Act, 2013 was to resolve the uncertainty and specifically to empower the Board to institute such proceedings. (Department of Trade and Industry *Lotteries Policy Review: A discussion document* August 2012, <http://www.icnl.org/research/library/files/South%20Africa/Lotteriespolicy.pdf>, accessed on 20 May 2015) The Lotteries Amendment Act, 2013 was also drafted, *inter alia*, to resolve issues caused by the Lotteries Act’s interchangeable use of the term “Board”, to eliminate overlapping of the Minister and the Board’s functions. (Para 2.2, Memorandum on the Objects of the Lotteries Amendment Bill, 2013; Department of Trade and Industry *Presentation to the Portfolio Committee on Trade and Industry on the Lotteries Amendment Bill* 23 July 2013, [https://www.thedti.gov.za/parliament/2013/Lotteries\\_Bill\\_23July2013.pdf](https://www.thedti.gov.za/parliament/2013/Lotteries_Bill_23July2013.pdf), accessed on 20 May 2015)

<sup>113</sup> In his discussion of the CPA’s interface with the Lotteries Act, Eiselen reaches a similar conclusion. Eiselen S “Section 121” in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (Original Service 2014) par 12. In the same vein, Van Heerden argues that section 36 of the CPA moves the regulation of promotional competitions away from the Lotteries Act, even though section 56 of the Lotteries Act should have been amended in order to make this clear. [Van Heerden C “Section 36” in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (Original Service 2014) (“Van Heerden ‘Section 36’”) paras 3-4] See also Strachan D “Promotional competitions under the CPA” 2010 (December) *Without Prejudice* 34-35 (“Strachan”) 34.



exemption for the lawful conducting of promotional competitions in South African legislation.<sup>120</sup> Before this, promoters had to construct their competitions in such a manner that it could not be regarded as gambling or a lottery.<sup>121</sup> As such, section 54 widened the scope for the lawful operation of promotional competitions.

However, compliance with the requirements of section 54 and the accompanying regulations did cause some challenges and frustration.<sup>122</sup> Often these arose because section 54 did not explicitly list the requirements for the lawful operation of a promotional competition, but instead listed the circumstances under which a promotional competition would *not be unlawful*.<sup>123</sup> (In other words, the Lotteries Act provided a system of negative regulation.)

In practice, various issues were encountered with section 54's provisions. For example, the Lotteries Act defined a promotional competition as "a lottery conducted for the purpose of promoting the sale or use of any goods or services".<sup>124</sup> This definition was described as "circuitous", because the definition of "lottery" contained a reference to a "promotional competition".<sup>125</sup> It was also unclear whether section 54 only provided an exemption where a party promoted its own goods or services, or whether a competition would still be lawful even if the promoter marketed a third party's goods or services. Section 1 of the Lotteries Act described a "promotional competition"

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2003"); MacKenzie 12-13; Young C "So you think it's easy to run a competition. Think again" 2006 (May) *Without Prejudice* 6:4 42-43 ("Young").

<sup>120</sup> Louw 2003 unpagued.

<sup>121</sup> In order to conduct a lawful competition, a promoter would have had to remove one or more of the lottery elements (chance, subscription and prize) in order to avoid it being classified as a lottery. (See Louw 2003 unpagued.) Such an approach would have been similar to the one in Great Britain at the time. British case law such as *Witty v World Service, Ltd* 1935 All ER 243 (CD); *Reader's Digest Association Ltd v Williams* [1976] 2 All ER 737 (QBD); and *Imperial Tobacco Ltd v Attorney-General* [1980] All ER 866 (HL) could have provided useful guidance on issues such as whether the outcome of a competition depended on chance or skill (*Witty* and *Reader's Digest*). However, there were discrepancies between English case law and South African case law relating to whether a competition would be unlawful if entrants were required to purchase the promoter's goods. In the *Imperial Tobacco* case, such a competition was declared to be an illegal lottery, but in *S v Pepsi-Cola (Pty) Ltd* 1985 (3) SA 141 (C) the Cape Provincial Division came to a different conclusion. However, the *Pepsi-Cola* judgement has been criticised. (See fn 55 above.)

<sup>122</sup> Louw referred to "negativity about section 54" and criticised the drafting of the section and its accompanying regulations. He noted contradictions in the provisions and remarked that the section was "based on an apparent complete lack of appreciation of what sales promotion is all about". (Louw 2003 unpagued) Other authors state that the "law relating to promotional competitions was in a mess". (Michalsons "Promotional competitions – a checklist to comply with the CPA" 5 April 2014 <http://www.michalsons.co.za/promotional-competitions/2432>, accessed on 23 May 2015)

<sup>123</sup> Introductory wording of s54(1).

<sup>124</sup> Lotteries Act, s1.

<sup>125</sup> Young 42.

merely as “a lottery conducted for the purpose of promoting the sale or use of any goods or services”, while regulation 1 of the PC Regulations defined “goods or services” as “goods or services which are ordinarily manufactured, sold, supplied, distributed or delivered or in any other way form a substantial part of the business of the promoter involved in a particular promotional competition in the calendar year during which that promotional competition is held”. Louw pointed out that regulation 1 would have created difficulties where a franchisor ran a competition to promote the goods or services of its franchisees (in circumstances where the franchisor did not trade in those goods or services as well.)<sup>126</sup> However, in *National Lotteries Board v Bruss NO*, the court held that the definition in a statute could not be interpreted by use of a definition in the accompanying regulations and that a promoter could therefore run a competition to promote a third party’s goods or services.<sup>127</sup> Despite this, it is unclear why the court did not also consider the fact that the statute itself contained a similar limitation in the form of s54(1)(g), in terms of which a promotional competition would not have been unlawful if “the goods or services manufactured, sold, supplied, distributed or delivered in connection with the right to participate in a promotional competition are usually or ordinarily manufactured, sold, supplied, distributed or delivered by the person for whose benefit the promotional competition is held”.

There were some misunderstandings regarding promotional competitions conducted by charities too. When section 54 (as amended) came into force, charitable organisations welcomed its provisions on the basis that it would allow them to conduct fundraising activities.<sup>128</sup> To this author, it appears strange that charitable organisations were under the impression that promotional competitions could be held to raise funds, if one bears in mind that a promotional competition was defined as “a lottery conducted for the purpose of promoting the sale or use of any goods or services”. In any event, this impression would have been corrected by the judgement in *National Lotteries Board v Bruss NO* where the court declared a competition unlawful on the basis that it was not a promotional competition and that its actual purpose was to raise funds for charitable organisations.<sup>129</sup>

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<sup>126</sup> Louw 2003 unpagged.

<sup>127</sup> Page 170 of the judgement; Kingdon & Jakhoet 35.

<sup>128</sup> Pather S “Lottery Act moves are welcomed” *Citizen* 18 October 2001 4.

<sup>129</sup> Page 170-171 of the judgement.



Furthermore, the section did not clarify whether a competition would be unlawful if entrants incurred costs in submitting their entries.<sup>130</sup> The provisions of section 54 also seemed to be contradictory regarding the price that could be charged for the goods or services to which the competition related.<sup>131</sup> The role of goods and services in promotional competitions was also unclear to some. For example, it seems that Abdurahman was of the view that a promotional competition had to involve a requirement in terms of which participants were obliged to purchase the promoter's goods or services, because she states: "[...] participants *must* in addition to obtaining the chance to win a prize, also obtain goods and/or services" (own emphasis).<sup>132</sup> However, it is submitted that the Lotteries Act merely required that the competition had to *promote* the sale of goods or the provision of services. If the Lotteries Act did in fact require that goods or services had to be purchased (which does not appear to be the case), it would have solved the question whether a promoter could have required participants to purchase goods or services to enter. (Section 54 was silent on this issue.) Nevertheless, it is submitted that section 54 implied that such a requirement would have been lawful, because it regulated the price that a promoter could charge for goods or services.

The fact that the Lotteries Act stated that a promotional competition would *not* have been unlawful if "it [was] conducted in the Republic" also leads to interpretational challenges. This could have created the impression that a promoter had to conduct the competition only within the Republic of South Africa, or that the administration of the competition and the random draw had to take place in South Africa (in view of the fact that "conduct" could have had different meanings). This would have caused problems for a foreign promoter who wanted to run a promotional competition in a

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<sup>130</sup> Young 42. In *National Lotteries Board v Bruss NO* the court held that the competition in that matter was an illegal lottery because the R7.50 text message fee that had to be paid by entrants constituted subscription and that the competition was in any event not a promotional competition because it was not conducted to promote goods or services. (Pages 169-170 of the judgement) Similarly, in *FirstRand Bank v National Lotteries Board* the court held that the "Million-a-Month" competition contravened the Lotteries Act, due to the presence of the subscription element. (Page 128 of the judgement) See also Aguiar 44-45, and Hartley A "Illegal SMS competitions under the spotlight" IOL News 7 February 2006 (<http://www.iol.co.za/news/south-africa/illegal-sms-competitions-under-the-spotlight-1.265656>, accessed on 23 May 2015) in which the journalist reported on a National Lottery Board investigation into competitions which required entrants to enter by way of premium rated text messages.

<sup>131</sup> S54(1)(b) prohibited a promoter from increasing the prices, while s54(1)(j) allowed price increases as long as prices were not increased to such an extent that the price actually constituted consideration for entry into the competition. (Louw 2003 unpagged)

<sup>132</sup> Abdurahman 37.

number of countries (including South Africa), if the administration or random draw took place outside the Republic. However, from minutes of meetings of the Parliamentary Trade and Industry Portfolio Committee, it appears that the intention behind section 54(1)(a) was actually to clarify that section 54 only applied to promotional competitions conducted in South Africa, on the basis that the legislation could not apply extraterritorially. In view of this, it was intended that section 54(1)(a) would contain the word “only” (in order to convey the meaning that the legislation would apply in South Africa only), but the word “only” was omitted in the final wording because it could have created the impression that a competition would have been lawful only if the competition was conducted in South Africa only (and nowhere else).<sup>133</sup>

Further challenges were faced because of restrictions relating to the nature of competitions and the prizes offered or awarded. A competition would have been unlawful if it was “substantially similar to any competition, game or sports pool conducted by or on behalf of the National Lottery”.<sup>134</sup> In those times (as at present) the National Lottery conducted a variety of games (such as the country’s main lottery as well as scratch card competitions), and it would have been difficult for a promoter to avoid such competition mechanisms.<sup>135</sup> The difficulty would have been compounded by the requirement that promoters were not allowed to award prizes that were similar to those offered or awarded by the National Lottery.<sup>136</sup> Additional restrictions in respect of prizes caused further challenges.<sup>137</sup> The provisions in terms of which a competition

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<sup>133</sup> See Minutes of the Trade and Industry Portfolio Committee’s meeting on 17 October 2001 (<http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2001/minutes/011017pctrade.htm>, accessed on 23 May 2015) and 26 October 2001 (<http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2001/minutes/011026pctrade.htm>, accessed on 23 May 2015).

<sup>134</sup> S54(1)(i).

<sup>135</sup> Young 42; Mackenzie 12-13.

<sup>136</sup> Regulation 3(1)(a) prohibited the awarding of prizes “substantially similar to goods, services or benefits offered or awarded as prizes in a competition, game or sports pool conducted by or on behalf of the National Lottery during the period in which that promotional competition is being held”. This was problematic, because the National Lottery offered a wide range of prizes (for example cash and cars), and the nature of the prizes changed from time to time. (Mackenzie 13) Louw also pointed out that the wording of reg 3(1)(c) did not really make sense because the National Lottery was not an entity or organisation, but a lottery conducted by a licensee in terms of the Lotteries Act. As such, the wording should have referred to a lottery, competition and the like conducted by the particular licensee. (Louw 2003 unpagged)

<sup>137</sup> A prize could not be offered if “the possession, use, rendering, distribution or delivery [was] dependent on the payment of a fee or any consideration to any person in order to fully possess or use the prize”. (Reg 3(1)(c) of the PC Regulations; Young 42) This meant that a competition could have been unlawful if a winner had won a holiday in a hotel, but the winner had to pay entrance fees to the resort in which the hotel was located, or if a winner had won an overseas trip, but had to pay visa fees. Under reg 3(1)(d) it would also have been unlawful to award a prize if, *inter alia*, use of the prize required



circular definition of “promotional competition” that was contained in the Lotteries Act.<sup>143</sup> Further, it does not restrict prizes and competitions from being similar to those offered as part of the National Lottery.<sup>144</sup> It also does not prohibit promoters from awarding prizes if winners will need to pay fees to third parties or obtain licences, authorisations or the like in order to use the prizes.<sup>145</sup> Whereas contravention of the Lotteries Act’s provisions relating to promotional competitions would have attracted criminal sanctions, a promoter will face different consequences if it does not comply with the CPA’s requirements.<sup>146</sup> A consumer could file a complaint with the National Consumer Commission on the grounds that the promoter’s non-compliance constitutes prohibited conduct. A compliance notice may be served on the promoter and an administrative penalty might eventually be imposed.

A number of other provisions have not been carried over from the Lotteries Act. For example, the CPA does not contain the confusing wording which stated that a promotional competition would not be unlawful if it is conducted in South Africa.<sup>147</sup> The CPA also omits the requirement that the competition must not be the only or substantial factor that induces persons to purchase the goods or services to which a competition relates.<sup>148</sup> The Lotteries Act prohibited a competition which constituted an unlawful business practice under the Consumer Affairs (Unfair Business Practices) Act, 1988<sup>149</sup> or a restrictive practice under the Competition Act, 1998.<sup>150</sup> These provisions have not been mirrored in the CPA.

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<sup>143</sup> Young 41-42; Abdurahman 37.

<sup>144</sup> Young 42.

<sup>145</sup> The prohibitions contained in reg 3(1)(c) and (d) of the PC Regulations have therefore not been repeated in the CPA. (Young 42) Having said this, the CPA does state that a promoter may not award a prize if the supply of the prize to the winner would be unlawful – for example, a promoter may not give a minor alcohol as a prize. However, a promoter is not prohibited from awarding a prize where possession or use of the prize “is or may be restricted or regulated by, or is otherwise subject to, any regulation”. See s36(3)(b)(i).

<sup>146</sup> See Van Heerden “Section 36” par 22.

<sup>147</sup> See s54(1)(a) of the Lotteries Act.

<sup>148</sup> Such a requirement was contained in s54(1)(c) of the Lotteries Act.

<sup>149</sup> In fact, s121(2)(f) of the CPA repealed the Consumer Affairs (Unfair Business Practices) Act, 1988. However the provisions of that Act were taken up in the CPA. As such, a promotional competition would still have to comply with similar provisions (now contained in other parts of the CPA). See, for example, the general standards that relate to the marketing of goods and services in s29 and the rights to fair and honest dealing contained in Part F of the CPA.

<sup>150</sup> S2(9) provides for the concurrent operation of the CPA and other legislation, except if there is a conflict – in which case the provision that affords better protection to the consumer would take precedence. As such, it is submitted that the Lotteries Act’s requirement relating to a restrictive practice

The Lotteries Act restricted a promotional competition to the promoting of goods or services usually manufactured, sold, supplied, distributed or delivered by the promoter.<sup>151</sup> This meant that a promoter or its brand could not necessarily be promoted by way of a promotional competition.<sup>152</sup> Furthermore, the goods or services of a third party could not be promoted in this manner.<sup>153</sup> The CPA has changed this situation. It specifically allows for the promotion of a “producer, distributor, supplier, or association of any such persons”, as well as *any* goods or services.<sup>154</sup> As such, it appears that the CPA allows a promoter to promote a third party’s goods or services by way of a promotional competition.

The CPA retains the Lotteries Act’s principle that a promoter may not charge consideration for entry into a promotional competition.<sup>155</sup> (The term “consideration” is defined in the CPA and has a very wide meaning.)<sup>156</sup> However, in contrast with the Lotteries Act, the CPA provides no exception for competitions that involve no subscription.<sup>157</sup> Consequently, it appears that the CPA’s provisions would apply even if entry into a promotional competition is absolutely free.<sup>158</sup> (This makes sense if one

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would have been superfluous in the CPA, because the provisions of the Competition Act, 1998 would in any event apply if a promotional competition amounted to such a practice.

<sup>151</sup> Lotteries Act, s54(1)(g) and the definition of “goods or services” in the PC Regulations.

<sup>152</sup> See Louw 2003 unpagged.

<sup>153</sup> See page 203 above.

<sup>154</sup> CPA, s36(1)(d).

<sup>155</sup> S36(3)(a).

<sup>156</sup> According to s1:

“‘consideration’ means anything of value given and accepted in exchange for goods or services, including-

(a) money, property, a cheque or other negotiable instrument, a token, a ticket, electronic credit, credit, debit or electronic chip or similar object;

(b) labour, barter or other goods or services;

(c) loyalty credit or award, coupon or other right to assert a claim; or

(d) any other thing, undertaking, promise, agreement or assurance,

irrespective of its apparent or intrinsic value, or whether it is transferred directly or indirectly, or involves only the supplier and consumer or other parties in addition to the supplier and consumer”.

<sup>157</sup> Ilhaam Jakoet, quoted in Kingdon E “Competition regulations change under the Consumer Protection Act” Polity.org.za 10 January 2011 <http://www.polity.org.za/article/competition-regulations-change-under-the-consumer-protection-act-2011-01-10>, accessed on 24 May 2015 (“Kingdon 2011”). S63 of the Lotteries Act provides that the Lotteries Act’s provisions do not apply to a lottery that does not involve a subscription. As such, when promotional competitions were still governed by the Lotteries Act, the provisions of that statute would not have applied if a promoter managed to operate a promotional competition that involved no subscription.

<sup>158</sup> Even so, there is still an exemption for very small competitions, because the CPA will not apply if the prizes offered do not exceed the threshold determined from time to time. At the time of writing, the threshold is still R1.00. It is submitted that this threshold is extremely low and that most, if not all, competitions would exceed this threshold.



of suppliers or their goods and services,<sup>168</sup> transactions with consumers,<sup>169</sup> as well as the goods or services that are supplied pursuant to such transactions.<sup>170</sup> These grounds of application will now be examined in further detail.

The CPA applies to transactions that take place in South Africa,<sup>171</sup> unless one of the exemptions in section 5(2) apply or if an “industry-wide exemption” has been granted in terms of the provisions of sections 5(3) and 5(4).<sup>172</sup> In terms of section 5(2), the CPA does not apply to a transaction if “goods or services are promoted or supplied to the State”,<sup>173</sup> if an industry-wide exemption applies,<sup>174</sup> or if the transaction amounts to a credit agreement,<sup>175</sup> employment agreement,<sup>176</sup> collective bargaining agreement,<sup>177</sup> or collective agreement.<sup>178</sup> Further, the CPA does not apply to a transaction if “the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold value determined by the Minister in terms of section 6”.<sup>179</sup> The current threshold is R2 million.<sup>180</sup>

A transaction involves an agreement in terms of which goods or services are supplied or to be supplied to a consumer, as well as the supply of goods or services to a consumer in exchange for consideration.<sup>181</sup> A promotional competition in itself would not ordinarily be regarded as a transaction. But, the CPA also applies, separately, to the promotion of goods or services as well as to the promotion of “the supplier of any

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<sup>168</sup> S5(1)(b).

<sup>169</sup> S5(1)(a).

<sup>170</sup> S5(1)(c).

<sup>171</sup> S5(1)(a).

<sup>172</sup> See De Stadler 2013 7-11, 13-15; De Stadler E “Section 5” in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (Original Service 2014) (“De Stadler 2014”) paras 6-59; Van Eeden 2013 49-50.

<sup>173</sup> S5(2)(a).

<sup>174</sup> See ss5(3) and 5(4).

<sup>175</sup> S5(2)(d).

<sup>176</sup> S5(2)(e).

<sup>177</sup> S5(2)(f). This refers to a collective bargaining agreement as defined in section 23 of the Constitution of the Republic of South Africa, 1996 and the Labour Relations Act, 1995.

<sup>178</sup> S5(2)(g). This exemption relates to collective agreements under the Labour Relations Act, 1995.

<sup>179</sup> S5(2)(b).

<sup>180</sup> See GN 294, *Government Gazette* No. 34181, 1 April 2011.

<sup>181</sup> See the definition of “transaction in s1 of the CPA.

goods or services”.<sup>182</sup> (The terms “promote”,<sup>183</sup> “goods”<sup>184</sup> and “services”<sup>185</sup> are defined in section 1.) A promotional competition is a tool for promoting goods or services. As such, the CPA would apply to a promotional competition – hence the provisions contained in section 36.

Even if goods or services are promoted, the CPA will not apply if the goods or services “could not reasonably be the subject of a transaction to which [the CPA] applies”.<sup>186</sup> According to De Stadler, this means that if the transaction that might result from the promotion would not be subject to the CPA, the CPA would not apply to the promotion of the relevant goods or services either.<sup>187</sup> However, she explains that the CPA will still apply to the promotion of goods or services, even if the promotion does not lead to an eventual transaction (where such transaction would have been covered by the CPA’s provisions).<sup>188</sup> It is submitted that De Stadler’s explanations are correct and that the legislature intended to prevent a situation where the CPA’s protection extends to the promotion of goods or services where the relevant consumer would not be protected if they were to conclude a transaction in respect of the relevant goods or services.

However, the exemption in section 5(1)(b)(i) will lead to interpretational challenges in practice. For example, the CPA does not apply to a transaction if the consumer is a juristic person whose annual turnover or asset-value exceeds the relevant

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<sup>182</sup> S5(1)(b).

<sup>183</sup> See fn 220 below for the definition of “promote”.

<sup>184</sup> According to s1,

“‘goods’ includes –

- (a) anything marketed for human consumption;
- (b) any tangible object not otherwise contemplated in paragraph (a), including any medium on which anything is or may be written or encoded;
- (c) any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium, or a licence to use any such intangible product;
- (d) a legal interest in land or any other immovable property, other than an interest that falls within the definition of ‘service’ in this section; and
- (e) gas, water and electricity”.

<sup>185</sup> S1 contains a very long definition of “services”. It includes, *inter alia*, “any work or undertaking performed by one person for the direct or indirect benefit of another”; “the provision of any education, information, advice or consultation” (subject to exceptions); banking, financial and insurance services (subject to exceptions); transportation services; services related to accommodation, entertainment, and electronic communication; as well as rights of occupation and franchise related services.

<sup>186</sup> S5(1)(b)(i).

<sup>187</sup> De Stadler 2014 par 69.

<sup>188</sup> De Stadler 2014 par 68.





irrespective of whether a participant is required to demonstrate any skill or ability before being awarded a prize.<sup>192</sup>

The definition applies to a wide variety of arrangements and would therefore apply to a scheme, even if it is not described as or appears to be a competition in the narrow sense. The definition is not limited to schemes which involve entrants contesting or competing against each other.<sup>193</sup> A scheme could be a promotional competition even if it involves a game played by consumers individually.<sup>194</sup> It is submitted that the definition would therefore cover schemes that involve the scratching of scratch cards as well as chance based games that can be played on the internet and via social media, even though the outcome of the game might not be influenced by the presence or success of other participants. Further, in order to cast the net as wide as possible, the definition would also cover any other kind of “scheme, arrangement, system, plan or device”.<sup>195</sup> Accordingly, when considering whether or not a scheme is a promotional competition under the CPA, one needs to look wider and keep in mind that something could fall within the scope of the CPA’s definition, even though it might not at first glance seem to be a competition in the usual or traditional sense.<sup>196</sup>

Prizes play a key role in promotional competitions and this is reflected in the fact that the CPA’s definition of the term promotional competition refers to the distribution of prizes. The CPA contains an extensive definition of the term “prize”, and states that it “includes a reward, gift, free good or service, price reduction or concession, enhancement of quantity or quality of goods or services, or other discounted or free thing”.<sup>197</sup> (In contrast, the Lotteries Act has a much narrower definition of the term “prize” and merely refers to “the prize awarded to the winner of a lottery”.) When

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<sup>192</sup> S36(1)(d).

<sup>193</sup> See the discussion of the concept “competition” above at pages 191-192 and, in particular, the English courts’ interpretation of the term in fn 48 above.

<sup>194</sup> A promotional competition could therefore be a “passive competition” and does not need to involve elements of competition in the narrow sense, such as “rivalry” (term used in *Whitbread & Co Ltd v Bell* 69), “effort or striving or dexterity” (term used in *Imperial Tobacco Ltd v Attorney-General* 879) or “conflicts of interest” between participants (term used in *Elderton v United Kingdom Totalisator Co Ltd* 629).

<sup>195</sup> These elements correspond with those contained in the Lotteries Act’s definition of “lottery”. See the discussion at pages 185-198 above.

<sup>196</sup> One should therefore also look out for schemes that do not fit into the normal mould, such as the arrangement in *R v Cranston* which involved bonds (see page 186-187 above) as well as the scheme in *FirstRand Bank Ltd v National Lotteries Board* which involved bank accounts.

<sup>197</sup> S36(1)(b); De Stadler 2013 66.

evaluating a competition, one should therefore look out for extraordinary things that could constitute the prize, and not be limited by a narrow understanding of the term “prize”. However, it must also be kept in mind that if all consumers receive a prize, the scheme might be a promotional offer instead of a promotional competition.<sup>198</sup>

Another key feature which needs to be kept in mind when considering the application of section 36 relates to the element of lot or chance. A promotional competition is defined as a competition or similar arrangement in terms of which prizes are distributed “by lot or chance”.

However, the question arises whether section 36 only applies to chance based competitions, or whether its scope extends to skill based competitions as well. Some authors are of the view that section 36 covers both chance based and skill based competitions.<sup>199</sup> De Stadler states that something will be a promotional competition if it involves “the slightest element of luck” and that a competition will only escape the application of section 36 if it is “entirely dependent on the skill of the participant”. Kingdon and Jakhoet believe that “it is irrelevant whether the competition awards prizes based on lot or chance, or on the skill of the participant – in both instances the competition must comply with the [CPA]”.<sup>200</sup> Melville does not even mention lot or chance, and remarks that the CPA covers “games and other similar arrangements used for promotional purposes, irrespective of whether a participant is required to demonstrate any skill or ability before being awarded a prize”.<sup>201</sup>

Despite these views, it is suggested that the reach of section 36 is limited to competitions in which lot or chance determines the outcome. It is submitted that authors who hold that section 36 applies to both chance and skilled based competitions are misled by the concluding text of the promotional competition definition: “[...] irrespective of whether a participant is required to demonstrate any skill or ability before being awarded a prize.”<sup>202</sup> When interpreting the definition, it may be

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<sup>198</sup> De Stadler 2013 67. Promotional offers are regulated by s34 of the CPA. S34(2) defines a promotional offer as “an offer or promise, expressed in any manner, of any prize, reward, gift, free good or service, price reduction or concession, enhancement of quantity or quality of goods or services, irrespective of whether or not acceptance of the offer is conditional on the offeree entering into any other transaction”. Section 34(1)(c) specifically excludes promotional competitions from the operation of s34.

<sup>199</sup> De Stadler 2013 66.

<sup>200</sup> Kingdon & Jakhoet 35.

<sup>201</sup> Melville 60.

<sup>202</sup> Extract from 36(1)(d).

that they regard it as stating that a promotional competition is something in which prizes are distributed by lot or chance, irrespective of whether a participant is required to show skill or ability. However, it is submitted that one must have regard to both the beginning and the end of the definition, in order to interpret its application. The beginning of the definition contains the essence and defines a promotional competition at the outset as “any competition [...] for distributing prizes by lot or chance”. It is submitted that the rest of the definition merely contains qualifications or clarifications relating to lot or chance based competitions (and only such competitions). It seems that authors who hold a contrary view argue that the concluding wording of the definition extends its reach in order to encapsulate skill based competitions as well. However, it is submitted that it would be senseless for the definition to state clearly that it pertains to the distribution of prizes by lot or chance, and to then make an about turn at the end and state that it also applies to competitions in which skill must be demonstrated. If this was the case, it is submitted that the introductory wording would have referred to the distribution of prizes by lot or chance *and/or on account of the skill demonstrated by participants*.

It is submitted that a promotional competition is first, foremost and solely a lot or chance based competition, and the concluding text was merely added to prevent promoters from introducing some slight measure of skill (such as a very simple general knowledge question) in an attempt to avoid a competition from being classified as a promotional competition. In support of this argument, it may be pointed out that the qualification at the end of the definition relates specifically to a skill requirement which must be shown before a prize is awarded, and not to skill or ability that must be shown in the course of the competition. The wording also does not refer to the demonstration of skill or ability in order to participate in the competition. It seems to relate merely to skill or ability that must be shown at the end of the competition in order for someone to receive a prize (and not in order for that person to win the competition). The wording might even mean that it contemplates the situation where someone has already won the competition, but needs to show skill or ability in order to then receive the prize.

It is submitted that the concluding text’s purpose of preventing promoters from avoiding the CPA’s application might have its roots in existing case law. In two

separate cases, *S v Bryant*<sup>203</sup> and *S v Alexander*,<sup>204</sup> the courts had to consider whether the competitions before them were lotteries. Both matters involved games of Bingo, in which the result depended on chance. After a person won a game of Bingo, they first had to answer a simple general knowledge question in order to receive their prize. The courts found that the competitions were predominantly chance based, and that the organisers could not prevent the competitions from being classified as lotteries by posing simple questions to winners at the end of the Bingo games.<sup>205</sup> It is submitted that the concluding text of the CPA's definition of promotional competition was inserted to deal with such cases, and any other situations in which competition organisers attempt to avoid the CPA's application.<sup>206</sup>

It can be challenging to establish whether a competition is based on skill. The relevant considerations have already been discussed above,<sup>207</sup> and the details will not be repeated here. In the context of the CPA, De Stadler avers that a competition will be a promotional competition if it involves "the slightest element of luck (as opposed to skill)".<sup>208</sup> However, it is submitted that just as a slight element of skill cannot change a chance based competition into a skill based one, a slight element of chance cannot change a true skill based competition into a chance based one. If De Stadler's view was correct, virtually all competitions would in any event be chance based, even if they did involve substantial skill. This is because the outcome of even true skill based competitions could be influenced by chance, for example if there is a sudden gust of wind which changes the direction of a golfer's ball, if a runner slips on a wet running surface or if a chess player knocks over a chess piece by mistake.<sup>209</sup> In fact, as the court pointed out in *R v James and Tennant*,<sup>210</sup> one finds "an element of chance in all human achievements". In *S v Alexander*,<sup>211</sup> the court cited those words from *R v James and Tennant* and stated that "when success or failure, as the case may be, can be predicted or influenced by human knowledge, experience, art or skill the occurrence

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<sup>203</sup> 1962 (2) SA 702 (N).

<sup>204</sup> 1962 (3) SA 649 (A).

<sup>205</sup> *S v Bryant* 708; *S v Alexander* 652-653.

<sup>206</sup> It is submitted that Abdurahman might have contemplated this purpose as well, because she seems to refer to these cases too, although she does not name them. (Abdurahman 37)

<sup>207</sup> See pages 196-198.

<sup>208</sup> De Stadler 2013 66.

<sup>209</sup> See Dendy 1989 50-51.

<sup>210</sup> 1919 TPD 47 at 49.

<sup>211</sup> 1962 (3) SA 649 (A).



of business”.<sup>219</sup> In view of the above discussions, it is submitted that the CPA does not require that a competition must be conducted as part of an enterprise that frequently conducts promotional competitions, and that a promotional competition would still fall within the ambit of section 36 if it is the kind of competition that would be held by a typical business. As such, it is submitted that a competition could still be classified as a promotional competition, even if it is a once-off or infrequent occurrence.

The provisions of section 36(1)(d)(i) require that the competition must be conducted “for the purpose of promoting a producer, distributor, supplier, or association of any such persons, or the sale of any goods or services”.<sup>220</sup> As such, the competition cannot be conducted for other purposes, such as fundraising.<sup>221</sup> The competition can promote any of the parties above, but one needs to note that the CPA accords specific means to those parties.<sup>222</sup> As such, if the promoter cannot be classified as one of those parties, the competition might not meet the requirements of section 36(1)(d)(i).<sup>223</sup>

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<sup>219</sup> Naudé T “The Consumer’s Right to Safe, Good Quality Goods and the Implied Warranty of Quality Under Sections 55 and 56 of the Consumer Protection Act 68 of 2008” 2011 *South African Mercantile Law Journal* 23:3 336 (“Naudé 2011”) 337. Naudé also refers to income tax law, and concludes that a lease agreement, for example, would be subject to the CPA’s provisions even if the lessor leases out only one property. (Naudé 2011 338)

<sup>220</sup> The CPA (s1) states that “promote” means to:

- “ (a) advertise, display or offer to supply any goods or services in the ordinary course of business, to all or part of the public for consideration;
- (b) make any representation in the ordinary course of business that could reasonably be inferred as expressing a willingness to supply any goods or services for consideration; or
- (c) engage in any other conduct in the ordinary course of business that may reasonably be construed to be an inducement or attempted inducement to a person to engage in a transaction.”

A “distributor”, in the context of specific goods, is defined as:

“a person who, in the ordinary course of business –

- (a) is supplied with those goods by a producer, importer or other distributor; and
- (b) in turn, supplies those goods to either another distributor or a retailer”. (S1)

A “supplier” is “a person who markets any goods or services”. (S1)

<sup>221</sup> In *National Lotteries Board v Bruss NO* the court held that the Winikhaya competition was conducted for fundraising purposes and not to promote goods or services. In view of the wording of 36(1)(d)(i), it is submitted that the position would have been the same under the CPA.

<sup>222</sup> “Producer”, in relation to particular goods, is defined by s1 as a person who:

- “(a) grows, nurtures, harvests, mines, generates, refines, creates, manufactures or otherwise produces the goods within the Republic, or causes any of those things to be done, with the intention of making them available for supply in the ordinary course of business; or
- (b) by applying a personal or business name, trade mark, trade description or other visual representation on or in relation to the goods, has created or established a reasonable expectation that the person is a person contemplated in paragraph (a)”.

<sup>223</sup> In view of this, it is doubtful whether a charitable organisation can qualify as promoters unless the competition is conducted, for example, in the context of the organisation’s supply of goods or services.

However, one person could conduct a competition to promote another person.<sup>224</sup> A competition can also be held to promote goods or services on their own.<sup>225</sup>

Another key requirement is contained in section 36(1)(d)(ii), in terms of which a competition will only be regarded as a promotional competition if its prizes exceed the prescribed threshold. The current threshold is R1.00.<sup>226</sup> It appears that the purpose of section 36(1)(d)(ii) is to allow the conducting of competitions in which prizes of negligible value are awarded. In this vein, De Stadler remarks that it would have been appropriate to differentiate between promotional competitions based on the value of the prizes involved, on the basis that a competition with low value prizes does not warrant the same strict regulation as a competition in which high value prizes are offered.<sup>227</sup> Still, if the CPA's intention is to protect consumers against abuse, some might argue that the threshold exemption in section 36(1)(d)(ii) should not have formed part of the legislation and that all promotional competitions should have been covered by the CPA. Be that as it may, it is submitted that the R1.00 threshold is too low to achieve the purpose behind section 36(1)(d)(ii), and that virtually all competitions would exceed the threshold. In fact, it seems that a promoter would only benefit from the exemption if the relevant prizes had no value. Accordingly, it is submitted that the threshold should be increased.

It is important to determine whether a competition meets all of the requirements mentioned above and whether it thus falls within the scope of the CPA's definition of a "promotional competition". The reason for this lies in the fact that a promotional competition must comply with all of the CPA's provisions that pertain to the operation of promotional competitions. If the competition does not fall within the scope of the definition, compliance might not be required. However, if the competition falls outside such scope but can nonetheless be regarded as a lottery, the promoter might be faced with a situation where the competition could be classified as an illegal lottery, unless it otherwise complies with the Lotteries Act's requirements.<sup>228</sup> This constitutes another

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<sup>224</sup> Compare this to the position under the erstwhile s54(1)(g) of the Lotteries Act, which required that "the goods or services manufactured, sold, supplied, distributed or delivered in connection with the right to participate in a promotional competition [had to be] usually or ordinarily manufactured, sold, supplied, distributed or delivered by the person for whose benefit the promotional competition is held".

<sup>225</sup> It need not be the goods or services of the promoter, as opposed to the position under s54(1)(g) of the Lotteries Act.

<sup>226</sup> CPA Regulations, reg 11(4).

<sup>227</sup> De Stadler 2013 67.

<sup>228</sup> See the discussion above at pages 199-202.









#### 5.4.5 Protection against misleading information

In keeping with the CPA's purposes of advancing fair business practices, improving consumer information and protecting consumers from improper conduct,<sup>241</sup> and in line with section 29's general marketing standards, section 36(2) prohibits persons from making certain false or misleading statements in the context of competitions. In particular, a person is prohibited from informing another person that a participant has won a competition, if:

- (i) no competition has in fact been conducted;
- (ii) the person has not in fact won the competition;
- (iii) the prize for that competition is subject to a previously undisclosed condition; or
- (iv) the person is required to offer further consideration for the prize, after the results of the competition have been announced.<sup>242</sup>

The provision prohibits a "person" from making the relevant statements. Section 1 does not have a specific definition for that term, and states that "'person' includes a juristic person". As such, one could interpret the provision to mean that no one may make such statements, even if the person making the statement is not even connected to the competition. However, it is submitted that the prohibition's main purpose must be to prevent suppliers and promoters from making those statements.

Section 36(2)(b) contains further prohibitions, but in this case they relate specifically to prizes. A person may not inform someone else that they have a right to a prize:

- (i) to which the person does not in fact have a right;
- (ii) if the prize was generally available or offered to all similarly situated persons or class of persons; or
- (iii) if, before becoming eligible to receive the prize, the person is required to offer further consideration for the prize or to purchase any particular goods or services.

In essence, the provision prohibits statements to the effect that someone has won a prize, if that is not the case or if everyone actually has such a right.

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<sup>241</sup> See s3 of the CPA, which outlines the purpose and policy of the CPA, including "promoting fair business practices" (s3(c)), protecting consumers from improper, misleading and similar conduct (s3(d)) and "improving consumer awareness and information" (s3(e)).

<sup>242</sup> S36(2)(a).













or services” as prizes.<sup>263</sup> However, it is submitted that section 36(3)(b)(i) does not prohibit the awarding of illegal prizes as such, but rather the awarding of goods or services where the supply of such goods or services is illegal. If the prohibition was aimed at illegal goods or services only, a promoter would have been allowed to supply alcohol to children, because alcohol as such is not an illegal product (but the supply of alcohol to minors is illegal). Tennant seems to give an altogether different meaning to section 36(3)(b)(i) when she states that a promoter must “award prizes to lawful candidates such as to legal citizens of the Republic of South Africa”.<sup>264</sup> However, it is submitted that the relevant prohibition is not aimed at the lawfulness or legality of the prize recipient, but concerns the lawfulness of the supply of the prize instead.

The focus of the abovementioned prohibition seems to be on the lawfulness of the supply of the prize to the winner, and not necessarily on the prize as such. In other words, when choosing prizes for a competition, a promoter would have to check whether there is any legislation that regulates or prohibits the supply of the relevant product or service to the persons that might be winners in the competition. For example, legislation might prohibit the supply of alcohol or tobacco to minors. As such, alcohol or tobacco should not be offered in a competition unless the competition is open for entry by adults only.<sup>265</sup> In order to clarify the scope of the prohibition, the provision states that it is not intended to prevent a promoter from awarding a prize merely because “the winner’s right to possess or use the prize is or may be restricted or regulated by, or is otherwise subject to, any public regulation”.<sup>266</sup> For example, a promoter may award a television as a prize, even though the winner may need to obtain a television licence in order to use the prize.<sup>267</sup>

Promoters must ensure that the promotional materials for their competitions are accurate.<sup>268</sup> They should give attention to the description of the prizes being offered, and avoid any misleading, deceptive or ambiguous statements. The description must

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<sup>263</sup> Opperman & Lake 51.

<sup>264</sup> Tennant 174.

<sup>265</sup> See De Stadler 2013 72 fn 148.

<sup>266</sup> S36(3)(b)(i).

<sup>267</sup> As another example, Van Heerden mentions that a promoter would not be precluded from offering a motor vehicle as a prize, even though the winner will need a driver’s licence in order to use the prize. (Van Heerden “Section 36” par 12)

<sup>268</sup> De Stadler 72.

be drafted in such a manner that consumers will understand what is included in the prize and what will be for the winner's own account.<sup>269</sup> In illustrating this, De Stadler explains that consumers would think that they will win flights and a hotel stay if a promoter advertises the opportunity to win "a trip to Madagascar", and it would therefore be misleading if the promoter in the end provides the winner with airplane tickets only.<sup>270</sup> It is submitted that consumers might also be misled if a promoter advertises a competition in which the winner will receive an "all-inclusive holiday in Thailand", but the winner then has to pay for hotel meals and resort fees. It may also be misleading to offer participants the opportunity to "win a year's supply of milk", if the intention is to provide the winner with a maximum of one litre of milk per day. Accordingly, if the promoter intends to impose such a limitation, the promoter would have to clarify this in the marketing material and the terms and conditions that relate to the competition.

Problems will arise if the description or illustration of prizes in marketing material does not match the prizes that are eventually awarded. This would be the case where a winner receives a budget range vehicle while the marketing material depicted a luxury sedan. Melville points out that the CPA's promotional competition provisions do not contain a specific prohibition against this, but submits that the promoter might still breach the CPA's provisions relating to false, misleading or deceptive marketing.<sup>271</sup>

The CPA also deals with the availability of prizes – section 36(10) applies the provisions of section 35(5) to promotional competitions. If one adapts the wording of section 35(5) accordingly, it seems that promoters may not place any restrictions on the availability of prizes during a specific period unless the promoter has given twenty business days' written notice to participants.<sup>272</sup> Based on the wording of section 35(5), it would also appear that the periods during which the availability of prizes is restricted may not exceed a total of ninety days in any calendar year. De Stadler remarks that these provisions are "very awkward" in relation to promotional competitions.<sup>273</sup> However, she submits that the provisions imply that promoters may not terminate a

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<sup>269</sup> De Stadler 72.

<sup>270</sup> De Stadler 72.

<sup>271</sup> See s41. (Melville 62)

<sup>272</sup> However, See s35(5).

<sup>273</sup> De Stadler 2013 74.



The CPA does not prescribe the content for competition rules. However, section 36(5) prescribes certain details that need to be disclosed in offers to participate in promotional competitions. As such, it is submitted that competition rules should contain at least the details described by that subsection. However, promoters should ensure that they include all important terms and conditions in the rules (whether or not they are prescribed by the CPA).<sup>279</sup> The competition rules should at least contain the competition's opening and closing date, details of who may enter the competition, the requirements for participation, any restriction on participation as well as clear details surrounding the prizes.<sup>280</sup>

Care should be taken in the drafting of competition rules. Section 22 of the CPA requires that all notices, documents and visual representations required by the CPA or other law must be in plain language.<sup>281</sup> Since the CPA requires promoters to prepare competition rules, those rules need to be in plain language. According to section 22(2), a document will be in plain language if:

[...] it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort [...].<sup>282</sup>

In determining whether a consumer can understand the document, as set out above, one must consider the following factors: (1) the document's "context, comprehensiveness and consistency",<sup>283</sup> (2) its "organisation, form and style",<sup>284</sup> (3)

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<sup>279</sup> See De Stadler 2013 71. She notes that s36(2)(a)(iii) prohibits a promoter from notifying someone that they had won a prize if, inter alia, "the prize for that competition is subject to a previously undisclosed condition". As such, all relevant conditions should also be contained in the competition rules.

<sup>280</sup> De Stadler 2013 71.

<sup>281</sup> Regarding the CPA's plain language requirements, see De Stadler 2013 104-112; Stoop PN "Section 22" in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (Original Service 2014) paras 1-33 ("Stoop 2014"); Stoop PN & Chürr C "Unpacking the right to plain and understandable language in the Consumer Protection Act 68 of 2008" 2013 *Potchefstroom Electronic Law Journal* 16:5 514; Gouws M "A Consumer's Right to Disclosure and Information: Comments on the Plain Language Provisions of the Consumer Protection Act" 2010 *South African Mercantile Law Journal* 22:1 79; Louw E *The Plain Language Movement and Legal Reform in the South African Law of Contract* ("E Louw").

<sup>282</sup> S22(2).

<sup>283</sup> S22(2)(a).

<sup>284</sup> S22(2)(b).

its “vocabulary, usage and sentence structure”,<sup>285</sup> and (4) “the use of any illustrations, examples, headings or other aids to reading and understanding”.<sup>286</sup> According to section 22(3), the National Consumer Commission is also empowered to issue guidelines that can be used in order to determine whether a document is in plain language. However, to date, such guidelines have not yet been published. It is submitted that such guidelines would aid drafters in implementing the CPA’s broad plain language requirements.<sup>287</sup> In the interim, drafters could refer to the guidelines published in other jurisdictions, such as the United States of America.<sup>288</sup> Software can be used as an aid in plain language drafting too.<sup>289</sup>

When drafting competition rules, a promoter should determine the class of consumers at which the competition is aimed, and consider whether the rules will be appropriate and whether the class of consumers will be able to understand them. The rules must be drafted in such a manner that a consumer with “average literacy skills” can comprehend them. However, De Stadler explains that the document does not need to be “dumbed down”, but the language must still be simple and easy enough in order for the consumer to grasp the contents.<sup>290</sup> She submits that one could therefore rather use the term “understandable language” instead of “plain language”.<sup>291</sup>

Section 22 also places an emphasis on the presentation of a document, requiring that one must consider its “organisation, form and style” and the use of “aids to reading and understanding”.<sup>292</sup> One often encounters fine print competition rules that are shrunk into a tiny font size on a single page. It is likely that such rules might not pass the plain language test. Instead, promoters should consider using a font size that is easy to read (bearing in mind that some consumers might struggle with their vision). It is submitted that promoters should not try to save space, particularly if rules are displayed on a web page (where space should usually not be a problem). It would also

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<sup>285</sup> S22(2)(c).

<sup>286</sup> S22(2)(d).

<sup>287</sup> Louw E remarks that the CPA’s definition of plain language is “very broad” and it lacks clear guidance for drafters. (E Louw 137)

<sup>288</sup> Stoop 2014 paras 27-28.

<sup>289</sup> Stoop 2014 29.

<sup>290</sup> De Stadler 2013 105. De Stadler also cites Baitsewe R “Plain Language: More than just ‘plain’ words” June 2012 *Consumer Law Review* [https://jutalaw.co.za/newsletter/newsletter/consumer-law-database\\_jun-2012-1-1-1-1-1-1-1/](https://jutalaw.co.za/newsletter/newsletter/consumer-law-database_jun-2012-1-1-1-1-1-1-1/), accessed on 17 July 2015 (“Baitsewe”).

<sup>291</sup> De Stadler 2013 105.

<sup>292</sup> Ss22(2)(b) and (c).

be easier to grasp the document's contents if it has a logical layout. This could be achieved by, for example, using numbering, headings and bullet points.<sup>293</sup> Further, one could use bold type to highlight crucial provisions and text boxes that explain complicated concepts.<sup>294</sup> In view of the many languages spoken in South Africa, it is submitted that a promoter must also consider whether the rules should perhaps be available in more than one language, or whether a specific language might be more appropriate for a particular target audience.

Apart from ensuring that competition rules are in plain language, promoters need to make sure that the contents of their competition rules are in line with the CPA's provisions. The CPA records consumers' rights to fair, just and reasonable terms and conditions.<sup>295</sup> Suppliers are prohibited from offering to supply or supplying goods or services, or concluding agreements with consumers in regard to such supplying on prices or terms that are unfair, unreasonable or unjust.<sup>296</sup> It is submitted that the terms and conditions that govern a promotional competition would not fall within the scope of the aforesaid prohibition, because a promotional competition is not a transaction in terms of which goods or services are supplied. However, the CPA also prohibits suppliers from marketing goods or services in a manner that is unfair, unreasonable or unjust.<sup>297</sup> A promotional competition is a tool by which goods and services are marketed, and it is submitted that suppliers would therefore be prohibited from running a promotional competition in a manner that is unfair, unreasonable or unjust. Accordingly, a promoter would have to ensure that the terms and conditions of its competitions are fair, reasonable and just. The CPA also requires the promoter to draw certain onerous terms to the consumer's attention in a conspicuous manner.<sup>298</sup>

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<sup>293</sup> De Stadler 2013 110.

<sup>294</sup> De Stadler 2013 110; Baitsewe (unpaged); Louw E 103.

<sup>295</sup> Ss48-52. See Naudé T "Unfair Contract Terms Legislation: The Implications of Why We Need it for its Formulation and Application" 2006 *Stellenbosch Law Review* 17:3 361 373-374; Naudé T "The Use of Black and Grey Lists in Unfair Contract Terms Legislation in Comparative Perspective" 2007 *South African Law Journal* 124:1 128; Naudé T "The consumer's 'right to fair, reasonable and just terms' under the new Consumer Protection Act in comparative perspective" 2009 *South African Law Journal* 126:3 505; Naudé T "The consumer's 'right to fair, reasonable and just terms' under the new Consumer Protection Act in comparative perspective" 2009 *South African Law Journal* 126:3 505; Stoop PN *The Concept 'Fairness' in the Regulation of Contracts under the Consumer Protection Act 68 of 2008*.

<sup>296</sup> S48(1)(a).

<sup>297</sup> S48(1)(b).

<sup>298</sup> S49. These onerous terms include provisions which limit the supplier's "risk or liability to the consumer" and indemnities granted by a consumer to a supplier. See s49(1).

Although the CPA contains a so-called “grey list” of terms and conditions that are deemed unfair, unreasonable and unjust,<sup>299</sup> such list does not contain any terms that relate to promotional competitions in particular. However, some of the listed terms might be found in competition rules, for example a provision which excludes or limits the promoter’s liability for the consumer’s death or injury,<sup>300</sup> a term which excludes the promoter’s liability for non-performance,<sup>301</sup> a provision in terms of which the consumer must “indemnify the supplier against liability incurred by it to third parties”,<sup>302</sup> a provision which allows the promoter unilaterally to alter the terms and conditions,<sup>303</sup> an acknowledgement that is detrimental to the consumer,<sup>304</sup> an exclusion of the consumer’s right of recourse against the promoter,<sup>305</sup> or providing that the terms and conditions will be governed by the laws of a country other than South Africa.<sup>306</sup> Even if competition rules do not contain terms that are on the grey list, a promoter would still have to consider the terms and conditions of the competition and determine, in general, whether or not they could be deemed unfair, unreasonable and unjust. In this regard, one must bear section 48(2) in mind, which provides that a term will be unfair, unreasonable and unjust if, *inter alia*, it is “excessively one-sided in favour of any person other than the consumer”,<sup>307</sup> or if it is “so adverse to the consumer as to be inequitable”.<sup>308</sup>

Apart from the CPA’s provisions relating to terms and conditions that are deemed to be unfair, unjust or unreasonable, there are also prohibitions in respect of certain terms. These may be relevant in respect of competition rules too. The rules may not include, for example, a provision which is intended to circumvent the operation of the

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<sup>299</sup> Reg 44 of the CPA Regulations; De Stadler 2014 46.

<sup>300</sup> Reg 44(3)(a). Promoters often insert this kind of term in competition rules in instances where consumers have to participate in potentially dangerous activities or where the use of the prizes awarded in the competition could be dangerous or harmful.

<sup>301</sup> Reg 44(3)(b) and (n). Competition rules often state that the promoter will be allowed to suspend or terminate the competition and that participants will have no claims against the promoter in this regard.

<sup>302</sup> Reg 44(3)(e).

<sup>303</sup> Reg 44(3)(i).

<sup>304</sup> Reg 44(3)(v).

<sup>305</sup> Reg 44(3)(x).

<sup>306</sup> Reg 44(3)(bb). This might be encountered in the case where a foreign promoter runs a promotional competition in South Africa. In such an instance, one might also find that the terms and conditions state that disputes will be subject to the jurisdiction of a foreign forum – which might also be deemed to be unfair.

<sup>307</sup> S48(2)(a).

<sup>308</sup> S48(2)(b).







- (e) the medium through or by which the results of the competition will be made known; and any person from whom, any place where, and any date and time on or at which –
  - (i) a person may obtain a copy of the competition rules; and
  - (ii) a successful participant may receive any prize.<sup>326</sup>

Section 36(5) does not make it clear whether this information must be stated in all offers and marketing materials relating to a competition. It prescribes what must be contained in “[a]n offer to participate”. This prescription could create the impression that every offer must therefore contain such information. However, section 36(6) seems to clarify this situation somewhat by stating that the requirements of section 36(5) may be met by displaying the relevant information directly on the competition entry medium (for example, the entry form) or on documentation that accompanies that medium or in any advertisement.<sup>327</sup> The information may also be made known in an advertisement “published during the time and throughout the area in which the promotional competition is conducted”, but the advertisement must draw attention to the promotional competition and it must be obvious that the advertisement is associated with the promotional competition.<sup>328</sup> When reading section 36(6), it appears that the prescribed information must not be contained in anything and everything that constitutes an offer to participate, and that the requirement will be fulfilled as long as all the information is disclosed in any of the manners set out in that sub-section. Even so, it is submitted that the requirements of section 36(5) could have been clearer.

One must consider how the requirements of section 36(6) will feature in practice. In traditional on-pack competitions,<sup>329</sup> it may be easy to display the required information on the packaging or a label, tag or entry form that accompanies same. However, it might be difficult to display all of the information on a small product (such as a pen). De Stadler argues that it should be acceptable for the packaging to refer to the fact that terms and conditions apply, and that the terms and conditions “need not be contained in one ‘document’”, and that it should suffice if the entry form refers to terms and conditions that can be found elsewhere.<sup>330</sup>

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<sup>326</sup> S36(5).

<sup>327</sup> Ss36(6)(a) and 36(6)(b).

<sup>328</sup> S36(6)(c).

<sup>329</sup> These are competitions that are advertised or displayed on the outside of product packaging.

<sup>330</sup> De Stadler 2013 69.















competition. Regulation 11(6)(j) requires that the persons who were involved in the conducting of the competition must declare the following under oath or affirmation:

the prize winners were to their best knowledge not directors, members, partners, employees, agents or consultants of or any other person who directly or indirectly controls or is controlled by the promoter *or marketing service providers in respect of the promotional competition, or the spouses, life partners, business partners or immediate family members*". (Own emphasis)

On the other hand, section 36(3)(b)(ii) states that the following persons may not enter a promotional competition:

- (aa) a director, member, partner, employee or agent of, or consultant to the promoter or any other person who directly or indirectly controls or is controlled by, the promoter; or
- (bb) a supplier of goods or services in connection with that competition.

If one compares regulation 11(6)(j) with section 36(3)(b)(ii) it can be seen that regulation 11(6)(j) excludes persons that are not excluded in section 36(3)(b)(ii). (See the text emphasised above.) However, regulation 11(6)(j) does not exclude "a supplier of goods or services in connection with [a] competition".<sup>358</sup> It is submitted that regulation 11(6)(j) attempts to exclude persons that are not excluded in section 36(3)(b)(ii), and that one may argue that regulation 11(6)(j) is *ultra vires* to the extent that it excludes persons that are not excluded in section 36(3)(b)(ii).

It is also difficult to understand the scope of regulation 11(6)(j). Must the relevant persons declare that the winners are not "directors, members, partners, employees, agents or consultants of or any other person who directly or indirectly controls or is controlled by the promoter" only, or does it extend to "directors, members, partners, employees, agents or consultants of or any other person who directly or indirectly controls or is controlled by" the marketing service providers in respect of the promotional competition as well? Or does the wording mean that the declaration must state that marketing service providers were not prize winners? The reference to "the spouses, life partners, business partners or immediate family members" at the end of regulation 11(6)(j) is unclear too. It is assumed that the intention is that the relevant person must also declare that the prize winners were not "spouses, life partners,

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<sup>358</sup> S36(3)(b)(ii)(bb).



In view of the CPA and ECTA's provisions discussed above, promoters need to ensure that they allow consumers to opt out from receiving marketing communications. In the context of promotional competitions this would apply if promoters send out emails or text messages in which they publicise their promotional competitions. Promoters have to implement appropriate systems in order to avoid a situation where they continue sending such materials to consumers that have requested them to stop sending those. The relevant provisions also need to be kept in mind when promoters gather consumer information in the course of running a promotional competition and wish to send future communications, such as newsletters or information about promotions, to consumers.

In future, promoters will have to adhere to the requirements of the Protection of Personal Information Act ("POPI").<sup>367</sup> When POPI comes into force, it will regulate the processing of personal information comprehensively.<sup>368</sup> The term "personal information" is defined in very broad terms. In general, this includes "information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person".<sup>369</sup> Personal information includes, *inter alia*, information relating to a person's "race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth" as well as medical and employment history, contact particulars, biometric information, as well as opinions and views.<sup>370</sup> The term "processing" is equally broad and is defined as "any operation or activity or any set of operations, whether or not by automatic means, concerning personal information".<sup>371</sup> This includes a variety of actions, such as the collection, storage, dissemination and destruction of personal information.<sup>372</sup>

In order to process consumers' personal information, a promoter would have to ensure that it complies with the conditions for the lawful processing of personal information.<sup>373</sup>

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<sup>367</sup> 4 of 2013. At the date hereof, the substantive provisions of POPI are not yet in force, although the provisions that provide for the establishment of the Information Protection Regulator and the drafting of regulations have come into effect. (See No. R. 25, 2014 *Government Gazette* No. 37544, 11 April 2014.)

<sup>368</sup> See Mncwango S "The complex rules for promotional competitions" 2013 (April) *Without Prejudice* 13:3 82.

<sup>369</sup> POPI, s1.

<sup>370</sup> POPI, s1.

<sup>371</sup> POPI, s1.

<sup>372</sup> POPI, s1.

<sup>373</sup> POPI, S4(1) and S8.

POPI allows the processing of personal information in specific circumstances only, including where the data subject has consented to the processing.<sup>374</sup> Accordingly, it would be best for promoters to seek competition entrants' consent for the collection and processing of their personal information,<sup>375</sup> since it may prove more difficult to rely on the other grounds for justification of processing.<sup>376</sup>

POPI will also regulate unsolicited electronic communications, but only in the context of direct marketing that takes place by way of electronic means.<sup>377</sup> Once POPI has come into force, a promoter will only be allowed to process a consumer's personal information for direct marketing purposes if the promoter has obtained the consumer's consent or if the consumer is an existing customer of the promoter.<sup>378</sup> If the promoter wishes to undertake the direct marketing on the basis that the consumer is a customer of the promoter, it must have obtained the consumer's personal information in the context of a transaction with the consumer for purposes of marketing the promoter's own goods or services.<sup>379</sup> Furthermore, the promoter must have afforded the consumer the opportunity to object to the collection of the consumer's personal information at the time of collection, and the consumer must have the opportunity to object again "on the occasion of each direct marketing communication" thereafter.<sup>380</sup>

## 5.6 Sanctions

Although this thesis will not focus on the enforcement of the law in relation to promotional competitions,<sup>381</sup> attention should be drawn to the penalties that can be imposed on promoters that transgress the relevant provisions. The law can only be fully effective if it is complemented by sanctions that are sufficiently daunting in order to dissuade persons from committing contraventions. The Lotteries Act and the CPA

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<sup>374</sup> POPI s11(1).

<sup>375</sup> S1 defines "consent" as "any voluntary, specific and informed expression of will in terms of which permission is given for the processing of personal information".

<sup>376</sup> Taylor D & Cronjé F *101 Questions and Answers About the Protection of Personal Information Act* ("Taylor & Cronjé") 30; De Stadler E & Esselaar P *A Guide to the Protection of Personal Information Act* ("De Stadler & Esselaar") 13.

<sup>377</sup> Van Zyl & De Stadler par 14; De Stadler & Esselaar 64.

<sup>378</sup> POPI, s69(1); Van Zyl & De Stadler par 14; De Stadler & Esselaar 65-67.

<sup>379</sup> POPI, s69(a) and (b).

<sup>380</sup> POPI, s69(3)(c).

<sup>381</sup> Regarding enforcement of the CPA, see De Stadler 2013 169-182, Van Eeden 2013 387-456 and Van Heerden C "Enforcement of the Act" in Naudé and Eiselen (eds) *Commentary on the Consumer Protection Act* 99-1 to 119-2 ("Van Heerden 'Enforcement'").

are the two statutes that have a bearing on the regulation of promotional competitions in South Africa. Accordingly, the applicable penalties found in them are discussed below.

The interplay between the Lotteries Act and the CPA was discussed above.<sup>382</sup> It was pointed out that sections 56 and 57 of the Lotteries Act prohibit a broad range of conduct relating to lotteries and that a promoter would have to structure its competition in such a way that it complies with the CPA's requirements relating to promotional competitions in order to be lawful. If this cannot be achieved, the promoter would have to remove one of the lottery elements (chance, prize or consideration) in order to prevent the competition from being an unlawful lottery. If this is not done, the board of the National Lotteries Commission might investigate the matter and take steps against the promoter.<sup>383</sup> If the promotional competition is unlawful, the promoter might be guilty of an offence in terms of the provisions of section 57(1) of the Lotteries Act. Conviction of such an offence can lead to a fine, imprisonment or both.<sup>384</sup> Under earlier legislation, many unlawful lotteries ended up in our courts and led to convictions.<sup>385</sup> However, on occasion, it was also questioned whether the criminal justice system's time should be wasted on such matters when other, more serious crimes were proliferating.<sup>386</sup> Promotional competitions have also featured in judgments based on the Lotteries Act, although the relevant competitions were merely declared unlawful lotteries and no penalties were imposed.<sup>387</sup>

If a competition falls within the classification of a promotional competition in terms of the CPA and is not an unlawful lottery under the Lotteries Act, there may still be ramifications if the promotional competition is not conducted in accordance with the CPA's provisions. In the event of non-compliance, the matter could be investigated by the National Consumer Commission ("NCC"), through its own initiative or in response to a consumer complaint.<sup>388</sup> The NCC can issue a compliance notice if it concludes

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<sup>382</sup> See section 5.2.4 above.

<sup>383</sup> See the board's functions in s10(1)(d) of the Lotteries Act.

<sup>384</sup> See s62 of the Lotteries Act.

<sup>385</sup> See the cases discussed in section 3.2.2 and 3.2.3 in chapter 3 above.

<sup>386</sup> See *S v Pepsi-Cola (Pty) Ltd* 1985 (3) SA 141 (C) 142.

<sup>387</sup> See *FirstRand Bank v National Lotteries Board* [2008] 3 All SA 121 (SCA) and *National Lotteries Board v Bruss NO* [2009] 2 All SA 164 (SCA).

<sup>388</sup> S99(d) read with sections 72 and 73 of the CPA. See De Stadler 2013 175-178; Van Eeden 2013 394-407; Van Heerden C "Protection of Consumer Rights and Consumers' Voice".

that there is a contravention of the CPA's provisions.<sup>389</sup> The offending promoter will be obliged to comply with the compliance notice, unless it is successful in an objection against the compliance notice.<sup>390</sup> If the promoter does not adhere to it, the NCC can apply to the National Consumer Tribunal for the imposition of an administrative fine.<sup>391</sup> The Tribunal can impose a fine which may not exceed the greater of R1 million or ten percent of the offender's annual turnover during the preceding financial year.<sup>392</sup> Alternatively, failure to comply with the compliance order can be referred to the National Prosecuting Authority.<sup>393</sup> This is because such non-compliance constitutes an offence.<sup>394</sup> If prosecution of the matter leads to a conviction, a fine and/or imprisonment of up to 12 months can be imposed.<sup>395</sup>

In view of the above, promoters should ensure that they conduct their promotional competitions in a lawful manner. If this is not done, they could face significant penalties. However, the penalties can only serve as real deterrents if the relevant legislation is actively enforced. Accordingly, the National Lotteries Commission and the NCC should monitor promotional competitions, investigate non-compliance and take steps to ensure that offenders are sanctioned. Consumers will receive effective protection only once this is done.

## 5.7 Conclusion

If a promoter wishes to conduct a competition in South Africa for purposes of promoting goods or services, it first needs to establish whether the competition will be based on skill or chance. If the outcome is determined by chance, the promoter needs to ensure that the competition will not be prohibited by the provisions of section 56 of the Lotteries Act. In order to achieve this, the promoter would have to ensure that the competition complies with the requirements contained in the CPA and the CPA Regulations. In particular, the competition would have to be conducted in accordance

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<sup>389</sup> S100 of the CPA. See De Stadler 2013 178-180; Van Heerden "Enforcement" 100-1 – 100-15; Van Eeden 2013 408-413.

<sup>390</sup> S101 of the CPA. See Van Heerden "Enforcement" 101-1 – 101-4; Van Eeden 2013 413-414.

<sup>391</sup> S100(6)(a). See De Stadler 2013 180-181; Van Heerden "Enforcement" 112-1 – 112-4; Van Eeden 2013 415.

<sup>392</sup> S112(2).

<sup>393</sup> S100(6)(b). See Van Heerden "Enforcement" 100-14 – 100-15.

<sup>394</sup> S110(2). See Van Heerden "Enforcement" 111-1 – 111-2; De Stadler 2013 181-182.

<sup>395</sup> S111(1)(b).





## CHAPTER 6

### SELF-REGULATION OF PROMOTIONAL COMPETITIONS

- 6.1 Introduction
- 6.2 Examples of international and foreign self-regulation
- 6.3 Advertising Standards Authority of South Africa
- 6.4 Wireless Application Service Providers' Association
- 6.5 General
- 6.6 Conclusion

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#### 6.1 Introduction

The preceding chapters focussed on the statutory regulation of promotional competitions. However, regulation is not limited to legislation. Consumer protection legislation in particular is often complemented by self-regulation in the form of industry codes.<sup>1</sup> These codes often regulate promotional competitions as well. The purpose of this chapter is therefore to examine the nature of self-regulation and to consider relevant industry codes, especially those codes that regulate promotional competitions. In particular, the benefits and disadvantages of self-regulation will be discussed, as well as some examples of international self-regulation. The focus will then turn to self-regulation on a local level. The practical application of the relevant industry codes will be illustrated by referring to rulings issued by industry authorities. The chapter will conclude with an evaluation of the state of self-regulation in South Africa.

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<sup>1</sup> Woker T “Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act” 2010 *Obiter* 217-231 (“Woker 2010”) 221-223; Melville N & Yeates J “Section 82” in Eiselen S & Naudé T (eds) *Commentary on the Consumer Protection Act* (“Melville & Yeates”); De Stadler E *Consumer Law Unlocked* (“De Stadler 2013”) 93-94, 182.

## 6.2 Self-regulation in general

Self-regulation entails the regulation or governing of an industry by the role players in that industry.<sup>2</sup> It is a type of “decentred regulation”,<sup>3</sup> which involves the notion that governments should not have the sole role in and responsibility for regulation.<sup>4</sup> This form of regulation is not new and is an extensive source of rules and regulations.<sup>5</sup> It should not be regarded as “an imperfect substitute for government regulation”, but could be viewed as a form of regulation in its own right.<sup>6</sup> Self-regulation can relate to a variety of subject matters, such as health, product safety, the environment, marketing, advertising and privacy.<sup>7</sup>

Self-regulation can take on many forms, but broadly one can distinguish between voluntary self-regulation and self-regulation that is backed up by legislation.<sup>8</sup> It could be regarded as “co-regulation” as well, which could involve regulation which was developed by an industry in order to avoid government regulation, but could also consist of self-regulation which was created as a result of government’s pressure on or directive to an industry.<sup>9</sup> While some authors explain that self-regulation is often

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<sup>2</sup> Boddewyn JJ “Advertising Self-Regulation: True Purpose and Limits” 1989 *Journal of Advertising* 18:2 19 (“Boddewyn”) 20; Black J “Constitutionalising Self-Regulation” 1996 *Modern Law Review* 59:1 24-55 (“Black 1996”) 25-28; Black J “Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a ‘Post-Regulatory’ World” 2001 *Current legal problems* 54:1 103-146 (“Black 2001”) 116; Gunningham N & Rees J “Industry Self-Regulation: An Institutional Perspective” 1997 *Law & Policy* 19:4 363 (“Gunningham & Rees”) 364; Ramsay I *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (2<sup>nd</sup> ed) (“Ramsay 2007”) 115-116; Schimmel G *Advertising Law: A Guide to the Code of Advertising Practice* (“Schimmel”) 5; Ogus A “Rethinking Self-Regulation” 1995 *Oxford Journal of Legal Studies* 15:1 97-108 (“Ogus”); Baldwin R, Cave M & Lodge M *Understanding Regulation: Theory, Strategy, and Practice* (“Baldwin ea 2012”) 136-137. According to Boddewyn, self-regulation can refer to an organisation’s internal regulation or to the regulation of various organisations that form part of an industry, but this discussion will centre on self-regulation of a group of organisations in an industry. (Boddewyn 20)

<sup>3</sup> Black 2001 105-112; Black J “Critical Reflections on Regulation” 2002 *Australian Journal of Legal Philosophy* 27:1 1-35 34.

<sup>4</sup> Black 2001 103-104.

<sup>5</sup> Black 1996 25.

<sup>6</sup> Ramsay 2007 116.

<sup>7</sup> Gunningham & Rees 365.

<sup>8</sup> Melville & Yeates par 3.

<sup>9</sup> Black 2001 118. Black mentions that co-regulation may be explained as “regulation in the shadow of the law”. See also Gunningham and Rees 366; and Senden L “Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?” 2005 *Electronic Journal of Comparative Law* 9:1 11 <http://www.ejcl.org/91/abs91-3.html> (“Senden”), accessed on 15 August 2015, who cites the Interinstitutional Agreement on better law-making, which was concluded between the European



governance” tool.<sup>19</sup> It can serve as a form of societal and social control.<sup>20</sup> Self-regulation might involve lower regulatory costs too.<sup>21</sup> Furthermore, it may be easier for an industry organisation to obtain compliance with a self-regulatory code, whereas compliance with government regulation might be more difficult to achieve.<sup>22</sup> Self-regulation can develop consumers’ trust in an industry and might make an industry more credible.<sup>23</sup> In this regard, Boddewyn explains that advertising self-regulation is often very effective because advertising takes place in the public eye and is therefore subject to public scrutiny and practical sanctions (such as rulings that require the withdrawal of an advertisement or the publishing of corrections).<sup>24</sup>

However, self-regulation is not without criticism. Many commentators remark that self-regulation can often be flawed due to the involvement of and cosy arrangements between industry role-players.<sup>25</sup> Self-regulation can be toothless unless a strong industry body is involved, and clear sanctions need to be created and enforced.<sup>26</sup> Woker remarks that organisations often ignore sanctions or resign from industry organisations if they are taken to task (but remarks that the Advertising Standards Authority seems to be successful due to the buy-in of prominent organisations as well as effective penalties).<sup>27</sup> Self-regulation is also weakened by inconsistent enforcement.<sup>28</sup> In addition, its effect can be questioned if the industry is not transparent and accountable.<sup>29</sup> Critics remark that “the industry’s perceived abuses alienate consumers and conflict with the goal of consumer protection”.<sup>30</sup> Furthermore, industry codes need to be in touch with society and consumers in order to be relevant.<sup>31</sup>

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<sup>19</sup> See Haufler *V A Public Role for the Private Sector: Industry Self-Regulation in a Global Economy* (“Haufler”) 1.

<sup>20</sup> See Boddewyn 19; Gunningham & Rees 363.

<sup>21</sup> Ramsay 2007 116.

<sup>22</sup> Ramsay 2007 116.

<sup>23</sup> Labarbera PA “Analyzing and advancing the State of the Art of Advertising Self-Regulation” 1980 *Journal of Advertising Regulation* 9:4 27-38 27.

<sup>24</sup> Boddewyn 22.

<sup>25</sup> Gunningham & Rees 366-367; Haufler 2; Melville & Yeates par 10. Melville & Yeates point out that the first version of the Industry Code of Conduct for the Automotive Industry was subject to such criticism. (Melville & Yeates par 10 fn 5 and the source cited there.)

<sup>26</sup> Woker 2010 222.

<sup>27</sup> Woker 2010 222.

<sup>28</sup> Melville & Yeates par 12; Gunningham & Rees 370.

<sup>29</sup> Gunningham & Rees 370; Haufler 2.

<sup>30</sup> Reader TW “Is Self-Regulation the Best Option for the Advertising Industry in the European Union – An Argument for the Harmonization of Advertising Laws through the Continued Use of Directive” 1995 *University Pennsylvania Journal of International Business Law* 16:1 181-215 (“Reader”) 182.

<sup>31</sup> Boddewyn 20.



of Advertising was released in 1937.<sup>41</sup> Since then, self-regulatory organisations in numerous countries have modelled their advertising industry codes on the ICC's Code of Advertising.<sup>42</sup> The Code has been described as the "bible of advertising self-regulation".<sup>43</sup> The latest revised version of the ICC Consolidated Code of Advertising and Marketing Communications Practice ("ICC Code") was published in 2011.<sup>44</sup>

The ICC Code is merely a self-regulatory code.<sup>45</sup> It is not binding on any particular person or organisation and is subordinate to whatever legislation may apply.<sup>46</sup> The ICC does not publish any rulings relating to the ICC Code either, although it might provide guidance on interpretation of its provisions.<sup>47</sup> However, the ICC motivates "its adoption and use" on a global basis in order to set "standards of ethical conduct" relating to the "promotion of any kind of goods and services".<sup>48</sup> As such, a number of organisations apply the ICC Code, for example the Danish Consumer Ombudsman,<sup>49</sup> the Swedish Advertising Ombudsman<sup>50</sup> and the German Advertising Standards Authority.<sup>51</sup> A number of countries' self-regulatory organisations have also based their advertising industry codes on the ICC Code, including South Africa, Mexico, India and Canada.<sup>52</sup>

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<sup>41</sup> International Chamber of Commerce "Self-regulation", <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Areas-of-work/Marketing-and-Advertising/Self-regulation/> ("ICC Self-Regulation"), accessed on 15 August 2015

<sup>42</sup> ICC Self-Regulation unpagged.

<sup>43</sup> Boddewyn JJ *Advertising Self-Regulation and Outside Participation: A Multinational Comparison* 3, quoted in Verbruggen P "Case Study Report: Transnational Private Regulation in the Advertising Industry" ("Verbruggen 2011") 5, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2256043](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2256043) (accessed on 23 August 2015).

<sup>44</sup> International Chamber of Commerce, Consolidated Code of Advertising and Marketing Communications Practice (ninth revision, 2011) ("ICC Code") i ([http://www.codescentre.com/media/2083/660%20consolidated%20icc%20code\\_2011\\_final%20with%20covers.pdf](http://www.codescentre.com/media/2083/660%20consolidated%20icc%20code_2011_final%20with%20covers.pdf), accessed on 16 June 2015)

<sup>45</sup> In other words, it does not have the status of legislation enacted by a parliament.

<sup>46</sup> Verbruggen 2011 xiv; ICC Code 2.

<sup>47</sup> Verbruggen P "Enforcement of transnational private regulation of advertising practices: decentralization, mechanisms and procedural fairness" in Cafaggi F (ed) *Enforcement of Transnational Regulation: Ensuring Compliance in a Global World* ("Verbruggen 2012") 305; ICC Code, art 25.

<sup>48</sup> ICC Code 3-4.

<sup>49</sup> Danish Consumer Ombudsman "ICC Codes", <http://www.consumerombudsman.dk/Regulatory-framework/dcoguides/icccodes>, accessed on 15 August 2015.

<sup>50</sup> Swedish Advertising Ombudsman "About" <http://reklamombudsmannen.org/eng/about>, accessed on 15 August 2015.

<sup>51</sup> German Association of Communications Agencies "Germany: Self-Regulatory Organisations", [http://www.gwa.de/fileadmin/media-center/Dokumente/Self\\_Regulation\\_in\\_Germany.pdf](http://www.gwa.de/fileadmin/media-center/Dokumente/Self_Regulation_in_Germany.pdf), accessed on 15 August 2015.

<sup>52</sup> International Chamber of Commerce "Marketing and Advertising", <http://www.iccwbo.org/advocacy-codes-and-rules/areas-of-work/marketing-and-advertising/>, accessed on 15 August 2015.

Apart from the “General Provisions on Advertising and Marketing Communication Practice” established by it,<sup>53</sup> the ICC Code contains a chapter that is dedicated to sales promotion.<sup>54</sup> The chapter regulates various forms of sales promotion, such as premium offers, price reductions and vouchers.<sup>55</sup> The provisions also relate to “prize promotions” in particular. The ICC Code defines a prize promotion as “any skill contest or prize draw used in conjunction with a sales promotion activity”.<sup>56</sup> Accordingly, the provisions would apply in respect of skill based contests as well as competitions in which the outcome is determined by chance.

The ICC Code sets out a number of general principles in respect of sales promotions.<sup>57</sup> These provisions are aimed at ensuring fair and honourable conduct, meeting consumer expectations, prompt and efficient administration, transparent terms and conditions, fair conduct and avoiding anything which is “likely to bring sales promotions into disrepute”.<sup>58</sup> These general principles are followed by some specific principles. If one applies those specific principles to prize promotions, the ICC Code can be understood to require that all offers relating to prize promotions must be clear and free of exaggeration.<sup>59</sup> The prize promotion must not be marketed in a way which might mislead consumers regarding the “value, nature or the means of participation”.<sup>60</sup> If consumers are required to purchase a product in order to participate in the prize promotion, the promoter must ensure that the availability of those products is sufficient to meet anticipated demand.<sup>61</sup> The relevant promotional items need to be safe and

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<sup>53</sup> The General Provisions consist of 26 articles that set out general principles relating to matters such as decency (article 2), honesty (article 3), truthfulness (article 5), data protection and privacy (article 19) and environmental behaviour (article 22).

<sup>54</sup> Chapter A (pages 16-21 of the ICC Code).

<sup>55</sup> ICC Code 16.

<sup>56</sup> ICC Code 16. Although some provisions are aimed at prize promotions specifically, the provisions relate mostly to all forms of sales promotions (which would include prize promotions).

<sup>57</sup> Art A1.

<sup>58</sup> See the principles set out in art A1.

<sup>59</sup> Art A2.

<sup>60</sup> Art A3.

<sup>61</sup> Art A4. Promoters must be able to prove that they calculated this demand prior to launching the competition. The provisions of s34(5)(a) of the CPA reflect these requirements as well (in the context of promotional offers).





game will be a lottery if it contains the prize, chance and consideration elements, and that such a game or contest must not be conducted.<sup>71</sup>

In Europe, the European Advertising Standards Alliance (“EASA”) promotes self-regulation in the advertising industry on a regional level.<sup>72</sup> The EASA consists of the self-regulatory organisations that operate in the Alliance’s various member countries in addition to members from the advertising industry.<sup>73</sup> The advertising industry in Europe established EASA in order to self-regulate advertising and avoid legislation being passed instead.<sup>74</sup> EASA does not have its own industry code, and its self-regulatory organisation members typically base their own codes on the ICC Code.<sup>75</sup> EASA is also a member of the International Chamber of Commerce and is involved in setting the standards contained in the ICC Code.<sup>76</sup>

EASA does not function as an umbrella self-regulatory organisation for Europe,<sup>77</sup> but functions as “the advertising industry’s single voice on self-regulation”.<sup>78</sup> It does, however, coordinate complaints received in respect of advertising across European countries’ borders.<sup>79</sup> A consumer in one country can therefore file a complaint against an advertisement with the self-regulatory organisation in the consumer’s country, and that organisation will then refer the complaint via EASA to the self-regulatory organisation in the country where the media platform that carried the advertisement is based.<sup>80</sup> EASA carries out advertising monitoring projects and provides advertising clearance advice as well.<sup>81</sup>

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<sup>71</sup> S33.2. The section mentions that such a contest or game would violate federal or state legislation.

<sup>72</sup> European Advertising Standards Alliance “What is EASA?” <http://www.easa-alliance.org/About-EASA/Who-What-Why-/page.aspx/110>, accessed on 16 June 2015 (“EASA”). See De Stadler 2013 60.

<sup>73</sup> EASA (internet article unpagged); Gray O “Responsible advertising in Europe” 2005 *Young Consumers* 6:4 19-23 (“Gray”) 20. South Africa’s Advertising Standards Authority is a non-European corresponding member of EASA. (European Advertising Standards Alliance, “South Africa” <http://www.easa-alliance.org/South-Africa/page.aspx/153>, accessed on 16 June 2015)

<sup>74</sup> Verbruggen 2011 xii; Reader 181-182.

<sup>75</sup> Casey D & Scott C “The Crystallization of Regulatory Norms” 2011 *Journal of Law and Society* 38:1 76-95 93; EASA “Advertising Self-Regulation: The Essentials” [http://www.easa-alliance.org/binarydata.aspx?type=doc/ASR\\_the\\_essentials.pdf/download](http://www.easa-alliance.org/binarydata.aspx?type=doc/ASR_the_essentials.pdf/download) (accessed on 24 August 2015) (“EASA Essentials”) 9.

<sup>76</sup> Verbruggen 2012 306.

<sup>77</sup> Cunningham A “Advertising Self-Regulation in a Broader Context” 2000 *Journal of Promotion Management* 5:2 61-83 (“Cunningham”) 63.

<sup>78</sup> EASA Essentials 17.

<sup>79</sup> Verbruggen 2013 516.

<sup>80</sup> Cunningham 65-66; EASA Essentials 18.

<sup>81</sup> Verbrugge 2012 310.





broadcasting licensees must adhere to the ASA Code's provisions.<sup>97</sup> The ASA Code applies to "the advertiser, the advertising practitioner and the medium involved in publication of the advertiser's message to the public", to the extent that they are bound by the ASA Code.<sup>98</sup>

The ASA Code's provisions cover a broad range of matters related to advertising. It contains some limited provisions relating to competitions as well. If an advertiser advertises a competition, the ASA may require the advertiser to provide substantiation that the competition is legal.<sup>99</sup> The ASA Code also contains some provisions in respect of fundraising competitions specifically.<sup>100</sup> Furthermore, it requires that, if an advertisement displays the value of a prize, such value must be inclusive of "VAT".<sup>101</sup> Presumably, "VAT" refers to "value-added tax" levied under the Value-Added Tax Act.<sup>102</sup> It is submitted that the ASA Code contains this requirement in order for consumers to be informed of the prize's full value. However, it is not quite clear why the ASA considered it necessary to regulate this. It is submitted that the consumer would not have been severely prejudiced if the advertised value was exclusive of value-added tax. Of course, if the consumer was required to purchase goods to a certain value in order to enter the competition, it would have been important to display such value with value-added tax included. In any event, the Value-Added Tax Act provides that prices shall be deemed to include value-added tax,<sup>103</sup> and a vendor is required to include such tax in advertised prices.<sup>104</sup>

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<sup>97</sup> See s55 of the Electronic Communications Act. See Van Heerden "Marketing" par 33. The position was similar under the repealed Independent Broadcasting Act 153 of 1993. (See R Brand 115)

<sup>98</sup> ASA Code, Preface, par 7.

<sup>99</sup> ASA Code, Section III 8.1.1. The substantiation must be "in the form of acceptable legal advice". It is submitted that the written opinion of an attorney or advocate will meet this requirement and that the opinion would have to conclude that the competition does not breach the provisions of, *inter alia*, the CPA and the Lotteries Act, 1997.

<sup>100</sup> Fund raising competitions fall outside the scope of this work. However, readers are referred to Section III 8.1.3 of the ASA Code, which provides that an advertisement for a fund raising competition may only be published if the competition is legal, "prizes offered are already available or guaranteed", prizes will be awarded no matter how many entries were received (and the competition will not be cancelled after the advertisement has appeared) and the competition closing date and the date on which winners will be announced are published in a "major regional or national publication".

<sup>101</sup> ASA Code, Section III 8.1.2.

<sup>102</sup> 1991.

<sup>103</sup> S64(1).

<sup>104</sup> S65.

In the context of timeshare advertising, the ASA Codes states that an advertiser may not refer to gifts or awards as “prizes” except if a competition is being run.<sup>105</sup> Furthermore, the ASA’s Food and Beverage Code provides that a competition may not be targeted at minor children, unless the advertising for the competition states that parents or legal guardians must accept the competition offer on behalf of their children.<sup>106</sup> In relation to alcohol advertising, Appendix A to the ASA Code states that competitions aimed at children “may not be linked to any alcohol beverage brand or product through sponsorship”, and advertising should make it clear that persons younger than eighteen years may not participate in competitions that promote alcohol brands or products.<sup>107</sup>

Competition organisers often expect winners to participate in promotional activities and require use of their images and photographs in promotional and advertising material. In this regard, the ASA Code states that advertisers may not depict living persons in advertisements without the prior consent of such persons.<sup>108</sup> Accordingly, organisers would have to obtain prior permission from competition winners and participants before using their photographs in any advertising material. However, there are exceptions to this rule. The organiser would not need to obtain consent if the persons are depicted in background shots, provided that the usage is not “defamatory, offensive or humiliating” and the advertisement must be withdrawn if the organiser receives an objection from a person depicted in the advertisement.<sup>109</sup> Consent would also not be required if, in the ASA’s opinion, the depiction “is not inconsistent with the subject’s right to a reasonable degree of privacy and does not constitute an unjustifiable commercial exploitation of the individual’s fame or reputation”.<sup>110</sup> Although this might not necessarily be relevant in the context of competitions, one should note that there are exceptions for use of persons’ image in police and official

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<sup>105</sup> ASA Code, Appendix F 8.3.

<sup>106</sup> ASA Code, Appendix J 13.4.

<sup>107</sup> ASA Code, Appendix A (Alcohol Advertising – ARA), “Additional Rules Relating to Promotions”, par 1.

<sup>108</sup> ASA Code, Section II 11.1.

<sup>109</sup> ASA Code, Section II 11.2.1.

<sup>110</sup> ASA Code, Section II 11.2.4.

notices,<sup>111</sup> as well as “advertisements for books, films, radio or television programmes, press features and the like”.<sup>112</sup>

The ASA does not carry out advertising monitoring and will not, of its own accord, initiate steps against infringers of the ASA Code.<sup>113</sup> If the promoter of a competition does not comply with the ASA Code’s provisions, a consumer or competitor can file a complaint with the ASA.<sup>114</sup> It must be kept in mind that the ASA Code regulates advertising only. As such, in the context of promotional competitions, a complaint would typically relate to the content of a competition’s advertising and marketing materials.<sup>115</sup> Complaints would not necessarily relate to the actual mechanics of a competition, although the adviser can be required to provide proof that the competition is lawful.<sup>116</sup>

If a complaint is filed, the alleged infringer will have an opportunity to respond before the complaint will be considered by the ASA’s Directorate, Advertising Standards Committee or Advertising Industry Tribunal.<sup>117</sup> If the complaint is upheld, the infringer may be ordered to withdraw the relevant advertising,<sup>118</sup> to submit an amended version for pre-clearance,<sup>119</sup> or submit all further advertising for pre-clearance for a limited period.<sup>120</sup> A ruling can involve adverse publicity for the offender too, such as the publication of its name.<sup>121</sup> The ASA can also require the offender to publish the ruling against it.<sup>122</sup> However, the ASA is not empowered to impose fines or require advertisers to comply with their own advertising.<sup>123</sup>

The ASA Code is binding only on members of the ASA. However, these members include a wide variety of industry organisations and trade associations.<sup>124</sup> Accordingly,

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<sup>111</sup> ASA Code, Section II 11.2.3.

<sup>112</sup> ASA Code, Section II 11.2.2.

<sup>113</sup> Schimmel *Advertising Law* 19.

<sup>114</sup> ASA Code, Procedural Guide, clause 3.1.

<sup>115</sup> The rulings discussed in section 6.4.2 below illustrate the type of complaints in this regard.

<sup>116</sup> See fn 99 above.

<sup>117</sup> ASA Code, Procedural Guide, clauses 8, 9 and 10.

<sup>118</sup> ASA Code, Procedural Guide, clause 14.1.

<sup>119</sup> ASA Code, Procedural Guide, clause 14.2.

<sup>120</sup> ASA Code, Procedural Guide, clause 14.3.

<sup>121</sup> ASA Code, Procedural Guide, clause 14.4.

<sup>122</sup> ASA Code, Procedural Guide, clause 14.5.

<sup>123</sup> Schimmel 38.

<sup>124</sup> See par 3 of the ASA Code’s Preface.

although an individual advertiser might not be an ASA member, the ASA Code will still apply if the relevant advertising is carried by an entity, such as a broadcaster or newspaper that belongs to an association which is an ASA member. If the ASA rules against an advertiser and it fails to comply with the ruling, the ASA can issue a so-called ad alert.<sup>125</sup> If this is done, no ASA member will carry or publish the offending advertiser's advertising.<sup>126</sup> If the ASA Code is eventually accredited by the National Consumer Commission in terms of the CPA's provisions, a breach of the ASA Code will also constitute prohibited conduct and an administrative fine could be imposed by the National Consumer Tribunal.<sup>127</sup>

#### 6.4.2 Examples of ASA rulings relating to promotional competitions

On a regular basis, the ASA publishes rulings relating to complaints considered by the ASA's dispute resolution bodies.<sup>128</sup> From time to time, those complaints relate to advertising involving competitions. Often, the complaints revolve around misleading, dishonest or ambiguous claims in such advertising. For example, in a complaint against a competition conducted by a newspaper,<sup>129</sup> the ASA Directorate decided that the relevant advertising material was misleading and contravened Section II 4.2.1 of the ASA Code, because the material created the impression that a participant would win a motor vehicle if they held a specific number, while the participant would in fact receive only the *opportunity* to win.<sup>130</sup> In another matter involving misleading advertising,<sup>131</sup> the advertiser undertook to change its advertising material because the material stated that participants would receive one competition entry for every fax received using the advertiser's service, while the terms and conditions stated that at

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<sup>125</sup> ASA Code, Procedural Code, clause 15.4.

<sup>126</sup> Schimmel 40.

<sup>127</sup> De Stadler 58 fn 10. See also fn 35 above.

<sup>128</sup> Rulings are published on the ASA's website located at [www.asasa.org.za](http://www.asasa.org.za).

<sup>129</sup> *Sowetan BMW Competition / S Zwane / 2014 – 1841 F.*

<sup>130</sup> *Sowetan BMW Competition* (ruling unpagged). The original advertising material stated: "If you have the lucky number 114, you will receive the BMW1 and be proclaimed the Grand Prize Winner". The material was then amended as follows: "It is you who can become the owner of the brand new BMW1! Check right now: If you have lucky number 114, follow the steps to claim your BMW1". The Directorate held that the original and amended material was misleading, because people who received the lucky number would only become *eligible* to win the prize, and would not in fact win the prize.

<sup>131</sup> *Olympics 2012 Competition / N van der Lingen / 19461* (ruling unpagged).









WASPA Code, which is binding on all WASPA members.<sup>149</sup> WASPA's media monitors conduct daily research in order to verify whether WASPA members are complying with the WASPA Code.<sup>150</sup> WASPA is also a member of the International Audiotex Regulators Network ("IARN").<sup>151</sup> IARN is an international organisation that was formed for purposes of sharing information regarding the regulation of phone-paid services.<sup>152</sup>

The WASPA Code contains a section which regulates promotional competitions specifically.<sup>153</sup> It defines a "promotional competition" as "any competition, game, scheme, arrangement, system, plan or device for distributing prizes as defined in section 36 of the Consumer Protection Act, 2008".<sup>154</sup> In view of the cross-reference to the CPA, it appears that section 18 of the WASPA Code is focussed on chance based competitions.

Under the WASPA Code, the maximum permitted cost of a competition entry is R1.50.<sup>155</sup> This is the same as the limit specified in the CPA Regulations.<sup>156</sup> The WASPA Code also states that "[a]ll valid and correct entries must have the same chance of winning".<sup>157</sup> It is submitted that promoters may therefore not discriminate between competition entries and that promoters should give all entrants the same opportunity to win. Furthermore, a competition must have a closing date (unless it is an instant win competition) and prizes must be allocated within 28 days of that date.<sup>158</sup> For a period of 30 days after the closing date, the promoter must send a reply to further entrants, advising them that the competition has already closed.<sup>159</sup> (It is assumed that the references to "days" imply calendar days. The WASPA Code refers to "days" in

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<sup>149</sup> WASPA Code, par 1.5. Previously, WASPA enforced both the WASPA Code as well as the so-called "Ad Rules", which were very detailed. However, WASPA recently consolidated the WASPA Code and the Ad Rules into one document. (Jacobson P "Rewritten WASPA Code better regulates mobiles services in SA" *Web Tech Law* 27 August 2014 <http://webtechlaw.com/2014/08/27/rewritten-waspa-code-better-regulates-mobile-services-sa/>, access on 20 June 2015)

<sup>150</sup> About WASPA (internet article unpagged).

<sup>151</sup> About WASPA (internet article unpagged).

<sup>152</sup> International Audiotex Regulators Network, <http://www.iarn.org/> (website unpagged), accessed on 16 August 2015. IARN has also issued a handbook which contains guidelines regarding the regulation of phone-paid services. (See [http://www.iarn.org/documents/iarn\\_handbook.pdf](http://www.iarn.org/documents/iarn_handbook.pdf), accessed on 16 August 2015.)

<sup>153</sup> S18.

<sup>154</sup> S18.1.

<sup>155</sup> S18.2. This limit is the same as the one in reg 11(1) of the Consumer Protection Act Regulations.

<sup>156</sup> See reg 11(1).

<sup>157</sup> S18.3.

<sup>158</sup> Ss18.6 and 18.7.

<sup>159</sup> S18.8.

section 18, while it refers to “business days” in some other sections.) A promoter may also not extend a competition period or fail to award prizes on the basis that insufficient entries were received or that entries were of inadequate quality.<sup>160</sup>

An offer which invites the public to enter a promotional competition must at least contain the information prescribed by the WASPA Code. Section 18.4 requires that the offer must state the following:

- (a) the competition to which the offer relates;
- (b) the steps required by a person to participate in the competition;
- (c) the full cost to enter the competition;
- (d) the basis on which the results of the competition will be determined;
- (e) the closing date for the competition;
- (f) how the results of the competition will be made known;
- (g) how a person can obtain a copy of the competition rules; and
- (h) how the successful participant can obtain the prize.

These requirements are very similar to those contained in section 36(5) of the CPA. In previous versions, the WASPA Code required that the advertising material had to include, *inter alia*, “any information which is likely to affect a decision to participate”.<sup>161</sup> It is submitted that it would have been difficult to comply with such a requirement, since various factors might influence a participant when they consider whether or not to enter a competition. This could include, for example, the odds of winning or the number of expected participants.

The information listed in section 18.4 of the WASPA Code must be contained in an advertisement relating to the competition or must be provided to entrants before they enter.<sup>162</sup> The WASPA Code also prohibits certain practices in relation to promotional

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<sup>160</sup> S18.6.

<sup>161</sup> De Stadler E *Consumer Law Unlocked* 69.

<sup>162</sup> S18.5. As an example, the subsection states that a promoter may redirect an entrant to a website that contains the terms and conditions.



If a WASPA member is found to have contravened the WASPA Code, it could be ordered to remedy the breach or pay a fine.<sup>174</sup> Its WASPA membership could be suspended or terminated as well.<sup>175</sup> Since WASPA members usually provide wireless application services to other businesses (for example, in order to send direct marketing messages), a member can be required to disclose the identity of their customer, to cease providing services to them or to withhold any money due to them.<sup>176</sup> The network operator, over whose network the member's services are provided, could also be advised to take steps, such as terminating or suspending the member's access to a specific number or category of services, withholding funds due to the member, paying such funds to WASPA as a fine or issuing a refund to customers.<sup>177</sup> The WASPA Code extends beyond WASPA members as well, since notices can be issued to non-members too.<sup>178</sup> If a WASPA member allows a non-member to breach the WASPA Code's provisions, such member will be deemed to be in breach of the same provisions.<sup>179</sup> It appears, therefore, that the WASPA Code makes provision for extensive sanctions that could be very effective in practice. Further, in contrast with the ASA Code, the WASPA Code's provisions and sanctions extend beyond mere advertising and address the actual services provided by WASPA members too.

## 6.5 General

Apart from the provisions of the ASA Code and the WASPA code, promoters need to ensure that they comply with the requirements of any other applicable industry codes. For example, in the context of direct marketing, members of the Direct Marketing Association of Southern Africa must comply with its Code of Ethics and Standards of Practice.<sup>180</sup> In the pharmaceutical industry, organisations who are members of the

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<sup>174</sup> WASPA Code, s24.43(a) and (c).

<sup>175</sup> WASPA Code, s24.43(d) and (e).

<sup>176</sup> WASPA Code, s24.43(f) to (h).

<sup>177</sup> WASPA Code, s24.44.

<sup>178</sup> WASPA Code, s24.50 to 24.53.

<sup>179</sup> WASPA Code, s24.53.

<sup>180</sup> The Code of Ethics and Standards of Practice of the Direct Marketing Association of Southern Africa is currently not available on that association's website ([www.dmasa.org](http://www.dmasa.org), accessed on 21 June 2015), but it is attached to the ASA Code as Appendix C. Clause 10.2.1 of the version attached to the ASA Code warns association members that lotteries and contests are "highly regulated by law" and that they should seek professional advice in order to conduct contests and the like.



do so within a specific period.<sup>185</sup> Some of the WASPA Code's provisions are simpler and clearer than those contained in the CPA. For example, the CPA prescribes the information that must be disclosed by a promoter as part of an offer to participate in a promotional competition,<sup>186</sup> but the provisions relating to the manner in which such information must be disclosed are not entirely clear.<sup>187</sup> The WASPA Code contains similar provisions, but they have been drafted in a simpler and clearer manner.<sup>188</sup> The WASPA Code regulates the marketing of promotional competitions as well. In essence, the provisions prohibit promoters from giving consumers false impressions regarding their chances of winning.<sup>189</sup> These provisions complement and amplify the similar ones found in the CPA.<sup>190</sup>

It is submitted that the efficacy of industry regulation depends on industry members' cooperation with self-regulatory bodies and the effectiveness of industry authorities. The relevant industry codes contain quite extensive sanctions. However, in order for these sanctions to act as deterrents, self-regulatory authorities should monitor promotional competitions and resolve complaints from the public efficiently. It is suggested that industry organisations should review their codes in order to determine whether they regulate promotional competitions adequately. In addition, they should consider taking steps to educate their members about the relevant provisions and warn them against the consequences of non-compliance.

In conclusion, it is submitted that self-regulation plays an important role in the regulation of promotional competitions in South Africa. The public cannot rely on the law and statutory institutions alone to police the industry and ensure that consumers are not abused. Statutory regulation also develops at a slow pace and is not flexible enough to keep track with trends in the marketing and promotions industry. The current level of self-regulation is quite developed in South Africa. However, it might fall short in relation to promotional competitions. Accordingly, self-regulatory organisations must continue to improve their codes and play their part to ensure that their members comply with the law as well as the industry codes when it comes to promotional

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<sup>185</sup> S18.6 and s18.7 of the WASPA Code.

<sup>186</sup> See s36(5) of the CPA.

<sup>187</sup> See s36(6) of the CPA.

<sup>188</sup> See s18.4 and s18.5 of the WASPA Code.

<sup>189</sup> See s18.9 of the WASPA Code.

<sup>190</sup> See s36(2) of the CPA.



competitions. Furthermore, they should continue to hold non-complying promoters accountable. In the end, this will grow consumers' trust in the industry and improve the reputation of industry role-players.

## CHAPTER 7

### CONCLUSION AND RECOMMENDATIONS

- 7.1 Conclusion
  - 7.2 Recommendations
  - 7.3 Final remarks
  - 7.4 Suggestions for further research
- 

#### 7.1 Conclusion

##### 7.1.1 Purpose and process of this research

The aim of this research was to examine how and to what extent promotional competitions are regulated in South Africa. The intention was to contribute to the academic literature in this subject field, in view of the dearth of academic literature in this context in South Africa specifically. The conclusion was reached that South Africa's law relating to promotional competitions is in fact quite evolved and comprehensive. Accordingly, a drastic review or redrafting of the relevant legislation was not proposed. However, it was found that there are some defects and inconsistencies and these need to be addressed in order to make it easier to interpret and apply the law and enforce it properly.

The research process was undertaken by way of the doctrinal method and involved a study and synthesis of the relevant legislation, case law and other materials. Literature from the social sciences was consulted as well. In addition, historical research was undertaken in order to provide an overview of the history of gambling, lotteries and promotional competitions. The relevant laws of New Zealand and Great Britain were surveyed too and compared with the local position. (Great Britain was selected for this purpose because its case law relating to lotteries has been cited by South African courts and can be used to interpret the relevant South African provisions. There are also similarities between South Africa's lotteries legislation and the relevant British legislation. Furthermore, both Great Britain and New Zealand follow common law systems, and New Zealand's legislation relating to sales promotion schemes has had

an influence on British legislation relating to the same subject matter.) This study also involved an analysis of and a commentary on the current regulation of promotional competitions in South Africa, while industry self-regulation was examined too.

### 7.1.2 Perspectives from the social sciences and other fields

The research commenced, in chapter 2, with an exploration of the relevant terms that are used in respect of this study's subject matter. It was explained that promotional competitions lie within the broader field of gambling.<sup>1</sup> It was found that gambling encompasses lotteries and related activities as well,<sup>2</sup> although the various activities display different nuances.<sup>3</sup> Some persons prefer to use the euphemistic term "gaming" instead of gambling.<sup>4</sup> Broad and narrow definitions for the term "gambling" were discussed.<sup>5</sup> It was found that, in essence, gambling involves an activity where participants contribute money or something of value in the hope of receiving a prize or reward, depending on the outcome of an unknown future event.<sup>6</sup> After definitions in foreign sources were referred to,<sup>7</sup> the South African position was examined.<sup>8</sup> While this country's Lotteries and Gambling Board referred to a variety of definitions in its report,<sup>9</sup> the current National Gambling Act, 2004 does not define "gambling" as a concept. However, it regulates specific "gambling activities".<sup>10</sup>

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<sup>1</sup> See page 16 above.

<sup>2</sup> See pages 16-24. Carnelley M "Guarding the Guardians: Non-Judicial and Judicial Control over Unlawful Decisions by the South African Gaming Boards" 2001 *Obiter* 74-101; Christie RH & Bradfield GB *Christie's The Law of Contract in South Africa* (6<sup>th</sup> ed) 393.

<sup>3</sup> NE Wiehahn 1995, 3-4.

<sup>4</sup> See pages 24-26 above. See, for example, Rose I N *Gambling and the Law* 75.

<sup>5</sup> See pages 16-24 above. McMillen points out that gambling has shifting meanings. [McMillen J "Understanding Gambling: History, concepts and theories" in McMillen J (ed) *Gambling Cultures: Studies in history and interpretation* ("McMillen") 6.] There are also distinctions between legal and economic definitions of gambling. [Becker T "The German Market for Gambling and Betting" in Spapens T, Littler A and Fijnaut C (eds) *Crime, addiction, and the regulation of gambling* 141 ("Becker") 142.]

<sup>6</sup> See Collins P *Gambling and the public interest* ("P Collins") 15; McMillen 6-7; Rose I N "The International Law of Remote Wagering" 2007 *John Marshall Law Review* Vol 40 ("Rose 2007") 1161; Rose I N *Gambling and the Law* ("Rose 1986") 75.

<sup>7</sup> See pages 17-18 above.

<sup>8</sup> See pages 19-21 above.

<sup>9</sup> The Main Report on Gambling in South Africa (RP 85/1995) ("LGB Main Report"); Wiehahn NE *Gambling in South Africa – A New Challenge* ("NE Wiehahn 1995") 3-4.

<sup>10</sup> National Gambling Act, 2004, s3.

Thereafter, lotteries were examined. It was pointed out that a lottery contains three essential elements: consideration, lot or chance, and a prize.<sup>11</sup> It therefore involves an activity where a person contributes consideration (also known as subscription), and where lot or chance will determine whether the person will win a prize.<sup>12</sup> The definition of the term “lottery” in South Africa’s Lotteries Act<sup>13</sup> was examined, and it was pointed out that it does not contain a reference to the “contribution” requirement.<sup>14</sup> As such, it appeared as if the Lotteries Act could apply even if an activity did not involve consideration, but it was noted that section 63 of the Lotteries Act excludes from its scope a lottery which does not involve subscription.

The discussion then turned to the play element that underlies gambling, lotteries, promotional competitions and related activities.<sup>15</sup> This element was investigated because it relates to people’s motivation for gambling and participating in competitions, and it informs the relevant policy considerations. It was pointed out that gambling is a form of play,<sup>16</sup> and that play shapes culture.<sup>17</sup> Gambling constitutes a form of human action too.<sup>18</sup> With reference to the work of Roger Caillois, it was indicated that there are various forms of play.<sup>19</sup> In particular, gambling involves agonistic play (competitive activities)<sup>20</sup> and aleatory play (chance based activities).<sup>21</sup> It is important to understand these distinctions because they are also encountered in some forms of gambling regulation.

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<sup>11</sup> See pages 26-28 above. See, for example, Williams FE *Lotteries, Law and Morals* (“FE Williams 1958”) 69; *R v Cranston* 1914 AD 238; *R v Lew Hoi* 1937 AD 215 220; *Minister of Mineral and Energy Affairs v Lucky Horseshoe (Pty) Ltd* 1994 (2) SA 46 (A) 52.

<sup>12</sup> LGB Main Report 151.

<sup>13</sup> 57 of 1997 (hereafter the “Lotteries Act”).

<sup>14</sup> See page 27 above.

<sup>15</sup> See pages 29-35. Herman RD *Gamblers and Gaming: Motives, Institutions and Controls* (“Herman 1976”) 1-9; Downes DM, Davies, BP, David ME and Stone P *Gambling, work and leisure: a study across three areas* 11-14; Smith JF & Abt V “Gambling as Play” in Frey JH & Eadington WR (eds) *Gambling: Views from the Social Sciences. The Annals of the American Academy of Political and Social Sciences* 122 122-132; Reith G *HOMO ALEATOR: A Sociological Study of Gambling in Western* 199-253; Reith G “The Experience of Play” in Cosgrave JF (ed) *The Sociology of Risk and Gambling Reader* 255-287; Ottaway J *The UK National Lottery and Charitable Gambling* (“Ottaway”) 91-127.

<sup>16</sup> Herman 1976 1.

<sup>17</sup> Huizinga J *Homo Ludens: A study of the play-element in culture* 46.

<sup>18</sup> Goffman E *Interaction Ritual: Essays on Face-to-Face Behavior* 149-270 149.

<sup>19</sup> Caillois R *Man, Play, and Games* (“Caillois”) 12.

<sup>20</sup> Caillois 14

<sup>21</sup> Caillois 17.

Having discussed the play nature of gambling, the discussion then narrowed down on the policy issues that surround gambling. In order to consider these issues, the reasons why people gamble were first examined.<sup>22</sup> Financial gain was identified as one of the most prominent reasons for gambling.<sup>23</sup> Even so, it is not necessarily a profitable activity,<sup>24</sup> and may even be wasteful.<sup>25</sup> There are psychological reasons for gambling too.<sup>26</sup> In particular, gambling is a challenge,<sup>27</sup> and stimulates people's problem solving capabilities.<sup>28</sup> It allows them to experiment with chance and risk.<sup>29</sup> However, it also entertains<sup>30</sup> and creates fun.<sup>31</sup>

It was submitted that people's reasons for gambling are relevant in the context of promotional competitions.<sup>32</sup> Some people might enter competitions in order to win prizes, particularly money. Others enjoy the challenge and entertainment of participating in them. Widespread advertising for such competitions might stimulate participation as well. Since some people might be highly stimulated or motivated to participate in competitions due to these reasons, it was submitted that they should be regulated in order to protect consumers against abuse, exploitation and irresponsible behaviour. In particular, the regulation should focus on the marketing of such competitions and the prizes that are offered.

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<sup>22</sup> See pages 35-42 above.

<sup>23</sup> See pages 36-37 above. Brenner R with Brenner GA *Gambling and Speculation: A Theory, a History, and a Future of Some Human Decisions* ("Brenner & Brenner") 19; Binde P "Why people gamble: a model with five motivational dimensions" 2013 *International Gambling Studies* 13:1 81-97; Clotfelter CT & Cook PJ *Selling Hope: State Lotteries in America* ("Clotfelter & Cook") 71; Rule S & Sibanyoni C *The Social Impact of Gambling in South Africa* ("Rule & Sibanyoni") 30-33.

<sup>24</sup> Walker, MW "A Sociocognitive Theory of Gambling Involvement" in Eadington WR & Cornelius JA (eds) *Gambling and Commercial Gaming: Essays in Business, Economics, Philosophy and Science* ("Walker 1992") 372. See also Rosecrance J *Gambling without Guilt: the Legitimation of an American Pastime* ("Rosecrance") 63-64.

<sup>25</sup> Clotfelter & Cook 119-120; Walker 1992 372.

<sup>26</sup> Walker 1992 372. See also Rosecrance 53-58.

<sup>27</sup> Walker 1992 373.

<sup>28</sup> Frey JH "Gambling: A Sociological Review" in Frey JH & Eadington WR (eds) *Gambling: Views from the Social Sciences. The Annals of the American Academy of Political and Social Sciences* 107 ("Frey") 110; Moodie GE "Perspective on Gambling" in Eadington WR & Cornelius JA (eds) *Gambling and Commercial Gaming: Essays in Business, Economics, Philosophy and Science* 1992 443-447.

<sup>29</sup> Giddens A "Fate, Risk and Security" in Cosgrave JF (ed) *The Sociology of Risk and Gambling Reader* 29.

<sup>30</sup> See, for example, LGB Main Report 53; Basham P & Luik J "The Social Benefits of Gambling" March 2011 *Economic Affairs* 13:1 ("Basham & Luik") 9-13.

<sup>31</sup> Clotfelter & Cook 118-119; Rule & Sibanyoni 30-31.

<sup>32</sup> See pages 41-42 above.

The focus then turned to the economic impact of gambling in general. Many countries operate lotteries in order to generate revenue.<sup>33</sup> In view of gambling's economic potential, the Gambling Review Commission recommended that South Africa's National Lottery should continue with its "revenue maximisation mandate".<sup>34</sup> Gambling can contribute to community projects too and stimulate the economic growth of a country.<sup>35</sup> It may benefit the tourism industry as well.<sup>36</sup> It was argued that, similar to the economic impact of gambling, promotional competitions may have an impact on the growth of a business.<sup>37</sup> However, from a policy perspective, it was submitted that promotional competitions should remain promotional tools and not become sources of revenue in themselves.<sup>38</sup>

Even though gambling may have positive effects, its impact on people cannot be ignored. Reference was made to views that gambling is detrimental to people's work ethic and that it causes crime and other ills.<sup>39</sup> Gambling can have a negative effect on a gambler's family and other persons around the gambler.<sup>40</sup> Problem gambling seems to be one of the most prominent issues that surround gambling,<sup>41</sup> although there is no consensus regarding its prevalence and extent.<sup>42</sup> Yet, on local level, it seems that some South Africans do struggle with problem gambling and that the occurrence may be higher than in Europe.<sup>43</sup> Nevertheless, it appeared that not all forms of gambling lead to problem gambling,<sup>44</sup> and all persons are not necessarily problem gamblers.<sup>45</sup>

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<sup>33</sup> Scott C "Lotteries and Gaming: Some Public Policy Issues" in Scott M (ed) *Lotteries, gaming and public policy* 19; Clotfelter & Cook 219-221.

<sup>34</sup> 2010 Gambling Review 134, 138.

<sup>35</sup> Ligthelm, AA, Mango T & Jonkheid E *Socio-Economic Impact of Legalised Gambling in South Africa* 106; LGB Main Report 60-61.

<sup>36</sup> Leiper N "Tourism and Gambling" 1989 *GeoJournal* 19:3 269-275.

<sup>37</sup> See page 52 above.

<sup>38</sup> See page 52 above.

<sup>39</sup> See page 43 above. LGB Main Report 55-55.

<sup>40</sup> Carnelley 2000 195.

<sup>41</sup> Collins P *Gambling and the public interest* 137; Carnelley M "The Proliferation of Gambling, Problem Gambling and Public Policy" 2000 *Obiter* 192-199 ("Carnelley 2000"); LGB Main Report 55-58; Gambling Review Commission *Review of the South African Gambling Industry and its Regulation* September 2010 ("2010 Gambling Review") 79; Blaszczynski A & Nower L "A pathways model of problem and pathological gambling" *Addiction* 97 487-499.

<sup>42</sup> P Collins 131-132.

<sup>43</sup> 2010 Gambling Review 87-88.

<sup>44</sup> Walker 1992 394.

<sup>45</sup> Martinez TM *The Gambling Scene: Why People Gamble* 46.

Some views in respect of gambling were then examined.<sup>46</sup> It appeared that a popular argument against gambling centred on the claim that it instils in people the belief that they can get “something for nothing”.<sup>47</sup> Some allege that it gives people false hope and that governments should not rely on it as a revenue generating tool.<sup>48</sup> It is also criticised on the basis that it might be detrimental to the poor and less fortunate.<sup>49</sup> Some also out that gambling has a “human costs” element,<sup>50</sup> and that it causes gambling disorder, financial hardship and family problems. On the other hand, some authors were found to be in favour of the deregulating or liberalising gambling.<sup>51</sup> They argue that the likelihood of harm is overemphasized,<sup>52</sup> and that gambling does not necessarily lead to addiction or problem gambling.<sup>53</sup> Instead, they are of the view that gambling might have positive social or economic effects.<sup>54</sup>

Since regulation is a key theme of this study, the concepts of law, vice and regulation were then explored.<sup>55</sup> Vice primarily affects the persons who engage in the relevant conduct and is characterised by habit and excess.<sup>56</sup> It was pointed out that laws are created in order to curb vice.<sup>57</sup> These laws are often based on morality, but the focus is shifting to harm prevention.<sup>58</sup> Crimes are committed when the relevant laws are contravened.<sup>59</sup>

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<sup>46</sup> See pages 52-55 above

<sup>47</sup> See, for example, Kaplan HR “The Social and Economic Impact of State Lotteries” in Frey JH & Eadington WR (eds) *Gambling: Views from the Social Sciences. The Annals of the American Academy of Political and Social Sciences* 104.

<sup>48</sup> Kaplan 104-105.

<sup>49</sup> Frey JH “Gambling: A Sociological Review” in Frey JH & Eadington WR (eds) *Gambling: Views from the Social Sciences. The Annals of the American Academy of Political and Social Sciences* 111.

<sup>50</sup> P Collins 34-36.

<sup>51</sup> Basham & Luik 12. See also Littlewood M “Gambling and Regulation: Why there is Nothing to Fear from Liberalisation” March 2011 *Economic Affairs* 34-37 (“Littlewood”).

<sup>52</sup> Littlewood 34; Basham & Luik 12.

<sup>53</sup> Littlewood 36-37.

<sup>54</sup> Littlewood 37; Basham & Luik 9-12.

<sup>55</sup> See pages 55-58 above.

<sup>56</sup> Leitzel J *Regulating Vice: Misguided Prohibitions and Realistic Controls* 4.

<sup>57</sup> See page 56 above. Dombrink J “Gambling and the Legalisation of Vice: Social movements, public health and public policy in the United States” in McMillen J (ed) *Gambling Cultures: Studies in history and interpretation* 43; P Collins 21; Green SP “Vice Crimes and Preventive Justice” 10 October 2013 *Criminal Law and Philosophy* (published online at <http://link.springer.com/article/10.1007/s11572-013-9260-7>, accessed on 5 March 2015) 1.

<sup>58</sup> Green 10.

<sup>59</sup> Sutherland EH *Criminology* 11, 18.

While gambling has been prohibited during various eras and in a variety of jurisdictions,<sup>60</sup> it was found that attitudes toward gambling were shifting.<sup>61</sup> Governments were realising that gambling merely went underground if it was prohibited.<sup>62</sup> Gambling was losing its vice character, morality was playing a smaller roll and the church's view about gambling was shifting.<sup>63</sup> The position in South Africa appeared to be similar, where the focus is shifting from judging gambling on a moral basis to developing its revenue generating potential.<sup>64</sup> However, the legislature has noted that society and the country's economy should be protected against gambling's negative effects.<sup>65</sup> Accordingly, the policy is to guard against over-stimulation of the demand for gambling.<sup>66</sup> Even so, South Africa follows a revenue model in respect of lotteries specifically.<sup>67</sup>

The policy issues regarding promotional competitions were examined as well.<sup>68</sup> It was submitted that these competitions are not completely harmless – they have gambling roots and marketers could misuse these competitions to consumers' detriment. One of the biggest risks may be that a consumer could suffer financial harm arising from uncontrolled and abusive promotional competitions.<sup>69</sup> There is also the risk that promotional competitions could serve as "precursors" of gambling and entice

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<sup>60</sup> Dixon D *From prohibition to regulation: bookmaking, anti-gambling, and the law* ("Dixon") 6-7, 9.

<sup>61</sup> See pages 59-61 above. See Dixon in general. See also Eadington WR "Ethical and Policy Considerations in the Spread of Commercial Gambling" in McMillen J (ed) *Gambling Cultures: Studies in history and interpretation* ("Eadington 1996") 243; Rose IN "Gambling and the Law®: The Third Wave of Legal Gambling" 2010 *Villanova Sports & Entertainment Law Journal* 17:2 361 388-385; Rose IN "The Rise and Fall of the Third Wave: Gambling Will be Outlawed in Forty Years" in Eadington WR (ed) *Gambling and Public Policy: International Perspectives*.

<sup>62</sup> P Collins 2.

<sup>63</sup> Dombink 49, 58; Eadington 1996 245; Smith JF "When it's Bad it's Better: Conflicting images of gambling in American culture" in McMillen J (ed) *Gambling Cultures: Studies in history and interpretation* 102.

<sup>64</sup> Monnye S L "Gambling in South Africa: is online gambling not a component of gambling?" UNLV Gaming Law Journal Vol 3 (Fall 2012) ("Monnye") 221-222; National Gambling Board *The Social Impact of Gambling in South Africa: Qualitative Perspective 2013* 20-22, available online at <http://www.ngb.org.za/SiteResources/documents/Social%20impact%20of%20gambling%20qualitative%20perspective%202013.pdf>, accessed on 19 March 2015).

<sup>65</sup> Preamble to the National Gambling Act, 2004.

<sup>66</sup> Preamble to the National Gambling Act, 2004.

<sup>67</sup> 2010 Gambling Review 9.

<sup>68</sup> See pages 67-72 above.

<sup>69</sup> James JS "Regulating the Sweepstakes Industry: Are Consumers Close to Winning?" 2000 *Santa Clara Law Review* 41:2 581-618 ("James"); Unknown *Bank Night and Similar Devices as Illegal Lotteries* 1941 *Yale Law Journal* 50:5 941; Griffiths M "Instant-win products and prize draws: Are these forms of gambling?" 2003 *Journal of Gambling Issues* 9 ("Griffiths 2003"), <http://jgi.camh.net/doi/full/10.4309/jgi.2003.9.5>, accessed on 21 March 2015.



consumers to explore more serious forms of gambling.<sup>70</sup> In addition, consumers could be abused as a result of misleading, deceptive or fraudulent marketing in relation to promotional competitions.<sup>71</sup> Promotional competitions are also often aimed at vulnerable persons, such as children<sup>72</sup> and the elderly.<sup>73</sup> Furthermore, the internet and new media provide ever growing platforms for competitions, leading to additional issues, such as infringements on consumer privacy.<sup>74</sup>

Yet, despite the abovementioned issues, it was submitted that promotional competitions do not present challenges that cannot be overcome. Consumer abuse can be prevented if the regulation of these competitions protects consumers against abusive and misleading practices and adequate measures are put in place to guard against financial abuse in particular. In this regard, it is submitted that the regulation of these competitions should continue to prohibit promoters from requiring participants to offer consideration or to pay entry fees. However, it is submitted that society has developed to such an extent that people should be able to distinguish between gambling and promotional competitions, even though those activities might share the same roots. This is borne out by the fact that promotional competitions are now the subject of consumer protection law instead of gambling law in South Africa. Perhaps it is telling that members of the public are not protesting against the conducting of promotional competitions, while some of them do protest against the establishment of new casinos. Consequently, it is submitted that promotional competitions should not be subject to legislation which is as strict as gambling law, provided that consumer protection law continues to shield consumers against possible abusive practices that might be associated with promotional competitions.

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<sup>70</sup> Griffiths 2003 unpagued.

<sup>71</sup> James 596.

<sup>72</sup> Paxman K, Pelton T & Pelton FL "Should corporations be permitted to use promotional contests to manipulate the buying habits of children and youth?" in Pelton T, Reis G & Stewart S (eds) *Connections 2006* 65-76.

<sup>73</sup> Cushing C & Tierney J "Regulating the Sweepstakes Industry. Multistate Litigation" undated 6-7, <http://web.law.columbia.edu/sites/default/files/microsites/career-services/Regulating%20the%20Sweepstakes%20Industry.pdf> accessed on 27 March 2015.

<sup>74</sup> Seligman TJ "Marketing through Online Promotions" April 2004 *The Computer and Internet Lawyer* 21:4 22 24-26.

### 7.1.3 The consumer protection perspective

It was pointed out that the regulation of promotional competitions had shifted from gambling law to consumer protection law. Accordingly, it was deemed necessary to examine consumer protection law in further detail.<sup>75</sup> It was found that consumer protection law focuses primarily on the relationship between suppliers and consumers.<sup>76</sup> In particular, consumer protection law is in place to address the imbalance of power that exists between businesses and consumers, to protect consumers against unfair practices and to provide them with adequate remedies against suppliers.<sup>77</sup>

### 7.1.4 The marketing context

Promotional competitions were the core focus of this study. In view of this, the marketing context was explored in order to understanding the marketing nature of these schemes. It was explained that marketing consists of activities aimed at attracting customers and clients.<sup>78</sup> In order to drive marketing, businesses need to employ marketing communication tools.<sup>79</sup> Sales promotion is one of these tools.<sup>80</sup> Sales promotion involves a number of activities, including promotional competitions.<sup>81</sup> Promotional competitions were found to be unique components of sales promotion.<sup>82</sup> They can be of great value to marketers,<sup>83</sup> but have some drawbacks too.<sup>84</sup> However, they can be successful if designed properly.<sup>85</sup>

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<sup>75</sup> See pages 72-76.

<sup>76</sup> See, for example, De Stadler 2013 1.

<sup>77</sup> Woker T "Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act" 2010 *Obiter* 217 230-231; Van Eeden 2013 1.

<sup>78</sup> See page 77 above. See, for example, American Association of Marketing "Definition of Marketing" <https://www.ama.org/AboutAMA/Pages/Definition-of-Marketing.aspx> (accessed on 20 April 2014).

<sup>79</sup> See, for example, Koekemoer L *Advertising and sales promotion* ("Koekemoer") 1.

<sup>80</sup> Koekemoer 4.

<sup>81</sup> See Belch GE & Belch MA *Advertising and Promotion: An integrated marketing communications perspective* 518; Cook G "Sales Promotion" in Du Plessis *ea Integrated marketing communication: A contemporary approach* 192-208; Jethwaney J & Jain S *Advertising management* (2<sup>nd</sup> ed) (Jethwaney & Jain) Ch 12; Semenik *ea Advertising and promotion: An integrated brand approach* (6<sup>th</sup> international ed) 537-538; Yeshin T *Sales Promotion* 12.

<sup>82</sup> Cummins J & Mullin R *Sales Promotion: How to create, implement and integrate campaigns that really work* (3<sup>rd</sup> ed) 203.

<sup>83</sup> Peattie K & Peattie S "Sales Promotion Competitions – A Survey" 1993 *Journal of Marketing Management* 9:3 271 283-285.

<sup>84</sup> Brown C *The Sales Promotion Handbook* 101-102.

<sup>85</sup> Brown 102.

### 7.1.5 The historical background

In Chapter 3, this thesis provided a brief overview of the history of gambling, lotteries and promotional competitions. The overview commenced with a brief history from a global perspective. It was pointed out that people have been gambling since ancient times.<sup>86</sup> The activity has its roots in religious practices, such as the drawing of lots.<sup>87</sup> (It turned out that cheating and fraud was present too, even in ancient times.)<sup>88</sup> Gambling grew in prominence during the rise of the Roman Empire.<sup>89</sup> Lotteries were popular as well, although they were conducted mostly for amusement and not in the present-day form.<sup>90</sup> The prevalence of gambling in ancient Rome led to the development of early gambling laws, and the activity was largely outlawed.<sup>91</sup>

The lottery in its modern form traces its roots back to the early Renaissance.<sup>92</sup> Early lotteries of this type were conducted in Italy as well as the Low Countries.<sup>93</sup> One of the most famous of the early lotteries was the Queen's Lottery, which was organised in England during the reign of Elizabeth I.<sup>94</sup> The first rudimentary promotional competitions saw the light at around the same time.<sup>95</sup> Some traders used lotteries to dispose of merchandise that did not sell well.<sup>96</sup>

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<sup>86</sup> See pages 90-97 above. See, for example, Williams FE 1958 22-23; C l'Estrange Ewen *Lotteries and sweepstakes* ("Ewen") 19-22; Curtin L & Bernardo K *The History of Sweepstakes* ("Curtin & Bernardo") 11-22; Ashton J *A History of English Lotteries* ("Ashton") 2-3; Ezell JS *Fortune's Merry Wheel: The Lottery in America* ("Ezell") 2; Kopp SW & Taylor CR "Games, Contests, Sweepstakes, and Lotteries: Prize Promotion and Public Policy" in Sheth JN (series ed) & Fullerton RA (ed) *Research in Marketing: Explorations in the History of Marketing* 151 ("Kopp & Taylor") 152; Ottaway 27-30; Murray HJR *A History of Board-Games other than Chess* 7-9; Jones JP *Gambling Yesterday and Today* 13-21 ("Jones"); LGB Main Report; Schwartz DG *Roll the Bones: The History of Gambling* ("Schwartz") 6; Brenner & Brenner 1-18.

<sup>87</sup> Jones 16; Ewen 20.

<sup>88</sup> Schwartz 6. Loaded dice were discovered in ancient Egyptian tombs (LGB Main Report 26) and early Indian records mention "clogged" dice (Jones 14).

<sup>89</sup> Jones 19; Schwartz 25.

<sup>90</sup> Ezell 2; Ashton 3.

<sup>91</sup> Carnelley M & Schrage E "Gambling Regulation: A comparison between the Roman and South African gambling laws" in Hoctor SV & Schwikkard PJ (eds) *The Exemplary Scholar: Essays in Honour of John Milton* ("Carnelley & Schrage"); Schwartz 28; Jones 20; Ewen 21.

<sup>92</sup> Ezell 2; Ashton 4. According to Brenner and Brenner, Western Europe's first private lottery was conducted in Florence in 1530. (Brenner & Brenner 9)

<sup>93</sup> Ezell 2; Ashton 4; Ewen 25-28.

<sup>94</sup> Dean D "Elizabeth's Lottery: Political Culture and State Formation in Early Modern England" 2011 *The Journal of British Studies* 587 (Dean) 591; Ewen 34-64; Ezell 3-4; Ashton 4-24; Curtin & Bernardo 44-46.

<sup>95</sup> Ewen 23-24; Ashton 3-4. See also Van Niekerk JP *The Development of the Principles of Insurance Law in the Netherlands from 1500 to 1800* 104.

<sup>96</sup> Ewen 23-24; Ashton 3-4. See also Van Niekerk JP *The Development of the Principles of Insurance Law in the Netherlands from 1500 to 1800* 104.

The prevalence of sweepstakes and promotional competitions started to increase towards the end of the nineteenth century only.<sup>97</sup> Initially, these competitions were conducted in the form of gift enterprises, which were schemes arranged by merchants to attract customers and increase sales.<sup>98</sup> Newspapers made use of promotional competitions for this purpose too, particularly in England.<sup>99</sup> Their competitions took on various forms, such as missing word competitions<sup>100</sup> and limerick competitions.<sup>101</sup> Prize promotions grew in popularity in the United States from the start of the twentieth century.<sup>102</sup> In particular, sweepstakes became very prevalent in that country during the 1950s.<sup>103</sup>

The discussion then turned to the South African history of gambling and related activities.<sup>104</sup> It was found that the first local gambling legislation dated back to 1658.<sup>105</sup> Subsequently, during the 1800s, each of the former South African colonies passed gambling legislation.<sup>106</sup> This was replaced with national gambling legislation, which was adopted in 1965.<sup>107</sup>

Over the years, the South African courts have been called upon to interpret the provisions of the various gambling statutes. It was found that these judgements were useful in order to interpret gambling concepts.<sup>108</sup> For example, the judgement in *R v Lew Ho*<sup>109</sup> dealt with the essential elements of a lottery. Some other early judgements related specifically to promotional competitions and the question whether those

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<sup>97</sup> Kopp & Taylor 156.

<sup>98</sup> Curtin & Bernardo 93.

<sup>99</sup> Miers D *Regulating Commercial Gambling* 176-184.

<sup>100</sup> Bender 144-145; Ewen 308.

<sup>101</sup> Bender 146; Ewen 309-311.

<sup>102</sup> Curtin & Bernardo 107-123; Kopp & Taylor 158-164.

<sup>103</sup> Curtin & Bernardo 7.

<sup>104</sup> See pages 107-124 above.

<sup>105</sup> Carnelley M "Offences relating to gambling and lotteries" in Milton JRL, Cowling MG and Hooror SV *South African Criminal Law and Procedure Vol III: Statutory Offences* 2<sup>nd</sup> ed, service number 21, ("Carnelley 2011") 2.

<sup>106</sup> Carnelley 2011 2-3; Lötter S "The odds against gambling" 1994 *South African Journal of Criminal Justice* (7) 189 ("Lötter") 192.

<sup>107</sup> See the Gambling Act, 1965.

<sup>108</sup> See pages 109-113 above.

<sup>109</sup> 1937 AD 215.

















































































































































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